Territorialization of the Internet Domain Name System

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Territorialization of the Internet
Domain Name System

Marketa Trimble*

Abstract

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

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

TABLE OF CONTENTS

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

The internet Domain Name System (DNS)—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) has administered the DNS with special rules that were for the most part originally intended to operate independently of national governments and also in large part independently of national laws. The rules were supposed to represent the ideal that early commentators and activists promoted for governance of the internet—governance of a new space that would be independent from existing countries and subject to a new type of rulemaking. 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.

Territorialization of the internet is a phenomenon that arises from linking

2. See infra Part II.
5. See Barlow, supra note 4; Johnson & Post, supra note 4.
6. See infra Part IV.
7. See infra Parts IV–VI.
the internet to physical geography. Territorialization of the internet seems to be growing, 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 locations. 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

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

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

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

11. See Daniel Sui, Understanding Locational-Based Services: Core Technologies, Key Applications and Major Concerns, in HANDBOOK ON GEOGRAPHIES OF TECHNOLOGY 85, 85 (Barney Warfd., 2017) ("Location-based services (LBS) generally refers to all the information services that exploit the ability of technology to know where objects or people are located, and to modify the information it presents accordingly.").


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

Territorialization of the internet seems antithetical to the original concept of the internet as a distributed network lacking a single point of control; the absence of centralized control implies that data should flow freely on the network—that access to data should not be limited in any way based on physical geography. 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 driven by the increasing use of cellular devices for Internet access, and cellular networks are another place with a rich history of location-based services.


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


17. See id.

18. See infra Part III.

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


21. See infra notes 80–82 and accompanying text.
irreversible, will mean for the DNS in the future.\textsuperscript{22}

This article begins in Part II by discussing different approaches to the relationship between internet space and the physical world; the discussion of the approaches introduces terminology and a conceptual framework that reappear throughout the article.\textsuperscript{23} Part III discusses the geographical indifference\textsuperscript{24}—or the lack of geographical awareness—with which the DNS was originally designed.\textsuperscript{25} The geographical indifference led to clashes between global rights to domain names on the one hand and territorially-limited rights to alphanumerical designations granted or recognized by national law and governments on the other hand.\textsuperscript{26} Nevertheless, the geographical indifference was never absolute, and Part IV identifies the elements of geographical awareness in the DNS by analyzing the DNS’s geographical ties that are apparent in domain name dispute resolution, particularly in the choice of applicable law.\textsuperscript{27} Part V seeks indications in recent DNS history and in current developments of the increasing territorialization that is apparent on the internet; the Part reviews rules for various types of top-level domains—rules for both domain name registration and dispute resolution.\textsuperscript{28} Part VI contemplates the future of the DNS in light of the trend towards territorialization and discusses how territorialization might assist in increasing user confidence in the DNS.\textsuperscript{29}

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

\begin{itemize}
\item \textsuperscript{22} See infra Part VI.
\item \textsuperscript{23} See infra Part II.
\item \textsuperscript{24} See Georg Jacobs, Internet Specific Collisions of Trade Marks in the Domain Name System—An Economic Analysis Based on US Law, 37(2) IIC 156, 157 (2006) (referring to the “indifference” of the DNS as to a trademark’s “geographical or product-related scope”).
\item \textsuperscript{25} See infra Part III.
\item \textsuperscript{27} See infra Part IV.
\item \textsuperscript{28} See infra Part V.
\item \textsuperscript{29} See infra Part VI.
\item \textsuperscript{30} See infra Part V. The law “for” the internet is the law that governs the internet itself as a
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 (the percentage of direct traffic) is difficult to measure; the widespread use of bots 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), perhaps it is reasonable to assume that domain names will maintain some value for some time. High-profile disputes evidence the fact that domains

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


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


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

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

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

II. 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. 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.

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


38. See infra text accompanying notes 39–57.

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

40. See Johnson & Post, supra note 39.


42. See Barlow, supra note 4.
Territorialization of the Internet

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 project illustrates this approach: the project enables anyone to apply to become an online “resident” of Estonia without actually physically residing there. Cyberspace thus creates a cyber extension to Estonian territory. Similarly, in the domain name space, the top-level domain .vegas 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. 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.

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

43. See Graham, supra note 13. “Content is becoming unfixed from its containers, but re-fixed to locations. Ever more information is augmenting places, and ever more places are becoming augmented.” Id. at 45.
45. Id. (“The Republic of Estonia is the first country to offer e-Residency, a government issued digital identity that empowers entrepreneurs around the world to set up and run a location-independent business.”).
46. See id.
48. See id. (“Unlike other city or geographic top level domains, there are no restrictions to registration.”).
49. See infra Part V. Eric Goldman points out that the word “Vegas” might serve as a metonym in this context. Email from Eric Goldman (Dec. 25, 2017) (on file with the author).
51. See id. at 638–39.
from jurisdictions in which the providers’ games are illegal;\footnote{52} licensees of copyrighted content employ geoblocking to limit access to the content to users connecting from the territory for which the licensees hold licenses.\footnote{53} Geolocation technologies,\footnote{54} with their improving reliability and increasing granularity, make these types of territorial associations and delineations increasingly easier, cheaper, and more precise.\footnote{55} This third approach is also apparent in the territorial restrictions that some top-level domain registries impose on eligibility for registration of domain names on domains that they control; for example, the registries\footnote{56} of the .ca, .eu, and .paris top-level domains require that registrants originate from, or be associated with, the territory that the top-level domains represent, to match the territory that the top-level domains represent.\footnote{57}

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

\footnote{52}{See Marketa Trimble, Proposal for an International Convention on Online Gambling, in \textit{Regulating Internet Gaming: Challenges and Opportunities}, 353, 352–88 (Ngai Pindell & Anthony Cabot eds., 2013).}
\footnote{53}{See Trimble, supra note 14, at 49.}
\footnote{54}{See Muir & Van Oorschot, supra note 14 (discussing geolocation technologies).}
\footnote{55}{See id.}
\footnote{56}{See infra note 72 (discussing “registries”).}
\footnote{57}{See infra Section V.A (discussing the domains and their registration eligibility requirements).}
\footnote{58}{See infra Section V.A.}
\footnote{59}{See, e.g., Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1179 (9th Cir. 2010) (“Outside the special case of trademark.com, or domains that actively claim affiliation with the trademark holder, consumers don’t form any firm expectations about the sponsorship of a website until they’ve seen the landing page—if then. This is sensible agnosticism, not consumer confusion.”).}
businesses.\textsuperscript{61}

