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30 August 2004

BY FACSIMILE & EMAIL (03) 9349 5711 and jo.lim@auda.org.au

.au Domain Administrators
107 Faraday Street
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Dear Sirs

auDA Name Policy Review Panel - Domain Name Eligibility and Allocation Policy Rules for Open 2LDs Issues Paper August 2004

We refer to the Domain Name Eligibility and Allocation Policy Rules for Open 2LDs Issues Paper ("the Paper") released by auDA's Name Policy Review Panel ("the Panel") on 9 August 2004.

Please find following our submissions in respect of the issues raised in the Paper and our other comments in relation to auDA's domain name eligibility and allocation policy rules.

Issues relating to registrant identity and integrity of the Australian DNS: *Opening up .au to non-Australian registrants*

We submit that the current policy should not be amended. We consider that one of the main reasons why the .au registry is generally characterised by good data integrity compared with the gTLDs and other ccTLDs is because the .au domain space is limited to Australian registrants or those registrants that fall into the three limited exceptions to the general rule.

We note the pros and cons identified by the Panel, and consider that, in this case, the cons outweigh the pros. In addition to the cons identified by the Panel, we add that opening up the .au domain space to non-Australian registrants more generally will negatively impact on the good data integrity of the .au domain space. Registrars are likely to have greater difficulty in verifying the domain name eligibility of non-Australian registrants resulting in, among other things, decreased reliability of the public WHOIS registry. This will lead to further difficulty in identifying and contacting registrants and enforcing auDA policy as well as problems for third parties wishing to enforce their trade mark and intellectual property rights.

Issues relating to allocation criteria for domain names: *Close and substantial connection rule*

We submit that if the close and substantial connection rule is to be maintained in its present form there needs to be much greater adherence and enforcement of the rule by registrars and auDA. We note that at 10.2 of auDA's Guidelines for Accredited Registrars on the Interpretation of Policy Rules for Open 2LDS ("the Guidelines") it is stated that:

"It is important to note that this rule is NOT intended as a "free for all", and the degree of flexibility is limited by the categories of close and substantial connection outlined in the policy rules"

However, our experience has clearly demonstrated that, whilst the rule may not be intended as a "free for all", the rule does, in fact, result in a "free for all" situation. As highlighted by the Panel, registrants regularly provide false warranties under the close and substantial connection rule in order to obtain a .au domain name. Occasionally, but not necessarily, the false warranty may be made in bad faith or with a non bona fide claim. Our own experience has shown that registrants often use the close and substantial connection rule to infringe a third party's trade mark and intellectual property rights.

By way of example (based on actual experiences we have encountered):

- Person X seeks registration of a domain name for his travel agency business.
- X seeks to rely on the close and substantial connection rule to obtain registration of a domain name which consists, in part, of the word "BLOGGS" (which for the purposes of this example is a registered trade mark in Australia for travel and related services) and in part the word "Travel".
- X therefore seeks registration of the domain name "bloggstravel.com.au" - on the basis that this domain name has a close and substantial connection to X's travel agency business.
- **Issue:** although "travel" is closely connected to X's business - in the example given the use of the term "Bloggs" (which could easily be replaced with real life brand name examples such as Virgin or Qantas) is not in any way related to X's business.
- **Issue:** Guideline 10.4 notes that *"...registrars are expected to act with integrity and use their common sense in determining whether the registrant's warranty is bona fide"*. In the example given inquiries should be made as to the basis of X's close and substantial connection. Our experience shows us that such inquiries are not made.
- **Issue:** The close and substantial connection test makes it too easy for X to register pretty much any brand name in conjunction with an element of the business being conducted, without restriction.

Registrants are willing to make false warranties as there are generally no ramifications against them for doing so. One of the only readily available actions that may be taken is

for auDA to revoke a domain name licence however, as stated by the Paper, auDA has only done so on just 2 to 3 occasions.

Under the current policy, registrants are under no obligation to investigate a registrant's application made under the close and substantial connection rule. We note that as stated at 10.3 of the Guidelines, registrars may seek further information or clarification from the registrant where necessary. However, because of ambiguity of the rule and the fact that registrars are not required to investigate the registrant's warranty, our experience has shown that registrars are unlikely to decline a registrant's claim to a .au domain name that has been made under the close and substantial connection rule.

We submit that there has also been a lack of enforcement by auDA on enforcing the close and substantial connection rule. We note that parties may have recourse to the auDRP, however, we consider that a party should not have to expend unnecessary costs and resources in bringing dispute proceedings in situations where auDA policy has been breached. The auDA policy and its terms are in place to prevent such action needing to be taken if domain names do not comply with registrability criteria. The failure to enforce the close and substantial connection rule undermines the purpose, value and integrity of auDA's Domain Name Eligibility policy and the usefulness of auDA as a regulatory body.

We, therefore, submit that the close and substantial connection rule should be clearly delineated to decrease the number of ineligible registrants. Ideally, the rule should be narrowly defined in order to reduce the use of domain names as a means to infringe third parties' trade mark and intellectual property rights. A greater burden should also be placed on registrars on verifying domain applications made under the close and substantial connection rule. In addition, auDA should more adequately consider complaints made to it regarding registrant's eligibility under the close and substantial connection rule in accordance with auDA policy.

Issues relating to allocation criteria for domain names: *Exact match, abbreviation and acronym*

The Panel has suggested that in order to simplify the policy rules, all allocation criteria for all the 2LDs (including exact match, abbreviation and acronym) be replaced with the general connection warranty discussed at 3.1 of the Paper. We submit that, save for the close and substantial connection rule discussed above, the current allocation criteria is adequate and should not be amended.

As mentioned above, relaxing the allocation criteria for the .au domain space is likely to result in a significant loss of the value and integrity of the .au domain space. Replacing the current exact match, abbreviation and acronym rule with a general connection warranty will only result in more registrants making false warranties in order to obtain a .au domain name. It is also likely to cause increased use of the .au domain space for cybersquatting; general bad faith activity; and trade mark and intellectual property infringement.

People who wish to register domain names that are derived from their own names should make use of the id.au 2LD which is specifically intended for personal names.

Other comments

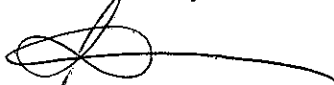
In addition to the above submissions, we suggest that the WHOIS registry in respect of .au domain names should include a criteria for identifying whether the registrant has relied on the close and substantial connection rule, and if so, under which subsection of Schedule 2, 2(c) of auDA's Domain Name Eligibility policy. For instance, the WHOIS registry could indicate that a registrant has relied on the close and substantial connection rule because the domain name relates to a product that the registrant manufactures or sells as per 2(c)(i) of Schedule C of the Domain Name Eligibility policy.

Providing this information publicly would save time and resources for third parties wishing to investigate and challenge the allocation eligibility of registrants and would improve the transparency of the .au domain space.

If you have any enquiries in relation to any of our submissions or comments please do not hesitate to contact the writer.

We look forward to the Panel's recommendations to auDA in relation to the above issues.

Yours sincerely



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