

14 February 2007

THE OFFICE OF THE DOMAIN NAME COMMISSIONER

**REVIEW OF THE REGISTERING, MANAGING AND CANCELLING
DOMAIN NAMES POLICY (RMC 1.5)**

Submission made by Clive Elliott

Background

I am aware that the Law and Technology Committee of the Auckland District Law Society, of which I am the convener, intended to make a submission on the above. However this has not been possible.

One issue that arises as a result of the current review is whether the DNC should identify and require a baseline minimum standard for domain names. One view is that a regime which is not necessarily particularly onerous but at least excludes plainly unlawful or highly offensive domains is appropriate and should be given consideration. My comments below are relatively brief and directed solely to this issue.

Under the existing "first come first served" policy, the process is highly automated and no assessment is made as to the suitability or legality of any domain name. The benefits of this approach are obvious in terms of speed, cost and efficiency. I suggest however that there may well be other considerations that should be considered.

I set out below my proposal for a regime where the current model is retained but modified to regulate in some way plainly offensive names and those that are statutorily prohibited or otherwise contrary to law.

Similar Regulatory regimes

Can some guidance be obtained from existing legislation? Time has not permitted a full review of available options but a useful starting point is S 22 of the Companies Act 1993. It states:

Section 22 Application for reservation of name

(1) An application for reservation of the name of a company must be sent or delivered to the Registrar, and must be in the prescribed form.

(2) The Registrar must not reserve a name—

(a) The use of which would contravene an enactment; or

- (b) That is identical or almost identical to the name of another company or another company under the [Companies Act 1955](#); or*
- (c) That is identical or almost identical to a name that the Registrar has already reserved under this Act or the [Companies Act 1955](#) and that is still available for registration; or*
- (d) That, in the opinion of the Registrar, is offensive*

A similar, but wider, assessment is made pursuant to the Trade Marks Act 2002. In particular, S 17 sets out a series of absolute grounds for the Commissioner not permitting registration of a trade mark. This section reads as follows:

17 Absolute grounds for not registering trade mark: general

- (1) The Commissioner must not register as a trade mark or part of a trade mark any matter—*
 - (a) the use of which would be likely to deceive or cause confusion; or*
 - (b) the use of which is contrary to New Zealand law or would otherwise be disentitled to protection in any court; or*
 - (c) the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Maori.*
- (2) The Commissioner must not register a trade mark if the application is made in bad faith.*
- (3) Despite subsection [\(1\)\(b\)](#), the Commissioner may register a trade mark even if use of the trade mark is restricted or prohibited under the [Smoke-free Environments Act 1990](#).]*

The provisions of most relevance here seem to be S 17(1)(a), namely that the use of a trade mark would effectively be contrary to law and S 17(1)(c) that the use or registration would be offensive to a significant section of the community. It will be noted that the first subsection above relates only to use and the second to use or registration, in other words suggesting that the mere registration of certain trade marks may be offensive to members of the community.

Leaving aside the issue of the deceptive marks/names, there seems to be a relatively consistent approach between these two enactments, at least in so far as the more serious types of unregistrable names are concerned.

Practical Implementation

I consider that there is no overwhelming reason why the statutorily prohibited names criterion might not be utilised, even in a highly automated and efficient environment. The Registrar of Companies has a similar jurisdiction which is only exercised in extreme cases but at least sets some benchmark.

For example, I don't think there would be much argument that the domain <fuck.co.nz> is likely to offend a substantial number of New Zealanders. I accept that the domain name regime is particularly susceptible to skilful

circumvention, whether of marks, names or terms, e.g. <f*ck.co.nz>, or <fcuk.co.nz> and I accept that a system should not be set up if it is likely to fall into disrepute or even worse fail completely. However, that does not, in my view, mean that efforts to set basic/low level benchmarks should not be considered.

A Possible Way Ahead

In my view, the objective should be to find an appropriate balance and to ensure that only the worst cases are dealt with and if people manage to get around any plainly unlawful/highly offensive names with clever variations then so be it. The above example in my view illustrates where the line between unacceptable and acceptable might be.

I support a move towards a type of light handed “gateway” service where the DNC would be required to exercise some level of judgement as to whether a name can be registered or to cancel after the event names that are plainly offensive or contrary to law. I accept that the current DRS is inapplicable. However, there is nor reason why a similar regime with a very rudimentary pre-vetting system or in the alternative a “take down” process could not be implemented. There is also no reason why it could not be operated on a “user pays” basis, namely that the party making the complaint pays a modest fee to have it dealt with.

I do not, with respect, accept the argument put forward that all the DNC really does is to provide a repository for domain names, many of these may never in fact be used and accordingly there is no actual problem to be addressed. The fact is that the domain names referred to above are likely to be used, sold or otherwise dealt with. In my view, if they are plainly unlawful or offensive the registry should not encourage, facilitate or be involved in that process, without at least providing some form of “safety valve” for the worst excesses to be dealt with. I am certainly not advocating a type of “nanny” regime where InternetNZ has to continually step in and make a judgment call on what is right or wrong, simply a low level bar against the most egregious, profane and offensive domain names.

I am happy to expand on my views if required.

Yours sincerely

Clive Elliott