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Territorialization of the Internet Domain Name System

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D R A F T

Marketa Trimble, *Territorialization of the Internet Domain Name System*, 45 Pepp. L. Rev. ____ (forthcoming 2017)

TERRITORIALIZATION
OF THE INTERNET
DOMAIN NAME SYSTEM

*Marketa Trimble**

ABSTRACT

A 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 geoblocking 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 territorialization trend 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 the territorialization trend – a trend 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 the article shows that the territorialization trend is detectable in the DNS as well. The article contemplates what impact, if any, the trend will have on the future of the DNS – a future that 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.

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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. The Internet Corporation for Assigned Names and Numbers (“ICANN”)² has administered the DNS with special rules that were for the most part intended to operate independently of national governments and also in large part independently of national laws. The rules 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.³ However, the DNS and its rules have never been completely detached from physical geography and from the laws of the physical world. 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.

¹ The domain name system (“DNS”) provides for domain names (e.g., “icann.org”) that are linked to numerical internet protocol (“IP”) addresses (“192.0.32.7” for icann.org). 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 P. Mockapetris, *Domain Names – Implementation and Specification*, IETF, Network Working Group, RFC 1035, November 1987, available at <https://www.ietf.org/rfc/rfc1035.txt> (last visited Dec. 9, 2016); Jon Postel, *Domain Name System Structure and Delegation*, IETF Network Working Group, RFC 1591, March 1994, available at <https://tools.ietf.org/html/rfc1591> (last visited Jan. 5, 2017); P. Hoffman, A. Sullivan & K. Fujiwara, *DNS Terminology*, IETF, RFC 7719, December 2015, available at <https://tools.ietf.org/html/rfc7719#section-6> (last visited Dec. 9, 2016). See also, generally, What Does ICANN Do?, ICANN, available at <https://www.icann.org/resources/pages/what-2012-02-25-en> (last visited Nov. 22, 2016). On the beginning and the early history of DNS see, e.g., Peter K. Yu, *The Origins of ccTLD Policymaking*, 12 CARDOZO J. INT’L & COMP. L. 387, 390 ff. (2004).

² Since 1998, “ICANN has performed the IANA (Internet Assigned Numbers Authority) Functions on behalf of the global Internet community.” *Glossary, ICANN*, available at <https://www.icann.org/resources/pages/glossary-2014-02-03-en#i> (last visited Dec. 9, 2016).

³ John Perry Barlow, *Declaration of Cyberspace Independence*, ELEC. FRONTIER FOUND. (Davos, Switzerland 1996), available at <https://www.eff.org/cyberspace-independence> (last visited Dec. 10, 2016); David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

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Territorialization of the internet is a phenomenon that arises from linking the internet to physical geography. Territorialization of the internet seems to be growing;⁴ 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. Within this trend, localized advertising, localized content, and location-based services have become commonplace as an increasing volume of advertising, content, and services are delivered to users based on their physical location.⁵ 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. With the increasing precision and reliability of geolocation and geoblocking tools,⁶ 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.⁷

Territorialization of the internet seems antithetical to the original concept of the internet as a distributed network lacking a single point of control;⁸ the

⁴ E.g. Alexander Mayrhofer & Christian Spanring, *A Uniform Resource Identified for Geographic Locations ('geo' URI)*, Internet Engineering Task Force, RFC 5870, June 2010 (“An increasing number of Internet protocols and data formats are extended by specifications for adding spatial (geographic) location.” *Id.*, p. 4).

⁵ Scott Bridwell, *Location-Based Services (LBS)*, in *ENCYCLOPEDIA OF GEOGRAPHIC INFORMATION SCIENCE* (Karen K. Kemp ed., 2008), 268-270.

⁶ On geolocation and geoblocking *see, e.g.*, James A. Muir & Paul C. Van Oorschot, *Internet Geolocation: Evasion and Counterevasion*, *ACM COMPUTING SURVEYS*, Dec. 2009, at 4:1; Richard Barnes, James Winterbottom & Martin Dawson, *Internet Geolocation and Location-Based Services*, *IEEE COMMUNICATIONS MAGAZINE*, Apr. 2011, at 102; Marketa Trimble, *The Role of Geoblocking in the Internet Legal Landscape*, *IDP: REVISTE DE INTERNET, DERECHO Y POLÍTICA* (forthcoming 2017).

⁷ One sign of territorialization could be a July 2016 decision in which a panel of 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. *Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, *Microsoft v. United States*, 829 F.3d 197, 220 (2d Cir. 2016).

⁸ Paul Baran, *On Distributed Communications: I. Introduction to Distributed*

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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. 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. The DNS should be the flagship of this resistance to territorialization. However, links to physical geography were never completely foreign to the DNS; 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. The important question is what the territorialization trend, which appears to be irreversible, will mean for the DNS in the future.

This article begins in Part I 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. Part II discusses the geographical indifference⁹ – or the lack of geographical awareness – with which the DNS was originally designed. The geographical indifference led to clashes between global rights to domain names on the one hand and territorially-limited rights to other alphanumeric designations granted or recognized by national law and governments on the other hand.¹⁰ Nevertheless, the geographical indifference was never absolute, and Part III 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. Part IV seeks indications in recent

Communications Networks, RAND CORP. (Aug. 1964), http://www.rand.org/pubs/research_memoranda/2006/RM3420.pdf (last visited Dec. 10, 2016).

⁹ 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 both “geographical and product-related scope”).

¹⁰ On the instances of an early recognition of the problem see, e.g., Statement of Policy of the Management of Internet Names and Addresses, U.S. Department of Commerce, National Telecommunications and Information Administration, 1998, *available at* <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses> (last visited Dec. 12, 2016); The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the WIPO Internet Domain Name Process, WIPO, 1999, p. 3, *available at* <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf> (last visited Dec. 12, 2016) [hereinafter “1999 WIPO Final Report”], pp. 98-106.

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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. Part V 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.

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,¹¹ the importance of the DNS for the future of the internet may be debated. With more users relying on search engines to locate and access websites, domain names seem to be becoming less important, if not inconsequential. 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 (i.e., the percentage of direct traffic) is difficult to measure; the widespread use of bots¹² skews the statistics that measure direct traffic. 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. 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),¹³ perhaps it is reasonable to assume that domain names will maintain some value for some time.¹⁴

¹¹ The law “for” the internet is the law that governs the internet itself as a network; the DNS rules are laws for the internet. The law “on” the internet is the national law that applies to activities that occur on the internet.

¹² “Internet bots are software agents which perform automated tasks.” Eri Koike & Shinya Nishizaki, *Software Analysis of Internet Bots Using a Model Checker*, Information Science and Cloud Computing Companion (ISCC-C), 2013, p. 242, available at <http://ieeexplore.ieee.org/abstract/document/6973599/?reload=true> (last visited Jan. 25, 2017).

¹³ Google Registry, FAQs, available at <https://www.registry.google/about/faqs.html> (last visited Feb. 1, 2017).

¹⁴ It might be evidence of the undiminishing value of domain names that the numbers of disputes concerning domain names have not decreased but have remained relatively flat in recent years. However, it is important to view this flat development in light of the dramatically increasing numbers of domain name registrations. For example, the World Intellectual Property Organization (“WIPO” – one of the ICANN-approved dispute resolution service providers) registered 2,696 domain name cases filed in 2010, and 2,754

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I. THE INTERNET AND PHYSICAL GEOGRAPHY

There are three approaches to the relationship between the internet and physical geography. 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. This approach defeats traditional notions of geography by creating a space – cyberspace – that is disassociated from the physical world. 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.¹⁵ 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.¹⁶

The second approach to the relationship between the internet and physical 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. The Estonian e-residency project¹⁷ illustrates this approach: the project enables anyone to apply to become an online “resident” of Estonia without actually physically residing there.¹⁸ Cyberspace thus creates a cyber extension to

domain name cases filed in 2015. 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, and 2,732 .com domain names in 2015. Compare this flat development to the increase in the number of registered .com domain names, which grew from over 80 million in 2010 to over 120 million in 2015. Statistics drawn from *WIPO Domain Name Dispute Resolution Statistics*, WIPO, available at <http://www.wipo.int/amc/en/domains/statistics/> (last visited Dec. 19, 2016); *The Domain Name Industry Brief*, Verisign, Vol. 8, Issue 1, Feb. 2011, p. 2, available at <https://www.verisign.com/assets/domain-name-report-feb-2011.pdf> (last visited Dec. 19, 2016); *The Domain Name Industry Brief*, Verisign, Vol. 13, Issue 1, Apr. 2016, p. 2, available at <https://www.verisign.com/assets/domain-name-report-april2016.pdf> (last visited Dec. 19, 2016).

The flat (rather than increasing) development in the number of domain name cases might be the result of parties’ experiences in domain name disputes – experiences that could have positively impacted the behavior of domain name registrants.

¹⁵ ANDREW BLUM, TUBES: A JOURNEY TO THE CENTER OF THE INTERNET (2013).

¹⁶ Barlow, *supra* note 3.

¹⁷ Estonian E-Residency, available at <https://e-estonia.com/e-residents/about/> (last visited Aug. 7, 2016).

¹⁸ “The Republic of Estonia is the first country to offer [an] e-Residency – a transnational

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Estonian territory. Similarly, in the domain name space, the top-level domain .vegas¹⁹ enlarges in cyberspace the physical footprint of the City of Las Vegas, Nevada, 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.²⁰ 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.²¹

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. Location-based services that link activities to actual places are examples, as are websites that regulate their accessibility by copying physical jurisdictions. For instance, for regulatory compliance in some jurisdictions, regulated gambling providers geoblock to deny access to users connecting from jurisdictions in which the providers’ games are illegal;²² licensees of copyrighted content employ geoblocking to limit access to the content to users connecting from the territory for which the licensees hold licenses. Geolocation technologies,²³ with their improving reliability and increasing granularity, make these types of territorial associations and delineations increasingly easier, cheaper, and more precise. 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 registries²⁴ 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

digital identity available to anyone in the world [who is] interested in administering a location-independent business online.” *Id.*

¹⁹ .vegas, available at <http://www.nic.vegas/> (last visited Aug. 7, 2016).

²⁰ “Unlike other city or geographic top level domains, there are no nexus requirements or other restrictions to ownership.” FAQs, .vegas, available at <http://www.nic.vegas/> (last visited Aug. 7, 2016).

²¹ See also *infra* Part V.

²² See Marketa Trimble, *Proposal for an International Convention on Online Gambling*, in REGULATING INTERNET GAMING: CHALLENGES AND OPPORTUNITIES (Ngai Pindell & Anthony Cabot eds., UNLV Gaming Press, 2013).

²³ On geolocation technologies see *supra* note 6.

²⁴ See *infra* note 31 for “registries.”

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the territory that the top-level domains represent.²⁵

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.²⁶ 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.²⁷ 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. 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 businesses.²⁸

Users' expectations might be more nuanced in other circumstances. 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. First, many users might not know that "TV" represents a country code,²⁹ let alone that there is a country called Tuvalu and that "TV" is the country code for Tuvalu. 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. 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. For example,

²⁵ See *infra* Part IV.A for a detailed discussion of the domains and their registration eligibility requirements.

²⁶ *Id.*

²⁷ Judge Alex Kozinski opined on consumer expectations with regard to second-level domains in *Toyota Motor Sales 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." *Id.*).

²⁸ See, e.g., *Cable News Network LP, LLP v. Elie Khouri d/b/a Channel News Network et al.*, National Arbitration Forum, No. 117876, 68 U.S.P.Q. 1570, 2002 ILRC 3241 (commenting on attaching geographic terms to a mark in domain names and on user expectations when a user sees such domain names).

²⁹ Country Codes – ISO 3166, ISO, available at http://www.iso.org/iso/country_codes (last visited Aug. 7, 2016).

