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DOMAIN NAME COMMISSION LTD.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOMAIN NAME COMMISSION LTD., Plaintiff, vs. WHOIS API, INC., Defendant.	Case No. **19-4870** **COMPLAINT FOR:** **(1) BREACH OF CONTRACT** **(2) VIOLATIONS OF THE COMPUTER FRAUD AND ABUSE ACT (18 U.S.C. § 1030(a))** **(3) VIOLATIONS OF THE COMPREHENSIVE COMPUTER DATA ACCESS AND FRAUD ACT (CAL. PENAL CODE § 502)** **(4) UNFAIR AND DECEPTIVE PRACTICES (CAL. BUS. & PROF. CODE § 17200 *ET SEQ.*)**

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4833-9724-6858v.4 0112485-000002

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Plaintiff Domain Name Commission Limited ("DNCL") alleges as follows:

I. INTRODUCTION

1. DNCL brings this action to stop Defendant Whois API, Inc. ("WhoisAPI"), from misusing .nz domain name registration information in violation of DNCL's governing Terms of Use and applicable law, and from infringing the privacy of the individuals who register .nz domain names.

2. DNCL is a non-profit organization, based in New Zealand, that has been appointed by InternetNZ to develop and monitor a competitive registrar market, as well as to create a fair environment for the registration and management of .nz domain names. DNCL is responsible for, among other things, authorizing and de-authorizing .nz domain name registrars, administering the .nz Dispute Resolution Service, and—of particular importance for this matter—enforcing .nz policies and regulating use of the .nz WHOIS service, which provides information about domain names ending in ".nz".

3. DNCL, in conjunction with InternetNZ, provides the .nz WHOIS service subject to specific Terms of Use ("TOU"), which are designed to (i) protect the privacy of the registrants who license .nz domains by preventing their registration information from being harvested in bulk; (ii) provide individual registrants with control over their own registration information by prohibiting the retention and publication of historical WHOIS records, which may contain personal information that registrants later change or choose to withhold from public access; and (iii) protect the integrity and accessibility of the .nz WHOIS servers. In addition, since November 2017, DNCL has offered individual registrants who do not conduct significant trade using their.nz domain names the opportunity to withhold public availability of their detailed contact information through the .nz WHOIS service. As of May 2019, 35,995 individuals have taken this opportunity to protect their privacy.

4. WhoisAPI's activities undermine the protections that DNCL promises to provide to .nz registrants and violate the TOU governing the .nz WHOIS service.

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The products and services WhoisAPI offers to its customers are built on practices that infringe .nz registrants' privacy rights and expectations by harvesting their registration information in bulk from the registry where it is maintained; using high-volume queries and technical measures designed to evade the restrictions that protect .nz WHOIS servers against that form of abuse; and storing and retaining registrant data, including detailed personal contact information, even after a registrant has chosen to withhold their data from public access. These activities cause irreparable harm to DNCL's reputation and integrity, divert resources from DNCL's mission, interfere with its contractual relationships with .nz domain name registrars, and harm DNCL's goodwill.

II.   PARTIES

5.   DNCL is a non-profit entity and is registered in New Zealand as a charitable organization and a Limited Liability Company. DNCL's sole shareholder is Internet New Zealand Incorporated ("InternetNZ"), a non-profit incorporated society established to protect, promote, and foster the development of the Internet in New Zealand.

6.   Upon information and belief, Defendant Whois API, Inc., is a California corporation with its principal place of business in Walnut, California.

III.   JURISDICTION AND VENUE

7.   This Court has subject-matter jurisdiction over DNCL's claims for violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, pursuant to 28 U.S.C. § 1331. The Court has subject-matter jurisdiction over DNCL's remaining claims for breach of contract, violations of the California Comprehensive Computer Data Access and Fraud Act, Cal. Penal Code § 502, and unfair and deceptive practices, Cal. Bus. & Prof. Code § 17200 *et seq.*, pursuant to 28 U.S.C. § 1367.

8.   This Court also has subject-matter jurisdiction over all claims pursuant to 28 U.S.C. § 1332. This is a civil action between a citizen of California and a citizen of a foreign state. DNCL is a citizen of New Zealand, a foreign state, and, on

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information and belief, WhoisAPI is a citizen of the State of California, where it has

its principal place of business. This action seeks injunctive relief and damages, in

addition to other relief, and the amount in controversy exceeds $75,000, exclusive of

interest and costs.

9.   This Court has personal jurisdiction over WhoisAPI because it resides

and does business in the State of California, in that it maintains its principal place of

business in Walnut, California.

10.   Venue is proper in this District under 28 U.S.C. § 1391 because

WhoisAPI maintains its principal place of business in Walnut, California, and as

such resides in this district; a substantial part of the events or omissions giving rise to

DNCL's claims occurred in this district; and WhoisAPI is subject to personal

jurisdiction in this district.

IV.   FACTS COMMON TO ALL CLAIMS

A.   Domain Name Background and Terminology

11.   An Internet user typically accesses a website by opening a web browser,

clicking on the navigation bar, and entering a Uniform Resource Locator ("URL").

For example, the URL for DNCL's website is "http://www.dnc.org.nz". As the user

browses on DNCL's website, he or she will be directed to various other URLs, such

as "http://www.dnc.org.nz/irpo" or "http://www.dnc.org.nz/story/policy".

12.   A domain name is a string of characters that is used to locate a web site

on the Internet. Domain names were developed because they are easier for Internet

users to remember than the numerical IP addresses the Internet actually uses to route

traffic. When an Internet user enters a domain name into a browser, for example, the

browser consults the Domain Name System ("DNS"), which looks up the numerical

IP address that corresponds to the domain name. Underlying network protocols then

use the IP address to locate and identify computer services and devices operated by

individuals or organizations on the Internet. Domain names are most commonly used

in URLs or email addresses. For example, "dnc.org.nz" is the domain name in the

URL for DNCL's website on the Internet described in Paragraph 11 above, and in associated email addresses, such as info@dnc.org.nz.

13.   Domain names are split into multiple pieces. Each piece is separated by a period and is part of a hierarchical structure of domain name identifiers.

14.   A top-level domain ("TLD") is at the highest level in the DNS hierarchy, and is represented by the portion of the domain name to the right of the last period (i.e., ".nz" in the domain name "dnc.org.nz").

