

Everything You Need to Know About Domain Name Leasing (Including Example Agreement) - With Zak Muscovitch

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<http://www.domainsherpa.com/zak-muscovitch-leasing/>

Do you have someone interested in a domain name you own but they can't afford it? Maybe a lease with an option to purchase is the right solution for both you and them. This show walks you through a domain name lease agreement clause by clause, line by line, and helps both the lessee and lessor identify what to include and the pitfalls to avoid. Stay tuned.

I have three sponsor messages before we get into today's show.

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Michael Cyger: Hey everyone. My name is Michael Cyger, and I'm the Publisher of DomainSherpa.com - the website where you come to learn how to become a successful domain name investor and entrepreneur directly from the experts. I attended the NamesCon Conference in Las Vegas in January 2015. One of my favorite presentations was actually given by a lawyer. I

know, can you believe it? I am joking of course. Some of my best friends are lawyers.

And today I am bringing one of those best friends back to Domain Sherpa because he is a past Sherpa. I am pleased to welcome back to Domain Sherpa, Zak Muscovitch, an Internet and Intellectual Property Lawyer at the Muscovitch Law Firm, located at DNAttorney.com. Zak, welcome back to the show.

Zak Muscovitch: Thrilled to be here, Michael. Thank you.

Michael: I know you must hear attorney jokes all the time, right?

Zak: I have never heard any attorney jokes.

Michael: All right, do not sue me. I will not tell any. All right, so let's start this domain name leasing conversation with some numbers. I want to try and set the stage for people to understand. Is this something we are talking about actually something that happens or not? So, from my swag estimates, my ballpark estimates, I think there are about 15 hundred to two thousand domain name aftermarket sales per month. Okay, so these are domain names that are owned by somebody and sold as a premium to somebody else in marketplaces like Sedo or GoDaddy Auctions or Flippa and similar sites.

So, let me start by asking you, Zak. How many domain name leases do you think are entered into per month?

Zak: Well, that would be a very interesting question to find the answer to, but unfortunately there is no data available about those numbers because it is not trackable and people do not tend to disclose leases as opposed to reporting sales, for example, on DN Journal. So, it is hard to say how many leases are occurring in terms of numbers. I personally do about two or three dozen per year, and that is just a small operation. And from what I see, working with a lot of large domain investors, both on their side and also on the other side, I see it happening quite a bit. I have seen it happen for years and I see it happening more and more recently.

Michael: Okay. So, just your law firm is doing two to three dozen per year, so clearly it is happening. If you look at all the attorneys out there that focus on domain name specific intellectual property, and then if you look at IP, in whole there is probably many, many more. So, this is a relatively common occurrence, so that sort of sets the stage that people should be considering this if they are looking to get access to a domain name or somebody owns a great domain name and they just cannot seem to come to terms with somebody.

So, what I want to say is we are going to be discussing some legal topics in this show. I want to start off by saying that this interview is not legal advice. Not.

Zak: Say it one more time.

Michael: Not legal advice. Zak and I are discussing a legal agreement that he has generously allowed us to share directly with you, but this is general information for educational purposes. If you are a domain name investor, an entrepreneur, a business owner, looking for domain name lease advice, consult with a qualified attorney. Zak Muscovitch is one of them of course, and his link is just below if you are interested.

Okay, so we are going to spend an hour with you, Zak. People are going to get to know you and see if they like you, and if they like what you are saying and how you talk, then give Zak a call.

All right, so what is a domain name lease in a nutshell, Zak?

Zak: All right. So, a domain name lease is really, I would say, a catchall term for one of several different kinds of agreements. So, really there is three different basic formats I would say for a domain name lease, and maybe it is best to kind of compare to leasing a car. So, for example, if you lease a car, one form of lease, and it is not all that common, is a walkaway lease. So, essentially you are paying every month for the use of the vehicle, maybe there is a downpayment as well or a deposit, and you lease that vehicle for three years and you are paying, let's say, five hundred dollars per month for

three years. At the end of it, you walk away. You return the vehicle. You have used it. It is like going to Avis or Budget and renting a car.

Same with a domain name lease agreement in this very simple form. You are paying a deposit perhaps, a monthly rental price for the use of the domain name. At the end of it, you have no right to purchase it. You have no interest in it. There is no option to purchase it. Those payments are taken off the purchase price. That is as simple as it is. That is a rare form of agreement. I do not see a lot of that because really the only time someone would want to lease a domain name without acquiring any possible interest in it or an option to purchase it would perhaps be if they are only interested in the traffic, and so they are renting the domain name for the traffic only for a period of time. That is it.

The second kind of lease agreement I will say is the most common one that I do. It involves a deposit at the beginning, monthly rental of the domain name, and then there is an option to purchase it. So, let's say that it is a 36-month lease for the domain name. Let's say you put one hundred dollars down at the beginning, just to use simple numbers, and then you are paying one hundred dollars every month for 36 months. And at the end of it or at any period of time throughout that 36 months, you have the right, as the party who is leasing the domain name, to say to the lessor, who is the party that is leasing the domain name to you, the domain name owner.

These are confusing terms: lessor and lessee, and I will help maybe give some advice on how to separate the two after. You then have the option to tell the domain name owner, "Look, I want to pull the trigger on my option. The agreed upon option price was ten thousand dollars, so I would like to pay that ten thousand and like to receive title to the domain name." So, that is the second most common kind.

The third common kind, which is not quite as common as the second one, would be a lease where you pay a deposit, you pay the monthly rental, same as number two - the one we just went over -, but then, at the end of it, at the end of making the 36 months of payments, you will owe the domain name. So, there is no back loaded purchase cost. Essentially you paid for that domain name, but paid for it over time.

So, those are really the three general categories of a domain name lease.

Michael: All right, great, and so let's define these terms that you just talked about. There is a lessee and a lessor. How can people remember these two words and who they are?

Zak: Yeah, I mean even for someone who has been practicing law for 15 years, these terms are confusing and I often see that people get them backwards in agreements. It is really hard to separate them. The only kind of tip that I can come up with to remember which one is which, for what it is worth, is the lessor is the domain name owner. Does that work?

Michael: I like that.

Zak: Lessor is the domain owner, whereas the lessee is the one that is leasing the use of it from the owner or the lessor.

Michael: All right, that makes sense. All right, so we should try and use these terms, so they become more familiar with people. So, if a lessee approaches a domain name owner, who is the lessor, and says, "I would like to buy your domain name," and the lessor says, "All right, great, it is 30 thousand dollars to buy it," and the lessee is like: "30 thousand bucks. What," then the lessor can say, "Well, give me one hundred bucks to start a relationship, an agreement, and one hundred dollars per month for 36 months. And then, at the end of that term, you can pay me the 30 thousand dollars. If you grow your business from the domain name, you can pay it off anytime you want and you own the domain name," or they can set the payments at a higher number and spread that 30 thousand dollars over the term of the loan, which is the third option that you mentioned.

Great. And so, why do you think that the third option, which is paying the whole thing off over a series of, say, three years is less common than the second option, paying a monthly fee and then a balloon payment at the end?

Zak: Right. Well, probably because if we take a 30-thousand-dollar domain name and you spread the payment over the course of a three-year term of 36

months, the rental cost per month for the lessee would probably be higher under that third method than the second method, because the second method, we are able to lower those monthly rental payments and then put what you correctly referred to as a balloon payment essentially at the end. That is the option purchase price. So, it is a way of lowering the monthly payments and that is something that is more desirable for the lessee, whereas the lessor may prefer that third method instead.

Michael: Yeah, okay, so we are going to talk about the pros and cons of doing that as we go through. Nice mug, Zak.

Zak: Thank you for that mug.

Michael: As we actually go through the lease agreement that you have graciously provided to the Domain Sherpa audience, because I want to know what happens if we end up doing the second option for the lease, which is an option to purchase at the end, so a balloon payment at the end let's say and low monthly payments, and suddenly I get an offer from somebody I was not expecting for some outrageously high amount. Then what are my options? Am I locked in to one hundred dollars per month from this lessee or do I have some options? So, we will discuss that.

So, the typical deal parameters that you just mentioned are a downpayment, some period of time, a payment amount over that period, and it sounds like it is generally monthly payments, but I want to know from you if you have seen quarterly payments or yearly payments, or payments for the year in advance. Are those typical or every contract you do is a monthly payment?

