

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2018

Territorialization of the Internet Domain Name System

Marketa Trimble

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Intellectual Property Law Commons](#), [International Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Trimble, Marketa, "Territorialization of the Internet Domain Name System" (2018). *Scholarly Works*. 1020.
<https://scholars.law.unlv.edu/facpub/1020>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Territorialization of the Internet

Domain Name System

Marketa Trimble*

Abstract

Territorialization of the internet—the linking of the internet to physical geography—is a growing trend. Internet users have become accustomed to the conveniences of localized advertising, have enjoyed location-based services, and have witnessed an increasing use of geolocation and geo-blocking tools by service and content providers who—for various reasons—either allow or block access to internet content based on users’ physical locations. This article analyzes whether, and if so how, the trend toward territorialization has affected the internet Domain Name System (DNS). As a hallmark of cyberspace governance that aimed to be detached from the territorially-partitioned governance of the physical world, the DNS might have been expected to resist territorialization—a design that seems antithetical to the original design of and intent for the internet as a globally distributed network that lacks a single point of control. However, the DNS has never been completely detached from physical geography, with which it has many ties, and this article shows that the trend toward increased territorialization is detectable in the DNS as well. This article contemplates what impact, if any, the trend will have on the future of the DNS. While the

* Samuel S. Lionel Professor of Intellectual Property Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks for their helpful comments Professor Eric Goldman, the participants of the 2017 International IP Roundtable held at the New York University School of Law, and the 17th Annual Intellectual Property Scholars Conference held at Cardozo Law School. The author is grateful to Andrew Martineau and Elizabeth Manriquez of the Wiener-Rogers Law Library at the William S. Boyd School of Law for research support, and William S. Boyd School of Law students Nathaniel T. Collins, Justin A. Corne, and Cory M. Ford for contributing their efforts to the underlying research on top-level domains. The author is indebted to Gary A. Trimble for his valuable editing suggestions. This work was supported in part by the Center for Cyber Law & Policy at the University of Haifa in conjunction with the Israel National Cyber Directorate in the Prime Minister’s Office.

future of the DNS is challenged by the role of internet search engines, whose predominant use by internet users could render the DNS, as we know it today, obsolete, disputes over domains and domain names with geographical meaning, such as .amazon and france.com, suggest that the DNS remains very much relevant and that territorialization presents a significant friction point in the DNS.

TABLE OF CONTENTS

I.	INTRODUCTION	625
II.	THE INTERNET AND PHYSICAL GEOGRAPHY	630
III.	THE GEOGRAPHICAL INDIFFERENCE OF THE DOMAIN NAME SYSTEM.....	635
IV.	THE DOMAIN NAME SYSTEM AND ITS GEOGRAPHICAL AWARENESS	643
	A. <i>The UDRP and the Applicability of National Law</i>	644
	B. <i>Choice of Law in UDRP Proceedings</i>	650
	C. <i>UDRP Un-Territorialized?</i>	659
V.	TERRITORIALIZATION OF THE INTERNET DOMAIN NAME SYSTEM.....	662
	A. <i>Territorialization in Registration Eligibility Requirements</i>	663
	B. <i>Territorialization in Dispute Resolution</i>	673
VI.	DOMAIN NAMES, TERRITORIALIZATION, AND USER CONFIDENCE.....	678
VII.	CONCLUSIONS.....	682

I. INTRODUCTION

The internet Domain Name System (DNS)¹—the system that has made internet addressing user-friendly—has had a complex relationship with the physical world, sometimes rejecting and sometimes embracing links to physical geography.² The Internet Corporation for Assigned Names and Numbers (ICANN)³ has administered the DNS with special rules that were for the most part originally intended to operate independently of national governments and also in large part independently of national laws.⁴ The rules were supposed to represent the ideal that early commentators and activists promoted for governance of the internet—governance of a new space that would be independent from existing countries and subject to a new type of rulemaking.⁵ However, the DNS and its rules have never been completely detached from physical geography and from the laws of the physical world.⁶ This article analyzes the complex interface between the DNS and physical geography, seeks to identify in the developments of this interface the signs of an increasing territorialization of the internet, and discusses how the DNS might respond to territorialization.⁷

Territorialization of the internet is a phenomenon that arises from linking

1. The domain name system (DNS) provides for domain names (e.g., “icann.org”) that are linked to numerical internet protocol (IP) addresses (e.g., “192.0.32.7” for icann.org). *What Does ICANN Do?*, ICANN, <https://www.icann.org/resources/pages/what-2012-02-25-en> (last visited Apr. 10, 2016). Domain names are typically easier for users to remember than IP addresses, and the use of domain names, instead of IP addresses, also makes internet addresses more appealing for use in advertising. *See id.*; *see also* P. Mockapetris, *Domain Names—Implementation and Specification*, INTERNET ENGINEERING TASK FORCE (Nov. 1987), <https://www.ietf.org/rfc1035.txt>; J. Postel, *Domain Name System Structure and Delegation*, INTERNET ENGINEERING TASK FORCE (Mar. 1994), <https://tools.ietf.org/html/rfc1591>; P. Hoffman, A. Sullivan & K. Fujiwara, *DNS Terminology*, INTERNET ENGINEERING TASK FORCE (Dec. 2015), <https://tools.ietf.org/html/rfc7719#section-6>. On the beginning and the early history of DNS see, for example, Peter K. Yu, *The Origins of ccTLD Policymaking*, 12 CARDOZO J. INT’L & COMP. L. 387, 390 (2004).

2. *See infra* Part II.

3. *See Glossary*, ICANN, <https://www.icann.org/resources/pages/glossary-2014-02-03-en#i> (last visited Apr. 10, 2018). Since 1998, “ICANN has performed the IANA (Internet Assigned Numbers Authority) Functions on behalf of the global Internet community.” *See id.*

4. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>; David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

5. *See* Barlow, *supra* note 4; Johnson & Post, *supra* note 4.

6. *See infra* Part IV.

7. *See infra* Parts IV–VI.

the internet to physical geography.⁸ Territorialization of the internet seems to be growing,⁹ the internet is becoming increasingly geographically aware, and the demand for territorialization appears to be on the rise as content providers, service providers, users, and governments are more and more interested in connecting activities on the internet with physical locations and territories.¹⁰ Within this trend, localized advertising, localized content, and location-based services¹¹ have become commonplace as an increasing volume of advertising, content, and services are delivered to users based on their physical locations.¹² Users' desire to connect the internet to physical reality is not only evidenced by the fact that most users do not seem to protest the localization of content; it is also illustrated by the popularity among users of location-based applications and augmented reality games—applications and online games that are planted into the physical world.¹³ With the increasing precision and

8. See *infra* Part II. “Territorialization” is the action of territorializing, i.e. “mak[ing] (something) territorial; to organize on a territorial basis; to associate with or restrict to a particular territory or district.” *Territorialization*, OXFORD ENGLISH DICTIONARY (3d ed. 2011).

9. See, e.g., A. Mayrhofer & C. Spanning, *A Uniform Resource Identifier for Geographic Locations* (‘geo’ URI), INTERNET ENGINEERING TASK FORCE (June 2010), <https://tools.ietf.org/html/rfc5870>. “An increasing number of Internet protocols and data formats are extended by specifications for adding spatial (geographic) location.” *Id.*

10. Rob Kitchin, Tracey P. Lauriault & Matthew W. Wilson, *Understanding Spatial Media*, in UNDERSTANDING SPATIAL MEDIA 1, 2 (Rob Kitchin, Tracey P. Lauriault & Matthew W. Wilson eds., 2017). Other authors have commented on the increasing role of geography in the functioning of the internet: “Geography . . . has become a key ‘organizational logic of the web’ and the web has become a key means to mediate space, location and sociality.” See *id.* The authors point out certain developments that represented important milestones for the role of geography in the functioning of the internet: “Key developments included the public release of the Google Maps API in 2005 and the centrality of location-awareness in iOS and Android smartphone apps from 2009 onwards that encouraged the development of mobile apps.” See *id.* at 3.

11. See Daniel Sui, *Understanding Locational-Based Services: Core Technologies, Key Applications and Major Concerns*, in HANDBOOK ON GEOGRAPHIES OF TECHNOLOGY 85, 85 (Bamey Warf ed., 2017) (“[L]ocation-based services (LBS) generally refers to all the information services that exploit the ability of technology to know where objects or people are located, and to modify the information it presents accordingly.”).

12. Scott Bridwell, *Location-Based Services (LBS)*, in ENCYCLOPEDIA OF GEOGRAPHIC INFORMATION SCIENCE 267, 268–70 (Karen K. Kemp ed., 2008); *Understanding Consumers’ Local Search Behavior*, Google, May 2014, <https://www.thinkwithgoogle.com/advertising-channels/search/how-advertisers-can-extend-their-relevance-with-search-download/> (last visited May 17, 2018) (“4 in 5 consumers use search engines to find local information.”).

13. See Mark Graham, *Digitally Augmented Geographies*, in UNDERSTANDING SPATIAL MEDIA 44, 51 (Rob Kitchin, Tracey P. Lauriault & Matthew W. Wilson eds., 2017) (“[A]n increasing amount of everyday geographic life becomes augmented and technologically mediated.”); Richard Barnes, James Winterbottom & Martin Dawson, *Internet Geolocation and Location-Based Services*, IEEE COMMUNICATION MAGAZINE, Apr. 2011, at 102 (“Much of the growth in the Internet today is being

reliability of geolocation and geoblocking tools,¹⁴ governments see the tools as viable means to implement territorial restrictions on activities on the internet; for example, governments that regulate online gambling mandate that online gambling operators employ geoblocking to ensure that operators limit their gambling offerings only to the territories in which they are licensed.¹⁵

Territorialization of the internet seems antithetical to the original concept of the internet as a distributed network lacking a single point of control;¹⁶ the absence of centralized control implies that data should flow freely on the network—that access to data should not be limited in any way based on physical geography.¹⁷ If any design should have resisted territorialization of the internet, it would be the design of the systems and rules that were created specifically for cyberspace and created independently of the governance of the physical world.¹⁸ The DNS should be the flagship of this resistance to territorialization.¹⁹ However, links to physical geography were never completely foreign to the DNS;²⁰ the DNS and its rules have interacted with the physical world from the beginning of the DNS, and, as this article discusses, the interactions have grown stronger over the years.²¹ The important question is what the territorialization trend, which appears to be

driven by the increasing use of cellular devices for Internet access, and cellular networks are another place with a rich history of location-based services.”).

14. See James A. Muir & Paul C. Van Oorschot, *Internet Geolocation: Evasion and Counterevasion*, 42 ACM COMPUTING SURVEYS 4:1 (2009) (discussing geolocation and geoblocking); Barnes, Winterbottom & Dawson, *supra* note 13, at 102; Marketa Trimble, *The Role of Geoblocking in the Internet Legal Landscape*, IDP: REVISTA DE INTERNET, DERECHO Y POLÍTICA (2016), <http://idp.uoc.edu/articles/abstract/3076/>.

15. Microsoft Corp. v. United States (*In re* Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.), 829 F.3d 197, 220 (2d Cir. 2016), *cert. granted*, 138 S. Ct. 356 (2017). One sign of territorialization could be a July 2016 decision in which the U.S. Court of Appeals for the Second Circuit noted in dicta that data were under the jurisdiction of the country in which the data were located on a server. *Id.*

16. See Paul Baran, *On Distributed Communications: I. Introduction to Distributed Communications Networks*, RAND CORP. (Aug. 1964), http://www.rand.org/pubs/research_memoranda/2006/RM3420.pdf.

17. See *id.*

18. See *infra* Part III.

19. See *infra* notes 78–79 and accompanying text.

20. See Milton L. Mueller & Farzaneh Badiei, *Governing Internet Territory: ICANN, Sovereignty Claims, Property Rights and Country Code Top-Level Domains*, 18 COLUM. SCI. & TECH. L. REV. 435, 436–37 (2017).

21. See *infra* notes 80–82 and accompanying text.

irreversible, will mean for the DNS in the future.²²

This article begins in Part II by discussing different approaches to the relationship between internet space and the physical world; the discussion of the approaches introduces terminology and a conceptual framework that reappear throughout the article.²³ Part III discusses the geographical indifference²⁴—or the lack of geographical awareness—with which the DNS was originally designed.²⁵ The geographical indifference led to clashes between global rights to domain names on the one hand and territorially-limited rights to alphanumerical designations granted or recognized by national law and governments on the other hand.²⁶ Nevertheless, the geographical indifference was never absolute, and Part IV identifies the elements of geographical awareness in the DNS by analyzing the DNS's geographical ties that are apparent in domain name dispute resolution, particularly in the choice of applicable law.²⁷ Part V seeks indications in recent DNS history and in current developments of the increasing territorialization that is apparent on the internet; the Part reviews rules for various types of top-level domains—rules for both domain name registration and dispute resolution.²⁸ Part VI contemplates the future of the DNS in light of the trend towards territorialization and discusses how territorialization might assist in increasing user confidence in the DNS.²⁹

While territorialization of the internet is a topic of great importance for the future of the internet and the development of the law for and on the internet,³⁰ the importance of the DNS for the future of the internet may be

22. See *infra* Part VI.

23. See *infra* Part II.

24. See Georg Jacobs, *Internet Specific Collisions of Trade Marks in the Domain Name System—An Economic Analysis Based on US Law*, 37(2) IIC 156, 157 (2006) (referring to the “indifference” of the DNS as to a trademark’s “geographical or product-related scope”).

25. See *infra* Part III.

26. On the instances of an early recognition of the problem see U.S. DEP’T OF COMMERCE, NAT’L TELECOMM. & INFO. ADMIN., NO. 980212036-8146-02, STATEMENT OF POLICY ON THE MANAGEMENT OF INTERNET NAMES AND ADDRESSES (1998), <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses> and WORLD INTELLECTUAL PROPERTY ORGANIZATION, FINAL REPORT OF THE WIPO INTERNET DOMAIN NAME PROCESS 98–106 (1999), <http://www.wipo.int/amc/en/processes/process1/report/finalreport.html> [hereinafter 1999 WIPO FINAL REPORT].

27. See *infra* Part IV.

28. See *infra* Part V.

29. See *infra* Part VI.

30. See *infra* Part V. The law “for” the internet is the law that governs the internet itself as a

debated.³¹ With more users relying on search engines to locate and access websites, domain names seem to be becoming less important, if not inconsequential.³² What the role and the value of domain names will be in the future is to be seen; the percentage of direct traffic and algorithms employed by search engines will influence the value of domain names in the future. The percentage of users who access websites directly by typing domain names into an internet browser (the percentage of direct traffic) is difficult to measure; the widespread use of bots skews the statistics that measure direct traffic.³³ With search engine providers keeping their search algorithms secret, it is difficult to assess the weight that the algorithms give to domain names, and one can only speculate what the weight might be in the future.³⁴ Given that at least one of the major search engine providers has been active on the domain market (Google has applied for a delegation of a number of new domains),³⁵ perhaps it is reasonable to assume that domain names will maintain some value for some time.³⁶ High-profile disputes evidence the fact that domains

network; the DNS rules are laws for the internet. *See infra* Part IV. The law “on” the internet is the national law that applies to activities that occur on the internet. *See infra* Section IV.A.

31. See Scott J. Shackelford et al., *Igovernance: The Future of Multi-Stakeholder Internet Governance in the Wake of the Apple Encryption Saga*, 42 N.C. J. INT’L L. 883, 884–85 (2017).

32. See Jacqueline D. Lipton, *A Winning Solution for YouTube and Utube? Corresponding Trademarks and Domain Name Sharing*, 21 HARV. J. L. & TECH. 509, 512 (2008) (“Domain names may be increasingly unimportant in the age of complex Internet search engines, because Internet users can effectively find what they are looking for by using a search engine such as Google, rather than by manually entering the domain name.”). Furthermore, the availability of site-specific applications can obviate the need to access content through the websites where the content is hosted. The author thanks Eric Goldman for this observation. Email from Eric Goldman (Dec. 25, 2017) (on file with the author).

33. See ERI KOIKE & SHIN-YA NISHIZAKI, SOFTWARE ANALYSIS OF INTERNET BOTS USING A MODEL CHECKER 242 (2013), <http://ieeexplore.ieee.org/abstract/document/6973599/?reload=true> (“Internet bots are software agents which perform automated tasks.”).

34. See, e.g., Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CAL. L. REV. 351, 363 (2014) (highlighting that Google’s search algorithms are trade secrets and its algorithms rely on signals that are given different weights).

35. See *FAQs*, GOOGLE REGISTRY, <https://www.registry.google/about/faqs.html> (last visited Apr. 10, 2018) (explaining new domains for which Google has applied to be the registry).

36. See *WIPO Cybersquatting Cases Hit Record in 2016, Driven by the New Top-Level Domain Names*, WORLD INTELL. PROP. ORG. (Mar. 16, 2017), http://www.wipo.int/pressroom/en/articles/2017/article_0003.html [hereinafter *WIPO I*]. It might be evidence of the continuing value of domain names that the numbers of disputes concerning domain names have not decreased, but have remained relatively flat in recent years (although they increased in 2016). *See id.* However, it is important to view these numbers of domain name disputes in light of the dramatically increasing numbers of domain name registrations. *See* VERISIGN, THE DOMAIN NAME INDUSTRY BRIEF 2 (2016), <https://www.verisign.com/assets/domain-name-report-april2016.pdf>. The development in the number of domain name cases might be the result of parties’ experiences with domain name disputes—

and domain names with geographical meaning, such as the domain .amazon and the domain name france.com, continue to generate significant controversies in the DNS.³⁷

II. THE INTERNET AND PHYSICAL GEOGRAPHY

There are three approaches to the relationship between the internet and physical geography.³⁸ The first approach is one of indifference: the internet is utilized to create new spaces that are not intended to be associated with physical geography at all.³⁹ This approach defeats traditional notions of geography by creating a space—cyberspace—that is disassociated from the physical world.⁴⁰ The idea of a “cloud” exemplifies this approach; however, independence of the cloud from geography is a fiction because the cloud relies on a physical infrastructure that must be located in an actual physical place.⁴¹ Nevertheless, for some commentators the notion persists that cyberspace is a new place that does not have to—and should not—obey the territorial limits of the physical world, and that should be and could be governed separately from the physical world.⁴²

The second approach to the relationship between the internet and physical

experiences that could have positively impacted the behavior of domain name registrants. *See id.*; WIPO I, *supra*; VERISIGN, THE DOMAIN NAME INDUSTRY BRIEF 2 (2011), <https://www.verisign.com/assets/domain-name-report-feb-2011.pdf>. For example, the World Intellectual Property Organization (“WIPO”—one of the ICANN-approved dispute resolution service providers) registered 2,696 domain name cases filed with WIPO in 2010; 2,754 domain name cases filed in 2015; and 3,036 domain name cases filed in 2016. *WIPO Domain Name Dispute Resolution Statistics*, WIPO, <http://www.wipo.int/amc/en/domains/statistics/> (last visited Apr. 10, 2018). As far as the number of .com domain names involved in WIPO domain name cases is concerned, there were 3,153 .com domain names in 2010; 2,732 .com domain names in 2015; and 3,135 .com domain names in 2016. *Id.* Compare these numbers of domain name cases to the increase in registered .com domain names, whose numbers rose from over 80 million in 2010 to over 120 million in 2015 and over 126 million in 2016.

37. *Adopted Board Resolutions: Regular Meeting of the ICANN Board*, ICANN (Sept. 23, 2017), <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.e>; *France.com, Inc. v. The French Republic*, EDVA, 1:18-cv-00460-LO-IDD, docket document 1, April 19, 2018.

38. *See infra* text accompanying notes 39–57.

39. *See* David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370–71 (1996) (“Cyberspace has no territorially based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location. . . . The system is indifferent to the *physical* location of those machines, and there is no necessary connection between an Internet address and a physical jurisdiction.”).

40. *See* Johnson & Post, *supra* note 39.

41. *See* ANDREW BLUM, TUBES: A JOURNEY TO THE CENTER OF THE INTERNET (2012).

42. *See* Barlow, *supra* note 4.

geography is to regard the internet as a complement of the physical world: the internet is utilized to create an extension of physical space—a complement or an add-on that enlarges physical space beyond its natural limitations.⁴³ The Estonian e-residency project illustrates this approach:⁴⁴ the project enables anyone to apply to become an online “resident” of Estonia without actually physically residing there.⁴⁵ Cyberspace thus creates a cyber extension to Estonian territory.⁴⁶ Similarly, in the domain name space, the top-level domain .vegas enlarges in cyberspace the physical footprint of the City of Las Vegas, Nevada,⁴⁷ because anyone—whether or not they are located in Las Vegas—may register a .vegas domain name on the domain and thus obtain an association with the city.⁴⁸ Through its top-level domain, Las Vegas is gaining a new “territory” in cyberspace for businesses and others who want to be associated in some manner with the city and its brand.⁴⁹

The third approach to the relationship between the internet and physical geography is one of perfect identity: the internet is employed to match the location of places and activities, and create a cyberspace overlay on top of the physical world that is congruent with the geographical contours of physical territories.⁵⁰ Location-based services that link activities to actual places are examples, as are websites that regulate their accessibility by copying physical jurisdictions.⁵¹ For instance, for regulatory compliance in some jurisdictions, regulated gambling providers geoblock to deny access to users connecting

43. See Graham, *supra* note 13. “Content is becoming unfixed from its containers, but re-fixed to locations. Ever more information is augmenting places, and ever more places are becoming augmented.” *Id.* at 45.

44. *Become an e-Resident*, REPUBLIC OF ESTONIA E-RESIDENCY, <https://e-resident.gov.ee/become-an-e-resident/> (last visited Apr. 10, 2018).

45. *Id.* (“The Republic of Estonia is the first country to offer e-Residency, a government issued digital identity that empowers entrepreneurs around the world to set up and run a location-independent business.”).

