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I. Introduction

Over one billion people¹ view information on the internet through over eighty five million domain names world wide.² Last year, in response to the growth of the internet, the World Summit on Information Society ("WSIS")³ affirmed the principle that, "the international management of the Internet should be .

¹ Internet World Stats, Internet Usage Statistics—The Big Picture, <http://www.internetworldstats.com/stats.htm> (last visited July 21, 2006).

² Verisign, The Verisign Domain Name Report, **The Domain Name Industry Brief**, Nov. 2005, at 2, available at <http://www.verisign.com/static/036316.pdf> [hereinafter Verisign Report].

³ See World Summit on Information Society, Basic Information: About World Summit on Information Society, <http://www.itu.int/wsis/basic/about.html> (last visited Aug. 2, 2006) (providing information about the organization, its mandate, and the two conferences on information society held in Tunisia and Geneva); see also Internet Governance Forum, Message from the United Nations Secretary-General, <http://www.intgovforum.org/sg-letter-en.html> (last visited Aug. 1, 2006) (stating that the inaugural conference of the IGF in Athens will discuss broad issues relating to the openness, security, diversity, and access of the internet).

. . with the full involvement of governments, the private sector, civil society and international organizations."⁴ But while the WSIS called for the increased participation of international organizations, it stated that sovereign states have the right⁵ to regulate internet public policy issues that affect their citizens.⁶

⁴ World Summit on Information Society [WSIS], Tunis Agenda for the Information Society, ¶ 29, WSIS-05/TUNIS/DOC/6 (rev. 1) (Nov. 18, 2005) [hereinafter Tunis Agenda]. See Kenneth Neil Cukier, Who Will Control the Internet?, **Foreign Affairs**, Nov/Dec. 2005, at 7 (reporting that many governments feel that a "multinational treaty" should regulate the internet and that China called for the creation of a new "international treaty organization").

⁵ See Kim G. Von Arx & Gregory R. Hagen, Sovereign Domain Names A Declaration of Independence of ccTLDs from Foreign Control, 9 **Rich. J.L. & Tech.** 4, ¶ 21 (2002) (noting how nations recognize their country code top level domain ("ccTLD") as a part of their national sovereignty); see also Walter C. Dauterman, Jr., Comment, Internet Regulations: Foreign Actors and Local Harms—At the Crossroads of Pornography, Hate Speech, and Freedom of Expression, 28 **N.C.J. Int'l L. & Com. Reg.** 177, 184-88 (2002) (discussing the jurisdictional

The conflict between the call for increased international cooperation and the sovereign rights of states to regulate the internet brings to the forefront a key legal issue not addressed at the WSIS summit: the extent to which governments⁷ should

issues that relate to nations wanting to control the internet within "clearly marked" borders).

⁶ Tunis Agenda, supra note 4, ¶ 35a. See ICANN Oversight and Security of Internet Root Servers and the Domain Name System (DNS): Subcommittee on Communications Committee on Commerce, Science and Transportation United States Senate, 108th Cong.

(2004) (testimony of John Kneuer, Deputy Assistant Secretary for Communications and Information, United States Department of Commerce) (testifying that governments and civil society organizations effectively represent the interests of private individuals as they relate to the internet).

⁷ See Government Advisory Committee, The Internet Domain Name System and the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), <http://gac.icann.org/web/about/gac-outreach-english.htm> (last visited Aug. 7, 2006) (explaining that nations should offer their input through the GAC because of the divergent national laws related to domain names); see also discussion, infra Part II.C (examining the current tension between national

control freedom of speech⁸ within the existing domain name system.⁹

The internet can transmit an individual's thoughts and ideas¹⁰ instantly around the world unlike previous information

governments and the private organization that currently manages the domain name system).

⁸ See **Ronald J. Krotoszynski Jr., The First Amendment in Cross-Cultural Perspective A Comparative Legal Analysis of the Freedom of Speech** 214 (2006) (arguing that free speech is "highly culturally contingent" and thus an individual should not depend only on "universalistic" claims about the right); see also Global Internet Liberty Campaign, Protecting the Human Right to Freedom of Expression on the Global Internet, <http://www.gilc.org/speech/report/> (last visited Aug. 7, 2006) [hereinafter *gilc*] (maintaining that the internet allows individuals to circumvent governmental controls through changing the name of a banned website or "dialing into" a new server).

⁹ See Interview with ICANN President and CEO Paul Twomey China Business News On-Line, Interfax News Agency, Mar. 17, 2006 [hereinafter Twomey Interview] (emphasizing that ICANN wants governments to distinguish between domain names policies and the content found on websites).

technologies.¹¹ Domain names are the unique location identifiers of every web page, and thus, are an inherent part of the internet.¹² The United States established the present domain

¹⁰ See Dawn Nunziato, Freedom of Expression, Democratic Norms, and Internet Governance, 52 **Emory L.J.** 187, 194 (2002)

(insisting that the internet is a “valuable forum” for the expression of ideas and thoughts across the globe); see also Twomey Interview, supra note 9 (stating that content “drives” the internet, and that the utility of the internet for most individuals is the ability to access information).

¹¹See gilc, supra note 8 (explaining that the internet is a unique communications medium because the Internet is:(1) global, provides immediate access to information from around the world; (2) decentralized, works without “gatekeepers”; (3) open, provides an inexpensive medium to publish content; (4) abundant, unlimited amounts of capacity to store information); see also Joanne Holman & Michael A. McGregor, The Internet as Commons: The Issue at Access, 10 **Comm. L. & Pol'y** 267, 282-86 (2005) (articulating that the internet is different from other forms of communication because it allows users to interact and communicate with others, and also enables the production of a “vast range of content”).

name system by partially ceding control¹³ over to a private non-profit corporation based in the United States known as the Internet Corporation for Assigned Names and Numbers ("ICANN").¹⁴

¹² See Peter B. Maggs, American Law in a Time of Global Interdependence: U.S. National Reports To the XVITH International Congress of Comparative Law: Section III The ".us" Internet Domain, 50 **Am. J. Comp. L.** 297, 298 (2002) (explaining that every domain name includes a top level domain ("tld") and a local domain). In weather.com, .com is the tld and weather is the "second level domain". Id. See also Peter K. Yu, The Origins of CCTLD Policymaking, 12 **Cardozo J. Int'l & Comp. L.** 387, 392 (2004) (detailing how domain names are a "practical necessity" because they are easier to remember than "numeric addresses" and are needed for identification of general websites); Craig McTaggart, Symposium/Article, The ENUM Protocol, Telecommunications Numbering, and Internet Governance, 12 **Cardozo J. Intl & Comp. L.** 507, 525 (2004) (stating that the domain name system is "hierarchical" in order to maintain the feasibility of a global internet network).

¹³ See Memorandum of Understanding Between The U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, [http:// www.icann.org/general/icann-mou-25nov98.htm](http://www.icann.org/general/icann-mou-25nov98.htm) (last visited Aug. 7, 2006) [hereinafter MOU] (describing how

Tensions exist between ICANN and national governments over the extent to which the domain name system should facilitate

the United States government was to cede control of the domain name system to ICANN and the principles that the government wanted the private organization to maintain).

¹⁴ See Victor Mayer-Schonberger, The Shape of Governance: Analyzing the World of Internet Regulation, 43 **Va. J. Int'l L.** 605, 660-62 (2003) (arguing that the motivation of Congress to create a private organization and not an international body derived from the need for "flexible and timely solution" to the growth of the internet). Further, an international agreement would have taken too "long to finalize". Id. See also Michael Fromkin, Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution, 50 **Duke L.J.** 17, 20 (2000) (explaining that ICANN is a private non profit California Corporation with a memorandum of understanding with the United States Department of Commerce to regulate the allocation of domain names world wide); Elizabeth G. Thornburg, Fast, Cheap, And Out of Control: Lessons From the ICANN Dispute Resolution Process, 6 **J. Small & Emerging Bus. L.** 191, 196 (2002) (detailing how ICANN was put in charge of adopting a dispute resolution policy that would ensure the timely adjudication of domain name disputes).

certain forms of speech.¹⁵ In order to ensure that domain names continue to provide the global internet community access to

¹⁵ See Kieren McCarthy, Newly Asked Questions: Why Can't I Find .xxx On the Net, **The Guardian**, May 18, 2006, at 2 (reporting that although ICANN initially supported the creation of a .xxx domain name, an area for pornographic and obscene material, the organization likely voted against the measure because of pressure from the United States government with the support of conservative Christian groups); see also Rana Foroohar, et. al., The Internet Splits Up; The Web Changed the World. Politics is not Changing it Back, **Newsweek International**, May 15, 2006 (emphasizing that many nations protested ICANN's proposal to create a .xxx domain name because they viewed pornography as offensive); Burt Helm, Domain Wars Rage On, **Business Week Online**, May 23, 2006 (elaborating that ICM registry is commencing a law suit in U.S. District Court in order to obtain communications that will "shed light" on why ICANN voted against the .xxx); Michael Geist, Domain Names Shouldn't Be Only a U.S. Domain, **Toronto Star**, May 22, 2006 at C03 (explaining that the free speech community has expressed disappointment in ICANN's policies to resolve domain name disputes, because the policy "has been used to shut down websites presenting legitimate criticism").

information and content,¹⁶ the development of international law¹⁷ within the domain name system may be necessary.¹⁸ But the

¹⁶ See United States Strives to Maintain Internet Dynamism, **States New Service**, Oct. 6, 2005 (noting that the United States delegation at the WSIS summit did not look favorably upon the nations that supported certain policy proposals because of their records in restricting content on the internet); see also **Rolf H. Weber, Regulatory Models for the Online World** 187 (2002) (articulating that freedom of expression includes the right to communicate and "disseminate" information and to receive information of a "public nature").

¹⁷ Compare, Ira Magaziner, The Role Governments Should Play in Internet Policy, in **Protecting Our Children On the Internet**, 87, 88 (Jens Waltermann & Marcel Machill eds., 2000) (arguing that the state should intervene in the maintenance of the internet in order to protect the rights "of its citizens" from treats against the "common good"), with Adam Newey, Freedom of Expression: Censorship in Private Hands, in **Liberating Cyberspace Civil Liberties, Human Rights, and the Internet**, 38, 39 (Pluto Press & Liberty: The National Council for Civil Liberties eds., 1999) (hypothesizing that freedom of expression may flourish if both private actors and national governments did not regulate the internet).

ability of international law to substantively define the protection of freedom of speech in relation to domain names is at a critical point in history because of the increasing influence of national laws.¹⁹

The vacuous response to freedom of speech concerns within the current system encouraged national governments to exert more control over domain names. First, the United States did not consider the implications for free speech when it ceded control over to ICANN.²⁰ At the same time, ICANN's mandate specified

¹⁸ But see Kim G. von Arx, ICANN—Now and Then ICANN's Reforms and Its Problems, 2003 **Duke L. & Tech. Rev.** 7, ¶ 27 (2003) (stating that the United States Government views the "internalization" of ICANN as a poor option for the domain name system, and thus will unlikely relinquish control of the A root server); **Monroe E. Price & Stefaan G. Verhulst, Self Regulation and the Internet**, 9 (2005) (arguing that self-regulation is beneficial because it avoids "state intervention" in areas of freedom of speech, and offers standards for "social responsibility").