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

ICANN rules permit domain registry operators (“registries”)\textsuperscript{69} to choose their own approach to territorial association; this freedom applies to all top-

\begin{itemize}
\item \textsuperscript{61} See id.
\item \textsuperscript{62} See infra notes 66–68.
\item \textsuperscript{63} See Barbara A. Solomon, Domain Name Disputes: New Developments and Open Issues, 91 TRADEMARK REP. 833, 834–35 (2001).
\item \textsuperscript{64} Country Codes—ISO 3166, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, http://www.iso.org/iso/country_codes (last visited Apr. 10, 2018).
\item \textsuperscript{65} See supra note 63 and accompanying text.
\item \textsuperscript{66} See Matthew Edward Searing, “What’s in a Domain Name?” A Critical Analysis of the National and International Impact on Domain Name Cybersquatting, 40 WASHBURN L.J. 110, 113–14 n.31 (2000).
\item \textsuperscript{67} See infra note 68.
\item \textsuperscript{68} See Right Now, SERMERSOOQ.GL, https://sermersooq.gl/kl/ (last visited Apr. 10, 2018) (Sermersooq is the municipality in which Nuuk is located).
\item \textsuperscript{69} See Welcome Registry Operators, ICANN, https://www.icann.org/resources/pages/registries/registries-en (last visited Apr. 10, 2018). Registries are responsible for operating top-level domains. Id. The responsibility for operating the domains is delegated to the operators by ICANN. Id. While the term “registry” is commonly used as a shortened term for registry operators, a “registry” is technically “authoritative, master database of all domain names registered in each Top Level Domain,” which are operated by registry operators. Glossary, ICANN, https://www.icann.org/resources/pages/glossary-2014-02-03-en# (last visited Apr. 10, 2018); see also Torsten Bettinger & Volker Greimann, ICANN’s Agreements with Registries and Registrars, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 26–28 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015).
\end{itemize}
level domain registries, including registries of country-code top-level domains ("ccTLDs") 70 and new generic top-level domains ("new gTLDs"), 71 even if the domains refer to a place or a territory. 72 Some registries of territorially-linked domains have leaned toward the second type of approach mentioned above and have created new add-on spaces for the physical space that a domain references. 73 Some of these new spaces clearly benefit from an association with a physical space, such as .vegas with Las Vegas; the Las Vegas brand, regardless of where the brand is used, may attract registrants to the domain. 74 Other domains thrive even though they are completely disassociated from their territorial link; the .tv domain is successful because of the coincidental identity of Tuvalu’s country code with the abbreviation for television. 75 Other registries, such as .ca, .eu, and .paris, adopted the third approach and guard the association between domains and the physical territories that the domains represent. 76

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


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

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


76. See infra Section V.A.
III. THE GEOGRAPHICAL INDIFFERENCE OF THE DOMAIN NAME SYSTEM

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

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), which

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78. See id. These domains were followed by .net and .int, with .arpa maintained as the original domain of the internet’s predecessor, the Arpanet. See id.; Internet History of the 1980s, COMPUTER HIST. MUSEUM, http://www.computerhistory.org/intemethistory/1980s/ (last visited Apr. 10, 2018).
79. See Educause Customer Service Agreement, EDUCAUSE, https://net.educause.edu/FAQ/DisplayCSA (last visited Apr. 10, 2018). The .edu registration eligibility requirements have changed; currently, “[w]ith the exception of Grandfathered Institutions, only U.S. postsecondary institutions that are institutionally accredited by an agency on the U.S. Department of Education’s list of Nationally Recognized Accrediting Agencies may obtain an Internet name in the .edu domain.” Id. For an example of a grandfathered institution see CENTER FOR INTERNATIONAL INTELLECTUAL PROPERTY STUDIES, UNIVERSITE DE STRASBOURG, http://www.ceipi.edu/ (last visited Apr. 10, 2018).
85. See infra notes 89–95 and accompanying text.
ICANN created to govern disputes between domain name registrants (“respondents”) and opponents of domain name registrations (“complainants”), disputes are decided by providers that are established in centers that are not necessarily linked to the location of the respondents, complainants, registries, or registrars. The UDRP addresses the classical cybersquatting scenario and allows a complainant with a trademark or service mark (“trademark”) to file a complaint against the registrant of a domain name that is identical or confusingly similar to that trademark. 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.

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, granted or recognized by the national laws of individual countries and also are, with some exceptions, protected only within the territory for which they were granted or recognized. It is possible that a designation, such as a trademark, could be protected in multiple

88. See supra note 69 (defining “registry”).
89. See Glossary, supra note 69. “Registrars” are entities that register domain names. Id.; see also Bettinger & Greimann, supra note 69, at 26–30.
90. For simplification, this article uses “trademark” in this context for both trademark and service marks.
91. See UDRP, supra note 86.
92. See infra Section IV.B. (further discussing choice of law).
93. See infra notes 94–99.
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, 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 alphanumeric 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 alphanumeric designation.

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

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.

101. See id.
102. See id. Under the UDRP, the complainant can choose to file a complaint with any ICANN-approved dispute-resolution provider. See UDRP, supra note 86, at 4(e); see also List of Approved Dispute Resolution Service Providers, ICANN, https://www.icann.org/resources/pages/providers-6d-2012-02-25-en (last visited Apr. 10, 2018).
104. See Gibson Brands, Inc., Claim No. FA1501001602037.
105. See id. It appears that even if a U.S. court were to review the case under the anti-cybersquatting provisions of the Lanham Act, the complainant would lose in the court as well if the court accepted the panel’s finding—or agreed with the panel—on the lack of respondent’s bad faith. See 15 U.S.C. § 1125(d)(1)(A) (2012). Under the Lanham Act, the owner of a mark must show both that the domain name is confusingly similar to the distinctive mark of the trademark owner (or identical, confusingly similar, or dilutive of a famous mark) and that the respondent had “a bad faith intent to profit from that mark.” Id.; see infra Section IV.A. (discussing the possibility of filing a suit in a court after a UDRP proceeding). Not all UDRP panels would necessarily decide the way the panel decided in epiphoneamps.com. See Xbridge Ltd. v. Marchex Sales, Inc., WIPO, Case No. D2010-2069 (Mar. 1, 2001), http://www.wipo.int/amc/en/domains/search/text.jsp?case=d2010-2069 (The panel recognized that paragraph 2 of the UDRP “could be regarded as creating or reinforcing an obligation on a
Disputes over domain names continue to occur, 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, new gTLDs, and internationalized domain names (IDNs). 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 (particularly on the .com domain) continues to appear crowded because trademark owners and other prospective domain name registrants still turn to registrant to conduct some form of due diligence in order to determine whether the domain name at issue infringes any third party rights). The UDRP requires that a registrant “determine whether [the registrant’s] domain name registration infringes or violates [any third party] rights.” UDRP, supra note 86, ¶ 2. But cf. Anomaly Action Sports S.R.L. Con Sigla AAS S.r.l. v. Kruse, WIPO, Case No. D2013-0276 (Mar. 15, 2013), http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0276 (pointing out that “the doctrine of constructive knowledge is one that now most UDRP panels have declined to recognise as forming part of the UDRP”).

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

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


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

110. See id.
the general purpose domains for the most coveted domain names.111 The DNS, comprising a limited number of preferred domains, would seem to be a useful natural catalyst—a potentially viable mechanism for reducing the number of identical trademarks (at least word trademarks) globally.112 With a limited number of identical alphanumerical designations available as domain names on the highly-valued domains,113 duplicative trademarks might slowly disappear because prospective trademark owners should prefer to adopt unique trademarks because of the limited availability of domain names, particularly domain names on the highly-valued gTLDs.114 However, not all trademarks are born in sterile laboratory conditions; more considerations affect the selection and adoption of a mark than a rational calculation based on a diligent ex-ante search and clearing of a mark. A change in the way search engines treat domain names could relieve overcrowding of the coveted domain space; if the use of search engines is the predominant method of reaching websites,115 pressure to obtain a coveted domain name could decrease if search engine algorithms give negligible weight to domain names or if search engines provide preferential treatment to domain names on the top-level domains other than the gTLDs that are most highly valued at present.116

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

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

113. See supra note 111.

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

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

In addition to trademark rights, other territorially-delineated rights to alphanumerical designations pose challenges in domain name disputes: names of places or geographical areas might be protected as geographical indications when the names are linked to particular goods, and the domain names using those geographical names may clash with the geographical indications. 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, in France and throughout the rest of the European Union (EU) through EU law, and in some additional countries because of international agreements. 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.