15.   A country code TLD ("ccTLD") is a specific kind of TLD that is specifically designated for a particular country, sovereign state, or other territory to use to service its community. ccTLDs are assigned using the two-level country codes defined by the International Organization for Standardization to represent countries, dependent territories, and special areas of geographical interest. In particular, the country code in a ccTLD indicates the country that administers and sets policies regarding domain name registration for that ccTLD. ccTLDs are held in trust for the local Internet community of the country they represent by a designated manager appointed by that community. The ccTLD for New Zealand is ".nz", and its designated manager is InternetNZ.

16.   The "second-level domain" is the piece of the domain name at the second highest level in the DNS hierarchy (i.e., ".org" in the domain name "dnc.org.nz"). Similar to ccTLDs for many countries other than the United States and Canada, second-level domains for .nz frequently indicate the core purpose of a website. For example, a ".org.nz" website serves an organizational purpose; a ".gov.nz" website serves a governmental purpose; and a ".co.nz" website serves a commercial purpose.

17.   The domain "identifier" is chosen by the individual or organization who can be located through the domain name (i.e., "dnc" in the domain name "dnc.org.nz").

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18.   The Internet Corporation for Assigned Names and Numbers ("ICANN") is a non-profit organization responsible for coordinating and maintaining the Internet's unique identifiers, including domain names, TLDs, and ccTLDs.

19.   A registrant is an individual, company, or organization that registers and manages a domain name on the Internet. Domain names are licensed to registrants.

20.   A domain registry is the organization that manages TLDs and their infrastructure. A domain registry's responsibilities typically include creating domain name extensions, developing the policy framework for the domain, and keeping the definitive register of domain names.

21.   A registrar is an organization, accredited by ICANN and/or a ccTLD, that acts as a middle-man between a domain registry and registrants, in that it has the authority to issue domain licenses from registries to registrants. Registrars manage domain names on behalf of registrants.

22.   Registrars and registries are required by their contracts with ICANN and/or a ccTLD to operate a service called WHOIS, which allows the public to search for and obtain information about registered domains. The data returned by the WHOIS service typically includes (1) information about the domain (e.g., the date it was registered or last modified, its status, and its expiration); (2) information about the registrar (e.g., its name and contact information); and (3) information about the registrant (e.g., the name and contact information of the organization or individual currently managing the domain name).

B.   Operation and Organization of the .nz Domain Name Space

23.   InternetNZ was established in 1995 and is the recognized delegated manager for the .nz ccTLD. The Internet Assigned Numbers Authority (IANA), a function managed by ICANN, delegated this authority to InternetNZ in 1996. As the delegated manager for the .nz domain, InternetNZ has a duty to manage the .nz ccTLD in service to the local internet community. Among other responsibilities, InternetNZ operates the registry for .nz, meaning it keeps the definitive register of .nz

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domain names and is responsible for the policy framework relating to the .nz domain name space.

24.   ICANN has formally recognized InternetNZ as the sole authority for the administration and management of .nz domain names. There are currently over 700,000 registered .nz domain names, a tiny fraction of the well over 330 million domain names across the world and all TLDs.

25.   InternetNZ established DNCL as its wholly-owned subsidiary in 2007. DNCL's organizational mission is to develop, monitor, and oversee a competitive registrar market and to create a fair environment for the registration and management of .nz domain names. InternetNZ appointed DNCL to manage and administer the .nz domain name space under the terms of an Operating Agreement between the entities dated April 1, 2008.

26.   Under these agreements, DNCL performs several functions, including overseeing the registration and management of .nz domain names, authorizing registrars, managing the operation of the .nz domain name space and the agreements and policies that underpin it, monitoring activity in and regulating the use of the .nz domain name space, administering a dispute resolution service for disputes between .nz domain name registrants, and representing the .nz domain name space in international fora. In sum, DNCL has sole authority for administration and management of .nz domain names on behalf of the people and businesses of New Zealand and other .nz registrants.

27.   InternetNZ issues policies that govern the operation and regulation of the .nz domain name space, and DNCL is responsible for enforcing these policies. The Operations and Procedures policy sets out the operations and procedures that apply to the running of the .nz domain name space. This policy must be followed by all participants in the .nz domain name space. A copy of the Operations and Procedures policy is attached as **Exhibit 1** to this Complaint.

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28.   To request a .nz domain name, an individual or organization must provide certain information to a registrar, including the potential registrant's name, contact details (email address, physical address, and contact phone number), administrative and technical contacts, and other information. The registrar is responsible for ensuring the domain name is available, that mandatory information has been provided, and that the information provided is in the correct format where appropriate (e.g., domain name or email address). The registrar then accesses the .nz register to enroll and maintain the domain name on behalf of the registrant.

29.   After the registration is added to the .nz register, domain name registration information becomes available through the WHOIS service. As a result, that information is frequently referred to as "WHOIS data" or "WHOIS information."

C.   Terms of Use Governing the .nz WHOIS Service

30.   WHOIS information for the .nz domain name space can be accessed through any one of three avenues: (1) the DNCL website; (2) the .nz Port 43 service; and (3) registrars who have special access to the .nz WHOIS service through SRS xml or EPP xml lookups, authenticated requests made against registry systems which only authorized .nz registrars can use. Although .nz WHOIS information is available through other sources, such as through registrars or third parties like WhoisAPI, those sources must use one of these three avenues to access .nz information.

31.   DNCL has made a deliberate policy decision to allow the public to obtain WHOIS data for .nz domain names only by searching a specific domain name, with exceptions only in limited circumstances when DNCL approves applications to obtain registrant information to support disputes over .nz domain names or to obtain information about the inquirer's own .nz domain registrations. In other words, as a matter of policy, DNCL offers no reverse lookup function through which the public may search a registrant's name, phone number, email address, or physical address to obtain .nz WHOIS information.

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32.   In a typical month, over 17 million .nz WHOIS queries are performed.

33.   WHOIS data is commonly used to determine the availability of domain names. Because WHOIS data includes information regarding the registrant of a domain name, it may also be used to help combat spam or fraud, identify trademark infringers, and enhance accountability of domain name registrants. In addition, WHOIS data can be used to identify and locate domain name registrants who may be posting illegal content or engaging in phishing scams.