46. See *id.*

47. See *About*, VEGAS, <http://www.nic.vegas/> (last visited Apr. 10, 2018).

48. See *id.* (“Unlike other city or geographic top level domains, there are no restrictions to registration.”).

49. See *infra* Part V. Eric Goldman points out that the word “Vegas” might serve as a metonym in this context. Email from Eric Goldman (Dec. 25, 2017) (on file with the author).

50. See Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 582–84 (2012) (outlining the various uses of geolocation and geoblocking).

51. See *id.* at 638–39.

from jurisdictions in which the providers' games are illegal;⁵² licensees of copyrighted content employ geoblocking to limit access to the content to users connecting from the territory for which the licensees hold licenses.⁵³ Geolocation technologies,⁵⁴ with their improving reliability and increasing granularity, make these types of territorial associations and delineations increasingly easier, cheaper, and more precise.⁵⁵ This third approach is also apparent in the territorial restrictions that some top-level domain registries impose on eligibility for registration of domain names on domains that they control; for example, the registries⁵⁶ of the .ca, .eu, and .paris top-level domains require that registrants originate from, or be associated with, the territory that the top-level domains represent, to match the territory that the top-level domains represent.⁵⁷

Not all domain names or domains that refer to a territory—such as the domain .vegas—actually denote the geographical origin of holders of the domain names or suggest any other geographical association of the content on websites with the domain names and/or on the domains.⁵⁸ It would be for an empirical study to determine whether users have formed any expectations with regard to associations between domains or domain names and the origin or content of websites.⁵⁹ From anecdotal evidence it appears that users perceive domain names on some well-known territorially-linked domains, such as .uk or .fr, as not necessarily indicating the location of the source (i.e., being the domain names of U.K. or French businesses) but suggesting some association with the countries for which the domains stand.⁶⁰ For example, users might expect to find on these domains English or French language versions of websites that might belong to non-U.K. and non-French

52. See Marketa Trimble, *Proposal for an International Convention on Online Gambling*, in *REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES*, 353, 352–88 (Ngai Pindell & Anthony Cabot eds., 2013).

53. See Trimble, *supra* note 14, at 49.

54. See Muir & Van Oorschot, *supra* note 14 (discussing geolocation technologies).

55. See *id.*

56. See *infra* note 72 (discussing “registries”).

57. See *infra* Section V.A (discussing the domains and their registration eligibility requirements).

58. See *infra* Section V.A.

59. See, e.g., *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010) (“Outside the special case of trademark.com, or domains that actively claim affiliation with the trademark holder, consumers don’t form any firm expectations about the sponsorship of a website until they’ve seen the landing page—if then. This is sensible agnosticism, not consumer confusion.”).

60. See, e.g., *Cable News Network LP, LLP v. Khouri*, Nat’l Arb. Forum, Claim No: FA0208000117876 (Dec. 16, 2002), <http://www.adrforum.com/Domaindecisions/117876.htm>.

businesses.⁶¹

Users' expectations might be more nuanced in other circumstances.⁶² For example, .tv—Tuvalu's country-code top level domain—might not evoke in users the same expectations as do the domains .uk or .fr.⁶³ First, many users might not know that "TV" represents a country code,⁶⁴ let alone that there is a country called Tuvalu and that "TV" is the country code for Tuvalu.⁶⁵ Second, users might by now be accustomed to seeing the .tv domain used more like a generic top-level domain (gTLD) for websites (and by registrants) not associated with Tuvalu or any particular territory.⁶⁶ Some domains might evoke a territorial association when used in a particular context, but might not evoke such an association when used in a different context.⁶⁷ For example, .gl might be perceived as a territorially-linked domain when used in the context of a domain name such as nuuk.gl (for the municipality of the capital city of Greenland),⁶⁸ but not as territorially-linked for a domain name such as goo.gl (for the Google URL Shortener), where the domain was clearly selected for a reason other than an association with the physical territory of Greenland.

ICANN rules permit domain registry operators ("registries")⁶⁹ to choose their own approach to territorial association; this freedom applies to all top-

61. *See id.*

62. *See infra* notes 66–68.

63. *See* Barbara A. Solomon, *Domain Name Disputes: New Developments and Open Issues*, 91 TRADEMARK REP. 833, 834–35 (2001).

64. *Country Codes—ISO 3166*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, http://www.iso.org/iso/country_codes (last visited Apr. 10, 2018).

65. *See supra* note 63 and accompanying text.

66. *See* Matthew Edward Searing, "What's in a Domain Name?" *A Critical Analysis of the National and International Impact on Domain Name Cybersquatting*, 40 WASHBURN L.J. 110, 113–14 n.31 (2000).

67. *See infra* note 68.

68. *See Right Now*, SERMERSOOQ.GL, <https://sermersooq.gl/kl/> (last visited Apr. 10, 2018) (Sermersooq is the municipality in which Nuuk is located).

69. *See Welcome Registry Operators*, ICANN, <https://www.icann.org/resources/pages/registries/registries-en> (last visited Apr. 10, 2018). Registries are responsible for operating top-level domains. *Id.* The responsibility for operating the domains is delegated to the operators by ICANN. *Id.* While the term "registry" is commonly used as a shortened term for registry operators, a "registry" is technically "authoritative, master database of all domain names registered in each Top Level Domain," which are operated by registry operators. *Glossary*, ICANN, <https://www.icann.org/resources/pages/glossary-2014-02-03-en#r> (last visited Apr. 10, 2018); *see also* Torsten Bettinger & Volker Greimann, *ICANN's Agreements with Registries and Registrars*, in *DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* 26–28 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015).

level domain registries, including registries of country-code top-level domains (“ccTLDs”)⁷⁰ and new generic top-level domains (“new gTLDs”),⁷¹ even if the domains refer to a place or a territory.⁷² Some registries of territorially-linked domains have leaned toward the second type of approach mentioned above and have created new add-on spaces for the physical space that a domain references.⁷³ Some of these new spaces clearly benefit from an association with a physical space, such as .vegas with Las Vegas; the Las Vegas brand, regardless of where the brand is used, may attract registrants to the domain.⁷⁴ Other domains thrive even though they are completely disassociated from their territorial link; the .tv domain is successful because of the coincidental identity of Tuvalu’s country code with the abbreviation for television.⁷⁵ Other registries, such as .ca, .eu, and .paris, adopted the third approach and guard the association between domains and the physical territories that the domains represent.⁷⁶

70. See *FAQs*, ICANN, <https://www.icann.org/resources/pages/faqs-2014-01-21-en> (last visited Apr. 10, 2018). ccTLDs use two-letter country codes in accordance with ISO 3166. See *Country Codes—ISO 3166*, *supra* note 64. ccTLDs “correspond to a country, territory, or other geographic location.” See *FAQs*, *supra*. See Peter K. Yu, *The Never-Ending ccTLD Story*, in ADDRESSING THE WORLD: NATIONAL IDENTITY AND INTERNET COUNTRY CODE DOMAINS 3 (Erica Schlesinger Wass ed., 2003) (discussing the exception in the case of .uk). ccTLD registries may be restricted by the national laws and regulations that were adopted for the ccTLDs by the jurisdictions with which the ccTLDs are associated. *Id.*

71. *About the Program*, ICANN, <https://newgtlds.icann.org/en/about/program> (last visited Apr. 10, 2018) (discussing how ICANN delegated the first new gTLDs in October 2013).

72. See *Base Registry Agreement*, ICANN, <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf> (last visited Apr. 10, 2018). *Id.*; see also *FAQs*, *supra* note 73 (“ICAN does not accredit registrars or set registration policies for ccTLDs.”); *infra* Section V.A and accompanying text.

73. See *New gTLDs now available: .london, .ninja, .xyz, .holiday, .futbol and many more!*, 123 REG, <https://123-reg.co.uk/domain-names/new-gtlds/> (last visited Apr. 10, 2018). See also *supra* text accompanying notes 44–49.

74. See *.vegas domain*, 101 DOMAIN, <https://www.101domain.com/vegas.htm> (last visited Apr. 10, 2018); *vegas*, ICANN, <https://newgtlds.icann.org/en/program-status/sunrise-claims-periods/vegas> (last visited Apr. 10, 2018).

75. See *supra* notes 67–68; *.tv*, VERISIGN, http://www.verisign.com/en_US/domain-names/tv-domain-names/index.xhtml? (last visited Apr. 10, 2018).

76. See *infra* Section V.A.

III. THE GEOGRAPHICAL INDIFFERENCE OF THE DOMAIN NAME SYSTEM

The DNS was originally intended to have no geographical ties and no geographical restrictions.⁷⁷ Three of the original five “general purpose” domains—.com, .edu, and .org⁷⁸—were designed in the 1980s with no registration eligibility requirements that would be defined by geography; anyone fitting the description of the purpose of the domains could register domain names with these domains.⁷⁹ The two remaining general purpose original domains—.gov and .mil—were territorially-defined in fact because they were delegated to the U.S. Government General Services Administration⁸⁰ and the U.S. Department of Defense,⁸¹ respectively, and have been reserved for the use of “official governmental organizations in the United States”⁸² and the U.S. military, respectively.⁸³ However, for these two domains the eligibility requirement has officially been entity-based rather than geography-based.⁸⁴

The manner in which disputes over domain names would be decided was also originally designed with a geographically-detached approach.⁸⁵ Under the Uniform Domain-Name Dispute Resolution Policy (UDRP),⁸⁶ which

77. See J. Postel & J. Reynolds, *Domain Requirements*, INTERNET ENGINEERING TASK FORCE (Oct. 1984), <https://tools.ietf.org/pdf/rfc920.pdf>.

78. See *id.* These domains were followed by .net and .int, with .arpa maintained as the original domain of the internet’s predecessor, the Arpanet. See *id.*; Internet History of the 1980s, COMPUTER HIST. MUSEUM, <http://www.computerhistory.org/internethistory/1980s/> (last visited Apr. 10, 2018).

79. See *Educause Customer Service Agreement*, EDUCAUSE, <https://net.educause.edu/FAQ/DisplayCSA> (last visited Apr. 10, 2018). The .edu registration eligibility requirements have changed; currently, “[w]ith the exception of Grandfathered Institutions, only U.S. postsecondary institutions that are institutionally accredited by an agency on the U.S. Department of Education’s list of Nationally Recognized Accrediting Agencies may obtain an Internet name in the .edu domain.” *Id.* For an example of a grandfathered institution see CENTER FOR INTERNATIONAL INTELLECTUAL PROPERTY STUDIES, UNIVERSITÉ DE STRASBOURG, <http://www.ceipi.edu/> (last visited Apr. 10, 2018).

80. See *Delegation Record for .GOV*, INTERNET ASSIGNED NUMBERS AUTHORITY, <https://www.iana.org/domains/root/db/gov.html> (last visited Apr. 10, 2018); 41 C.F.R. § 102–173 (2018).

81. *Delegation Record for .MIL*, INTERNET ASSIGNED NUMBERS AUTHORITY, <http://www.iana.org/domains/root/db/mil.html> (last visited Apr. 10, 2018).

82. *Federal Management Regulation; Internet GOV Domain*, GOV’T PUB. OFF., <https://www.gpo.gov/fdsys/pkg/FR-2003-03-28/html/03-7413.htm> (last visited Apr. 10, 2018).

83. See *.mil Domain Names*, BB-ONLINE, <https://www.bb-online.com/mobile/mil.shtml> (last visited Apr. 10, 2018).

84. See *U.S. Army Garrison Bavaria*, U.S. ARMY GARRISON BAVARIA, <http://www.bavaria.army.mil/> (last visited Apr. 10, 2018).

85. See *infra* notes 89–95 and accompanying text.

86. *Uniform Domain Name Dispute Resolution Policy*, ICANN (Aug. 26, 1999), <https://www.icann.org>.

ICANN created to govern disputes between domain name registrants (“respondents”) and opponents of domain name registrations (“complainants”),⁸⁷ disputes are decided by providers that are established in centers that are not necessarily linked to the location of the respondents, complainants, registries,⁸⁸ or registrars.⁸⁹ The UDRP addresses the classical cybersquatting scenario and allows a complainant with a trademark or service mark (“trademark”)⁹⁰ to file a complaint against the registrant of a domain name that is identical or confusingly similar to that trademark.⁹¹ The UDRP mentions no countries and includes no choice-of-law provisions that would direct UDRP panels to select any particular country’s law to apply in a given case.⁹²

The DNS’s detachment from geography and its indifference to territorial delineations of rights granted or recognized by countries has presented problems.⁹³ The DNS confers global rights to alphanumerical designations, and the rights clash with other intangible rights to alphanumerical designations, such as trademark rights and rights to geographical indications that are, with some exceptions,⁹⁴ granted or recognized by the national laws of individual countries and also are, with some exceptions, protected only within the territory for which they were granted or recognized.⁹⁵ It is possible that a designation, such as a trademark, could be protected in multiple

org/resources/pages/policy-2012-02-25-en [hereinafter *UDRP*].

87. See Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 157–89 (2001) (providing an overview of pre-UDRP history).

88. See *supra* note 69 (defining “registry”).

89. See *Glossary*, *supra* note 69. “Registrars” are entities that register domain names. *Id.*; see also Bettinger & Greimann, *supra* note 69, at 26–30.

90. For simplification, this article uses “trademark” in this context for both trademark and service marks.

91. See *UDRP*, *supra* note 86.

92. See *infra* Section IV.B. (further discussing choice of law).

93. See *infra* notes 94–99.

94. See Council Regulation 207/2009 on the Community trade mark, 2009 O.J. (L 78) 1 (EC); *Benelux Convention on Intellectual Property (Trademarks and Designs)*, DUTCH CIVIL LAW, <http://www.dutchcivillaw.com/legislation/Benelux%20Trademark%20Convention.pdf> (last visited Apr. 10, 2018).

95. See Jessica Litman, *Commentary: Trademark Law and Domain Names*, 6 INT’L INTELL. PROP. L. & POL’Y 22–1, 22–2; see also Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, http://www.wipo.int/treaties/en/text.jsp?file_id=288514#P151_21198; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 16(2)–(3), Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

countries, but the rights to the various national trademarks might be legitimately owned by different owners in different countries. Additionally, trademark rights, again with some exceptions,⁹⁶ are limited by the goods and services to which they apply, and therefore multiple identical trademarks may exist in the same country but be owned by different owners, depending on the goods and services for which the marks exist.⁹⁷ A number of legitimate trademark owners may therefore claim rights in a domain name—an alphanumerical designation that is identical or confusingly similar to the trademark.⁹⁸ However, on each domain only one domain name may exist that consists of a unique alphanumerical designation.⁹⁹

A clash between two owners of identical trademarks that are registered in two different countries is illustrated by a dispute concerning the epiphoneamps.com domain name.¹⁰⁰ The complainant, Gibson Brands, Inc., a U.S. corporation, owns the trademark “Epiphone” in numerous countries, including in the United States, but it does not own the trademark in China;

96. See TRIPS Agreement art. 16(3); 15 U.S.C. § 1125(c) (2012).

97. See Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain System*, 4 J. SMALL & EMERGING BUS. L. 149, 153 (2000); *Unacceptable Trade Marks*, GOV.UK (May 16, 2014), <https://www.gov.uk/guidance/unacceptable-trade-marks> (“[T]he same trade mark can be registered for different goods and services and by different proprietors.”).

98. See David Yan, *Virtual Reality: Can We Ride Trademark Law to Surf Cyberspace*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 773, 797 (2000).

99. For a discussion of conflicting trademark interests and domain names see, for example, Alexander Peukert, *The Coexistence of Trade Mark Laws and Rights on the Internet, and the Impact of Geolocation Technologies*, 47(1) IIC 60, 80 (2016); Lipton, *supra* note 32, at 517; Torsten Bettinger & Dorothee Thum, *Territorial Trademark Rights in the Global Village—International Jurisdiction, Choice of Law and Substantive Law for Trademark Disputes on the Internet: Part 1*, 31(2) IIC 162 (2000); *Id.*, Part 2, 31(3) IIC 285 (2000); Marshall Leaffer, *Domain Names, Globalization, and Internet Governance*, 6 IND. J. GLOBAL LEGAL STUD. 139, 146–54 (1998). For a proposal to remedy the conflicts to a certain degree by creating new TLDs that would correspond to categories of goods and services see Simon Higgs, *Top Level Domain Classification and Categorization*, INTERNET ENGINEERING TASK FORCE (July 1996), <https://tools.ietf.org/html/draft-higgs-tld-cat-02>. For a proposal “for country-code-based domain names that are related to legally registered names in the country” (e.g., GMBH.DE for German limited liability companies) see O. Vaughan, *A Convention for Using Legal Names as Domain Names*, INTERNET ENGINEERING TASK FORCE (May 1998), <https://tools.ietf.org/html/rfc2352>. See also Peukert, *supra*, at 80 (2016) (suggesting that “the user should . . . be allowed employ the [trademark] as part of its search engine optimization strategy and its home country TLD.”).

Permutations of alphanumerical designations may exist as domain names, for example, [trademark]sucks.com or [trademark]fan.com. See Alan N. Harris, *A Domain to Call Their Own*, 80 MICH. B.J. 34, 37 (2001).

100. See *Gibson Brands, Inc. v. Zong Wen*, Nat’l Arb. Forum, Claim No: FA1501001602037 (Mar. 9, 2015), <http://www.adrforum.com/domaindecisions/1602037.htm>.

another company, the registrant of *epiphoneamps.com*, has owned the trademark “Epiphone” in China since 2009.¹⁰¹ In the dispute over the domain name, a panel of the National Arbitration Forum decided in favor of the Chinese registrant—the respondent in the case.¹⁰² Finding other facts in favor of the respondent (i.e., the panel found no bad faith on the part of the respondent), the panel in its decision followed the first come, first served rule: the Chinese respondent prevailed because it was the first applicant to register *epiphoneamps.com* at the time that it owned the valid trademark in *some* jurisdiction.¹⁰³

It was of no help to Gibson that Gibson had held the “Epiphone” trademark in the United States much longer (since 1939) than the respondent had held the trademark in China, and that Gibson owns a similar domain name—*epiphone.com*.¹⁰⁴ The panel found not only no bad faith on the part of the respondent when it registered the domain name, but also concluded that it was Gibson who was in bad faith when Gibson filed the complaint because it had to know—or should have known—about the respondent’s ownership of the trademark in China.¹⁰⁵

101. *See id.*

102. *See id.* Under the UDRP, the complainant can choose to file a complaint with any ICANN-approved dispute-resolution provider. *See UDRP*, *supra* note 86, at 4(e); *see also List of Approved Dispute Resolution Service Providers*, ICANN, <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> (last visited Apr. 10, 2018).

103. *See Gibson Brands, Inc.*, Claim No: FA1501001602037; *see also Humax Co. Ltd. v. Genmab A/S*, Nat’l Arb. Forum, Claim No: FA0205000114301 (July 14, 2002), <http://www.adrforum.com/DomainDecisions/114301.htm>; *Sandvik Intellectual Property AB v. Harbhajan Singh/State Engineering Corporation*, WIPO, Case No. D2008-0608 (June 5, 2008), <http://www.wipo.int/amc/en/domains/decisions/html/2008/d2008-0608.html>. “[T]he jurisdiction[s] where the trademark is valid is not considered relevant to panel assessment under the first element.” World Intellectual Property Org. [WIPO], *WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition*, at 7 (2017), <http://www.wipo.int/amc/en/domains/search/overview3.0/> [hereinafter *WIPO Overview 3.0*].

104. *See Gibson Brands, Inc.*, Claim No. FA1501001602037.

105. *See id.* It appears that even if a U.S. court were to review the case under the anti-cybersquatting provisions of the Lanham Act, the complainant would lose in the court as well if the court accepted the panel’s finding—or agreed with the panel—on the lack of respondent’s bad faith. *See* 15 U.S.C. § 1125(d)(1)(A) (2012). Under the Lanham Act, the owner of a mark must show both that the domain name is confusingly similar to the distinctive mark of the trademark owner (or identical, confusingly similar, or dilutive of a famous mark) and that the respondent had “a bad faith intent to profit from that mark.” *Id.*; *see infra* Section IV.A. (discussing the possibility of filing a suit in a court after a UDRP proceeding). Not all UDRP panels would necessarily decide the way the panel decided in *epiphoneamps.com*. *See Xbridge Ltd. v. Marchex Sales, Inc.*, WIPO, Case No. D2010-2069 (Mar. 1, 2001), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=d2010-2069> (The panel recognized that paragraph 2 of the UDRP “could be regarded as creating or reinforcing an obligation on a

Disputes over domain names continue to occur,¹⁰⁶ notwithstanding the fact that many more domains are available than the few that were available originally. The domain name ecosystem has been replenished by the addition of new domains, including ccTLDs,¹⁰⁷ new gTLDs,¹⁰⁸ and internationalized domain names (IDNs).¹⁰⁹ But the original general purpose domains have usually been valued more highly than the domains that were added later,¹¹⁰ so even though there now exist more domains than there are jurisdictions that grant trademark rights, the domain name space on the highly-valued domains (particularly on the .com domain) continues to appear crowded because trademark owners and other prospective domain name registrants still turn to

registrant to conduct some form of due diligence in order to determine whether the domain name at issue infringes any third party rights"). The UDRP requires that a registrant "determine whether [the registrant's] domain name registration infringes or violates [any third party] rights." *UDRP*, *supra* note 86, at ¶ 2. *But cf.* *Anomaly Action Sports S.R.L. Con Sigla AAS S.r.l. v. Kruse*, WIPO, Case No. D2013-0276 (Mar. 15, 2013), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0276> (pointing out that "the doctrine of constructive knowledge is one that now most UDRP panels have declined to recognise as forming part of the UDRP").