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.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),³⁰ 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”)³¹ to choose their own approach to territorial association; this freedom applies to all top-level domain registries, including registries of country-code top-level domains (“ccTLDs”)³² and new generic top-level domains (“new gTLDs”),³³ even if the domains refer to a place or a territory. 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. 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. Other domains thrive even though they are completely disassociated from their territorial link; the .tv domain is successful because

³⁰ nuuk.gl, redirected to <https://sermersooq.gl/kl/> (last visited Feb. 1, 2017).

³¹ Domain registry operators (or “registries”) are responsible for operating top-level domains. The responsibility for operating the domains is delegated to the operators by ICANN. Registry Information, ICANN, *available at* <https://www.icann.org/resources/pages/registries/registries-en> (last visited Aug. 7, 2016). While the term “registries” is commonly used as a shortened term for registry operators, “registries” are technically “authoritative, master database[s] of all domain names registered in each Top Level Domain,” which are operated by registry operators. Glossary, ICANN, *available at* <https://www.icann.org/resources/pages/glossary-2014-02-03-en#r> (last visited Dec. 10, 2016). *See also* Torsten Bettinger & Volker Greimann, *ICANN’s Agreements with Registries and Registrars*, in *DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 26-34, at pp. 26-28.

³² ccTLDs use two-letter country codes in accordance with ISO 3166. ccTLDs “correspond to a country, territory, or other geographic location.” FAQs, ICANN, *available at* <https://www.icann.org/resources/pages/faqs-2014-01-21-en> (last visited Aug. 7, 2016). On the exception in the case of .uk *see* Peter K. Yu, *The Never-Ending ccTLD Story*, in *ADDRESSING THE WORLD: NATIONAL IDENTITY AND INTERNET COUNTRY CODE DOMAINS* (Erica Schlesinger Wass ed. 2003), p. 3.

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.

³³ ICANN delegated the first new gTLDs on March 22, 2013. *About the Program*, ICANN, *available at* <https://newgtlds.icann.org/en/about/program> (last visited Dec. 19, 2016).

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of the coincidental identity of Tuvalu’s country code with the abbreviation for television.³⁴ 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.³⁵

II. THE GEOGRAPHICAL INDIFFERENCE OF THE DOMAIN NAME SYSTEM

The DNS was originally intended to have no geographical ties and no geographical restrictions. Three of the original five “general purpose domains” – .com, .edu, and .org³⁶ – 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.³⁷ 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 Administration³⁸ and the U.S. Department of Defense,³⁹ respectively, and have been reserved for the use of “official governmental organizations in the United States”⁴⁰ and the U.S. military, respectively. However, for these two domains the eligibility requirement has officially been entity-based rather than geography-based.⁴¹

³⁴ .tv, Verisign, http://www.verisign.com/en_US/domain-names/tv-domain-names/index.xhtml?dmn=www.tv (last visited Jan. 8, 2017).

³⁵ See *infra* Part IV.A.

³⁶ J. Postel & J. Reynolds, *Domain Requirements*, Memo, October 1984, p. 2, available at <https://tools.ietf.org/pdf/rfc920.pdf>. These domains were followed by .net and .int, with .arpa maintained as the original domain of the internet’s predecessor, the Arpanet.

³⁷ 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.” Customer Service Agreement, .edu Administration, Section 4, available at https://net.educause.edu/edudomain/view_agreement.asp (last visited Dec. 19, 2016).

³⁸ Delegation Record for .GOV, available at <https://www.iana.org/domains/root/db/gov.html> (last visited Aug. 4, 2016); 41 CFR Part 102-173.

³⁹ Delegation Record for .MIL, available at <http://www.iana.org/domains/root/db/mil.html> (last visited Aug. 4, 2016).

⁴⁰ Policy, Final Rule, 41 CFR Part 102-173, March 28, 2003, Vol. 68, No. 60, available at <https://www.dotgov.gov/portal/web/dotgov/policy#10217330> (last visited Aug. 4, 2016).

⁴¹ E.g., U.S. Army Garrison Bavaria, available at <http://www.bavaria.army.mil/> (last

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The manner in which disputes over domain names would be decided was also originally designed with a geographically-detached approach. Under the Uniform Domain-Name Dispute Resolution Policy (“UDRP”),⁴² which ICANN created to govern disputes between domain name registrants (“respondents”) and opponents of domain name registrations (“complainants”),⁴³ disputes are decided by providers that are established in centers that are not necessarily linked to the location of the respondents, complainants, registries,⁴⁴ or registrars.⁴⁵ The UDRP addresses the classical cybersquatting scenario and allows a complainant with a trademark or service mark (“trademark”)⁴⁶ to file a complaint against the registrant of a domain name that is identical or confusingly similar to that trademark.⁴⁷ 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.⁴⁸

The DNS’s detachment from geography and its indifference to territorial delineations of rights granted or recognized by countries has presented problems. 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,⁴⁹ granted or recognized by the national laws of individual

visited Aug. 30, 2016).

⁴² Uniform Domain-Name Dispute Resolution Policy, adopted August 26, 1999, available at <https://www.icann.org/resources/pages/policy-2012-02-25-en> (last visited Aug. 5, 2016).

⁴³ For an overview of pre-UDRP history 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, 157-189 (2001).

⁴⁴ For “registries” see *supra* note 31.

⁴⁵ “Registrars” are entities that register domain names. Glossary, ICANN, available at <https://www.icann.org/resources/pages/glossary-2014-02-03-en#r> (last visited Dec. 10, 2016). See also Bettinger & Greimann, *supra* note 31, pp. 26-30.

⁴⁶ For simplification, this article uses “trademark” in this context for both trademark and service marks.

⁴⁷ *Id.*, 4.a.(ii).

⁴⁸ See further discussion of choice of law in Part III *infra*.

⁴⁹ Council Regulation (EC) No 207/2009 on the Community trade mark; Benelux Convention on Intellectual Property (Trademarks and Designs), Hague, 2005, available at <http://www.dutchcivillaw.com/legislation/Benelux%20Trademark%20Convention.pdf> (last visited Dec. 10, 2016).

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countries and also are, with some exceptions,⁵⁰ protected only within the territory for which they were granted or recognized. It is possible that a designation, such as a trademark, could be protected in multiple 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,⁵¹ 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. 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. However, on each domain only one domain name may exist that consists of a unique alphanumerical designation.⁵²

A clash between two owners of identical trademarks that are registered in two different countries is illustrated by a dispute concerning the *ephoneamps.com* domain name.⁵³ The complainant, Gibson Brands, Inc., a

⁵⁰ Paris Convention for the Protection of Industrial Property, 1883, as amended, Article 6*bis*; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Article 16(2) and (3), Apr. 15, 1994, 1869 U.N.T.S. 299 (hereinafter “TRIPS Agreement”).

⁵¹ TRIPS Agreement, Article 16(3); 15 U.S.C. 43(c).

⁵² For a discussion of conflicting trademark interests and domain names *see, e.g.*, Alexander Peukert, *The Coexistence of Trade Mark Laws and Rights on the Internet, and the Impact of Geolocation Technologies*, 47(1) IIC 60 (2016); Jacqueline D. Lipton, *A Winning Solution for YouTube and Utube? Corresponding Trademarks and Domain Name Sharing*, 21 HARV. J.L. & TECH. 509 (2008); 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, 146-154 (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-Draft, July 1996, point 7. 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* Owain Vaughan, *A Convention for Using Legal Names as Domain Names*, Network Working Group, RFC 2352, May 1998, p. 5. *See also* Peukert, *supra*, 80 (suggesting that “the user should ... be allowed employ the [trademark] as part of its search engine optimization strategy and its home country TLD.” *Id.*).

Permutations of alphanumerical designations may exist as domain names, e.g. [trademark]sucks.com or [trademark]fan.com.

⁵³ *Gibson Brands, Inc. v. zong wen / shen zhen shi kai di xin shi ye you xian gong si*,

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U.S. corporation, owns the trademark “Epiphone” in numerous countries, including in the United States, but it does not own the trademark in China; another company, the registrant of epiphoneamps.com, has owned the trademark “Epiphone” in China since 2009. 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.⁵⁴ 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.⁵⁵

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. 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.⁵⁶

Claim No. FA1501001602037, National Arbitration Forum, March 9, 2015.

⁵⁴ Under the UDRP, the complainant can choose to file a complaint with any ICANN-approved dispute-resolution provider. UDRP, 4.e.

⁵⁵ For the same result in earlier cases *see* Humax Co. Ltd. v. Genmab A/S, National Arbitration Forum, Claim No. FA0205000114301, July 14, 2002; Sandvik Intellectual Property AB v. Harbhajan Singh/State Engineering Corporation, WIPO Case No. D2008-0608, June 5, 2008.

⁵⁶ Gibson Brands, Inc. v. zong wen / shen zhen shi kai di xin shi ye you xian gong si, Claim No. FA1501001602037, National Arbitration Forum, March 9, 2015. 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. 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.” 15 U.S.C. §1125(d)(1)(A). For the possibility of filing a suit in a court after a UDRP proceeding *see infra* Part III.A.

Not all UDRP panels would necessarily decide the way the panel decided in epiphoneamps.com. In simplybusiness.com, a panel recognized that paragraph 2 of the UDRP “could be regarded as creating or reinforcing an obligation on a registrant to conduct some form of due diligence in order to determine whether the domain name at issue infringes any third party rights.” Xbridge Ltd. v. Marchex Sales, Inc., WIPO, D2010-2069, 2011.

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Disputes over domain names continue to occur,⁵⁷ 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,⁵⁸ new gTLDs,⁵⁹ and internationalized domain names (“IDNs”).⁶⁰ But the original general purpose domains have usually been valued more highly than the domains that were added later, 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

Paragraph 2 of the UDRP requires that a registrant “determine whether [the registrant’s] domain name infringes any third party rights.” UDRP, par. 2.

But *cf.* Anomaly Action Sports S.R.L. Con Sigla AAS S.r.l. v. Jonathan Kruse, WIPO, No. D2013-0276, March 15, 2013 (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”).

⁵⁷ Since 2010, more than 2,500 domain name disputes have been filed with WIPO each year. Total Number of Cases per Year, *available at* <http://www.wipo.int/amc/en/domains/statistics/cases.jsp> (last visited Aug. 30, 2016). *See also* Forum Domain Name Filings Hold Steady While Portfolio of Products Expands under Updated Brand, Forum, Sept. 11, 2015, *available at* <http://www.adrforum.com/news> (last visited Aug. 30, 2016). *See also supra* note 14.

⁵⁸ “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.” Peter K. Yu, *The Neverending ccTLD Story*, p. 2, *available at* <http://home.uchicago.edu/mferzige/ccTLDs.pdf> (last visited Aug. 7, 2016). “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.*, p. 3. As of April 2006, there were 245 ccTLDs. Evolution in the Management of Country Code Top-Level Domain Names (ccTLDs), OECD, DSTI/ICCP/TISP(2006)6/FINAL, November 17, 2006, *available at* <https://www.oecd.org/sti/ieconomy/37730629.pdf> (last visited Dec. 12, 2016), p. 6 [hereinafter “2006 OECD Report”].

⁵⁹ The first new gTLD was delegated in 2013. Delegated Strings, Overview, ICANN, *available at* <https://newgtlds.icann.org/en/program-status/delegated-strings> (last visited Aug. 7, 2016). The first new gTLD became available for domain name registrations in 2014. As of July 29, 2016, a total of 1,129 new gTLDs were delegated. Program Statistics, ICANN, *available at* <https://newgtlds.icann.org/en/program-status/statistics> (last visited Aug. 7, 2016).