Zak: Well, I have seen all of those, Michael. I have seen monthly. I have seen quarterly. I have seen annual. More often it is the monthly payment because that is just the way business is geared, towards monthly payments in terms of rent, etc.

Michael: Yeah, okay. All right, so what I am going to do now, Zak, is share my screen and we are going to walk through your agreement, for educational purposes, the agreement that people can download and take a look at. So, you see the contract on the screen, Zak.

Zak: Yes, I do.

Michael: Excellent. All right, so I am going to start right at the top and sort of walk you through this, domain name lease agreement with option to purchase. So, we are going through your second option.

Zak: Exactly.

Michael: This is the deposit, a little bit lower fee per month, and then there is a balloon or an option to purchase the domain name. So, right off the bat, I can see that if I am going to use this as a basis for something after consulting an attorney, I will want to replace anything in square brackets with the actual content that should be there, like domain name should be DomainSherpa.com.

Zak: Yeah, so the square brackets indicate essentially a placeholder.

Michael: Great. All right, this lease agreement. The agreement dated. The date here. Now, this is the first question that I have about legal agreements, Zak. What date are you supposed to put in there, the date that it is actually signed or the date that you started negotiating and you presented an agreement, the lessor presented the lessee with the agreement, or does it not matter?

Zak: Well, it never matters until there is a problem, right? So, ideally what we like to see is we like to have the agreement dated the same date as the signature. However, there is also room to put a date that the agreement was prepared at the very beginning there, and then down below, where the signature page is, those can be dated when the agreement is actually signed. The cleanest way is to do it all on one date.

Michael: Okay. All right, name of owner is the next thing you need to fill in. Should be relatively straightforward, the owner's name, but sometimes a domain name could be in my personal name even though it is owned by my LLC, my business. Which owner should be listed here, the business name or the registrant name?

Zak: Right. Well, I think that the most important way of looking at this is to look at it from the perspective of the lessee, the party who wants to lease the use of this. As the party who wants to lease the use of the domain name, Michael, I would want to make sure that I am leasing from the party that is the actual owner of the domain name. So, the first thing I do is, if I am contacting the owner, he might get back to me if his name is John Smith, he might get back with a name of company, and hopefully that will be reflected in the actual WhoIS details, but often it is not as you have pointed out.

Sometimes there is another structure there, where there is an individual (Unclear 14:50.3) on behalf of his company or there is more than one company involved, and so really from the lessee's perspective, you want to have the WhoIS details match the party you are contracting with as closely as possible. And (Unclear 15:03.8) that, at least have a satisfactory explanation from the domain name owner about why the WhoIS details are not the same as in this agreement.

Michael: Okay, so the lessee should go type in WhoIS.se/[the domain name], see who it is registered to. If it is not the legal entity and it is just an individual, that individual's name should be here. If it is a legal entity, that legal entity should be here. If there is a differentiation, if the lessor says, "Oh, it is my company, but the information on the WhoIS says it is his personal," you might want to get that resolved.

Zak: That is right, and I mean one of the themes that we will see running throughout these agreements is just how much care and time you put into a lease agreement is really contingent upon the value of the domain name. Right?

Michael: Right.

Zak: So, we will not want to go through all kinds of hoops and due diligence on a five-hundred-dollar domain name. We would put a lot more work into a million-dollar domain name. So, really from a practical perspective, you have to keep that in mind throughout this process to see just how careful you need to be in the circumstance.

Michael: Great. All right, so this is the owner's address and the lessee. So, this may actually be an individual's name or, more likely, it would be the legal entity, the company of the lessee. Right?

Zak: Right. Well, this is interesting because what this contract is, is a commitment by the lessee to make these payments over this period of time. And so, if that lessee were to stop making these payments for whatever reason, refusing to make the payments or failing to make the payments, the domain name owner, the lessor could theoretically have the right to sue the lessee for the balance of the payments due under the lease. And so, a lessee, particularly for high-value domain name, where there are significant monthly payments, may be deciding to setup an entity just to be the party to lease this domain name.

Why? Because if the business goes south and he is unable to make those monthly payments, well, then the domain name owner, the lessor will have recourse against his shell company. And so, one of the things as the lessor, you will want to pay attention to who you are contracting with, an individual or a brand new entity or a well established entity, because that will give you an indication of the wherewithal of the lessee to complete the transaction.

Michael: Yeah, great point. So, this box that I just highlighted right here, Zak, are your notes. They should be removed if somebody was actually going to use portions of this agreement with proper legal advice, I should point out. And you start by saying the parties should be identified and verified through corporate searches and/or photo identification. I am not sure I have ever done that for one of my legal agreements, except maybe when I sold my media company back in 2008. Do you recommend that for any transaction amount, or is it just transactions that are higher in nature?

Zak: Well, ideally it would be done for all of them, and I will explain why, but from a practical perspective, once again we get back to what degree of due diligence is justified, what degree of effort is justified given the price of the transaction, the value of the domain name. The reason that ideally we would do this in a lease situation in particular and perhaps not so much in a purchase transaction is that a purchase transaction, like the ones you have

mentioned you have participated in, Michael, those are over very quickly. The money gets paid. The domain name gets transferred. That is a lot different than a lease relationship that can take place over months or years.

And so, in a purchase context, as a seller, you get paid. You do not care who pays you. As the purchaser, you get the domain name. You do not care who sold it to you, generally speaking, whereas in a lease, because the relationship is an ongoing one and there is liabilities there and there is commitments to pay money over time, you want to see who you are dealing with. And this is not a big deal. Someone tells you they are ABC Inc. You ask them what state and you do a corporate search in that secretary of state's database, and it is usually a free search.

Michael: Great. All right. It is funny. We just spent five minutes talking about this first little paragraph, but there are so many important details in here. And the other thing I wanted to ask you, Zak, is let's say I own a domain name and somebody comes to me and says, "Hey Mike, I want to lease that domain name. Here is my agreement." Who should be responsible for creating this agreement, in your opinion?

Zak: Right. Well, generally speaking, our audience is domain investors who are domain name owners. And domain name owners who are interested in leasing either should have a basic form of agreement ready for leasing if they are expecting lease inquiries, and that agreement should be tailored to their particular likes and dislikes and needs. The lessee typically would not have a template or a draft ready, but if that person did present it, well, certainly then there is a review and a back and forth over the appropriate clauses because one of the most misleading things about a legal agreement is people ask can I have a template for a particular transaction.

Well, this document may very much look like a template, but really it is the thought and considerations that go behind this black type on white paper, where the skill and experiences come into play.

Michael: Yeah, great point. All right. And the other note you have on here is that if the domain is privacy protected, it should be revealed for the lessee to make sure that the lessor actually owns it.

Zak: That is something that is often good to ask, or even if it is a momentary reveal, so to speak, just to see who is behind it.

Michael: Yeah, great. All right. The lessor and the lessee hereby agree as follows. Article I. The domain name. It seems pretty straightforward. We have got to define what we are talking about here.

Zak: That is right, and sometimes it is a list and you attach those as a schedule. That is a very simple part of it.

Michael: So, if you did attach it as a schedule, shall lease from the lessor, the domain name(s) as identified Appendix I.

Zak: Very good.

Michael: Something like that.

Zak: You obviously went to law school, Michael.

Michael: No, but I play a lawyer on TV. All right. So, any other notes that you wanted to go over in this section, Zak.

Zak: No, I think that is a fairly straightforward section. Let's take a look at Section II.

Michael: All right, Section II. Term and use of the domain name.

Zak: Right. Well, someone might ask what is the appropriate term to use. Should it be 12 months? Should it be 36 months? Well, there is no hard and fast rule. There is not even a rule of thumb for that. What the decision is about how long the term is, is a factor of several considerations. The first one is really, when you are leasing a domain name when there is an option to purchase, the parties have to agree on essentially what is the purchase price for this domain name. So, if it is one hundred thousand dollars, you need to get a sense about how much the lessee, the party who is leasing the domain name from the lessor/owner, is able to pay financially per month.

And that will be a factor of how long the lease will be. From the domain name owner's perspective, you certainly want to make it as short of a period as possible. For the obvious reason, you want to get the money paid to you as quickly as possible, because leases, and we will talk about this a little more, do not always mature to termination. Sometimes they go bad and you will want to get as much money upfront as possible.

Michael: Okay. So, basically these are just dates. Commencing on January 1, 2015 and expiring on December 31, 2015. 12 months, thereafter namely on the expiration date. What should go into this area that I just highlighted right here, Zak?