106. *See Total Number of Cases per Year*, WIPO, <http://www.wipo.int/amc/en/domains/statistics/cases.jsp> (last visited Apr. 10, 2018). Since 2010, more than 2,500 domain name disputes have been filed with WIPO each year. *Id.*; *see also Forum Domain Name Filings Hold Steady While Portfolio of Products Expands Under Updated Brand*, ADR FORUM (Sept. 11, 2015) <http://www.adrforum.com/news>; *supra* note 36 and accompanying text (discussing the number of domain name disputes).

107. *See generally* Yu, *supra* note 70 (discussing the history of ccTLDs). "The first ccTLD .us was created and delegated in March 1985 . . . [The] other delegations—.uk (for the United Kingdom) and .il (for Israel)—followed the same year." *Id.* "The number of ccTLD delegations went from 46 in 1990 to 108 in 1993. By the mid-1990s IANA had delegated virtually all the ccTLDs . . ." *Id.* at 4. As of April 2006, there were 245 ccTLDs. *See* KARINE PERSET & DIMITRI YPSILANTI, ORG. FOR ECON. CO-OPERATION & DEV., *EVOLUTION IN THE MANAGEMENT OF COUNTRY CODE TOP-LEVEL DOMAIN NAMES (CCTLDs)* 6 (2006), <https://www.oecd.org/sti/ieconomy/37730629.pdf> [hereinafter 2006 OECD REPORT].

108. *See generally Delegated Strings*, ICANN, <https://newgtlds.icann.org/en/program-status/delegated-strings> (last visited Apr. 10, 2018) (publishing delegation of new gTLDs). The first new gTLD was delegated in 2013. *Id.* The first new gTLD became available for domain name registrations in 2014. *Domain Name Registrations*, ICANN, <https://www.icann.org/resources/pages/cct-metrics-domain-name-registration-2016-06-27-en> (last visited Apr. 10, 2018). As of July 29, 2016, a total of 1,129 new gTLDs were delegated. *See Program Statistics*, ICANN, <https://newgtlds.icann.org/en/program-status/statistics> (last visited Apr. 10, 2018).

109. *See Internationalized Domain Names*, ICANN, <https://newgtlds.icann.org/en/about/idns> (last visited Apr. 10, 2018). "Internationalized Domain Names (IDNs) are domain names represented by characters other than the traditional ASCII characters (a through z). Such domain names could contain letters or characters from non-Latin scripts (for example, Arabic or Chinese)." *Id.* The first IDN ccTLDs were made available in 2010. *See First IDN ccTLDs Available*, ICANN (May 5, 2010), <https://www.icann.org/news/announcement-2010-05-05-en>.

110. *See id.*

the general purpose domains for the most coveted domain names.¹¹¹

The DNS, comprising a limited number of preferred domains, would seem to be a useful natural catalyst—a potentially viable mechanism for reducing the number of identical trademarks (at least word trademarks) globally.¹¹² With a limited number of identical alphanumeric designations available as domain names on the highly-valued domains,¹¹³ duplicative trademarks might slowly disappear because prospective trademark owners should prefer to adopt unique trademarks because of the limited availability of domain names, particularly domain names on the highly-valued gTLDs.¹¹⁴ However, not all trademarks are born in sterile laboratory conditions; more considerations affect the selection and adoption of a mark than a rational calculation based on a diligent ex-ante search and clearing of a mark. A change in the way search engines treat domain names could relieve overcrowding of the coveted domain space; if the use of search engines is the predominant method of reaching websites,¹¹⁵ pressure to obtain a coveted domain name could decrease if search engine algorithms give negligible weight to domain names or if search engines provide preferential treatment to domain names on the top-level domains other than the gTLDs that are most highly valued at present.¹¹⁶

111. See Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 543–45 (2005) (providing examples of how highly-valued domains have become overcrowded). As of January 20, 2018, there were more than 130 million domain names registered on .com, accounting for almost half of all domain names; the second most populated domain (.tk) had only 20 million domain names. See *Domain Count Statistics for TLDs*, DOMAINTOOLS, <https://research.domaintools.com/statistics/tld-counts/> (last visited Apr. 10, 2018). The most populated new (non-internationalized) gTLD (.xyz) had more than 1 million domain names. *Id.*; see also Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1300–01 (1998).

112. See generally Litman, *supra* note 97, at 159–61. The effect of the mechanism could extend to trademarks other than word marks as well; other marks, for example consisting of colors or pictures, could be described by alphanumeric designations that could also become domain names. See *infra* Part IV.

113. See *supra* note 111.

114. See *supra* notes 107–11 and accompanying text.

115. See *supra* notes 32, 36 and accompanying text.

116. See generally Benjamin Boroughf, *The New Dot Context: How to Mitigate Trademark Concerns in ICANN's New gTLP Program*, 10 ISJLP 85, 122–23 (2014) (considering how deemphasizing the relevance of domain names may lead to fewer registrations of similar domain names on popular domains); Jude A. Thomas, *Fifteen Years of Fame: The Declining Relevance of Domain Names in the Enduring Conflict Between Trademark and Free Speech Rights*, 11 J. MARSHALL REV. INTELL. PROP. L. 1, 55–56 (2011) (describing the effects of deemphasizing the value

In addition to trademark rights, other territorially-delineated rights to alphanumerical designations pose challenges in domain name disputes: names of places or geographical areas might be protected as geographical indications when the names are linked to particular goods, and the domain names using those geographical names may clash with the geographical indications.¹¹⁷ For example, “Champagne,” as an appellation of origin for wine from a region in France, is protected as a geographical indication in France through French law,¹¹⁸ in France and throughout the rest of the European Union (EU) through EU law,¹¹⁹ and in some additional countries because of international agreements.¹²⁰ However, a geographical indication, whether it is protected in one or in multiple countries, is not among the rights that entitle a UDRP complainant to challenge a domain name registration using the same name.¹²¹

of domain names); *supra* note 36 (discussing the increasing number of domain name disputes).

117. See *infra* note 118 and accompanying text.

118. Decree of August 26, 1936; Decree of June 17, 1938; Law of February 11, 1951. Loi du 6 mai 1919 relative à la protection des appellations d’origine [Law of May 6, 1919 relating to the Protection of Appellations of Origin], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], May, 8, 1919, p. 4727; Loi du 22 juillet 1927 tendant à compléter la loi du 6 mai 1919 relative à la protection des appellations d’origine [Law of July 22, 1927 to supplement the Law of May 6, 1919 on the Protection of Appellations of Origin], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], July 27, 1927, p.7762–63; Décret du 28 septembre 1935 relatif à l’application du décret du 30 juillet 1935 relatif à la défense du marché des vins et au régime économique de l’alcool [Decree of 28 September 1935 on the application of the Decree of 30 July 1935 on the defense of the wine market and the economic regime for alcohol], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Sept. 29, 1935, p. 10522; Décret du 29 juin 1936 portant définition de l’appellation contrôlée “Champagne” [Decree of 29 June 1936 defining the Champagne appellation controlee], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], July 4, 1936, p. 7020–21; Décret 79–756 du 4 septembre 1979 fixant les conditions de production des vins de pays (version consolidée au 3 septembre 2000) [Decree 79–756 of September 4, 1979 laying down the conditions for the production of Country wines (consolidated version as of September 3, 2000)].

119. See Council Regulation 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, art. 107, 2013 O.J. (L 347) 671, 675–78; *Extract From the Register*, EUROPEAN COMMISSION: DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT (Sept. 18, 1973), <http://ec.europa.eu/agriculture/markets/wine/e-bacchus/index.cfm?event=pdfEccgi&language=EN&eccgiId=7183>.

120. See 19 U.S.C. § 4201 (2012); World Intellectual Property Organization [WIPO], *Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration*, art. 5, WIPO (Oct. 31, 1958), http://www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.html; (231) *Champagne*, WIPO, <http://www.wipo.int/cgi-lis/ifetch5?ENG+LISBON+17-00+21526566-KEY+256-0+231+F-ENG+1+8+1+25+SEP-0/HITNUM,NO,APP-ENG+champagne+> (last visited Apr. 10, 2018); TRIPS Agreement, *supra* note 95, at art. 22–25.

121. See Comité Interprofessionnel du vin de Champagne v. Vickers, WIPO, Case No. DCO20111-

The 2001 Report of the Second WIPO Internet Domain Name Process¹²² acknowledged the problem of clashes between domain names and geographical indications but recommended waiting until international law developed further before it would be decided how these clashes would be resolved.¹²³

The 2001 Report also acknowledged clashes between domain names and geographical names that are not geographical indications.¹²⁴ Early on the question arose whether administrative agencies associated with a place or territory should have preferential rights to domain names that consist of the geographical names of the place or territory.¹²⁵ For example, in the portofhelsinki.com case, the panel rejected the notion that the administrative agency (Port of Helsinki) had some type of premium right to the domain name portofhelsinki.com.¹²⁶ The panel rejected the contention “that a unique geographical name should be considered as belonging to the legal authority of the geographical area in question under the Policy.”¹²⁷ As the barcelona.com

026 (June 21, 2011), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=DCO2011-0026>. As of December 10, 2016, champagne.com redirected to champagne.fr—a website of the Comité Champagne, the trade association of Champagne producers; champaign.com led to the website www.inert.com, which offered the domain name for sale. *Id.* For a different approach to geographical indications under other dispute resolution policies for specific domains see *infra* Section IV.B.

122. *The Recognition of Rights and the Use of Names in the Internet Domain Name System: Report of the Second WIPO Internet Domain Name Process*, WIPO (Sept. 3, 2001), <http://www.wipo.int/amc/en/processes/process2/report/html/report.html> [hereinafter 2001 WIPO Report].

123. *Id.* The Report “suggested that the international framework in this area needs to be further advanced before an adequate solution is available to the misuse of geographical indications in the DNS. As far as other geographical terms are concerned, the Report produces considerable evidence of the widespread registration of the names of countries, places within countries and indigenous peoples as domain names by persons unassociated with the countries, places or peoples. However, these areas are not covered by existing international laws and a decision needs to be taken as to whether such laws ought to be developed.” *Id.* at ¶ iv.

124. *Id.* at ¶ 107.

125. *Id.* See Heather Ann Forrest, *Domain Name Allocation and Government Super-Prioritization: Lessons Learned from the UDRP Keep ICANN Out of the Business of Deciding What Is or Is Not a Country*, 18 VAND. J. ENT. & TECH. L. 1, 21–35 (2015) (analyzing cases involving administrative agencies).

126. *Port of Helsinki v. Paragon Int’l Projects Ltd.*, WIPO, Case No. D2001-0002 (Feb. 12, 2001), <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0002.html>.

127. *Id.*; see also *Brisbane City Council v. Warren Bolton Consulting Pty. Ltd.*, WIPO, Case No. D2001-0047 (May 7, 2001), <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0047.html>. “Unless the evidence demonstrates that the name of a geographical location is in fact performing the function of a trademark, such a name should not be considered a trademark for the purposes of the Uniform Policy.” *Id.*; see also Forrest, *supra* note 125, at 27–33; *WIPO Overview 3.0*, *supra* note 103, at § 1.6. “[I]t has generally proven difficult for an entity affiliated with or responsible

case (discussed below) showed,¹²⁸ even when administrative agencies hold trademarks to their geographical names, an agency's trademark ownership alone does not necessarily suffice for the agency to gain rights in a domain name.¹²⁹ Even for these types of cases, the 2001 Report recommended waiting before any changes are made to the UDRP.¹³⁰

IV. THE DOMAIN NAME SYSTEM AND ITS GEOGRAPHICAL AWARENESS

Notwithstanding its geographically-indifferent design and its creators' ambivalence toward preferential treatment for geographical indications and geographical names, the DNS has not been completely detached from geography, territorial boundaries, and national laws.¹³¹ The DNS has taken national rights into account—first through the UDRP, which gives preference to trademark owners to some extent,¹³² and later, additionally, through registration rules that began to offer trademark owners preferential early domain name registrations.¹³³ Recently, ICANN began to require that certain geographical terms be reserved—meaning that the terms not be made available for registration as domain names.¹³⁴

Before Part IV discusses recent developments, this Part focuses on the geographical awareness that the DNS has exhibited in the UDRP from the beginnings of the DNS;¹³⁵ the UDRP enables a holder of rights in a trademark or service mark¹³⁶ to bring a UDRP complaint when a domain name at issue

for a geographical area (which has not otherwise obtained a relevant trademark registration) to show unregistered trademark rights in that geographical term on the basis of secondary meaning." *Id.* In January 2016, the new TLD .helsinki was delegated to the City of Helsinki. *See Delegation Record for .HELSINKI*, INTERNET ASSIGNED NUMBERS AUTHORITY, <https://www.iana.org/domains/root/db/helsinki.html> (last visited Apr. 10, 2018); *see also infra* Section V.A. (regarding ICANN's policy on geographical terms and the new gTLDs).

128. *See infra* Part IV.

129. *See* Forrest, *supra* note 125, at 24–27, 34; *see also infra* notes 153–56 and accompanying text.

130. *See* 2001 WIPO Report, *supra* note 122, at 117–18.

131. *See infra* Section IV.A.

132. *See* Andrew Main, *Plea for a Sane Top-Level Domain*, NETWORK WORKING GRP., Oct. 2001, at 6–7, <https://www.ietf.org/archive/id/draft-main-sane-tld-00.txt>. While the UDRP does consider national rights to some extent, not everyone has been satisfied with UDRP rules. *See id.*

133. *See infra* note 403 and accompanying text (discussing additional domain registration protection).

134. *See About Reserved Names and Name Collision Occurrence Management*, ICANN, <https://www.icann.org/resources/pages/reserved-2013-06-28-en> (last visited Apr. 10, 2018).

135. *See infra* notes 179–205 and accompanying text.

136. For the remainder of this discussion, “trademark” refers to both a trademark and a service

is identical or confusingly similar to the trademark.¹³⁷ The trademark may be a nationally-registered trademark, such as a U.S. trademark registered by the U.S. Patent and Trademark Office, or it may be a regionally-registered trademark, such as a European Community trademark registered by the European Union Intellectual Property Office.¹³⁸ It may also be a trademark registered with a U.S. state, such as a Georgia state trademark,¹³⁹ or even an unregistered mark.¹⁴⁰

A. *The UDRP and the Applicability of National Law*

Whether national law should apply in UDRP cases has been disputed;¹⁴¹ the UDRP is silent on what country's law, if any, should apply in UDRP cases.¹⁴² The absence of a choice-of-law provision is surprising, given that, according to a 2001 WIPO report, the aim of the UDRP drafters was not "to regulate the whole universe of the interface between trademarks and domain names, but only to implement the lowest common denominator of internationally agreed and accepted principles concerning the abuse of trademarks."¹⁴³ This language seems to acknowledge that the UDRP did not address some of the more complex or controversial issues, leaving them to be resolved according to law not found in the UDRP.¹⁴⁴ The report noted further that the drafting of the UDRP "was less about legislation than about the efficient application of existing law in a multijurisdictional and cross-territorial space."¹⁴⁵

mark.

137. See *UDRP*, *supra* note 86, at ¶ 4(a).

138. See *supra* text accompanying notes 93–99.

139. See *Vericheck, Inc. v. Admin Manager*, Nat'l Arb. Forum, Claim No: FA0606000734799 (Aug. 2, 2006), <http://www.adrforum.com/domaindecisions/734799.htm>; see also *Lahoti v. Vericheck, Inc.*, 586 F.3d 1190, 1193 (9th Cir. 2009) (addressing the same trademark confusion issue under 15 U.S.C. § 1125(d)).

140. See *infra* note 250 and accompanying text.

141. See, e.g., Laurence R. Helfer, *Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?*, 12 CARDOZO J. INT'L & COMP. L. 493, 495 (2004). "Certain reforms of the UDRP would enhance its status as a distinct body of law and further distance it from national legal systems." *Id.*

142. See *generally* UDRP, *supra* note 86.

143. 2001 WIPO Report, *supra* note 122, at 21–22.

144. See *id.*; Helfer, *supra* note 141, at 494 (noting that the UDRP was designed to supplement, but not supplant, domestic cybersquatting litigation).

145. *Id.*

Notwithstanding the UDRP's silence regarding the choice of law that should apply in domain name disputes, choice-of-law questions have been important in domain name cases.¹⁴⁶ Applicable law can make a significant difference in the outcome of a domain name case, as evidenced by the well-known barcelona.com case, which was decided by a UDRP panel in 2000 and again later by U.S. courts in 2002 and 2003.¹⁴⁷ The case involved a dispute between a Spanish trademark owner and a U.S. trademark owner; it was the U.S. trademark owner that registered barcelona.com and the Spanish trademark owner—the Barcelona City Council—that contested the registration.¹⁴⁸ The Barcelona City Council initiated a UDRP proceeding before a WIPO panel, which decided in favor of the Council¹⁴⁹ after the panel, in the absence of any instruction in the UDRP as to what country's trademark law should govern, respected the Council's Spanish registration of the trademark.¹⁵⁰

The dissatisfied U.S. trademark owner subsequently filed a lawsuit in a U.S. court¹⁵¹—not to overturn the panel decision under the UDRP, but to declare that under U.S. law his registration of barcelona.com was not

146. See, e.g., *infra* notes 147–56 and accompanying text (discussing the barcelona.com case).

147. See *Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com Inc.*, WIPO, Case No. D2000-0505 (Aug. 4, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0505.html>; *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, 189 F. Supp. 2d 367 (E.D. Va. 2002), *rev'd and vacated*, 330 F.3d 617 (4th Cir. 2003). The barcelona.com case has been discussed by numerous commentators. See, e.g., Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 885, 939–40 (2004) (noting that the district court decision would have “permitted a U.S. court to protect a Spanish mark against acts in the United States under U.S. law” but that the U.S. Court of Appeals for the Fourth Circuit reversed the district court, “reaffirming that U.S. trademark law offers protection only to U.S. trademark rights”); Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. COMP. & INT'L L. 109, 112 (2004) (noting that the Fourth Circuit court ruled against the city and applied U.S. trademark law); Helfer, *supra* note 141, at 497–99; see generally Zohar Efroni, *A Barcelona.com Analysis: Toward a Better Model for Adjudication of International Domain Name Disputes*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 29 (2003); Zohar Efroni, *A Guidebook to Cybersquatting Litigation: The Practical Approach in a Post-Barcelona.com World*, 2003 U. ILL. J.L. TECH. & POL'Y 457 (2003).

148. See *Barcelona.com, Inc.*, 330 F.3d at 619.

149. See *Excelentísimo Ayuntamiento de Barcelona*, WIPO, Case No. D2000-0505.

150. See *id.*

151. See *Barcelona.com, Inc.*, 189 F. Supp. 2d 367. The UDRP also contemplates the possibility that either a complainant or respondent may “submit [. . .] the dispute to a court of competent jurisdiction for independent resolution before [the UDRP] mandatory administrative proceeding is commenced or after such proceeding is concluded.” *UDRP*, *supra* note 86, at ¶ 4(k).

unlawful.¹⁵² The district court followed the WIPO panel's approach and applied Spanish trademark law, but the appellate court disagreed.¹⁵³ Because the claim in the U.S. courts was based on U.S. law—the reverse domain name hijacking provision of the Lanham Act¹⁵⁴—the appellate court applied U.S. law, noting that “United States courts do not entertain actions seeking to enforce trademark rights that exist only under foreign law.” The appellate court in *Barcelona* denied the Barcelona City Council its trademark rights under U.S. law and therefore any rights in the domain name *barcelona.com*.¹⁵⁵

The U.S. appellate court in *Barcelona* referred to the UDRP's “loose rules regarding applicable law,”¹⁵⁶ but the UDRP has, in fact, no rules at all regarding choice of applicable law.¹⁵⁷ The lack of choice-of-law rules can be problematic;¹⁵⁸ while the UDRP does contain its own substantive rules, the rules do not address all issues, and unless UDRP panels supplement the rules with their own UDRP-specific judge-made rules, some application of national law may be necessary to resolve unaddressed issues.¹⁵⁹ Even when UDRP panelists devise their own UDRP-specific substantive rules, it is likely that the specific rules will be influenced by a national law imported via the panelists' background and education, and their experiences in their own national legal systems.¹⁶⁰ Unaddressed issues are not limited to the validity

152. See *Barcelona.com, Inc.*, 189 F. Supp. 2d 367; *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 23–29 (1st Cir. 2001) (finding jurisdiction under 15 U.S.C. § 114(2)(D)(v), which provides registrants with a cause of action to recover domain names lost in UDRP proceedings).

153. See *Barcelona.com, Inc.*, 330 F.3d at 627 (“It requires little discussion to demonstrate that th[e] use of Spanish law by the district court was erroneous under the plain terms of the statute.”).

154. 15 U.S.C. §1114(2)(D)(v) (2012).

155. See *Barcelona.com, Inc.*, 330 F.3d at 628. The City of Barcelona has been using *barcelona.eu*, and in 2015 the new TLD *.barcelona* was delegated to the City of Barcelona. *Delegation Record for BARCELONA*, INTERNET ASSIGNED NO. AUTH., <https://www.iana.org/domains/root/db/barcelona.html> (last visited Apr. 10, 2018).

156. *Barcelona.com, Inc.*, 330 F.3d at 624.

157. See *infra* note 168 and accompanying text.

158. See Helfer & Dinwoodie, *supra* note 87, at 261–62, n. 386. Some argue that “the current Rule 15, by failing in any real way to address choice of law, fails to ensure that national interest will appropriately be recognized by panels, or to provide panels with guidance on where such recognition should occur.” *Id.*

159. See *id.*; see also *WIPO Overview 3.0*, *supra* note 103, at § 3.15 (“In some limited cases such as where the parties shared a common nationality and the import of a specific national law concept is particularly germane to an issue in dispute, panels have applied national law principles in assessing the UDRP elements.”).