34.   To prevent abuse of the .nz WHOIS service, DNCL provides WHOIS data in response to a WHOIS query pursuant to the terms and conditions of the TOU. Specifically, the TOU provide:

> **Terms of Use:** By submitting a WHOIS query you are entering into an agreement with Domain Name Commission Ltd on the following terms and conditions, and subject to all relevant .nz Policies and procedures as found at https://dnc.org.nz/. It is prohibited to:
>
> - Send high volume WHOIS queries with the effect of downloading part of or all of the .nz Register or collecting register data or records;
>
> - Access the .nz Register in bulk through the WHOIS service (ie. where a user is able to access WHOIS data other than by sending individual queries to the database);
>
> - Use WHOIS data to allow, enable, or otherwise support mass unsolicited commercial advertising, or mass solicitations to registrants or to undertake market research via direct mail, electronic mail, SMS, telephone or any other medium; . . .
>
> - Use WHOIS data in contravention of any applicable data and privacy laws, including the Unsolicited Electronic Messages Act 2007;
>
> - Store or compile WHOIS data to build up a secondary register of information;
>
> - Publish historical or non-current versions of WHOIS data; and
>
> - Publish any WHOIS data in bulk.

35.   The TOU were last updated on June 26, 2016. Before that date, the TOU provided:

> Users are advised that the following activities are strictly forbidden.

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Using multiple WHOIS queries, or using the output of multiple WHOIS queries in conjunction with any other facility or service, to enable or effect a download of part or all of the .nz Register.

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Using any information contained in the WHOIS query output to attempt a targeted contact campaign with any person, or any organisation, using any medium.

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A breach of these conditions will be treated as a breach of the .nz Policies and Procedures. Sanctions in line with those specified in the policies and procedures at www.dnc.org.nz may result from any breach.

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36.   When a user searches for a domain on the DNCL website, the TOU are

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shown at the bottom of the results page. An exemplar screenshot of how the DNCL

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website displays the WHOIS results page, including the TOU, is attached to this

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Complaint as **Exhibit 2**.

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37.   When a user searches for a domain through the Port 43 WHOIS service,

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the TOU are displayed above the WHOIS data. An exemplar screenshot showing

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how the TOU are displayed in response to a WHOIS query through Port 43 is

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attached to this Complaint as **Exhibit 3**.

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38.   Use of the .nz WHOIS service, whether through the DNCL website or

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through Port 43, indicates agreement to these TOU. The TOU are displayed every

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time a query is submitted, meaning that ongoing and continuous use of the .nz

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WHOIS service establishes actual knowledge of and agreement to the TOU.

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39.   The DNCL website includes a page, available at

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https://www.dnc.org.nz/whois, explaining that .nz domain name registration

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information can be searched by domain name. A screenshot of this page is attached

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as **Exhibit 4** to this Complaint. That page explains that "[t]he ability to search for"

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.nz domain name registration "information is referred to as a domain name

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registration query ('Query') or a domain name search," and that "[b]y performing a

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'Query,' you are also agreeing to be bound by the Terms of Use of the service."

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40.   In addition to but independent of the TOU, DNCL has implemented

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extensive automated rate limiting to prevent bulk harvesting of .nz WHOIS data.

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The rate limiting operates both for individual IP addresses and for aggregate blocks

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of IP addresses using multiple methods of aggregation. On the basis of this rate limiting, the .nz WHOIS servers typically have blocked between 40 million to 80 million WHOIS queries per month to prevent bulk harvesting of .nz WHOIS data.

41.   Nonetheless, rate limiting based on IP addresses can be evaded by using cloud services to run multiple simultaneous queries from a wide range of IP addresses, or by using other distributed computing networks to conceal the true source of the query.

42.   Due to increasing concerns about bulk harvesting of .nz WHOIS registrant data, since April 20, 2018, information that identifies .nz domain name registrants or administrative or technical contacts is no longer being offered through Port 43. This has resulted in increased volumes of WHOIS searches being undertaken via the DNCL website. DNCL has implemented additional security measures to prevent misuse, namely a "roadblock" test called CAPTCHA, which is designed to distinguish between human and machine input. An example of the CAPTCHA tool (showing a set of 9 photographs from which a website user must identify each image containing a car) is attached as **Exhibit 5**. Since the introduction of CAPTCHA on DNCL's website, bad actors have continued efforts to circumvent the roadblock to facilitate bulk queries.

D.   Registrant Privacy and the .nz Individual Registrant Privacy Option

43.   Registrants around the world have become increasingly concerned about their personal information, especially their personal contact information, being publicly available through WHOIS. As a result, ICANN, registries, and registrars all over the world have begun taking steps to provide registrants with enhanced choice and control over the public disclosure of their personal information.

44.   More recently, in relation to the European Union's General Data Protection Regulation ("GDPR"), in a letter dated December 6, 2017, the Article 29 Data Protection Working Party expressed its view that "public access to the Whois data in its current form goes beyond" the legitimate purpose for WHOIS services.

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ICANN responded in March 2018 by issuing a "cookbook" describing an interim model intended to ensure that WHOIS services comply with EU privacy law.

45. In New Zealand, InternetNZ and DNCL have long been attuned to registrant privacy and safety concerns and the tension between the need to provide individual registrants choice and control over their personal information and the benefits of public availability of WHOIS data.

46. For example, it is important that .nz domain name registrants be identifiable to ensure accountability and to allow them to be quickly contacted in cases of harm. Bad actors can and do use domain names to attack, harass, or scam others. There is a benefit in the public being able to see who is behind a domain name to verify the trustworthiness of .nz websites or email addresses, or to increase consumer confidence when online trade is involved. In addition, WHOIS provides a valid and valuable tool for those who have protection and legal rights to enforce. And if a website is hacked, WHOIS information can be used to inform the owner that their interests are being compromised.

47. At the same time, there is increasing awareness of the importance of privacy in the online world. Surveys conducted for the New Zealand Office of Privacy Commissioner highlight that many individuals in New Zealand are concerned about the privacy of their online information. In particular, many people are concerned about having their contact details publicly visible.

48. In late 2015, DNCL conducted its first public consultation about whether registrant personal data should or should not be collected and made accessible through a WHOIS search. Specifically, DNCL sought and obtained input from the New Zealand Internet community about why .nz registrant data should or should not be collected; why that data should or should not be made publicly available; why the display and availability of .nz registrant data should or should not be the same for all parties; and whether there were concerns about the current approach.

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49.   DNCL conducted its second public consultation around January 2016. For the second consultation, DNCL asked for and obtained input from the New Zealand Internet community about whether the full range of .nz WHOIS data—which included registrant contact name and contact details, admin contact name and contact details, technical contact name and contact details, domain name details, name servers, and registrar information—should continue to be provided in response to a WHOIS search. In addition to receiving written submissions, DNCL held public meetings online and in person in Christchurch, Auckland, and Wellington.