Zak: All we are trying to do there is to be very, very clear about how many months the lease is, what day it starts and what day it ends.

Michael: Okay. Setup fees. This is the deposit that you spoke about earlier. So, just to make sure that people are serious about the lease, you might take one hundred or five hundred or one thousand dollars upfront.

Zak: Yes. The deposit is more than a mere formality. What we are trying to achieve there from the domain owner's perspective is to get a significant enough financial commitment upfront that it shows us two primary things. The first is that the lessee is serious, and the second is that we want to get enough money to cover legal fees, the time and effort of putting together this transaction, and also enough money that if it goes south at the very beginning, that we have at least got some money out of this fellow upfront.

Michael: Well, that is a great point. So, let's say that the domain name is worth ten thousand dollars. What would be an adequate setup fee to show that the lessee is serious about it and could cover legal fees?

Zak: Right. Well, I mean it would really depend on how long the term was. A ten-thousand-dollar number is easy to work with because if a lessee is serious about it and cannot come up with the ten thousand upfront and wants to pay let's say one thousand dollars per month, I would probably tend to think along the lines of a two-thousand-dollar deposit and eight thousand dollars payable

over eight months. And I think that is something that is manageable and reasonable, given the value of that domain name.

Michael: And that is a real life example. For a relatively small business owner that wants to own a great domain name for ten thousand dollars, it could be an upgrade to one that they have right now, you could see them from a cash flow perspective paying two thousand dollars upfront and then one thousand dollars per month for the next eight months and coming up to a ten-thousand-dollar number.

Zak: That is right, and I probably would be hesitant to accept anything less than a two-thousand-dollar deposit under that situation because I would want a significant financial commitment that was also manageable. Two thousand dollars is in that situation.

Michael: Yeah. And if the domain name was 50 thousand dollars, you might say ten thousand dollars is an adequate deposit.

Zak: Yeah, ten thousand would probably be on the high side, but certainly is in the realm of reasonability. It could be five thousand or 75 hundred at that point in time. A way of looking at it is seeking a first and last month's rent perhaps.

Michael: Okay, all right. Length of term is negotiated. I was recently contacted by somebody that wanted to lease a domain name that I own and I was more than happy to do that, and he asked for terms and I presented them. I think I presented it over 24 or 36 months because I wanted him to feel like the monthly amount was low enough, but I think that might have turned him off that the term was so long. I find it hard to negotiate with people that do not necessarily know what they want, so you have to suggest something, but then if they do not like your suggestion for the term, then it could turn them off.

How do you recommend that domain owners, lessors, deal with figuring out what the right lease term is for the lessee?

Zak: Right. Okay. Well, most lease discussion start off with a purchase discussion. As you pointed out in the beginning, most of the time someone comes to the domain owner and says, "I would like to buy the domain name," and they say, "Absolutely. Three million dollars," and this week that does not seem like a lot of money given the news, but generally speaking, three million dollars and the person says, "Well, I certainly cannot afford that." And then you could have a discussion about, well, okay, how much can you afford. And they might have a number in mind that you could use as a starting point, or they might have a discussion.

You say, "Listen, this is my plan for the domain name. This is the kind of revenue that I am anticipating as a result of my monetization of it, and so I think I am able to pay the monthly rent for this out of my revenues, but it is going to take me perhaps eight months to get the site developed and indexed in Google, get the business to a stable point, so I would really like to make the payments low at the beginning. After eight months, make them higher," and then you might say. "Well, tell me more about this business because you were asking me to let you use my valuable property for a much lower sum than I would normally be willing to. You need to sell me on the merits of this business. And if you can convince me of that, I can be more flexible and I would be willing to give you favorable terms because I want you to succeed, because if you succeed with this, then you are able to exercise the option to purchase from me, and then I have sold the domain name and you have gotten it," which is what both parties want.

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Michael: Yeah, and everything you have said makes complete sense, Zak, and lessee would never admit what they think they are going to make per month on the domain name because what if it is really high. They do not want to tell the domain owner that they are going to make a lot of money off this domain name because then they might try and negotiate for harder terms. Right?

Zak: Well, that sounds like it makes sense, and that is probably correct a lot of time, but surprisingly, a lot of the time as well the lessee or the prospected lessee has grand plans about the use of the domain name and the website, and may be making quite optimistic estimations of his or her anticipated revenue and profitability, and that can be used against them by saying, "Okay, you think you could make one hundred thousand per month. You should easily be able to afford 50 thousand per month as a lease payment."

Michael: Yeah, all right. Throughout the term, lessee's obligation under this agreement is in good standing. Lessee should have the right to use the domain name in accordance with the terms. So, what you are saying is that as long as payments are being made in the agreed upon fashion, the lessee gets full rights to use the domain name.

Zak: That is right, and this is a theme that runs throughout the core of this agreement, and that is that all bets are essentially off if the domain name is misused or payments are not made. This is not a license to use the domain name for the term in any manner you see fit and without paying. Those payments and proper use of the domain names are conditions of this agreement continuing.

Michael: And do we have details down below on what proper use of the domain name is.

Zak: This particular version of the agreement is a shorter form agreement that does not go into a lot of detail about what prohibited activities are. Those can be itemized in greater detail. For example, you can specify no spamming, no (Unclear 31:28.9), no pornography, no sale of ammunition or weapons, etc. You could list everything out, or you could use it as a short form: nothing illegal. And it really depends on how much effort you want to put into the lease and what the value of the domain name is to see what the right approach is, because I feel comfortable with 35-page agreements, but not everyone does understandably.

And so, you could have the most intricate, precise and excellent domain name lease agreement presented to the other party. They take a look at the 35 pages and say, "I think I have seen enough." So, you have to take some care in just how precise you want to be because it could be bad business.

Michael: Yeah, all right. And then the final paragraph in this Section II is upon expiration of this term, the lease agreement shall be immediately terminated using the provisions below. So, you have a note here about survival of the indemnification. Those are big words.

Zak: Yeah. An agreement. This gets into kind of a nuance, fine legal point, but when an agreement is terminated, generally speaking, it means it is completely over and that no party has any other obligations to each other. But sometimes there is a situation where even though the agreement is over, there should still be some obligations to each other. And an easy example of that are, for example, non-disclosure provisions. Even though the lease may be over, you still may want to require the other parties to be quiet for a period of time, and so that is what we call survival of a clause or a provision.

And so, the indemnification provisions here should survive the termination, and really what that is trying to say is that once the agreement is over because you have reached it, for example, you still have to indemnify me for my losses, even though it is technically over.

Michael: Got it. And somebody, if they have a really high value domain name, they might want royalties going forward, after the purchase of the domain name. That might be termination of the lease portion, but then continuation of some other provisions.

Zak: That is right. That is a very good and creative point. There could be a royalty provision that carries on after termination, and perhaps that is a subject of a schedule that is a separate royalty agreement.

Michael: Makes sense. All right, Section III of the domain name lease agreement is payments. Lessee shall pay to the lessor non-refundable setup fee. Here is where you actually define what that deposit or setup fee is. And your note says desired currency clearly stated because if you do not put in the currency, which is here US dollars, that clearly defines it. Right?

Zak: Yeah.

Michael: You might get Yuan or something. Pesos.

Zak: It does not happen often, but once in a while you see someone thought they were talking about Australian dollars instead of United States dollars, and one is off by ten percent. So, that should be clearly stated because these are International agreements a lot of the time between parties in two totally different parts of the world.

Michael: Yeah, all right, great point. On the first of each successive month of the 36 months, 24-month term, commencing on, and I assume that this is a date. January 1, 2015.

Zak: Yeah. Not every deal happens on the first of the month. Sometimes you may reach a deal in the middle of the month or after a week, but it sure makes things simple if you have the payments due on the first of each month, especially if you are leasing more than one domain name because it makes it easy to keep track. So, often, even if I am writing up the agreement and executing it on the 15th of the month, I will rather wait the two weeks to start it at the right time in order to make things simple going forward.

Michael: Yeah, that makes sense. All right, lessee shall pay the lessor a monthly rental price of whatever is agreed upon. It is listed right here for the use of the domain name, and you are calling that rent.

Zak: Yeah.

Michael: And the notes here: applicable taxes should be considered.