117. See infra note 118 and accompanying text.


121. See Comité Interprofessionnel du vin de Champagne v. Vickers, WIPO, Case No. DCO20111-
The 2001 Report of the Second WIPO Internet Domain Name Process 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.

The 2001 Report also acknowledged clashes between domain names and geographical names that are not geographical indications. Early on the question arose whether administrative agencies associated with a place or territory should have preferential rights to domain names that consist of the geographical names of the place or territory. For example, in the portofhelsinki.com case, the panel rejected the notion that the administrative agency (Port of Helsinki) had some type of premium right to the domain name portofhelsinki.com. 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.”

As of December 10, 2016, champagne.com redirected to champagne.fr—a website of the Comité Champagne, the trade association of Champagne producers; champagn.com led to the website www.inert.com, which offered the domain name for sale. For a different approach to geographical indications under other dispute resolution policies for specific domains see infra Section IV.B.


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.”


“Unless the evidence demonstrates that the name of a geographical location is in fact performing the function of a trademark, such a name should not be considered a trademark for the purposes of the Uniform Policy.” Id.; see also Forrest, supra note 125, at 27–33; WIPO Overview 3.0, supra note 103, at § 1.6. “[I]t has generally proven difficult for an entity affiliated with or responsible
case (discussed below) showed, 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. Even for these types of cases, the 2001 Report recommended waiting before any changes are made to the UDRP.

IV. THE DOMAIN NAME SYSTEM AND ITS GEOGRAPHICAL AWARENESS

Notwithstanding its geographically-indifferent design and its creators’ ambivalence toward preferential treatment for geographical indications and geographical names, the DNS has not been completely detached from geography, territorial boundaries, and national laws. The DNS has taken national rights into account—first through the UDRP, which gives preference to trademark owners to some extent, 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 mark to bring a UDRP complaint when a domain name at issue for a geographical area (which has not otherwise obtained a relevant trademark registration) to show unregistered trademark rights in that geographical term on the basis of secondary meaning.” Id. In January 2016, the new TLD .helsinki was delegated to the City of Helsinki. See Delegation Record for HELSINKI, INTERNET ASSIGNED NUMBERS AUTHORITY, https://www.iana.org/domains/root/db/helsinki.html (last visited Apr. 10, 2018); see also infra Section V.A. (regarding ICANN’s policy on geographical terms and the new gTLDs).

128. See infra Part IV.
129. See Forrest, supra note 125, at 24–27, 34; see also infra notes 153–56 and accompanying text.
131. See infra Section IV.A.
132. See Andrew Main, Plea for a Sane Top-Level Domain, NETWORK WORKING GRP., Oct. 2001, at 6–7, https://www.ietf.org/archive/id/draft-main-sane-tld-00.txt. While the UDRP does consider national rights to some extent, not everyone has been satisfied with UDRP rules. See id.
133. See infra note 403 and accompanying text (discussing additional domain registration protection).
135. See infra notes 179–205 and accompanying text.
136. For the remainder of this discussion, “trademark” refers to both a trademark and a service
is identical or confusingly similar to the trademark. 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. It may also be a trademark registered with a U.S. state, such as a Georgia state trademark, 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; 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 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.” 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.”

\[Vol. 45: 623, 2018\] Territorialization of the Internet PEPPERDINE LAW REVIEW

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137. See UDRP, supra note 86, at ¶ 4(a).
138. See supra text accompanying notes 93–99.
140. See infra note 250 and accompanying text.
141. See, e.g., Laurence R. Helfer, Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?, 12 CARDOZO J. INT’L & COMP. L. 493, 495 (2004). “Certain reforms of the UDRP would enhance its status as a distinct body of law and further distance it from national legal systems.” Id.
142. See generally UDRP, supra note 86.
144. See id.; Helfer, supra note 141, at 494 (noting that the UDRP was designed to supplement, but not supplant, domestic cybersquatting litigation).
145. Id.
Notwithstanding the UDRP’s silence regarding the choice of law that should apply in domain name disputes, choice-of-law questions have been important in domain name cases.\textsuperscript{146} Applicable law can make a significant difference in the outcome of a domain name case, as evidenced by the well-known barcelona.com case, which was decided by a UDRP panel in 2000 and again later by U.S. courts in 2002 and 2003.\textsuperscript{147} The case involved a dispute between a Spanish trademark owner and a U.S. trademark owner; it was the U.S. trademark owner that registered barcelona.com and the Spanish trademark owner—the Barcelona City Council—that contested the registration.\textsuperscript{148} The Barcelona City Council initiated a UDRP proceeding before a WIPO panel, which decided in favor of the Council\textsuperscript{149} 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.\textsuperscript{150}

The dissatisfied U.S. trademark owner subsequently filed a lawsuit in a U.S. court—\textsuperscript{151} not to overturn the panel decision under the UDRP, but to declare that under U.S. law his registration of barcelona.com was not

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146. See, e.g., infra notes 147–56 and accompanying text (discussing the barcelona.com case).
148. See Barcelona.com, Inc., 330 F.3d at 619.
149. See Excelentísimo Ayuntamiento de Barcelona, WIPO, Case No. D2000-0505.
150. See id.
151. See Barcelona.com, Inc., 189 F. Supp. 2d 367. The UDRP also contemplates the possibility that either a complainant or respondent may “submit [] the dispute to a court of competent jurisdiction for independent resolution before [the UDRP] mandatory administrative proceeding is commenced or after such proceeding is concluded.” UDRP, supra note 86, at ¶ 4(k).
}
unlawful. The district court followed the WIPO panel’s approach and applied Spanish trademark law, but the appellate court disagreed. Because the claim in the U.S. courts was based on U.S. law—the reverse domain name hijacking provision of the Lanham Act—the appellate court applied U.S. law, noting that “United States courts do not entertain actions seeking to enforce trademark rights that exist only under foreign law.” The appellate court in Barcelona denied the Barcelona City Council its trademark rights under U.S. law and therefore any rights in the domain name barcelona.com.

The U.S. appellate court in Barcelona referred to the UDRP’s “loose rules regarding applicable law,” but the UDRP has, in fact, no rules at all regarding choice of applicable law. The lack of choice-of-law rules can be problematic, 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 a national law imported via the panelists’ background and education, and their experiences in their own national legal systems. Unaddressed issues are not limited to the validity

153. See Barcelona.com, Inc., 330 F.3d at 627 (“It requires little discussion to demonstrate that the use of Spanish law by the district court was erroneous under the plain terms of the statute.”).
155. See Barcelona.com, Inc., 330 F.3d at 628. The City of Barcelona has been using barcelona.eu, and in 2015 the new TLD barcelona was delegated to the City of Barcelona. Delegation Record for BARCELONA, INTERNET ASSIGNED NO. AUTH., https://www.iana.org/domains/root/db/barcelona.html (last visited Apr. 10, 2018).
156. Barcelona.com, Inc., 330 F.3d at 624.
157. See infra note 168 and accompanying text.
158. See Helfer & Dinwoodie, supra note 87, at 261–62, n. 386. Some argue that “the current Rule 15, by failing in any real way to address choice of law, fails to ensure that national interest will appropriately be recognized by panels, or to provide panels with guidance on where such recognition should occur.” Id.
159. See id.; see also WIPO Overview 3.0, supra note 103, at § 3.15 (“In some limited cases such as where the parties shared a common nationality and the import of a specific national law concept is particularly germane to an issue in dispute, panels have applied national law principles in assessing the UDRP elements.”).
160. See Helfer & Dinwoodie, supra note 87, at 261, n. 386 (“By virtue of their inherent legitimacy deficit, non-national institutions may need to be particularly cognizant of the ability of
and ownership of a complainant’s trademark, but include issues such as the standard for determining the confusing similarity between a domain name and a trademark.  