⁶⁰ “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).” Internationalized Domain Names, ICANN, *available at* <https://newgtlds.icann.org/en/about/idns> (last visited Aug. 7, 2016). The first IDN ccTLDs were made available in 2010. First IDN ccTLDs Available, ICANN, *available at* <https://www.icann.org/news/announcement-2010-05-05-en> (last visited Aug. 7, 2016).

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(particularly on the .com domain) continues to appear crowded because trademark owners and other prospective domain name registrants still turn to the general purpose domains for the most coveted domain names.⁶¹

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.⁶² With a limited number of identical alphanumeric designations available as domain names on the highly-valued domains, 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. 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, 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.⁶³

In addition to trademark rights, other territorially-delineated rights to alphanumeric 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

⁶¹ As of December 23, 2016, there were more than 127 million domain names registered on .com, accounting for almost half of all domain names; the second most populated domain (.tk) had only 18 million-plus domain names. The most populated new (non-internationalized) gTLD (.xyz) had a little over 6 million domain names. Domain Count Statistics for TLDs, *available at* <http://research.domaintools.com/statistics/tld-counts/> (last visited Dec. 23, 2016). *See also* Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 545 (2005); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 Chi.-Kent L. Rev. 1295, 1300-1301 (1998).

⁶² 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.

⁶³ *See supra* note 14 and the accompanying text.

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indications. 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,⁶⁴ in France and throughout the rest of the European Union (“EU”) through EU law,⁶⁵ and in some additional countries because of international agreements.⁶⁶ 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.⁶⁷ The 2001 Report of the Second WIPO Internet Domain Name Process⁶⁸ 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.⁶⁹

The 2001 Report also acknowledged clashes between domain names and geographical names that are not geographical indications.⁷⁰ Early on the

⁶⁴ Law of May 6, 1919; Law of July 22, 1927; Decree of September 28, 1935; Decree of June 29, 1936; Decree of August 26, 1936; Decree of June 17, 1938; Law of February 11, 1951.

⁶⁵ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, Article 107; PDO-FR-A1359.

⁶⁶ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958; Lisbon No. 231; TRIPS Agreement, Articles 22 – 25.

⁶⁷ As of December 10, 2016, champagne.com redirected to champagne.fr – a website of the Comité Cahmpagne, the trade association of Champagne producers; champaign.com led to the website www.inert.com, which offered the domain name for sale. *See also* Comité Interprofessionnel du vin de Champagne (CIVC) v. Steven Vickers, WIPO Case No. DCO2011-0026, June 21, 2011 (concerning the domain name champagne.co). On a different approach to geographical indications under some other dispute resolution policies for specific domains *see infra* Part IV.B.

⁶⁸ 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, September 3, 2001, *available at* <http://www.wipo.int/amc/en/processes/process2/report/html/report.html> (last visited Aug. 5, 2016) [hereinafter “2001 WIPO Report”].

⁶⁹ 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.*, p. viii.

⁷⁰ *Id.*, p. 107.

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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.⁷¹ For example, in portofhelsinki.com,⁷² the panel rejected the notion that the administrative agency (Port of Helsinki) had some type of premium right to the domain name portofhelsinki.com. 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.”⁷³ As the barcelona.com case (discussed below) showed,⁷⁴ 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.⁷⁵ Even for these types of cases, the 2001 Report recommended waiting before any changes are made to the UDRP.⁷⁶

III. 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

⁷¹ For a detailed analysis of cases involving administrative agencies 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).

⁷² Port of Helsinki v. Paragon International Projects Ltd., WIPO Case No. D2001-0002, February 12, 2001, available at <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0002.html> (last visited Aug. 5, 2016).

⁷³ *Id.* See also Brisbane City Council v. Warren Bolton Consulting Pty Ltd, WIPO Case No. D2001-0047 (“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 71, pp. 27-33.

In January 2016, the new TLD .helsinki was delegated to the City of Helsinki. Delegation Report for .HELSINKI, available at <https://www.iana.org/domains/root/db/helsinki.html> (last visited Dec. 19, 2016). For the ICANN’s policy regarding geographical terms and the new gTLDs see *infra* Part IV.A.

⁷⁴ See *infra* Part III.A.

⁷⁵ See Forrest, *supra* note 71, pp. 24-27 and 34. See also *infra* notes 90 - 93 and accompanying text.

⁷⁶ 2001 WIPO Report, *supra* note 68, p. 117-118.

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detached from geography, territorial boundaries, and national laws. The DNS has taken national rights into account – first through the UDRP, which gives preference to trademark owners to some extent,⁷⁷ and later, additionally, through registration rules that began to offer trademark owners preferential early domain name registrations. Recently, ICANN began to require that certain geographical terms be reserved – meaning that the terms not be made available for registration as domain names.

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; the UDRP enables a holder of rights in a trademark or service mark⁷⁸ to bring a UDRP complaint when a domain name at issue is identical or confusingly similar to the trademark.⁷⁹ 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.⁸⁰ It may also be a trademark registered with a U.S. state, such as a Georgia state trademark,⁸¹ or even an unregistered mark.

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

Whether national law should apply in UDRP cases has been disputed;⁸² the UDRP is silent on what country's law, if any, should apply in UDRP cases. 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

⁷⁷ Not everyone has been satisfied with UDRP rules. For a proposal to create a new TLD that would not be subject to UDRP see Andrew Main, *Plea for a Sane Top-Level Domain*, Network Working Group, October 2001, pp. 6-7.

⁷⁸ For simplification, the rest of the text uses “trademark” to refer to both a trademark and a service mark.

⁷⁹ UDRP, 4.a.(i).

⁸⁰ See *supra* note 49.

⁸¹ *Verichack, Inc. v. Admin Manager*, National Arbitration Forum, No. FA0606000734799, August 2, 2006. For the U.S. follow-up case under 15 U.S.C. 1125(d) see *Lahoti v. Verichack, Inc.*, 586 F.3d 1190 (9th Cir. 2009).

⁸² 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.*).

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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.”⁸³ 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. 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.”⁸⁴

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. 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 2003.⁸⁵ The case involved a dispute between a Spanish trademark owner and a U.S. trademark owner; it was the U.S. trademark owner who registered barcelona.com and the Spanish trademark owner – the Barcelona City Council – that contested the registration. The Barcelona City Council initiated a UDRP proceeding before a WIPO panel, which decided in favor of the Council⁸⁶ 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.⁸⁷

⁸³ 2001 WIPO Report, *supra* note 68, pp. 21-22.

⁸⁴ *Id.*

⁸⁵ Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com Inc., WIPO Administrative Panel Decision, Case No. D2000-0505, August 4, 2000; Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona, 189F.Supp.2d 367 (E.D.Va. 2002); Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona, 330 F.3d 617 (4th Cir. 2003). The case was 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 (2004); Paul Schiff Berman, *Judges as Cosmopolitan Transnational Actors*, 12 TULSA J. COMP. & INT’L L. 109 (2004); Helfer, *supra* note 82, 497-499; 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).

⁸⁶ Excelentísimo Ayuntamiento de Barcelona v. Barcelona.com Inc., WIPO Administrative Panel Decision, Case No. D2000-0505, August 4, 2000.

⁸⁷ *Id.*

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The dissatisfied U.S. trademark owner subsequently filed a lawsuit in a U.S. court⁸⁸ – not to overturn the panel decision under the UDRP, but to declare that under U.S. law his registration of barcelona.com was not unlawful.⁸⁹ The district court followed the WIPO panel’s approach and applied Spanish trademark law, but the appellate court disagreed.⁹⁰ Because the claim in the U.S. courts was based on U.S. law – the reverse domain name hijacking provision of the Lanham Act⁹¹ – 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.”⁹²

The U.S. appellate court in *Barcelona* referred to the UDRP’s “loose rules regarding applicable law”⁹³ but the UDRP has, in fact, no rules at all regarding choice of applicable law.⁹⁴ The lack of choice-of-law rules can be problematic;⁹⁵ 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. Even when UDRP panelists devise their own UDRP-specific substantive rules, it is likely that the specific rules will be influenced by the panelists’ background and education, and their experiences in their own national legal systems.

⁸⁸ 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, 4.k.

⁸⁹ On jurisdictional issues *see* *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14 (1st Cir. 2001).

⁹⁰ *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d 617 (4th Cir. 2003).

⁹¹ 15 U.S.C. § 1114(2)(D)(v).

⁹² *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d 617, 628 (4th Cir. 2003). The appellate court referred to Spanish law but did not base its decision on it. *Id.*, 629. 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, available at <https://www.iana.org/domains/root/db/barcelona.html> (last visited Dec. 19, 2016).

⁹³ *Id.*, 624.

⁹⁴ *See infra* note 96 and the accompanying text.

⁹⁵ For a criticism of the lack of choice-of-law rules from the perspective of preserving national interests *see* *Helfer & Dinwoodie*, *supra* note 43, 262 (“[T]he current Rule 15, by failing in any real way to address choice of law, fails to ensure that national interests will appropriately be recognized by panels, or to provide panels with guidance on where such recognition should occur.” *Id.*).

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Unaddressed issues are not limited to the validity 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.

UDRP panelists have not been uniform in their opinions on the applicability of national law in UDRP cases. The Rules for the UDRP⁹⁶ give UDRP panels wide discretion with regard to the choice of applicable law: "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*."⁹⁷ Two commentators, Helfer and Dinwoodie, warned in 2001 that "the determination of issues ... by the *invariable* application of a single national law would be unhelpful."⁹⁸ They projected that "in the long term, the [UDRP] non-national system might usefully develop autonomous rules that apply in disputes transcending national borders,"⁹⁹ 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."¹⁰⁰

The very first UDRP decision, in January 2000, did include a brief choice-of-law analysis and a conclusion about applicable national law. 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.¹⁰¹ 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 [had] recent experience with similar disputes."¹⁰² However, in the end the panel found it "unnecessary to

⁹⁶ Rules for Uniform Domain Name Dispute Resolution Policy, September 28, 2013, available at <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en> (last visited Aug. 5, 2016). See also the previous version of the Rules, August 26, 1999, available at <https://archive.icann.org/en/udrp/udrp-rules-24oct99.htm> (last visited Aug. 5, 2016).

⁹⁷ Rules for Uniform Domain Name Dispute Resolution Policy, September 28, 2013, par. 15.(a), available at <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en> (last visited Aug. 5, 2016) (emphasis added).

⁹⁸ Helfer & Dinwoodie, *supra* note 43, 264-265.

⁹⁹ *Id.*, 265.

¹⁰⁰ *Id.* See also Helfer, *supra* note 82, p. 496 ("As a practical matter, of course, it would be impossible and unwise to insulate completely the UDRP from national laws." *Id.*).

¹⁰¹ World Wrestling Federation Entertainment, Inc. v. Michael Bosman, WIPO Case No. D99-0001, January 14, 2000.

¹⁰² *Id.*

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consult decisions of United States' courts" to determine whether the domain name was used in bad faith.¹⁰³

Following the *Barcelona* appellate court decision,¹⁰⁴ some UDRP panelists recognized the potentially overriding role of national law and took the role into account when assessing the applicability of national law. In the 2004 UDRP decision concerning the domain name *hjeta.com*,¹⁰⁵ which the respondent used for a website criticizing complainant's practices, the panelist in the case, David H. Bernstein (a panelist from the United States),¹⁰⁶ pointed out a split among UDRP panels, where panels 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.¹⁰⁷ In the *hjeta.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,”¹⁰⁸ because such an approach would prevent forum shopping. 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.”¹⁰⁹

Not all UDRP panelists agreed that the UDRP should yield to national law – or take national law into account to any significant degree.¹¹⁰ Six days before the *hjeta.com* decision, a UDRP panel deciding *maxol.com*¹¹¹ took a position in favor of an autonomous interpretation of the UDRP, noting that the UDRP “provides an international procedure for international

¹⁰³ *Id.*

¹⁰⁴ See *supra* notes 85 - 92 and the accompanying text.

