

# New Zealand Law Society

## Registering, Managing and Cancelling Domain Names – Policy Review Consultation Paper

The Society's Electronic Commerce Subcommittee (the Committee) appreciates the opportunity to comment on the Policy Review Consultation Paper *Registering, Managing and Cancelling Domain Names* (the Paper). The Committee consists of lawyers and other technology professionals with an interest in legal issues relevant to e-commerce, the Internet and information technology generally.

### General comments on proposals

The Paper seeks comments on 5 separate proposals that, if implemented, would result in a significant change to the principles underlying the registration, cancellation and management of domain names.

For many years the .nz Domain Name Space (DNS) has operated on a "first come, first served" basis. This means that anyone who complies with the registration rules is able to register any domain name that is not already on the register. Any conflict between an applicant or other party and an existing registrant is left to those parties to resolve; although InternetNZ has implemented a dispute resolution service that facilitates the efficient and low cost resolution of disputes involving registrations of .nz domain names.

The rules have evolved over time. Initially there was a list of "prohibited words", but that was removed some years ago. These rules are not onerous. Each registrant must provide sufficient information for the registrant to be contacted, and agrees to submit to the dispute resolution process. Registrants must be identifiable individuals over the age of 18 years or properly constituted organisations. Some 2<sup>nd</sup> level domains are moderated (e.g. .cri.nz, .govt.nz, .iwi.nz and .mil.nz) while others are open to all comers (e.g. .co.nz, .net.nz, .org.nz, .gen.nz).

The "first come first served" registration process has been accepted as a legitimate model for many years, not only in New Zealand but overseas in countries such as the United Kingdom and Australia and in relation to international domains such as .com, .org and .net. The "first come, first served" registration process has served New Zealand Internet users well because it provides consumers with a simple, efficient, low cost and easily understood process for the registration of domain names. As a result there has been a rapid and sustained growth of registration of domain names in the .nz domain space.

The legitimacy of the "first come first served" registration process has been recognised in several New Zealand legal cases; notably the *Oggi* case, which was decided in 1998.<sup>1</sup>

The *Oggi* case also demonstrates that the "first come, first served" policy offers protection to InternetNZ and the Domain Name Commissioner. It is significant that Oggi Advertising also brought proceedings against ISOCNZ, New Zealand's authorised domain registration authority (now InternetNZ) and its domain name company, Domainz. The judge held that Domainz had acted responsibly and noted:

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<sup>1</sup> *Oggi Advertising v McKenzie and others* [1999] 1 NZLR 631

*“Given the responsible attitude taken by domainz it is, in my view, the responsibility of the Court to devise procedures for any necessary rectification as may most efficiently permit correction without imposing cost or unnecessary burden on domainz”.<sup>2</sup>*

Domainz subsequently recovered payment of court’s costs from Oggi. The outcome might well have been different had InternetNZ implemented domain name registration rules that required Domainz to exercise judgement as to whether or not particular domain names were misleading or infringed the rights of others.

## **Specific Proposals**

### *Prevention of fraudulent applications*

The objective of preventing fraudulent applications or ensuring that domain names have integrity would inevitably require the abandonment of the “first come first served” registration process and result in increased transaction costs. These would be borne not by persons who wrongfully attempt to register fraudulent or unlawful domain names or by aggrieved parties, but by all registrants. For the most part, the mere registration of a name does not contribute to unlawful or unacceptable conduct. The difficulty arises when the name is put to some unlawful use. These issues are readily able to be resolved, either through the .nz dispute resolution process or through litigation.

The Dispute Resolution Service (DRS) provides a means by which those who claim an interest in any name, which has been registered by someone else, can have that interest addressed. In general, disputes under the scheme relate to registrations, and not to uses of names. The advantage of this approach is that the costs of the process are borne by the parties concerned and not by registrants generally, except to the limited extent that the Domain Names Commission (DNC) provides administrative services when complaints are filed.

Case law in recent years demonstrates that effective remedies are available where fraudulent or unlawful domain names are registered and, to the Committee’s knowledge, the DNC has always acted promptly in implementing courts’ orders and decisions of experts concerning domain name registrations. Hence no change to the status quo is required.

### *Introducing a requirement to check applications for domain names*

Implementation of this proposal would also require the abandonment of the “first come first served” registration process. Because domain name registrations are not analogous to company name registrations there is no reason why the DNC should be required to adopt the same approach to registration of names as the Companies Office under section 22(2) of the Companies Act.

In this context it is instructive to note that although section 22(2)(a) states that the Registrar of Companies must not reserve a company name, the use of which would contravene an enactment, from a practical perspective, it is impossible for the Registrar to determine whether the use of a name could breach the Fair Trading Act 1986 or the Trade Marks Act 1953. In practice no such checking takes place. This much is acknowledged on the Companies Office website<sup>3</sup>:

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<sup>2</sup> At p.636

<sup>3</sup> [http://www.companies.govt.nz/cad-docs/F/FS\\_Company\\_Names.html#8](http://www.companies.govt.nz/cad-docs/F/FS_Company_Names.html#8) (last checked 2007-11-09)

*“The Registrar does not consider whether a name could breach any other enactments (e.g. the Fair Trading Act 1986 or the Trade Marks Act 1953). Before forwarding your application to the Companies Office, you should consider the possibility of the name infringing a registered or pending trade mark. A trade mark search is recommended....The Fair Trading Act contains a general prohibition against misleading and deceptive conduct. This could include carrying on business under a name that is misleading or deceptive. The Court, not the Registrar, determines the question of whether a name is misleading or deceptive.”*

The DNC should adopt the same pragmatic approach as that adopted by the Companies Office in this regard. Clearly, if the usage is unlawful, then there are legal mechanisms available for dealing with an offender. However these decisions should be made by the Courts, not through the domain name registration process.

