

Book Reviews

Book Review – Protection of Geographical Names in International Law and Domain Name System Policy (2nd ed)

Heather Forrest

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Central to the operation and accessibility of a global internet is the domain name system (DNS).¹ DNS administration and policy authority is managed by the Internet Corporation for Assigned Names and Numbers (ICANN).² Recent expansion by ICANN of generic top-level domains (gTLDs) has provided further opportunities for users within the global internet community to identify and express themselves online,³ and is arguably the most significant change to the DNS to date.⁴ In her second edition of *Protection of Geographical Names in International Law and Domain Name System Policy*, Heather Forrest extends her analysis of rights to geographical names and how those rights recognised under international law are reflected in DNS policy. This is achieved by examining the practical implications of developments and disputes arising from the 2012 New gTLD Program on account of assumptions as to governments' exclusive rights in geographic names.

Forrest argues that current DNS policy, namely, the *gTLD Applicant Guidebook*,⁵ fails to provide clear, predictable policy consistent with international law on the treatment of geographic names in the DNS.⁶ This is highlighted by case studies into recent disputes involving gTLDs with geographic names.⁷ Forrest argues that the *gTLD Applicant Guidebook* is based on a false assumption that governments possess exclusive rights in geographic names and a blindness to the potential existence of third parties' rights,⁸ inconsistent with the recognition of rights in geographic names under international law.⁹ Unpredictable and ad hoc decision-making by ICANN under current DNS policy creates potential for disputes to arise between governments and private parties. These disputes generate

¹ Heather Forrest, *Protection of Geographical Names in International Law and Domain Name System Policy* (Kluwer Law International, 2nd ed, 2017) ch 2; Internet Corporation for Assigned Names and Numbers, *What Does ICANN Do?* (2017) <<https://www.icann.org/resources/pages/what-2012-02-25-en>>.

² Forrest, above n 1, 2.

³ Ibid.

⁴ Ibid 49.

⁵ ICANN, *gTLD Applicant Guidebook: Version 2012-01-11* (11 January 2012) <<https://newtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>>.

⁶ Forrest, above n 1, 6.

⁷ Ibid.

⁸ Ibid 5, 21.

⁹ Ibid 337–9.

significant publicity and risk eroding public trust in the legitimacy of DNS expansion and ICANN's role in that process.¹⁰

Separated into three parts, this book provides an in-depth exposition into the inadequacy of current DNS policy on the use of geographic names. First, Forrest identifies the underlying issues arising from the use of geographic names in the DNS. In particular, the author identifies the potential for conflict between holders of legal rights in names or 'offline' rights and registrants of domain names or 'online' rights,¹¹ especially on account of assumptions as to the existence of exclusive rights possessed by governments in geographic names.¹² This is explained by reference to the broader context surrounding the development of the DNS.¹³ Recent disputes surrounding the New gTLD Program have been added to the second edition to further contextualise these issues.

A key case study employed in the text involves the highly publicised dispute regarding an application for the '.amazon' gTLD string.¹⁴ ICANN maintained the application was rejected on the basis of a 'strong presumption' of governments' superior rights to geographic names created by advice from the ICANN Governmental Advisory Committee (GAC) and an expert report.¹⁵ Amazon argued, inter alia, that the name 'Amazon' clearly fell outside the definition of 'geographic names requiring government support' or 'country or territory names' under the *gTLD Applicant Guidebook*, and that ICANN's decision to accept the GAC advice was unfair and arbitrary.¹⁶ Forrest explains the dispute is just one example of unpredictable and inconsistent ICANN decision-making, particularly having previously validated other new gTLDs with geographically meaningful names.¹⁷ Further, Forrest demonstrates that regardless of the outcome of the arbitral award, current DNS policy is

¹⁰ Ibid 36, 48.

¹¹ Ibid 3, 13–21.

¹² Ibid 21.

¹³ Ibid ch 2.

¹⁴ Ibid 45. *Amazon EU S.à.r.l. v ICANN* (Final Declaration, International Centre for Dispute Resolution Independent Review Panel, Case No 01-16-0000-7056, 10 July 2017) <<https://www.icann.org/en/system/files/files/irp-amazon-final-declaration-11jul17-en.pdf>>.

¹⁵ Forrest, above n 1, 47. See also ICANN, 'ICANN's Response to Amazon EU S.à.r.l.'s Request for Independent Review Process', Submission in *Amazon EU S.à.r.l. v ICANN*, IDCR 01-16-0000-7056, 13 April 2016, <<https://www.icann.org/en/system/files/files/irp-amazon-icann-response-13apr16-en.pdf>>.