¹⁰⁵ Howard Jarvis Taxpayers Association v. Paul McCauley, WIPO Case No. D2004-0014, April 22, 2004.

¹⁰⁶ Bernstein's resume is available at <http://www.wipo.int/export/sites/www/amc/en/domains/panel/profiles/bernstein-davidh.pdf> (last visited Dec. 11, 2016).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*, fn. 2.

¹¹⁰ 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 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.” *Id.*).

¹¹¹ McMullan Bros., Limited et al. v. Web Names Ltd, WIPO Case No D2004-0078, April 16, 2004.

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application.”¹¹² “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.”¹¹³ 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.¹¹⁴ Eight days after the hjta.com decision, another UDRP panelist disagreed with Bernstein; in the covancecampaign.com decision,¹¹⁵ 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].”¹¹⁶ Perhaps not surprisingly, neither panelist in the latter two cases was from the United States.¹¹⁷

Matthew S. Harris, the panelist in maxol.com, and Bernstein exchanged views on the potential applicability of national law again in 2008. In a detailed January 2008 decision in 1066ha.com¹¹⁸ 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;” he added that the approach “should be avoided wherever possible” because “[i]t risks the UDRP fragmenting into a series of different systems.”¹¹⁹ Bernstein responded in a July 2008 decision in sermosucks.com¹²⁰ – a decision that concerned another criticism website. 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.¹²¹

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Covance, Inc. and Covance Laboratories Ltd. v. The Covance Campaign, WIPO Case No. D2004-0206, April 30, 2004.

¹¹⁶ *Id.*

¹¹⁷ Matthew S. Harris was the panelist in maxol.com; Alistair Payne was the panelist in covancecampaign.com. The panelists’ resumes are available at <http://www.wipo.int/export/sites/www/amc/en/domains/panel/profiles/harris-matthews.pdf> and <http://www.wipo.int/export/sites/www/amc/en/domains/panel/profiles/payne-alistair.pdf> (last visited Dec. 11, 2016).

¹¹⁸ 1066 Housing Association Ltd. v. Mr. D. Morgan, WIPO Case No. D2007-1461, January 18, 2008.

¹¹⁹ *Id.*

¹²⁰ Sermo, Inc. v. CataylstMD, LLC, WIPO Case No. D2008-0647, July 2, 2008.

¹²¹ *Id.*

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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. Bernstein emphasized the desirability of predictability and a reduction in forum shopping, and reiterated his preference for the national law approach.

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. 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 that is selected. In choice of law, *dépeçage* may dictate that different rules be used to select the laws that are applicable to different issues.¹²²

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. Sometimes panels expressly state what country's law they applied and what directed their choice of applicable law;¹²³ at other times panels simply apply a particular national law without explaining what led them to adopt the particular choice.¹²⁴ 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.¹²⁵ 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.¹²⁶

¹²² Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 58 (1973).

¹²³ E.g., Pavillion Agency, Inc., Cliff Greenhouse and Keith Greenhouse v. Greenhouse Agency Ltd., and Glenn Greenhouse, WIPO case No. D2000-1221, December 4, 2000; Myer Stores Ltd. v. Mr. David John Singh, WIPO case No. D2001-0763, July 10, 2001.

¹²⁴ E.g., FMR Corp. v. Native American Warrior Society, Lamar Sneed, Lamar Sneed, WIPO Case No. D2004-0978, January 20, 2005.

¹²⁵ Helfer, *supra* note 82, p. 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.” *Id.*).

¹²⁶ Although the UDRP does not require that panels apply national laws, UDRP panel decisions are rarely completely divorced from national laws. Even when panelists do not apply any particular country's law, certainly their legal backgrounds might influence their

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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. In one decision a panel recognized that a national law did apply, but the panel expressed its hesitancy to apply the law because “only one panelist [was] intimately familiar with its provisions;”¹²⁷ 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.”¹²⁸ 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...),”¹²⁹ “which would apply to any legal proceedings in this case.”¹³⁰ These statements show at a minimum an understanding that there might be some value in reconciling UDRP decisions with national law.

In cases in which UDRP panels did discuss their choice of applicable law, the panels used various criteria to select the applicable law.¹³¹ In some cases a panel chose applicable law based on the parties’ domiciles. For example, in *cliffgreenhouse.com*¹³² the panel applied, in addition to “the Policy and Rules that govern [the] proceeding,” “the internal, substantive law of the State of New York [... and] the Federal Trademark Act as applicable in New York” because “the Complainants and Respondents are all New York residents and

views on and approaches to substantive issues.

¹²⁷ Australian Trade Commission v. Matthew Reader, WIPO Case No. D2002-0786, November 12, 2002.

¹²⁸ *Id.*

¹²⁹ Chelsea and Westminster Hospital NHS Foundation Trust v. Frank Redmond, WIPO Case No. D2007-1379, November 14, 2007

¹³⁰ *Id.*

¹³¹ The WIPO Overview 2.0 notes that when panels have selected a particular country’s law, the panels “have done so on grounds including the location or nationality of the parties, or where a specific concept of national law is judged germane to an issue in dispute, or bearing in mind, in certain circumstances, the mutual jurisdiction election in the UDRP proceeding that would likely govern the location (and therefore the law) of any subsequent court case.” WIPO Overview 2.0, *supra* note 177.

¹³² Pavillion Agency, Inc., Cliff Greenhouse and Keith Greenhouse v. Greenhouse Agency Ltd., and Glenn Greenhouse, WIPO case No. D2000-1221, December 4, 2000.

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do business in New York.”¹³³ Similarly, in *myeronline.com*¹³⁴ 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.¹³⁵ In *myeronline.com*, 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.”¹³⁶ The fact that a registrar was domiciled in the United States was taken into account in *cnn.com*, 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 Respondents chose to register each of the disputed domain names through a U.S. registrar”;¹³⁷ the respondents in the case were from Lebanon. In some cases, panels selected the law of the country on which a party based its claim of rights. For example, in *newzealand.biz*,¹³⁸ 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.

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. 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,¹³⁹ a challenge under national law for reverse domain-name hijacking, as was the case in *barcelona.com*,¹⁴⁰ may result in a court applying forum law and following

¹³³ *Id.* See also, e.g., *Grupo Picking Pack, S.A. f/k/a Grupo Hispano-Suiza, S.A. v. Prospero Moran and Asturnet, S.L.*, WIPO Case No. D2000-1220, December 18, 2000 (Spanish law); *Wort & Bild Verlag Konradshöhe GmbH & Co. KG v. Andreas Bergmann*, WIPO Case No. D2009-1442, December 18, 2009 (German law).

¹³⁴ *Myer Stores Ltd. v. Mr. David John Singh*, WIPO case No. D2001-0763, July 10, 2001.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Cable News Network LP, LLP v. Elie Khouri d/b/a Channel News Network et al.*, National Arbitration Forum, No. 117876, 68 U.S.P.Q. 1570, 2002 ILRC 3241.

¹³⁸ *Her Majesty the Queen, in Right of Her Government in New Zealand v. Ismer*, WIPO, No. DBIZ2002-0270, October 2, 2002.

¹³⁹ *Supra* note 97.

¹⁴⁰ See *supra* note 88 and the accompanying text. For a discussion of the ACPA’s application in other cases see, e.g., Michael Geist, *Cyberlaw 2.0*, 44 B.C. L. REV. 323, 339-342 (2003).

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whatever choice-of-law rule, if any, the forum law includes. Therefore, for example, in *worldwrestlingfederation.com*¹⁴¹ 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.¹⁴² In *sermosucks.com*,¹⁴³ 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.¹⁴⁴

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. Under the UDRP, the complainant must submit to jurisdiction in "at least one specified Mutual Jurisdiction,"¹⁴⁵ 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."¹⁴⁶ Although the complainant is likely to submit to only one jurisdiction,¹⁴⁷ the

¹⁴¹ *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*, WIPO, No. D99-0001, January 14, 2000.

¹⁴² *Id.* See also *American Mensa, Ltd. v. Alan Heigl et al.*, WIPO Case No. D2005-0068, April 24, 2005.

¹⁴³ *Sermo, Inc. v. CataylstMD, LLC*, WIPO Case No. D2008-0647, July 2, 2008.

¹⁴⁴ *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."). In *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). *Richard Starkey v. Mr. Bradley*, National Arbitration Forum, FA0612000874575, February 12, 2007, Partial Dissent of David H. Bernstein.

¹⁴⁵ UDRP Rules of Procedure, par. 3(b)(xiii), available at <https://www.icann.org/resources/pages/rules-be-2012-02-25-en> (last visited Dec. 11, 2016).

¹⁴⁶ *Id.*, par. 1. Note that registrars for the .com, .net, and .org domains do not have to be located in the United States. 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 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).

¹⁴⁷ Note that the UDRP Rules of Procedure talk about "at least one specified Mutual

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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.¹⁴⁸ 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.¹⁴⁹

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. The first category concerns the existence, validity, and ownership of trademarks; trademarks give complainants rights under the UDRP, and respondents' trademarks may help establish respondent's legitimate interests in a disputed domain name. 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 national law.¹⁵⁰ The second category of issues encompasses all other issues to which national law might apply.

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.¹⁵¹ The WIPO

Jurisdiction." UDRP Rules of Procedure, par. 3(b)(xiii), *available at* <https://www.icann.org/resources/pages/rules-be-2012-02-25-en> (last visited Dec. 11, 2016) (emphasis added).

¹⁴⁸ See, for example, the in rem jurisdiction provided for in the ACPA.

¹⁴⁹ See, e.g., *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..." *Id.*).

¹⁵⁰ See, e.g., *Harris in 1066 Housing Association Ltd. v. Mr. D. Morgan*, WIPO Case No. D2007-1461, January 18, 2008, fn. 3 ("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..." *Id.*).

¹⁵¹ There are exceptions for some registered trademarks because "panels have typically found trademark registrations that are automatic or unexamined (such as US state registrations as opposed to US federal registrations) are not owed the same deference under the UDRP as examined registrations." WIPO Overview 2.0, *supra* note 177. See also GERALD M. LEVINE, *DOMAIN NAME ARBITRATION* 115-116 (Legal Corner Press 2015); Torsten Bettinger & Allegra Waddell, *Uniform Domain Name Dispute Resolution Policy*, in

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Overview of WIPO Panel Views on Selected UDRP Questions (“WIPO Overview 2.0”) notes that “[t]he location of the trademark [... is] irrelevant for the purpose of finding rights in [the complainant’s] trademark under the first element of the UDRP.”¹⁵² 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. As a panel noted in *tenerife.com*,¹⁵³ a UDRP proceeding is not a proper proceeding to challenge the validity of a complainant’s registered trademark; rather, a validity challenge should be launched with the national trademark registration authority.¹⁵⁴ 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; the WIPO panel in *barcelona.com* accepted a trademark registration under Spanish law, but the U.S. appellate court in *Barcelona* applied U.S. law to assess the existence of the trademark.¹⁵⁵

As opposed to cases of registered trademarks, where UDRP panels assume that trademarks are valid, UDRP panels might assess the validity of unregistered trademarks based on national law.¹⁵⁶ Panels might turn to national law to determine, for example, whether the functionality or geographical nature of a mark will render the mark invalid.¹⁵⁷ For such a

DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 1263-1451, at p. 1342.

For an example where a panel applied U.S. law to determine standing *see* *American Honda Co., Inc. v. Gabriel Salcedo (a/k/a Tuhonda)*, WIPO, No. D2013-1846, December 31, 2013.

¹⁵² WIPO Overview 2.0, *supra* note 177.

¹⁵³ *Excmo. Cabildo Insular de Tenerife and Promocion Exterior de Tenerife, S.A. v. Jupiter Web Services Limited*, WIPO Case No. D2003-0525, September 9, 2003, *available at* <http://www.wipo.int/amc/en/domains/decisions/html/2003/d2003-0525.html> (last visited Aug. 5, 2016).

