THE AUSTRALIAN **DOMAIN NAME** ADMINISTRATOR

2007 NAMES POLICY PANEL

Sixth Meeting
14 August 2007, 2.00-5.00pm
Maddocks Lawyers, Sydney

MINUTES

Present:
Bruce Arnold, Philip Argy, Darrell Burkey, Grace Chu Te, Brett Fenton, Peter Firminger, David Goldstein, Kim Heitman, Kathryn Kerr (proxy for Graham Ingram), Amin Kroll, Jo Lim, Jeff Marr, Andrew McCullough, Jamie Murphy, Bennett Oprysa, George Pongas, Holly Raiche, Dean Shannon (observer) Tony Steven, Bruce Tonkin, Derek Whitehead,

Teleconference:
Simon Delzoppo, Sally Foreman, Paul Szyndler

Apologies:
Alex Woerndle

Actions:

- DW and JL to draft secondary market proposal.
- DW and JL to draft Panel's second consultation report.

Discussion:

1. Discussion of domain monetisation policy

DS gave a short presentation about domain monetisation based on his seven years experience in the .com market. His former company holds 550,000 .com domain names, and sells on average 5 domain names per day for an average price of USD800 per domain name. DS advised that, at the moment, the com.au market is worth 40% less than the .com market.

BT explained that domainers obtain profitable domain names through two ways: by registering expired domain names that already have associated traffic, or by registering topical domain names about a current event or celebrity.

JL advised that there are some gaps in the current policy relating to the protection of brand names where they are included in compound domain names (eg. domain names like telstraphones.com.au or safewaysupermarket.com.au would not be covered under the current policy).

There was general discussion about the impact of domain monetisation. The Panel noted that:

- auDA's conservative estimate is that approximately 5% of com.au domain names have been registered for the purpose of domain monetisation

- there has not been a noticeable increase or spike in registrations since the domain monetisation policy was introduced in July 2006
- around 30-50% of complaints to auDA are about domain monetisation

There was also some discussion about what domain monetisation means in practice; it is often difficult to define a "monetised website", based on the design of the site and the ratio of ads to other content.

Two propositions were put forward, which attracted some minority support, but were rejected by the majority of Panel members on a formal vote:

- that the domain monetisation policy be abolished, ie. it would no longer be permissable to use the close and substantial connection rule to register domain names for the purpose of monetisation
- that domain monetisation be separated out from the close and substantial connection rule, and that domainers be required to self-select the "domain monetisation" category at the time of registration.

The Panel agreed to recommend that the current domain monetisation policy be strengthened to provide additional protection to brand names.

2. Discussion of secondary market

JM and DS tabled an informal survey of 84 small business owners in the Gold Coast region showing that 95% did not have a problem with selling .au domain names.

The Panel considered the two options outlined in the discussion paper (attached). A straw poll of Panel members indicated clear consensus for relaxing the current policy to permit a wider range of circumstances in which transfers could take place, however there was no consensus for an open secondary market in domain names.

There are two opposing principles held by Panel members:

1. Domain names are a public resource, and .au policy should not regard domain name licences as a tradeable commodity.
2. An open market is the norm, and domain name licences should be as tradeable as any other form of licence.

Some Panel members expressed concerns that a secondary market would artificially inflate demand by making people think they need to buy more domain names, or that there is a lot of money to be made in selling them. It was thought that small business in particular would be priced out of the market.

Other Panel members argued that a secondary market would give small business more choice and open up new online business opportunities. It was also pointed out that restricting transfers to a private transaction would not necessarily make domain names more affordable.

There was general agreement that cybersquatting, domain speculation and warehousing would need to be addressed within an open market scenario.

BT proposed a model to facilitate implementation of a secondary market in a way that addresses concerns about equity and access, domain speculation and warehousing, and other potential negative effects. He suggested the following:

- an initial centralised market, with all sales listed on a public website
- domain names cannot be transferred in the first 6 months of registration
- cap on the number of domain names that a registrant can transfer per annum

- domain names must be listed for 30 days before sale to allow time for any objections from trademark holders
- the registrant must advertise a fixed upfront price
- a transfer fee is payable to auDA, to cover the cost of monitoring the market
- sale price must be published on the site and notified to auDA
- a built-in 6 month review mechanism.

The Panel will continue discussion of this proposal on the mail list.

3. Next steps

The Panel is due to release a second consultation report containing its draft recommendations to the auDA board.

The aim is to finalise the report on the mail list and release it by the end of August, for public consultation during September.

Next meeting:
Tuesday 11 September, 2-5pm in Melbourne – to be confirmed, depending on the outcome of Panel discussions on the mail list.

2007 NAMES POLICY PANEL

SALE OF DOMAIN NAMES (SECONDARY MARKET) – FOR DISCUSSON ON 14 AUGUST

This paper follows on from discussion at the Panel meeting on 10 July 2007.

For reference, the current policy is explained in Attachment A.