50.   In June 2016, DNCL held a third public consultation requesting input on a proposed change that would allow individual registrants to have their details withheld from publication under certain circumstances, such as where their personal safety may be at risk if their contact details were displayed. This proposal was based on the mix of submissions received during the two earlier consultations: the submissions largely supported making registrant details publicly available in response to WHOIS searches, but also raised some concerns about registrant privacy and security. DNCL received written submissions ranging from those saying no information should be made public, to supporting the proposed privacy process, to supporting the status quo, and many options in between.

51.   DNCL held a fourth public consultation in October and November 2016, which sought and obtained input on a new proposal, under which a registrant who declared he or she was an individual would automatically have his or her contact address and telephone number information withheld from public WHOIS data. The consultation also sought input on whether to include geography with name and email information in the publicly available WHOIS data.

52.   DNCL held the fifth and final consultation between March and May 2017. It sought and obtained input on proposed changes that would (1) provide individual registrants who do not use the domain name to a significant extent in trade with the option of withholding their telephone number and address information from

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public WHOIS data, and (2) define a process for requesting the withheld information in cases of legitimate need.

53.   Based on this extensive consideration and solicitation of input from the New Zealand Internet community, on November 28, 2017, DNCL launched the Individual Registrant Privacy Option ("IRPO"). Since March 28, 2018, all authorized .nz registrars have been required to offer registrants the ability to apply for the IRPO.

54.   The IRPO is available to individual registrants of .nz domain names who do not use their licensed domain name for significant trade. A registrant may apply for the IRPO through his or her authorized .nz registrar at the time of registration or at any later time. If a registrant is eligible, his or her telephone number and address ("Withheld Information") will be withheld from the public WHOIS record and not displayed. The public WHOIS record will still include other contact information, including name, email, and country. The registrant is still responsible for providing correct registration details, including email, phone, and address contact information.

55.   Even if an individual registrant has opted into the IRPO, that individual's Withheld Information may nonetheless be disclosed if an entity (such as a government agency or arm of law enforcement) can establish a legitimate need for access, on either a one-off or ongoing basis. For entities that have a legitimate need for ongoing access to Withheld Information, DNCL will enter Memoranda of Understanding ("MOUs") with those entities to facilitate either streamlined or automatic access to the Withheld Information or historical records. To ensure it provides appropriate transparency into access and disclosure of individuals' Withheld Information, DNCL will post the MOUs on its website, notify the registrant of the access as soon as practicable, and publish transparency reports.

56.   DNCL entered into its first such MOU on June 8, 2018, with the Computer Emergency Response Team (CERT), which forms part of the New Zealand Ministry of Business, Innovation and Employment.

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57.   Accordingly, the IRPO uses a carefully balanced process through which registrants can protect their private information while public authorities can still obtain that information for legitimate reasons.
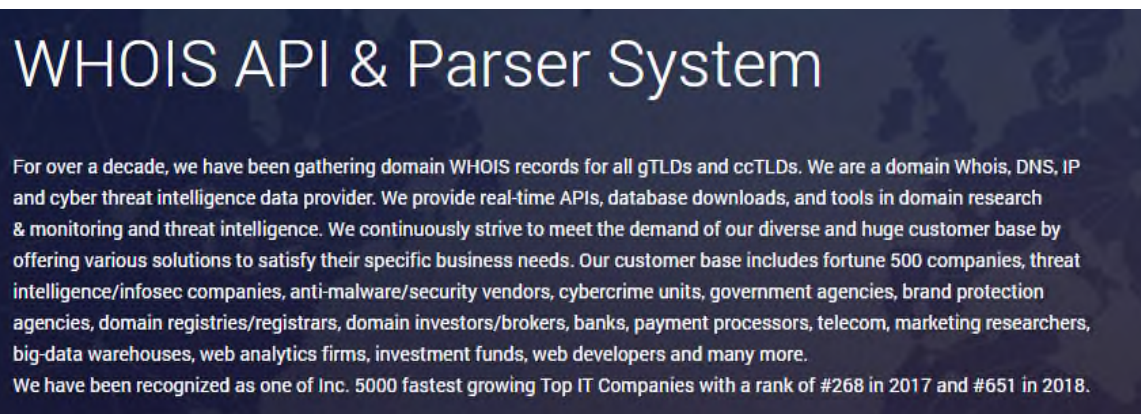
58.   DNCL implemented the IRPO to allow registrants to control and protect their private information in recognition of the significant privacy and safety concerns of many .nz domain name holders.

59.   There are approximately 712,000 active .nz domain name registrations. Of these, approximately 257,000 are eligible for IRPO. (The remainder are organizations and individuals who conduct significant trade and are therefore ineligible for IRPO.) Of the 257,000 domain names eligible for IRPO, almost 36,000 (approx. 14%) have enrolled. Enrollment continues to grow steadily. Since June 2018, for example, the number of enrollments has increased by more than 300%.

60.   By combining availability of the IRPO with strict enforcement of the TOU, DNCL empowers many individual .nz registrants to withhold their personal contact information altogether. This is because the information is neither presently available nor re-creatable through historical records held by third parties.

