

30 July 2004

Dear Jo,

Having been involved with the OCOS model from its perception, as the founding member of the OCOS Working Party and its Convener and my involvement in the OCOS pilot project, I have spent a great deal of time and effort supporting and preserving community use of geographic names in .au. My contributions have been purely based upon the fact that there is clearly a greater good for all members of all communities in Australia to do so.

It is through this experience and capacity that I again wish to contribute to another consultation on the matter of geographic naming in .au, particularly this current consultation discussing the reservation of geographic names in .com.au and .net.au

It has been a journey for geographic naming in .au since 1999 when auDA was first appointed as the self-regulatory body for the .au name space and the OCOS Working Party, comprising of representative members from the Bathurst community, commenced discussions with auDA on the idea of a new name space allowing every community in Australia to have access to the valuable asset of their geographic name in a new logical and innovative name space, whilst protecting it from commercial use and potential exploitation in .net.au and .com.au domains.

The Model was subsequently developed over 3 public consultation processes before it was approved with changes for pilot testing by the auDA Board in November 2002, who clearly saw the potential of the model and also resolved to maintain the restriction on the use of geographic names in .com.au and .net.au at the time for the many reasons evident at the time that remain the same today.

The journey continues today. The OCOS pilot project has worked through and tested policy and application processes for the new name space with 3 test case communities. These communities have contributed a great deal to the development of the new name space and are commencing their website development, (having had their applications approved by auDA's National Reference Group who are overseeing the project) whilst they await auDA's processes for formal registration of their domain names under the new name space. A date for implementation is yet to be determined by auDA.

We are approaching the final reporting processes and results of the pilot project this month, which will lead to auDA's preparations for implementing the new name space. This is clearly a critical time for the new name space. And if auDA remain committed to it, they should not consider confusing the public and jeopardizing community representation and ownership by considering releasing geographic names in .com.au and .net.au.

In the many consultations that have been conducted by auDA over the past 4 years, many clear and legitimate arguments have been presented for the case of preserving

geographic names in .com.au and .net.au. We should note that no consultation on this matter to date has indicated to the contrary. We seem to be revisiting the same issues time and time again, even though the circumstances and environment have not changed (for example the new geographic domain names under the OCOS Model have not been implemented yet and auDA has not determined a date for doing so).

auDA should note the many contributions to consultations in the past as they remain as relevant today as at any time and these should all be seriously considered in its context. To that end I would like to reiterate some valuable comments made in a previous consultation below regarding the case for ownership of a geographic name and misuse, in addition to the comments already made throughout this consultation.

‘The Case for ownership and misuse

The rights of the individual to use a name seemingly belonging to the community to promote a commercial product have already been addressed by legislation in nearly every developed country in the world.

The USA has implemented legislation relating to the incorrect use of geographical names in respect to trade marks. The Intellectual Property Update, published by the Dorsey & Whitney Intellectual Property Practice Groups in July 2001 states that the “Lanham Act prohibits registration of marks which are "primarily geographically descriptive or deceptively misdescriptive" of the goods or services.”

(Intellectual Property Update: What's In A Name, or, When Can Geographic Terms Be Appropriated As Trademarks? (online). July 2001), <http://www.dorseylaw.com/updates/IP/IPJul2001.asp>).

This report goes on to state; “The prohibition derives from the common law concept that no one person can obtain an exclusive right to the use of a geographic name so as to preclude others from truthfully representing to the public that their goods or services originate from the same place.”

(In Re Charles S. Loeb Pipes, Inc., 190 U.S.P.Q. 238 (TTAB 1976).

Quoted in Intellectual Property Update: What's In A Name, or, When Can Geographic Terms Be Appropriated As Trademarks? (online). July 2001), <http://www.dorseylaw.com/updates/IP/IPJul2001.asp>).

Australia also has legislation and guidelines that protect geographical names from being misused in respect to trademarking. Section 61 of the Trademarks Act 1995 (Commonwealth Consolidated Acts: TRADE MARKS ACT 1995 SECT 61 (online), 1995. http://www.austlii.edu.au/au/legis/cth/consol_act/tma1995121/s61.html [Accessed 19 September 2002]) also stipulates similar prohibitions as does Chapter 15, part 22 of IP Australia’s Trade Marks Manual of Practice and Procedure.)

Although not substantiated, the similarities between the Lanham Act and the Trademarks Act 1995 would suggest that common law principle outlined in the Dorsey & Whitney report would also be applicable in Australia.

To this end, I believe that geographic names must be protected for exclusive community use as important social and economic development tools, as proposed in the OCOS model. In addition to this, geographic names must be protected from use by commercial

entities, to prevent unfair competitive advantage by using a name that cannot by its nature belong to any single entity. A local example of this would be wine regions. If one winery held the rights to Hunter.com.au, they would hold unfair competitive advantage of all other wineries in the Hunter geographic area.