UDRP panelists have not been uniform in their opinions on the applicability of national law in UDRP cases. The Rules for the UDRP 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.” Two commentators, Laurence R. Helfer and Graeme B. Dinwoodie, warned in 2001 that “the determination of issues . . . by the invariable application of a single national law would be unhelpful.” They projected that “in the long term, the non-national system might usefully develop autonomous rules that apply in disputes transcending national borders,” but suggested that “the development of such autonomous principles must be grounded, at least initially and at least in part, in the underlying national interests and values.”

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. The panel decided that U.S. law would apply “to the extent that it would assist the panel” because of the U.S. domiciles of the parties and because “United States’ courts recent experience with similar

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

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


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


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


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

Following the Barcelona appellate court decision, 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 hjta.com, 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), pointed out a split among UDRP panels, which seemed to have reached different results in cases concerning criticism websites depending on whether the parties and the panelists were from the United States—and thus subject to (or at least familiar with) robust U.S. protection for free speech—or from another country. In the hjta.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,” 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.”

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

169. Id.
170. Id.
171. See supra notes 147–55 and accompanying text.
173. See id.
176. Id.
177. Id.
178. Id. at n.2.
before the hjta.com decision, a UDRP panelist deciding maxol.com took a position in favor of an autonomous interpretation of the UDRP, noting that the UDRP “provides an international procedure for international application.” "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.” 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.

Eight days after the hjta.com decision, another UDRP panelist disagreed with Bernstein; in the covancecampaign.com decision, 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].” Perhaps not surprisingly, the panelists in the maxol.com and covancecampaign.com cases were not from the United States.

Matthew S. Harris, the panelist in maxol.com, and Bernstein exchanged views on the potential applicability of national law again in 2008. In a

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

181. Id.
182. Id.
183. Id.
185. Id.
detailed January 2008 decision in 1066ha.com, 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.” Bernstein responded in a July 2008 decision in sermosucks.com—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. 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

188. See 1066Hous. Ass’n Ltd., WIPO, Case No. D2007-1461.
189. See id.
190. See id.
192. See id. (“Legal systems have long recognized that accepting some inconsistency is a practical necessity, especially given the lack of global harmonization of laws . . . .”).
193. Id. (“Under the Howard Jarvis approach, UDRP decisions may be consistent with how the relevant national courts would rule, but the decisions would be inconsistent within the UDRP system . . . .”).
194. Id. (“Although consistency may remain an elusive goal, this approach would help promote predictability in the UDRP system in that parties would know in advance which national laws . . . . would most likely apply. It would also prevent forum shopping . . . .”).
195. See Victoria Holstein-Childress, Lex Cyberus: The UDRP as a Gatekeeper to Judicial Resolution of Competing Rights to Domain Names, 109 PA. ST. L. REV. 565, 580–81 (“As a threshold matter, it is important to note that the UDRP itself neither requires panelists to apply the law of any particular nation, nor sets forth any choice of law guidelines for panelists.”).
that is selected.\textsuperscript{196} In choice of law, \textit{depeçage} may dictate that different rules be used to select the laws that are applicable to different issues.\textsuperscript{197}

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

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

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\textsuperscript{197} \textit{Id.} at 58 (“This process of applying the rules of different states to determine different issues has the forbidding name of \textit{depeçage}, although it is sometimes more colloquially referred to as ‘picking-and-choosing.’”).
\textsuperscript{198} See \textit{infra} notes 199–202 and accompanying text.
\textsuperscript{201} Helfer, \textit{supra} note 141, at 496 (“Panels are, at least implicitly, applying the law of a particular country to determine issues such as when a complainant has rights in a mark that is registered in national trademark offices or used in domestic commerce.”).
\textsuperscript{202} \textit{Id.} at 495. Although the UDRP does not require that panels apply national laws, UDRP panel decisions are rarely completely divorced from national laws. \textit{Id.} Even when panelists do not apply any particular country’s law, certainly their backgrounds might influence their views on and approaches to substantive issues. \textit{Id.}
\textsuperscript{203} See \textit{infra} notes 204–07 and accompanying text.
\end{footnotesize}
because “only one panelist [was] intimately familiar with its provisions,”204 the panel nevertheless noted that, in the particular case, Australian law applied to the trademark rights of the complainant and that the panel “believe[d] its decision [was] correct under Australian law.”205 In another decision, a panel insisted that no national law applied in the case but concluded that its approach in the end “appear[ed] to be consistent with national trademark laws (including that of the UK),”206 “which would apply to any legal proceedings in this case.”207 These statements show, at a minimum, an understanding that there might be some value in reconciling UDRP decisions with national law.208

In cases in which UDRP panels did discuss their choice of applicable law, the panels used various criteria to select the applicable law.209 In some cases, a panel chose applicable law based on the parties’ domiciles.210 For example, in the cliffgreenhouse.com case,211 the panel applied, in addition to “the Policy and Rules that govern [the] proceeding,”212 “the internal, substantive law of the State of New York [and] the Federal Trademark Act as applicable in New York”213 because “the Complainants and Respondents are all New York residents and do business in New York.”214 Similarly, in the myeronline.com
case, 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. In the myeronline.com case, the panel gave no weight to the fact that the registrar was in the United States and that “the disputed domain name is accessible to Internet users worldwide.” The fact that a registrar was domiciled in the United States was taken into account in the cnn.com case, where a panel decided that U.S. law should apply “to the extent needed” because “the Complainant was a U.S.-based corporation and . . . the respondents chose to register each of the disputed domain names through a U.S. registrar”; 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 the newzealand.biz case, the panel applied the law of New Zealand and “relevant international law” to evaluate the common law rights that the complainant—Her Majesty the Queen—asserted in the case.

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, a challenge under national law for reverse domain-name hijacking, as was the case in barcelona.com,
may result in a court applying forum law and following whatever choice-of-law rule, if any, the forum law includes. Therefore, for example, in the worldwrestlingfederation.com case, 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. In the sermosucks.com case, 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.

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," 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." Although the
complainant is likely to submit to only one jurisdiction, the laws of other jurisdictions may create grounds for personal jurisdiction for a domain name-related lawsuit, and such laws can override the UDRP Rules and the complainant’s choice of jurisdiction. 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.