¹⁹ See discussion, infra Part III.B (detailing how national governments are increasing their influence over the domain name system).

²⁰ See U.S. Dep't of Commerce, Management of Internet Names and Addresses, 63 Fed. Reg. 31,741, 31,742 (June 10, 1998) available

that the organization should represent the internet community,²¹ without the involvement of national governments and international organizations.²² Second, no international convention or organization directly addressed free speech concerns as they relate to domain names.²³ With no set of legal

at <http://www.icann.org/general/white-paper-05jun98.htm>.

[hereinafter White Paper] (stating that the private corporation in charge of the domain name system would not need to adjudicate free speech disputes, because the modified domain name system would not disturb free speech protections).

²¹ See J. Postel, Domain Name System Structure and Delegation, <http://www.isi.edu/in-notes/rfc1591.txt> (last visited Aug. 7, 2006) [hereinafter Postel] (articulating that Domain Name managers would offer their services to the international internet community).

²² See MOU, supra note 13 (noting the importance of private actors in the stability, competition, coordination, and representation of the domain name system); see also Arx & Hagen, supra note 5 (citing to the White Paper which stated that the United States delegated power to ICANN in order to increase the "voice" of the "global internet user").

²³ See Johannes Morsink, **The Universal Declaration of Human Rights: Origins, Drafting, and Intent** 66 (1999) (explaining that

standards it was only a matter of time before nations stepped in to influence domain name policy.

National governments are also exerting greater control over domain names through advisory committees,²⁴ established by ICANN, and through the significant growth²⁵ of country code top level

the extent to which the world needed to tolerate hate speech created by the Nazis and other fascist groups motivated the language contained in article 19 of the Universal Declaration of Human Rights); see also The United Nations International Covenant on Civil and Political Rights, G.A. Res. 2200(A) (XXI), art. 19 § 2, U.N. Doc. A/6316 (March 21, 1976) [hereinafter UN Covenant] (stating nothing about the internet as a "frontier" where "everyone shall have the right to freedom of expression").

²⁴ See Wolfgang Kleinwaechter, ICANN Governance: From Self-Governance To Public-Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Resources, 36 **Loy. L.A. L. Rev.** 1103, 1123-24 (2003) (elaborating on how ICANN reforms, known as ICANN 2.0, allowed for the increased involvement of national governments in policy decisions); see also discussion, infra Part II.D (information about the Government Advisory Council and how the committee works within the current domain name system governance structure).

²⁵ See Verisign Report, supra note 2, at 3 (stating that ccTLDs

domains ("ccTLD").²⁶ ccTLDs are two-letter country codes assigned to every country in the world.²⁷ Many governments now view the maintenance of ccTLDs as a part of their sovereign right.²⁸

registrations grew by 25%); see also The European Registry of Internet Domain Names, Eurid's Quarterly Progress Report To The European Commission: First Quarter (2006), available at <http://www.eurid.eu/en/general/news/eurid2019s-first-quarterly-report-is-now-available> [hereinafter EURid] (providing statistics on the growth of the .eu domain name and specific ccTLDs in Europe).

²⁶ See generally **Addressing the World National Identity and Internet Country Code Domains** (Erica Schlesinger Wass ed., 2003) (offering essays on the effect ccTLDs have on several nations' identities).

²⁷ See Arx & Hagen, supra note 5, ¶ 4 (noting that there are 243 nations with a delegated ccTLD)

²⁸ See Kenneth Neil Cukier, Presented at INET 2002: Eminent Domain: Initial Policy Perspectives on Nationalizing Country Code Internet Addresses (June 2002), available at <http://www.inet2002.org/CD-ROM/lu65rw2n/papers/g03-b.pdf> (arguing that nations view the two letter ccTLD as a part of their sovereignty and "vital national interest").

With the increasing involvement of national governments in domain name governance and the rising registration of ccTLDs, a critical question remains: how can the current system change to protect freedom of speech on the internet in relation to domain names? Because of the increasing power of national governments, the United States needs to encourage an international convention that ensures freedom of speech will be protected in the transparent allocation of domain names on the internet.

Part II of this Comment explores domain name laws in relation to international freedom of speech protections,²⁹ the freedom of speech guarantees protected by ICANN,³⁰ and the free speech considerations in a variety of national ccTLDs policies.³¹ Part III analyzes the implications for free speech in relation to domain names with the increasing involvement of national

²⁹ See discussion, infra Part II.A (discussing the protections granted by the Universal Declaration of Human Rights).

³⁰ See discussion, infra Parts II.B-C (detailing the importance of free speech within domain names and specifying how ICANN's Universal Dispute Resolution Policy addresses free speech concerns in domain name disputes).

³¹ See discussion, infra Part II.D (providing background information about ccTLDs and explaining ccTLD laws from the European Union, China, and India).

governments,³² and the possible solutions that the international community could provide.³³ Part IV offers recommendations for inviting national governments into an international convention to guarantee free speech considerations in the allocation and dispute resolution of domain names.³⁴

II. Background

The debate over the extent to which international law can regulate free speech in the transmission of content is not new.³⁵

³² See discussion, infra Parts III.A-B (analyzing how domain law affect an individuals free speech and how the increasing role of national governments threatens free speech in relation to domain names).

³³ See discussion, infra Part III.C (arguing that international organization would aid in the protection of freedom of speech in relation to domain names).

³⁴ See discussion, infra Parts IV.A-C (recommending that a national convention, ICANN, and the Universal Declaration of Human Rights recognize free speech in relation to domain names).

³⁵ See Michael J. Farley, Conflicts Over Government Control of Information—The United States and Unesco, 59 **Tul. L. Rev.** 1071, 1074-78 (1985) (detailing how the Soviet Bloc nations attempted to create a New World Information Communication Order to compensate for the perceived Western Bias “in the gathering

The internet presents an opportunity for international law to regulate domain names³⁶ because the world wide web is not subject to the traditional forces of governmental control.³⁷ Although the internet is a unique communications tool, there still exists a

and controlling of news”).

³⁶ See Johnson & Post, Symposium, Surveying Law and Borders: Law And Borders—The Rise of Law in Cyberspace, 48 **Stan. L. Rev.** 1367, 1370-72 (1996) (arguing that the internet functions beyond the territorial borders of nations because the cost and speed of transmission are “almost entirely independent” of physical locations). But see Dauterman Jr., supra note 5, at 218-19 (contending that the internet exists in real time and real place, and that international guarantees on freedom of speech, such as the UDHR give nations a blank check in the regulation of speech on the internet). Dauterman concludes that the only real limits on national control of the internet are found in the “internationally accepted principles of extraterritorial jurisdiction”. Id.

³⁷ See Holman & McGregor, supra note 11, at 288 (explaining that the characteristics of the Internet allow individuals to believe that a free exchange of information exists without the traditional forms of governmental regulation).

debate over the extent to which international³⁸ or national law³⁹ should regulate and control this distinct communications medium.⁴⁰

³⁸ See generally, Henry H. Perritt, Jr., Symposium, Internet and Legal Theory the Internet is Changing International Law, 73 **Chi.-Kent L. Rev.** 997, 1037 (2003) (exploring how the internet can help facilitate the growth of international law because it allows for the growth of "international norms"). See Dauterman Jr., supra note 5, at 208 (maintaining that legitimate regulation of the internet needs to conform to international guarantees of free speech and expression).

³⁹ See Mayer-Schonberger, supra note 14, at 613-15 (articulating that "traditionalists" believe nations should govern the internet because of a state's "democratic legitimization" and the ability of the nation-state to enforce regulations on a large scale).

⁴⁰ See Johnson & Post, supra note 36, at 1374 (stating that any regulatory measures in cyberspace are likely to fail because users on the internet can simply move to the next logical open portal ie they can exit those areas of the internet under control). But see Dawn Nunziato, Book Review: Exit Voice, and Values on the Net, 15 **Berkeley Tech. L.J.** 753, 766-68 (2002) (contending that a cyber market premised upon the ability of an

A similar debate occurs in regards to freedom of speech. Local cultural values largely determine the level of speech protected in different societies across the globe.⁴¹ On one side of the spectrum is the United States, dedicated to protecting the freedom of speech⁴², and on the opposite end, nations that curtail and censor almost all forms of expression.⁴³

internet user to exit may not allow the protection of "unpopular or minority speech").

⁴¹ See Weber, supra note 16, at 190 (listing political, historical, religious, and social consideration as variables that determine what a society views as protected speech); see also Krotoszynski Jr., supra note 8, at 214 (explaining that free speech is "highly culturally contingent" and that an individual should not depend only on "universalistic" claims about the right).

⁴² See Reno v. ACLU, 521 U.S. 844, 868 (1997) (discussing how the Communications Decency act violated the first amendment because the CDA completely silenced protected speech). Compare Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (expressing the idea that the state can limit free speech only if an individual is advocating the incitement of "imminent lawless action"), with New York Times Co. v. Sullivan, 376 U.S. 254, 281 (1964) (holding that a public official cannot recover from defamation

These seemingly polar views of free speech protection attempt to coexist within international guarantees of human rights.⁴⁴ In the past, nations agreed to limit speech that advocated hate and discrimination, and thus, there are some

unless he proves that the statement was made with "actual malice").

⁴³ See Colby C. Nuttall, Defining International Satellite Communications As Weapons of Mass Destruction: The First Step in A Compromise Between National Sovereignty and the Free Flow of Ideas, 27 **Hous. J. Intl' L.** 389, 400 (2005) (noting that nations which limit the free flow of information cite to article II of the U.N. charter which grants deference to a nation's "cultural, religious, social, and economic interest"); see also Mark Konkel, Internet Indecency, International Censorship, Service Providers' Liability 19 **N.Y.L. Sch. J. Int'l & Comp. L.** 453, 465 (2000) (emphasizing that levels of free speech protection depend largely upon the extent to which a nation has the jurisdiction to adjudicate a claim).

⁴⁴ See Dauterman, supra note 5, at 212 (arguing that the UDHR and the Discrimination Convention are weak because they fail to define the standards by which nations should guarantee particular rights).

areas of consensus.⁴⁵ The tension between national norms of free speech and international guarantees of human rights largely frames the debate in relation to domain names.

A. Free Speech and International Law: The Universal Declaration of Human Rights

The international community often cites to the Universal Declaration of Human Rights ("UDHR") Article 19 as a guarantee for freedom of speech.⁴⁶ Article 19 of the UDHR states that "everyone has the right to freedom of opinion and expression . . .

⁴⁵ See Universal Declaration of Human Rights, G.A. Res. 217 A (III) art. 7, U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter UDHR Resolution] ("All are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."); see also **Morsink**, supra note 23, at 72 (maintaining that the drafters of the UDHR believed that an individual should be protected from both blatant forms of discrimination and the "incitement" of discrimination).

⁴⁶ See **Morsink**, supra note 23, at 65-69 (describing the debate between nations over article 19, in which the Soviet Union worried that freedom of expression would enable fascist to express their ideas, and Western governments viewed the article as necessary in order to protect freedom of expression).

