

# Freehills

We welcome the opportunity to provide some brief comments on auDA's current WHOIS policy (no. 2003-08).

Our perspective in providing these comments is as lawyers who regularly advise their clients on their rights in relation to their business competitors and other market participants. Relevant to this context is our expertise in advising on intellectual property issues.

Our comments on this policy are limited to the issues of inclusion of: (1) contact address information; and (2) creation dates and transfer information; in the WHOIS data for domain name licences.

## **1 Identification of registrants**

We strongly support the retention of the practice of displaying details sufficient to identify the owner of a domain name licence.

In the case of corporations, the display of the company name and its ABN or ACN enable the accurate identification of the relevant company, and the publicly accessible ASIC database will, in any event, give a registered address for that company. Nevertheless, we recommend that address details be retained for convenience, and also to avoid any perception that corporations are treated differently from individuals or partnerships.

In the case of individuals, the WHOIS information needs to additionally continue to contain a correct physical address, since that is the only practical way that an individual can be actually identified. Where the domain name licence is held by more than one person, each person's address should be provided.

Inclusion of the address details also facilitates communication with the domain name licensee, since correspondence may be posted or couriered to that address. This enables people, including consumers, to seek to resolve a dispute without having to first turn to formal legal dispute resolution (possibly involving lawyers), or the courts (for example to obtain a court order that the relevant registrar provide the address details of the domain name licensee).

Other details such as email addresses, telephone and facsimile numbers are also useful in facilitating communication with the domain name licensee, but are not essential.

A person who wishes, for reasons of privacy, to have an internet presence without disclosing their identity is still able to do so in a number of ways, including registration of a domain name in an appropriate domain space other than the .au space.

## **2 Creation dates and transfer information**

We recommend that the creation date and transfer details (ie the name of any previous licensee and the date of transfer) be included in the WHOIS information, for the reasons outlined below. Alternatively, but less preferably, we recommend making the information readily available upon request by any person.

We understand that the creation date data field was removed from the WHOIS information in order to combat a practice whereby companies would solicit

renewal payments and instructions from customers of other registrars, prior to the expiry of the two year renewal period. In particular, some of these approaches were misleading to the recipients.

Since then, auDA has successfully taken legal action against Domain Names Australia Pty Ltd, and it also addresses the practice in the .au Domain Name Suppliers' Code of Practice (2004-04).

We therefore question whether the motivation for removing the creation date field is still as compelling, however we are not best placed to answer that question. In any event, this consideration should be weighed against the benefits of providing public access to creation date information, and transfer information, discussed below.

The creation date provides useful and relevant information for a person who wishes to assess the strength of their legal position in comparison with that of the domain name licensee. It is generally the case in Australia that trade mark rights belong to the first in time to use the trade mark, rather than the first to file a trade mark application for the mark (see, for example, section 58 of the Trade Marks Act and case law on that section), so the creation date of a domain name licence may be relevant to this issue. In any event, the creation date provides a more complete picture of the licensee's rights in the content of the domain name.

Ideally, for the same reasons, the WHOIS information should also show the name of any previous registrant of the domain name licence, and the date of the transfer.

Disclosing the creation date and historical 'owners' and transfer dates does not disclose information that was truly confidential since at any time after the creation date a person viewing the WHOIS data would have seen that the domain name licensee held the domain name licence.

Access to the creation date and transfer history can also greatly assist a person to determine whether they would be likely to succeed with an auDRP Complaint in respect of a domain name, since the timing of the creation of the domain name licence and any transfer will often be highly relevant to the question of whether they have acted in 'good faith' (one of the three criteria under the auDRP).

Since a domain name licence only became subject to the auDRP after it was renewed subsequent to 1 August 2002 (19 June 2003 for .edu.au domain name licences), we are aware that auDA has maintained a policy of disclosing creation dates primarily for the purposes of determining whether a particular domain name licence was subject to the auDRP or not. However, since more than two years have now passed since August 2002 and June 2003, it is clear that all .au domain names are now subject to the auDRP. The online form nevertheless still refers to the purpose of determining whether the domain name licence is subject to the auDRP, although it appears to contemplate also providing the creation date for the broader purpose of determining whether the party has superior rights to the domain name licence or not.

The similarities between domain names and trade marks means that the Australian Register of Trade Marks should provide a useful point of comparison in relation to the question of what information is useful and appropriate to provide to other members of the public. In this regard, the application and registration dates for all Australian trade mark applications and registrations are publicly accessible using

IP Australia's online database, ATMOSS, as are transfer details (although not all historical transfer information is available).

While, for the reasons above, we consider that the creation date and transfer information (if any) should be included in the WHOIS information so that it is readily accessible, at a minimum we recommend that the creation date and transfer information be accessible, without charge, upon submission of a request coupled with an undertaking not to use the information for the purposes of soliciting a domain name renewal. That is, a compromise position would be a mechanism analogous to the auDRP creation date request process, but without restriction to the narrow purpose of use for assessing rights to the domain name licence. A further compromise would be to implement such a mechanism for .net.au and .com.au domain name licences only, being the two domains more clearly related to commerce in Australia.

Finally, we recommend that auDA consider, at an appropriate time, implementing a proprietorship search function for domain names, and call for and consider submissions on the desirability of such a functionality. Such a search is, for example, possible for trade mark applications and registrations using the ATMOSS database (and is similarly possible for patents and registered designs).

Respectfully submitted,

**Freehills**

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