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 some national law. The second category of issues

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

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

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

238. See id.

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

encompasses all other issues to which national law might apply.\footnote{240} In the first category of issues, and for registered trademarks, complainant’s trademark registration under the law of any jurisdiction will suffice to show complainant’s rights in the trademark.\footnote{241} The WIPO Panel Views on Selected UDRP Questions (WIPO Overview 3.0) notes that “[t]he jurisdiction(s) where the trademark is valid is not considered relevant to panel assessment.”\footnote{242} Any invalidity of complainant’s trademark should not affect a UDRP panel’s finding of complainant’s rights as long as the rights arise from a registered trademark.\footnote{243} As a panel noted in the tenerife.com case, a UDRP proceeding is not a proper proceeding to challenge the validity of a complainant’s registered trademark;\footnote{244} rather, a validity challenge should be launched with the national trademark registration authority.\footnote{245} However, as the barcelona.com case demonstrates, the choice of a particular law to assess the existence a registered trademark can be detrimental to the ultimate outcome of a domain name dispute;\footnote{246} the WIPO panel in the barcelona.com case accepted a trademark registration under Spanish law, but the U.S. appellate court in Barcelona.com applied U.S. law to assess the existence of the trademark.\footnote{247} As opposed to cases of registered trademarks, where UDRP panels

\footnote{240. See infra notes 262–66 and accompanying text.}
\footnote{241. See WIPO Overview 3.0, supra note 103, at § 1.1.2. There are exceptions for some registered trademarks because “panels tend to carefully review certain types of automatic/unexamined registered trademarks such as US state registrations (as opposed to US federal registrations).” Id. at § 1.2.2; see also, e.g., Gerald M. Levine, DOMAIN NAME ARB. 115–16 (2015); Torsten Bettinger & Allegra Waddell, Uniform Domain Name Dispute Resolution Policy, in DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK 1263, 1342 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015); American Honda Co. v. Salcedo, WIPO, Case No. D2013-1846 (Dec. 31, 2013) (determining standing by application of U.S. law), http://www.wipo.int/amc/en/domains/search/textjsp?case=D2013-1846.
}
\footnote{242. WIPO Overview 3.0, supra note 103, at § 1.1.2.
}
\footnote{243. Id.
}
}
\footnote{245. See id.; see also Guagliardo v. Wu, WIPO, Case No. D2017-2089 (Jan. 10, 2018) (“[P]anels tend to carefully review certain types of automatic/unexamined registered trademarks such as US state registrations (as opposed to US federal registrations).”).
}
\footnote{246. See supra note 147 and accompanying text.
}
\footnote{247. See id. U.S. law was in fact the law of the mutual jurisdiction to which the Barcelona complainant submitted. Barcelona.com, Inc v. Excelentísimo Ayuntamiento de Barcelona, 330 F.3d 617, 619 (4th Cir. 2003). The U.S. appellate court applied U.S. law, not because it was the law of the mutual jurisdiction, but because the court decided the case based on a cause of action brought under U.S. law. Id.; see also supra note 231 and accompanying text.
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656
assume that trademarks are valid, UDRP panels might assess the validity of unregistered trademarks based on national law. \(^2^{48}\) Panels might turn to national law to determine, for example, whether the functionality or geographical nature of a mark will render the mark invalid. \(^2^{49}\) For such a decision, a UDRP panel may apply the national law of the country for which the unregistered trademark rights are claimed, \(^2^{50}\) unless a panel uses some autonomous interpretation of the UDRP. \(^2^{51}\)

The choice of applicable law can also be relevant for the assessment of respondents’ rights. \(^2^{52}\) Under the UDRP, a respondent’s “rights or legitimate interests” in a domain name may be evidenced by a showing that a respondent “ha[s] been commonly known” under the domain name, \(^2^{53}\) 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. \(^2^{54}\) Some registrants rely on a


\(^2^{49}\) See Tatra, a.s. v. Tatra Ltd., Nat’l Arb. Forum, Claim No. FA0911001296249 (Feb. 5, 2010), http://www.adrforum.com/Domaindecisions/1296249.htm (noting that “the question of whether a word is generic is not generally relevant for purposes of this first element of the Policy, except in so far as a complainant attempts to demonstrate rights in a trademark absent a trademark registration (sometimes called ‘common law’ trademark rights).”).

\(^2^{50}\) See supra note 220; see also Felipe v. Registerfly.com, WIPO, Case No. D2005-0969, (Dec. 19, 2005), http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-0969.html (“Unregistered trademark rights do not exist in some nebulous way across the breadth of the countries in which a complainant proves it has a reputation. These rights derive from national laws and do not exist divorced from such laws.”); Fashiontv.com GmbH v. Olic, WIPO, Case No. D2005-0994, (Dec. 8, 2005), http://www.wipo.int/amc/en/domains/decisions/html/2005/d2005-0994.html (“Common law rights/unregistered trademark rights do not exist on a world-wide basis. They may or may not exist in specific jurisdictions. It is for the Complainant to identify the jurisdiction or jurisdictions in which the rights are alleged to arise . . . ”).

\(^2^{51}\) Levine, supra note 241, at 123.

\(^2^{52}\) See infra note 255 and accompanying text.

\(^2^{53}\) UDRP, supra note 86, at ¶ 4(a)(ii).

\(^2^{54}\) See id. The requirement that a registrant be known under the same name as the domain name is often helpful to registrants who hold no registered trademarks, id., but the requirement may help defeat the registration of domain names that are based on very recent registrations of new trademarks, or other registrations of trademarks that have not been used by the registrant, and the registrant is not commonly known by the trademark. See Goldman, Sachs & Co. v. Wevers, Nat’l Arb. Forum, Claim No. FA0610000812109 (Nov. 22, 2006), http://www.adrforum.com/Domaindecisions/812109.htm. However, not every new or recent trademark registration will be detrimental to a registrant’s case; bona fide preparations to use a domain name, including obtaining a new trademark registration, might
trademark registration to show their rights and legitimate interests in a domain name, in which case it becomes important to a panel to determine which country’s trademark registration—and which country’s law—the panel will apply:255 Panels accept registrant’s trademark registration as valid (as they do in the case of a complainant’s registered trademark),256 but a panel must make a separate assessment of whether a registrant is commonly known in the particular territory for which the registrant owns the trademark.257

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

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

256. See, e.g., ACE Ltd. v. WebMagic Ventures, LLC, Nat’l Arb. Forum, Claim No. FA0802001143448 (Apr. 8, 2008), http://www.adrforum.com/Domaindecisions/1199331.htm. ("A UDRP proceeding is an improper forum in which to seek invalidation or disregard of a duly issued federal trademark registration.")

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

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


260. Id.


658
when it decided that the respondent did not act in bad faith.262

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

C. UDRP Un-Territorialized?

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

262. See id.
263. See infra notes 264–67. The previous Section referred to disputes that addressed these issues. See supra notes 171–92 and the accompanying text.
265. Id.
266. See infra note 267 and accompanying text.
269. See infra note 270 and accompanying text.
rules—ICANN’s—applies to all disputes, eliminating the choice of law problem.”