.regardless of frontiers.”⁴⁷ Although it is not a treaty, scholars consider the UDHR as a part of customary international law.⁴⁸ But there are exceptions within the UDHR that limit the legal obligations of member states. Article 29(2) states that nations can limit the applicability of the UDHR in order to meet the “requirements of morality, public order, and the general welfare in a democratic society.”⁴⁹

B. Free Speech and Domain Names

A large part of the internet is transmission of content.⁵⁰ Domain name registrations of both gTLDs and ccTLDs are

⁴⁷ UDHR Resolution, supra note 45, art. 19.

⁴⁸ See Konkell, supra note 43, at 472 (maintaining that the UDHR has become a “normative instrument” for member states because many nations incorporated the “principles” of the UDHR into their own laws).

⁴⁹ See UDHR Resolution, supra note 45, art. 29 § 2 (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others . . .”).

⁵⁰ See **Interfax News Agency**, supra note 9 (that the director of ICANN believed that the real thing that “drives” the internet is content).

increasingly dramatically around the world,⁵¹ and thus domain names⁵² play an important role in the transmission of an individual's ideas.⁵³ Although the Domain Name system may not

⁵¹ See Verisign Report, supra note 2, at 2 (stating that the 85.6 million domain names world wide at the end of third quarter 2005 was a "record setting number" that reflects a "29 percent increase year over year"); see also EURid, supra note 25, at 4 (emphasizing that in just one week the .eu domain name registered 1.5 million new websites); China Internet Network Information Center, <http://www.cnnic.net.cn/en/index/00/index.htm> (last visited Aug. 7, 2006) [hereinafter CNNIC] (providing up to date statistics on the number of domain names registered in China).

⁵² See Internet Domain Names: Hearings Before the Subcomm. On Communications of the Senate Comm. On Commerce, Sci., and Transp., 107th Cong. (2001) (statement of Michale M. Roberts, President and CEO, ICANN) (testifying how the DNS allows internet users to type the name of internet addresses, instead of the unique numbers assigned to each computer, in order to find an internet website).

⁵³ See Chinese Domain Name Consortium, The Proposal for Internationalizing ccTLD names, June 2005, at 2, available at <http://www.icann.org/announcements/idn-tld-cdnc.pdf> (stating

affect national policies already censoring the internet,⁵⁴ the control over how a domain name is registered and disputes are adjudicated ultimately implicate a website's content.⁵⁵ For a website to display information it must initially register a

that a domain name is the "most important way" to locate resources on the internet). But see Yu, supra note 12, at 406 (arguing that ICANN and the DNS represent a tiny portion of the internet governance issue because most commentators focus on child pornography, spam, and the intellectual property rights associated with the internet).

⁵⁴ See Elaine Chen, Global Internet Freedom: Can Censorship And Freedom Coexist?, 13 **DePaul-LCA J. Art & Ent. L. & Pol'y** 229, 245 (2003) (listing nations such as Cuba, Laos, Burma, Saudi Arabia, Syria, Tunisia, Vietnam, Yemen, and China which "severely" hamper their citizens' ability to access the internet); see also Phillip J. Oliveri, Technological Software That Counters Internet Jamming: Its Role in the U.S. and In Non-Democratic Countries, 2003 **Syracuse Law & Tech J.** 5, 6 (2003) (explaining that nations can censor what an individual views on the internet when either the government owns and operates the actual internet service providers, or when the government uses proxy servers to block information from being accessed by an individual).

⁵⁵ Nunziato, supra note 10, at 193.

domain name.⁵⁶ And if the domain name is cancelled the content is ultimately lost.⁵⁷

C. ICANN: The Private Organization that Maintains the Domain Name System.

The creation of ICANN, a private corporation in California, came from the realization of the United States government⁵⁸ that

⁵⁶ See MOU supra note 13 (maintaining that the United States government wanted ICANN to develop a "domain name registration service" that would ensure the stability of the internet); see also, Internet Corporation for Assigned Name and Numbers, Accreditation Overview, <http://www.icann.org/registrars/accreditation-overview.htm> (last visited Aug. 3, 2006) (noting that the shared registration system is a system in which ICANN forms a contract with a accredited organization to register different domain names); Froomkin, supra note 14, at 41 (emphasizing the registrants and managers, not specific "IP numbers," make every domain name unique on the internet).

⁵⁷ Nunziato, supra note 10, at 193.

⁵⁸ See A proposal to Improve Technical Management of Internet Names and Addresses Discussion Draft, 63 Fed. Reg. 8826 (Feb. 20, 1998) [hereinafter Green Paper] (stating that the corporation in charge of domain names should be headquartered within the United States and subject to American regulations and

domain name management needed to have a private partnership in order for the internet to grow.⁵⁹ The United States wanted ICANN to control the domain name system with little participation from national governments, in order to fully represent internet users.⁶⁰

But two problems developed with the establishment of ICANN:

1) no policy stipulating how ICANN would ensure the protection

laws); see also James Glavem, Net Mourns Passing of Giant **Wired News**, Oct. 18, 1998, <http://www.wired.com/news/Culture/0,1284,15682,00.html> (detailing how the "father of the internet" David Postel was the architect of the modern domain name system).

⁵⁹ See Kleinwaechter, supra note 24, at 1108 (explaining that Postel believed in limiting the role of government in the management of the domain name system); see also Nunziato, supra note 10, at 231 (detailing why the United States could not rely upon the carefully-designed, preexisting structures of representative government because the internet transcended the boundaries of territorial sovereigns).

⁶⁰ See Green Paper, supra note 58 (stating that in the view of the United States the private partnership would secure four basic objectives of the DNS stability, competition, private bottom-up coordination, and representation).

of an individual's speech in relation to domain names;⁶¹ 2) national governments questioning the legitimacy of a private organization in the United States controlling the registration and adjudication of all domain names,⁶² including generic top

⁶¹ See Nunziato, supra note 10, at 193 (arguing that ICANN's policies affect free speech because they reduce the anonymity of the register, and the UDRP procedures allow for the "surrender" of domain names that are critical of trademark owners).

⁶² See Internet Management: Limited Progress on Privatization Project Makes Outcome Uncertain: Testimony Before the Subcomm. On Sci., Tech., and Space of the Senate Comm. On Commerce, Sci., and Transp., 107th Cong. 15 (2002) (testimony of Peter Guerrero, Director, Physical Infrastructures Issues, United States General Accounting Office) [hereinafter Guerrero testimony] (testifying that because ICANN is a private organization attempting to develop domain names from the bottom up within the global internet community ICANN's "legitimacy and effectiveness" remain in "question). But see White Paper, supra note 20 (articulating that the U.S. government may have considered the concerns of national governments when it stated that, "management structures should reflect the functional and geographic diversity of the internet and its users").

level domains("gTLD").⁶³ ICANN maintains gTLD domain names, such as .com, .net, and .org. by contracting with other private organizations.⁶⁴ In the past year, nearly 46% of all registered domain names were with the gTLD ".com" domain name.⁶⁵ Because the control ICANN has over domain names, some nations proposed regulating authority from ICANN to an international organization.⁶⁶

1. The Universal Dispute Resolution Policy

In order to adjudicate disputes between internet users around the globe ICANN established the Uniform Domain Name

⁶³ See Arx, supra note 18, ¶ 11 (listing .com, .net, .mil, .gov as domain names of the gTLD).

⁶⁴ See Parisi v. Netlearning, Inc., 139 F.Supp 2d 745, 747 (E.D. Va. 2001) (noting that although ICANN maintains the domain name system, every accredited register works with ICANN through renewable contracts and not direct regulation).

⁶⁵ See Verisign Report, supra note 2, at 2 (stating that in 2005 the .com domain name registration grew by 29% over the previous year).

⁶⁶ See Kleinwaechter, supra note 24, at 1111 (explaining how the initial U.S. proposal for the domain name system caused a wave of criticism, particularly from the E.U. which called for an "international representative body for future Internet Governance.").

Dispute Resolution Policy (“UDRP”)⁶⁷. The UDRP attempts to resolve private domain name disputes mainly in regards to trademark law.⁶⁸ ICANN lists four official agencies—located around the world—that are responsible for adjudicating domain name disputes according to the UDRP.⁶⁹

⁶⁷ See generally Uniform Dispute Resolution Policy, infra note 70, ¶ 1 (emphasizing that the purpose of the UDRP is to settle disputes involving the “registration” and “use” of a domain name). See Stacey H. King, Trademarks, Domain Names, and the Uniform Dispute Resolution Policy, in **Trademark Law & the Internet Issues, Case Law and Practice Tips** 275, 276 (Lisa E. Cristal & Neal S. Greenfield eds., 2nd ed. 2001) (reiterating that the UDRP is binding on all domain name registrants that use an accredited ICANN register, and that some ccTLD have adopted the UDRP on a voluntary basis).

⁶⁸ See Lisa M. Sharrock, The Future of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions From Within the UDRP Framework, 51 **Duke L.J.** 817, 821 (2001) (stating that domain names disputes include “pure speculation”—registration of un-trade-marked words in order to sell for a profit, and cybersquatting—registering a domain name with protected trademarks in order to demand a “ransom”).

⁶⁹ See Internet Corporation for Assigned Name And Numbers,

Approved Providers, <http://www.icann.org/udrp/approved-providers.htm> (last visited Aug. 4, 2005) (listing the approved providers that use the UDRP in domain name disputes); see also Asian Domain Name Dispute Resolution Centre, <http://www.adndrc.org/adndrc/index.htm> (last visited Aug. 7, 2006) (detailing the history and the cases handled by the center); International Institute for Conflict Prevention & Resolution, http://www.cpradr.org/ICANN_Menu.asp?M=1.6.6 (last visited Aug. 7, 2006) (explaining how the institute incorporates the UDRP into its adjudication procedures of domain name disputes); National Arbitration Forum, <http://domains.adrforum.com> (last visited Aug. 7, 2006) (articulating how the forum adjudicates domain names disputes); Sue Ann Mota, Internet Domain Name Disputes Working Towards a Global Solution, 7 **Comp. L. Rev. & Tech. J.** 213, 217-18 (2004) (providing general background information on the number of cases that the Asian Domain Name Dispute Resolution Center, International Institute for Conflict Prevention & Resolution, and the National Arbitration Forum have adjudicated).

2. National Sovereignty Concerns Associated with the UDRP

Although, the UDRP policy allows parties to appeal a panel's decision to appropriate national courts,⁷⁰ ICANN's adjudication policies in regard to domain names aroused national sovereignty concerns.⁷¹ In the United States the fourth circuit noted that individuals registering their domain name with ICANN are provided "full blown" recourse to national courts "in order to prevent abuse of the UDRP process."⁷²

⁷⁰ See Internet Corporation for Assigned Name and Numbers, Universal Dispute Resolution Policy, Oct. 24, 1999, § 4(k), available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> [hereinafter UDRP] (stating that an individual is free to file a claim in a national court, even before the approved UDRP panel adjudicates the dispute).

⁷¹ See Graeme B. Dinwoodie, National Trademark Laws and the Non National Domain Name System, 21 U. Pa J. Int'l Econ. L. 495, 511 (2000) (emphasizing that although there is a core principle of free speech protection, nations deal with levels of protection in different ways).