E.   WhoisAPI's Products and Services

61.   WhoisAPI offers a variety of products and services that it markets to the public as a tool for domain research and monitoring. WhoisAPI touts its products and services on its website:
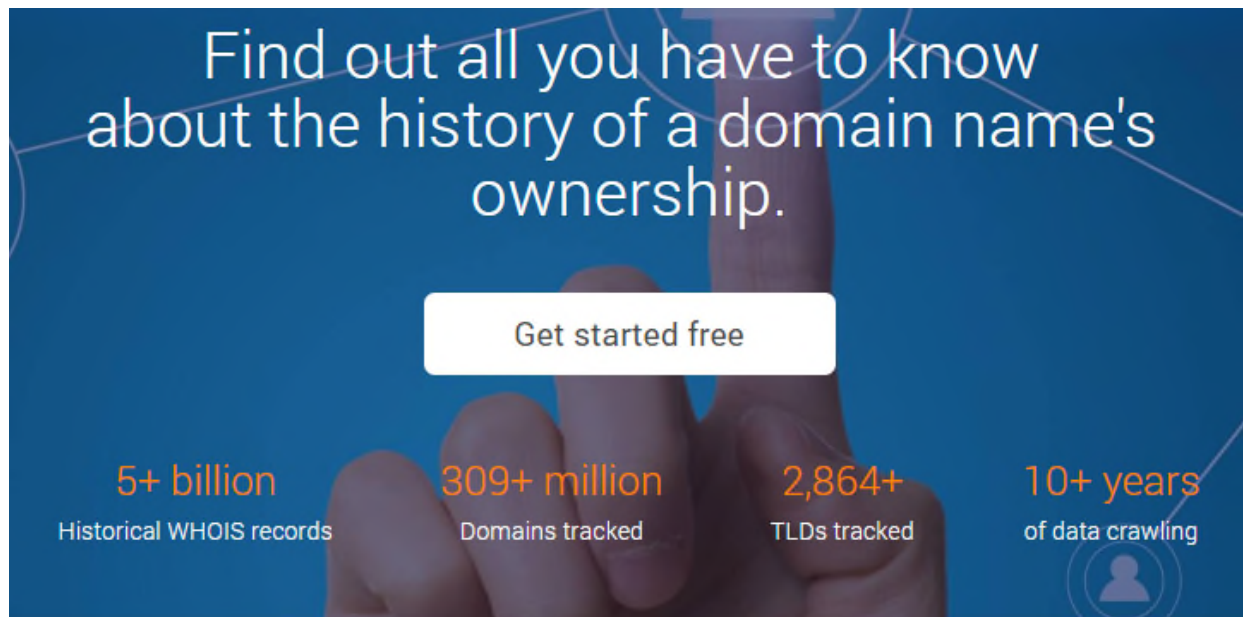

WHOIS API & Parser System

For over a decade, we have been gathering domain WHOIS records for all gTLDs and ccTLDs. We are a domain Whois, DNS, IP and cyber threat intelligence data provider. We provide real-time APIs, database downloads, and tools in domain research & monitoring and threat intelligence. We continuously strive to meet the demand of our diverse and huge customer base by offering various solutions to satisfy their specific business needs. Our customer base includes fortune 500 companies, threat intelligence/infosec companies, anti-malware/security vendors, cybercrime units, government agencies, brand protection agencies, domain registries/registrars, domain investors/brokers, banks, payment processors, telecom, marketing researchers, big-data warehouses, web analytics firms, investment funds, web developers and many more.
We have been recognized as one of Inc. 5000 fastest growing Top IT Companies with a rank of #268 in 2017 and #651 in 2018.

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WhoisAPI, https://www.whoisxmlapi.com/ (last visited March 12, 2019).

62.   Upon information and belief, WhoisAPI's products and services rely extensively on WHOIS data, including vast quantities of non-current, historical WHOIS records. For example, WhoisAPI's website states that its services "allow you to view relevant historical WHOIS records – and find out how a domain's ownership was changing. For the past 10+ years, we have been tracking WHOIS histories of hundreds of millions domains [sic]."

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WhoisAPI, "Whois History API", https://whois-history-api.whoisxmlapi.com/ (last visited March 12, 2019).

63. WhoisAPI markets its services using the size and claimed coverage of its database of WHOIS records. For example, in describing how it can assist companies seek to use WHOIS data to marketers who want to "understand market forces and properly formulate various brand strategies," WhoisAPI touts the wealth of data it has collected:

5 billion+	300 million+	2,864+	99.5 %
WHOIS records	Domain names tracked	TLDs & ccTLDs	IP addresses in use covered

WhoisAPI, "Marketing Research Solutions," https://main.whoisxmlapi.com/ solutions/marketing-research-solutions (last visited March 12, 2019).

64. Several WhoisAPI services rely on both current and historic WHOIS data, including .nz WHOIS data. For example, WhoisAPI offers to the public its own, free "Whois Lookup" tool at https://www.whoisxmlapi.com/. The Whois Lookup results page available to the public includes a complete copy of the Whois Record, as it appears at the time of the lookup.

65. Upon information and belief, when a query for a .nz domain name is entered on the WhoisAPI Whois Lookup tool, WhoisAPI automatically obtains the WHOIS record from the Port 43 WHOIS service, posts that information in its results page, and saves that WHOIS record in its database as a historical WHOIS record. The default view that WhoisAPI presents to its users consists of a formatted view of the WHOIS record, with the TOU excised from the results before it is displayed in response to a search for a .nz domain. An exemplar screenshot of this results page is attached to this Complaint as **Exhibit 6**.

66. Upon information and belief, WhoisAPI uses a distributed network of IP addresses from all over the world to query the .nz WHOIS service using Port 43.

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1   Upon information and belief, WhoisAPI uses this distributed network of global IP

2   addresses to conceal its violation of the TOU, evade the .nz WHOIS rate limiting

3   protocols, and enable WhoisAPI to execute a high volume of queries without being

4   blocked, with the purpose of obtaining WHOIS records for most if not all domain

5   names in the .nz Registry.

6   67.   Although WhoisAPI provides users with limited free access to current

7   WHOIS information, it provides paying customers with access to additional

8   information. For example, through its Domain Research Suite dashboard, WhoisAPI

9   provides information about how many other domains are associated with the same

10   domain registrant and how many historical WHOIS records WhoisAPI maintains for

11   that domain name. WhoisAPI calls these services "Reverse Whois Search" and

12   "Whois History Search," respectively.

13   68.   WhoisAPI's "Reverse Whois Search" tool allows the user to search for a

14   unique identifier such as an individual's name or a company's name, phone number,

15   email address, or physical address and, through a reverse lookup, obtain a list of all

16   domain names linked to that person or organization. (As explained above, DNCL

17   has made a policy decision not to provide the reverse lookup available through

18   WhoisAPI.) This tool allows the user to obtain extensive WHOIS information based

19   on an individual's identity, rather than based on an individual domain. Upon

20   information and belief, WhoisAPI provides this service by maintaining and querying

21   a database similar to a domain registry that associates registrants with the registration

22   information for the domain names they license.

23   69.   WhoisAPI's "Whois History Search" tool allows its customers to access

24   historical Whois records. WhoisAPI advertises that, for more than 10 years, it has

25   been tracking the Whois history of hundreds of millions of domains. On information

26   and belief, these records are maintained in the WhoisAPI database and, while a

27   limited number of queries are provided for free, customers must ultimately purchase

28   "credits" to be able to continue using the Domain Research Suite.

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70.   When a customer searches for a domain through the Whois History Search tool, WhoisAPI provides a display allowing the customer to access all historical WHOIS records that WhoisAPI has obtained and stored for that domain.