160. See Helfer & Dinwoodie, *supra* note 87, at 261, n. 386 (“[B]y virtue of their inherent legitimacy deficit, non-national institutions may need to be particularly cognizant of the ability of

and ownership of a complainant's trademark, but include issues such as the standard for determining the confusing similarity between a domain name and a trademark.¹⁶¹

UDRP panelists have not been uniform in their opinions on the applicability of national law in UDRP cases.¹⁶² The Rules for the UDRP give UDRP panels wide discretion with regard to the choice of applicable law.¹⁶³ "A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and *any rules and principles of law that it deems applicable*."¹⁶⁴ Two commentators, Laurence R. Helfer and Graeme B. Dinwoodie, warned in 2001 that "the determination of issues . . . by the *invariable* application of a single national law would be unhelpful."¹⁶⁵ They projected that "in the long term, the [UDRP] non-national system might usefully develop autonomous rules that apply in disputes transcending national borders," but suggested that "the development of such autonomous principles must be grounded, at least initially and at least in part, in the underlying national interests and values."¹⁶⁶

The very first UDRP decision, in January 2000, did include a brief choice-of-law analysis and a conclusion about applicable national law.¹⁶⁷ The complainant and the respondent were both domiciled in the United States, and the registrar of the domain name worldwrestlingfederation.com was an Australian entity.¹⁶⁸ The panel decided that U.S. law would apply "to the extent that it would assist the panel" because of the U.S. domiciles of the parties and because "United States' courts recent experience with similar

other (national) institutions to interfere with the effectuation of the non-national policies.").

161. See *id.* at 154–57; see generally *Rules for Uniform Domain Name Dispute Resolution Policy*, ICANN (Sept. 23, 2018), <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en> (noting that a confusing similarity issue is an applicable dispute without laying out a standard for determining such disputes) [hereinafter *UDRP Rules*].

162. See *infra* notes 163–166 and accompanying text.

163. *UDRP Rules*, *supra* note 161; see also *Archived Rules for Uniform Domain Name Dispute Resolution Policy*, ICANN (Oct. 24, 1999), <https://archive.icann.org/en/udrp/udrp-rules-24oct99.htm> (archiving the previous version of the rules).

164. See *UDRP Rules*, *supra* note 161, at ¶ 3.15.

165. Helfer & Dinwoodie, *supra* note 87, at 264–65.

166. *Id.* at 265; see also Helfer, *supra* note 141, at 496 ("As a practical matter, of course, it would be impossible and unwise to insulate completely the UDRP from national laws.").

167. See *World Wrestling Fed'n Ent't, Inc. v. Bosman*, WIPO, Case No. D99-0001 (Jan. 14, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/1999/d1999-0001.html>.

168. See *id.*

disputes.”¹⁶⁹ However, in the end the panel found it “unnecessary to consult decisions of United States’ courts” to determine whether the domain name was used in bad faith.¹⁷⁰

Following the *Barcelona* appellate court decision,¹⁷¹ some UDRP panelists recognized the potentially overriding role of national law and took the role into account when assessing the applicability of national law.¹⁷² In the 2004 UDRP decision concerning the domain name *hija.com*, which the respondent used for a website criticizing complainant’s practices,¹⁷³ the panelist in the case, David H. Bernstein (a panelist from the United States),¹⁷⁴ pointed out a split among UDRP panels, which seemed to have reached different results in cases concerning criticism websites depending on whether the parties and the panelists were from the United States—and thus subject to (or at least familiar with) robust U.S. protection for free speech—or from another country.¹⁷⁵ In the *hija.com* case, which involved only U.S.-domiciled parties, Bernstein concluded that it was best to “align[] the decisions under [the UDRP] with decisions emerging from the [U.S.] courts,”¹⁷⁶ because such an approach would “prevent forum shopping.”¹⁷⁷ In a footnote to the decision, Bernstein noted that “in the event of a conflict between [the UDRP] and local law, the Policy makes it clear that local law, as interpreted by national courts, would ultimately govern any issues of domain name transfer.”¹⁷⁸

Not all UDRP panelists agreed that the UDRP should yield to national law—or take national law into account to any significant degree.¹⁷⁹ Six days

169. *Id.*

170. *Id.*

171. *See supra* notes 147–55 and accompanying text.

172. *See* Howard Jarvis Taxpayers Ass’n v. McCauley, WIPO, Case No. D2004-0014 (Apr. 22, 2004), <http://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0014.html>.

173. *See id.*

174. *See Biographical Data: David H. Bernstein*, WIPO ARB. & MEDIATION CTR., <http://www.wipo.int/export/sites/www/amc/en/domains/panel/profiles/bernstein-davidh.pdf> (last visited Apr. 10, 2018).

175. *See* Howard Jarvis Taxpayers Ass’n v. McCauley, WIPO, Case No. D2004-0014 (Apr. 22, 2004), <http://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0014.html>.

176. *Id.*

177. *Id.*

178. *Id.* at n.2.

179. *See* Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 449 (2001) (“[T]he entire UDRP project

before the *hjeta.com* decision, a UDRP panelist deciding *maxol.com*¹⁸⁰ took a position in favor of an autonomous interpretation of the UDRP, noting that the UDRP “provides an international procedure for international application.”¹⁸¹ “To import a national rule simply because both parties come from the same jurisdiction,” the panelist noted, “may result in similar cases being decided in a different manner dependent upon geographical accident.”¹⁸² Calling the potential differences in outcome “inherently unattractive,” the panelist admitted that “[a]t times resort to national law may be unavoidable” but considered it easily avoidable in the *maxol.com* case.¹⁸³ Eight days after the *hjeta.com* decision, another UDRP panelist disagreed with Bernstein; in the *covancecampaign.com* decision,¹⁸⁴ the panelist wrote that “[a]s a matter of principle, this Panel would not have thought that it was appropriate to import unique national legal principles into the interpretation of [the UDRP].”¹⁸⁵ Perhaps not surprisingly, the panelists in the *maxol.com* and *covancecampaign.com* cases were not from the United States.¹⁸⁶

Matthew S. Harris, the panelist in *maxol.com*, and Bernstein exchanged views on the potential applicability of national law again in 2008.¹⁸⁷ In a

is premised upon the development of substantive non-national rules so as to obviate the problems of disparate national laws and national rights operating in the context of a ubiquitous online environment.”).

180. *McMullan Bros., Ltd. v. Web Names Ltd.*, WIPO, Case No. D2004-0078 (Apr. 16, 2004), <http://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0078.html>.

181. *Id.*

182. *Id.*

183. *Id.*

184. *See Covance, Inc. v. Covance Campaign*, WIPO, Case No. D2004-0206 (Apr. 30, 2004), <http://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0206.html>.

185. *Id.*

186. *See McMullan Bros., Ltd.*, WIPO, Case No. D2004-0078 (the decision was rendered by panelist Matthew S. Harris, a British national); *Covance, Inc.*, WIPO, Case No. D2004-0206 (the decision was rendered by panelist Alistair Payne, who is a national of Australia, New Zealand, and Ireland); *see also WIPO List of Neutrals: Biographical Data for Matthew S. Harris*, WIPO, <http://www.wipo.int/export/sites/www/amc/en/domains/panel/profiles/harris-matthews.pdf> (last visited Apr. 10, 2018); *WIPO List of Neutrals: Biographical Data for Alistair Payne*, WIPO, <http://www.wipo.int/export/sites/www/amc/en/domains/panel/profiles/payne-alistair.pdf> (last visited Apr. 10, 2018).

187. *1066 Hous. Ass’n Ltd. v. Morgan*, WIPO, Case No. D2007-1461 (Jan. 18, 2008), <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1461.html>; *Sermo, Inc. v. CatalystMD, LLC*, WIPO, Case No. D2008-0647 (July 2, 2008), <http://www.wipo.int/amc/en/domains/decisions/html/2008/d2008-0647.html>.

detailed January 2008 decision in 1066ha.com,¹⁸⁸ Harris reiterated his position in favor of an autonomous interpretation of the UDRP, noting that “there is no real justification for . . . a local laws approach either in the Policy or the Rules”,¹⁸⁹ he added that the approach “should be avoided wherever possible” because “[i]t risks the UDRP fragmenting into a series of different systems.”¹⁹⁰ Bernstein responded in a July 2008 decision in sermosucks.com—a decision that concerned another criticism website.¹⁹¹ Bernstein pointed out that regardless of the approach that a panel adopts—whether it aligns with potentially applicable national law or applies autonomous UDRP law—some inconsistency may always result.¹⁹² Inconsistencies can arise either (1) among UDRP decisions if they are based on different countries’ laws, or (2) between a UDRP decision and a national court decision, if the UDRP decision is based on autonomous UDRP law and the national court decision on national law.¹⁹³ Bernstein emphasized the desirability of predictability and a reduction in forum shopping, and reiterated his preference for the national law approach.¹⁹⁴

B. Choice of Law in UDRP Proceedings

The threshold choice-of-law question—whether national law should apply at all in UDRP proceedings—has not been uniformly resolved.¹⁹⁵ But if the answer is yes, the two questions that must follow are (a) what country’s law should apply, meaning how it should be decided which country’s law should apply, and (b) what issues should be decided based on the national law

188. See *1066 Hous. Ass’n Ltd.*, WIPO, Case No. D2007-1461.

189. See *id.*

190. See *id.*

191. See *Sermo, Inc.*, WIPO, Case No. D2008-0647.

192. See *id.* (“Legal systems have long recognized that accepting some inconsistency is a practical necessity, especially given the lack of global harmonization of laws . . .”).

193. *Id.* (“Under the *Howard Jarvis* approach, UDRP decisions may be consistent with how the relevant national courts would rule, but the decisions would be inconsistent within the UDRP system . . .”).

194. *Id.* (“Although consistency may remain an elusive goal, this approach would help promote predictability in the UDRP system in that parties would know in advance which national laws . . . would most likely apply. It would also prevent forum shopping . . .”).

195. See Victoria Holstein-Childress, *Lex Cyberus: The UDRP as a Gatekeeper to Judicial Resolution of Competing Rights to Domain Names*, 109 PA. ST. L. REV. 565, 580–81 (“As a threshold matter, it is important to note that the UDRP itself neither requires panelists to apply the law of any particular nation, nor sets forth any choice of law guidelines for panelists.”).

that is selected.¹⁹⁶ In choice of law, *depeçage* may dictate that different rules be used to select the laws that are applicable to different issues.¹⁹⁷

A review of UDRP panels' choice-of-law approaches is complicated by the fact that panels are not always explicit about the approaches that they adopt in selecting applicable law.¹⁹⁸ Sometimes panels expressly state what country's law they applied and what directed their choice of applicable law,¹⁹⁹ at other times panels simply apply a particular national law without explaining what led them to adopt the particular choice.²⁰⁰ Panels sometimes devise substantive rules from national law but do not refer to the law or specifically state that they are using a particular national law.²⁰¹ Because panels may apply "any rules . . . that [they] deem applicable," they do not have to justify the rules that they apply or refer to their origin.²⁰²

In some decisions, panels have expressed their ambivalence about applying national law but have nevertheless referred to the national law that they believed might have applied.²⁰³ In one decision, a panel recognized that a national law did apply, but the panel expressed its hesitancy to apply the law

196. See Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 60, 63, 75 (1973).

197. *Id.* at 58 ("This process of applying the rules of different states to determine different issues has the forbidding name of *depeçage*, although it is sometimes more colloquially referred to as 'picking-and-choosing.'").

198. See *infra* notes 199–202 and accompanying text.

199. See, e.g., Pavillion Agency, Inc., v. Greenhouse Agency Ltd., WIPO, Case No. D2000-1221, (Dec. 4, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1221.html> ("[B]ecause the Complainants and Respondents are all New York residents and do business in New York, this Panel will apply the internal, substantive law of the State of New York, the Federal Trademark Act as applicable in New York, and the Policy and Rules that govern this proceeding."); Myer Stores Ltd. v. Singh, WIPO, Case No. D2001-0763 (Jul. 10, 2001), <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0763.html> ("In these circumstances the panel finds that, in addition to the Policy, the Rules and Supplemental Rules, the applicable law is the law of the State of New South Wales, Australia, including Australian Federal law.").

200. See, e.g., FMR Corp. v. Native Am. Warrior Soc'y, WIPO, Case No. D2004-0978 (Jan. 20, 2005), <http://www.wipo.int/amc/en/domains/decisions/html/2004/d2004-0978.html> (applying United States trademark law).

201. Helfer, *supra* note 141, at 496 ("Panels are, at least implicitly, applying the law of a particular country to determine issues such as when a complainant has rights in a mark that is registered in national trademark offices or used in domestic commerce.").

202. *Id.* at 495. Although the UDRP does not require that panels apply national laws, UDRP panel decisions are rarely completely divorced from national laws. *Id.* Even when panelists do not apply any particular country's law, certainly their backgrounds might influence their views on and approaches to substantive issues. *Id.*

203. See *infra* notes 204–07 and accompanying text.

because “only one panelist [was] intimately familiar with its provisions”,²⁰⁴ the panel nevertheless noted that, in the particular case, Australian law applied to the trademark rights of the complainant and that the panel “believe[d] its decision [was] correct under Australian law.”²⁰⁵ In another decision, a panel insisted that no national law applied in the case but concluded that its approach in the end “appear[ed] to be consistent with national trademark laws (including that of the UK),”²⁰⁶ “which would apply to any legal proceedings in this case.”²⁰⁷ These statements show, at a minimum, an understanding that there might be some value in reconciling UDRP decisions with national law.²⁰⁸

In cases in which UDRP panels did discuss their choice of applicable law, the panels used various criteria to select the applicable law.²⁰⁹ In some cases, a panel chose applicable law based on the parties’ domiciles.²¹⁰ For example, in the *cliffgreenhouse.com* case,²¹¹ the panel applied, in addition to “the Policy and Rules that govern [the] proceeding,”²¹² “the internal, substantive law of the State of New York [and] the Federal Trademark Act as applicable in New York”²¹³ because “the Complainants and Respondents are all New York residents and do business in New York.”²¹⁴ Similarly, in the *myeronline.com*

204. *Austl. Trade Comm’n v. Reader*, WIPO, Case No. D2002-0786 (Nov. 12, 2002), <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1379.html>.

205. *Id.*

206. *Chelsea & Westminster Hosp. NHS Found. Trust v. Redmond*, WIPO, Case No. D2007-1379 (Nov. 14, 2007), <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1379.html>.

207. *Id.*

208. Helfer, *supra* note 141, at 496.

209. *WIPO Overview 3.0*, *supra* note 103, at § 4.15 (discussing how panels have selected a particular country’s law “where the parties share a common nationality and the import of a specific national law concept is particularly germane to an issue in dispute”).

210. See, e.g., *Sermo, Inc. v. CatalystMD, LLC*, WIPO, Case No. D2008-0647 (July 2, 2008), <http://www.wipo.int/amc/en/domains/decisions/html/2008/d2008-0647.html> (“If both parties are resident in the same jurisdiction, then it seems wholly appropriate to consider the national laws of that jurisdiction since, presumably, those laws govern the parties’ conduct, legal rights, and potential liabilities.”).

211. *See Pavillion Agency, Inc. v. Greenhouse Agency Ltd.*, WIPO, Case No. D2000-1221 (Dec. 4, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1221.html>.

212. *See id.*

213. *See id.*

214. *Id.*; see also *Wort & Bild Verlag Konradshöhe GmbH & Co. KG v. Bergmann*, WIPO, Case No. D2009-1442 (Dec. 18, 2009), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1221.html> (applying German law); *Grupo Picking Pack, S.A. v. Prospero Moran*, WIPO, Case No. D2000-1220 (Dec. 18, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1220.html> (applying the law of Spain).

case,²¹⁵ the panel applied “the law of the State of New South Wales, Australia, including Australian Federal law,” in addition to “the [UDRP] Policy, the Rules and Supplemental Rules,” because the parties were domiciled in Australia.²¹⁶ In the *myeronline.com* case, the panel gave no weight to the fact that the registrar was in the United States and that “the disputed domain name is accessible to Internet users worldwide.”²¹⁷ The fact that a registrar was domiciled in the United States was taken into account in the *cnn.com* case, where a panel decided that U.S. law should apply “to the extent needed” because “the Complainant was a U.S.-based corporation and . . . the [r]espondents chose to register each of the disputed domain names through a U.S. registrar”;²¹⁸ the respondents in the case were from Lebanon.²¹⁹ In some cases, panels selected the law of the country on which a party based its claim of rights.²²⁰ For example, in the *newzealand.biz* case, the panel applied the law of New Zealand and “relevant international law” to evaluate the common law rights that the complainant—Her Majesty the Queen—asserted in the case.²²¹

Given the experience of the UDRP panel in the *barcelona.com* case, it is not surprising that some UDRP panels have chosen applicable national law in light of the likely forum (and therefore also the likely applicable law) of a potential subsequent court case.²²² While a court challenge of a UDRP panel decision should result in a court respecting the UDRP’s minimalistic choice-of-law rule contained in the Rules for the UDRP,²²³ a challenge under national law for reverse domain-name hijacking, as was the case in *barcelona.com*,²²⁴

215. See *Myer Stores Ltd. v. Singh*, WIPO, Case No. D2001-0763 (July 10, 2001), <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0763.html>.

216. *Id.*

217. *Id.*

218. *Cable News Network LP, LLP v. Khouri*, Nat’l Arb. Forum, Claim No: FA0208000117876 (Dec. 16, 2002), <http://www.adrforum.com/Domaindecisions/117876.htm>.

219. See *id.*

220. See, e.g., *Her Majesty the Queen v. iSMER*, WIPO, Case No. DBIZ2002-0270 (Oct. 2, 2002), <http://www.wipo.int/amc/en/domains/decisions/html/20002/dbiz2002-00270.html>.

221. See *id.*

222. See *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617, 623 (4th Cir. 2003); see also *Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com, Inc.*, WIPO, Case No. D2000-0505 (Aug. 4, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0505.html>.

223. See *supra* note 164.

224. See *Barcelona.com, Inc.*, 330 F.3d at 624; see also *supra* note 151 and accompanying text. For a discussion of the ACPA’s application in other cases see Michael Geist, *Cyberlaw 2.0*, 44 B.C. L.

may result in a court applying forum law and following whatever choice-of-law rule, if any, the forum law includes.²²⁵ Therefore, for example, in the *worldwrestlingfederation.com* case,²²⁶ the panel cited the U.S. courts' "recent experience with similar disputes" and the U.S. domiciles of the parties to justify the panel's choice of U.S. law.²²⁷ In the *sermosucks.com* case,²²⁸ panelist Bernstein justified the application of U.S. law not only by the U.S. domiciles of the parties and the U.S. location of the registrar, but also by the possibility that U.S. law would be applied by a U.S. court in a subsequent challenge of the panel's decision.²²⁹

Determining applicable law based on the jurisdiction in which a losing party may launch a challenge to a UDRP decision may be problematic because there might be more than one jurisdiction available for such a challenge.²³⁰ Under the UDRP, the complainant must submit to jurisdiction in "at least one specified Mutual Jurisdiction,"²³¹ which may be "at the location of either (a) the principal office of the Registrar . . . or (b) the domain-name holder's address as shown for the registration of the domain name."²³² Although the

REV. 323, 339–42 (2003).

225. See *WIPO Overview 3.0*, *supra* note 103, at § 4.14.4 ("It is widely recognized that national courts are not bound by UDRP panel decisions [A] court case is generally acknowledged to represent a de novo hearing of the case under national law.").

226. *World Wrestling Fed. Ent't, Inc. v. Bosman*, WIPO, Case No. D99-0001 (Jan. 14, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/1999/d1999-0001.html>.

227. *Id.*; see also *Am. Mensa, Ltd. v. Heigl*, WIPO, Case No. D2005-0068 (Apr. 24, 2005), <http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-0068.html>.

228. *Sermo, Inc. v. CataylstMD, LLC*, WIPO, Case No. D2008-0647 (July 2, 2008), <http://www.wipo.int/amc/en/domains/decisions/html/2008/d2008-0647.html>.

229. *Id.* "[I]f this Panel were to order transfer, Respondent could prevent the transfer by filing suit in Tulsa, Oklahoma, and the Panel firmly believes that the court would apply U.S. legal principles in any such challenge given that all of the parties are based in the U.S. and all of the conduct at issue occurred in the U.S. If Complainant doubts that would be the result, Complainant is, of course, free to test that hypothesis by filing suit in a U.S. court to learn whether the courts would find the registration and use of this Domain Name to violate the Lanham Act or other relevant U.S. laws." *Id.* In a case involving the domain name *ringostarr.mobi*, Bernstein argued in favor of applying U.S. law based on the United States being the mutual jurisdiction, notwithstanding the fact that both parties were from the United Kingdom (although the complainant did provide a U.S. address). *Starkey v. Bradley*, Nat'l Arb. Forum, Claim No. FA0612000874575 (Feb. 12, 2007) (Bernstein, P., dissenting in part), <http://www.adrforum.com/domaindecisions/874575.htm>.

230. See generally UDRP Rules, *supra* note 161.

231. *Id.* at ¶ 3(b)(xii).

232. *Id.* at ¶ 1. Note that registrars for the .com, .net, and .org domains do not have to be located in the United States. See *id.* As of 2004, there were "over eighty .com and .net registrars in twenty-three countries . . . and approximately seventy .org registrars in twenty-one countries . . . outside of the

complainant is likely to submit to only one jurisdiction,²³³ the laws of other jurisdictions may create grounds for personal jurisdiction for a domain name-related lawsuit, and such laws can override the UDRP Rules and the complainant's choice of jurisdiction.²³⁴ Adding to the complexity is that, for each jurisdiction, a UDRP panel must decide whether it will apply the jurisdiction's substantive law or apply the jurisdiction's choice-of-law rules to determine which national law might apply if a court were to apply the choice-of-law rules.²³⁵

As to the issues that should be decided according to the national law that is selected, there are two categories of issues in UDRP proceedings.²³⁶ The first category concerns the existence, validity, and ownership of trademarks;²³⁷ trademarks give complainants rights under the UDRP, and respondents' trademarks may help establish respondent's legitimate interests in a disputed domain name.²³⁸ Even panelists who have promoted an autonomous UDRP interpretation with no application of national law agree that the existence, validity, and ownership of trademarks must be assessed according to some national law.²³⁹ The second category of issues

United States." Jinku Hwang, *Is the ACPA a Safe Haven for Trademark Infringers?—Rethinking the Unilateral Application of the Lanham Act*, 22 J. MARSHALL J. COMPUTER & INFO. L. 655, 664 (2004).

