

TABLE OF CONTENTS

ABSTRACT	2
CHAPTER 1: INTRODUCTION.....	3
CHAPTER 2: INTELLECTUAL PROPERTY RIGHTS AND CONSUMER PRIVACY.....	5
INTELLECTUAL PROPERTY ISSUES	5
CONSUMER PRIVACY	7
CHAPTER 3: ACCESS REGIME	9
DOMINANCE, SEPARATION OF ACCOUNTS AND COSTING METHODOLOGY	11
NEW SHORT CODES FOR BRANDED DQ SERVICE	11

ABSTRACT

This Determination Notice sets out the Office's decisions in relation to service providers' access to directory listings. In July 2001, in its first consultative document on directory information markets, the Office of Utilities Regulation (OUR) began to explore the possibility of facilitating competitive entry into these markets and, in particular, the market for directory enquiry (DQ) service (also known as directory assistance service). In a second consultative document issued in February 2002, the OUR proposed a structural model that could be used to facilitate competition in the supply of DQ services. Finally, in May 2002, the OUR hosted a Public Forum to explore the issues related to intellectual property rights, consumer privacy and the structure and operation of the DQ market. That process informed the decisions in this Notice.

CHAPTER 1: INTRODUCTION

- 1.0 The Telecommunications Act, 2000 (the Act) designates the Office of Utilities Regulation (OUR) to function as the independent regulatory body for the telecommunications sector in Jamaica. Section 4 of the Act outlines the functions of the Office. Subsection (1)(a) states that:

“The Office shall regulate telecommunications in accordance with this Act and for that purpose the Office shall – regulate specified services and facilities....”

- 1.1 Directory information services and products are not classified as specified services under the Act; however, as in other jurisdictions, the Office’s duties are deemed to extend to these products and services, since they are considered to be necessary for the provision of telecommunications services. Directory assistance services, and by extension, the use and access to directory listings information is referred to in Section 48(1)(a)(ii) of the Act. This Section imposes an obligation on public voice service providers to ensure that customers can reasonably and reliably reach a directory assistance or directory enquiry (DQ) service. In promoting the interest of customers under Section 4(1)(d) of the Act, the OUR is duty bound to ensure that access (wholesale and retail) to directory listing information is provided at reasonable tariffs. The denial of access to directory listing information or the provision of access on a discriminatory basis, or at tariffs that are above cost, could result in potential subscribers avoiding a new service provider’s offer of a specified service.
- 1.2 In order to provide consumers with reasonable access to directory listing information as required under Section 48 the Act, a service provider must purchase and resell the services of the incumbent DQ operator or provide its own DQ service. The provision of its own service requires access to directory listing information from other service providers. Third party access to directory listings, whether real-time or otherwise, raises questions relating to consumer privacy and intellectual property rights. These issues proved to be pivotal to the consultative process.
- 1.3 The consultative process on directory information products and services commenced with the objective of facilitating the liberalization of the markets for these products and services. Emphasis was placed on the market for directory assistance or DQ service since this is the only directory service that service providers are obligated to supply in accordance with the Act.
- 1.4 In July 2001, in its first consultative document on the liberalization of directory information markets, the OUR began to explore the possibility of facilitating competitive entry into the markets for directory information products and services. Responses were received from Jamaica Promotions Limited (JAMPRO); Fair Trading Commission (FTC); DIGICEL; and Cable and Wireless Jamaica (C&WJ).

- 1.5 In February 2002, a second consultative document was issued. This Document proposed a structural model that could be used to facilitate competition in the supply of DQ services. The model was premised on the idea of a single comprehensive database, owned and operated by an independent entity or by any service provider.
- 1.6 Throughout most of the consultative process, focus was placed on issues of intellectual property rights and consumer privacy. Cable and Wireless Jamaica (C&WJ) made specific claims of copyright to its directory database and printed directories. Additionally, C&WJ argued that the provision of third party access to its database would constitute a breach of consumer privacy based on Section 47 of the Act.
- 1.7 On May 29, 2002, the OUR convened a Public Forum to explore the issues related to intellectual property rights, consumer privacy and the structure and operation of a liberalized DQ market. Although it was hoped that the forum could be used to achieve consensus on the areas of concern and identify the areas of disagreement, both Digicel and Centennial Digital Jamaica Limited (Centennial), after expressing initial interest in participating in the Forum, decided not to participate.
- 1.8 The Forum was originally organized to hear arguments on the abovementioned issues but C&WJ and Digicel did not fully address these issues in their submissions. The submissions filed did however suggest that there was a basis for agreement on the methodology for providing DQ services.
- 1.9 Members of the public were advised of the Forum by a public notice posted in both daily newspapers and specific invitations were issued to service providers (SPs). Some of the institutions represented at the Forum were:
- Psearch Associates Co. Ltd.
 - Cable and Wireless Jamaica Limited
 - Fair Trading Commission
 - Consumer Affairs Commission
 - Ministry of Industry Commerce and Technology
 - IBM World Trade Corp.
 - Telecommunications Consultancy of Jamaica
 - National Investment Bank of Jamaica Limited
 - HALTEK Global
 - Derrymore Information Services
- 1.10 This Determination Notice sets out the Office's decisions in relation to the service providers' access to directory listings. Issues of intellectual property rights and consumer privacy are addressed in Chapter 2, and Chapter 3 addresses issues related to the access regime used in the provision of DQ services.