¹⁵⁴ *Id.* *Cf. supra* note 151.

¹⁵⁵ U.S. law was in fact the law of the mutual jurisdiction to which the *Barcelona* complainant submitted. 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. *See supra* note 145 and the accompanying text.

¹⁵⁶ For decisions recognizing common-law trademarks *see, e.g.*, *Tuxedos By Rose v. Nunez*, National Arbitration Forum, FA 95248, Aug. 17, 2000; *S.A. Bendheim Co., Inc. v. Hollander Glass*, National Arbitration Forum, FA 142318, Mar. 13, 2003.

¹⁵⁷ *Tatra, a.s. v. Tatra Ltd., Tatra folks PO*, National Arbitration Forum, Claim No. FA0911001296249, February 5, 2010 (In the context of a discussion on whether it matters that the word “Tatra” might be a name of a geographic region the panel noted that “the

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decision, a UDRP panel may apply the national law of the country for which the unregistered trademark rights are claimed,¹⁵⁸ unless a panel uses some autonomous interpretation of the UDRP.¹⁵⁹

The choice of applicable law can also be relevant for the assessment of respondents' rights. Under the UDRP, a respondent's "rights or legitimate interests"¹⁶⁰ in a domain name may be evidenced by a showing that a respondent "ha[s] been commonly known"¹⁶¹ under the domain name. 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.¹⁶² Some registrants rely on a trademark registration to show their rights and legitimate interests in a domain name, in which case it becomes important to a panel to determine

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)." *Id.*)

¹⁵⁸ See *supra* note 138. See also *Fashiontv.com GmbH v. Mr. Chris Olic*, WIPO Case No. D2005-0994, December 8, 2005 ("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..." *Id.*); *Antonio de Felipe v. Registerfly.com*, WIPO Case No. D2005-0969, December 19, 2005 ("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." *Id.*)

¹⁵⁹ Levine, *supra* note 151, 123.

¹⁶⁰ UDRP, 4.(a)(ii).

¹⁶¹ *Id.*

¹⁶² 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, 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, e.g., *Goldman, Sachs & Co. v. Lis Wevers c/o Goldman Advertising Services BV*, National Arbitration Forum, Claim No. FA0610000812109, November 22, 2006.

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 suffice to show a registrant's rights and legitimate interests if the registrant proves a use or "demonstrable preparations to use ... the domain name ... in connection with a bona fide offering of goods and services." UDRP, 4.c.(i). See, e.g., *Spark Networks Ltd. v. Joel Blatt*, National Arbitration Forum, Claim No. FA0806001199331, July 17, 2008.

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which country's trademark registration – and which country's law – the panel will apply.¹⁶³ Panels accept registrant's trademark registration as valid (as they do in the case of a complainant's registered trademark),¹⁶⁴ 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.¹⁶⁵

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. In *neusiedler.com*,¹⁶⁶ for instance, the geographical nature of complainant's name helped the respondent to 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.¹⁶⁷ In *sorel.com*¹⁶⁸ a panel took the geographical nature of a name into account when it decided that the respondent did not act in bad faith.¹⁶⁹

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; Section 1 above referred to disputes that concerned such other issues.¹⁷⁰ 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”;¹⁷¹ such panels

¹⁶³ “Panels have tended to recognize that a respondent's registration of a trademark which corresponds to a disputed domain name normally will, but does not necessarily, establish respondent rights or legitimate interests in that domain name for the purposes of the second element of the UDRP.” WIPO Overview 2.0, *supra* note 177.

¹⁶⁴ *E.g.*, *ACE Ltd. v. WebMagic Ventures, LLC*, National Arbitration Forum, Claim No. FA0802001143448, April 8, 2008 (“A UDRP proceeding is an improper forum in which to seek invalidation or disregard of a duly issued federal trademark registration.” *Id.*).

¹⁶⁵ *E.g.*, *Banque Hottinguer SA v. Hottinger and Cie Groupe Financiere Hottinguer SA / Jardinier Joel, Hottinger and Cie*, WIPO, No. D2014-1340, October 14, 2014.

¹⁶⁶ *Neusiedler A.G. v. Vinayak Kulkarni*, WIPO Case No. D2000-1769, February 5, 2001, *available at* <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1769.html> (last visited Aug. 5, 2016).

¹⁶⁷ *Id.*

¹⁶⁸ *Sorel Corporation v. Domaine Sales Ltd*, National Arbitration Forum, Case No. FA 0102000096674, March 28, 2001, *available at* <http://www.adrforum.com/domaindecisions/96674.htm> (last visited Aug. 5, 2016).

¹⁶⁹ *Id.*

¹⁷⁰ *See supra* notes 104 - 121 and the accompanying text.

¹⁷¹ *Petroleo Brasileiro S.A. – Petrobras v. Ivo Lucio Santana Marcelino Da Silva*, WIPO

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turned to sources of national and/or international law to evaluate fair use.¹⁷² However, other panels have disagreed and have insisted on an autonomous definition of fair use; 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.”¹⁷³

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.¹⁷⁴ 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: recently, David Post categorically stated that “[u]nder the UDRP, one set of rules – ICANN’s – applies to all disputes, eliminating the choice of law problem.”¹⁷⁵

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. 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. UDRP case law now exists even on the issue of legitimate interests in a domain name used for a website criticizing a complainant,¹⁷⁶ although

Case No. D2014-1331, September 23, 2014.

¹⁷² *Id.*

¹⁷³ *Chelsea and Westminster Hospital NHS Foundation Trust v. Frank Redmond*, WIPO Case No. D2007-1379, November 14, 2007.

¹⁷⁴ For example, in *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. Stephen Smith and Oneandone Private Registration/ 1&1 Internet Inc.*, WIPO Case No. D2009-0062, March 25, 2009. In 2014, another panel stated that “the [UDRP] provides the legal bases for deciding complaints untrammelled by national laws.” *Retail Royalty Company and AE Direct Co LLC v. A K*, National Arbitration Forum, No. FA1409001580871, October 31, 2014.

¹⁷⁵ David G. Post, *Internet Infrastructure and IP Censorship*, IP Justice Journal: Internet Governance and Online Freedom Publication Series, Aug. 1, 2015, p. 4.

¹⁷⁶ *See, e.g., Alsace Croisieres SA v. John Livingstone / Write Place Publications Inc.*, WIPO Case No. D2013-2025, January 11, 2014 (resolving without referring to any national

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different panel views persist on how to resolve the fair use issue.¹⁷⁷

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. The 2011 WIPO Overview 2.0¹⁷⁸ states that the UDRP is “[r]ooted in generally-recognized principles of trademark law” and “the decision framework of the UDRP generally does not require [that UDRP panels] resort to concepts or jurisprudence specific to national law (other than with respect to the question of whether trademark rights exist).”¹⁷⁹ Of course one may wonder whether the case law might have developed under the strong influence of U.S. law;¹⁸⁰ if it did, then UDRP law might not in fact have developed as a fully autonomous body of law. The prevailing application 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 cases¹⁸¹ and/or the high percentage of UDRP panelists from the United States. Commentators have pointed out the uses of doctrines of U.S. law even in cases involving no U.S. parties¹⁸² as proof of the influence of U.S. law on the

law on fair use a case between a French complainant and a U.S. respondent concerning the domain name of a criticism website); Titan Enterprises (Qid) Ply Ltd v. Dale Cross / Contact Privacy Inc., WIPO Case No. 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).

¹⁷⁷ WIPO Overview of WIPO Panel Views on Selected UDRP Questions, 2d ed., WIPO, 2011, available at <http://www.wipo.int/amc/en/domains/search/overview2.0/index.html> (last visited Dec. 11, 2016) [hereafter “WIPO Overview 2.0”].

¹⁷⁸ WIPO Overview 2.0, *supra* note 177.

¹⁷⁹ *Id.*, par. 4.15.

¹⁸⁰ For an early observation of the influence of U.S. law see Helfer & Dinwoodie, *supra* note 43, 266-267; Helfer, *supra* note 82, 496. For a recent observation of the influence see LEVINE, *supra* note 151, 38-39.

¹⁸¹ 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.

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.

The statistics were calculated from WIPO Domain Name Dispute Resolution Statistics, available at <http://www.wipo.int/amc/en/domains/statistics/> (last visited Dec. 11, 2016).

¹⁸² *E.g.*, F. Hoffmann-Law Roche AG v. Alexandr Grog, WIPO Case No. D2013-0995, September 27, 2013 (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. Con Sigla AAS S.r.l. v. Jonathan Kruse, WIPO, No. D2013-

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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.¹⁸³

Given the influence of national law on the UDRP, the UDRP might be far from being geographically blind. First, panels must apply *some* national law to determine the existence of trademark rights. 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. In this respect, it is possible that territorialization has not really been a growing trend in UDRP proceedings, but geographical ties have certainly been present in the UDRP since its beginning and have not seemed to diminish.¹⁸⁴

IV. 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 III above. 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.¹⁸⁵ Based on the lessons, ICANN and the registries of the ccTLDs and the new gTLDs have sought ways to prevent or mitigate the clashes.

0276, March 15, 2013 (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).

¹⁸³ *E.g.*, RapidShare AG and Christian Schmid v. Hou Yanpeng, WIPO Case No. D2010-0893, July 28, 2010; Rakuten Kobo Inc. v. World Public Library, WIPO Case No. D2016-1708, October 17, 2016.

¹⁸⁴ U.S. law is not the only national law that affects domain name dispute resolutions. With the proliferation of domains came a proliferation of dispute resolution policies; 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). As will be discussed in Part 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.

¹⁸⁵ *See supra* note 10.

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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. 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.

This Part reviews the territorialization signs in two categories: The first 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. The second category consists of adjustments to dispute resolution policies that make the policies more geographically aware.

A. *Territorialization in Registration Eligibility Requirements*

The registries of some TLDs opted to adopt territorial restrictions in their domain name registration eligibility requirements. Typically such restrictions appear for domains that have some territorial link; some of the ccTLDs are the primary examples of this approach. Not all ccTLD registries introduced, for all domain levels, eligibility requirements that included territorial restrictions; 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.¹⁸⁶

The complexity of the registration requirements varies; for example, the

¹⁸⁶ E.g., .cr (Costa Rica), available at <https://www.nic.cr/preguntas-frecuentes/acerca-de-dominios> (last visited Dec. 19, 2016); .sv (El Salvador), available at http://www.svnet.org.sv/svnet.php?url=p_gral.php (last visited Dec. 19, 2016); HKIRC Registration Policies, v.1.0 Feb. 22, 2011, Section 3.4 ff., available at <https://www.hkirc.hk/content.jsp?&id=3&#!/6> (last visited Dec. 19, 2016); .il Registration Rules, v.1.5, July 2016, Section B; .my Supporting Documents, available at <https://www.mynic.my/en/supportingdocument.php> (last visited Dec. 19, 2016); Información Sobre los Nombres de Dominio .MX, available at https://www.registry.mx/jsf/static_content/domain/domain_faq.jsf (Last visited Dec. 19, 2016); .uk Rules. See also Alistair Payne & David Fixler, *Australia (.au)*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 153-168, at p. 155; Ho-Hyun Nahm, *The Republic of Korea (.kr)*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 757-788, at pp. 760-761.

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Domain Name Registration Service Agreement for the Algerian .dz domain states simply that domain names on the domain may be registered only by “entities established in the country either having a legal representation in the country or having document [*sic*] justifying property rights of name in Algeria.”¹⁸⁷ 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*.¹⁸⁸

Territory-based registration eligibility requirements vary for different ccTLDs. Typical requirements include one or more of the following: citizenship,¹⁸⁹ permanent residence,¹⁹⁰ and/or residence¹⁹¹ in a certain

¹⁸⁷ Domain Name Policy for the Algerian Country Code Top Level Domain .DZ, January 2012, Section 5, p. 5.