⁷² Barcelona.com v. Excelentisimo Ayuntamiento De Barcelona, 330 F.3d 617, 623-24 (4th Cir. 2003). See Anticybersquatting Consumer Protection Act § 1125(d), 15 U.S.C.S. § 1125(2006) (stating that an individual will be liable in a civil action by

3. UDRP Free Speech Cases

UDRP panels have decided whether or not a domain name furthers an individual's right to freedom of speech.⁷³ Within the UDRP, some expert panels have held that a register's free speech interest does not extend to the right to use another domain name.⁷⁴ The implication of individuals' free speech

the owner of the "mark" if that person has a "bad faith" interest in the mark); see also Lanham Act § 1125(a), 15 U.S.C.S. § 1114 (2006) (prohibiting the use of a trademark that is likely to cause confusion about the source of the product or service).

⁷³ See Robert A. Badgley, Internet Domain Names and ICANN Arbitration: The Emerging "Law" of Domain Name Custody Disputes, 5 **Tex. Rev. L. & Pol.** 343, 361 (2001) (citing to CompUSA Mgmt. Co. v. Kahn, Case No. 123921 (Nat. Arb. Forum Oct. 18, 2002) (noting that the respondent's negative characterization of complaintant's goods was legitimate as any other "commercial activity" because the first amendment protects a person's right to criticize)).

⁷⁴ See Victoria Holstein-Childress, Lex Cyberus: The UDRP as a Gatekeeper to Judicial Resolution of Competing Rights to Domain Names 109 **Penn St. L. Rev** 565, 570-91 (2004) (providing details of WIPO panels that have dealt with free speech claims); see

rights are mostly adjudicated in cases involving gripe sites or suck cites, such as walmartsucks.com.⁷⁵ The following two cases are examples of how World Intellectual Property (“WIPO”) panels⁷⁶ ruled on free speech considerations.

i. Estee Lauder v. Hanna

also Dr. Milton Mueller, Success by Default: A New Profile of Domain Name Trademark Disputes Under ICANN’s UDRP, **Syracuse University School of Information Studies**, June 24, 2002, at 22-7 (explaining that many plaintiffs in domain name dispute arbitrations are not shy about using domain name challenges to simply silent critics). Overall the study found that in Critic and Commentary cases respondents won in UDRP panels only 36% of the time. Id.

⁷⁵ See Badgley, supra note 73, at 360 (arguing that individuals register “gripe cites” for the purpose of criticizing another business or entity).

⁷⁶ See World Intellectual Property Organization, <http://arbiter.wipo.int/domains/> (last visited Aug. 7, 2006) (providing general information about WIPO and the cases adjudicated by the organization); see also Mota, supra note 69, at 217 (detailing how the World Intellectual Property Organization ruled on certain domain name cases).

In Estee Lauder v. Hanna the respondent claimed a protected free speech right to create a domain name similar to the Estee Lauder website.⁷⁷ The panel evaluated UDRP section 4(a)(ii)—whether the respondent had any rights or legitimate interest in respect to the domain name.⁷⁸ The panel acknowledged that under U.S. law, the respondent had an “extensive free speech right to provide a platform to criticize the mark owner.”⁷⁹ But the panel found that the respondent’s first amendment rights in the United States did not outweigh the trademark interests embodied in the UNDRP’s standard.⁸⁰

ii. Bridgestone Firestone v. Myers

In Bridgestone Firestone v. Myers the complainants alleged that the respondent’s domain name was similar to their own.⁸¹ The

⁷⁷ Estee Lauder Inc. v. Estelauder.com, Case No. D2000.0869, (WIPO Sept. 25, 2000), available at <http://arbiter.wipo.int/Domains/decisions/html/2000/d2000-0869.html> [hereinafter Estee Lauder].

⁷⁸ UDRP, supra note 70, § 4(a)(ii).

⁷⁹ Estee Lauder, supra note 77.

⁸⁰ Id.

⁸¹ Bridgestone Firestone v. Jack Myers, Case No. D2000-0190 (WIPO July 7, 2000), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0190.html> [hereinafter Bridgestone].

respondent argued that he had a free speech right to maintain the domain name.⁸² The panel noted that its jurisdiction was limited to the rules of the UDRP.⁸³ But since both parties were from the U.S, the panel decided to reference to U.S. case law.⁸⁴

Although free speech is not listed as a legitimate noncommercial fair use of a domain name under section 4(c)(iii) of the UDRP, the panel argued that the list was not "exclusive".⁸⁵ The panel concluded that the exercise of free speech through criticism and commentary demonstrated, "a right or legitimate interest in the domain name . . . the right to free speech should be one of the foundations of Internet law."⁸⁶

⁸² Id.

⁸³ UDRP supra note 70, § 4(a).

⁸⁴ See Bally Total Fitness Holding Corp. v. Faber, 29 F.Supp.2d 1161, 1163 (C.D. Cal. 1998) (holding that the defendants use of a trademark on an internet site was commentary and did not impinge or dilute the plaintiffs mark); see also Name.Space, Inc. v. Network Solutions Inc., 202 F.3d 573, 585 (2d Cir. 2000) (concluding that "domain names" are not automatically protected by the first amendment because courts must first analyze the use of the domain name).

⁸⁵ Bridgestone, supra note 81.

⁸⁶ Id.

D. Country Code Top Level Domains

In the mid 1980s, nations were issued ccTLDs based upon ISO 3166-1 country codes.⁸⁷ Although ICANN officially controls every ccTLD, as the internet developed, national governments viewed ccTLDs as components of their national sovereignty, furthering political and economic goals.⁸⁸ National governments offer a

⁸⁷ See J. Postel, supra note 21 (arguing that individual managers, and not governments, should act as a "trustee" for the ccTLD for both the citizens of the nation and the "global internet community"); see also Kleinwaechter, supra note 24, at 1106 (emphasizing that many world governments initially ignored Postel's delegation of ccTLDs because few governments considered the DNS "worthy of attention").

⁸⁸ See Arx & Hagen, supra note 6, ¶ 21 (explaining that because certain ccTLDs require a "domestic presence" for an individual to register a domain name, there is an inherent "association" or relationship between the country and the registrant); see also Yu, supra note 12, at 388-90 (articulating that although nations were initially uninterested in ccTLD, as the internet developed national governments realized the social and economic importance of domain name system); Xue Hong, Domain Name Dispute Resolution in China: A Comprehensive Review, 18 *Temp. Int'l & Comp. L.J.*

significant amount of input into ccTLD policy through the Government Advisory Committee ("GAC").⁸⁹ The GAC provides advice to ICANN in respect to the implications of the private organization's decisions on national laws.⁹⁰ The influence of

1, 3-4 (2004) (detailing how the China Network and Information Center ("CNNIC") is under the control of the Ministry of Information Industry ("MII")).

⁸⁹ See generally Internet Corporation for Assigned Name and Numbers, Bylaws for Internet Corporation for Assigned Names and Numbers, art. XI § 2, <http://www.icann.org/general/bylaws.htm> (last visited Aug. 7, 2006) (illustrating how the GAC can appoint annually one non-voting "liaison" to the ICANN Board of Directors and the ICANN Nominating Committee).

⁹⁰ Compare Internet Corporation for Assigned Names and Numbers, Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains, ¶ 1.2, http://gac.icann.org/web/home/ccTLD_Principles.rtf (last visited Aug. 7, 2006) (stating that ccTLD issues should be dealt with by local "internet communities" because of the local impact of many ccTLD policies), with Peter K. Yu, The Never Ending ccTLD Story, in **National Identity and Internet Country Code Domains**, supra note 26, at 7 (arguing a "confederation" of local ccTLD administrators could come together and recognize ICANN). Yu also

the GAC increased as a result of ICANN's concern over its relationship with private organizations that maintain ccTLDs in their respective countries.⁹¹ Many of the local organizations deny ICANN's authority over domain names.⁹² The following are examples of national and super-national ccTLD laws.

notes that if ccTLD managers continue to not recognize the authority of ICANN, then the power of the organization will eventually weaken. Id., at 8.

⁹¹ See Committee on ICANN Revolution and Reform, Recommendations for the Revolution and Reform of ICANN, May 2002, at IX, available at <http://www.icann.org/committees/evol-reform/recommendations-31may02.htm> (suggesting that in order to reach a balance between allowing national governments to express their concerns to ICANN and representing the interests of individual internet users across the globe the "GAC Secretariat" and ICANN's staff should have "regular interaction"); see also Taggart, supra note 12, at 538 (evaluating Lynn's presidential report and concluding that Lynn realized that a purely private organization could not handle both the technical and policy aspects of "DNS management").

⁹² Michael Fromkin, Habermas@Discourse.Net: Toward Criticle Theory of Cyberspace, 116 **Harv. L. Rev.** 749, 849 (2003). See Sharrock, supra note 68, at 839 (specifying that the UDRP does

1. European Union and ".eu"

The domain name ".eu" has been in existence since December 2005.⁹³ Only companies with their principle place of business within the community and citizens of the Union can register with the ".eu" ccTLD.⁹⁴ The European Union also implemented a domain name dispute resolution policy that incorporated several public policy concerns and the recommendations of WIPO.⁹⁵ Questions of

not apply to ccTLDs, if the nation has not officially "adopted" the UDRP); see also Arx & Hagen, supra note 5, ¶ 34 (explaining that "most countries" have not signed agreements with ICANN because of differences over payments, "equality" in decision-making, and "representation" with the ICANN structure); Maggs, supra note 12, at 604 (questioning why ICANN policies do not distinguish between closed and open ccTLDs).

⁹³EURid, supra note 25, at 4.

⁹⁴See Commission Regulation 733/2002 art. 4 section 2(b)(i)-(iii), 2002 O.J. (L 113) 1 [hereinafter .eu regulation] (stating that in order to register a domain name with the ".eu" ccTLD a business must have its "central administration or principal place of business" within the community; an organization needs to be "established" within the community; and a "natural resident" of the European Union).

⁹⁵ Id., arts. 4-5.

legitimate free speech concerns in the adjudication in domain name disputes are left to national and European Union laws.⁹⁶

2. China and ".cn"

Registrations of the ".cn" domain name are rapidly growing.⁹⁷ The Ministry of Information Industry must approve all domain name registrations.⁹⁸ Non Chinese "entities"⁹⁹ may register websites under the ".cn" domain name.¹⁰⁰ Any domain name

⁹⁶ See id., art. 21 § 2(c) (detailing that a holder of a domain name can make a legitimate and non-commercial use of a domain name as long as the holder does not have the intent to mislead consumers).

⁹⁷ See China Internet Network Information Center, Domain Name Statistics, <http://www.cnnic.net.cn/en/index/00/index.htm> (last visited August 1, 2008) (providing monthly domain name registration statistics which depict an increase of the .cn domain name).

⁹⁸ China Internet Domain Name Regulations Order No. 30, Ministry of Information Industry of the People's Republic of China, art. 8 (2004) [hereinafter known as China Internet Domain Name]

⁹⁹ See Hong, supra note 88, at 7 (specifying that an individual cannot register a domain name under .cn).