233. *UDRP Rules*, *supra* note 161 at ¶ 3(b)(xii) (noting that the UDRP Rules of Procedure only require submission to one specified Mutual Jurisdiction).

234. See Eric Misterovich, *In Rem Jurisdiction for Domain Names Under the ACPA*, REVISION/LEGAL (Feb. 24, 2015), <https://revisionlegal.com/internet-lawyer/in-rem-jurisdiction-for-domain-names-under-the-acpa/>; see also Michael Xun Liu, *Jurisdictional Proceedings of In Rem Proceedings Against Domain Names*, 20 MICH. TELECOMM. & TECH. L.R. 467, 496 (2014) (indicating that in rem jurisdiction provided for under the ACPA extends so far as to potentially infringe on international sovereignty).

235. See *Sermo, Inc. v. CataylstMD, LLC*, WIPO, Case No. D2008-0647 (July 2, 2008) ("[W]here there is some question about the laws that may apply, then a Panel should also consider the location of mutual jurisdiction, and the conflict of laws principles that would be applied by courts in that jurisdiction, since that is the jurisdiction in which the courts may be asked to consider the parties respective rights if a challenge is filed . . .").

236. See *infra* notes 238–40 and accompanying text.

237. See *UDRP*, *supra* note 86; see also *infra* notes 241–47 and accompanying text.

238. See *id.*

239. See, e.g., *1066 Hous. Ass'n Ltd. v. Morgan*, WIPO, Case No. D2007-1461, (Jan. 18, 2008), <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1461> ("Trademarks (with a few exceptions) are by their very nature national rights with national scope. It is difficult to see how the existence and extent of trademark rights can be assessed other than by reference to local law. Also the fact that trademark rights can only have a national foundation is something that has long been settled . . .").

encompasses all other issues to which national law might apply.²⁴⁰

In the first category of issues, and for registered trademarks, complainant's trademark registration under the law of any jurisdiction will suffice to show complainant's rights in the trademark.²⁴¹ WIPO Overview of WIPO Panel Views on Selected UDRP Questions (WIPO Overview 3.0) notes that "[t]he jurisdiction(s) where the trademark is valid is not considered relevant to panel assessment."²⁴² Any invalidity of complainant's trademark should not affect a UDRP panel's finding of complainant's rights as long as the rights arise from a registered trademark.²⁴³ As a panel noted in the *tenerife.com* case, a UDRP proceeding is not a proper proceeding to challenge the validity of a complainant's registered trademark;²⁴⁴ rather, a validity challenge should be launched with the national trademark registration authority.²⁴⁵ However, as the *barcelona.com* case demonstrates, the choice of a particular law to assess the existence a registered trademark can be detrimental to the ultimate outcome of a domain name dispute;²⁴⁶ the WIPO panel in the *barcelona.com* case accepted a trademark registration under Spanish law, but the U.S. appellate court in *Barcelona.com* applied U.S. law to assess the existence of the trademark.²⁴⁷

As opposed to cases of registered trademarks, where UDRP panels

240. See *infra* notes 262–66 and accompanying text.

241. See *WIPO Overview 3.0*, *supra* note 103, at § 1.1.2. There are exceptions for some registered trademarks because “panels tend to carefully review certain types of automatic/unexamined registered trademarks such as US state registrations (as opposed to US federal registrations).” *Id.* at § 1.2.2; see also, e.g., Gerald M. Levine, DOMAIN NAME ARB. 115–16 (2015); Torsten Bettinger & Allegra Waddell, *Uniform Domain Name Dispute Resolution Policy*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 1263, 1342 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015); *American Honda Co. v. Salcedo*, WIPO, Case No. D2013-1846 (Dec. 31, 2013) (determining standing by application of U.S. law), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-1846>.

242. *WIPO Overview 3.0*, *supra* note 103, at § 1.1.2.

243. *Id.*

244. See *Excmo. Cabildo Insular de Tenerife & Promocion Exterior de Tenerife, S.A. v. Jupiter Web Servs. Ltd.*, WIPO, Case No. D2003-0525 (Sept. 9, 2003), <http://www.wipo.int/amc/en/domains/decisions/html/2003/d2003-0525.html>.

245. See *id.*; see also *Guagliardo v. Wu*, WIPO, Case No. D2017-2089 (Jan. 10, 2018) (“[P]anels tend to carefully review certain types of automatic/unexamined registered trademarks such as US state registrations (as opposed to US federal registrations).”).

246. See *supra* note 147 and accompanying text.

247. See *id.* U.S. law was in fact the law of the mutual jurisdiction to which the *Barcelona* complainant submitted. *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d 617, 619 (4th Cir. 2003). The U.S. appellate court applied U.S. law, not because it was the law of the mutual jurisdiction, but because the court decided the case based on a cause of action brought under U.S. law. *Id.*; see also *supra* note 231 and accompanying text.

assume that trademarks are valid, UDRP panels might assess the validity of unregistered trademarks based on national law.²⁴⁸ Panels might turn to national law to determine, for example, whether the functionality or geographical nature of a mark will render the mark invalid.²⁴⁹ For such a decision, a UDRP panel may apply the national law of the country for which the unregistered trademark rights are claimed,²⁵⁰ unless a panel uses some autonomous interpretation of the UDRP.²⁵¹

The choice of applicable law can also be relevant for the assessment of respondents' rights.²⁵² Under the UDRP, a respondent's "rights or legitimate interests" in a domain name may be evidenced by a showing that a respondent "ha[s] been commonly known" under the domain name.²⁵³ A respondent might be commonly known without holding a trademark, and the ownership of a valid trademark by itself does not suffice to show that a respondent is commonly known under the trademark unless the respondent has actually been commonly known under the trademark.²⁵⁴ Some registrants rely on a

248. See *WIPO Overview 3.0*, *supra* note 103, at § 1.3; see also, e.g., *Tuxedos By Rose v. Nunez*, Nat'l Arb. Forum, Claim No. FA0007000095248 (Aug. 17, 2000), <http://www.adrforum.com/domain/decisions/95248.htm>.

249. See *Tatra, a.s. v. Tatra Ltd.*, Nat'l Arb. Forum, Claim No. FA0911001296249 (Feb. 5, 2010), <http://www.adrforum.com/Domaindecisions/1296249.htm> (noting that "the question of whether a word is generic is not generally relevant for purposes of this first element of the Policy, except in so far as a complainant attempts to demonstrate rights in a trademark absent a trademark registration (sometimes called 'common law' trademark rights).").

250. See *supra* note 220; see also *Felipe v. Registerfly.com*, WIPO, Case No. D2005-0969, (Dec. 19, 2005), <http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-0969.html> ("Unregistered trademark rights do not exist in some nebulous way across the breadth of the countries in which a complainant proves it has a reputation. These rights derive from national laws and do not exist divorced from such laws."); *Fashiontv.com GmbH v. Olic*, WIPO, Case No. D2005-0994, (Dec. 8, 2005), <http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-0994.html> ("Common law rights/unregistered trademark rights do not exist on a world-wide basis. They may or may not exist in specific jurisdictions. It is for the Complainant to identify the jurisdiction or jurisdictions in which the rights are alleged to arise . . .").

251. Levine, *supra* note 241, at 123.

252. See *infra* note 255 and accompanying text.

253. UDRP, *supra* note 86, at ¶ 4(a)(ii).

254. See *id.* The requirement that a registrant be known under the same name as the domain name is often helpful to registrants who hold no registered trademarks, *id.*, but the requirement may help defeat the registration of domain names that are based on very recent registrations of new trademarks, or other registrations of trademarks that have not been used by the registrant, and the registrant is not commonly known by the trademark. See *Goldman, Sachs & Co. v. Wevers*, Nat'l Arb. Forum, Claim No. FA0610000812109 (Nov. 22, 2006), <http://www.adrforum.com/Domaindecisions/812109.htm>. However, not every new or recent trademark registration will be detrimental to a registrant's case; bona fide preparations to use a domain name, including obtaining a new trademark registration, might

trademark registration to show their rights and legitimate interests in a domain name, in which case it becomes important to a panel to determine which country's trademark registration—and which country's law—the panel will apply.²⁵⁵ Panels accept registrant's trademark registration as valid (as they do in the case of a complainant's registered trademark),²⁵⁶ but a panel must make a separate assessment of whether a registrant is commonly known in the particular territory for which the registrant owns the trademark.²⁵⁷

It is interesting to note that complainants who rely on their registered trademarks may still lose UDRP disputes if their trademarks consist of geographical names; in disputes between commercial enterprises, the geographical nature of a trademark may help to defeat a complaint.²⁵⁸ In the *neusiedler.com* case,²⁵⁹ for instance, the geographical nature of complainant's name helped the respondent prevail on the issue of respondent's rights and legitimate interests because a panel agreed with respondent's contention that the complainant could not monopolize a geographical name.²⁶⁰ In the *sorel.com* case,²⁶¹ a panel took the geographical nature of a name into account

suffice to show a registrant's rights and legitimate interests if the registrant proves a use or "demonstrable preparations to use . . . the domain name . . . to make a bona fide offering of goods and services." *UDRP*, *supra* note 86, at ¶ 4(c)(i); *see also, e.g.*, *Spark Networks Ltd. v. Blatt*, Nat'l Arb. Forum, Claim No. FA0806001199331 (July 17, 2008), <http://www.adrforum.com/Domaindecisions/1199331.htm>.

255. *See WIPO Overview 3.0*, *supra* note 103, at § 2.12.1. "Panels have recognized that a respondent's prior registration of a trademark which corresponds to a domain name will ordinarily support a finding of rights or legitimate interests in that domain name for purposes of the second element." *Id.*

256. *See, e.g.*, *ACE Ltd. v. WebMagic Ventures, LLC*, Nat'l Arb. Forum, Claim No. FA0802001143448 (Apr. 8, 2008), <http://www.adrforum.com/Domaindecisions/1143448.htm> ("A UDRP proceeding is an improper forum in which to seek invalidation or disregard of a duly issued federal trademark registration.").

257. *See, e.g.*, *Banque Hottinguer SA v. Hottinger*, WIPO, Case No. D2014-1340 (Oct. 14, 2014), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2014-1340> ("Previous panels have declined to find respondent's rights or legitimate interests in a domain name on the basis of a corresponding trademark registration where the overall circumstances demonstrate that such trademark was obtained primarily to circumvent the application of the UDRP."). "The existence of a respondent trademark does not . . . automatically confer rights or legitimate interests on the respondent." *WIPO Overview 3.0*, *supra* note 103, at § 2.12.2.

258. *See infra* notes 259–62 and accompanying text.

259. *Neusiedler v. Kulkarni*, WIPO, Case No. D2000-1769 (Feb. 5, 2001), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1769.html>.

260. *Id.*

261. *Sorel Co. v. Domaine Sales Ltd.*, Nat'l Arb. Forum, Case No. FA0102000096674 (Mar. 28, 2001), <http://www.adrforum.com/domaindecisions/96674.htm>.

when it decided that the respondent did not act in bad faith.²⁶²

The second category of issues to which national law may apply is the contentious category that covers all issues other than the existence, validity, and ownership of trademarks;²⁶³ Section A above referred to disputes that concerned such other issues. For example, when assessing a registrant's legitimate interests in a domain name, some UDRP panels have taken into account "the noncommercial free speech fair use defense";²⁶⁴ such panels turned to sources of national and/or international law to evaluate fair use.²⁶⁵ However, other panels have disagreed and have insisted on an autonomous definition of fair use;²⁶⁶ one such panel noted, for example, that "[t]he meaning [of fair use] should take into account general principles of law [or laws] which are widely accepted throughout the world . . . [and] it should not depend on or vary with the particular national law or laws."²⁶⁷

C. UDRP Un-Territorialized?

The question whether, and if so to what extent, national law may or should apply in UDRP proceedings has not been resolved, and criticism of the national law approach continues to appear in some UDRP decisions.²⁶⁸ Whether choice of law is an issue for UDRP panels to address continues to be debated even if at least one commentator considers the issue resolved.²⁶⁹ recently, David Post categorically stated that "[u]nder the UDRP, one set of

262. *See id.*

263. *See infra* notes 264–67. The previous Section referred to disputes that addressed these issues. *See supra* notes 171–92 and the accompanying text.

264. *Petroleo Brasileiro S.A.—Petrobras v. Da Silva*, WIPO, Case No. D2014-1331 (Sept. 23, 2014), <http://www.wipo.int/amc/en/domains/decisions/text/2014/d2014-1331.html>.

265. *Id.*

266. *See infra* note 267 and accompanying text.

267. *Chelsea & Westminster Hospital NHS Found. Tr. v. Redmond*, WIPO, Case No. D2007-1379 (Nov. 14, 2007), <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-1379.html>.

268. *See infra* notes 268–85 and accompanying text. For example, in a case involving the domain *royalholiday.info*, a panel refused to apply the law of the country of the respondents and the registrar or the law of the complainant, and explicitly rejected the idea that "conflicts of laws provisions should be applied to assist in the selection of some particular national law." *Grupo Costamex, SA de C.V. v. Smith*, WIPO, Case No. D2009-0062 (Mar. 25, 2009), <http://www.wipo.int/amc/en/domains/decisions/html/2009/d2009-0062.html>. In 2014, another panel stated that "the [UDRP] provides the legal bases for deciding complaints untrammelled by national laws." *Retail Royalty Company v. A K, Nat'l Arb. Forum*, Claim No. FA1409001580871 (Oct. 31, 2014), <http://www.adrforum.com/domaindecisions/1580871.htm>.

269. *See infra* note 270 and accompanying text.

rules—ICANN’s—applies to all disputes, eliminating the choice of law problem.”²⁷⁰

Although the choice-of-law issue has probably not been eliminated, the controversy does seem to have moved slowly into the background, possibly because UDRP case law has become more plentiful.²⁷¹ The more robust that domain name dispute case law becomes, the less will be the need for panels to turn to national law to supplement the substantive rules included in the UDRP.²⁷² UDRP case law now exists even on the issue of legitimate interests in a domain name used for a website criticizing a complainant,²⁷³ although different panel views persist on how to resolve the fair use issue.²⁷⁴

It would seem that through the development of their own body of case law, UDRP panels have slowly been divorcing the UDRP from national law.²⁷⁵ WIPO Overview 3.0 states that the UDRP is “rooted in general trademark law principles” and that “in its own terms UDRP jurisprudence generally would not require resort to particular national laws.”²⁷⁶ Of course, one may wonder whether the case law might have developed under the strong influence of U.S. law;²⁷⁷ if it did, then UDRP law might not in fact have developed as a fully autonomous body of law.²⁷⁸ The prevailing application

270. David G. Post, *Internet Infrastructure and IP Censorship*, IP JUSTICE J.: INTERNET GOVERNANCE & ONLINE FREEDOM PUBL’N SERIES 1, 4 (2015).

271. See *WIPO Cybersquatting Cases Hit Record in 2016, Driven by New Top-Level Domain Names*, WIPO (Mar. 16, 2017), http://www.wipo.int/pressroom/en/articles/2017/article_0003.html; Doug Isenberg, *WIPO’s UDRP ‘Overview’ Gets Bigger (and Better)*, GIGALAW (May 24, 2017), <https://giga.law/blog/2017/5/24/wipos-udrp-overview-gets-bigger-and-better>.

272. See *WIPO Overview 3.0*, *supra* note 103, at § 4.1. “While the UDRP does not operate on a strict doctrine of binding precedent, it is considered important for the overall credibility of the UDRP system that parties can reasonably anticipate the result of their case . . . [P]anels strive for consistency with prior decisions.” *Id.*

273. See, e.g., *Alsace Croisieres SA v. Livingstone*, WIPO, Case No. D2013-2025 (Jan. 11, 2014), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-2025> (resolving without referring to any national law on fair use a case between a French complainant and a U.S. respondent concerning the domain name of a criticism website); *Titan Enters. (Qid) Ply Ltd. v. Cross*, WIPO, Case No. D2015-2062 (Jan. 13, 2016), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2015-2062> (resolving without referring to any national law on fair use a case between two Australian parties concerning the domain name of a criticism website).

274. See *WIPO Overview 3.0*, *supra* note 103, at § 2.6.3.

275. See *supra* notes 272–74 and accompanying text.

276. *WIPO Overview 3.0*, *supra* note 103, at § 4.15.

277. Compare Helfer & Dinwoodie, *supra* note 87, at 266–67 (offering early observations about the influence of U.S. law on UDRP proceedings), with Levine, *supra* note 241, at 38–39 (offering recent observations of the influence of U.S. law); see also Helfer, *supra* note 141, at 496.

278. See Helfer, *supra* note 141, at 495–96.

of U.S. law in UDRP cases (whether applied openly or tacitly) could easily have resulted because of the initially high percentage of U.S. parties in UDRP cases²⁷⁹ and/or the high percentage of UDRP panelists from the United States.²⁸⁰ Commentators have pointed out the uses of doctrines of U.S. law, even in cases involving no U.S. parties,²⁸¹ as proof of the influence of U.S. law on the UDRP; some UDRP panels have expressed doubts about using the doctrines, such as the doctrine of nominative fair use, in UDRP cases in which one or both parties are not U.S. parties.²⁸²

Given the influence of national law on the UDRP, the UDRP might be far from being geographically blind.²⁸³ First, panels must apply *some* national law to determine the existence of trademark rights.²⁸⁴ Second, U.S. law has influenced and shaped the UDRP, and even after the UDRP has developed a sufficient body of its own case law, it continues to be influenced by U.S. law because it was U.S. case law that has guided the development of UDRP case law.²⁸⁵ In this respect, it is possible that territorialization has not really been a growing trend in UDRP proceedings, but geographical ties have certainly

279. See *WIPO Domain Name Dispute Resolution Statistics*, WIPO, <http://www.wipo.int/amc/en/domains/statistics/> (last visited Apr. 10, 2018) (statistics calculated based on this source on Dec. 11, 2016). The percentage of WIPO UDRP cases filed by U.S. complainants (based on the year in which the cases were decided) was 100% in 1999 (when only one case was filed) and 49% in 2000; it remained over 40% between 2001 and 2007, inclusive. *Id.* The percentage of WIPO UDRP cases filed against U.S. respondents (based on the year in which the cases were decided) was 100% in 1999 (when only one case was filed) and 51% in 2000; it remained over 30% between 2001 and 2010, inclusive. *Id.*

The statistics were calculated from WIPO Domain Name Dispute Resolution Statistics, available at <http://www.wipo.int/amc/en/domains/statistics/> (last visited Apr. 10, 2018).

280. See *WIPO Domain Name Panelists*, WIPO, <http://www.wipo.int/amc/en/domains/panel.html> (last visited Apr. 10, 2018).

281. See, e.g., *Hoffmann-La Roche AG v. Grog*, WIPO, Case No. D2013-0995 (Sept. 27, 2013), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0995> (the doctrine of nominative fair use applied in a case brought by a Swiss complainant against a Ukrainian respondent; the registrar was an Australian entity); cf. *Anomaly Action Sports S.R.L. v. Kruse*, WIPO, Case No. D2013-0276 (Mar. 15, 2013), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0276> (refusing to apply U.S. law, not because one of the parties was not domiciled in the United States, but because the panel rejected the application of national law in general).

282. E.g., *RapidShare AG v. Yanpeng*, WIPO, Case No. D2010-0893 (July 28, 2010), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=d2010-0893>; *Rakuten Kobo Inc. v. World Pub. Library*, WIPO, Case No. D2016-1708 (Oct. 17, 2016), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2016-1708>.

283. See *supra* notes 277–81 and accompanying text.

284. See *WIPO Overview 3.0*, *supra* note 103, at § 4.15.

285. See *supra* notes 272–82 and accompanying text.

been present in the UDRP since its beginning and have not seemed to diminish.²⁸⁶

V. TERRITORIALIZATION OF THE INTERNET DOMAIN NAME SYSTEM

The DNS has never been completely detached from physical geography; it has always respected national laws and national rights to a certain extent, as explained in Part IV above.²⁸⁷ ICANN's experience with the original gTLDs, the domain name dispute resolution policies of various registries, and case law under the UDRP have provided important lessons about clashes between domain names and territorially-limited rights to other alphanumerical designations.²⁸⁸ Based on the lessons, ICANN and the registries of the ccTLDs and the new gTLDs have sought ways to prevent or mitigate the clashes.²⁸⁹

The efforts to prevent or mitigate the clashes between domain names and nationally-protected alphanumerical designations have coincided with signs of territorialization in the DNS.²⁹⁰ Some of the signs relate to the efforts to prevent or mitigate disputes over domain names between holders of different nationally-protected alphanumerical designations, such as identical trademarks registered in two countries or trademarks registered in the same country for different classes of goods.²⁹¹

This Part reviews the territorialization signs in two categories: The first

286. *See id.* U.S. law is not the only national law that affects domain name dispute resolutions. *See* Helfer, *supra* note 141, at 496. With the proliferation of domains came a proliferation of dispute resolution policies. *See FAQs: Internet Domain Names*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/amc/en/center/faq/domains.html#6> (last visited Apr. 10, 2018). Some of the ccTLD and new gTLD registries adopted the UDRP with no changes, but others modified the UDRP to serve the particular interests of the registries and/or jurisdictions with which the TLDs are associated (if any). *See, e.g., Domain Name Dispute Resolution Service for Country Code Top Level Domains (ccTLDs)*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/amc/en/domains/ccld/> (last visited Apr. 10, 2018). As discussed in Section IV.B, the modification of the UDRP sometimes consists of introducing a choice-of-law provision or a provision giving a preference to owners of trademarks and other rights to alphanumerical designations that are registered, granted in, or recognized by a particular country. *See supra* notes 199–214 and accompanying text.