71.   WhoisAPI also offers customers various other paid services, including "bulk, efficient and unrestricted access to all [WHOIS] data offline."

F.   WhoisAPI's Activities Violate the .nz WHOIS Terms of Use and Other Laws, and Undermine the Privacy of Individual Registrants

72.   WhoisAPI has violated the TOU in several ways by, among other things, circumventing technical controls, querying the .nz registry in bulk, retaining historical WHOIS records, and creating a secondary registry so it can sell registrants' private information to WhoisAPI's paying customers.

73.   Specifically, upon information and belief, WhoisAPI conducts a high volume of queries through the .nz WHOIS Port 43 service to populate its database of current and historical WHOIS records. In doing so, WhoisAPI has violated and continues to violate the provisions of the TOU that prohibit "[s]end[ing] high volume WHOIS queries with the effect of downloading part or all of the .nz Register or collecting register data or records" and "[a]ccess[ing] the .nz Register in bulk through the WHOIS service (i.e., where a user is able to access WHOIS data other than by sending individual queries to the database)."

74.   WhoisAPI's activities also violated the previous version of the TOU, which prohibited "[u]sing multiple WHOIS queries, or using the output of multiple WHOIS queries in conjunction with any other facility or service, to enable or effect a download of part or all of the .nz Register."

75.   Upon information and belief, WhoisAPI maintains a database of WHOIS records, including .nz WHOIS records obtained through the .nz WHOIS Port 43 Service, that associates .nz domain names with registration information. WhoisAPI then relies upon this database to allow users to search for WHOIS information using a registrant's name or contact information, including information

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that the registrant may have chosen to withhold. In doing so, WhoisAPI has violated and continues to violate the provision of the TOU that prohibits "[s]tor[ing] or compil[ing] WHOIS data to build up a secondary register of information."

76.   WhoisAPI makes available to the public for a fee all historical WHOIS records that it has obtained for a domain, including .nz domains. In doing so, WhoisAPI has violated and continues to violate the provision of the Terms of Use that prohibits "[p]ublish[ing] historical or non-current versions of WHOIS data."

77.   WhoisAPI sells to its customers access to substantially all of the .nz WHOIS records that it has accumulated, allowing them to search those records in bulk through its Reverse Whois Search and Whois History Search services. In doing so, WhoisAPI has violated and continues to violate the provision of DNCL's TOU that prohibits "publish[ing] any WHOIS data in bulk."

78.   Regulators in the United States and Europe have expressed similar concerns with the methods that WhoisAPI has used and continues to use to access WHOIS data, and the amount of WHOIS data WhoisAPI makes publicly available.

G.   WhoisAPI's Unlawful Activity Harms DNCL

79.   WhoisAPI's unlawful activities as described above have already caused and continue to cause irreparable harm to DNCL and to individual .nz domain name registrants.

80.   WhoisAPI's activities have damaged and continue to damage DNCL's integrity and reputation in the New Zealand Internet community due to loss of goodwill from individual registrants who license .nz domain names. DNCL represents and assures individual .nz domain names that if they successfully apply for the Individual Registrant Privacy Option, their detailed contact information will be withheld from public view and made available only pursuant to a rigorous process to entities that can establish a legitimate need for that information. DNCL can make this commitment only because its TOUs categorically prohibit persons and entities like WhoisAPI, who have previously accessed DNCL's Port 43 service, from

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maintaining a secondary database of .nz WHOIS data and from publishing historical or non-current versions of WHOIS data.

81.   WhoisAPI has never sought to enter into a Memorandum of Understanding with DNCL establishing a legitimate need for the information that individual registrants have chosen to withhold from public view. Yet WhoisAPI's activities make individual registrants' withheld personal data available to the public for a fee by providing historical WHOIS records, which may include detailed personal contact information even after an individual registrant has exercised the option to withhold that information from the public.

82.   In addition, individual registrants of .nz domain names have expectations of privacy based on New Zealand law providing statutory privacy rights to individuals. DNCL's Terms of Use for the .nz WHOIS service protect individuals' privacy rights. WhoisAPI's violations of DNCL's Terms of Use frustrate these individuals' privacy rights and cause further harm to registrant good will and to DNCL's reputation and integrity.

83.   By interfering with the IRPO, WhoisAPI's activities also interfere with DNCL's mission and contractual obligations, and have diverted and continue to divert DNCL resources away from its core organizational mission.

84.   WhoisAPI's unlawful activities are also preventing DNCL from providing its services in accordance with the TOU and IRPO, which DNCL implemented in response to privacy and safety concerns raised by the .nz Internet community. DNCL therefore is being thwarted in its ability to offer its services in accordance with the TOU, to implement policies supported by the people and businesses of New Zealand and other .nz registrants, and to honor individual registrants' choice to protect the privacy of their personal information.

85.   By issuing high-volume queries to the .nz WHOIS service, WhoisAPI is also taxing the .nz WHOIS servers, disrupting network transmissions, and otherwise interfering with DNCL's technical infrastructure.

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86.   The harms caused by WhoisAPI's unlawful activities are not mitigated or balanced by any value provided through WhoisAPI's services. The customers who would seek to use WhoisAPI's services to obtain information about .nz domains could, in the alternative, obtain current .nz WHOIS information that is freely available through DNCL's website, save for personal information that individual registrants have chosen to withhold pursuant to the IRPO. In addition, when appropriate, historical and withheld .nz WHOIS information is available through special request (either for one-time or for ongoing access) at https://dnc.org.nz/irpo/access.

87.   In addition, the information regarding .nz registrants available through DNCL is more current and accurate than that available through WhoisAPI, which continues to publish historical (and therefore potentially outdated) information. WhoisAPI's customers, including law enforcement and other public interest organizations, would receive more accurate .nz WHOIS information (for free and without violating the TOU) through DNCL, using its WHOIS query function.

H.   DNCL's Efforts to Stop WhoisAPI's Unlawful Activity

88.   DNCL has sought to have WhoisAPI cease and desist its unlawful activities and stop harming DNCL and .nz registrants without the need for litigation.

89.   On December 17, 2018, counsel for DNCL sent a cease and desist letter to WhoisAPI and its CEO and registered agent, explaining that DNCL had become aware that WhoisAPI was accessing and querying .nz WHOIS servers, downloading .nz WHOIS data, storing a vast database of historical WHOIS records, and re-publishing that data through its "Whois History Search" and "Reverse Whois Search" products, and that WhoisAPI's activities were violating the TOU and other laws. The letter demanded that WhoisAPI immediately desist accessing .nz WHOIS servers or using and publishing .nz WHOIS data except as permitted by the TOU. A copy of this letter is attached to this Complaint as **Exhibit 7**.