CHAPTER 2: INTELLECTUAL PROPERTY RIGHTS AND CONSUMER PRIVACY

- 2.0 The statutes that are critical to the analysis in this chapter are, the *Telecommunications Act 2000 (the Act)*, the *Copyright Act (1993)* and the *Copyright (Amendment) Act 1999*. Reference to the *Copyright Act* relates to the *Jamaican Copyright Act*. The term “service provider” used in this document is as defined in Section 2(1) of the Act.

INTELLECTUAL PROPERTY ISSUES

- 2.1 In its submission to the OUR on May 22, 2002, Submission to the Telecommunications Directory Information Forum, as well as its comments on responses to both consultative documents, C&WJ claimed that it “. . . has copyrights in the compiled and organized database used to provide DQ services. These rights are independent of and in addition to any rights CWJ may have in the information being compiled, and independent of and in addition to the rights CWJ has in the various classification tools used to organize the information.”
- 2.2 According to C&WJ, the “. . . compilation rights are enshrined in the Jamaican Copyright Act, by virtue of the inclusion of “compilation” in the definition of “literary work”, and by virtue of CWJ’s status as a qualified person as that term is defined in that Act. Section 5 of the Copyright Act grants protection to the categories of eligible works listed in section 6, which include original literary works, as long as the authors are qualified persons, as set out in section 7.” (For a definition of “literary work” see paragraph 2.7).
- 2.3 Under the *Copyright Act*, it may be argued that directory databases are copyrightable as they may qualify as “literary works”. However, it is generally understood that the critical determinant of a copyrightable work is that the author must have made intellectual efforts in selecting or arranging its content, thus creating a work that is original. This was emphasized in the United States Supreme Court’s decision in *Feist Publications, Inc., v. Rural Telephone Service Co., Inc*¹.
- 2.4 In the abovementioned case, Rural Telephone Service Company (Rural) provided local telephone listings as mandated by the Government. Listing data are obtained from information supplied by its subscribers who must provide their names and addresses in order to obtain telephone service. A potential competitor, Feist Publications (Feist), publishes telephone listings for a wider geographic area, including Rural’s coverage area. After failing to obtain a licence from Rural to use its white pages listings, Feist appropriated Rural’s white pages listing information.
- 2.5 Although Rural had initial success in contesting the case, based on the “sweat of the brow” doctrine, the US Supreme Court found in favour of Feist. The US

¹ This case is outside of the Commonwealth jurisdiction, therefore, this reference is only cited for comparison.

Supreme Court's findings indicated that listings were facts and hence, not copyrightable. According to the US Supreme Court:

"Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but copyright is limited to the particular selection or arrangement".²

2.6 In the Canadian case of *Tele-direct (Publications) Inc. v. American Business Information, Inc. (C.A.)*, in relation to Tele-direct's appeal against the trial judge's decision that copyright did not exist in the compilation of information contained in its Yellow Pages directories, the Federal Court of Appeal found, inter alia that:

- (a) Copyrights can exist in compilations only if there is sufficient originality in their organization and presentation.
- (b) Copyrights cannot exist in facts.

2.7 The *Copyright Act* defines a literary work as:

"... any work other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

- (a) a written table or compilation;
- (b) a computer program,

and for the purpose of paragraph (a) of this definition, compilation means a collection of works, data or other material, whether in machine-readable form or any other form, which constitutes an intellectual creation by reason of selection or arrangement of the works, data or other material comprised in it."

Based on this definition, any claim of copyright in a literary work (in this case, a database) must demonstrate that the work constitutes an intellectual creation by reason of selection or arrangement. Thus, a database is not copyrightable per se, it is copyrightable only if the facts contained in it were selected or arranged in a manner that makes the end product (the work) an original work. Section 6(1)(a) of the *Copyright Act* states that:

"Copyright is a property right which, ... may subsist in the following categories of work-

- (a) original literary, dramatic, musical or artistic works...."