¹⁰⁰ See id., at 6 (stating applicants registering with the .cn

registered, including “.cn,” cannot have content that harms the “national honor,” violates state religion policies, or instigates crime.¹⁰¹

3. India and “.in”

The “.in” registry is a not-for profit organization that although autonomous, is accountable to the government.¹⁰² The government of India is the “final authority” for “.in” domain name in order to ensure its maintenance is in “accordance with the public interest and relevant laws of the country.”¹⁰³

III. Analysis

Although nations can censor what individuals within their territory view on the internet,¹⁰⁴ there are no definitive zones

ccTLD no longer are required to be Chinese entities).

¹⁰¹ China Internet Domain Name, supra note 98, art. 27.

¹⁰² .in Internet Domain Name, Policy Framework and Implementation, Government of India, Ministry of Communications & Information Technology, § 3.5.1 (2004) [hereinafter .in policy].

¹⁰³ Id. § 3.4.12.

¹⁰⁴ See Oliveri supra note 54, at 6 (explaining how nations can censor what their citizens view on the internet by either controlling the internet service providers or establishing proxy servers to block access to certain websites).

of censorship in relation to the registration and adjudication of domain names.¹⁰⁵ But that could change in the very near future.¹⁰⁶ Neither ICANN,¹⁰⁷ nor individual nations that register their own ccTLDs,¹⁰⁸ explicitly protect an individual's freedom of speech in relation to a domain name. Thus, in order to

¹⁰⁵ See Kleinwaechter supra note 24, at 1124 (arguing that ICANN operates in an era where the concept of the nation state is complemented by "an emerging new governance system"); see also Froomkin, supra note 14, at 41 (maintaining that the domain name system requires each domain name to be unique in order for an individual to manage successfully manage a website, and not necessarily because each domain name need an association with a single "IP number").

¹⁰⁶ See Dauterman, supra note 5, at 1123 (hypothesizing that national governments could instruct ccTLD managers to remove unwanted second level domain from the Internet).

¹⁰⁷ See White Paper supra note 20 (stating that the organization in charge of domain names does not need to address free speech "guarantees").

¹⁰⁸ See discussion, supra Part I.D (noting that the European Union's, China's, and India's laws did not explicitly mention the importance of providing free speech protections in relation to domain names).

protect freedom of speech as it relates to domain names, safeguards may have to be implemented through international law.¹⁰⁹

A. Domain Names Laws Affect an Individuals Free Speech

Domain name regulations clearly implicate free speech interests for the global internet community. Domain names are an important part of the internet because domain name registrations increased dramatically around the world.¹¹⁰ The

¹⁰⁹ See Kleinwaechter, supra note 24, at 1123-24 (recognizing that conflicts are numerous between national governments and private entities over the governance of the domain name system). Such conflict arise from national policies that seek to restrict freedom of speech in relation to domain names. Id. See also Johnson & Post, supra note 36 ,at 1394 (arguing that territorial local claims to restrict online transactions "should be resisted"). The article goes on to state that resisting territorial claims is the "net equivalent of the first amendment". Id., at 1395.

¹¹⁰ See Verisign Report, supra note 2, at 2 (providing statistics that demonstrate that a "record setting" number of domain names were registered in the third quarter of 2005).

eighty five million domain names allow individuals to access a website's content and information.¹¹¹

But the current domain name system does not protect individuals free speech rights. The UDRP allows for the cancellation or transfer of a domain name.¹¹² If a panel believes that a gripe cite or even a similar domain name is acting in bad faith,¹¹³ all the content on the domain name is lost, including

¹¹¹ See Nunziato, supra note 10, at 193 (articulating that domain names allow individuals to view the content on a website).

¹¹² See UDRP, supra note 70, § 3 (stating that the UDRP panel will "cancel" or "transfer" a domain name); see also Nunziato, supra note 10, at 201-06 (contending that ICANN implicates an individuals free speech rights because (1) a person cannot anonymously register a domain name because ICANN requires information, and (2) in the Cybersquatting dispute resolution framework).

¹¹³ See UDRP, supra note 70, § 4(b) (holding that evidence of bad faith in the registration of domain names can lead to the cancellation of that particular domain name); see also Badgley, supra note 73, at 368 (arguing that when a gripe cite uses "pejorative" language on the cite but not in the domain name the free speech defense would only be available if the individual did not receive any commercial gain from the use of the domain

the critical commentary.¹¹⁴ Further, national governments can regulate the types of domain names that register with the local ccTLD, and like the UDRP, transfer or cancel the domain name.¹¹⁵

name, and the cite actually expresses ideas); Nunziato, supra note 10, at 273 (explaining that in some cases the first amendment does protect expressive phrases).

¹¹⁴ See Nunziato, supra note 10, at 193 (articulating that an organization that controls the maintenance of a domain name, can regulate the content of the website and ultimately the internet by canceling the domain name); see also Cukier, supra note 28, at IV (insisting that revoking a domain name on the internet is similar to "political exile" because once the domain name is revoked all the ideas and views on the website are lost to the general public).

¹¹⁵ See discussion, supra Part II.D 1-3 (providing information about national laws for the European Union, China, and India domain names). The European Union places the question of legitimate free speech concerns with national courts and European Union laws. China does not allow any domain name that goes against the national honor, and India stipulates that the .in domain name will be maintained in "accordance with the public interest". Id.

B. The Increasing Role of National Governments Threatens the Ability of Internet Users to Utilize Domain Names to Advocate Free Speech.

Currently there is a vacuum of free speech protection as it relates to domain names. Nations want an international body¹¹⁶ to control the allocation of domain names because of questions over the legitimacy of a single private corporation in the U.S. controlling the domain names system.¹¹⁷ But, at the same time there is no guarantee in the UDHR that nations must protect free

¹¹⁶ See Guerrero Testimony, supra note 62 (detailing that because ICANN is a private organization maintaining all the internet's domain names that ICANN legitimacy "remains in question"); see also Cukier, supra note 4, at 7 (stating that many governments feel that the internet should be regulated by a "multinational treaty").

¹¹⁷ See Froomkin, supra 92, at 842 (arguing that although many governments participated in the development of ICANN, the organization failed to reach consensus on a relatively small range of topics). Compare Burt Helm, supra note 15 (explaining how the ICANN vote was also seen within the international community as another example of the United State's control over the internet), with Susan P. Crawford, The ICANN Experiment, 12 **Cardozo J. Int'l & Comp. L.** 409, 410 (2003) (insisting that ICANN has undertaken policy decisions concerning the domain name system "with very little oversight" from the U.S. government).

speech as it relates to domain names.¹¹⁸ Further, the UDRP does not officially recognize free speech as a legitimate interest in a domain name.¹¹⁹ Thus, the increasing role of national governments in the registration and adjudication of domain name disputes could chill free speech rights for citizens around the world if there is no protection.¹²⁰

¹¹⁸ Compare UN Covenant, supra note 23, art. 19 § 2 (providing no mention of domain names as a "frontier" guaranteeing the right to freedom of expression), with UDHR, supra note 45, art. 19 (mentioning nothing about frontiers including domain names).

¹¹⁹ See Bridgestone, supra note 841 (indicating that the panel in the Bridgestone case noted that free speech is not listed as a legitimate noncommercial fair use); see also Sharrock, supra note 68, at 831 (arguing that because the UDRP is not specific the global internet community does not have a comprehensive domain name regulation to address a variety of issues).

¹²⁰ See Kleinwaechter, supra note 24, at 1123 (stating that national control of domain names could lead to a new level of "censorship"); see also Cukier, supra note 28, at IV ("The sequestration of ccTLDs by government authorities under claims of national sovereignty opens up Internet users to very real potential harms."). "It certainly weakens ICANN's power to influence how a (ccTLD) is politically run, which enabled the

1. UNDP Regulations 4a and 4(c)iii do not Recognize A Legitimate Free Speech Interest, and Even When a panel May Recognize a Free Speech Right, National Laws Play a Prominent Role in the UDRP Decision

Free speech concerns were not an inherent part of the development of ICANN¹²¹ nor the UDRP.¹²² Section 4(c)(iii) of the UDRP does not qualify any of the legitimate rights that an individual may have in a domain name.¹²³ The vague language in section 4a may resolve the majority of domain name disputes that involve some aspect of trademark infringement.¹²⁴ But,

body to uphold the interests of a local Internet community and not necessarily their government." Id.

¹²¹ See White Paper, supra note 20 (stating that the organization in charge of maintaining the domain name system would not need to address free speech protections because existing protections would "not be disturbed").

¹²² See UDRP supra note 70, § 4(c)(iii) (explaining that an individual can demonstrate their rights by claiming a legitimate non-commercial use, but the UDRP does not list what are the legitimate non-commercial uses of a domain name).

¹²³ Id.

¹²⁴ See Nunziato, supra note 10, at 277 (detailing how the developers of the UDRP intended that the policy would only address disputes involving bad faith "cybersquatting"); see also

individuals may argue that a domain name represents a free speech interest, because the name directs internet users to the website's content.¹²⁵ The Estee Lauder panel stated that the respondents "extensive free speech right" provided by U.S. law was not enough to overcome the UDRP's vague standards.¹²⁶ Thus, the panel's decision in Estee Lauder represents how even a claim of a free speech interest in a domain name, can be completely ignored due to the UDRP's narrow focus on trademark issues.¹²⁷

Bridgestone, supra note 81 (noting that the panel concluded that its jurisdiction was limited to the policy and rules of the UDRP); Mueller, supra note 74, at 22-7 (calculating that 2,500 unique organizations or individuals initiated complaints between February 2000-February 2002).

¹²⁵ See Bridgestone, supra note 81 (stating that under 4(c)(iii) of the UDRP free speech is not listed as a legitimate noncommercial interest); see also UDRP supra note 70, § 4(a)(ii) (listing general applicable disputes which do not explicitly include a free speech right).

¹²⁶ Estee Lauder, supra note 77.

¹²⁷ See Holstein-Childress, supra note 74 (arguing that the Estee lauder panel's "expansive construction" of the UDRP foreclosed any possibility of using a confusingly similar domain name to draw attention to "the subject matter of a complaint site").

Even when the Bridgestone panel did find a legitimate free speech right to a domain name, it seemed to implicitly make its decision¹²⁸ based upon the substantial weight of U.S. case law.¹²⁹ Courts in the United States have a clear history of protecting and balancing free speech interests¹³⁰, and thus U.S. case law

Compare Taubman Co. v. Webfeats, 319 F.3d 770, 774 (6th Cir. 2003) (explaining that the Latham act, is constitutional because it regulates “commercial speech” which is not entitled to strict first amendment protections), with Bosley Med. Inst., Inc. v. Kremer, 403 F.3d 672, 674 (9th Cir. 2005) (holding that the non-commercial use of a domain name website does implicate the “infringement” portion of the Lanham Act).

¹²⁸ See Thornburg, supra note 14, at 210 (hypothesizing that UDRP panels may feel compelled to consult specific national laws because the UDRP’s vague laws do not address divergent national laws).

¹²⁹ Compare Name.Space, Inc. v. Network Solutions Inc., 202 F.3d 573, 585 (2d Cir. 2000) (concluding that domain names are neither entitled or excluded from the protections of the first amendment), with Reno v. ACLU, 521 U.S. 844, 868 (1997) (discussing how the Communications Decency act violated the 1st amendment because the act completely silenced the ability of internet users to engage in protected speech).

may easily persuade any UDRP panel in recognizing a free speech interest in relation to a domain name.¹³¹

But if all the individuals in a UDRP dispute are from a nation, such as China¹³², that does not fully recognize freedom of speech, UDRP panels might be inherently persuaded to not recognize a legitimate free speech interest.¹³³ Such a scenario

¹³⁰ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (expressing the idea that the state can limit free speech only if an individual is advocating the incitement of “imminent lawless action”).