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90.   Although the cease and desist letter demanded a response by January 14, 2019, WhoisAPI did not respond. Repeated efforts to contact WhoisAPI were unsuccessful. Counsel for DNCL even called and left voicemail messages at a mobile telephone number associated with WhoisAPI's CEO, but received no response.

91.   In the December 17, 2018 cease and desist letter, DNCL completely and permanently revoked WhoisAPI's permission and license to use the .nz WHOIS service due to WhoisAPI's ongoing breach of the terms governing use of that service. DNCL also took technical measures in an effort to block WhoisAPI from continuing to access its Port 43 service. Nevertheless, WhoisAPI continued to send queries to the .nz WHOIS service even after revocation of its right to access the service. On information and belief, WhoisAPI's behavior continues to this day.

IV.   CAUSES OF ACTION

FIRST CLAIM

Breach of Contract

92.   A claim for breach of contract requires showing (1) the defendant entered into a contract, (2) the terms of the contract, (3) that the defendant breached the duties imposed by the contract, and (4) the plaintiff was damaged.

93.   By using the .nz WHOIS service, WhoisAPI entered into a contract with DNCL requiring WhoisAPI to abide by the TOU in exchange for DNCL providing the WHOIS data.

94.   WhoisAPI had actual notice of the TOU. Among other things, it made repeated, ongoing, and continuous requests to the .nz WHOIS service through Port 43. Each request received a response containing the TOU above the WHOIS data. Moreover, WhoisAPI explicitly removes the TOU from the formatted query results it displays to persons who use its services to query .nz WHOIS information, reflecting its conscious awareness of and intent to disregard (and, in fact, conceal) the TOU.

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95. Since June 26, 2016, the TOU have provided that users of the .nz WHOIS service may not, among other things, (1) send high volume WHOIS queries with the effect of downloading part of or all of the .nz Register or collecting register data or records; (2) access the .nz Register in bulk through the WHOIS service (i.e., access WHOIS data other than by sending individual queries to the database); (3) store or compile WHOIS data to build up a secondary register of information; (4) publish historical or non-current versions of WHOIS data; and (5) publish any WHOIS data in bulk. The previous TOU provided that users of the .nz WHOIS service may not, among other things, use multiple WHOIS queries, or use the output of multiple WHOIS queries in conjunction with any other facility or service, to enable or effect a download of part or all of the .nz Register.

96. WhoisAPI has breached and continues to breach these provisions of the TOU by engaging in the conduct alleged above and other activities.

97. DNCL has been damaged by WhoisAPI's activities as described above, in that DNCL has and will continue to experienced loss of goodwill from individual registrants, harm to its reputation and integrity in the .nz Internet community, and interference with its mission and other contractual relationships.

98. DNCL is entitled to injunctive relief. WhoisAPI has no adequate remedy at law for WhoisAPI's wrongful conduct because, among other things, WhoisAPI's conduct harms DNCL in such a way that DNCL could not be made whole by any monetary award, and WhoisAPI's wrongful conduct, and the resulting damage to DNCL, is continuing.

SECOND CLAIM

Violations of the Computer Fraud and Abuse Act
18 U.S.C. § 1030(a)

99. A claim for violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a)(2)(C), arises when a defendant either intentionally accesses a computer without authorization or exceeds authorized access, thereby obtaining

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information from a protected computer, and the plaintiff suffers damage or loss from the violation aggregating to at least $5,000 in value over a one-year period.

100. In addition, and in the alternative, a claim for violation of the CFAA, 18 U.S.C. § 1030(a)(5)(C), arises when a defendant intentionally accesses a protected computer without authorization, causing damage or loss as a result of that conduct, and the plaintiff suffers damage or loss from the violation aggregating to at least $5,000 in value over a one-year period.

101. The .nz WHOIS servers and the WHOIS service provided by those servers are used in interstate and foreign commerce and communication, and WhoisAPI's conduct involved interstate commerce and communication.

102. Before December 17, 2018, WhoisAPI had limited authorization to access the .nz WHOIS servers and the WHOIS service, as long as it complied with the TOU. While WhoisAPI was authorized to submit individual DNS queries to the .nz WHOIS service and obtain WHOIS data, the TOU prohibited WhoisAPI from (a) sending high volume WHOIS queries with the effect of downloading part of or all of the .nz Register, (b) accessing the .nz Register in bulk through the WHOIS service, or (c) storing or compiling WHOIS data to build up a secondary register of information. DNCL never granted WhoisAPI authority to access the .nz WHOIS servers and the WHOIS service in violation of the TOU.

103. Before December 17, 2018, WhoisAPI accessed the .nz WHOIS servers and the WHOIS service without authorization, and it exceeded even the authorized access it had been granted under the TOU. WhoisAPI systematically and routinely violated the TOU by (a) sending high volume WHOIS queries to the .nz WHOIS servers with the effect of downloading part of or all of the .nz Register, (b) accessing the .nz Register in bulk through the WHOIS service, and (c) storing or compiling WHOIS data to build up a secondary register of information. Moreover, WhoisAPI intentionally employed technical measures to conceal its attempts to unlawfully obtain .nz WHOIS data, and to evade automated detection and blocking technology

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employed by DNCL to limit and prevent WhoisAPI's access to the .nz WHOIS servers and the WHOIS service.

104.   Because of WhoisAPI's continuous and ongoing violation of the TOU, DNCL revoked WhoisAPI's limited license to access and use the .nz WHOIS on December 17, 2018.   Thereafter, WhoisAPI no longer had authority to access the .nz WHOIS servers and the WHOIS service at all under any circumstances.

105.   Nevertheless, on and after December 17, 2018, WhoisAPI continued to access the .nz WHOIS servers without authorization and obtained .nz WHOIS data from those servers.   On information and belief, that conduct is ongoing.

106.   As a result of WhoisAPI's unlawful conduct, DNCL has suffered loss in an amount in excess of the $5,000 statutory minimum during each relevant one-year period, in an amount to be proved at trial.   This loss includes, without limitation, the costs DNCL has incurred in investigating and responding to WhoisAPI's misconduct.