I hold the view that the removal of restriction will add to public confusion adversely affecting the extremely positive potential of the OCOS model, an unnecessary increase in litigation and a predominantly negative impact on all Australian communities and entities, who as a group (a community) are the rightful custodians of their name.’

To this end, one may only truly consider this consultation on the basis of any changes in the environment, community or otherwise, to determine as to whether or not the restriction should be removed based on ‘change’ of situation or circumstances.

Otherwise we will continually find ourselves in a position of reviewing the same information with the same results, until the pursuit of attempting to remove this policy by whatever motivations exist (commercial, financial or otherwise) and are determined to so prevail over the fundamental premise of the preservation: the integrity of all Australians, their communities and community names.

Such an ongoing effort would be better channeled in committing and contributing to systems and methodologies equipped to be ground breaking and potentially internationally standard setting, such as OCOS, whereby all parties both commercial and community stand to benefit equally.

Therefore in answer to Questions 1 of this consultation:

**Should the restriction on geographic names in com.au and net.au be maintained?
If so, why?**

My answer is an unreserved yes, the restriction must remain in place and I submit this and all other submissions which I have tabled in the past detailing why this is the case.

There is no need to consider releasing these names in .com.au and .net.au at this time. Geographic names are community names first and foremost. We need to ensure that geographic names are allocated in an effective and responsible manner, firstly by establishing the new community geographic name space and by ensuring they remain protected in .com.au and .net.au. Any conflict with this will jeopardise geographic names for all parties concerned.

Even now commercial bodies can register their business name if contains a geographic name in .com.au and .net.au, in a way that reflects their business activity. For example: Fairlight shipping company can register fairlightships.com.au etc. So one may ask, why would a company need to have exclusive right to a community name? One may ask what are the true motivations and interests in having the community name exclusively when all companies can have a name that reflects exactly what they do, including a geographic name where relevant.

I can only maintain and agree with the countless arguments presented throughout this consultation, consultations conducted in the past and those included in the OCOS Model to maintain this restriction. It is the only way that all parties with benefit in the long term.

**Why is this still an issue and for who? Where are we today?
What has changed and why is this still an issue worth revisiting?**

1. Commercial registrars remain enthusiastic as to the release of geographic names in .com.au and .net.au due to the immediate commercial benefit they would gain in registering these names.
2. Some companies who have a name in their business/trading name that is also a geographic name want to register that name
3. The geographic 2LDS through the OCOS pilot project are coming to a close and auDA will be commencing implementation preparation based on the results of the pilot. The pilot was due to be completed in December 2004 and is currently on schedule to have all reporting for auDA completed as early as October 2004. No date or plan for implementation has been determined by auDA for the new name space or timelines for establishment.

Net Result: There is no specific change in the environment or circumstances to indulge a consideration in a change of policy in this area.

Why is their demand for the names to be released and where from?

I refer to points 1 & 2 above.

The general community would be largely unaware of this issue. Those that are aware have been very supportive of the OCOS model, as has been observed in the support gained for the model, previous consultations and the pilot test cases. The OCOS Model of managing the effective use of geographic names allows. It is the best and most beneficial model to allow everyone to benefit, (including commercial bodies individually and as a group).

auDA has kept awareness raising of the OCOS Model and the new 2LDS to a minimum during pilot testing and development. It would not be until implementation where larger scale education and promotion campaigns would take place that awareness would be increased of the new 2LDs and how they will work. And a date for implementation is yet to be determined.

Do communities as rightful owners of their name want the restriction to be removed?

One could ask, have they been consulted? My understanding is that auDA have issued information about this consultation to some of their industry subscription listings and discussion lists and a media release. This I am sure would have captured a number of the domain name industry players and commercial bodies but the 'public' as a whole, am I not so confident.

From the number of community submissions tabled during this consultation, it is clear that the communities that are aware of it do not want the restriction to be removed.

What is different about this consultation from all others thus far?

The auDA Board, as opposed to an auDA appointed Advisory Panel, has commissioned this consultation. No other differences are apparent. For example: The Community Geographic Domain names (OCOS) have not been implemented or established as yet, or given a chance to become publicised and established, so that environment has not yet changed.

The same motivations and unsubstantiated arguments regarding commercial use of what is technically a public/community asset are no different.

I note with some disappointment that Mr Larry Bloch, Managing Director of Netregistry and auDA Board member has declared his views on this issue through this consultation in context of which I also note a clear pattern of evidence that many respondents to the consultation have been solicited by Netregistry to respond in accordance with their views. All of which I suggest creates a strong conflict of interest: An auDA Board member clearly involving himself and his company in targeting and soliciting consultation responses for a consultation the auDA board have commissioned to work in favor of a result that that member will almost certainly financially benefit from. I sincerely hope all auDA board members consider this in respect of their determinations about this consultation.

Again I urge the auDA board to support the continued range of information, opinion and evidence in support of currently maintaining the restriction of use of geographic names in .com.au and .net.au .

Sincerely,
Natasha McGuire