Zak: Yeah. Tax regimes are so different in some parts of the world, and really it can be surprising once you get into it. And really, in an ideal world, you would seek tax advice from an accountant or specialist tax advisor for each one of your domain name leases or purchase transaction, and so that is what I would recommend.

Michael: That is all you are going to say on the subject.

Zak: Generally speaking, I have seen, for example, transactions where the purchaser or lessor is in China and the payment is going to someone in the United States or Canada, for example, that under certain Chinese tax laws, there is a tax that has to be withheld for payments out of the country. So, for example, if it's a one-hundred-thousand-dollar purchase of a domain name, and that is all you put in there, the accounting department of the purchasing corporation say, "Okay, but we are supposed to remit 15 percent of that to the taxation authority."

Similarly, with leasing from US-based companies to non-US companies, there are also potential withholding taxes for leases, and so that is why if you are going to get serious about leasing, it is always a good idea to speak to a tax advisor.

Michael: Yeah, great point. And I know that there are valued-added taxed (VAT) in EU. I know that my local city here, just outside of Seattle charges me tax on all the revenue that I generate. Even if I do not make any profit, I pay tax on the revenue for my company. So, those are taxes that may want to be passed through to the customer.

Zak: Exactly. So, as long as you are clear and you say that listen, this is a net transaction and any applicable taxes are paid by the lessee is a prudent course of action, so there is no dispute about that.

Michael: Yeah, all right. Section IV. Option to purchase. Oh, actually, before we get there, I want to go over one more question about the payments. You say right here often the amount of rent is variable. Increases as the term progresses. So, it is not the simple here is the monthly rental price of one thousand dollars for the 12 months, let's say. One thousand dollars for 12 months. You may actually increase it. How would that be worded if you are starting at one hundred dollars and ending at one thousand dollars and having it all work out to the same amount?

Zak: Okay. Well, let's look at the reason that you would have a variable, increasing monthly rent. The primary reason that you would do that, as the domain name owner, is you want to create a built-in incentive for the lessee to exercise the option to purchase sooner rather than later. And so, by telling the lessee, saying, "Listen, it starts off at one thousand dollars per month for the first year, but after the second year, it is not two thousand dollars per month," from the lessee's perspective, he wants to avoid those two-thousand-dollar month payments, so he is going to be incentivized to purchase the domain early through the option to purchase.

Now, when we get into a complex payment system like that, typically we will set it out in a chart. We will have a chart, month-by-month, about what the rent is because it could seem simple when you are drafting up the agreement, but after a couple years, it gets a little more complicated because memories fail, so it is good to have a chart about monthly payments.

Michael: Yeah, so if you are going to start on January 1st, you will say January 1, 2015, the monthly payment due is one hundred dollars. February through December, one hundred dollars. And then, starting January 1, 2016, it goes to one thousand dollars. And then maybe January 1, 2017, it goes to two thousand dollars. So, it is clear. There is no I did not understand the text. There is none of that ambiguity. They know exactly how much they pay within the agreed upon term of January 1st.

Zak: Exactly.

Michael: Yeah, great suggestion. All right. Section IV. Option to purchase. So, we have talked about the lease term. We have talked about payments over time. Now we are telling them that if they want to own the domain name at the end of this term, they have an option to purchase.

Zak: Yes. And so, theoretically, someone need not exercise the option. They could pay the monthly rent all through the 36-month term, for example, and at the end say okay, have a nice day. I enjoyed your domain. It was wonderful.

Michael: Or their business did not work out the way they thought, and they do not want the domain name.

Zak: That is right, and that is one of the main reasons why a lessee will be interested in a lease rather than a straight-up purchase, because it is a new business. They want to try it out. They want to see how it goes. They are going to invest in the development of the site, but they do not want to pay the hundred thousand dollars to purchase the domain name. They want to pay a few months of five thousand dollars each and see how it works out. And if it does not work out, they will walk away if it permitted. And even if it is not permitted, you might end up suing the shell company.

Michael: Yeah. So, let's say that I do own a domain name that I think is worth ten thousand dollars and the potential lessee thinks it is worth ten thousand dollars as well. So, we have agreed on the purchase price. Then we start this lease and we say, "Okay, for 12 months, you get the use of this domain name in all ways for two hundred dollars down and one hundred dollars per month for the first year, and then you have the option to purchase at the end of the first year." Would that option to purchase be the full ten thousand dollars or do I reduce it based on payments that have already been made?

Zak: Right. Well, that is a matter for negotiating between the parties. Often the lessee will say, "Listen, every payment that I make, I want it to come off the price of the domain name," and often there is a way of structuring that, that is satisfactory to the domain owner, but in such a case, the value of the

domain name goes up. So, for example, if you, Michael, thought the domain name was worth ten thousand and the lessee thought it was only worth five thousand and he would like to make all the payments come off the purchase price, that could be a negotiating point that you say, "Okay, well, I am willing to let each payment come off the purchase price, but I want to go with the higher number, the ten thousand."

Michael: Okay, great point. Your notes here: sometimes there is an obligation rather than an option to purchase. When would you want to make it an obligation rather than an option?

Zak: Right. Okay, so this is a little nuance, and the reason is, is because if you are a domain owner and you are dealing with an established company, let's say Coca Cola, for example, you will fully expect them to comply with the agreement and pay rent. Pay rent on time throughout the whole term of the agreement. But if it is a new company, non-established with no assets, you have to consider that they may not do that. And so, when we say there is an obligation to purchase the domain name, really you have to consider who the lessee is.

If it is Coca Cola and I put in an obligation to purchase, I know that they are going to be paying the full amount. If you try to oblige a brand new lessee, shell company to purchase it, they might agree to it in good luck. So, the obligation to purchase really is contingent upon the financial wherewithal of the lessee.

Michael: Okay. All right. And notice here, prior to exercising the option to purchase is often desirable so that the lessor can plan for the period post-term, so basically you are saying if you do want to exercise the option to purchase, we need to know within two months of expiration date of this agreement.

Zak: Right, and anyone who has rented an apartment will know that in a typical rental agreement for an apartment, the landlord wants to be able to show the place, prospective tenants, before the last day of the lease. And so, you put in a very comparable provision for this.

Michael: Yeah, that makes sense. All right. And the last note that you have here in the blue area: the option purchase price is the value the parties agree on, which can go up as the term progresses. I know that some of my domain names, well, not very many of them, but some of them actually do appreciate. What if I do want to have an appreciation formulate in the value of the domain name? Can I do that as well? Is that common, Zak?

Zak: Yeah. Yeah, I do see that quite often. We will put in a chart and we will say year one: purchase price is ten thousand. Year two: purchase price is 12 thousand. Year three: 15 thousand, etc. And it is a great incentive for the lessee to pull the trigger on it.

Michael: Yeah. So, in addition to the variable, increasing monthly rent, which we have just discussed, which rewards a lessee for purchasing sooner because their monthly rent goes up over time, this could be an incentive as well, where you have an increasing purchase price for the domain name.

Zak: That is right.

Michael: Awesome. Let's see here. And you say sometimes by exercising the option to purchase, remaining rent is waived. Is that sometimes or often, in your experience?

Zak: Only sometimes. Often there is discussions that happen outside of the four corners of the agreement. So, for example, a lessee might contact you, as the lessor, and say, "Listen, I've got 16 months remaining, and it is one thousand dollars per month. We can keep the agreement I signed. I signed it, but what would you say about taking ten thousand dollars right now?" And you can negotiate that. It is not the greatest situation often because the domain owner is giving a discount, but sometimes it is good for both parties, so it is a matter for negotiation.

Michael: Yeah, okay. As a condition of this option, the option purchase price must be paid no later than ten days subsequent to the notice of exercise of the option. So, basically if they notify you within two months, then they need to pay you no later than ten days from that notification.

Zak: Yeah, we just want to put something in there that says listen, you cannot just exercise the option willy-nilly in a vacuum. If you exercise the option, I expect to get paid within X period of time. Ten days is a reasonable amount in most cases.

Michael: Yeah, and so I often wonder. Are these ten business days or are these ten calendar days? What is the legal determination when it just says ten days?

Zak: Well, normally, if it just says ten days, it is ten calendar days. If it is ten business days, then it is normally there is a definition of what a business day will be, and we will include a definition such as every day except a weekend or a bank holiday in the state of Delaware.

Michael: Yeah. So, I do not need to write ten calendar days. Ten days is a legal definition of a calendar day.