¹⁸⁸ Canadian Presence Requirements for Registrants, Version 1.3 [hereinafter “.ca Requirements”].

¹⁸⁹ .ca Requirements, Section 2(q); .hu Domain Registration Rules and Procedures, Section 1.1.1 [hereinafter “.hu Rules”]; .ie Registration Requirements, Section 1, *available at* <https://www.iedr.ie/register-a-domain/registration-requirements/> (last visited Dec. 19, 2016) [hereinafter “.ie Requirements”]; Saudi Domain Name Registration Regulation, Section 2.2 [hereinafter “.sa Regulation”]; .tn Domain Name Registration, *available at* <http://www.registre.tn/en/index.php?rub=264&srb=336> (last visited Dec. 19, 2016) [hereinafter “.tn Registration”]; The usTLD Nexus Requirements Policy, *available at* <http://www.neustar.us/the-ustld-nexus-requirements/> (last visited Dec. 19, 2016) [hereinafter “.us Policy”].

¹⁹⁰ Terms and Conditions for Domain Name Registration and Support in the .bg Zone and the Sub-zones, v.4.6, Aug. 17, 2011, Section 3, *available at* <https://www.register.bg/user/static/rules/en/index.html#2> (last visited Dec. 19, 2016) [hereinafter “.bg Terms”]; .ca Requirements, Section 2(q); .hu Rules, Section 1.1.1.; Domain Name Policy for .no, Section 5.1, *available at* <https://www.norid.no/en/regelverk/navnepolitikk#link1> (last visited Dec. 19, 2016) [hereinafter “.no Policy”]; .us Policy.

¹⁹¹ Domain Name Registration Service Agreement, June 25, 2016, Section 2.4, *available at* <https://bermudanic.bm/#/legal> (last visited Dec. 19, 2016) [hereinafter “.bm Agreement”]; EU Registration Policy, v. 8.0, Section 1; Règles d’Enregistrement des Domaines de Premier Niveau de l’Internet Correspondant aux Codes Pays du Territoire National, March 22, 2016, Section 5.1 [hereinafter “.fr Règles”]; Ordinary Registration Clause, The Gambia, *available at* <http://www.nic.gm/htmlpages/gm-policy.htm> (last visited Dec. 19, 2016) [hereinafter “.gm Clause”]; *About the Domain .id*, *available at* <https://pandi.id/en/domain/about-the-domain-id/> (last visited Dec. 19, 2016); Terms and Conditions (.ir), Appendix 1: Domain Rules, Section A.2, *available at* https://www.nic.ir/Terms_and_Conditions_ir_Appendix_1_Domain_Rules (last visited Dec. 19, 2016) [hereinafter “.ir Terms”]; .ie Requirements, Section 1; .kr The General Terms and Conditions, Articles 4 and 5, *available at* <http://krnic.or.kr/jsp/eng/domain/policy.jsp>

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country for natural persons, and incorporation,¹⁹² registration¹⁹³ and/or establishment in a certain country for entities.¹⁹⁴ 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;¹⁹⁵ 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.¹⁹⁶ 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.”¹⁹⁷ Similarly, registration on the Iranian .ir domain requires that organizations be “legally represented” in Iran.¹⁹⁸

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. 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.”¹⁹⁹ The .ir domain is open to “[o]rganizations connected with the official representations of Iran abroad.”²⁰⁰ The Irish .ie domain may be

(last visited Dec. 19, 2016); .ZA Second Level Domain General Policy, Apr. 1, 2015, Section 1.3.1. [hereinafter “.za Policy”]; .us Policy.

¹⁹² .bm Agreement, Section 2.4; .hu Rules, Section 1.1.1; .us Policy.

¹⁹³ .bg Terms, Section 3; EU Registration Policy, v. 8.0, Section 1; .hu Rules, Section 1.1.1; .ie Requirements, Section 1; Policy for Acquisition of the Right to Use Domain Names under the Top Level Domain .lv, Nov. 24, 2015, Section 3.1.1.1, *available at* <https://www.nic.lv/en/policy> (last visited Dec. 19, 2016) [hereinafter “.lv Policy”]; .no Policy, Section 5.1; .sa Regulation, Section 2.2.

¹⁹⁴ .bg Terms, Section 3; .ca Requirements, Section 2(q); EU Registration Policy, v. 8.0, Section 1; .fr Règles, Section 5.1; .gm Clause; .lv Policy, Section 3.1.1.1; .sa Regulation, Section 2.2; .za Policy, Section 1.3.1; .us Policy.

¹⁹⁵ EU Registration Policy, v. 8.0, Section 1 (Norway, Iceland, and Liechtenstein); .fr Règles, Section 5.1. *See also* .it domain name registration restrictions in Frequently Asked Questions, *available at* <http://www.nic.it/en/faq#t127n81932> (last visited Dec. 19, 2016) (Norway, Iceland, Liechtenstein, and Switzerland).

¹⁹⁶ .bg Terms, Section 3; .hu Rules, Section 1.1.1.

¹⁹⁷ .eg Rules & Policies, Registration Rules, par. 3, *available at* <http://www.egregistry.eg/Roles&Policies.html> (last visited Dec. 19, 2016) [hereinafter “.eg Rules”].

¹⁹⁸ .ir Terms, Section A.1.

¹⁹⁹ .gm Clause.

²⁰⁰ .ir Terms, Section A.3.

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used by companies not registered in Ireland who “are trading with clients in Ireland.”²⁰¹ Spain limits the eligibility for registration on its .es domain to “individuals or ... entities with interests in or ties with Spain.”²⁰²

The registration eligibility requirements do not mitigate disputes over domain names between owners of the domain names and holders of rights to identical alphanumerical 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 trademark²⁰³ without necessarily excluding an owner of a foreign trademark (who also meets the registration requirements) from registering an identical domain name. 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.²⁰⁴ Some ccTLDs have featured sunrise periods with territory-based limitations on eligibility. ICANN made sunrise periods mandatory for new gTLDs, and the process is now also complemented by ICANN’s Trademark Clearinghouse²⁰⁵ – “a global repository for trademark data.”²⁰⁶

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. By lifting their registration eligibility limitations and making their ccTLDs “open,”²⁰⁷ registries sought to attract new registrants and increase

²⁰¹ .ie Requirements, Section 1.

²⁰² Order ITC/1542/2005 of 19 May, which approved the National Plan for Internet Domain Names Under the Country Code Corresponding to Spain (“.es”), Chapter II, Section 6.

²⁰³ .ca Requirements, Section 2(q) (owners of trademarks registered in Canada may also register a .ca domain name “consisting of or including the exact word component of that registered trade-mark.” *Id.*); .ie Requirements, Section 1; .sa Regulation, Section 2.2; .tn Registration.

²⁰⁴ Trademark Clearinghouse FAQs, available at <https://newgtlds.icann.org/en/about/trademark-clearinghouse/faqs> (last visited Aug. 5, 2016). See also Forrest, *supra* note 71, pp. 10-12.

²⁰⁵ Trademark Clearinghouse, available at <https://newgtlds.icann.org/en/about/trademark-clearinghouse> (last visited Aug. 5, 2016).

²⁰⁶ *Id.*

²⁰⁷ Open ccTLDs are “ccTLDs in which there are no restrictions on the persons or entities registering in them.” ccTLD Best Practices for the Prevention and Resolution of

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the number of domain name registrations. A 2006 OECD report pointed out a noticeable “trend” at the time for the ccTLDs to liberalize their registration requirements.²⁰⁸ Registries have pursued the liberalization to increase their registration business;²⁰⁹ 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.”²¹⁰

Not all domain liberalizations have eliminated or narrowed territory-based restrictions,²¹¹ but a number of ccTLD registries did lift territory-based restrictions on registration eligibility either for all domain levels or for some domain levels – for example Belgium (in 2000),²¹² Sweden (in 2003),²¹³

Intellectual Property Disputes, v. 1, June 20, 2001, p. 2, *available at* <http://www.wipo.int/export/sites/www/amc/en/docs/bestpractices.pdf>. (last visited Jan. 26, 2017).

²⁰⁸ 2006 OECD Report, *supra* note 58, p. 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 10, pp. 3 and 106.

²⁰⁹ YOUN JUNG PARK, *THE POLITICAL ECONOMY OF COUNTRY CODE TOP LEVEL DOMAINS* 148 (2008).

²¹⁰ 2006 OECD Report, *supra* note 58, p. 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. 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). 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.” Final Report – New Top Level Domains of National Importance, Norwegian Ministry of Transport and Communications, December 2010, p. 31.

The 2006 OECD report mentioned that there were “pros and cons to liberalising requirements for registering a domain name;” 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.” It also mentioned the value of “provid[ing] assurance to consumers and companies that they are dealing with legitimate locally-based entities.” 2006 OECD Report, *supra* note 58, p. 5.

²¹¹ *E.g.*, in 2012 .cn became available to persons (it had previously been available only to entities). *See* Lian Yunze & Liu Yuping, *China (.cn)*, in *DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 687-710, at p. 692.

²¹² Park, *supra* note 209, p. 148.

²¹³ Petter Rindforth, *Sweden (.se)*, in *DOMAIN NAME LAW AND PRACTICE: AN*

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Slovenia (in 2005),²¹⁴ Portugal (in 2012),²¹⁵ Åland (in 2016),²¹⁶ and Finland (in 2016).²¹⁷ Some countries 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 chosen European countries, or with no trademark rights in France.²¹⁸

New gTLDs were delegated with significant attention to physical geography. ICANN excluded “country or territory names” from the new gTLD applications altogether;²¹⁹ applications for other “geographic names ... must [have] be[en] accompanied by documentation of support or non-objection from the relevant governments or public authorities.”²²⁰ 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

INTERNATIONAL HANDBOOK (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 875-, at p. 878.

²¹⁴ Domain Name Law and Practice, available at http://global.oup.com/booksites/content/0199278253/updates/country_overviews/slovenia (last visited Dec. 30, 2016); General Terms and Conditions for Registration of Domain Names under the .si Top-Level Domain, July 1, 2016, available at <https://www.register.si/wp-content/uploads/2016/08/general-terms.pdf> (last visited Dec. 30, 2016).

²¹⁵ FCCN Announces the Liberalization of .pt Domain Registration, Feb. 27, 2012, available at <https://www.centri.org/news/news/fccn-announces-the-liberalization-of-pt-domain-registration.html> (last visited Dec. 19, 2016).

²¹⁶ Åland liberalized its registration eligibility requirements as of September 6, 2016. See *Who Can Apply for ax-domain Name?*, available at <https://whois.ax/en/> (last visited Dec. 19, 2016).

²¹⁷ Finland liberalized its registration eligibility requirements in 2016. See *How to Get an fi-Domain Name*, Aug. 30, 2016, available at <https://www.viestintavirasto.fi/en/fidomain/howtogetanfi-domainname.html> (last visited Dec. 19, 2016).

²¹⁸ David Taylor, *France (‘.fr’)*, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 313-358, at p. 323. The pre-liberalization period of the ccTLDs that were later liberalized might be viewed as being a prolonged sunrise period.

²¹⁹ gTLD Applicant Guidebook, Version 2012-06-04, 2012, 2-13, par. 2.2.1.4.1.

²²⁰ *Id.*, 2-14, par. 2.2.1.4.2.

