The Territorialization of the Internet Domain Name System

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“Territorialization”

= the action of territorializing, i.e. “mak[ing] (something) territorial; to organize on a territorial basis; to associate with or restrict to a particular territory or district”

Are Domain Names Still Relevant?

- Effect of search engines on the Domain Name System ("DNS")
- Statistics of domain name disputes
- New top-level domains
The Territorialization of the DNS

(1) The Process of the Territorialization of the Internet

(2) The DNS and Its Territorialization
   a) Choice of Law in UDRP
   b) Registration Eligibility
   c) Dispute Resolution

(3) The Effects of the Territorialization of the DNS
The Territorialization of the Internet

- A number of developments suggest a territorialization trend on the internet:
  - The increasing use of geolocation to deliver location-based content that is tailored to a user’s physical location
  - The popularity among users of location-based services
  - The increasing use of geoblocking to limit the access of users to content, based on a user’s physical location
  - Attempts by some governments to partition off their national space on the internet
The Internet Domain Name System ("DNS")

- The .com, .edu, and .org original top-level domains were created without being defined by or limited by geography.
  - But cf. .gov, .mil, and later also .edu
- The Uniform Dispute Resolution Policy ("UDRP") was adopted in 1999 with no choice-of-law provision.
- Claims to domain names clashed with claims to geographical terms.
  - E.g., portofhelsinki.com
- Clashes emerged that involved conflicts between (1) domain names and (2) national laws and nationally-protected rights.
  - Global rights to domain names v. national rights to trademarks, geographical indications
  - E.g., barcelona.com, epiphoneamps.com
The Territorialization of the DNS (I)

- **Choice of law** was always present in UDRP cases, to some extent.
  - Disagreements exist among UDRP panelists about the role, if any, that **national law** should play in UDRP cases.
  - National law is applied to determine the existence, validity, and ownership of trademarks.
    - Barcelona.com showed that choice of law does matter in UDRP cases.
  - Some panels have applied national law to determine other issues in UDRP cases.
    - E.g., non-commercial fair uses of trademarks.
  - The methods through which UDRP panels select applicable national law have varied.
The Territorialization of the DNS (II)

- The registries for some top-level domains have adopted **territory based registration eligibility requirements**.
  - The requirements are based on factors such as nationality, residence, place of incorporation, place of business, trademark ownership, or other types of association with the territory to which the domain is linked.
    - E.g., .ca (Canada), .dz (Algeria), .eu (European Union), .fr (France), .us (United States)
  - Some registries did eventually lift some of their territory-based registration eligibility requirements.
    - E.g., .se (Sweden), .si (Slovenia), .pt (Portugal), .fr (France – partially)
  - But new top-level domains have appeared that impose territory-based registration eligibility requirements.
    - E.g., .corsica, .kyoto, .osaka, .paris, .london, .scot.
The Territorialization of the DNS (III)

- The registries for some top-level domains have adapted the text of the UDRP or have adopted a different dispute resolution policy to give **preference to national or local rights**.
  - Listing preferred national rights
    - E.g., .br (Brazil), .eu (European Union), .ie (Ireland), .se (Sweden)
  - Listing applicable law
    - E.g., .de (Germany), .dk (Denmark), .eu (European Union)
The Effects of Territorialization on the DNS

• It is unlikely that users will develop a general expectation that the DNS is territorially-linked: (1) Historically, users could not rely on all domains being territorially-linked; and (2) not all new top-level domains are territorialized.

• Nevertheless, an opportunity exists to develop on the internet an extension to an existing physical space and benefit from the goodwill of that physical space (to treat an internet space as a complement of the physical territory).
  ○ E.g., the Estonian e-residency project
  ○ E.g., top-level domains such as .kyoto, .paris, .vegas

• There is likely to be value for a domain in developing a strong reputation for territorial fidelity, particularly if it is coupled with a safeguard of the authenticity of the origin of domain names.
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The Internet and Physical Geography

• Three approaches to the relationship between the internet and physical geography:
  
  ○ Indifference
    • E.g., a “cloud”
  
  ○ Perfect identity
    • E.g., .ca, .eu, .paris, .kyoto
  
  ○ Complement of the physical world
    • E.g., Estonian e-residency project, .vegas