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

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


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


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

275. WIPO Overview 3.0, supra note 103, at § 4.15.

276. WIPO Overview 3.0, supra note 103, at § 2.6.3.

277. See supra notes 272–74 and accompanying text.

278. See Helfer, supra note 141, at 495–96.
of U.S. law in UDRP cases (whether applied openly or tacitly) could easily have resulted because of the initially high percentage of U.S. parties in UDRP cases\(^\text{279}\) and/or the high percentage of UDRP panelists from the United States.\(^\text{280}\) Commentators have pointed out the uses of doctrines of U.S. law, even in cases involving no U.S. parties,\(^\text{281}\) as proof of the influence of U.S. law on the UDRP; some UDRP panels have expressed doubts about using the doctrines, such as the doctrine of nominative fair use, in UDRP cases in which one or both parties are not U.S. parties.\(^\text{282}\)

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

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


\(^{283}.\) See supra notes 277–81 and accompanying text.

\(^{284}.\) See WIPO Overview 3.0, supra note 103, at § 4.15.

\(^{285}.\) See supra notes 272–82 and accompanying text.
been present in the UDRP since its beginning and have not seemed to diminish.286

V. TERRITORIALIZATION OF THE INTERNET DOMAIN NAME SYSTEM

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

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

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

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

287. See supra Part IV.


289. See supra Part III.


291. See id.
category consists of limitations on the granting of rights to domains and domain names; the limitations are built into domain name registration eligibility requirements and into new domain delegation rules. 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.

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

292. See infra Section V.A.
293. See infra Section V.B.
294. See infra notes 298–315 and accompanying text.
295. See infra notes 300–315 and accompanying text.
296. See infra note 297 and accompanying text.
“entities established in the country either having a legal representation in the country or having document [sic] justifying property rights of name in Algeria.”

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.

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

The eligibility requirements for some ccTLDs allow persons and entities without a physical presence in the country to register a domain name with that ccTLD as long as the person or entity has another nexus to the country of the ccTLD.\textsuperscript{311} For example, domain names on The Gambian .gm domain are available for registration by anyone “providing information or services for or about The Gambia, or otherwise benefiting the local Internet community of The Gambia.”\textsuperscript{312} The .ir domain is open to “[o]rganizations connected with files/ZASLDGeneralPolicy_final_1_April_2015.pdf [hereinafter .za Policy]; .us Policy, supra note 301.

304. See .bm Agreement, supra note 303; .hu Rules, supra note 303; .us Policy, supra note 303.
305. See .bg Terms, supra note 302 (Section 3); EU REGISTRATION POLICY, supra note 303, at 3; .hu Rules, supra note 301 at 3; .ir Requirements, supra note 303; Policy for Acquisition of the Right to Use Domain Names under the Top Level Domain .lv, NIC (July 1, 2009), https://www.nic.lv/en/policy [hereinafter .lv Policy] (Section 3.1.1.1); .no Policy, supra note 303; .sa Regulation, supra note 303.
306. See .bg Terms, supra note 303; .ca Requirements, supra note 303, at 3; EU REGISTRATION POLICY, supra note 303; .fr Policy, supra note 303, at 3; .lv Policy, supra note 305; .sa Regulation, supra note 301 (Section 2.2); .za Policy, supra note 305, at 9 (Section 1.3.1); .us Policy, supra note 303.
307. See EU REGISTRATION POLICY, supra note 302, at 3 (listing Norway, Iceland, and Liechtenstein); .fr Policy, supra note 303, at 3; .lv Policy, supra note 303, at 3; see also Frequently Asked Questions, REGISTRO.IT, http://www.nic.it/en/faq#t127n81932 (last visited Apr. 11, 2018) (stating that the .it domain name may only be used by citizens, residents, or those that have an office registered in the areas of the European Economic Area (EEA), the Vatican, the Republic of San Marino, and Switzerland).
308. See .bg Terms, supra note 303; .hu Rules, supra note 308.
310. See .ir Terms, supra note 303.
311. See infra notes 312–15 and accompanying text; see also, e.g., .gm Policies, supra note 303.
312. See .gm Policies, supra note 303.
the official representations of Iran abroad.”313 The Irish .ie domain may be used by companies not registered in Ireland who “are trading with clients in Ireland.”314 Spain limits the eligibility for registration on its .es domain to “individuals or . . . entities with interests in or ties with Spain.”315

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

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

313. See .ir Terms, supra note 303.
314. See .ie Requirements, supra note 303.
316. See .ca Requirements, supra note 299, at 3; .ie Requirements, supra note 301; .sa Regulation, supra note 301; in Requirements, supra note 301.
317. Trademark Clearinghouse FAQs, ICANN, https://newgtlds.icann.org/en/about/trademark-clearinghouse/faqs (last visited Apr. 11, 2018); see also Forrest, supra note 125, at 10–12.
318. See Forrest, supra note 125, at 12.
320. See Trademark Clearinghouse FAQs, supra note 317.
321. See infra notes 322–26 and accompanying text.
ccTLDs “open,” registries sought to attract new registrants and increase 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. Registries have pursued the liberalization to increase their registration business; 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.”

Not all domain liberalizations have eliminated or narrowed territory-based restrictions, but a number of ccTLD registries have lifted their territory-based restrictions on registration eligibility either for all domain levels or for some domain levels—for example Belgium (in 2000), Sweden...
Some countries have liberalized their territory-based requirements only in part; for example, France liberalized its rules gradually in 2004, 2006, 2010, and 2011, and eventually opened up the registration of the .fr domain to French citizens residing abroad (in 2010) and to persons and entities from EU member states and Iceland, Liechtenstein, Norway, and Switzerland (in 2011), while continuing to disallow registrations for persons not residing and entities not registered in the EU or the other four European countries, or with no trademark rights in France.\textsuperscript{334}

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

\begin{thebibliography}{99}
\bibitem{329} See Peter Rindforth, \textit{Sweden} (’se'), in \textit{DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK} 875, 878 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015).
\bibitem{334} David Taylor, \textit{France} (’fr’), in \textit{DOMAIN NAME LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK} 313–58 (Torsten Bettinger & Allegra Waddell eds., 2d ed. 2015). The pre-liberalization period of the ccTLDs that were later liberalized might be viewed as being a prolonged sunrise period. \textit{Id.}
\bibitem{335} See infra notes 336–38 and accompanying text.
\bibitem{337} \textit{Id.} at 2–17 (¶ 2.2.1.4.2).
\end{thebibliography}
selected economic and other groupings’ list.”

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. For example, a domain name registration for the .corsica domain is available to “[l]egal entity in Corsica . . . [i]ndividuals living in Corsica, . . . [and] any individual who has and will prove a direct or indirect link attachment (economic, social, cultural, familial, historical or otherwise) with Corsica.”

Some link to the territory might suffice; for example, “[a]ny natural or legal person . . . [with] ties to Alsace” may register a domain name on .alsace. The domains .berlin and .hamburg both require that the registrant have “an economic, cultural, historical, social or any other connection to the [city].”

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

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338. Id. at 2-14–2-15, 2-16–2-17, A-16 (¶ 2.2.1.4.2). A primary example of the controversy that gTLDs may generate is the application for the delegation of .amazon. Adopted Board Resolutions: Regular Meeting of the ICANN Board, ICANN (Sept. 23, 2017), https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.e. The ICANN Board’s decision not to advance Amazon EU S.à.r.l.’s application was overruled by an independent review panel on July 11, 2017; however, the Board decided on September 23, 2017, to take additional time to consider the application. Id. In February 2018 “[t]he ICANN Board . . . asked the ICANN org President and CEO to facilitate negotiations between the Amazon Cooperation Treaty Organization’s (ACTO) member states and the Amazon corporation.” GAC Advice – Abu Dhabi Communicque: Actions and Updates (04 February 2018), https://www.icann.org/en/system/files/files/resolutions-abudhabi60-gac-advice-scorecard-04february2018-en.pdf (last visited May 17, 2018).