287. *See supra* Part IV.

288. *See supra* note 26, 108, 271–86 and accompanying text.

289. *See supra* Part III.

290. *See generally* WIPO, THE MANAGEMENT OF INTERNET NAMES AND ADDRESSES: INTELLECTUAL PROPERTY ISSUES 7–8 (1999), <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf> (discussing the interface between the DNS and intellectual property).

291. *See id.*

category consists of limitations on the granting of rights to domains and domain names; the limitations are built into domain name registration eligibility requirements and into new domain delegation rules.²⁹² The second category consists of adjustments to dispute resolution policies that make the policies more geographically aware.²⁹³

A. Territorialization in Registration Eligibility Requirements

The registries of some TLDs opted to adopt territorial restrictions in their domain name registration eligibility requirements.²⁹⁴ Typically, such restrictions appear for domains that have some territorial link; some of the ccTLDs are the primary examples of this approach.²⁹⁵ Not all ccTLD registries introduced, for all domain levels, eligibility requirements that included territorial restrictions;²⁹⁶ some ccTLDs that have no territorial restrictions on domain name registration eligibility on their top-level domain have second-level domains on which registration is restricted, including on a territorial basis.²⁹⁷

The complexity of the registration requirements varies; for example, the Domain Name Registration Service Agreement for the Algerian .dz domain states simply that domain names on the domain may be registered only by

292. See *infra* Section V.A.

293. See *infra* Section V.B.

294. See *infra* notes 298–315 and accompanying text.

295. See *infra* notes 300–315 and accompanying text.

296. See *infra* note 297 and accompanying text.

297. E.g., *Frequently Asked Questions—About Domains*, !cr, <https://www.nic.cr/preguntas-frecuentes/acerca-de-dominios> (last visited Apr. 11, 2018) (explaining the difference between top-level domains and second-level domains); *Políticas*, SVNET, http://www.svnet.org.sv/svnet.php?url=p_gral.php (last updated July 15, 2009) (visiting the various second-level domains within El Salvador .sv domain); *HKIRC Registration Policies*, HONG KONG INTERNET REGISTRATION CORPORATION LIMITED (Feb. 22, 2011), <https://www.hkirc.hk/content.jsp?id=3&#!/6> (discussing second-level domain names in section 3.4 of the registration policies); *Supporting Documents*, .MYNIC (Nov. 25, 2016), <https://www.mynic.my/en/supportingdocument.php> (providing a list of second- and third-level domain names); *Information About .MX Domain Names*, REGISTRY.MX, https://www.registry.mx/jsf/static/content/domain/domain_faq.jsf (last visited Apr. 11, 2018) (explaining the .MX domain classifications); *Rules*, NOMINET (June 2014), https://nominet-prod.s3.amazonaws.com/wp-content/uploads/2015/10/Rules_June_2014.pdf (defining the four levels of domain names); see also Alistair Payne & David Fixler, *Australia (.au)*, in *DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* 153, 155 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015) (listing Australia's sub-domains); Ho-Hyun Nahm, *The Republic of Korea (.kr)*, in *DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* 757, 760–61 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015) (explaining the Republic of Korea's sub-domains).

“entities established in the country either having a legal representation in the country or having document [sic] justifying property rights of name in Algeria.”²⁹⁸ Restrictions for the Canadian .ca domain name registration are formulated in a much more detailed manner; registrants must meet the conditions that are detailed in a separate document entitled *Canadian Presence Requirements for Registrants*.²⁹⁹

Territory-based registration eligibility requirements vary for different ccTLDs.³⁰⁰ Typical requirements include one or more of the following: citizenship,³⁰¹ permanent residence,³⁰² and/or residence³⁰³ in a certain country

298. DEMOCRATIC REPUBLIC OF ALGERIA, MINISTRY OF HIGHER EDUCATION AND SCIENTIFIC RESEARCH, RESEARCH CENTER ON SCIENTIFIC AND TECHNICAL INFORMATION, DOMAIN NAME POLICY FOR THE ALGERIAN COUNTRY CODE TOP LEVEL DOMAIN .DZ 5 (2012), http://www.nic.dz/en/images/pdf_nic/charte.pdf.

299. CANADIAN INTERNET REGISTRATION AUTH., CANADIAN PRESENCE REQUIREMENTS FOR REGISTRANTS 1, <https://cira.ca/sites/default/files/public/policy/cprregistrants-en.pdf> [hereinafter *.ca Requirements*].

300. See *infra* notes 301–315 and accompanying text.

301. See *.ca Requirements*, *supra* note 299, at 1; OFFICIAL .HU DOMAIN REGISTRY, DOMAIN REGISTRATION RULES AND PROCEDURES 1, 3 (2017), <http://www.domain.hu/domain/English/szabalyzat/szabalyzat.pdf> [hereinafter *.hu Rules*]; .IE REGISTRATION REQUIREMENTS, .IE DOMAIN REGISTRY, <https://www.iedr.ie/register-a-domain/registration-requirements/> (last visited Apr. 11, 2018) [hereinafter *.ie Requirements*]; *Saudi Domain Name Registration Regulation*, .SA SAUDI NETWORK INFORMATION CENTER (Mar. 31, 2011), <http://www.nic.sa/en/view/regulation> [hereinafter *.sa Regulation*]; *Domain Name Registration*, TUNISIAN INTERNET AGENCY, <http://www.registre.tn/en/index.php?rub=264&srub=336> (last visited Apr. 11, 2018) [hereinafter *.tn Registration*]; *usTLD Nexus Requirements Policy*, .US, <http://www.about.us/policies/ustld-nexus-requirements> (last visited Apr. 11, 2018) [hereinafter *.us Policy*].

302. See *Terms and Conditions for Domain Name Registration and Support in the .bg Zone and the Sub-Zones*, REGISTER.BG, <https://www.register.bg/user/static/rules/en/index.html#> (last updated Jan. 8, 2018) [hereinafter *.bg Terms*]; *.ca Requirements*, *supra* note 299, at 3; *.hu Rules*, *supra* note 301, at 3; *Domain Name Policy for .no*, NORID, <https://www.norid.no/en/regelverk/navnepolitikk#link1> (last updated Dec. 1, 2017) [hereinafter *.no Policy*]; *.us Policy*, *supra* note 302.

303. See *Registration of Domain Names Agreement*, BERMUDANIC, https://my.bermudanic.bm/legal/legal_terms.html (last modified June 25, 2016) [hereinafter *.bm Agreement*]; .EU, DOMAIN NAME REGISTRATION POLICY 3, https://eurid.eu/media/filer_public/0a/fe/0afef70a-85c0-4075-8052-d2853fbe1dfff/registration_policy_en.pdf [hereinafter *EU REGISTRATION POLICY*]; AFNIC, NAMING POLICY FOR FRENCH NETWORK INFORMATION CENTRE14 (2016), https://www.afnic.fr/medias/documents/Cadre_legal/Afnic_Naming_Policy_12122016_VEN.pdf [hereinafter *.FR POLICY*]; THE GAMBIA, <http://www.nic.gm/htmlpages/gm-policy.htm> (last visited Apr. 11, 2018) [hereinafter *.gm Policies*]; *Registration Requirements*, .ID PANDI, <https://dev.pandi.id/en/domain/registration-requirements/> (last visited Apr. 11, 2018); *Terms and Conditions (.ir), Appendix 1: Domain Rules*, IRNIC, https://www.nic.ir/Terms_and_Conditions_ir_Appendix_1_Domain_Rules (last visited Apr. 11, 2018) [hereinafter *.ir Terms*]; *.ie Requirements*, *supra* note 301; *The General Terms and Conditions*, KRNIC, <http://knic.or.kr/jsp/eng/domain/policy.jsp> (last visited Apr. 11, 2018) (articles 4 and 5); .ZADNA, ZA SECOND LEVEL DOMAIN GENERAL POLICY 9 (2015), <https://www.zadna.org.za/uploads/>

for natural persons, and incorporation,³⁰⁴ registration,³⁰⁵ and/or establishment in a certain country for entities.³⁰⁶ In the case of the .eu and .fr domains, for example, the eligibility extends to all EU residents and the residents of a few other European countries;³⁰⁷ similarly, in the case of the Bulgarian .bg and Hungarian .hu domains, not only Bulgarians or Hungarians, but all EU citizens and entities may register.³⁰⁸ Some local presence may be required for administrative—and also perhaps for enforcement—purposes; for example, for the .eg domain name registered by an entity not headquartered in Egypt, the “presence of a representative or recognized agent in Egypt” is required.³⁰⁹ Similarly, registration on the Iranian .ir domain requires that organizations be “legally represented” in Iran.³¹⁰

The eligibility requirements for some ccTLDs allow persons and entities without a physical presence in the country to register a domain name with that ccTLD as long as the person or entity has another nexus to the country of the ccTLD.³¹¹ For example, domain names on The Gambian .gm domain are available for registration by anyone “providing information or services for or about The Gambia, or otherwise benefiting the local Internet community of The Gambia.”³¹² The .ir domain is open to “[o]rganizations connected with

files/ZA_SLD_General_Policy_final_1_April_2015.pdf [hereinafter *.za Policy*]; *.us Policy*, *supra* note 301.

304. See *.bm Agreement*, *supra* note 303; *.hu Rules*, *supra* note 303; *.us Policy*, *supra* note 303.

305. See *.bg Terms*, *supra* note 302 (Section 3); EU REGISTRATION POLICY, *supra* note 303, at 3; *.hu Rules*, *supra* note 301 at 3; *.ie Requirements*, *supra* note 303; *Policy for Acquisition of the Right to Use Domain Names under the Top Level Domain .lv*, NIC (July 1, 2009), <https://www.nic.lv/en/policy> [hereinafter *.lv Policy*] (Section 3.1.1.1); *.no Policy*, *supra* note 303; *.sa Regulation*, *supra* note 303.

306. See *.bg Terms*, *supra* note 303; *.ca Requirements*, *supra* note 303, at 3; EU REGISTRATION POLICY, *supra* note 303; *.FR POLICY*, *supra* note 303, at 14; *.gm Policies*, *supra* note 303; *.lv Policy*, *supra* note 305; *.sa Regulation*, *supra* note 301 (Section 2.2); *.za Policy*, *supra* note 305, at 9 (Section 1.3.1); *.us Policy*, *supra* note 303.

307. See EU REGISTRATION POLICY, *supra* note 302, at 3 (listing Norway, Iceland, and Liechtenstein); *.FR POLICY*, *supra* note 303, at 14; see also *Frequently Asked Questions*, REGISTRO.IT, <http://www.nic.it/en/faq#t127n81932> (last visited Apr. 11, 2018) (stating that the .it domain name may only be used by citizens, residents, or those that have an office registered in the areas of the European Economic Area (EEA), the Vatican, the Republic of San Marino, and Switzerland).

308. See *.bg Terms*, *supra* note 303; *.hu Rules*, *supra* note 308.

309. See *Registration Rules*, .EG, <http://www.egregistry.eg/Roles&Policies.html> [hereinafter *.eg Rules*].

310. See *.ir Terms*, *supra* note 303.

311. See *infra* notes 312–15 and accompanying text; see also, e.g., *.gm Policies*, *supra* note 303.

312. See *.gm Policies*, *supra* note 303.

the official representations of Iran abroad.”³¹³ The Irish .ie domain may be used by companies not registered in Ireland who “are trading with clients in Ireland.”³¹⁴ Spain limits the eligibility for registration on its .es domain to “individuals or . . . entities with interests in or ties with Spain.”³¹⁵

The registration eligibility requirements do not mitigate disputes over domain names between owners of the domain names and holders of rights to identical alphanumeric designations; clearly, two French citizens or two entities incorporated in Ireland may each own identical trademarks in different countries. Some ccTLD eligibility requirements do provide that an owner of a trademark registered in the country may register a domain name identical to the trademark without necessarily excluding an owner of a foreign trademark (who also meets the registration requirements) from registering an identical domain name.³¹⁶ It is during a “sunrise period” when registries may grant preferences for trademarks of a particular jurisdiction; a sunrise period normally precedes a general registration period and allows eligible persons and entities to pre-register domain names.³¹⁷ Some ccTLDs have featured sunrise periods with territory-based limitations on eligibility.³¹⁸ ICANN made sunrise periods mandatory for new gTLDs, and the process is now also complemented by ICANN’s Trademark Clearinghouse³¹⁹—“a global repository for trademark data.”³²⁰

Approaches to registration eligibility requirements have not been static; market forces have shaped the approaches, and some registries have changed their eligibility requirements if they perceived their requirements as too limiting.³²¹ By lifting their registration eligibility limitations and making their

313. See .ir Terms, *supra* note 303.

314. See .ie Requirements, *supra* note 303.

315. *Order ITC/1542/2005*, U. OF ALICANTE INTELL. PROP. & INFO. TECH. (May 19, 2005), http://www.uaipit.com/uploads/legislacion/files/1323883040_ORDEN_ITC.1542.2005.pdf (Chapter II, Section 6 approving the internet Domain Names National Plan under the country code corresponding to Spain (.es)).

316. See .ca Requirements, *supra* note 299, at 3; .ie Requirements, *supra* note 301; .sa Regulation, *supra* note 301; .tn Requirements, *supra* note 301.

317. *Trademark Clearinghouse FAQs*, ICANN, <https://newgtlds.icann.org/en/about/trademark-clearinghouse/faqs> (last visited Apr. 11, 2018); see also Forrest, *supra* note 125, at 10–12.

318. See Forrest, *supra* note 125, at 12.

319. See *Trademark Clearinghouse*, ICANN, <https://newgtlds.icann.org/en/about/trademark-clearinghouse> (last visited Apr. 11, 2018).

320. See *Trademark Clearinghouse FAQs*, *supra* note 317.

321. See *infra* notes 322–26 and accompanying text.

ccTLDs “open,”³²² registries sought to attract new registrants and increase the number of domain name registrations.³²³ A 2006 OECD report pointed out a noticeable “trend” at the time for the ccTLDs to liberalize their registration requirements.³²⁴ Registries have pursued the liberalization to increase their registration business;³²⁵ the OECD report noted that “[s]ome of the higher growth rates [in domain name registrations were] found in countries that have liberalised their registration requirements.”³²⁶

Not all domain liberalizations have eliminated or narrowed territory-based restrictions,³²⁷ but a number of ccTLD registries have lifted their territory-based restrictions on registration eligibility either for all domain levels or for some domain levels—for example Belgium (in 2000),³²⁸ Sweden

322. See WORLD INTELLECTUAL PROP. ORG., CC'TLD BEST PRACTICES FOR THE PREVENTION AND RESOLUTION OF INTELLECTUAL PROPERTY DISPUTES 2 (Jun. 20, 2001), <http://www.wipo.int/export/sites/www/amc/en/docs/bestpractices.pdf>. Open ccTLDs are “ccTLDs in which there are no restrictions on the persons or entities registering in them.” *Id.*

323. See *infra* notes 324–26 and accompanying notes.

324. 2006 OECD REPORT, *supra* note 107, at 5. According to a 1999 WIPO report, as of 1999 there were 243 ccTLDs of which 71% were “restricted,” meaning that they had some registration eligibility limitations that were viewed as “in effect, mitigat[ing] the potential problems arising from a first-come, first-served system.” 1999 WIPO FINAL REPORT, *supra* note 26, at ¶ 337.

325. Youn Jung Park, The Political Economy of Country Code Top Level Domains 147–48 (July 2008) (unpublished Ph.D. dissertation, Syracuse University) (on file with author).

326. 2006 OECD REPORT, *supra* note 107, at 5. A liberalization of registration eligibility might not be sufficient to increase the volume of domain name registrations; other factors influence volume, including pricing, reputation, and the general desirability of a domain. *Id.* at 45 n.41. Comparing the success of restricted and unrestricted domains, for example by numbers of domain name registrations per capita, per internet user, or per GDP amount is also problematic, as such comparisons do not take into account the lifespans of the domains (e.g., the length of time that registrations on the domains were available and the length of time that they were unrestricted). *Id.* A 2010 report by the Norwegian government noted that “[i]t is not known what drives the growth of the number of domains in a country. The size of population appears to be a factor that is seen in the majority of growth models.” NORWEGIAN MINISTRY OF TRANSP. AND COMM'C'NS, FINAL REPORT—NEW TOP LEVEL DOMAINS OF NATIONAL IMPORTANCE 31 (2010), http://www.norid.no/nytt/ReportNewTopLevelDomains_Norway.pdf.

The 2006 OECD report mentioned that there were “pros and cons to liberalising requirements for registering a domain name.” 2006 OECD REPORT, *supra* note 107, at 5. Furthermore, the report noted the possible higher costs of administration of restricted domain systems, but also the possible positive effects of “curbing cyber-squatting, online fraud and intellectual property violations.” *Id.* It also mentioned the value of “provid[ing] assurance to consumers and companies that they are dealing with legitimate locally-based entities.” *Id.*

327. See, e.g., Lian Yunze & Liu Yuping, *China (.cn)*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 687, 692 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015) (discussing how in 2012, .cn became available to persons (it had previously been available to entities only)).

328. Park, *supra* note 325, at 148.

(in 2003),³²⁹ Slovenia (in 2005),³³⁰ Portugal (in 2012),³³¹ Åland (in 2016),³³² and Finland (in 2016).³³³ Some countries have liberalized their territory-based requirements only in part; for example, France liberalized its rules gradually in 2004, 2006, 2010, and 2011, and eventually opened up the registration of the .fr domain to French citizens residing abroad (in 2010) and to persons and entities from EU member states and Iceland, Liechtenstein, Norway, and Switzerland (in 2011), while continuing to disallow registrations for persons not residing and entities not registered in the EU or the other four European countries, or with no trademark rights in France.³³⁴

New gTLDs were delegated with significant attention to physical geography.³³⁵ ICANN excluded “country or territory names” from the new gTLD applications altogether;³³⁶ applications for other “geographic names . . . must [have] be[en] accompanied by documentation of support or non-objection from the relevant governments or public authorities.”³³⁷ Such geographic names were defined as a capital city name, a city name, another territorial name (county, province, or state listed in the ISO 3166-2 standard), a UNESCO region, or a geographic term “appearing on the ‘Composition of macro geographical (continental) regions, geographical sub-regions, and

329. See Petter Rindforth, *Sweden (.se)*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 875, 878 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015).

330. See *Domain Name Law and Practice*, OXFORD U. PRESS (Apr. 15, 2005), http://global.oup.com/booksites/content/0199278253/updates/country_overviews/slovenia; see also REGISTER.SI, GENERAL TERMS AND CONDITIONS FOR REGISTRATION OF DOMAIN NAMES UNDER THE .SI TOP-LEVEL DOMAIN (2016), <https://www.register.si/wp-content/uploads/2016/08/general-terms.pdf>.

331. See FCCN Announces the Liberalization of .pt Domain Registration, COUNCIL OF EUROPEAN NATIONAL TOP-LEVEL DOMAIN REGISTRIES (Feb. 27, 2012), <https://www.centr.org/news/news/fccn-announces-the-liberalization-of-pt-domain-registration.html>.

332. See *Who Can Apply for ax-domain Name?*, ÅLANDS LANDSKAPSREGERIG, <https://whois.ax/en/> (last visited Apr. 11, 2018).

333. See *How to Get an fi-Domain Name*, FINNISH COMM. REG. AUTHORITY, <https://www.viestintavirasto.fi/en/fidomain/howtogetanfi-domainname.html> (last updated Aug. 30, 2016).

334. David Taylor, *France (.fr)*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 313–58 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015). The pre-liberalization period of the ccTLDs that were later liberalized might be viewed as being a prolonged sunrise period. *Id.*

335. See *infra* notes 336–38 and accompanying text.

336. INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, gTLD APPLICANT GUIDEBOOK 2–16, (2012), file:///C:/Users/soluser/Downloads/guidebook-full-04jun12-en%20(1).pdf (¶ 2.2.1.4.1).

337. *Id.* at 2–17 (¶ 2.2.1.4.2).

selected economic and other groupings’ list.”³³⁸

Some new gTLDs also include territory-based restrictions on registration eligibility—some restrictions are only applicable during the sunrise period, while others are applicable during both the sunrise period and general registration.³³⁹ The territorially-defined restrictions on registration eligibility that exist for some of the new gTLDs that have a territorial meaning vary widely.³⁴⁰ For example, a domain name registration for the .corsica domain is available to a “[l]egal entity in Corsica . . . [i]ndividuals living in Corsica, . . . [and] any individual who has and will prove a direct or indirect link attachment (economic, social, cultural, familial, historical or otherwise) with Corsica.”³⁴¹ Some link to the territory might suffice; for example, “[a]ny natural or legal person . . . [with] ties to Alsace” may register a domain name on .alsace.³⁴² The domains .berlin and .hamburg both require that the registrant have “an economic, cultural, historical, social or any other connection to the [city].”³⁴³

Sometimes, other positive ties to a new gTLD territory are promoted; for example, anyone registering a .scot domain name “must be linked to the

338. *Id.* at 2-14–2-15, 2-16–2-17, A-16 (¶ 2.2.1.4.2). A primary example of the controversy that gTLDs may generate is the application for the delegation of .amazon. *Adopted Board Resolutions: Regular Meeting of the ICANN Board*, ICANN (Sept. 23, 2017), <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.e>. The ICANN Board’s decision not to advance Amazon EU S.à.r.l.’s application was overruled by an independent review panel on July 11, 2017; however, the Board decided on September 23, 2017, to take additional time to consider the application. *Id.* In February 2018 “[t]he ICANN Board . . . asked the ICANN org President and CEO to facilitate negotiations between the Amazon Cooperation Treaty Organization’s (ACTO) member states and the Amazon corporation.” *GAC Advice – Abu Dhabi Communiqué: Actions and Updates (04 February 2018)*, <https://www.icann.org/en/system/files/files/resolutions-abudhabi60-gac-advice-scorecard-04feb18-en.pdf> (last visited May 17, 2018).