Therefore, this section requires that only original literary works may be granted protection. To date, it has not been demonstrated by C&WJ that its DQ database or its white or blue pages constitute intellectual creations or original works.

² See Bugar, Rowe Intellectual Property Law Newsletter at <http://www.burgarowe.com/intelaw.htm>. Last updated December 13, 2001.

- 2.8 In relation to the matter of selection, as in the abovementioned US Supreme Court case, C&WJ did not truly select to provide subscriber access to its directory listings through its Directory Assistance service. In fact, C&WJ is obligated by statute to supply such access (see Section 48(1) of the Act). Further, there is nothing creative in arranging the listings in an alphabetical order. The raw data consisting of directory listings used in the white pages, the yellow pages, blue pages (whether in printed or machine-readable form) and in the DQ database are not copyrightable.
- 2.9 Incumbent telecommunications operators often use claims of copyright in directory listings to erect artificial entry barriers in order to limit competition. These claims of copyright are often associated with outright refusal to grant third party access to this information or claims that access tariffs are likely to be exceedingly high, making entry uneconomical.

Determination 1.0

Refusal to grant service providers access to directory listings (whether printed or in machine-readable form) at reasonable tariffs will be viewed as an attempt to limit competition.

Determination 1.1

Tariffs for access to directory listings shall be—

- (i) **non-discriminatory;**
- (ii) **reasonable and transparent; and**
- (iii) **cost oriented.**

Determination 1.2

The terms and conditions of access to directory listings shall be non-discriminatory, reasonable and transparent.

CONSUMER PRIVACY

- 2.10 Section 47 of the Act states that:

“Every carrier and service provider shall, ... regard and deal with as secret and confidential, all information regarding the type, location, use, destination, quantity and technical configuration of services used by their customers.”

Throughout the Consultative process C&WJ asserted that privacy considerations would limit third party access to subscribers' directory listing information. In relation to subscribers that have opted to have their directory listing information in the white pages and in machine-readable forms, the aforementioned section of the Act would not limit the use of this information for the provision of directory assistance/enquiry services by other service providers. This is so since listed

subscribers are deemed to have authorized the use of their listing information for that purpose.

2.11 According to section 48(1) of the Act:

“Every service provider shall take such steps as are necessary to ensure that, in relation to its retail public voice services—

(a) each customer of that service can reasonably and reliably reach—

...
(ii)... a directory assistance service....”

2.12 If the Act did not allow for the supply of directory listings to other service providers who intend to use this information for the sole purpose of providing directory assistance/enquiry services in the context of a competitive telecommunications market, it would not be possible to create a comprehensive DQ database of fixed line listings and other telecommunications listings. It could be argued that, for example, a fixed line voice service provider with less than 5,000 listed subscribers in its DQ database could offer a DQ service using these listings and satisfy its obligation to provide the same service under section 48 of the Act. However, if this were the case, the search cost to locate a listed customer in a competitive fixed line market would be onerous. Hence, it is reasonable to assume that the intent of the Act was to facilitate access to a comprehensive DQ database. Additionally, the Act does not mandate that DQ service should only be supplied through an interconnect arrangement. If it did, this would undermine the spirit of the Act to create competitive telecommunications markets. Therefore, it is not considered that other access possibilities are legally excluded.

2.13 Finally, Section 47 of the Act could not apply to directory listings published by C&WJ in its white, blue and yellow pages in the telephone book and also made available on the Internet and through its directory assistance service.

Determination 1.3

Where customers’ consent was given for the publication of directory listing information, the supply of this information to third party public voice service providers for the purpose of providing directory assistance services is not governed by section 47 of the Act. The Office is however of the view that reverse searching, i.e., going from number to name and address, is not normally contemplated by customers and therefore, would require their specific permission.

2.14 In relation to ex-directory subscribers or subscribers who expressly decline to be listed in the telephone book, DQ database or other databases, Section 47 of the Act does limit the publication of, or the provision of access to this information.

CHAPTER 3: ACCESS REGIME

- 3.0 In its response to the first consultative document on the liberalization of directory information markets, C&WJ stated that:

“Under its current RIO CWJ already offers the following directory information services to other operators to enable their subscribers to:

- Access CWJ’s national DQ service;
- Access CWJ’s international DQ service;
- ... have [access to] a Directory Number Inclusion and Publication Service....”

C&WJ also indicated that its interconnect service includes a branding feature that allows service takers to customize the greeting heard by their subscribers when accessing C&WJ’s DQ service. All customers would use the same access code (114). According to C&WJ, its DQ service is offered to all service providers on a non-discriminatory basis.