¹³¹ But see Erica Schlesinger Wass, The United States' .US: Striving for the American Dream, in **Addressing the World National Identity and Internet Country Code Domains**, supra note 24, at 130 (reporting that NeuStar, Inc., the company in charge of the .us domain name, developed a restrictive language policy in order to “preserve” the value of the .us domain name).

¹³² See Chen, supra note 54, at 248 (explaining how China’s attempt to implement its “golden shield project” depends largely on the growth of software that enables nations to effectively control the internet).

¹³³ Compare Bridgestone, supra note 81 (noting that a WIPO panel’s jurisdiction is limited to the rules of the UDRP), and UDRP, supra note 70, § 4(a)(ii) (listing general applicable

is not unlikely. Some of the accredited dispute resolution organizations are located in different parts of the world,¹³⁴ and thus possibly persuaded by national laws that limit free speech.¹³⁵

2. The Influence of National Laws within the Adjudication of Domain Name Disputes Through the UDRP Also Threatens gTLDs

Although .com and .net are gTLDs such panel rulings could further open the door for national laws to play a significant role.¹³⁶ The gTLDs are not in themselves subject to the

disputes which do not explicitly include a free speech right), with Barcelona.com v. Excelentisimo Ayuntamiento De Barcelona, 330 F.3d 617, 623-24 (4th Cir. 2003) (recognizing that the design of the UDRP gave full recourse to national laws in order to prevent the "abuse of the UDRP process").

¹³⁴ See Mota, supra note 69, at 217-18 (noting that the approved providers of the UDRP include WIPO and the Asian Domain Name Dispute Resolution Centre).

¹³⁵ See id. (providing general information about the number of cases each of the approved UDRP centers adjudicated in the past year).

¹³⁶ But see Barcelona.com, 330 F.3d at 623-24 (holding that ICANN recognized in designing the UDRP that there should be full recourse of panel decisions to national courts).

jurisdiction of national governments.¹³⁷ But because of the vacuum left by the UDRP regulations in regard to freedom of speech, any UDRP approved panel may consider national laws as the only available source of legitimate law.¹³⁸

The UDHR, although considered customary international law, might have very little weight, especially with parties from nations where free speech interests are effectively silenced.¹³⁹ Further nations can limit their obligations to the UDHR by declaring they are within the general exceptions allowed by Article 29.¹⁴⁰ Even if a panel were to rule in favor of a free

¹³⁷ See Thornburg, supra note 14, at 197 (arguing that gTLDs are independent from national laws because they are subject to the UDRP).

¹³⁸ See Michael Froomkin, ICANN's Uniform Dispute Resolution Policy—Causes and Partial Cures, 67 **Brook. L. Rev.** 605, 642-44 (2002) (suggesting that the question of which national law applies to a free speech issues is maybe beyond the UDRP since it adjudicates only a "subset" of matters related to trademark infringement).

¹³⁹ See Chen, supra note 54, at 245 (listing nations that hamper the ability of their citizens to access and view information on the internet).

¹⁴⁰ See UDHR Resolution, supra note 45, art. 29, § 2 (emphasizing

speech interest, UNDRP allow parties to appeal to their national courts.¹⁴¹ Corporations or parties could appeal their cases in courts with national laws that do not fully recognize either the UDHR or an individual's free speech rights.¹⁴²

3. ccTLD Laws Clearly Increase the Role of National Governments

With national governments increasing their control over ccTLDs, significant gaps may develop in freedom of expression

that individuals can limit the applicability of the UDHR in order to meet the requirements of "morality, public order, and the general welfare in a democratic society"); see also Dauterman, supra note 5, at 210 (maintaining that an individual's rights to free expression under the UDHR can be limited if the state chooses to exercise its police power in a manner consistent with the provisions of the UDHR).

¹⁴¹ See UDRP, supra note 70, § 4(k) (stating that the mandatory proceedings of the UDRP allow for an individual to submit any domain name dispute to a "court of competent jurisdiction"). The provision also suggests that an individual could bypass a UDRP panel and file a complaint directly with a national court. Id.

¹⁴² See Froomkin, supra note 138, at 634 (articulating that during the development of the UDRP, domain name holders argued that they were unwilling to waive the right to have their day in court because they believed they could win in a national court).

and speech on the internet in relation to domain names. No nation or entity can entirely control the internet and the information that it provides to individuals around the globe.¹⁴³ But ccTLD laws increase the role of national governments within the domain name system.¹⁴⁴

i. The Divergence of National Laws in Relation to ccTLDs May Create Separate Free Speech Zones on the Internet

Laws of the European Union, China, and India ultimately put questions of free speech into the jurisdiction of laws enforced by national governments.¹⁴⁵ Both India and China explicitly state

¹⁴³ See gilc, supra note 8 (explaining that the unique attributes of the Internet, such as its openness and global reach, enable the world wide web to circumvent the traditional forces of government control).

¹⁴⁴ See .eu regulation, supra note 94, art. 21 § 2(b) (i) - (iii) (holding that a domain name holder is making a legitimate noncommercial use of a domain name as long as the individual does not intend to mislead consumers).

¹⁴⁵ See China Internet Domain, supra note 98, art. 4 (noting that the MII is responsible for the administration of domain names in China); see also .in policy, supra note 102, § 3.4.12 (emphasizing that the government of India has "final authority" of the .in domain name).

that the government can deny a domain name that contains contents that are contrary to the public interest.¹⁴⁶ But on its face, China's domain name law appears more restrictive than the laws currently governing the European Union's and India's ccTLDs.¹⁴⁷

With this divergence among national laws, separate free speech zones on the internet could form.¹⁴⁸ An individual

¹⁴⁶ See .in policy, supra note 101, ¶ 3.4.12 (maintaining that the government of India oversees the .in domain name in order to ensure that the domain name system is maintained in accordance with the "public interest"); see also China Internet Domain, supra note 98, art. 27 (listing national security, and the spread of pornography as reasons for canceling a domain name).

¹⁴⁷ Compare China Internet Domain, supra note 98, art. 27 (detailing seven broad interests that the state has in canceling a domain name), with .in policy, supra note 102, § 3.4.12 (noting that the government of India will regulate the .in domain name in order to ensure that the "relevant laws of the country" are maintained), and .eu regulation, supra note 94, art. 21 § 2(c) (stating that a register to the ".eu" domain name is subject to both national and European laws).

¹⁴⁸ See Micael Geist, Cyberlaw 2.0, 44 **B.C. L. Rev** 323, 335 (2003) (arguing that although the internet started as one

registering a ccTLD in India or the European Union would have substantially more free speech protection than in China.¹⁴⁹ Such a development would strengthen the current censorship of the internet in certain areas of the world, and thus, further reduce the power of the world-wide-web to transmit ideas across national borders.¹⁵⁰

unified network, the internet is becoming a "bordered medium" because an individual's location largely determines their ability to access information).

¹⁴⁹ Compare China Internet Domain, supra note 99, art. 27 (holding that China does not allow any domain names that contains content which harms the national honor or interest, violates state religion policies, and spreads obscenity or instigates crime), with New York Times Co. v. Sullivan, 376 U.S. 254, 281 (1964) (concluding that a public official cannot recover from defamation unless they prove that the statement was made with "actual malice").

¹⁵⁰ See Cukier, supra note 28, at IV (hypothesizing that as national laws gain more control over the internet, the interests of governments will overshadow those of the global internet user).

**ii. National Laws that Limit Free Speech in
Relation to Domain Names Violate the Spirit
of the UDHR**

Nations that place restrictions on the type of domain names or ccTLD effectively curtail the free speech available in that country.¹⁵¹ Although China may substantially control the flow of information on the internet within its territory,¹⁵² China explicitly states that any domain name cannot contain information that offends the national honor or interest.¹⁵³ Any nation that restricts the free flow of information goes against the spirit of Article 19 of the UDHR which states, "everyone has the right to freedom of opinion and expression . . . regardless of frontiers."¹⁵⁴

But China's domain name laws likely do not offend its obligations to uphold the UDHR.¹⁵⁵ The UDHR broadly defines the

¹⁵¹ Cukier, supra note 4, at 7.

¹⁵² See Chen, supra note 534, at 248 (detailing China's attempt to

totally control the information its citizens can view on the internet).

¹⁵³ See China Internet Domain Name, supra note 98, art.

27 (listing seven areas of public welfare that information located within a registered domain name cannot breach).

¹⁵⁴ UDHR Resolution supra note 45, art. 29 § 2.

interests that entitle nations to limit the human rights of its citizens,¹⁵⁶ which can encourage high levels of censorship.¹⁵⁷ Article 29 states that nations can limit the applicability of article 19 in order to maintain morality, public order, and the general welfare.¹⁵⁸ Language such as general welfare is especially vague, and China and India use similar language to

¹⁵⁵ See Konkell, supra note 43, at 400 (noting that even international treaties designed to protect an individual's right to express ideas allow governments to limit such expression in order to preserve the overall "welfare" of the state).

¹⁵⁶ See Dauterman, supra note 5, at 211-12 (arguing that the UDHR allows states to curb freedom of expression "in the name of the broad and vague terms" of protecting the welfare of their citizens).

¹⁵⁷ See White Paper supra note 20, ¶ 11 (articulating that the United States wanted to give the management of the DNS to a private organization in order to ensure that the concerns of the global internet user would not be overshadowed by government regulations).

¹⁵⁸ See UDHR Resolution supra note 45, art. 29 § 2 (stating that an individual's rights can be limited by the necessity of maintaining the public order).

justify the invalidity of any domain name that may go against the national interest.¹⁵⁹

iii. China's ccTLD Policy May Create a Conflict Among Different Nations Laws that Protect Freedom of Speech

China's sweeping and general language also affects ccTLD registration for domain name registers outside its territory.¹⁶⁰ Although the European Union allows only the registration of domain names too individuals within the community,¹⁶¹ China allows entities outside of its territory to register ccTLDs.¹⁶² A non-Chinese corporation¹⁶³, who registers with the ".cn" ccTLD in

¹⁵⁹ See discussion, supra Part II.D (specifying how both China and India have substantial government oversight over the domain name policies of their respective countries).

¹⁶⁰ See Thornburg, supra note 14, at 197 (explaining how the .com etc domain names are regulated by ICANN's dispute policy).

¹⁶¹ See .eu regulation, supra 94, art. 4 § 2(b)(i)-(iii) (holding that in order to register a domain name with the ".eu" ccTLD an individual needs to be "a natural resident" of the European Union).

¹⁶² See Hong, supra note 88, at 6 (reiterating that applicants registering with the .cn ccTLD no longer are required to be Chinese entities).

¹⁶³ See id., at 7 (maintaining that individuals cannot register a

China, could have its domain name transferred without provocation.¹⁶⁴

Although China could refuse to register a domain name without reason,¹⁶⁵ a corporation outside of China could still have its free speech curtailed by national laws.¹⁶⁶ Foreigners may sue the local registry within China or seek redress with one of the approved UDRP panels in order to protect their free speech interests.¹⁶⁷ Such a scenario could create a substantial conflict between national laws protecting free speech and China's ccTLD regulations.¹⁶⁸

.cn domain name).

