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Joy Liddicoat
Chair
Domain Name Commission Limited
PO Box 11-881
Wellington 6011

Proposed Registration of .nz Domain Names at the Second Level

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to respond to the revised Domain Name Commission Limited (DNCL) consultation paper *Proposed Registration of .NZ Domain Names at the Second Level (Round 2)*, May 2013 (Revised Consultation Paper).
2. The Revised Consultation Paper notes that the proposal "... could significantly change New Zealand's domain name space". The Law Society believes the Revised Consultation Paper raises a number of issues that require further consideration, in relation to:
 - the basis for the proposal to allow registration of .nz domain names at the second level;
 - the negative impact on brand owners, regulation of lawyers, and the public; and
 - DNCL's conflict of interest in undertaking the consultation and implementation of any registration scheme.

The basis for the proposal to allow registration of .nz domain names at the second level

3. DNCL's original consultation paper¹ referred to New Zealand's Internet community having been "vocal about allowing registrations at the second level", and said that "public opinion surveys also indicate that the general public's appetite for change has grown."
4. The Law Society raised concerns in its submission² on the original consultation paper that a representative group of the New Zealand public had not been sampled as the basis for the proposal to

¹ *Proposed Registration of .nz Domain Names at the Second Level*, Consultation Paper (May 2012)

² NZLS submission dated 27 September 2012. The submission can be viewed at http://www.lawsociety.org.nz/_data/assets/pdf_file/0014/56102/I-Domain_Name_Commission-Second_Level_Domain_Name-270812.pdf

allow registration of .nz domain names at the second level. The Law Society's particular concern was that the interests of trade mark owners may not have been adequately canvassed.

5. The Law Society submission asked for details of the public opinion surveys undertaken and a definition of "New Zealand's Internet community". The Revised Consultation Paper provides neither the details nor the definition requested, except to refer to a 2012 study "that exclusively targeted business owners".
6. According to Statistics New Zealand figures, there were 469,120 New Zealand enterprises in February 2012.³ Many of these business enterprises will be trade mark owners, and will have an interest in the proposal to allow registration of .nz domain names at the second level.
7. Neither the original consultation paper nor the Revised Consultation Paper indicates that the views of this group have been canvassed. Nor has sufficient detail been provided as to who comprised the "business owners" said to be targeted in the 2012 survey.
8. The Law Society therefore remains concerned that DNCL continues to base its consultation and recommendations on surveys that are not representative of all the relevant New Zealand public.

Negative impact on brand owners, regulation of lawyers, and the public

9. The Law Society raised concerns in its previous submission that the negative impact on trade mark owners of the proposed scheme for registration of .nz domain names at the second level may not have been adequately considered.
10. The Revised Consultation Paper reports that 115 submissions were received in relation to the initial Consultation Paper, of which 37 (32%) submissions were in favour of the initial proposal, 70 (63%) submissions were against, and 6 (5%) submissions commented on only some of the details. To the extent the 115 submissions received may be regarded as constituting a poll, a majority of submitters was therefore against the proposal.
11. In addition, the Revised Consultation Paper reports that a major concern expressed against the proposal was that existing domain name registrants would feel "forced" under the new system to incur costs in registering domain names they do not wish to use. In response, DNCL proposes that existing domain name registrants will be able to reserve registration of the equivalent to their current name at the second level for two years. However, the DNCL proposal would only defer the cost of registration, and applies only to existing domain name registrants and does not include existing trade mark owners, and therefore does not adequately protect either group.
12. In relation to the legal profession, the Law Society reiterates its earlier submission that:

“... it does not support the private ownership of domain names such as .lawyer.nz, .law.nz, .lawsociety.nz, .legal.nz, or related variations that represent the legal profession. This is because the ownership of such domain names potentially gives rise to regulatory and consumer protection concerns as outlined below.

It is an offence under section 21(b) of the Lawyers and Conveyancers Act 2006 (Act) for a non-lawyer to describe themselves as a lawyer. Section 6 of the Act defines a lawyer as “a person

who holds a current practising certificate as a barrister or as a barrister and solicitor". In addition, section 23 of the Act provides that it is an offence for a person, in connection to the provision of legal services, to make a "false or misleading representation" as to the legal services being provided. Finally rule 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) states:

A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.

As the statutory regulator of the legal profession in New Zealand, the Law Society regards the possibility of these domain names being opened up for commercial use as problematic. The Act and Rules provide safeguards to ensure that consumers of legal services have a clear understanding of the nature and status of services that are provided. There is a concern that the use of domain names containing words associated with the legal profession (particularly by entities that are non-lawyers and not subject to the complaints and disciplinary regulatory regime established under the Act) could create significant confusion in the minds of the public about the status, qualifications and level of regulation of those providing the legal services offered. The Law Society works hard to ensure that the potential for the public to be misled by those who falsely claim to be lawyers or who misrepresent the quality and status of legal services provided is minimised. Consequently, the Law Society remains concerned that consumers are adequately protected from potentially misleading conduct, the reputation of the profession is preserved and the likelihood of offences being committed under the Act is mitigated."⁴

DNCL's conflict of interest in undertaking this consultation and implementing any registration scheme

13. The DNCL stands to increase its revenue significantly from extra registrations under the proposed scheme. The Law Society is therefore concerned that the DNCL has a conflict of interest in undertaking this consultation and implementing the proposed registration scheme.
14. In this context, it is particularly important that special care is taken to ensure the views of all the relevant New Zealand public have been sampled and considered, and that all potentially adverse effects have been appropriately mitigated – rather than simply deferring the adverse effects for one relatively small group of domain name registration owners, as is currently proposed.
15. The Law Society reiterates its previous recommendation that a New Zealand version of the existing Trademark Clearinghouse should be established. This would provide trade mark owners with the option of registering their trade marks as a domain name (the Clearinghouse "Sunrise Service") or using their rights to prevent others registering their trade mark as domain names (the "Trademark Claims Service"). The New Zealand Clearinghouse would similarly protect existing domain name registrants.
16. Further information regarding the Trademark Clearinghouse regime generally is available at www.trademark-clearinghouse.com.

⁴ Note 2 above, at paragraphs 23 – 25.

Conclusion

17. This submission was prepared with the assistance of the Law Society's Intellectual Property Law Committee. If you would like to discuss the submission, please contact the convenor of the Intellectual Property Law Committee, Clive Elliott, through the Committee Secretary, Jason Cooper: (04) 4632967 or jason.cooper@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a horizontal line extending to the right.

Chris Moore
President