Issues

The Panel has previously identified some examples where a registrant may want to transfer their domain name for consideration (ie. "sell" their domain name), including:

- Example 1: "Pernell's Plumbing" is the registrant of pernells.com.au and decides they no longer need the domain name for their business so they will transfer it to "Pernell's Mercedes" car dealership – a transfer from one eligible registrant to another eligible registrant.
- Example 2: A registrant fails to renew their domain name (their own fault, or the fault of their registrar or reseller) and when it expires it is registered by another party. The new registrant is willing to give the domain name back to the old registrant.
- Example 3: A partnership owns a domain name and dissolves with an agreement the domain will be transferred to one of the parties from the partnership using a new registrant entity.
- Example 4: (1) Small business registered their business name sometime ago and registered a domain name that matches that business name; (2) Small business obtained a generic name that relates to their business through the auDA generic names auction process; (3) Small business is happy with the domain name obtain in (1) above, and doesn't feel it is getting the full value from the domain name registered in (2) above; (4) A second small business would like to use the generic name that was registered in (2) above; (5) The small business would like to sell the generic name, but is not simply prepared to cancel the name as the small business does get enough traffic from the name to justify its renewal cost.
- Example 5: (1) Company-A registers a "memorable" domain name with the intention to create a brand/business; (2) Things don't work out; (3) Company-A continues to hold onto the name and decides to monetise it; (4) Company-B notices name is not "used" and wants the name for a new brand/business - and does not want to register an alternative name or use another TLD; (5) Company-A is willing to part with the name only for a consideration.

The contentious issue seems to be how the transfer comes about. At the Panel meeting on 10 July, there appeared to be general support for changing the policy to allow the transfer of domain names for consideration in a private transaction, without going so far as to create or facilitate an open secondary market.

This paper addresses the two issues – private sale and open market – separately.

Note, for both private sale and open market:

- It is a given that the buyer of the domain name would have to meet normal eligibility rules, as if they were registering the domain name for the first time. Registrars would be required to check the eligibility of the buyer before processing the transfer (as per the current policy).
- It would also be possible to impose conditions on the seller, such as excluding domain names registered for the purpose of domain monetisation, or preventing transfers within the first 6 months of registration.

1. Transfer by private sale

This is where the registrant and buyer already know each other (as in the case of former business partners in example 3 above), or find each other through private means. Such means might include:

- where the buyer approaches the registrant using contact details on WHOIS or the registrant's website
- where the buyer makes inquiries through the registrar of record
- where the registrant approaches someone with the same name (as in example 1 above), or in the same business (as in example 4 above), or with a similar domain name (eg. the .com version of a com.au domain name).

If the policy allows transfer by private sale only, then the current prohibition on offering a domain name for sale would need to remain in place. This means that auDA would continue to handle complaints about registrants who offer their domain name for sale, and would reserve the right to delete a domain name where the registrant failed or refused to withdraw it from sale.

2. Transfer by open market

This is where the registrant offers or advertises their domain name for sale to a group of interested parties, or the public at large. There are a number of ways that a registrant may offer their domain name for sale:

- on their own website
- listing on eBay or other general auction site
- listing on Sedo or other domain brokerage site
- newspaper advertising
- direct marketing.

An open market could be completely unrestricted, with registrants permitted to choose their own selling method (and ensuing level of confidentiality). For example, the registrant might place an ad in the newspaper and then conduct private negotiations with interested buyers, or the registrant might list the domain name on eBay.

Alternatively, auDA could impose restrictions on an open market if it were considered necessary or desirable to address concerns about equity, price transparency and the potential for bad faith behaviour. For example:

- registrants might be required to notify details of the sale to auDA (including price) as a pre-condition of transfer
- auDA might approve one or more domain brokerage or auction sites that all registrants must use to transfer their domain name if they want to offer it for general sale.

Note that it is not the Panel's role to recommend an implementation method, however it is open to the Panel to make some suggestions.

ATTACHMENT A

Current policy

The .au domain name licence conditions state:

- the registrant must not, directly or indirectly, through registration or use of its domain name or otherwise, register a domain name for the purpose of selling it
- the registrant must not in any way transfer or purport to transfer a proprietary right in any domain name registration.

To enforce these conditions, auDA published the Clarification of Domain Name Licence – Prohibition on Sale of Domain Name (2005-05), which says that a registrant cannot "sell" their domain name, and must not advertise their domain name for sale.

However, under the Transfers (Change of Registrant) Policy (2004-03), a registrant may transfer their domain name licence to another eligible party under one of the following circumstances:

- the registrant sells part or all of their business operations or assets to the proposed new registrant, and the Deed of Sale includes the transfer of the domain name licence;
- the registrant assigns part or all of their intellectual property rights to the proposed new registrant, and the Deed of Assignment includes the transfer of the domain name licence;
- where the registrant is a legal entity, the registrant is liquidated or enters into administration and the liquidator or administrator authorises the transfer of the domain name licence to the proposed new registrant;
- the registrant and the proposed new registrant are legal entities belonging to the same group of related entities, eg. where a parent company transfers its domain name licence to a subsidiary;
- the registrant is holding the domain name licence in their capacity as an agent of the proposed new registrant, and at the time of registration the registrant had entered into an agreement to transfer the domain name licence to the proposed new registrant at a future date, eg. where a web designer, ISP, lawyer, accountant or other service provider registers a domain name on behalf of a client;
- where the registrant is an individual, the registrant dies or becomes insane and the executor or power of attorney authorises the transfer of the domain name licence to the proposed new registrant;
- a competent arbitrator, tribunal, court or legislative body orders the registrant to transfer their domain name licence to the proposed new registrant, eg. in the case of a proceeding under the .au Dispute Resolution Policy (auDRP);
- the registrant has entered into an agreement to transfer their domain name licence to the proposed new registrant in settlement of a dispute between the parties, and the Deed of Settlement includes the transfer of the domain name licence, eg. where a trade mark infringement dispute is settled out of court.