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By Email: policies@dnc.org.nz

SUBMISSIONS ON WHOIS POLICY REVIEW - PROPOSAL TO ALLOW SEARCHES BY REGISTRANT NAME

1. Baldwins is one of New Zealand's largest intellectual property firms. We assist our clients with the registration and renewal of various gTLDs and ccTLDs. We also assist our clients with disputes over ownership and use of domain names, including in particular .nz domain names. In this regard, we act as 'agent' to our clients.
2. We note that the Domain Name Commission is consulting on a proposal to allow limited searches of the .nz register by registrant name.
3. Information such as registrant and administrative contact details for .nz domain names is already available as part of the WHOIS records specified in clause 4 of the WHOIS policy. However, the only search functionality currently available is to search by domain name. There is no ability to search by registrant name and it is therefore necessary to guess what domain names a client might have, or might be interested in, and to search on those domain names. So while the information is available, without the ability to properly search it, the results are haphazard.
4. Searches by registrants seeking a list of their own .nz domain names would be useful to our clients. Clients frequently ask for a list of all of their .nz domain names. At present we are unable to provide this to clients and clients find this frustrating and are often confused about why they cannot perform a search on their own property.
5. Searches of the .nz domain name register by registrant name would be an extremely useful tool in providing evidence of unfair registration or registration in bad faith by a registrant, especially in relation to clause 5.1.3 of the Dispute Resolution Policy. Such evidence can be used by Experts in their decisions as evidence of unfair registrations, as seen at para 10.3 of the decision in *YPG IP Limited v E-Promote* (DRS Ref: 434).

6. We therefore strongly support the ability to search by registrant name. We do however have some concerns with the proposed wording of the WHOIS policy in relation to the Registrant Info Service, as it applies to intellectual property firms and advisors.

CLAUSE 7

7. Clause 7.1.2 of the proposed amended WHOIS policy restricts searches of the .nz domain name register by registrant name "for the sole purpose of supporting a Dispute Resolution Service complaint". This appears to prevent the results of these searches from being used in other proceedings such as trade mark infringement proceedings before the courts, opposition proceedings before Intellectual Property Office of New Zealand, or domain name complaints before other forums such as the UDRP procedure operated by WIPO.
8. Such information can be useful to our clients in considering whether there is sufficient evidence on which to base a successful DRS complaint, or take some other form of action against a domain name registrant.
9. We note by way of comparison that section 6(2)(d)(iv) of the Privacy Act 1993 allows the disclosure of information for the conduct of proceedings before any court or tribunal where such proceedings have been commenced or are "reasonably in contemplation". As we have noted already, the information which would be provided as part of a search request is already available to the public as part of the WHOIS records specified in clause 4 of the WHOIS policy, and is therefore not private information in any case. It is only the search functionality that will change.
10. We note that the proposed amended WHOIS policy gives the DNC the ability to refuse requests if it believes on reasonable grounds that there has been an abuse. We also note that a record of previous searches is kept and can be taken into account when considering a search request. There is therefore a safeguard built into the policy for those who make requests for improper purposes.
11. We therefore recommend the following two changes to the policy:
 - a. The wording of clauses 3.10 and 7.1, as well as clause 2.4 under each of the two processes set out under section B, and the declarations required by the application forms, be amended to take into account other types of legal action against a registrant.
 - b. The restriction on searches "for the sole purpose of supporting a DRS complaint" should be broadened to "for the purposes of supporting *or*

considering a DRS complaint or other form of legal action” or wording to similar effect.

12. Clause 7.3 allows “registrants” who will make regular applications for searches to pre-register for the Registrant Info Service. Given the scope of Baldwins’ (and indeed other agents’) practice in this area of intellectual property, pre-registration is an efficient option. However, the clause does restrict pre-registration to “registrants”. Would an agent (such as Baldwins) be able to use the pre-registration service?
13. Clause 7.4 states that the DNC will consider previous searches when deciding whether to approve any search application. If the service is available, it is possible that a firm like ours would request several searches under the Registrant Info Service over any given period of time. Would the assessment in clause 7.4 then be made on the basis of the number of searches an agent has made, or on the number of searches an agent has made on behalf of any one client?

SECTION B - PROCESSES

14. Clause 2.3 under the ‘Process for requesting a Registrant Info Service search for Registrant’s own .nz domain names’ states that an applicant must provide “evidence as to the applicant’s authority to apply for a search on behalf of a company”. This requirement is not replicated under the ‘Process for requesting a Registrant Info Service search for the purpose of supporting a DRS complaint’ (the process that an agent such as Baldwins would anticipate using to apply for searches on behalf of its clients), nor in Form WHO3 (which allows pre-registration). Form WHO2 on the other hand requires such evidence of authorisation.
15. Does this inconsistency prohibit an agent from applying for a search on behalf of a client? If such prohibition is not intended, would general written authorisation in relation to the management of intellectual property, signed by a relevant authority within the client company suffice?
16. Clause 3 under each of the two processes set out under section B states that the DNC has the discretion to decide whether the information requested under the Registrant Info Service should be released to the applicant. No further information has been provided on what information the DNC would consider in assessing the validity of the request or the grounds on which this discretion is exercised. We request that some guidance be provided in the policy on what information is required from the applicant / agent in this regard.

PRIVACY

17. A further concern is the privacy surrounding the results of Registrant Info searches. If an agent can apply for a search on behalf of its client, can the results of the search be disclosed to the client?

FEES

18. Will there be a fee for requesting a search? And if so, what will the fee be?

19. We thank the Commission for its consideration of the above issues and look forward to receiving more information on the WHOIS policy.

Yours sincerely

Baldwins Intellectual Property

A handwritten signature in blue ink, appearing to read 'KD' followed by a stylized flourish.

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