¹⁶⁴ See China Internet Domain Name, supra note 98, art. 27 (emphasizing that China does not allow any domain name that violates the national honor or a state interest).

¹⁶⁵ Id.

¹⁶⁶ See .in policy supra note 102, § 3.4.12 (stating that the government of India has "final authority" over the .in domain name).

¹⁶⁷ See UDRP, supra note 70, § 4(k) (explaining that an individual can seek redress from the UDRP by bringing the matter before a national court).

¹⁶⁸ Compare Bullfrog Films, Inc. v. Wick, 646 F. Supp. 492, 502 (C.D. Cal. 1986) (holding that the first amendment protects

C. International Organizations Are Not The Solution Because an International Organization Would Not Be Able to Affect Local ccTLD Laws and Reach Consensus on Free Speech Protection.

Ceding control of the domain name system from ICANN to an international organization would not solve the lack of free speech protections related to domain names. Domain name management involves the international community, with organizations such as WIPO applying the UDRP to domain name disputes.¹⁶⁹ But some nations want ICANN to cede all authority to an international organization, such as the United Nations.¹⁷⁰

communications that go beyond the borders of the United States) aff'd, 847 F.2d 502 (9th Cir. 1988), with European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 10 (holding that everyone has the right to freedom of expression without the interference of a "public authority" and regardless of "frontiers").

¹⁶⁹ See Mota, supra note 69, at 217 (providing information and statistics on WIPO's domain name cases).

¹⁷⁰ See Arch Puddington, Keep the Internet Free, **The Washington Post**, Nov. 12, 2005, at A25 (confirming that a number of countries are pressing to remove oversight from ICANN to a an organization that would be part of the U.N.).

Nations want ICANN to cede control over to an international organization because of questions over the legitimacy¹⁷¹ of a private organization in the United States controlling all of the domain names world wide.¹⁷² Even if the United States decided to cede control of the gTLD to an international body¹⁷³, it is

¹⁷¹ See Guerrero testimony, supra note 62 (insisting that national governments question ICANN's "legitimacy" and "effectiveness" because it is one private organization controlling all the domain names world wide).

¹⁷² See Froomkin, supra note 92, at 853-54 (arguing that ICANN cannot build consensus on the maintenance of the domain name system principally because of the subject matter involved). Froomkin believes that people involved in the ICANN process, have conflicting economic and political goals. Id. See also Chinese Domain Name Consortium, supra note 53, at 2 (proposing the internationalization of the domain name system because of the increasing number of internet users that do not speak English).

¹⁷³ But see Hearing Before Committee on Commerce, Science and Transportation United States Senate, 107th Cong. (2002) (testimony of Nancy J. Victory, Assistant Secretary for Communication and Information National Telecommunications and Information Administration United States Department of

doubtful that such an organization could address the growing influence of national ccTLD laws.¹⁷⁴ Further the organization would have the difficult task of formulating the extent of free speech protection in relation to domain names.¹⁷⁵ Although international organizations are involved with deciding trade mark disputes, building consensus on freedom of speech

Commerce) [hereinafter Victory Testimony] (testifying that the United States believes private sector management is better than having such functions performed by an inter-governmental body, such as the International Telecommunication Union); see also Froomkin, supra note 14, at 85 (arguing that government involvement in DNS management would need to increase if ICANN cannot implement the goals of the White Paper).

¹⁷⁴ See Cukier, supra note 4, at 7 (articulating that national governments view ccTLD as important part of their national sovereignty).

¹⁷⁵ See Froomkin, supra note 138, at 635-36 (explaining a similar conflict that occurred with WIPO). Froomkin describes how WIPO “consciously” excluded protection based on personal names etc. because national laws “differed substantially as to the extent names and other rights of personality” were protected. Id.

protections has historically been a very difficult task in the international realm.¹⁷⁶

1. Although Nations May Not Have Substantial Control Over gTLDs, Their Growing Influence Over ccTLDs Threatens the Potential Power of a International Organization

Currently nations want an international organization to control the domain name system because one private organization in the United States controls all domain names. Any organization that controls the domain name system has a great deal of power because of the importance of gTLDs in the domain name system.¹⁷⁷

¹⁷⁶ See Farley, supra note 35, at 1076 (providing a history of the debate between the United States and the Soviet Union over the MacBride Report on the New World Information and Communication Order). Critics in the United States objected to the report's bias against the private sector's involvement in communications because of the first amendment's protection of the press to act as a private enterprise. Id., at 1077. See also **Krotoszynski Jr.**, supra note 8, 214 (explaining that cultural considerations determine the amount of protection afforded to speech).

¹⁷⁷ See Froomkin, supra note 138, at 633 (emphasizing control of TLD creates a "powerful leverage" because individuals that register domain names want people from around the world to find

Private organizations maintain the gTLDs, and thus, national governments cannot control gTLDs in the same way that local laws regulate ccTLD.¹⁷⁸ Overall, an important portion of the domain name system is outside of the direct control of national governments, and thus many governments may prefer an international organization over the current governance structure.¹⁷⁹

their websites).

¹⁷⁸ See Thornburg, supra note 14, at 14 (detailing how the gTLDs are independent from national laws because all disputes involving gTLDs are resolved by the Uniform Dispute Resolution Policy which applies globally no matter where "in the world the parties reside or do business."); see also Geist, supra note 148, at 326 (arguing that many courts are reluctant to break up the online world based upon the concept of personal jurisdiction).

¹⁷⁹ See Herbert Burkert, Symposium, ICANN Governance: About a Different Kind of Water: An Attempt At Describing and Understanding Some Elements of the European Union Approach to ICANN 36 **Loy. L.A. L.Rev.** 1185, 1192 (2003) (suggesting that criticisms about the current approach to domain name governance do not address the issue of whether an internationally coordinated approach is necessary).

But as more nations start to adopt local ccTLD laws, the effectiveness of any organization, either public or private, will weaken.¹⁸⁰ The international community cannot assume that because private organizations in the European Union, India, and China run the local ccTLD registries that local government influence might eventually weaken. The laws of the European Union, China, and India ultimately put questions of free speech in the hands of the national laws and not into the regulation or discretion of private organizations.¹⁸¹ Even ICANN acknowledged that the organization needed the input of the GAC in order to

¹⁸⁰ See Cukier, supra note 28, at IV (arguing that internet users face harm because national ccTLD laws take into account the interests of the government and not the interests of the individual); see also Froomkin, supra note 92, at 849 (noting that a ccTLDs policies do not have to officially recognize the UDRP process).

¹⁸¹ Compare China Internet Domain, supra note 98, art. 4 (holding that the government agency, MII, controls all domain names in China), with .in policy, supra note 102, ¶ 3.4.12 (maintaining that the government of India has “final authority” of the .in domain name), and .eu regulation, supra note 94 art. 21 §§ 2(b)(i)-(iii) (stating that a register to the “.eu” domain name is subject to both national and European laws).

effectively maintain the domain name system.¹⁸² Thus, the opportunity to act may be closing because as ccTLD registrations increase, nations and the global internet community may grow comfortable with the divergence of free speech interest.¹⁸³

2. An International Organization Would Lose Credibility If It Determined The Extent of Free Speech Protection in Relation to Domain Names

Nations have reached some common ground on what forms of speech are not necessary to protect, such as the incitement of discrimination against a particular group.¹⁸⁴ But freedom of expression is defined largely by the cultural values of

¹⁸² See M. Stuart Lynn, President Report: ICANN--The Case for Reform, <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm> Lynn (last visited Aug. 7, 2006) (insisting that a formal relationship with ccTLDs is necessary in order to preserve the "interoperability" of the DNS root file, and allow local internet communities to handle "politicized" issues that arise within individual nations).

¹⁸³ See Cukier, supra note 28, at VII ("AT this stage in the Internet's development, many people are willing to sacrifice the technology's fast-paced development and radical innovation in return for stability and predictability, which a more governmental ICANN will mean.").

¹⁸⁴ See UDHR, supra note 45, art. 7 (noting that individuals should be protected from incitement to discrimination).

different societies across the globe and not by what a single organization or nation believes.¹⁸⁵ If an international organization decided to determine the extent of free speech associated with the transparent allocation of domain names, national governments would likely raise the same legitimacy concerns associated currently with ICANN.¹⁸⁶

Many nations and local ccTLD organizations already view ICANN as illegitimate.¹⁸⁷ Such a view of ICANN could easily transfer to an international organization if it decided to regulate the content of expression within a nation.¹⁸⁸ Thus,

¹⁸⁵ See Weber, supra note 16, at 193 (explaining how the United States has an open policy on free speech while other nations do not).

¹⁸⁶ Internet Management, supra note 62. See generally, Farley, supra note 35, at 1074-78 (comparing the conflicts between the east and west during the Cold War with UNESCO's New World Information and Communications Order, which looked to reform the west's news coverage of the third world and the Soviet Union).

¹⁸⁷ See Froomkin, supra note 92, at 849 (emphasizing that many ccTLD managers deny ICANN's authority to charge fees for the number of second level domains registered).

¹⁸⁸ See John-Perry Barlow, Accra Manifesto, <http://lists>.

there is no reason to assume that any nation would comply with a free speech protection that ran counter to their societal beliefs.¹⁸⁹

IV. Recommendations

The registration of Domain Names and the adjudication of domain name disputes affect freedom of speech for the global internet community.¹⁹⁰ Although many of the domain name registered are gTLD,¹⁹¹ the rise of ccTLDs registrations and the increase power of national governments over those domain names

essential.org/pipermail/random-bits/2002-March/000792.html (last visited Aug. 7, 2006) (suggesting that ICANN should become a “loose confederation of autonomous domains” in order to ensure that no central authority can regulate the character of domain names).

¹⁸⁹ But see *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1220 (9th Cir. 2006) (holding that a Court should not rush to decide if a foreign nation violated the first amendment, because the law is not clear on the extent to which the first amendment applies outside of the United States).

¹⁹⁰ See discussion, supra Part III.B (insisting that domain names affect free speech because once a domain name is cancelled all of the information is lost).

¹⁹¹ See Verisign Report, supra note 2, at 3 (noting that ccTLD registrations grew by 25%).

makes this point in history critical.¹⁹² Any recommendation needs to address both gTLD maintained by ICANN and the ccTLD operated by local managers and subject to national laws.¹⁹³ By ignoring the issues of domain name and freedom of speech, the windows in which we view content over the internet could forever splinter and divide.¹⁹⁴ The world community cannot allow zones of free speech in a bordered internet society.¹⁹⁵

¹⁹² See Dauterman, supra note 5, at 1123 (arguing that governments could instruct ccTLD managers to remove unwanted ccTLD domain names from the internet without notice or a proper adjudication procedure).

¹⁹³ See discussion, supra Part III.B3 (detailing and explaining how governments control ccTLDs through national and super-national laws).

¹⁹⁴ See Cukier, supra note 28, at IV (hypothesizing that if governments are allowed to fully control ccTLD, then the interests of the local Internet community may be lost).