Zak: Well, ten calendar days would be more precise, and so maybe we will make that revision to this agreement. And that is a good point, is that these are evolving documents. I find that the third lease that I do for a client is more tailored than the first least I do for that client because we learn from experience, and so these are constantly evolving documents, and so they do not remain static.

Michael: Yeah. Now, I often find that the devil is in the details of course, because if something can go wrong, it will go wrong. What happens when they make the wire payment and it shows up, or let's say that they have said that they want to execute the option to purchase, Zak. The ten days comes to an end and they are like: "Hey Mike, it is coming today," and it does not show up, and it does not show up on the 11th day. What happens at that point? What are the rights of the lessor at that point in time?

Zak: Right. Well, listen, bank errors happen. Banks get closed early. Wire transfers do not go out. Sometimes it is sent to the wrong account. Errors happen. So, we generally put in a grace period of let's say five business days. In this case, we would do business days because, to correct a bank error, the weekend does not generally help you. So, we put in a grace period to care of

a situation like that. However, we, as the domain name owner, do not want to get into a situation where the lessee is relying on the grace period every month. It gets annoying, right?

Michael: Yeah.

Zak: So, we say that after three late payments, we have the right to terminate because you are just not a great tenant, because all the bank errors seem to happen to you.

Michael: Yeah, okay. So, after three, or one, or two, or whatever the lessor decides, they have the right to terminate the agreement, which basically means they point the domain name back to a parked page and this is done with. The agreement is terminated.

Zak: That is right.

Michael: Okay, and I am going to ask you a few more questions about terminating an agreement, but we will get to that. Upon payment of the option purchase price, domain name is transferred. And your note here is that the transfer of the domain name may involve a transfer by an escrow agent that could involve an escrow agreement. If I have this legal agreement, this seems pretty clear to me. Why would I want to have an escrow agent and escrow agreement in place?

Zak: Okay, so great question. You have to look at this from the perspective of the lessor and the lessee. From the lessor's perspective, he is willing to let a stranger use his domain name, provided he gets paid every month. He is not going to transfer the domain name to the lessee and let the guy use it and send it back when he is done, after the term of the lease over. He is going to say it has got to remain with me. This is my valuable property. I am letting you use it, but it has got to remain with me.

The lessee, however, says well, hold on a second. I understand this is your valuable domain name and you want it to be kept in your domain registrar account. However, I am going to spending a lot of money developing this website over a period of three years. I totally trust you, but God forbid

something happens to you and I cannot get a hold of you, or you try to sell the domain behind my back, how can I afford to invest my time and money in the development of this business when I am relying solely upon you?

So, the solution often is to put it in the hands of an escrow agent, who is going to keep that domain name safe for both parties. And that is something that tends to happen more with higher valued domain names, because if we are talking about a two-hundred-dollar-per-month lease, really have to take into account the risk and the value, it is probably not worthwhile doing, but when we are talking about a ten-thousand-dollar-per-month domain name, it starts to become a serious consideration.

Michael: Got it. That makes perfect sense. All right, next section is place of payment. Lessee shall pay the setup fee via wire transfer as instructed. Lessee shall make all rent payments to the lessor via PayPal unless otherwise instructed. So, basically the lessor and the lessee will come an agreement on how it is probably most convenient to pay, and then that will be written in here. So, if the lessor is willing to accept PayPal and their fees, then they can pay the setup fee and the monthly payments by PayPal and be done. Right?

Zak: That is right. I mean, generally speaking, I see PayPal being used for the smaller numbers, the hundreds or small thousand payments, whereas wire transfer is used for the larger ones.

Michael: Yeah, that makes perfect sense, because most people have a 15 to 25-dollar wire transfer fee as well as receipt fee, so those are fees that you have to pay as well. PayPal takes a commission off of every dollar that is transferred. All right. Section VI. Ownership of domain name. Oh, let me ask you one more question here, Zak. You say wire. You say PayPal. They are both immediate electronic payment options. Somebody could take bit coin, right, if they wanted.

Zak: I imagine we will be seeing more of that. I have yet to work on a contract that bit coin payments were accepted, but I imagine that is possible.

Michael: Well, it has been so volatile lately. I am not sure I would want to take bit coin.

Zak: Yeah.

Michael: And then what about check, personal or business check? Should that ever be accepted or not?

Zak: I would not.

Michael: Why?

Zak: Well, listen, checks. If you are working with a party in a different country, there are sometimes 30, 60, or 90 days for a check to clear. That is a problem. Secondly, you do not want to deal with bounced checks and you may not know that a check has bounced for a period of time. With the electronic transfers through PayPal or wire, you know a lot faster. So, in my view, it is preferable to do PayPal or wire, but if you feel comfortable accepting checks, maybe the guy is in your hometown and that is the simplest way of doing it, have them give you a stack of post-dated checks. Sure.

Michael: Great point. All right. And you should be aware because even though Canada is right across the border from us, yeah, it could take 60 days for a check to clear, going through the International standard. So, great point. By that time, the lessee may have decided that they actually do not want to pay for the domain anymore, and then you are going to be out some amount of money if you do not want to take them to court.

All right, Section VI. Ownership of a domain name. Lessor retains the full title to the domain name, notwithstanding the lease of the same to the lessee. Subject only to the right only to use the domain name in accordance with the terms of the lease. Why is that important?

Zak: Yeah, I mean from one perspective, this should not really need to be said. It should be obvious that when you are leasing a domain name to somebody, they are not acquiring any interest in the domain name. They are just renting the use of it. The same way when you rent a car. You do not have any interest in the car you rent from Budget or Avis. But when we are trying to do a contract, we try to even state the obvious. So, what we are saying here

is listen, just because you are sending one hundred bucks per month does not mean that you are acquiring one hundred bucks worth of interest every month in domain name.

I am the domain name owner. I will own this until the day that I transfer title to you, which is either upon your exercise of the option or if it is essentially a leased home situation at the end of the term.

Michael: Yeah. And what is different than a lease of a car or a lease of an apartment compared to a lease of a domain name is that the domain owner is likely going to add value to the domain name or at least in their eyes. They may be blogging on a regular basis. They may have millions of people visiting their website over a month or a year and they may think that they are adding value to the domain name. One of their competitors might want to own it because of the authority value in Google's eyes that they built in the domain name, for instance.

So, this makes it clear they are not building equity in the domain name. The lessor retains the full title to the domain name.

Zak: That is right. And Michael, you raised some very good points because if you get into a more intricate and detailed long form domain name lease agreement, you will often see provisions that spell out the kinds of considerations that you are saying. For example, that the lessee, who has done all the work that is increased the ranking in search engines gets no compensation for that from the domain name owner, because you could imagine. Someone has worked on this for years. All of a sudden it has gone up all the way in the rankings, and then the lease is expiring and the lessee says, "But I put all this work into it. I deserve something for that."

Well, we spell out that you are not in these agreements.

Michael: Yeah, all right. In Section B or Clause B here, you say lessee shall be entitled to direct the lessor to set the DNS settings. Clearly the lessee wants access to email. They want to point the domain name at whatever website hosting company they use. Maybe third level domain names they want set up. If the lessor is in control, the lessee should want to know how

quickly the lessor is going to change those DNS settings to make sure that they get full use of the domain name.

Zak: Yeah. We will typically say something like within 48 hours of notification. And if it is an escrow agent, the escrow agent also to have an obligation to change the DNS settings.

Michael: Right, okay. Let's see. Acknowledges no option provided or represented. Written. Oral. Well, these are a lot of words. What is this section saying, Zak?

Zak: Well, this section basically is telling the lessee, saying, "Listen, I have not made any promises that you could buy the domain name or get any share in it other than what is written in this contract."

Michael: Got it. All right, Section VII. And I just noticed the time, Zak. We are a little bit over because we are going into so much detail, which I think is phenomenal. Do you have time to continue to go through the contract right now?

Zak: Absolutely, let's go.

Michael: Awesome. Thank you, Zak. All right, Section VII. Lessee's Compliance. All right, so this is going back to a note that I made. The lessee, in its use of the domain name, shall comply with all applicable laws, whether state, federal, provincial, national. So, basically if they are doing something illegal, then they are not complying with this agreement.

Zak: That is right. And the way this particular shorter form agreement is drafted is it is quite general. And as I mentioned earlier, we can get quite specific about what prohibited acts are, but let me say this. When you are a landlord of an apartment and you are renting it out, what do you do to protect yourself other than have a well-drafted lease agreement? You sit down and you meet with the tenant or you talk to the tenant and find out who are you. What do you plan on doing with my apartment? How many people are going to be living there? Are you going to have parties there? Are you running a business out of it?