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selected economic and other groupings’ list.”²²¹

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. The territorially-defined restrictions on registration eligibility that exist for some of the new gTLDs that have a territorial meaning vary widely.²²² For example, a domain name registration for the .corsica domain is available to a “legal entity in Corsica, ... individuals 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.”²²³ Some link to the territory might suffice; for example, “[a]ny natural or legal person ... [with] ties to Alsace”²²⁴ may register a domain name on .alsace. The domains .berlin and .hamburg both require that the registrant have “an economic, cultural, historical, social or any other connection to the [city].”²²⁵

Sometimes other positive ties to a new gTLD territory are promoted; for example, anyone registering a .scot domain name “must be linked to the [Scottish] community ... on a linguistic, cultural, tourism, business basis, or any other activity conducive to the welfare of the worldwide Scottish community.”²²⁶ 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

²²¹ *Id.*, 2-14 – 2-15, par. 2.2.1.4.2.

²²² ICANN refers to some of these gTLDs as “geoTLDs.” On the process of evaluating which gTLDs were geographic names *see* Torsten Bettinger & Mike Rodenbaugh, *ICANN’s New gTLD Program*, in *DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK* (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 65-123, at p. 99.

An international association called GeoTLD Group AISBL aims to represent more broadly-defined geography-based TLDs. *See* About, *available at* <http://geotld.group/about/> (last visited Dec. 20, 2016).

²²³ .corsica Registration Policy, June 8, 2015, v.1, Section 1.2, *available at* https://portal.ascio.com/productdb/q.aspx?downloadFile=.CORSICA_Registration_Policy.pdf (last visited Dec. 19, 2016).

²²⁴ .alsace Registration Policy, v.2.0, Jan. 15, 2015, Section 2.1.

²²⁵ Policy for the Registration of .berlin Domain Names, Section 5.1; Policy for the Registration of .HAMBURG Domain Names, May 10, 2014, Section 5.1.

²²⁶ .scot Registration Policy, Section 2.1.

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Commerce, or on “other economic association with a presence in Kyoto.”²²⁷ 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.”²²⁸

Some new gTLDs, like the .scot domain, are based on a vision of a space devoted to the culture of a particular territory. 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 ...; or 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.”²²⁹ A similar purpose is apparent from the registration eligibility requirements for domains that focus on linguistic and cultural communities, such as the .cat (Catalan), .eus (Basque), and .gal (Galician).²³⁰

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,²³¹ .melbourne,²³² .nyc,²³³ .osaka,²³⁴ .paris,²³⁵

²²⁷ .kyoto Domain Name Registration Policies, v. 1.0, May 26, 2015, Article 4.1.

²²⁸ Registration Requirement, Section 1, *available at* <http://domains.london/wp-content/uploads/2014/04/Dot-London-Registration-Agreement.pdf> (last visited Dec. 19, 2016).

²²⁹ .bzh Information, *available at* https://www.netnames.com/assets/shared/gtld-product-sheets/bzh_external.pdf (last visited Dec. 19, 2016).

²³⁰ .cat Domain Name Registration Agreement, Section 2.2.

²³¹ .madrid Registry Agreement, Specification 12.

²³² .melbourne Registration Policy, July 11, 2014, pp. 9 – 10.

²³³ .nyc Nexus Policy, *available at* http://www.ownit.nyc/policies/nyc_nexus_policy.php (last visited Dec. 19, 2016).

²³⁴ .osaka Registry Agreement, Specification 12.

²³⁵ .paris Registration Policy, Section 2.1.1.

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.quebec,²³⁶ .rio,²³⁷ swiss,²³⁸ .sydney,²³⁹ .tirol,²⁴⁰ .wien,²⁴¹ and zuerich²⁴² all have such restrictions. But there are also other new gTLDs that have opted not to impose territorial restrictions on registration eligibility: the .koeln,²⁴³ .nagoya,²⁴⁴ .okinawa,²⁴⁵ .tokyo,²⁴⁶ .vegas,²⁴⁷ and .yokohama²⁴⁸ domains have no territory-based restrictions.²⁴⁹

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.²⁵⁰ This heightened sensitivity translates into the rules for registering some ccTLDs and some new gTLDs – both ccTLDs and new gTLDs with and without territorial meaning. Since 2012, registries have had to reserve country and certain territory names; even non-territorial TLDs must comply with this requirement.²⁵¹ For example, the .travel registry agreed not to make country

²³⁶ .quebec General Registration Policies, Section 2.

²³⁷ .rio Registration and Sunrise Policies, November 4, 2014, Section 1.

²³⁸ .swiss Registration Policy, ed. 1, Aug. 1, 2015, Section 3.2.

²³⁹ .sydney Registration Policy, November 10, 2014, Section 4.1.

²⁴⁰ General Guidelines for Setting Up and Functioning of the .tirol Top-Level Domain, Section 3.3, *available at* http://www.nic.tirol/media/3603/general-guidelines_v1_-tirol.pdf (last visited Dec. 19, 2016).

²⁴¹ General Guidelines for Setting Up and Function of the .WIEN Top-Level Domain, Section 3.3, *available at* https://www.nic.wien/wien/policies/en/20160413_general-guidelines_v5.pdf (last visited Dec. 19, 2016).

²⁴² Domain Name Registration and Use Policy for <.zuerich>, Section 2.

²⁴³ Eligibility Policy for the TLD .koeln, *available at* https://dot.koeln/dns_koeln/static/uploads/Eligibility_Policy_koeln.pdf (last visited Dec. 19, 2016).

²⁴⁴ .nagoya Domain Name Registration Policies, v. 1.1, January 30, 2014, Section 3.1.

²⁴⁵ .okinawa Domain Name Registration Policies, v. 1.0, June 6, 2014, Section 3.1.

²⁴⁶ .tokyo Domain Name Registration Policies, v. 1.0, March 17, 2014, Section 3.1.

²⁴⁷ .vegas Policies, *available at* <http://www.nic.vegas/policies/> (last visited Dec. 19, 2016).

²⁴⁸ .yokohama Domain Name Registration Policies, v. 1.0, March 17, 2014, Section 3.1.

²⁴⁹ Some new gTLDs may require that a registrant provide a local contact. *See, e.g.*, .bayern Domain Name Registration Policy, Section 3(b).

²⁵⁰ 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 71, p. 14.

²⁵¹ Registry Agreement, Specification 5 (Schedule of Reserved Names), Section 4, *available at* <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf> (last visited Dec. 20, 2016). On the controversy surrounding ICANN's preferential treatment of countries' government interests *see* Forrest, *supra* note 71, pp. 7-8.

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names available for registration as second-level domain names.²⁵² Some TLDs have reserved territorial domain names for registration by particular registrants, such as local authorities and communal associations,²⁵³ or have allowed these registrations only with the consent of local authorities.²⁵⁴ 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,²⁵⁵ the .pt registry does not allow registrations of certain geographical names,²⁵⁶ and the registry of the domain .bio reserves domain names that are EU-protected geographical indications.²⁵⁷

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.²⁵⁸ 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

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* (Torsten Bettinger & Allegra Waddell eds., 2d ed., 2015), pp. 131-138, at pp. 135-136.

²⁵² .travel Registry Policies, Section 2.2.2., Sept. 14, 2010.

²⁵³ *E.g.*, .bayern Domain Name Registration Policy, Section 7; .cy Domain Name Registration Agreement, Section 5.7, *available at* <http://www.nic.cy/rulesreg.htm> (last visited Dec. 19, 2016).

²⁵⁴ General Terms & Conditions for the Registration of .gd Domain Names, Aug. 15, 2013, Section 3.6, *available at* <http://www.nic.gd/terms.php> (last visited Dec. 19, 2016).

²⁵⁵ .eg Rules, par. 5.

²⁵⁶ .pt Domain Name Registration Rules, June 16, 2014, Article 9(1)(f) ("except for registrations in the .com.pt second level domain").

²⁵⁷ .bio Domain Name Policy, V2.0, May 30, 2014, Section 5, p. 6, *available at* <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 visited Dec. 19, 2016).

²⁵⁸ For the history and the current state of the involvement of the Governmental Advisory Committee ("GAC") in the ICANN's work on rules for new gTLDs *see, e.g.*, GAC Geonames WG – Working Papers, March 8, 2016, pp. 2-4, *available at* <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> (last visited Dec. 20, 2016). *See also* A. Michael Froomkin, *When We Say USTM, We Mean It!*, 41 HOUS. L. REV. 862-865 (2004). On countries' earlier interests in national "branding" in the context of the DNS *see ibid.*

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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.²⁵⁹

B. Territorialization in Dispute Resolution

The analysis of territorialization should not end with registration eligibility requirements or protection for geographical names in the delegation and registration processes. 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. A preference may be given through either a domain name registration agreement or a domain dispute resolution policy. 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.²⁶⁰ It is also a route that can eliminate clashes between rights to identical alphanumerical designations that exist under the laws of different countries.

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.²⁶¹ While the UDRP is silent on the choice of

²⁵⁹ Scott Gerien & Christopher Passarelli, *Challenges for Geographical Indications (GIs) in the Context of the ICANN New Generic Top-Level Domains (gTLDs)*, Organization for an International Geographical Indications Network, 2016, p. 38 (“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.” *Id.*).

²⁶⁰ See a recommendation by the AIPPI (the International Association for the Protection of Intellectual Property) in *Issues of Co-existence of Trademarks and Domain Names: Public Versus Private International Registration Systems*, AIPPI, Question 173, Yearbook 2003/I, pp. 395-396, 2003, available at <http://aippi.org/wp-content/uploads/committees/173/RS173English.pdf> (last visited Jan. 26, 2017) (“The ccTLD registration systems should not discriminate among domain name registrants based on their nationality.” *Id.*, 2.).

²⁶¹ *E.g.*, Regulamento do Sistema Administrativo de Conflitos de Internet Relativos a Nomes de Domínios sob “.br” – Denominado SACI-Adm, Article 16, available at <http://registro.br/dominio/saci-adm-regulamento.html> (last visited Dec. 22, 2016) [hereinafter “.br Regulamento”]; .cu Normas para el Centro Cubano de Información de Red, Article 11.1, available at http://www.nic.cu/docum_det.php?doc_id=1&opt=1 (last visited Dec. 20, 2016); DK Hostmaster’s General Conditions for the Assignment, Registration and

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applicable law,²⁶² some other dispute resolution policies do include choice-of-law provisions. 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. The choice of the law of the territory as the law applicable to domain name disputes is strong evidence of the interests.²⁶³

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. 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.²⁶⁴ For example, the .ie dispute resolution policy provides protection

Administration of .dk Domain Names, v. 08, Jan. 31, 2016, Section 14, *available at* <https://www.dk-hostmaster.dk/en/general-conditions#14> (last visited Dec. 20, 2016); .eu Domain Name Registration Terms and Conditions, v. 8.0, Section 14, *available at* https://eurid.eu/media/filer_public/e9/ab/e9ab41de-16c1-41fa-b3aa-d81b6b0481df/terms_and_conditions_en.pdf (last visited Dec. 20, 2016); DENIC Domain Terms and Conditions, par. 9, <https://www.denic.de/en/domain-terms-and-conditions/> (last visited Dec. 20, 2016); Dispute Resolution Policy for Internet Domain Names (.ir), Section 1, *available at* https://www.nic.ir/Dispute_Resolution_Policy_ir (last visited Dec. 20, 2016); .il Registration Rules, v.1.5, July 2016, Section 30; Rules for the Registration of Domain Names under Kuwait Top Level Domain Name – kwTLD, Section 18, *available at* <http://www.kw/rules.asp> (last visited Dec. 20, 2016).

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. Some 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.*, .tm Terms and Conditions, Section 22, *available at* <http://www.nic.tm/terms.html> (last visited Dec. 20, 2016). *See, e.g.*, DeJohn v. The .TV Corp. Intern., 245 F.Supp.2d 913 (N.D. Ill. 2003).

²⁶² *See supra* Parts II and III.