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

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


[Scottish] community . . . on a linguistic, cultural, tourism, business basis, or any other activity conducive to the welfare of the worldwide Scottish community.”

In addition to being available to persons and entities residing in Kyoto, .kyoto domain names are available to persons and entities with “a legitimate purpose for registering and using a `.kyoto` domain name,” which may be based on “a positive economic contribution to Kyoto,” on an endorsement by the Kyoto Prefectural Government or the Kyoto Chamber of Commerce, or on “other economic association with a presence in Kyoto.” 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.”

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, . . . 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.” 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).

347. See infra notes 348–51 and accompanying text.
349. .cat Domain Name Registration Agreement, FUNDACIÓ PUNT CAT, https://variomedia.de/docs/agreements/cat.pdf (last visited Apr. 11, 2018) (§ 2.2).
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, .melbourne, .nyc, .osaka, .paris, .quebec, .rio, .swiss, .sydney, .tirol, .wien, and .zuerich all have such restrictions. But there are also other new gTLDs that have opted not to impose territorial restrictions on registration eligibility: the .koeln.

364. See supra notes 352–63 and accompanying text.
domains have no territory-based restrictions.\textsuperscript{371}

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

\textsuperscript{371}. See, e.g., bayern Domain Name Registration Policy, BAYERN, http://nic.bayem/assets/policies/ENG/Domain-Name-Registration-Policy-english.pdf (last visited Apr. 11, 2018) (§ 3(b)).
\textsuperscript{372}. For a critique of the differences in ICANN’s approaches to the protection of geographical terms at the top level and lower levels of the DNS see Forrest, supra note 125, at 14.
\textsuperscript{373}. See infra notes 374–80 and accompanying text.
\textsuperscript{376}. E.g., bayern Domain Name Registration Policy, supra note 371, at § 7; .cy Domain Name Registration Agreement, CY TLD REGISTRY, http://www.nic.cy/rulesreg.htm (last visited Apr. 11, 2018) (§ 5.7).
Some registries have precluded entirely the registration of certain geographic names; for example, the Rules and Policies for the .eg domain exclude from registration all country and city names.\(^{378}\) The .pt registry does not allow registrations of certain geographical names,\(^{379}\) and the registry of the domain .bio reserves domain names that are EU-protected geographical indications.\(^{380}\)

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

### B. Territorialization in Dispute Resolution

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


\(^{378}\) .eg Rules, supra note 309, at ¶ 5.


\(^{382}\) See Scott Gerien & Christopher Passarell, Challenges for Geographical Indications (GIs) in the Context of the ICANN New Generic Top-Level Domains, ORG. INT’L GEOGRAPHICAL INDICATIONS NETWORK 38 (2016), http://www.origin-gi.com/images/stories/PDFS/English/orGi_Publications_2010 /GI_gTLDs_JAN2016_WEB_VERSION.pdf (“Within the GAC, there is ongoing disagreement between the U.S. and Australian governments on the one hand, and the EU as well as 36 other countries on the other hand, over whether there is sufficient protection for GIs in the new gTLDs, and in .wine and .vin in particular.”).
and registration processes. 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. 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. While the UDRP is silent on the choice of

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383. See infra notes 384–87 and accompanying text.
384. See UDRP, supra note 86; infra note 385 and accompanying text.
385. See Patrick Kelly, Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute-Resolution, 17 BERKELEY TECH. L.J. 181, 198 (2002); UDRP, supra note 86; infra notes 386–411 and accompanying text.
387. See infra note 388 and accompanying text (providing several examples of registration agreements and dispute resolution policy agreements that include choice-of-law provisions).
applicable law, 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.

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 alphanumerical designations that are registered, granted, or recognized by a particular country. For example, the .ie dispute resolution policy provides protection for owners of “protected identifiers,” which are defined as trademarks that are protected in Ireland, geographical indications that are prima facie protected in Ireland, or personal names with a reputation in Ireland. An owner of a protected identifier may challenge a domain name that is identical or misleadingly similar to the protected identifier.

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

389. See supra Parts III and IV.

390. See supra note 388 and accompanying text.

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

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


396. See id. at ¶ 1.1.1; see also, e.g., Regulation on the Alternative Dispute Resolution Procedure of the .ma Domain, ORGANISATION MONDIALE DE LA PROPRIETE INTELLECTUELLE (June 10, 2015),
Even when a dispute resolution policy does not state a preference for a particular country’s trademarks, interpretation of the policy by a dispute resolution panel may result in the preferential treatment of the trademarks of a particular country. For example, the .au Dispute Resolution Policy does not specify what trademark law should apply to assess the existence and validity of a complainant’s trademark or service mark. For registered marks, decisions by panels initially varied, but eventually a consensus was reached that not only trademarks registered in Australia, but also “a trademark registered outside of Australia satisfies the requirements of the Policy.” Panels have also held, however, that if a complainant bases its complaint on an unregistered trademark, the complainant “must establish that it has unregistered trademark rights in Australia,” and mere “evidence that [the complainant] has unregistered trademark rights outside of Australia is insufficient.”

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 the epiphoneamps.com case, the governing law in the domain name dispute had been U.S. law, the complainant Gibson, who owned the U.S. trademark, would have prevailed over the Chinese respondent who owned the

397. See generally Masaaki Kotabe, Evolving Intellectual Property Protection in the World: Promises and Limitations, 1 U. PUERTO RICO BUS. L.J. 1, 16 (2010) (“[S]ome of the illustrations indicated all countries are inherently interested in protecting or giving preferential treatment (both consciously or unconsciously) to their domestic firms although various international agreements are supposed to treat all intellectual property equally regardless of the source of its origin.”).
400. Id. at § 1.1B. For a critical commentary on this interpretation of .auDRP see Alpana Roy & Althaf Marsoof, A Critical and Comparative Review of auDRP and UDRP Domain Name Decision, 19 (5–6) J. OF WORLD INTELL. PROP. 203, 205–06 (2016).
401. See supra note 397 and accompanying text.
trademark in China.\textsuperscript{402} Under U.S. law, the panel would have given preference to the U.S.-registered trademark over the Chinese-registered trademark.\textsuperscript{403}

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

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

\textsuperscript{402} See supra notes 100–05 (discussing the epiphoneamps.com case).

\textsuperscript{403} See supra note 397–401 and accompanying text.

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


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

\textsuperscript{407} Id.

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

\textsuperscript{409} See supra notes 384–94 and accompanying text.
particular country’s rights.410 A choice-of-venue provision for subsequent court proceedings may be employed to control for this variable.411

VI. DOMAIN NAMES, TERRITORIALIZATION, AND USER CONFIDENCE

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

410. See supra notes 387–94 and accompanying text.
411. E.g., Rules for the Cuban Network Information Center, supra note 388, at § 11.1; Terms and Conditions for the Right of Use to a .dk Domain Name, supra note 388, at § 14; eu Domain Name Registration Terms and Conditions, supra note 388, at § 14; Dispute Resolution Policy for Internet Domain Names (.ir), supra note 388, at § 4(k); Registration Rules: Rules for the Allocation of Domain Names Under the Israel Country Code Top Level Domain, supra note 388, at § 30; Registration Regulation of Country Code Top-Level Domains (ccTLD), State of Kuwait, CITRA (Dec. 21, 2016), http://www.kw/media/policy_files/Registration-Regulation-EN_vOlVPN.pdf (§ 18); usTLD Dispute Resolution Policy, .US (June 1, 2014), http://www.about.us/policies/ustld-dispute-resolution-policy (§ 1).