So, these are the kinds of comparable considerations as the landlord of the domain name. You really want to find out what it is going to be used for. And often, and most often, it is an innocuous use. Someone is going to be selling shoes on the website. Okay, I do not have to worry too much about someone in the shoe business. Someone else might say, "Well, I am going to use this for a firearms website." Well, maybe there are some more considerations you have to look at there.

Michael: Yeah, but let's say that I have a domain name that, and I am just going to make one up completely as an example. WebsiteBuilding.com or .NET or .ORG, or whatever. WebsiteBuilding, so I will build people's websites and I want to lease that domain name from you, Zak. You lease it to me and then I go out and spam anybody that I can find that is a small business owner that might need a website. Spamming is illegal in one or more parts of the world, right?

Zak: Yeah. I mean listen, this is all about risk management, and so part of the risk management is being comfortable with the person you are leasing the domain name to, but you cannot always avoid every problem. Problems happen despite your best efforts and intentions. And so, you have to be careful about who you rent it to and you have to keep an eye on the use of the domain name, and you have to be prepared to pull the plug on it in accordance with the agreement if there is a problem that occurs.

And the question that you raised also relates to trademark rights, because they can be infringing use of a domain name by the lessee. And so, that is one of the reasons, when I am assisting a domain name owner lease a domain name, we want to find out what the nature of the business is, because we want to be able to investigate if there is potential trademark infringements. It is not enough to just merely ask the lessee to sign a piece of paper that says I promise not to use the domain name for anything trademark infringing. You need to do some work yourself as the domain owner because you have this domain name. You should be the one that to some degree checks the various trademark databases and sees what uses the domain name can lawfully be permitted for without trademark infringing. And you should be monitoring it.

Michael: Yeah, so this first section says the lessee is responsible for not doing anything illegal. Infringing on a trademark is illegal, for example. And then down here you are saying if any of that happens, the lessee needs to notify the lessor of that, but what you are saying is that the lessor needs to also do some due diligence as this lease is progressing to make sure that the lessee is actually doing his or her responsibility.

Zak: You have really got a handle on that lessor and lessee business.

Michael: So, how do I verify that a lessee is not spamming, that does not have viruses on their website, is not infringing on a trademark of somebody else on the website or in emails that they are sending out, for example? That seems like a lot of work.

Zak: That is right, and really it sounds like that is impractical most of the time. And so, what we are doing here is we are trying to shift the liability for that onto the lessee to say listen, the lessee is responsible for not doing these things, but if it does, then we are able to terminate. And sometimes there is a small issue. It is not a major issue that the lessee is doing some smaller thing that is wrong, and you can give them opportunity to correct that before you terminate.

Michael: Okay. So, worst case scenario, I think one of the biggest worries of a domain name owner is that they lease the domain name, it is used improperly, it infringes on somebody's trademark, and a UDRP or a law suit is filed against the domain name owner of the domain name.

Zak: Yeah.

Michael: What do you do in that case, Zak?

Zak: Well, I guess that is the equivalent of a landlord of an apartment renting it to a grower and it being seized by the police because the apartment has been used to grow or produce drugs. It is a nightmare scenario. It gets very complicated when a domain name owner gets sued or UDRP not as a result of their own use of the domain name, but as a result of the lessee's use, and that is probably a discussion that would take more time than we have about

how to address it, but suffices to say it is complex and what we try to do there in some cases is differentiate between whose fault this really is, because we start the assumption that listen, there has not been problem with the domain owner's registration use of the domain name, so the problem occurred as a result of what the lessee is using it for.

The lessee has to be responsible for that. The difficulty comes, however, when the lessee might be responsible for it, but has no money to take care of the problem.

Michael: Right, and typically if you are being sued as the lessor and the lessee indemnifies you, then you can somehow work that out in the courts, but in a UDRP, has it ever happened that you have seen that a UDRP has been filed against a domain owner when it was actually the lessee that committed the infringement and the lessor somehow worked his way out of the UDRP?

Zak: I do not recall a particular case of that happening, but often the domain names that are leased were registered in good faith by the domain name owner, and the UDRP requires registration in bad faith and use in bad faith. So, this dual component, and so if the domain name owner has a valid defense of registered in good faith, that should suffice, but it is a very complicated area.

Michael: It is very complicated, and you just said the UDRP word for word, but we have seen cases where a panel will decide that it was registered in good faith, used in bad faith, and they are going to give it to the complainant anyways.

Zak: Yeah. I would love to talk to you about that aspect sometime, Michael, because there is a smaller school of thought within UDRP (Unclear 1:06:24.2) prudence that essentially finds retroactive bad faith. It is a minority position based upon certain interpretation of the UDRP, one which most panelists do not subscribe to.

Michael: Right, in which case then you would have to file a lawsuit after that UDRP decision, and it goes on and on. All right, that is a whole other discussion.

Zak: Yeah.

Michael: Section VIII is Indemnity. Can you tell me what indemnity and indemnifying means again?

Zak: Okay. So, an indemnifier is somebody that is essentially saying I will indemnify you. I will make good. I will protect you. I will cover you against harm. So, Michael, if you are the domain name owner and I am the domain name lessee, I will tell you Michael, I will indemnify you if anything bad happens as a result of my use of the domain name. And you might say okay, that is terrific, but how much money do you have to make good on that indemnity. And so, that is also a consideration, because an indemnity in some cases is only as good as the paper it is written on.

Michael: Yeah, exactly. If they have an LLC that does this agreement and the LLC closes down, there goes your indemnification. Right?

Zak: That is right.

Michael: Okay. And you have a note in here. The section gets more detailed. Indemnity is only as good as the indemnifier's means. They may not have insurance for whatever harm they have caused you. They may not have any resources, money in the bank, so things to be aware of. Section IX is Default. So, here is the section that default means that they did not complete their obligations under the agreement.

Zak: Yeah, that is one form of a default. They failed to pay their rent on time or repeatedly in breach of the agreement. In that case, the lessor has the option to terminate the contract.

Michael: Okay, and I want to make that clear. It is an option. The lessor can decide that they may want to keep the contract if the lessee is apologetic, it was an error, they ran into a hard month cash flow, and they are going to get

back on to right terms. That is the lessor's right to determine. But the trigger for the default is Item I: if the lessee fails to pay any payment payable under this lease on the due date for the payment, subject to a seven-day grace period, or whatever grace period you want to set as the lessor.

Zak: Yeah, technically if the lessee defaults in payment, defaults even after the grace period, it is a default. It is not up to the lessor to determine whether it is a default. It is a default, but it could be up to the lessor whether he wants to wave that default.

Michael: Very good. Item II: lessee fails to perform or observe any of the covenance or provisions of this lease as part of the lease to be performed (Unclear 1:09:19.9). What does that mean exactly, Zak?

Zak: Yeah, so that is a very general catchall that is basically saying to the lessee, do not break any of the rules in this lease or it will constitute a breach.

Michael: So, up above, we said do not do anything illegal. Down here, they fail to observe that they were spamming, which is illegal, so under this section, they are in breach of the section above, which then sends the agreement into default.

Zak: Exactly.

Michael: Got it. Writ of execution. That sounds like it should definitely come with English curls and a robe or something. What is a writ of execution?

Zak: Well, a lot of these subsections for instances of default rarely come into play, but what we are trying to do here is to say listen, if the lessee is going out of business and someone has seized its office and is trying to wind up as a corporate entity, put it into bankruptcy, well, then the deal is off.

Michael: That makes sense, and same thing for a distress warrant. If somebody comes to you as the lessor and says, "Hey, this guy just went out of business. I have got this court order that says I own everything that was his, including that domain name. Give me the domain name," would you then

give whoever is presenting you this a copy of the agreement, saying, "No, I actually own the domain name"? Is that how you resolve that situation?

Zak: Well, as we discussed earlier, a lease is truly a lease, and in this one there is no interest conveyed to the lessee at any period of time, until the option to purchase is exercised. So, if someone came and said, "I have taken over all the lessee's assets and I own the domain name," I would probably write a very brief letter to them, explaining one: no title or interest was conveyed in the lease, and I will necessarily share the lease agreement with them at that point, generally speaking. And number two: I would also talk about the assignment provisions in the lease that I prepared, which prohibit assignment by one party to another.