- 3.1 In its submission to the Directory Information Forum in May 2002, Digicel indicated that:

[It] “... is disappointed at the apparent lack of interest in the liberalization of the directory information exhibited by the market in general. Our proposals to date are based on the assumption that a number of players would share the cost of a third-party National Directory Database (NDD). This model would have the benefit of providing an independent DQ service that avoids the problems associated with allowing one operator to control the provision of that service.

We acknowledge C&WJ’s point that this low level of interest may increase the costs associated with establishing an independent NDD to the point where it becomes uneconomic. In the absence of a viable third party NDD it would appear that the only alternative is for C&WJ to provide a DQ interconnect service. However, we remain very seriously concerned that such an interconnect service falls well short of constituting a liberalized DQ market. Digicel believes that a number of key principles need to be established in order to support a liberalized DQ market and we therefore propose to accept C&WJ’s proposal subject to certain modifications.”

- 3.2 The following are some of the concerns expressed by Digicel that are relevant to the provision of DQ interconnect service.

- (a) “C&WJ’s DQ interconnect service must be provided on a cost-oriented and non-discriminatory basis.
- (b) Because ... C&WJ’s DQ interconnect service is to be provided on a continued monopoly basis it must be subject to increased regulatory scrutiny. Service takers must be in a position to analyze detailed cost information in order to be satisfied that the tariffs charged for DQ

interconnect services are reasonable, efficient and best practice. To achieve this level of transparency full accounting separation must be established so that ... C&WJ's DQ operation can be viewed as a standalone entity and detailed cost information made available to service takers.

- (c) Additionally, "Chinese Walls" should be created between ... C&WJ['s] DQ operation and the rest of C&WJ, particularly the sales department. This would prevent Digicel's customer information being [made] available to other departments within C&WJ....
- (d) C&WJ's DQ Interconnect Service must be sufficiently unbundled so as to ensure that service takers only pay for the services they require....
- (e) New short codes must be available to service takers in order to allow branding of the DQ service and the possible transfer to a DQ service provider other than C&WJ."

3.3 Both Centennial and Digicel have accepted the DQ interconnect service offered by C&WJ for the time being. Based on the current lack of interest in the provision of competitive DQ services by voice service providers, the Office considers it imprudent to promote a more liberalized environment at this time. Therefore, the DQ interconnect service offered by C&WJ will constitute the method by which DQ service is to be offered. Carriers would be free to provide their DQ information to C&WJ in order to create a comprehensive database or use this information in conjunction with other directory listings to provide their own DQ service.

Determination 1.4

The DQ interconnection service offered by Cable and Wireless shall constitute the method by which DQ service is to be provided unless a carrier opts to provide its own service. This matter may be re-examined after the end of an eighteen-month period that commences with the issuing of this Determination Notice.

Determination 1.5

Determination 1.4 does not foreclose entry into the market for DQ service or any other market.

Determination 1.6

Cable and Wireless is required to accept, publish and add to the DQ database, directory listing information supplied by other service providers.

DOMINANCE, SEPARATION OF ACCOUNTS AND COSTING METHODOLOGY

- 3.4 Most of the issues raised by Digicel (noted in paragraph 3.2) are based on the assumption of C&WJ's Dominance in the provision of specified services. In order that the Office can assess the RIO from C&WJ or any dominant carrier, each carrier should keep separate accounts as prescribed by the Office.
- 3.5 To facilitate transparency and ensure non-discriminatory provision of services to C&WJ's retail businesses and those of other service providers, and also to promote competition among carriers and service providers, appropriate rules for accounting separation will be implemented by the Office. However, a balance will be struck to ensure that confidential commercial information is not disclosed to competitors and potential competitors. The level of separation and the appropriate costing methodology will be determined by the outcome of the consultative process on accounting separation. Notwithstanding this, C&WJ must use an identical cost oriented tariff when calculating internal tariffs for access to directory listings as it uses for other service takers.

Determination 1.7

C&WJ must use an identical cost oriented tariff when calculating internal tariffs for access to directory listings as it uses for other service takers.

NEW SHORT CODES FOR BRANDED DQ SERVICE

- 3.6 Digicel has requested that new short codes should be allocated to service takers to allow branding of a service provider's DQ service. However, the OUR has an obligation to promote the efficient use of numbers (including access codes) and is of the view that this allocation would not be efficient. The OUR will consider allocating new access codes in cases where a competitive DQ service provider offers its customers (at a minimum), access to a comprehensive DQ database through its own operator service or call centre.

Determination 1.8

The Office will not allocate new access codes to facilitate branding of a service provider's DQ service, where that service is supplied by reselling an interconnect DQ service.