Another way that territorialization might be reinforced is through other requirements that dictate that domain name uses must comply with national laws. For example, an af “[d]omain name registration is strictly prohibited by . . . [a]ny other activity which is illegal under Afghan law.” Domain Policy, INFO. SYS. SECURITY DIRECTORATE: ISLAMIC REPUBLIC OF AFG., http://nic.af/en/page/what-we-do/afgnic/domain-policy (last visited Apr. 11, 2018) (§ 11). Under Fiji’s domain rules, “[n]o domain name may be used, directly or indirectly, for any purpose that is against the statutory laws of the Republic of Fiji Islands, or that is against the accepted norms of the Internet community.” Registration Agreement: FJ Domain Name Registration Service Agreement, U. OF SOUTH PACIFIC (Aug. 8, 2002), http://domains.fj/public/regagreement.php (§ 2). Under .ir registration rules, anyone may register a domain name as long as their “activity and the use of the domain name are not in conflict with the laws, practices and interests of the Islamic Republic of Iran.” Terms and Conditions (.ir), Appendix 1: Domain Rules, IPM, https://www.nic.ir/Terms_and_Conditions_ir_Appendix_1_Domain_Rules (last visited Apr. 11, 2018) (§ A.4).
412. See supra Parts IV and V.
413. See supra Part IV.
414. See supra Section IV.B.
some extent.415

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

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

415. See supra Section IV.C.
416. See NOrwegian Ministry of transp. and CommC'Ns, supra note 326, at 20 (finding a “growing international trend of authorities identifying a need for national regulation and governmental influence in relation to the use of the country’s ccTLD resources”).
417. See supra Section V.A.
418. See supra Section V.B.
419. See supra Section V.B.
420. E.g., Principles and Guidelines for the Delegation and Administration of Country Code Top-Level Domains, ICANN (Apr. 5, 2005), https://archive.icann.org/en/committees/gac/gac-ccTLD-principles.htm (“ccTLD policy should be set locally, unless it can be shown that the issue has global impact and needs to be resolved in an international framework. Most of the ccTLD policy issues are local in nature and should therefore be addressed by the local Internet community, according to national law.”); GAC Principles Regarding New gTLDs, ICANN (Mar. 28, 2007), https://archive.icann.org/en/topics/new-gtlds/gac-principles-regarding-new-gtlds-28mar07-en.pdf (“The new gTLDs should respect...[the sensitivities regarding terms with national, cultural, geographic and religious significance.”); Tunis Agenda for the Information Society, WORLD SUMMIT ON THE INFO. SOC’Y (Nov. 18, 2005), http://www.itu.int/net/wsis/docs2/tunis/agfis/infsoc05/day1d.html (“Countries should not be involved in decisions regarding another country’s country-code Top-Level Domain . . . .”); Protection of Country Names Against Registration and Use as Trademarks: Practices, Approaches and Possible Areas of Convergence, WIPO (Feb. 10, 2017), http://www.wipo.int/edocs/mdocs/sct/en/sct_37/sct_37_3.pdf (illustrating similar exhibitions of interest by national governments in protecting their country names).
421. See Post, supra note 270, at 8–10.
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. 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, and it is questionable whether territorialization can
turn back the clock on user perception of domain names. Judge Kozinski
in a 2010 decision referred to a “sensible agnosticism” 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.” Kozinski’s statement applies to domain names that include
trademarked words and also to domains and domain names that include
geographic terms (e.g., .paris) or otherwise refer to physical geography (e.g.,
.fr).

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

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422. Forrest, supra note 125, at 14 (“[B]y reserving country and territory names and by imposing a
consent requirement on other geographic names, ICANN inherently validates governments’ claims to
geographic names.”).
423. See Postel, supra note 1, at 5 (“The IANA is not in the business of deciding what is and what is
not a country.”).
425. See 2006 OECD REPORT, supra note 107, at 5 (noting the “pros and cons to liberalising
requirements for registering a domain name”). The Report noted the possible higher costs of
administering restricted domain systems, but also the possible positive effects of such systems in
“curbing cybersquatting, online fraud and intellectual property violations.” Id. The Report also
mentioned the value of the systems in “provid[ing] assurance to consumers and companies that they
are dealing with legitimate locally-based entities.” Id.
426. See Froomkin, supra note 381, at 843–44.
427. Toyota Motor Sales, U.S., Inc. v. Tabari, 610 F.3d 1171, 1179 (9th Cir. 2010).
428. Id.
429. Id. Judge Kozinski opined that users’ expectations might be different in cases of domain names
of the “trademark.com” type. Id.; see also ICANN Global Consumer Research Wave 2, ICANN, 31
hyperlink).
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 an increased user confidence in territorial fidelity of the DNS. Although domains and domain names might play a role in search engine algorithms, users do not tend to remember domain names but rather a combination of search terms that lead to the desired search results through the use of a search engine. Some advertisers do use domain names to attract user traffic to specific websites, and an empirical study would be required to determine whether advertisements increase direct website traffic or whether users reach websites through the use of a search engine even after viewing an advertisement that includes a domain name.

User confidence in territorial fidelity of the DNS might be irreparably lost as far as the perfect identity approach is concerned—users probably do not expect that a domain name on a domain that a priori appears to be territorially linked, such as .vegas, actually has any connection to a place called Vegas. But to the extent that domain names might still be important for advertising, direct traffic, and search engine results, it might be possible to foster increased user confidence based on a cyberspace extension of physical place. 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. Like any new physical neighborhood, the cyberspace extension

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

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

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

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

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

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

VII. CONCLUSIONS

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

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

436. Higgs, supra note 99, at § 4.3.1 (“Although there is no trademark status attached to a domain name when it is issued, through its use, a domain name can acquire secondary meaning in the eyes of the internet consumer.”).
438. See supra Part V; see also, e.g., Radin & Wagner, supra note 111, at 1296–98.
439. See supra Part II.
440. See supra notes 14–15, 53 and accompanying text.
441. See Trimble, supra note 14, at 45.
442. See Trimble, supra note 14, at 51.
negative aspects, so has the territorialization of the DNS. 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 and managed, 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 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

443. See supra Part V.
444. See supra Part VI.
445. See supra notes 43–57 and accompanying text; Part VI.
446. See Post, supra note 270, at 8–10.
447. See supra notes 420 and accompanying text; see also supra Part V.
448. See, e.g., Trimble, supra note 50; supra note 309 and accompanying text.
449. See supra Part I.
450. See supra Part VI.
cross the line of internationally-recognized norms, some action other than a de-territorialization of the DNS should be employed to remedy the situation.\footnote{451}

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

\footnote{451}{See supra Part VI.}
\footnote{452}{See supra Parts V–VI.}
\footnote{453}{See supra Parts III–IV.}
\footnote{454}{See supra notes 30–36 and accompanying text.}
\footnote{455}{See supra notes 30–36; Parts III–VI.}
\footnote{456}{See supra Part VI.}