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Debbie Monahan  
Domain Name Commissioner  
Domain Name Commission Ltd  
**WELLINGTON**

**BY E-MAIL**

Dear Debbie

### **WHOIS COPYRIGHT**

Thank you for your email attaching the opinion received from Peter Dengate Thrush. Our impression was that DNCL's paper to InternetNZ Council recommending amendments to the Operating Agreement was in the nature of an executive summary, rather than detailed advice, so it is probably unnecessary to comment on the detailed discussion of copyright principles other than to confirm that Peter's summary is accurate.

Assignment of the copyright, as opposed to an exclusive licence, was seen as a "clean" and uncomplicated method of giving enforcement rights to DNCL, without exposing InternetNZ to any risk of being involved in litigation surrounding the provision of the WHOIS service.

The recent case involving Mr Yim is instructive. This gentleman asserts that information appearing on the WHOIS record is incorrect and has threatened court proceedings against DNCL. The Operating Agreement, which is publicly available online (<http://www.dnc.org.nz/content/operatingagreement.pdf>), will expressly address ownership of copyright in the WHOIS database. If Yim proceeds with his threatened action and his advisers become aware that copyright in the WHOIS database remains vested in InternetNZ, there is a risk that InternetNZ will be named in those proceedings.

Against that consideration, Peter Dengate Thrush validly makes the point that:

"[The copyright works] would require to be treated as assets on the books of DNCL and, more significantly, could be lost if DNCL was successfully sued for a sum in excess of the value of its cash and other assets".

An exclusive licence would avoid that risk.

You may wish to explore with InternetNZ whether DNCL should indemnify InternetNZ in the event that InternetNZ faces any court proceedings in its capacity as copyright owner.

Peter Dengate Thrush notes that the copyright could also be lost in other ways, "for example, by sale if a rogue or incompetent Board were ever in place in DNCL".

However, the constitution of DNCL would prevent the Board from operating in that way and further, a sale of the copyright works would likely constitute a Major Transaction under s.129 of the Companies Act 1993 for which shareholder approval would be required (the sole shareholder being InternetNZ).

We suggest that on balance, an exclusive licence is preferable, but we think this should be documented outside of the Operating Agreement to avoid the problem identified above. We suggest we work with Peter Dengate-Thrush to finalise this.

Concerning suggestions for contractual drafting, we comment as follows using Mr Dengate Thrush's numbering:

- A. The suggested additional recital looks acceptable.
- B & F. If the exclusive licence is documented outside the Operating Agreement, then these changes will not be necessary. Recital F should be removed altogether and clause 2 will require some general refinement.
- C. We feel that the existing clause 1.5 adequately covers the situation, but if InternetNZ prefer the suggested wording, then that is perfectly acceptable also.
- D. As we understand it, DNCL manages the WHOIS service –DNCL determine what is shown in the WHOIS record and how it is to operate. Operate means “manage, work, control; put or keep in a function or state”. The word “operate” seems to accurately describe the current situation but again, InternetNZ may prefer a different verb.
- G. We do not understand the point being made here. Clause 11.1 is designed to resolve any conflict between the Operating Agreement and the Constitution by making it clear that the Constitution prevails.

Yours sincerely  
IZARD WESTON



**John Burton**  
Partner

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