#### *Enabling the immediate and effective cancellation of a fraudulent domain name*

As noted above, the Committee has no reason to believe that the DNC would not act promptly and responsibly where it has been established that a domain name has been registered fraudulently, and it is appropriate that this policy should be reflected in the rules relating to cancellation of domain names. However the question of whether or not a domain name is fraudulent should be determined by a court of law, not by the DNC.

#### *Checking that domain names do not contain words that are not permitted by law*

This proposal is open to the same objections as the proposal to introduce a requirement to check applications for domain names using criteria similar to those used by the Companies Office. In practice this requirement would require careful judgement on the part of the person doing the checking. As noted in the example given in the Paper, section 64 of the Reserve Bank of New Zealand Act 1989 places limits on the use of restricted words such as ‘bank’, ‘banker’, and ‘banking’ in a name or title. Domain names unrelated to banking that incorporate the word ‘bank’ are currently registered in New Zealand<sup>4</sup>. However it is quite possible that the word ‘bank’ could be used as part of a domain name without contravening the requirements of section 64 of the Reserve Bank Act. Once again, this judgement is best made by a court informed by relevant evidence and legal arguments, not by a person undertaking a simple registration process.

#### *Implementing a list of restricted words as a guide for registrars carrying out their functions*

This proposal presupposes that there should be a pre-screening process under which registrars would not register as domain names, certain restricted words on a list. This approach would not necessarily conflict with a “first come first served” registration process because all names would be available to first comers other than those names on the closed list.

Two members of the Committee were in favour of prohibiting the registration of highly offensive words as domain names, noting in this regard the position of the Registrar of Companies and the Commissioner of trade marks under the provisions of section 22(2)(d) of the Companies Act and section 17(1)(c) of the Trade Marks Act respectively.

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<sup>4</sup> See, for example, the website at <http://www.thebank.co.nz/index.asp?pageID=2145847005> (lasted viewed 2007-11-09)

However the majority of the Committee were opposed to changing the current registration process and could see no effective way of introducing a new list of “prohibited names” which cannot be registered. The question of what should be on such a list is very subjective, and many of the candidate offensive names are already registered as .nz domain names in some form. This means that the policy would need to deal with existing names, either through the renewal process or by introducing a new cancellation process in order to be effective. In addition, whatever happens within the .nz domain name space has no bearing on what may appear on .nz websites. A relatively innocuous domain name may be used to host highly offensive material.

One possible way of dealing with offensive names may be through some form of dispute resolution service, in the similar way as there are currently processes for dealing with registration of names which infringe intellectual property rights and similar rights.

For example, the DRS could be expanded to enable an aggrieved person to initiate a dispute against registration of a domain name on the basis that the name (of itself, and disregarding any use to which it is put), is highly offensive to a significant section of the community. Obviously some mechanism would need to be found to ensure that registrants agreed to accept the outcome of the dispute resolution process. This might be achieved by making submission to the dispute resolution process a condition of filing or renewal of a domain name registration.

### **Responses to general questions**

As is evident from the comments above, the Committee disagrees with the introduction of registration restrictions for open .nz domain names. It does not believe that such restrictions would help in preventing or limiting phishing and internet-related fraud. Those activities are matters for the relevant businesses and law enforcement authorities to deal with, and cannot be dealt with effectively in the domain name registration system, as they relate not to the registration of a domain name but rather to the way in which a domain name or website URL is used. However the DNC should continue to act promptly to deal with unlawful domain name registrations that are the subject of a court order or the decision of an expert under the DRS.

### **Defining and identifying what is restricted**

If there is any proposal to define restricted names, with checks to be carried out during registration, the Domain Name Commissioner would be exposed, without the benefit of statutory authority or government budgets, to claims and disputes every time it made a decision to which someone objected.

### **Responsibility to identify and act on what is restricted**

As already indicated above, if the Domain Name Commissioner, or any other body, accepts the responsibility of administering registration restrictions, then it would need to be adequately resourced to deal with those restrictions. In addition, it will undoubtedly be subject to claims and disputes by those affected by its decisions. The effect will be to create a potential liability for the Domain Name Commissioner and to absorb considerable resources for very little benefit.

**Managing existing registrations**

The Committee sees no satisfactory basis for imposing restrictions and applying them, retrospectively, to existing names, without similar exposure of the DNC to open-ended liability. The additional administrative costs required to manage new restrictions would inevitably be passed on to .nz domain name registrants generally with no countervailing benefit to them.

The Committee trusts that these comments are of assistance. If you would like to discuss them further, please contact Sarah Barker ([sarah.barker@lawerys.org.nz](mailto:sarah.barker@lawerys.org.nz)).

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