So, in other words, if John Smith leases the domain name, he cannot just have his friend Bob take it over. It is not assignable.

Michael: Got it. All right. In Section B, down here, you say lessor may immediately, without giving notice to the lessee, reset the DNS, setting the domain name, terminate this lease agreement, but that would require releasing the lessee from any liability. It is a long sentence there. Sorry, Zak.

Zak: This can be a tricky situation because the interest of the lessor and the lessee are very different in this respect. Let me put it this way. Sometimes a lessee does a minor breach of the agreement. Suppose they inadvertently send out ten thousand emails, which they normally do not do, and this was a mistake. You could tell them listen, stop that and the agreement will continue, and that is fine. Other times, I have yet to see this happen, but it could theoretically. Suppose someone puts on Al-Qaeda website on the domain name you leased to them, and now you are really worried about the resulting problems.

Do you want to give the guy seven days to cure that default? You want to change the DNS right away. So, often what we will try to do is, say, in these kinds of severe situations where the ownership of the domain name is imminently at risk, we need to be able to turn off the DNS on this, but for everything else we give you notice.

Michael: Got you, all right. And then Section C: if the lease is terminated for any reason other than its due fulfillment by the lessee, or other than the expressed consent of the lessee in writing, then without prejudice to the other rights at law, the lessor may at any time demand immediate payment of all of the following.

Zak: Right, so Michael, this gets back to something that we have briefly touched on before, is that the strict wording of this kind of agreement, and particularly that section, would say to the lessee listen, you are binding yourself to making 12 payments for one hundred dollars per month. If you stop after two and walk away, that does not mean I cannot collect the balance from you. I will sue you in small claims or regular court. I want to collect the balance that you owe. That is what this provision says.

But sometimes a lessee, as we talked about, will just have that shell company. Other times, he will have no money. But on other occasions, the lessee might be quite frank with the domain owner and say, "Listen, I am going to give this a shot. I am going to pay for as long as I am able to pay, but if I am not doing a good business, I want to walk away. You will keep what I have paid you, but you will not get any more from me," and the owner might say, "Okay, I understand. That is fine."

Michael: And that is not included in this section, but I may want to include that section, saying the lessee can walk away at any point and the lessor keeps all payments made to date.

Zak: Sure. A lessee may take a look at this section and say, "No sir, I am not going to be on the hook for the balance of 36 months of payments if my business does not work. Forget it. Take that out."

Michael: Yeah, all right, great point. And you say sometimes a lessee can terminate upon notice or break-up fee. So, I did not see that in here. You could include a provision that says, "You can terminate at any point you want, but you have to pay me another five hundred dollars or one thousand dollars," whatever the case may be.

Zak: That is right. Exactly. What is unusual, but can also happen, and you alluded to this at the beginning of our discussion, Michael. You said that as the domain name owner, if I am getting one hundred bucks per month for 36 months, what happens if in the middle of this, I get a one-million-dollar offer? Am I stuck?

Michael: Yeah, so let's talk about that. What happens?

Zak: Well, hopefully it will happen to somebody, right?

Michael: I know, right?

Zak: But listen, you are stuck because you have bound yourself to the agreement the same as you would hope the lessee would be bound to the agreement. If you anticipate something like that happening or you at least want to give yourself a leg up in the event that that does happen, you could put something in there. I have only seen it once or twice, where the domain owner says, "Listen, we are agreeing that the value of this domain name is one hundred thousand dollars, and I know you are going to be spending a lot of money developing this domain name. You have the right to purchase it after 36 months, but if I get an offer that I want to sell this domain name, I have to pay you back all the money you have spent on rent and I have to pay you this penalty fee, and that penalty fee will be either X dollars or an amount equal to everything you have spent in terms of development."

Very rare. Very complex, but possible.

Michael: Yeah, okay. Section X. Invalidity or severability. Well, I know what the word invalid means, but what is the general takeaway from this section, Zak?

Zak: I mean this is kind of a more boilerplate section for a contract. A boilerplate, we mean a standard kind of section that does not necessarily relate to domain names or domain name leasing. Basically what it says is that if there is some section in here that a judge finds as invalid, that does not make the whole contract invalid.

Michael: Just that one section.

Zak: Yes.

Michael: Great. So, if, for example, they determine you cannot charge taxes, whatever, that does not mean that they cannot stop making payments on the domain name, so it is just that one section.

Zak: Something like that.

Michael: All right. And then Section XI. Waiver. Another boiler plate paragraph that should be included.

Zak: Yeah, another boiler plate paragraph. Exactly. If the guy is late in paying a couple months and you never said anything, that does not mean that the third time is okay.

Michael: Yeah, all right. Section XII. Governing law. Now, this is an important one, right? I know that my lawyer always tells me that if I am doing a deal, that I need to have legal rights in my state, in my county, because I do not want to have to travel over to India or travel to Connecticut to defend my assets.

Zak: Right, and your lawyer is right. From your perspective, you want to have the governing law your own home turf, both in the kind of law that applies and the location of the courthouse. But from the other party's perspective, if they are in Mumbai, India, for example, they will want to have it in their backyard. They want to have the courts in Mumbai and Indian law. And so, there is really no right approach here. It is a matter of the negotiating strengths of the parties, but very often we can put it somewhere in the middle. In other words, neither party's home turf, but some other third jurisdiction, and that way it is equally difficult for both parties to avail themselves.

Michael: Yeah, or they might want to agree. I think you have the point in here that they use a mediator.

Zak: Right, or arbitrator really, which is essentially a private court. A retired judge or experienced attorney that will decide the case based upon written submissions on attendance, similar to a UDRP in some respects.

Michael: Got it. All right, Section XIII says Notices. If one party needs to notify the other party of any particular interest - maybe they want to walk away from the deal. Maybe they want to execute the option to purchase early or the option to purchase at all - this is how one party should notify the other party. I have often seen street addresses. I have seen fax numbers. I have seen email address. Sometimes email goes into spam. Sometimes mail does not get delivered. What do you recommend in terms of notices, Zak?

Zak: This is an easy section to overlook until there is a problem. I mean email really is the way most people communicate for certain things like this, but regular mail really seems old fashioned to send a notice by regular mail these days. And so, I would think courier, plus email is really the best approach.

Michael: Yeah, so email goes out immediately, and then some sort of courier like FedEx or UPS, where you get guaranteed proof of deliver.

Zak: Well, yeah. To save time and (Unclear 1:20.38.9), I would probably try to do it by email first. And then, if I did not get an acknowledgement, then I would move to courier.

Michael: Okay, so you could put that in here that if the email is not acknowledged within a certain period of time, then one party has to notify the other party by courier.

Zak: Yes.

Michael: Okay. All right, and then the last section are the signatures.

Zak: Right, the last section is the signatures, and any number of additional considerations that might come up based upon a particular situation. And just in that last little section, I listed a few possible other considerations that could come into play.

Michael: Yeah, let me ask you, Zak. I have been using DocuSign, an electronic, online signature service so that we not have to do faxes as often with some of my customers. Is DocuSign a legal way to execute a contract? Is that enforceable in court or by arbiter?

Zak: Most jurisdictions allow electronic signature of documents. That is something that should be checked. I mean I am still old fashioned enough that I like someone to print it out, sign it, and then scan it and email it to me. That is what I like. That is considered old fashioned these days, but DocuSign, once in a while someone tries that. I am personally not quite comfortable with it yet, but it is effective in most cases.

Michael: Okay, and I do not see anywhere on here for a notary. It does not seem like I need to have somebody else verify that I am who I say I am and I am signing this document. That is not necessary.

Zak: It really depends on how valuable the domain name is, how serious a transaction it is. That is something that could be (Unclear 1:22:27.1) in addition for asking for identification, etc. And in some countries, it may even be required.

Michael: Okay. All right, that is it for this section, Zak. I am going to switch back, so you can see me. There I am. Let me see what other questions I have for you. I know I have a lot, Zak.

Zak: Sure. Just at the end of that document, there is a few additional points that might be worth briefly mentioning.

Michael: Yeah. Lessor's representations and warranties as to any prior disputes, claims, notices, trademark issues. So, you are saying that the lessor needs to represent and warrant that they have not done something that has caused somebody else to have concerns about leasing a domain name.