¹⁹⁵ Compare Interfax News Agency, supra note 9 (noting that content makes the internet grow), with gilc, supra note 8 (explaining how the internet is a unique communications medium).

A. National Governments Should Collaborate on a Convention that Guarantees that Principles of Freedom of Speech Will Be Safeguarded in Regard to ccTLDs.

The United States should motivate other national governments to participate in an international convention that seeks to establish a legal guarantee of freedom of speech in relation to the registration and adjudication of ccTLD domain names disputes. A convention is the appropriate forum to determine free speech protections in relation to domain names, because of the multiple cultural views of free speech and the growing involvement of nations in the current domain name system.¹⁹⁶

The United States' leadership is necessary because America developed the internet, and ceded partial control of the domain name system to ICANN.¹⁹⁷ Although the United States may hesitate to participate in the convention,¹⁹⁸ America should recognize

¹⁹⁶ See discussion, supra Part III.C (discussing how freedom of speech guarantees vary widely across the globe). If an international organization attempted to control freedom of speech, the organization would face criticisms that it is not transparent or legitimate. Id.

¹⁹⁷ See discussion, supra Part II.C (detailing how the United States ceded partial control of the domain name system to ICANN).

that without an agreement, national influence over ccTLDs increases every day.¹⁹⁹ Other nations will likely join the convention because of previous requests to openly discuss domain name maintenance.²⁰⁰

1. A National Convention Needs to Affirm the Importance of the Private Sector and Civil Society in the Development of ccTLDs.

The WSIS summit reaffirmed the principle that the maintenance of the internet should include the involvement of government, the private sector, and civil society."²⁰¹ Nations should reaffirm the same principle in regard to ccTLDs. Although nations may consider ccTLDs as a part of their national sovereignty, outside factors and individuals can influence ccTLD laws.²⁰² By affirming the role of the private sector and civil

¹⁹⁸ See Victory Testimony, supra note 173 (testifying that the United States believes private sector management is better than having such functions performed by an inter-governmental body)

¹⁹⁹ See Verisign Report, supra note 2, at 3 (noting the record growth of ccTLDs in 2005).

²⁰⁰ See articles, supra note 15 (explaining how national governments want an international organization to control the domain name system because of the perceived control of the United States over ICANN).

²⁰¹ Tunis Agenda, supra note 4, ¶ 29.

society in the maintenance of ccTLDs, nations should want to develop local laws that embrace concerns of individual internet users, which include the ability to access information on the internet.²⁰³

2. A National Convention Should Incorporate the UDHR into ccTLD laws.

Nations should affirm the principles of article 19 of the UDHR into their ccTLDs law. Attempting to regulate national ccTLD laws will be difficult because many nations consider ccTLDs as a part of their national sovereignty.²⁰⁴ Nations could

²⁰² See Yu, supra note 12, at 388-90 (articulating that although nations were initially uninterested in ccTLDs, as the internet developed national governments realized the social and economic importance of domain name system); see also Fred Hao, Chinese Domain Name Dispute Resolution, **China Law & Practice**, April 1, 2004, at 23 (insisting that domain name registrations are important for the Chinese government because of the utility of domain names in helping the economy grow).

²⁰³ See Nunziato supra note 10 ,at 250 (arguing that in order to protect freedom of speech a government or organization must recognize the interests of groups and provide adequate safeguards to ensure compliance).

²⁰⁴ Yu, supra note 26, at 388-90 (emphasizing how ccTLD operators want a greater degree of autonomy from ICANN).

easily ignore any international convention that attempts to control their own views of what freedom of speech protections should include.²⁰⁵ Recognized as customary international law, the UDHR is not binding on nations,²⁰⁶ and thus, the application of the UDHR is unlikely to arouse national sovereignty concerns.²⁰⁷ By incorporating article 19 of the UDHR, nations will affirm a protection of freedom of speech in relation to ccTLDs that currently does not exist.²⁰⁸ At the very least, national laws will acknowledge the connection between a ccTLD and individuals free speech interest.

²⁰⁵ See UDHR Resolution, supra note 4547, art. 29 § 2 (stating that nations can limit protections found in the UDRP in order to ensure the “general welfare in a democratic society”).

²⁰⁶ Id.

²⁰⁷ See Konkel, supra note 43, at 472 (noting that the UDHR has become a “normative instrument” for member states).

²⁰⁸ See UDHR Resolution, supra note 455, art. 19 (stating that nations should not limit freedom of expression regardless of frontiers, but no where in the article 19 is frontiers qualified).

3. In the Alternative to adopting the UDHR, A National Convention Needs To Define Positive Rights of Free Speech in Relation to Domain Names.

In the past, national governments reached consensus on what forms of speech should not be protected. But as of yet there exist no affirmative freedom of speech right in relation to ccTLDs on the internet.²⁰⁹ Because the level of free speech protections across the globe varies,²¹⁰ the United States cannot push for a level of protection that is equal to those enshrined into the Constitution.²¹¹

²⁰⁹ Id.

²¹⁰ See Sakura Mizuno, When Free Speech and the Internet Collide: Nazi-Paraphernalia Case, 10 **Currents Int'l Trade L.J.** 56, 64-65 (2002) (describing how even France and the United States, two signatories to the UDHR and historically strong advocates of individual freedoms, differ on the extent of free speech protections.)

²¹¹ Compare Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (expressing the idea that the state can limit free speech only if an individual is inciting "imminent lawless action"), with Reno v. ACLU, 521 U.S. 844, 868 (1997) (holding that since the the Communications Decency act prohibited a form of protected speech it violated the first amendment).

The national convention should guarantee at least two positive freedom of speech rights in regards to ccTLDs: criticism of corporation and government abuses, and detailing organizations that solicit hate speech. Nations already acknowledge the importance of these free speech rights.²¹² Nations that do not provide strong protections for speech will likely not sign this portion of the convention. But if enough countries sign onto the convention, then the possible zone of free speech in regard to ccTLDs laws will be neither as severe or numerous.

B. ICANN Needs to Acknowledge in the UDRP That Domain Name Disputes Could Implicate Article 19 of the UDHR

Although the UDRP was meant to adjudicate a very narrow set of claims the UDRP needs to explicitly recognize the UDHR.²¹³ By recognizing the UDHR ICANN would not attempt to recognize one

²¹² See Morsink, supra note 23, at 72 (detailing how UDHR article seven states that an individual should be free of discrimination, and that nations wanted this article to also protect against the incitement of discriminatory speech).

²¹³ This is somewhat different than the recommendation made by Nuzniato. See Nunziato, supra note 10, at 250 ("ICANN's foundational documents should be amended to embody an explicit commitment to protecting the substantive democratic norm of freedom of expression.").

specific free speech interest,²¹⁴ Thus, ICANN's recognition of the UDHR is unlikely to upset governments that already believe the organization ignores national concerns in regards to freedom of speech.²¹⁵

Section 4a of the UDRP needs to add subsection (iv) with the following language: The UDRP acknowledges that Respondent may have a freedom of speech interest in maintaining the domain name. Although this argument is likely outside of the procedures of the UDRP, these procedures recognize that the UDHR article 19 creates a legitimate interest for domain name users. Although individuals could still appeal UDRP decisions to national courts²¹⁶ by adding the following language to the UDRP,

²¹⁴ See discussion, supra Part III.C (arguing that if an international organization attempted to define free speech it would suffer from the same transparency and illegitimacy concerns as ICANN)

²¹⁵ See Thornburg, supra note 14, at 211 (stating that private rule making should only be done in areas of the law where the international community has a high level of unanimity).

²¹⁶ See Barcelona.com v. Excelentísimo Ayuntamiento De Barcelona, 330 F.3d 617, 623-24 (4th Cir. 2003) (concluding that ICANN designed the UDRP to give full recourse to national laws in order to prevent the corruption of the UDRP process); see also

accredited panels should not completely ignore free speech interests,²¹⁷ or base free speech rights entirely on national laws.²¹⁸

C. UDHR Article(s) 19 & 25(2) Need To Be Amended to Include More Specific Language about the Guarantee of Freedom of Speech in Relation to Domain Names.

Ultimately the international community needs to amend the UDHR in order to account for the development of the internet.²¹⁹ The term frontiers in Article 19 of the UDHR should be qualified by imputing the following language: Frontiers include the communications mediums such as television, radio, and the

Sharrock supra note 68, at 83 (arguing that the current UDRP framework did not fulfill the need of the international community to have a consistent adjudication process).

²¹⁷ See Estee Lauder, supra note 807 (holding that the respondent's first amendment interests did not outweigh the trademark interest articulated in the UDRP)

²¹⁸ See Bridgestone, supra note 81 (noting that U.S case law influenced the WIPO panel's decision).

²¹⁹ See **Morsink**, supra note 23, at 66 (explaining that the destructive discriminatory speech of Nazis and other fascist groups before and during World War motivated the language contained in article 19 of the Universal Declaration of Human Rights).

internet and their devices to aid in the communication of content, such as domain names. Qualifying the term frontiers will place an international guarantee of free speech in regards to domain names, which currently does not exist.²²⁰

Article 29(2) of the UDHR states that in the exercise of these rights can be limited in order to meet the "requirements of morality, public order, and the general welfare in a democratic society"²²¹ The current broad language allows nations to completely ignore article 19.²²² The word reasonable should be inserted just before the world requirements. The word reasonable will, at the very least, limit the broad and vague discretion that nations currently enjoy through article 29.²²³

²²⁰ See UDHR Resolution, supra note 45, art. 19 (stating that article 19 does not qualify the term frontiers).

²²¹ Id., art. 29 sec. 2.

²²² See Konkell, supra note 43, at 465 (insisting that the UDRP only requires nations to protect a "low level" of speech and expression).

²²³ See UDHR Resolution, supra note 47, art. 29 § 2 (holding that rights within the UDRP can be limited in order to meet the "requirements of morality, public order, and the general welfare in a democratic society").

V. Conclusion

The conflict between a private organization running the domain name system and the sovereign rights of states to regulate the internet brings to the forefront a key legal issue: the extent to which governments should control freedom of speech within the existing domain name system.²²⁴ The vacuous response to freedom of speech concerns in both the development of ICANN and the current language of the UDHR allowed for the increased influence of national governments in the domain name system.²²⁵ With national governments increasing their control over ccTLDs, significant gaps may develop in freedom of expression and speech on the internet in relation to domain names.²²⁶ Thus, in order to protect freedom of speech as it relates to domain names, an international convention of nations, ICANN, and the UDHR should

²²⁴ See discussion, supra Part II. (explaining the current tension between national governments and the private organization that currently manages the domain name system).

²²⁵ See discussion, supra Part III. (arguing that the lack of recognition of free speech in relation to domain names by both ICANN and the UDHR allowed for the increased influence of national governments).

²²⁶ See discussion, supra Part III.B3 (emphasizing that different national laws in relation to domain names could create zones of free speech on the internet).

acknowledge freedom of speech in relation to domain names²²⁷

²²⁷See discussion, supra Part IV. (recommending that a national convention should acknowledge free speech in relation to domain names). Further ICANN needs to amend the UDRP to recognize free speech as a legitimate commercial interest, and both UDHR article 19 and 29 should be amended to ensure that freedom of speech guarantees are applied to the domain name system. Id.