¹⁶ Forrest, above n 1, 46–7. See also Amazon EU S.à.r.l., 'Request by Amazon EU S.à.r.l. for Independent Review', Submission in *Amazon EU S.à.r.l. v ICANN*, IDCR 01-16-0000-7056, 1 March 2016, <<https://www.icann.org/en/system/files/files/irp-amazon-request-redacted-02mar16-en.pdf>>.

¹⁷ Forrest, above n 1, 48.

prone to resource and time consuming disputes that may undermine confidence in future DNS expansion by ICANN.¹⁸

The remainder of the book is similar to the first edition, with updates in law and policy. In Part II, Forrest outlines the relevant framework within existing DNS policy for the recognition of rights in names. Under DNS policy, the development and application of protection mechanisms for rights in names is on an ad hoc basis.¹⁹ For instance, both *ex ante* and *ex post* rights recognition mechanisms to the allocation of names in the DNS have largely been limited to trademark rights.²⁰ However, DNS policy could nevertheless be used to protect non-trademark rights where applicable under international law.²¹ Forrest then explores the role which international law can play in establishing rights in geographic names. This is particularly with respect to soft law and the actions of intergovernmental and non-governmental organisations most active in the internet domain name environment, such as ICANN.²² These observations are to some extent contrary to her main thesis, by suggesting that ICANN's 'assumption' of governments' exclusive or superior rights in geographic names are in fact generating an emerging international norm respecting the internet. However, this point invariably involves predictions into future changes to international law,²³ which lie outside the scope of her analysis.²⁴

In the final segment of the book, Forrest identifies and analyses the extent to which rights in geographic names are recognised under international law. The scope of her analysis is broad and includes: intellectual property;²⁵ Article 6ter²⁶ of the *Paris Convention for the Protection of Industrial Property*;²⁷ principles of State sovereignty;²⁸ 'geographical indications';²⁹ unfair competition law;³⁰ and human rights.³¹ These conclusions support her findings earlier in the text that DNS policy and the rejection of new gTLD applications, such as the '.amazon' string, are based on assumption and without valid legal foundation.³²

¹⁸ Ibid. See also Kieren McCarthy, 'Amazon May Still Get .amazon Despite Govt Opposition – Thanks to Classic ICANN Cockup', *The Register* (online), 19 July 2017, <https://www.theregister.co.uk/2017/07/19/dot_amazon_icann/?page=1>.

¹⁹ Forrest, above n 1, 86.

²⁰ Ibid 133.

²¹ Ibid 133–4.

²² Ibid 146, 153–4, 164.

²³ Ibid 165.

²⁴ Ibid 7.

²⁵ Ibid 175–80, 183.

²⁶ Article 6ter concerns the protection of state flags and emblems, see World Intellectual Property Organisation, *Article 6ter* <<http://www.wipo.int/article6ter/en/>>.

²⁷ Forrest, above n 1, 187–96.

²⁸ Ibid 216.

²⁹ Ibid 228, 233, 243–4.

³⁰ Ibid 279–80.

³¹ Ibid 298–9, 305, 309, 321, 324.

³² Ibid 48.

The book fills an important gap in the literature with a narrow, yet in depth focus on the treatment of geographic-type names under DNS policy and international law. Other works in the field, for example, have focused on the interaction between DNS and trademark law,³³ local dispute resolution concerning country-code top-level domains,³⁴ or offer a broad overview of the DNS and internet governance.³⁵ Forrest's analysis could be strengthened, however, by expanding her discussion of future directions in this area of law and policy.³⁶

Additionally, the field of study in the book is accompanied by a proliferation of acronyms and use of technical terms and concepts in relation to the internet, DNS, and its governance, which consequently reduces its accessibility. While often acknowledged and mitigated by the author,³⁷ this work appears most suitable for lawyers and non-lawyers possessing some passing knowledge of the DNS, particularly, policy-makers and experts in the field.

Overall Forrest delivers a carefully researched, original, and compelling examination into the disparity between the assumptions as to rights in geographic names under DNS policy and those recognised by international law. She provides an up-to-date perspective on the issue through the addition of developments and disputes following from the New gTLD Program. Forrest is to be commended for her attention to a contemporary issue that is rarely considered by academics. Beyond the issue of geographical domain names, the text raises broader doctrinal issues across a number of disciplines, including, internet governance and the formation and formalisation of international norms respecting the internet.

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³³ See David Lindsay, *International Domain Name Law: ICANN and the UDRP* (Hart Publishing, 2007).

³⁴ See Alpana Roy, *Australian Domain Name Law* (Lawbook, 2016).

³⁵ See Torsten Bettinger and Allegra Waddell (eds), *Domain Name Law and Practice: An International Handbook* (Oxford University Press, 2nd ed, 2015).

³⁶ See, eg, Forrest, above n 1, 340–1.

³⁷ See, eg, Forrest, above n 1, 16–21.

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