339. See *infra* notes 340–65 and accompanying text.

340. See Bettinger & Rodenbaugh, *ICANN’s New gTLD Program*, in *DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* 99 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015). ICANN refers to some of these gTLDs as “geoTLDs.” *Id.* An international association called GeoTLD Group AISBL aims to represent more broadly-defined geography-based TLDs. See *About, GEOTLD.GROUP*, <http://geotld.group/about/> (last visited Apr. 11, 2018).

341. DOT CORSICA, .CORSICA REGISTRATION POLICY 4 (2015), https://portal.ascio.com/productdb/q.aspx?downloadFile=.CORSICA_Registration_Policy.pdf.

342. See, e.g., RÉGION ALSACE, .ALSACE REGISTRATION POLICY 5 (2015), www.mondomaine.alsace.fr/point/uploads/2015/01/alsace_registration_policy_V2.pdf.

343. .BERLIN, POLICY FOR THE REGISTRATION OF .BERLIN DOMAIN NAMES 3 (2015), <https://dot.berlin/files/u4/BERLIN-Registration-Policy.pdf>; .HAMBURG, POLICY FOR THE REGISTRATION OF .HAMBURG DOMAIN NAMES 2, https://nic.hamburg/uploads/user_upload/150604_HAMBURG_Registration_Policy.pdf.

[Scottish] community . . . on a linguistic, cultural, tourism, business basis, or any other activity conducive to the welfare of the worldwide Scottish community.”³⁴⁴ In addition to being available to persons and entities residing in Kyoto, .kyoto domain names are available to persons and entities with “a legitimate purpose for registering and using a ‘.kyoto’ domain name,” which may be based on “a positive economic contribution to Kyoto,” on an endorsement by the Kyoto Prefectural Government or the Kyoto Chamber of Commerce, or on “other economic association with a presence in Kyoto.”³⁴⁵ Economic ties are also emphasized for the .london domain; in addition to registrants with “a physical address in London,” registrants can register for the .london domain if they have “an affiliation with or interest in London, such as to provide affiliation, or offer products, goods or services, relevant to London or Londoners.”³⁴⁶

Some new gTLDs, like the .scot domain, are based on a vision of a space devoted to the culture of a particular territory.³⁴⁷ For example, the .bzh domain requires that the registrant have “a place of residence, headquarters or office located in Brittany”; however, registration is also open if a “significant and original content of the website [is] devoted to Brittany and the Breton culture, . . . a significant and original part of the website [is] in the Breton or Gallo language,” or if the registrant holds a “regular membership of Association www.bzh, which gathers representatives of the linguistic and cultural community.”³⁴⁸ A similar purpose is apparent from the registration eligibility requirements for domains that focus on linguistic and cultural communities, such as the .cat (Catalan),³⁴⁹ .eus (Basque),³⁵⁰ and .gal (Galician).³⁵¹

344. *.scot Registration Policy*, .SCOT, http://dotscot.net/wp-content/uploads/2016/09/dotSCOT_General_Registration_Policy.pdf, (last visited Apr. 11, 2018) (§ 2.1).

345. KYOTO, DOMAIN NAME REGISTRATION POLICIES 17 (2015), http://nic.kyoto/pdf/dotkyoto_domain_name_registration_policies.pdf.

346. *Registration Agreement*, .LONDON, <http://domains.london/wp-content/uploads/2014/04/Dot-London-Registration-Agreement.pdf> (last visited Apr. 11, 2018).

347. See *infra* notes 348–51 and accompanying text.

348. BZH, NETNAMES (Aug. 10, 2014), https://www.netnames.com/assets/shared/gtld-product-sheets/bzh_external.pdf.

349. *.cat Domain Name Registration Agreement*, FUNDACIÓ PUNTCAT, <https://variomedia.de/docs/agreements/cat.pdf> (last visited Apr. 11, 2018) (§ 2.2).

350. *.eus Registration Policy*, .EUS, https://www.domeinuak.eus/wp-content/uploads/2015/09/puntuEUS_GeneralRegistrationPolicy_en_en_2015-09.pdf (last visited Apr. 11, 2018) (§ 2.1(a)).

351. *.gal Registration Policy*, DOMINIO, http://dominio.gal/wp-content/uploads/sites/2/2016/02/gal_Registration_Policy_20150917.pdf (last visited Apr. 11, 2018) (§ 2.1(a)).

A number of new gTLDs with a territorial meaning have territory-based registration eligibility restrictions; in addition to the gTLDs mentioned above, for example, .madrid,³⁵² .melbourne,³⁵³ .nyc,³⁵⁴ .osaka,³⁵⁵ .paris,³⁵⁶ .quebec,³⁵⁷ .rio,³⁵⁸ .swiss,³⁵⁹ .sydney,³⁶⁰ .tirol,³⁶¹ .wien,³⁶² and .zuerich³⁶³ all have such restrictions.³⁶⁴ But there are also other new gTLDs that have opted not to impose territorial restrictions on registration eligibility: the .koeln,³⁶⁵

352. *.madrid Registry Agreement*, ICANN, <https://www.icann.org/sites/default/files/tlds/madrid/madrid-agmt-pdf-01may14-en.pdf> (last visited Apr. 11, 2018) (Specification 12).

353. *Registration Policy*, WWW.MELBOURNE (July 8, 2015), 10–11, <https://nic.melbourne/wp-content/uploads/2015/10/7-Registration-Policy.pdf> (last visited Apr. 11, 2018).

354. *.nyc Nexus Policy*, OWNIT, http://www.ownit.nyc/policies/nyc_nexus_policy.php (last visited Apr. 11, 2018).

355. *.osaka Registry Agreement*, ICANN, 91, <https://www.icann.org/sites/default/files/tlds/osaka/osaka-agmt-pdf-04sep14-en.pdf> (last visited Apr. 11, 2018).

356. *.paris Registration Agreement*, ICANN, 62, <https://www.icann.org/sites/default/files/tlds/paris/paris-agmt-pdf-30jan14-en.pdf> (last visited Apr. 11, 2018).

357. *General Registration Policies*, .QUEBEC, 2–3, http://registre.quebec/wp-content/uploads/2014/09/dotQUEBEC_General_Registration_Policies_WEB1.pdf (last visited Apr. 11, 2018).

358. *.rio Registration Policies*, NIC.RIO (Dec. 16, 2016), <http://nic.rio/english/policies/> (§ 1).

359. *.swiss Registration Policy*, DOT.SWISS, (Aug. 1, 2015), <https://www.nic.swiss/dam/nic/en/dokumente/swiss-Policy-Registration-Policy-edition1-d.pdf.download.pdf/swiss-Policy-Registration-Policy-edition1-e.pdf> (§ 3.2).

360. *.sydney Registration Policy*, www.sydney (July 9, 2015), <https://nic.sydney/wp-content/uploads/2014/07/7-Registration-Policy.pdf> (§ 4.1).

361. *General Guidelines for Setting Up and Function of the .tirol Top-Level Domain*, .TIROL, http://www.nic.tirol/media/3603/general-guidelines_v1_-tirol.pdf (last visited Apr. 11, 2018) (§ 3.3).

362. *General Guidelines for Setting Up and Function of the .WIEN Top-Level Domain*, .WIEN, https://www.nic.wien/wien/policies/en/20160413_general-guidelines_v5.pdf (last visited Apr. 11, 2018) (§ 3.3).

363. *Domain Name Registration and Use Policy For <.Zuerich>*, DEP'T FOR ECON. AFFAIRS, <http://www.dotzuerich.ch/assets/pdf/zuerich-Domain-Name-Registration-and-Use-Policy.pdf> (last visited Apr. 11, 2018) (§ 2).

364. See *supra* notes 352–63 and accompanying text.

365. *Eligibility Policy for the TLD .koeln*, DOTKOELN, https://dot.koeln/dns_koeln/static/uploads/Eligibility_Policy_koeln.pdf (last visited Apr. 11, 2018).

.nagoya,³⁶⁶ .okinawa,³⁶⁷ .tokyo,³⁶⁸ .vegas,³⁶⁹ and .yokohama³⁷⁰ domains have no territory-based restrictions.³⁷¹

In addition to recent examples of the territory-based restrictions of the new gTLDs for domain name registration, other recent developments also evidence a heightened sensitivity to the delegation of domains and the registration of domain names with territorial or geographical meanings.³⁷² This heightened sensitivity translates into the rules for registering domain names on some ccTLDs and some new gTLDs—both ccTLDs and new gTLDs with and without territorial meaning.³⁷³ Since 2012, registries have had to reserve country and certain territory names; even non-territorial TLDs must comply with this requirement.³⁷⁴ For example, the .travel registry agreed not to make country names available for registration as second-level domain names.³⁷⁵ Some TLDs have reserved territorial domain names for registration by particular registrants, such as local authorities and communal associations,³⁷⁶ or have allowed these registrations only with the consent of

366. .nagoya Domain Name Registration Policies, GMO (June 10, 2014), https://www.gmoregistry.com/en/geotlds/PDF/Nagoya_Domain_Name_Registration_Policies.pdf (§ 3.1).

367. .okinawa Domain Name Registration Policies, .OKINAWA (June 6, 2014), http://www.eigyo.co.jp/en/images/Okinawa_Domain_Name_Registration_Policies.pdf (§ 3.1).

368. .tokyo Domain Name Registration Policies, GMO (June 10, 2014), https://www.gmoregistry.com/en/geotlds/PDF/Tokyo_Domain_Name_Registration_Policies.pdf (last visited Apr. 11, 2018) (§ 3.1).

369. .vegas Policies, .VEGAS, <http://www.nic.vegas/policies/> (last visited Apr. 11, 2018) (§ 2.1).

370. .yokohama Domain Name Registration Policies, GMO (June 10, 2014), https://www.gmoregistry.com/en/geotlds/PDF/Yokohama_Domain_Name_Registration_Policies.pdf (§ 3.1).

371. See, e.g., .bayern Domain Name Registration Policy, .BAYERN, <http://nic.bayern/assets/policies/ENG/Domain-Name-Registration-Policy-english.pdf> (last visited Apr. 11, 2018) (§ 3(b)).

372. For a critique of the differences in ICANN's approaches to the protection of geographical terms at the top level and lower levels of the DNS see Forrest, *supra* note 125, at 14.

373. See *infra* notes 374–80 and accompanying text.

374. Registry Agreement, ICANN, <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf> (last visited Apr. 11, 2018) (Specification 5, § 4). On the controversy surrounding ICANN's preferential treatment of countries' government interests see Forrest, *supra* note 125, at 7–8. On the reserved geographical and geopolitical names in the .eu domain see Torsten Bettinger, *The European Top-Level Domain '.eu'*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 131, 135–36 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015).

375. .travel Registry Policies, TRALLIANCE REGISTRY MGMT. COMPANY (Dec. 2016), <http://www.travel.travel/PDFs/Sept142010TravelPolicies-Final.pdf> (§ 2.2.2).

376. E.g., .bayern Domain Name Registration Policy, *supra* note 371, at § 7; .cy Domain Name Registration Agreement, .CY TLD REGISTRY, <http://www.nic.cy/rulesreg.htm> (last visited Apr. 11, 2018) (§ 5.7).

local authorities.³⁷⁷ Some registries have precluded entirely the registration of certain geographic names; for example, the Rules and Policies for the .eg domain exclude from registration all country and city names,³⁷⁸ the .pt registry does not allow registrations of certain geographical names,³⁷⁹ and the registry of the domain .bio reserves domain names that are EU-protected geographical indications.³⁸⁰

ICANN's sensitivity to geographical names has resulted from countries, within the forum of ICANN's Governmental Advisory Committee, voicing their interest in protecting geographical names.³⁸¹ However, countries are not united on all protections for geographical names; one example is the long-running dispute between the United States and the European Union over the protection of geographical indications, and particularly over geographical indications for wines, which has caused further disagreements over sufficient levels of protection for geographical indications in new gTLDs, particularly in the .wine and .vin domains.³⁸²

B. Territorialization in Dispute Resolution

The analysis of territorialization should not end with registration eligibility requirements or protection for geographical names in the delegation

377. *General Terms & Conditions for the Registration of .gd Domain Names*, NICGD (Aug. 15, 2013), <http://www.nic.gd/terms.php> (§ 3.6).

378. .eg Rules, *supra* note 309, at ¶ 5.

379. *.pt Domain Name Registration Rules*, DNS.PT (June 16, 2014), https://www.dns.pt/fo-tos/gca/registration_rules_pt_156272736854d0fe49312ab.pdf.

380. *.bio Domain Name Policy*, .BIO, <http://docplayer.net/2367067-Bio-domain-name-policy-v2-0-last-update-may-30-2014-starting-dot-ltd-bio-domain-name-policy-v1-0-as-of-30-may-2014-1.html> (last updated May 30, 2014) (§ 5).

381. *GAC Geo-names WG—Working Papers*, GAC SECRETARIAT, 2–4 (Aug. 29, 2014), <https://gacweb.icann.org/display/gacweb/GAC+Working+Group+to+Examine+the+Protection+of+Geographic+Names+in+any+Future+Expansion+of+gTLDs?preview=/39944662/41944013/GAC%20Geo-names%20WG%20-%20Working%20Papers%20.pdf>; see also A. Michael Froomkin, *When We Say US™, We Mean It!*, 41 HOUS. L. REV. 839, 862–65 (2004). On countries' earlier interest in national "branding" in the context of the DNS see *id.* at 841–42.

382. See Scott Gerien & Christopher Passarelli, *Challenges for Geographical Indications (GIs) in the Context of the ICANN New Generic Top-Level Domains*, ORG. INT'L GEOGRAPHICAL INDICATIONS NETWORK 38 (2016), http://www.origin-gi.com/images/stories/PDFs/English/oriGIN_Publications_2010/GI_gTLDs_JAN2016_WEB_VERSION.pdf ("Within the GAC, there is ongoing disagreement between the U.S. and Australian governments on the one hand, and the EU as well as 36 other countries on the other hand, over whether there is sufficient protection for GIs in the new gTLDs, and in .wine and .vin in particular.").

and registration processes.³⁸³ Domain name dispute resolution is another avenue through which preference may be given to registrants who have built territorial ties with a territory that is associated with a TLD.³⁸⁴ A preference may be given through either a domain name registration agreement or a domain dispute resolution policy.³⁸⁵ This route to territorialization of a TLD might be preferable if registries do not want to, or must not, discriminate against some applicants in the domain name registration process based on applicants' nationality.³⁸⁶ It is also a route that can eliminate clashes between rights to identical alphanumerical designations that exist under the laws of different countries.³⁸⁷

To strengthen the connection between a domain and a particular territory, some domain name registration agreements and/or dispute resolution policies include a provision that identifies the country whose law will be applicable to domain name disputes.³⁸⁸ While the UDRP is silent on the choice of

383. See *infra* notes 384–87 and accompanying text.

384. See UDRP, *supra* note 86; *infra* note 385 and accompanying text.

385. See Patrick Kelly, *Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute-Resolution*, 17 BERKELEY TECH. L.J. 181, 198 (2002); UDRP, *supra* note 86; *infra* notes 386–411 and accompanying text.

386. See *Yearbook 2003/I*, INT'L ASS'N FOR THE PROTECTION OF INTELL. PROP., AIPPI, 396 (Oct. 2003), <http://aippi.org/wp-content/uploads/2015/08/Binder13.pdf> (“The ccTLD registration systems should not discriminate among domain name registrants based on their nationality.”).

387. See *infra* note 388 and accompanying text (providing several examples of registration agreements and dispute resolution policy agreements that include choice-of-law provisions).

388. See DENIC Domain Terms and Conditions, DENIC, <https://www.denic.de/en/domain-terms-and-conditions/> (last visited Apr. 11, 2018) (§ 9(2)); *Terms and Conditions for the Right of Use to a .dk Domain Name*, DK-HOSTMASTER (Dec. 19, 2017), <https://www.dk-hostmaster.dk/en/terms> (§ 14); *.eu Domain Name Registration Terms and Conditions*, EURID.EU, https://eurid.eu/media/filer_public/e9/ab/e9ab41de-16c1-41fa-b3aa-d81b6b0481df/terms_and_conditions_en.pdf (last visited Apr. 11, 2018) (§ 14); *Dispute Resolution Policy for Internet Domain Names (.ir)*, IPM, https://www.nic.ir/Dispute_Resolution_Policy_ir (last visited Apr. 11, 2018) (¶ 1); *Normas para el Centro Cubano de Información de Red* [Rules for the Cuban Network Information Center], NIC.CU, http://www.nic.cu/docum_det.php?doc_id=1&opt=1 (last visited Apr. 11, 2018) (art. 11.1); *Registration Rules: Rules for the Allocation of Domain Names Under the Israel Country Code Top Level Domain (“.IL”)*, ISRAEL INTERNET ASSOCIATION, http://www.isoc.org.il/files/docs/ISOC-IL_Registration_Rules_v1.6_ENGLISH_-18.12.2017.pdf (last updated Dec. 2017) (§ 30); *Regulamento do Sistema Administrativo de Conflitos de Internet Relativos a Nomes de Domínios sob “.br” – Denominado SACI-Adm* [Regulation of the Administrative System of Internet Conflicts Relating to Domain Names Under “.br”], REGISTRO.BR (Sept. 30, 2010), <https://registro.br/dominio/saci-adm-regulamento.html> (art. 16) [hereinafter *.br Regulamento*].

Not all choice-of-law provisions in domain name registration agreements dictate the law to be applied in disputes between a domain name registrant (a respondent) and a complainant. See, e.g., *Terms and Conditions*, NIC.TM, <http://www.nic.tm/terms.html> (last visited Apr. 11, 2018) (¶ 22). Some

applicable law,³⁸⁹ some other dispute resolution policies do include choice-of-law provisions.³⁹⁰ These other dispute resolution policies exist for some domains whose registries did not adopt the UDRP but rather created specially-tailored dispute resolution policies to reflect their own interests or the interests of the territory with which the domains are linked.³⁹¹ The choice of the law of the territory as the law applicable to domain name disputes is strong evidence of the interests.³⁹²

Applying the law of a particular country gives respect to the rights that protect alphanumerical designations that are registered, granted, or recognized by that particular country.³⁹³ Respect can also be achieved when a dispute resolution policy provides for a preference for rights to alphanumeric designations that are registered, granted, or recognized by a particular country.³⁹⁴ For example, the .ie dispute resolution policy provides protection for owners of “protected identifiers,” which are defined as trademarks that are protected in Ireland, geographical indications that are *prima facie* protected in Ireland, or personal names with a reputation in Ireland.³⁹⁵ An owner of a protected identifier may challenge a domain name that is identical or misleadingly similar to the protected identifier.³⁹⁶

choice-of-law provisions in registration agreements concern only the process of registration and potential disputes between an applicant (or registrant) and the registrar. *See, e.g., id.*; *DeJohn v. The TV Corp. Int'l.*, 245 F. Supp. 2d 913, 917–18 (N.D. Ill. 2003).

389. *See supra* Parts III and IV.

390. *See supra* note 388 and accompanying text.

391. *See supra* note 388 and accompanying text; *infra* note 392 and accompanying text; *see also, e.g.,* David A Simon, *An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute-Resolution Policy*, 53 B.C. L. REV. 65, 68–69 (2012).

392. *See Registration Agreement*, NIC AG, <http://www.nic.ag/agreement.htm> (last visited Apr. 11, 2018) (selecting the laws of the United States, California, and New York for a ccTLD associated with the island nation of Antigua and Barbuda) (§ 22). Although the applicable law that is selected need not be the law of the country or other jurisdiction with which the TLD is associated, typically it will be the country's law. *Id.*; *see also Domain Name Registration Terms and Conditions*, *supra* note 388 and accompanying text.

393. *See* Simon, *supra* note 391, at 99–106.

394. *See* Commission Regulation 874/2004 of 28 April 2004, Laying Down Public Policy Rules Concerning the Implementation and Functions of the .eu Top Level Domain and the Principles Governing Registration, 2004 O.J. (L 162) 40, 47 (art. 21(1)); *br Regulamento*, *supra* note 388, at art. 3(a); *Terms and Conditions of Registration Applicable for the Top-Level Domain .sei*, IIS.SE (May 27, 2015), https://www.iis.se/docs/Registreringsvillkor_eng.pdf (¶ 7.2).

395. *Dispute Resolution Policy*, IE DOMAIN REGISTRY, <https://www.iedr.ie/dispute-resolution/> (last visited Apr. 11, 2018) (¶ 1.3).