Zak: Yeah. So, if I am advising someone who is about to lease a domain name, I would want the lessor to tell me and sign in a document that he has not received any seize and desist letter or demand letters or lawsuits about this, because can you imagine you pay the guy five thousand deposit and the

next thing you know you get the lawyers that are: "Oh, so you are the one that is using it now." You want to avoid that as much as possible

Michael: Yeah, that would stink if the domain had a UDRP filed against it, so it was locked, and then you entered in this domain lease agreement and the owner could not actually change the DNS. You made a payment and the owner cannot even change the DNS to allow you to use it.

Zak: That is right. Well, that would be a clear breach by the lessor of your use of the domain name, but there are all kinds of situations that can arise that you would want to get that promise, that representation from the lessor that everything is cool. There has not been any notice of problems so far.

Michael: Yeah. The second point was preventing lessee from acquiring good will/intellectual property rights in the domain name without exercising the option to purchase. That was one of the points that you made earlier in the contract, that they were only getting use of the domain name.

Zak: Right. Well, this is an interesting issue from intellectual property and trademark law, and that is that, generally speaking, somebody acquires trademark rights through use of the mark in commerce. Right?

Michael: Yes.

Zak: So, even if our contract says, "Look, you can use my domain name, but you do not have any ownership interest until you exercise the option," what about how they are continuing to use it commerce all throughout this period of time? They could say, "Listen, I acquired common law trademark rights while I am using this," and turn the tables on the domain name owner and say, "Hey, now you cannot infringe my trademark rights," or suppose the lessee even applies for a trademark during this 36-month term and gets a trademark registration for a mark that is identical to your domain name. What are you going to do then?

So, it is an interesting question. We put in this provision to say that any common law or trademark rights that you may acquire during the term either are assigned to the domain name owner or are of no effect.

Michael: Okay. All right, so that should be included. If I was a lessor, I would want to make sure that is included.

Zak: That is right, yeah.

Michael: All right. And then the third note that you had: provisions for email continuation or gradual migration. What does that mean?

Zak: Yeah, sometimes a domain now owner has been using the domain name for their own email for years, before they started leasing the domain name, and so sometimes we will put in a provision that says the domain name owner still has got some email rights to it that gradually get migrated off over time. Something like that.

Michael: Yeah, okay, that makes sense. I understand. So, they will want to include a provision that says, "Michael@DomainName.com will continue to be used by the domain registrar, the lessor," so that is sort of off the table during this lease.

Zak: That is right.

Michael: Okay. So, one of the points that we talked about a couple of times during the lease contract was illegal use. What is the best way to verify that the lessee is not using the domain name to send spam email or infringing on other people's trademarks? How do you verify those things?

Zak: Very, very tough to verify. I think that the single most important thing that a domain name owner can do is be comfortable with the person they are leasing the domain name to, the same way as a landlord ought to be comfortable with the tenant they are allowing into their home or their apartment, and that is really the best thing that you can do. It is not a fool-proof thing, but (Unclear 1:27:16.6).

Michael: Yeah, so a landlord may drive by a leased property on a periodic basis to make sure that the landscaping is being maintained if they are responsible, that there is not trash outside, that is not spray painted, or

whatever the case may be. Similarly, a lessor may want to visit the website on a regular basis. They may want to subscribe to emails that the lessee is sending out, and just generally keep an eye on it. Although it is difficult to verify one hundred percent, you are saying just make sure you know your lessee.

Zak: As best as you can.

Michael: As best as you can, all right. Any other examples that you have, Zak, of a domain name lease going bad.

Zak: Okay, well, the thing that I see most often with domain name leases is a form of going bad, but it is not all that bad, and that is people just not paying. They will get very excited, they will pay the deposit, they will pay several months of rent, they will start putting the effort to build a website, and it does not go anywhere. Same as most businesses do not succeed, do not take off. And as the domain name owner, you have to be cognizant of that. It happens often. That is why you get as much money upfront as a deposit, and you have to be satisfied with the monthly rent because this is going to happen more often than not. And so, just be aware of that.

Michael: Okay. When you say it happens more often than not, do you see that from the lease agreements that you work on with your customers?

Zak: Well, perhaps it does not happen more often than not, but it happens often enough that it is a regular occurrence. You know what. It is a feature of the lease in some respects. In other words, that is what you are bargaining for. The lessee, in many cases, is saying I want to be able to stop payments. I want to give this a shot before buying the whole domain name. And so, on one hand, it is a feature of the transaction rather than a problem with it.

Michael: Yeah, that makes sense. And when somebody does default, Zak, what do I need to do as the lessor? Is it as simple as just sending an email and then following up with FedEx or UPS or whatever is identified in that section to say that you are in default, you did not pay, you passed the grace period, and this lease is terminated?

Zak: Most often, the domain name owner is not going to want to take a hard line right off the bat because they want to continue receiving monthly payments. So, they will ask for the payments. They will maybe give an extension. They will be patient. They will try to work with the lessee. But if that fails, then you use the notice provisions to send a clear notice that listen, based upon the clear interpretation of this agreement, you have breached it. It is terminated. I now have the right to resell it, use it, keep it, release it as I see fit.

Michael: Yeah, okay, that makes sense. Zak, you are very clear in describing all of the aspects of the domain name lease. I would like to use you for domain name leases, like this guy that I have been discussing with. If it goes forward, how many hours would you expect to work on a lease like this, considering you have a template, but then we would need to talk about the terms and the aspects, and maybe the lessee does not like a section, so you and I need to discuss that? What would I generally pay to have a lease put together for an individual use case?

Zak: So, I mean the price really varies broadly. I mean I am shocked to even say myself that a cheap lease can be 250 dollars in some cases. The reason is, is that a company that leases a lot of domain names gets comfortable with their own personal blueprint for what they want the lease to look like, and then it is just a matter of tweaking this or changing a few fields, and that can be done very fast, in minutes. But for some newer transactions, new parties that are leasing with more high value domain names, it can be in the thousands of dollars. 25 hundred, five thousand are more for very sophisticated transactions, so it really depends on the experience of the parties.

Michael: Okay, that makes sense. And if somebody is located in India or China or the United States, is that an issue for them using you when you are based in Canada?

Zak: Well, generally speaking, these lease agreements are often International in nature with some company in the Caribbean, for example, and another company in Europe. I do not think I have ever seen two parties in the same state, often in the same country. So, these agreements are very often

International in nature. And if there are local issues that come up that require local counsel, we use the local counsel to advise on those particular local issues.

Michael: All right, I think that answers all my questions, Zak. If you, the watcher, have questions for Zak, please post them in the comments below this video and we will ask Zak to come back and answer as many as he can. Now, Zak, somebody is likely going to have questions about specific use. What is the right type of question for them to ask that will actually allow you to answer it without providing legal advice?

Zak: Right. Well, my general policy is that I am happy to try to answer questions as much as I can of a general nature, without commenting on a specific situation that requires investigation, research, and advice, etc. And so, a general question might be what are my options about how to structure this transaction, etc., but as we get more detailed, it takes more time and then I would need to be retained. But Mike, I do not think in the history of domain name law has there been such an extensive discussion of domain name leases. This is incredible.

Michael: I agree with you, and I have enjoyed it. Maybe I am exception to the rule, but I love getting into the nitty-gritty. Not enough to make me want to be a lawyer, but I like to understand how things are put together and you clearly have a great grasp of all the important aspects that I can think of, Zak. So, I encourage you, the person who is watching this interview, to get out from behind your computer. It is so easy for us to just sit back, watch a video, and get our glean.

I want you to reach out and make a connection. I want you to create a relationship, and the easiest thing to do to start creating a relationship is by posting a comment below this video. All you have to do is say thanks, Zak, I appreciated you taking 1.5 hours of your time and chatting about the intricacies of domain name leasing so that I could better understand it. That is it, or whatever you want to say. Ask a question. The most important part is just reaching out. I am going to be the first to say thanks, Zak.

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Zak Muscovitch, Internet and Intellectual Property Lawyer at the Muscovitch Law Firm at DNAttorney.com. Thank you for coming on the show, sharing your knowledge of the domain name leasing space, and thanks for being a repeat Domain Sherpa for others.

Zak: Well, Michael, absolute thrill. My pleasure to discuss this. I think this is terrific. Thank you so much.

Michael: Thank you all for watching. We'll see you next time.

Watch the full video at:

<http://www.domainsherpa.com/zak-muscovitch-leasing/>