²⁶³ 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. *E.g.*, .ag Registration Agreement, Section 22, *available at* <http://www.nic.ag/agreement.htm> (last visited Dec. 20, 2016) (selecting the laws of the United States, California, and New York). The Terms and Conditions for the .eu domain refer to Belgian law. .eu Domain Name Registration Terms and Conditions, v. 8.0, Section 14, *available at* https://eurid.eu/media/filer_public/e9/ab/e9ab41de-16c1-41fa-b3aa-d81b6b0481df/terms_and_conditions_en.pdf (last visited Dec. 20, 2016).

²⁶⁴ *E.g.*, .br Regulamento, Article 3(A); Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions

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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.²⁶⁵ An owner of a protected identifier may challenge a domain name that is identical or misleadingly similar to the protected identifier.²⁶⁶

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. If, for example, in *epiphoneamp.com*, 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 trademark in China.²⁶⁷ Under U.S. law, the panel would have given preference to the U.S.-registered trademark over the Chinese-registered trademark.

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.²⁶⁸ In the *champagne.ie* case,²⁶⁹ a WIPO panel recognized “Champagne” as a

of the .eu Top Level Domain and the principles governing registration, Article 21(1); Terms and Conditions of Registration Applicable for the Top-Level Domain .se, May 27, 2015, Section 7.2, *available at* https://www.iis.se/docs/Registreringsvillkor_eng.pdf (last visited Dec. 22, 2016) [hereinafter “.se Terms”].

²⁶⁵ .ie Dispute Resolution Policy, Section 1.3, *available at* <https://www.iedr.ie/dispute-resolution/> (last visited Dec. 20, 2016).

²⁶⁶ *Id.*, Section 1.1.1. *See also, e.g.*, Règlement sur la Procédure Alternative de Résolution de Litiges di Domaine .ma, June 10, 2015, Section 2(a)(i), *available at* <http://www.wipo.int/amc/fr/domains/rules/cctld/ma/newrules.html> (last visited Dec. 20, 2016); 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”), Article 2, *available at* <http://www.dominios.es/dominios/sites/dominios/files/1197031617037.pdf> (last visited Dec. 20, 2016).

²⁶⁷ *See supra* notes 53 – 56 for a discussion of the *epiphoneamp.com* case.

²⁶⁸ *E.g.*, .se Terms, Section 7.2. An extension to other rights will not be a sign of territorialization unless preferential treatment is provided for rights registered, granted, or protected in a given country. *See, e.g., E.g.*, .cz Pravidla Alternativního Řešení Sporů, May 15, 2016, Article 2.3, *available at* <https://www.nic.cz/files/nic/PravidlaCZod20160515.pdf> (last visited Dec. 12, 2016).

²⁶⁹ Comité interprofessionnel du Vin de Champagne (CIVC) v. Richard Doyle, WIPO

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“protected identifier” that enjoys protection under the .ie Dispute Resolution Policy,²⁷⁰ 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).²⁷¹ 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].”²⁷²

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. 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 particular country’s rights. A choice-of-venue provision for subsequent court proceedings may be employed to control for this variable.²⁷³

Case No. DIE2007-0005, Feb. 5, 2008.

²⁷⁰ *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.*

²⁷¹ *Id.*

²⁷² Comité Interprofessionnel du vin de Champagne (CIVC) v. Steven Vickers, WIPO Case No. DCO2011-0026, June 21, 2011. 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.*

²⁷³ *E.g.*, .cu Normas para el Centro Cubano de Información de Red, Article 11.1, available at http://www.nic.cu/docum_det.php?doc_id=1&opt=1 (last visited Dec. 20, 2016); DK Hostmaster’s General Conditions for the Assignment, Registration and Administration of .dk Domain Names, Section 14, available at <https://www.dk-hostmaster.dk/en/general-conditions#14> (last visited Dec. 20, 2016); eu Domain Name Registration Terms and Conditions, v. 8.0, Section 14, available at https://eurid.eu/media/filer_public/e9/ab/e9ab41de-16c1-41fa-b3aa-d81b6b0481df/terms_and_conditions_en.pdf (last visited Dec. 20, 2016); Dispute Resolution Policy for Internet Domain Names (.ir), Section 4(k), available at https://www.nic.ir/Dispute_Resolution_Policy_ir (last visited Dec. 20, 2016); .il Registration Rules, v.1.5, July 2016, Section 30; Rules for the Registration of Domain Names under Kuwait Top Level Domain Name – kwTLD, Section 18, available at <http://www.kw/rules.asp> (last visited Dec. 20, 2016); Rules for the usTLD Dispute

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V. DOMAIN NAMES, TERRITORIALIZATION, AND USER CONFIDENCE

As Parts III and IV have discussed, a trend toward territorialization exists in the DNS. 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.²⁷⁴ 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.²⁷⁵ U.S. law has assisted in shaping UDRP case law and continues to influence UDRP law to some extent.²⁷⁶

Even stronger signs of territorialization are apparent in ccTLDs and new gTLDs that have a territorial link.²⁷⁷ First, the registration requirements and delegation rules for some domains are territorially defined, and the requirements and rules include territorial restrictions.²⁷⁸ Second, territorial preferences appear in dispute resolution policies for some ccTLDs and some

Resolution Policy, Section 1, *available at* <http://www.neustar.us/ustld-dispute-resolution-policy/> (last visited Dec. 20, 2016).

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 ... any other activity which is illegal under Afghan law.” .af Domain Policy, Section 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.” .fj Registration Agreement, Aug. 8, 2002, Section 2, *available at* <http://domains.fj/public/regagreement.php> (last visited Dec. 19, 2016). 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.” .ir Terms, Section A.4.

²⁷⁴ See *supra* Part III.

²⁷⁵ See *supra* Part III.B.

²⁷⁶ See *supra* Part III.C.

²⁷⁷ On governments’ growing interest in the DNS in general see Final Report – New Top Level Domains of National Importance, Norwegian Ministry of Transport and Communications, December 2010, p. 20 (“There is 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.” *Id.*).

²⁷⁸ See *supra* Part IV.A.

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new gTLDs, which policies give preference to rights that exist under particular national laws. 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.²⁷⁹

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.²⁸⁰ The increasing influence of governments on the design of the DNS has been criticized;²⁸¹ 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 geographic names.²⁸² 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.²⁸³

Territorialization might be pushing the DNS toward a stronger association between (a) territorially-linked domains and domain names, and (b) actual physical geography. Market forces within the DNS might militate against territorial limitations,²⁸⁴ and it is questionable whether

²⁷⁹ See *supra* Part IV.B.

²⁸⁰ E.g., Principles and Guidelines for Delegation and Administration of Country Code Top Level Domains, ICANN Governmental Advisory Committee, 2005, section 1.2. (“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.” *Id.*); GAC Principles Regarding New gTLDs, ICANN GAC, March 28, 2007, par. 2.1. (“The new gTLDs should respect ... [t]he sensitivities regarding terms with national, cultural, geographic and religious significance.” *Id.*); WSIS Tunis Agenda for the Information Society, par. 63 (“Countries should not be involved in decisions regarding another country’s country code top level domain...” *Id.*).

²⁸¹ David G. Post, *Internet Infrastructure and IP Censorship*, IP Justice Journal: Internet Governance and Online Freedom Publication Series, Aug. 1, 2015, pp. 8-10.

²⁸² Forrest, *supra* note 71, p. 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.” *Id.*).

²⁸³ Cf. Postel, *supra* note 1, p. 5 (“The IANA is not in the business of deciding what is and what is not a country.” *Id.*).

²⁸⁴ “On pros and cons to liberalising requirements for registering a domain name” see 2006 OECD Report, *supra* note 58, p. 5. The Report noted the possible higher costs of administering restricted domain systems, but also the possible positive effects of “curbing cyber-squatting, online fraud and intellectual property violations.” *Id.* The Report also

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territorialization can turn back the clock on user perception of domain names.²⁸⁵ Judge Kozinski in a 2010 decision referred to a “sensible agnosticism”²⁸⁶ 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.”²⁸⁷ Kozinski’s statement applies to domain names that include trademarked words²⁸⁸ and also to domains and domain names that include geographic terms (*e.g.*, .paris) or otherwise refer to physical geography (*e.g.*, .fr).

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 in territorial fidelity in the DNS) might have increased the value of territorially-linked domains. 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 a development of user confidence in a territorial fidelity in the DNS. Although domains and domain names might play a role in search engine algorithms,²⁸⁹ 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

mentioned the value of “provid[ing] assurance to consumers and companies that they are dealing with legitimate locally-based entities.” *Id.*

²⁸⁵ For calls to use national ccTLDs to create or reinforce a nation’s brand *see, e.g.*, A. Michael Froomkin, *When We Say USTM, We Mean It!*, 41 HOUS. L. REV. 839, 843-844 (2004).

²⁸⁶ *Supra* note 27.

²⁸⁷ *Id.*

²⁸⁸ Judge Kozinski opined that users’ expectations might be different in cases of domain names of the “trademark.com” type. *Id.*

²⁸⁹ For the uncertainty about the actual weight given to domains and domain names in search engine algorithms *see supra*.

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user traffic to specific websites,²⁹⁰ 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 the territorial fidelity of the DNS might be irreparably lost as far as the perfect identity approach²⁹¹ 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 are still 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.²⁹² 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.²⁹³ Like any new physical neighborhood, the cyberspace extension 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.²⁹⁴

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

²⁹⁰ For example, the Clark County School District has been using “teach.vegas” heavily in its campaign to attract teachers to Las Vegas, NV. *See* teach.vegas, redirected to <http://teachvegas.ccsd.net/> (last visited Jan. 5, 2017).

²⁹¹ On the “perfect identity” approach *see supra* Part I.

²⁹² On the “extension of the physical space” approach *see supra* Part I.

²⁹³ Daniel Rothberg, *Marketing Campaign Aims to Boost Lagging Dot Vegas Registration*, Las Vegas Sun, July 20, 2015, available at <https://lasvegassun.com/news/2015/jul/20/dot-vegas-15000-websites-use-domain-local/> (last visited Jan. 26, 2017).

²⁹⁴ Simon Higgs, *Top Level Domain Classification and Categorization*, Internet-Draft, July 1996, point 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.” *Id.*).

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poisoning, and registrar hijacking.²⁹⁵ On the list of priorities, the authenticity of origin must be placed higher today than the territorial fidelity of the DNS.

CONCLUSIONS

Territorialization of the internet has been both glorified and vilified. The majority of users appear to enjoy the convenience of localized advertising, localized content, and location-based services. 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. The increased use of circumvention of geoblocking suggests that users are displeased with these new territorial limits. While geoblocking allows content providers to comply with their territorially-defined rights and obligations, it undermines the global nature of the internet.

Just as the territorialization of the internet in general has positive and negative aspects, so has the territorialization of the DNS. 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. 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, meaning that a domain is cultivated as a brand that users can identify as a cyberspace extension of a known physical space.

Critics see negative aspects of DNS territorialization in the increased influence of governments on the internet. 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. Government power over domains may assist governments in enforcing rights and decisions on the internet to some extent because

²⁹⁵ C. Aishwarya, M. S. Sannidhan & Balaji Rajendran, *DNS Security: Need and Role in the Context of Cloud Computing*, 3rd International Conference on Eco-Friendly Computing and Communication Systems, 2014, pp. 230-231.

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governments might penalize non-compliance with takedowns of domain names.

That a government's purview now includes the internet no longer seems to be in question. 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. 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 cross the line of internationally-recognized norms, some action other than a de-territorialization of the DNS should be employed to remedy the situation.

Recent developments in the DNS have not yet been discussed in the context of the general trend toward territorialization on the internet. The reason might be the understandable focus in the literature on the most-highly coveted gTLDs and the UDRP, in which any signs of territorialization are non-existent and not readily apparent, respectively. 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. A number of factors make predictions of the future of domain names difficult: 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. 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. 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.

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