396. *See id.* at § 1.1.1; *see also, e.g., Regulation on the Alternative Dispute Resolution Procedure of the .ma Domain*, ORGANISATION MONDIALE DE LA PROPRIÉTÉ INTELLECTUELLE (June 10, 2015),

Even when a dispute resolution policy does not state a preference for a particular country's trademarks, interpretation of the policy by a dispute resolution panel may result in the preferential treatment of the trademarks of a particular country.³⁹⁷ For example, the .au Dispute Resolution Policy does not specify what trademark law should apply to assess the existence and validity of a complainant's trademark or service mark.³⁹⁸ For registered marks, decisions by panels initially varied, but eventually a consensus was reached that not only trademarks registered in Australia, but also "a trademark registered outside of Australia satisfies the requirements of the Policy."³⁹⁹ Panels have also held, however, that if a complainant bases its complaint on an unregistered trademark, the complainant "must establish that it has unregistered trademark rights in Australia," and mere "evidence that [the complainant] has unregistered trademark rights outside of Australia is insufficient."⁴⁰⁰

A preference for a country's territorial rights, such as the rights to a trademark, means that in a dispute over a domain name between two parties, where only one party owns a trademark in the preferred country that is identical or confusingly similar to the domain name, such party will prevail in the dispute if it is the law of the territory that governs the dispute.⁴⁰¹ If, for example, in the *epiphoneamps.com* case, the governing law in the domain name dispute had been U.S. law, the complainant Gibson, who owned the U.S. trademark, would have prevailed over the Chinese respondent who owned the

<http://www.wipo.int/amc/fr/domains/rules/cctld/ma/newrules.html> (§ 2(a)(i)); *Instrucción del Director General de la Entidad Pública Empresarial Red.es por la que se Establece el Reglamento del Procedimiento de Resolución Extrajudicial de Conflictos para Nombres de Dominio Bajo el Código de País Correspondiente a España ("ES")*, art. 2, <http://www.dominios.es/dominios/sites/dominios/files/1197031617037.pdf> (last visited Apr. 11, 2018) (art. 2).

397. See generally Masaaki Kotabe, *Evolving Intellectual Property Protection in the World: Promises and Limitations*, 1 U. PUERTO RICO BUS. L.J. 1, 16 (2010) ("[S]ome of the illustrations indicated all countries are inherently interested in protecting or giving preferential treatment (both consciously or unconsciously) to their domestic firms although various international agreements are supposed to treat all intellectual property equally regardless of the source of its origin.").

398. *.au Dispute Resolution Policy (auDRP)*, .AUDA (Apr. 15, 2016), <https://www.auda.org.au/policies/index-of-published-policies/2016/2016-01/> (§ 4(a)).

399. Andrew F. Christie, *auDA Overview of Panel Views on Selected auDRP Questions First Edition ("auDA auDRP Overview 1.0")*, .AUDA (July 2014), <https://www.auda.org.au/policies/audrp/audrp-overview/#1.1A> (§ 1.1A).

400. *Id.* at § 1.1B. For a critical commentary on this interpretation of .auDRP see Alpina Roy & Althaf Marsoof, *A Critical and Comparative Review of auDRP and UDRP Domain Name Decision*, 19 (5-6) J. OF WORLD INTELL. PROP. 203, 205-06 (2016).

401. See *supra* note 397 and accompanying text.

trademark in China.⁴⁰² Under U.S. law, the panel would have given preference to the U.S.-registered trademark over the Chinese-registered trademark.⁴⁰³

Some domain name dispute resolution policies protect not only trademarks but also other alphanumerical designations registered, granted, or protected in a given country, such as geographical indications.⁴⁰⁴ In the champagne.ie case,⁴⁰⁵ a WIPO panel recognized “Champagne” as a “Protected Identifier” that enjoys protection under the .ie Dispute Resolution Policy,⁴⁰⁶ and the complainant (the French trade association of Champagne producers) prevailed in the case over the respondent (a Champagne distributor located in Ireland that imported Champagne into Ireland).⁴⁰⁷ A few years later, the same complainant lost a case over the domain champagne.co because a WIPO panel in that case concluded that under the UDRP, which governed the case, “geographical indications, as such, remain outside the scope of the [UDRP].”⁴⁰⁸

Determining the country whose law will apply in a domain name dispute and/or designating the country whose rights will be preferred in a domain name dispute are powerful tools of DNS territorialization.⁴⁰⁹ The tools can mitigate clashes between owners of rights to alphanumerical designations, such as registered trademarks, and owners of domain names—but only if a court that might hear the case after a panel’s decision would respect the choice-of-law provision and/or the preference given by the panel to a

402. See *supra* notes 100–05 (discussing the epiphoneamps.com case).

403. See *supra* note 397–401 and accompanying text.

404. See, e.g., *Terms and Conditions of Registration Applicable for the Top-Level Domain .sei*, *supra* note 394, at § 3.2.1.; see also *Pravidla Registrace Doménových Jmen v ccTLD .cz*, <https://www.nic.cz/files/nic/PravidlaCZod20160515.pdf> (last visited Apr. 11, 2018) (§ 2.3).

405. Comité Interprofessionnel du Vin de Champagne (CIVC) v. Doyle, WIPO, Case No. DIE2007-0005 (Feb. 5, 2008), <http://www.wipo.int/amc/en/domains/decisions/html/2007/die2007-0005.html>.

406. *Id.* According to the panel in the case, “the Complainant has made out a *prima facie* case that the word ‘champagne’ is protectable under the Irish law of passing off,” and therefore “the Complainant has succeeded in establishing that the designation of origin CHAMPAGNE is a Protected Identifier for the purposes of the IEDR Policy.” *Id.*

407. *Id.*

408. Comité Interprofessionnel du vin de Champagne v. Vickers, WIPO, Case No. DCO2011-0026 (June 21, 2011), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=DCO2011-0026>. The complainant was unsuccessful in claiming its rights to the term as an unregistered trademark; the Panel was “not satisfied that the Complainant has shown that its rights in the expression ‘Champagne’ constitute an unregistered trademark right of the kind that would satisfy paragraph 4(a)(i) of the [UDRP].” *Id.*

409. See *supra* notes 384–94 and accompanying text.

particular country's rights.⁴¹⁰ A choice-of-venue provision for subsequent court proceedings may be employed to control for this variable.⁴¹¹

VI. DOMAIN NAMES, TERRITORIALIZATION, AND USER CONFIDENCE

Parts IV and V demonstrated that a trend toward territorialization exists in the DNS.⁴¹² Notwithstanding the fact that the DNS is perceived as a hallmark of the detachment of internet regulation from the influence of the territorially-partitioned governance of the physical world, from the early days of the internet it was apparent that the DNS could not be completely detached from national law and thus from physical geography.⁴¹³ Even when UDRP proceedings began to generate sufficient case law to supplement the substantive provisions of the UDRP and guide future UDRP panels, national law has continued to play a role in UDRP decisions—at a minimum, national law is the law that determines whether a trademark exists.⁴¹⁴ U.S. law has assisted in shaping UDRP case law and continues to influence UDRP law to

410. See *supra* notes 387–94 and accompanying text.

411. E.g., *Rules for the Cuban Network Information Center*, *supra* note 388, at § 11.1; *Terms and Conditions for the Right of Use to a .dk Domain Name*, *supra* note 388, at § 14; *eu Domain Name Registration Terms and Conditions*, *supra* note 388, at § 14; *Dispute Resolution Policy for Internet Domain Names (.ir)*, *supra* note 388, at § 4(k); *Registration Rules: Rules for the Allocation of Domain Names Under the Israel Country Code Top Level Domain*, *supra* note 388, at § 30; *Registration Regulation of Country Code Top-Level Domains (ccTLD)*, *State of Kuwait*, CITRA (Dec. 21, 2016), http://www.kw/media/policy_files/Registration-Regulation-EN_vOIVPNs.pdf (§ 18); *usTLD Dispute Resolution Policy*, .US (June 1, 2014), <http://www.about.us/policies/ustld-dispute-resolution-policy> (§ 1).

Another way that territorialization might be reinforced is through other requirements that dictate that domain name uses must comply with national laws. For example, an .af “[d]omain name registration is strictly prohibited by . . . [a]ny other activity which is illegal under Afghan law.” *Domain Policy*, INFO. SYS. SECURITY DIRECTORATE: ISLAMIC REPUBLIC OF AFG., <http://nic.af/en/page/what-we-do/afgnic/domain-policy> (last visited Apr. 11, 2018) (§ 11). Under Fiji’s domain rules, “[n]o domain name may be used, directly or indirectly, for any purpose that is against the statutory laws of the Republic of Fiji Islands, or that is against the accepted norms of the Internet community.” *Registration Agreement: FJ Domain Name Registration Service Agreement*, U. OF SOUTH PACIFIC (Aug. 8, 2002), <http://domains.fj/public/regagreement.php> (§ 2). Under .ir registration rules, anyone may register a domain name as long as their “activity and the use of the domain name are not in conflict with the laws, practices and interests of the Islamic Republic of Iran.” *Terms and Conditions (.ir)*, *Appendix 1: Domain Rules*, IPM, https://www.nic.ir/Terms_and_Conditions_ir_Appendix_1_Domain_Rules (last visited Apr. 11, 2018) (§ A.4).

412. See *supra* Parts IV and V.

413. See *supra* Part IV.

414. See *supra* Section IV.B.

some extent.⁴¹⁵

Even stronger signs of territorialization are apparent in ccTLDs and new gTLDs that have a territorial link.⁴¹⁶ First, the registration requirements and delegation rules for some domains are territorially defined, and the requirements and rules include territorial restrictions.⁴¹⁷ Second, territorial preferences appear in dispute resolution policies for some ccTLDs and some new gTLDs, which policies give preference to rights that exist under particular national laws.⁴¹⁸ The preference is expressed either by referring to the national rights in the dispute resolution policies or by setting a particular national law as the law applicable in disputes under the policies.⁴¹⁹

The territorialization trend appears to be growing as ICANN has become more receptive to government requests that the DNS give voice to governments and reserve geographical terms for use by special entities, such as local administrative agencies.⁴²⁰ The increasing influence of governments on the design of the DNS has been criticized;⁴²¹ the critics argue that there were early domain cases that showed that administrative agencies are not always the “rightful” owners of domain names with a geographic meaning if other persons or entities had already established goodwill under the

415. See *supra* Section IV.C.

416. See NORWEGIAN MINISTRY OF TRANSP. AND COMMUN., *supra* note 326, at 20 (finding a “growing international trend of authorities’ identifying a need for national regulation and governmental influence in relation to the use of the country’s ccTLD resources”).

417. See *supra* Section V.A.

418. See *supra* Section V.B.

419. See *supra* Section V.B.

420. E.g., *Principles and Guidelines for the Delegation and Administration of Country Code Top-Level Domains*, ICANN (Apr. 5, 2005), <https://archive.icann.org/en/committees/gac/gac-ccTLD-principles.htm> (“ccTLD policy should be set locally, unless it can be shown that the issue has global impact and needs to be resolved in an international framework. Most of the ccTLD policy issues are local in nature and should therefore be addressed by the local Internet community, according to national law.”); *GAC Principles Regarding New gTLDs*, ICANN (Mar. 28, 2007), <https://archive.icann.org/en/topics/new-gTLDs/gac-principles-regarding-new-gTLDs-28mar07-en.pdf> (“The new gTLDs should respect . . . [t]he sensitivities regarding terms with national, cultural, geographic and religious significance.”); *Tunis Agenda for the Information Society*, WORLD SUMMIT ON THE INFO. SOC’Y (Nov. 18, 2005), <http://www.itu.int/net/wsis/docs2/tunis/off/6rev1.html> (“Countries should not be involved in decisions regarding another country’s country-code Top-Level Domain”); *Protection of Country Names Against Registration and Use as Trademarks: Practices, Approaches and Possible Areas of Convergence*, WIPO (Feb. 10, 2017), http://www.wipo.int/edocs/mdocs/sct/en/sct_37/sct_37_3.pdf (illustrating similar exhibitions of interest by national governments in protecting their country names).

421. See Post, *supra* note 270, at 8–10.

geographic names.⁴²² Another criticism is that by giving a voice to national governments, the DNS will inevitably become another forum for the various territorial disputes that governments fight in the physical world.⁴²³

Territorialization might be pushing the DNS toward a stronger association between (a) territorially-linked domains and domain names, and (b) actual physical geography.⁴²⁴ Market forces within the DNS might militate against territorial limitations,⁴²⁵ and it is questionable whether territorialization can turn back the clock on user perception of domain names.⁴²⁶ Judge Kozinski in a 2010 decision referred to a “sensible agnosticism”⁴²⁷ with which users approach domain names: “[C]onsumers don’t form any firm expectations about the sponsorship of a website until they’ve seen the landing page—if then.”⁴²⁸ Kozinski’s statement applies to domain names that include trademarked words and also to domains and domain names that include geographic terms (e.g., .paris) or otherwise refer to physical geography (e.g., .fr).⁴²⁹

It is pointless to debate today whether the DNS might have benefited from taking a different approach to territoriality from its beginning; for example, the territorial limitations of nationally-registered trademarks might have been replicated in the DNS by allowing ccTLDs to register, only to the owner(s) of a trademark in one ccTLD country, the domain names that correspond to that nationally-registered trademark in that country. User belief that territorially-linked domains and domain names refer to actual physical geography (a belief

422. Forrest, *supra* note 125, at 14 (“[B]y reserving country and territory names and by imposing a consent requirement on other geographic names, ICANN inherently validates governments’ claims to geographic names.”).

423. See Postel, *supra* note 1, at 5 (“The IANA is not in the business of deciding what is and what is not a country.”).

424. See *infra* notes 425–29.

425. See 2006 OECD REPORT, *supra* note 107, at 5 (noting the “pros and cons to liberalising requirements for registering a domain name”). The Report noted the possible higher costs of administering restricted domain systems, but also the possible positive effects of such systems in “curbing cyber-squatting, online fraud and intellectual property violations.” *Id.* The Report also mentioned the value of the systems in “provid[ing] assurance to consumers and companies that they are dealing with legitimate locally-based entities.” *Id.*

426. See Froomkin, *supra* note 381, at 843–44.

427. Toyota Motor Sales, U.S., Inc. v. Tabari, 610 F.3d 1171, 1179 (9th Cir. 2010).

428. *Id.*

429. *Id.* Judge Kozinski opined that users’ expectations might be different in cases of domain names of the “trademark.com” type. *Id.*; see also ICANN Global Consumer Research Wave 2, ICANN, 31 (June 2016), <https://www.icann.org/news/announcement-2-2016-06-23-en> (follow “published” hyperlink).

in territorial fidelity in the DNS) might have increased the value of territorially-linked domains.⁴³⁰ But if any such belief ever existed, it is now gone; despite the territorialization of the DNS, users are unlikely to have and/or gain confidence in a territorial fidelity in the DNS, given the patchwork of domains and domain names that have, or do not have, geographical restrictions and/or preferences.

The prevalent use of search engines by users to navigate the internet will likely prevent an increased user confidence in territorial fidelity of the DNS. Although domains and domain names might play a role in search engine algorithms,⁴³¹ users do not tend to remember domain names but rather a combination of search terms that lead to the desired search results through the use of a search engine. Some advertisers do use domain names to attract user traffic to specific websites,⁴³² and an empirical study would be required to determine whether advertisements increase direct website traffic or whether users reach websites through the use of a search engine even after viewing an advertisement that includes a domain name.

User confidence in territorial fidelity of the DNS might be irreparably lost as far as the perfect identity approach⁴³³ is concerned—users probably do not expect that a domain name on a domain that a priori appears to be territorially linked, such as .vegas, actually has any connection to a place called Vegas. But to the extent that domain names might still be important for advertising, direct traffic, and search engine results, it might be possible to foster increased user confidence based on a cyberspace extension of physical place.⁴³⁴ For example, the registry of .vegas apparently invested significant effort in building the new domain as a space with a solid reputation—a “good address” to move to.⁴³⁵ Like any new physical neighborhood, the cyberspace extension

430. See, e.g., VERISIGN, BENEFITS AND BARRIERS OF BRINGING A SMALL BUSINESS ONLINE: PERSPECTIVES FROM GLOBAL SMALL BUSINESSES 4 (2013), <https://www.dnjournal.com/Research-small-business-september2013.pdf>.

431. On the uncertainty about the actual weight given to domains and domain names in search engine algorithms see *supra* Part II.

432. See TEACH VEGAS, <http://teachvegas.ccsd.net/> (last visited Apr. 11, 2018). (For example, the Clark County School District has been using “teach.vegas” heavily in its campaign to attract teachers to Las Vegas, NV.).

433. For information on the “perfect identity” approach see *supra* Part II.

434. For information on the “extension of the physical space” approach see *supra* Part II.

435. Daniel Rothberg, *Marketing Campaign Aims to Boost Lagging Dot Vegas Registration*, LAS VEGAS SUN (July 20, 2015), <https://lasvegassun.com/news/2015/jul/20/dot-vegas-15000-websites-use-domain-local/>.

of the City of Las Vegas can gain character, attracting “neighbors” who “move in” to associate with the lifestyle or other aspects connoted by the neighborhood. The domain becomes an extension of the physical place and may become a brand of its own.⁴³⁶

One important characteristic of a “good address” in the physical world is that the address be reliable; the address should identify a single place, and always the same place, and everyone, including the mailman, should be able to locate the place. In the DNS, the reliability of domain names as addresses that identify locations on the internet and their authenticity is the most important aspect of user confidence. The security of the DNS is therefore paramount to the future of the internet and is of significant concern to technical experts because of attacks on the DNS, such as internet protocol sniffing and spoofing, denial of service (DoS), DNS amplification, cache poisoning, and registrar hijacking.⁴³⁷ On the list of priorities, the authenticity of origin must be placed higher today than the territorial fidelity of the DNS.

VII. CONCLUSIONS

Territorialization of the internet has been both glorified and vilified.⁴³⁸ The majority of users appear to enjoy the convenience of localized advertising, localized content, and location-based services.⁴³⁹ But as geolocation, which enables the convenience, turns into geoblocking, the convenience becomes a straitjacket that creates online borders that prevent users from accessing some internet content from the users’ location.⁴⁴⁰ The increased use of circumvention of geoblocking suggests that users are displeased with these new territorial limits.⁴⁴¹ While geoblocking allows content providers to comply with their territorially-defined rights and obligations, it undermines the global nature of the internet.⁴⁴²

Just as the territorialization of the internet in general has positive and

436. Higgs, *supra* note 99, at § 4.3.1 (“Although there is no trademark status attached to a domain name when it is issued, through its use, a domain name can acquire secondary meaning in the eyes of the internet consumer.”).

437. See C. AISHWARYA, M. S. SANNIDHAN & BALAJI RAJENDRAN, DNS SECURITY: NEED AND ROLE IN THE CONTEXT OF CLOUD COMPUTING 230–31 (2014).

438. See *supra* Part V; see also, e.g., Radin & Wagner, *supra* note 111, at 1296–98.

439. See *supra* Part II.

440. See *supra* notes 14–15, 53 and accompanying text.

441. See Trimble, *supra* note 14, at 45.

442. See Trimble, *supra* note 14, at 51.

negative aspects, so has the territorialization of the DNS.⁴⁴³ If users' expectations can still be influenced by their experiences on the internet, it might still be possible for ccTLDs and new territorially-linked gTLDs that have territorial restrictions on registration and preferences for national rights in dispute resolution to gain reputations for territorial fidelity. If, together with territorial fidelity, these TLDs can safeguard authenticity of origin, the combination could foster user reliance on the TLDs and cause users to value domain names on these TLDs more highly than domain names on other TLDs.⁴⁴⁴ Although the perfect identity approach might create registration eligibility requirements that would be too restrictive, an extension of the physical space approach might bring positive results if the extension is skillfully designed and managed, meaning that a domain is cultivated as a brand that users can identify as a cyberspace extension of a known physical space.⁴⁴⁵

Critics see negative aspects of DNS territorialization in the increased influence of governments on the internet.⁴⁴⁶ Territorialization gives governments greater opportunities to influence decisions on who may register a domain name in a given domain and what rights will receive preferential treatment.⁴⁴⁷ Government power over domains may assist governments in enforcing rights and decisions on the internet to some extent because governments might penalize non-compliance with takedowns of domain names.⁴⁴⁸

That a government's purview now includes the internet no longer seems to be in question.⁴⁴⁹ What is important to recognize is at what point a government's influence becomes illegitimate, and what course of action is an appropriate remedy in cases where the influence does become illegitimate.⁴⁵⁰ There is a strong argument contending that democratically elected governments in jurisdictions operating under the rule of law are the only legitimate representatives of their citizens, and thus are the only legitimate bodies that may govern. If a government's influence on the DNS were to

443. *See supra* Part V.

444. *See supra* Part VI.

445. *See supra* notes 43–57 and accompanying text; Part VI.

446. *See Post, supra* note 270, at 8–10.

447. *See supra* notes 420 and accompanying text; *see also supra* Part V.

448. *See, e.g., Trimble, supra* note 50; *supra* note 309 and accompanying text.

449. *See supra* Part I.

450. *See supra* Part VI.

cross the line of internationally-recognized norms, some action other than a de-territorialization of the DNS should be employed to remedy the situation.⁴⁵¹

Recent developments in the DNS have not yet been discussed in the context of the general trend toward territorialization on the internet.⁴⁵² The reason might be the understandable focus in the literature on the most-highly coveted gTLDs and the UDRP; in the gTLDs and the UDRP, any signs of territorialization are nonexistent and not readily apparent, respectively.⁴⁵³ The uncertain future of the DNS also could be contributing to the recent slowdown in interest in the DNS; the robust use of search engines calls into question the future utility of domain names.⁴⁵⁴ A number of factors make difficult any predictions of the future of domain names: the involvement of search engine companies in the domain name market, the design of search engine algorithms, and the possible overuse of paid keywords and adwords are just some of the factors.⁴⁵⁵ Keyword and adword overuse, together with other interventions affecting search results, could decrease the appeal of search engine provider services and even lead to an increase in direct website traffic if users tire of paid links and advertisements and other preferential search results when they use search engines to locate websites and content.⁴⁵⁶ As they are likely to control other aspects of the future of the internet, search engine providers might also control the future of the DNS.

451. *See supra* Part VI.

452. *See supra* Parts V–VI.

453. *See supra* Parts III–IV.

454. *See supra* notes 30–36 and accompanying text.

455. *See supra* notes 30–36; Parts III–VI.

456. *See supra* Part VI.