THIRD CLAIM

Violations of the Comprehensive Computer Data Access and Fraud Act
Cal. Penal Code § 502

107.   A claim for violation of the California Comprehensive Computer Data Access and Fraud Act ("CDAFA") arises when a defendant (a) knowingly accesses and without permission uses any data, computer, computer system, or computer network to wrongfully control or obtain money, property, or data, Cal. Penal Code § 502(c)(1); (b) knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, *id.* § 502(c)(2); (c) knowingly accesses and without permission uses or causes to be used computer services, *id.* § 502(c)(3); (d) knowingly and without permission provides or assists in providing a means of accessing a computer, computer system, or computer network in violation of the CDAFA, *id.* § 502(c)(6); (e) knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network, *id.* § 502(c)(7); and (f) knowingly and without permission

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1   provides or assists in providing a means of accessing a computer or computer system

2   in violation of the CDAFA, *id.* § 502(c)(13).

3   108.   Before December 17, 2018, WhoisAPI had limited authorization to

4   access the .nz WHOIS servers and the WHOIS service as long as it complied with

5   the TOU. Thus, while WhoisAPI was authorized to submit individual DNS queries

6   to the .nz WHOIS service and obtain WHOIS data from either the DNCL website or

7   Port 43, the TOU expressly prohibited WhoisAPI from (a) sending high volume

8   WHOIS queries with the effect of downloading part of or all of the .nz Register,

9   (b) accessing the .nz Register in bulk through the WHOIS service, or (c) storing or

10   compiling WHOIS data to build up a secondary register of information. WhoisAPI

11   was not authorized to access the .nz WHOIS servers and the WHOIS service in

12   violation of the TOU.

13   109.   Before December 17, 2018, WhoisAPI exceeded the authorized access it

14   had been granted under the TOU. WhoisAPI systematically and routinely violated

15   the TOU by (a) sending high volume WHOIS queries to the .nz WHOIS servers with

16   the intent and effect of downloading part of or all of the .nz Register, (b) accessing

17   the .nz Register in bulk through the WHOIS service, and (c) storing or compiling

18   WHOIS data to build up a secondary register of information. Moreover, WhoisAPI

19   intentionally employed technical measures to conceal its attempts to unlawfully

20   obtain .nz WHOIS data, and to evade automated detection and blocking technology

21   employed by DNCL to limit and prevent WhoisAPI's access to the .nz WHOIS

22   servers and the WHOIS service.

23   110.   Because of WhoisAPI's continuous and ongoing violation of the TOU,

24   DNCL revoked WhoisAPI's limited license to access and use the .nz WHOIS on

25   December 17, 2018.   As of that date, WhoisAPI was no longer authorized to access

26   the .nz WHOIS servers and the WHOIS service at all under any circumstances.

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111.   Nevertheless, on and after December 17, 2018, WhoisAPI continued to access the .nz WHOIS servers without authorization and obtained and used .nz WHOIS data from those servers. On information and belief, that conduct is ongoing.

112.   DNCL has suffered damage or loss by reason of DNCL's violations of the CDAFA, including but not limited to the costs DNCL has incurred in investigating and responding to WhoisAPI's misconduct.

113.   DNCL is further entitled to an award of punitive or exemplary damages, pursuant to Cal. Penal Code § 502(e)(4). Even after express notice revoking its right to access the .nz WHOIS service, WhoisAPI continued to access and use of DNCL's computer systems. WhoisAPI intentionally engaged in conduct designed to conceal its identity and evade technological limitations imposed by DNCL intended to prevent WhoisAPI from continuing to do so.

114.   DNCL is entitled to recovery of its reasonable attorneys' fees pursuant to Cal. Penal Code § 502(e)(2).

115.   DNCL is also entitled to recovery of its attorneys' fees under California Civil Procedure Code § 1021.5. This action will provide a significant benefit to the public, the financial burden of private enforcement makes an award appropriate, and it is in the interest of justice to award such fees.

FOURTH CLAIM

Unfair Competition
Cal. Bus. & Prof. Code § 17200 *et seq.*

116.   WhoisAPI's acts as described above constitute unlawful, unfair, and fraudulent or deceptive business practices in violation of California Business & Professions Code § 17200.

117.   WhoisAPI's practices violate federal and state law, including but not limited to the Computer Fraud and Abuse Act (18 U.S.C. § 1030(a)), the common law of California, and California's Comprehensive Computer Data Access and Fraud Act (Cal. Penal Code § 502).

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118.   As a direct and proximate result of WhoisAPI's conduct, DNCL is entitled to all applicable remedies set forth in California Business & Professions Code § 17203.

119.   DNCL is entitled to an injunction restraining WhoisAPI and its agents, employees, servants, officers, alter egos, and all persons acting in concert with it, from engaging in any such further business practices in violation of California Business & Professions Code § 17200.

120.   DNCL is also entitled to attorney fees under California Civil Procedure Code § 1021.5. This action will provide a significant benefit to the public, the financial burden of private enforcement makes an award appropriate, and it is in the interest of justice to award such fees.

V.   PRAYER FOR RELIEF

WHEREFORE, DNCL respectfully prays for the following relief:

A.   Declaratory relief as to each of the above causes of action;

B.   Preliminary and permanent injunctive relief, including that WhoisAPI and its agents, servants, employees and all persons in active concert or participation with it, be enjoined and restrained during the pendency of this action and perpetually from:

(1)   Accessing the .nz Register for as long as its limited license remains revoked; or, in the alternative, sending automated, high-volume WHOIS queries and accessing the .nz Register in bulk;

(2)   Storing or compiling .nz WHOIS data in its own database;

(3)   Publishing information that has been withheld pursuant to the IRPO;

(4)   Publishing historical versions of .nz WHOIS data through its various services; and

(5)   Publishing .nz WHOIS data in bulk through its various services;

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1   C.   An order requiring WhoisAPI to delete all historical .nz WHOIS records

2 obtained and stored by WhoisAPI in violation of the .nz WHOIS terms of use;

3   D.   For judgment in favor of DNCL, and against WhoisAPI, for damages in

4 such amounts as may be proven at trial;

5   E.   For judgment against WhoisAPI for DNCL's costs of suit, including

6 DNCL's reasonable attorney's fees; and

7   F.   For such other relief as the Court may deem just and proper.

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9 DATED: June 4, 2019   DAVIS WRIGHT TREMAINE LLP
                                              SEAN M. SULLIVAN
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11   By: /s/ Sean M. Sullivan
                                                   Sean M. Sullivan
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13   Attorneys for Plaintiff
                                              DOMAIN NAME COMMISSION LTD.
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