Nominet DRS Consultation Response

Introduction:

Firstly may I say how disappointed I am to see that this consultation has not been actively promoted to those most important to Nominet's existence, i.e. the .uk registrants.

At the recent Nominet consultation event in London Emily Taylor opened proceedings by saying that Nominet really believes that the DRS should concern everybody who is into domain names in whatever respect, including registrants (and others) and it is these opinions that they need to hear and would like to hear in this consultation – However, when questioned why an email had not been sent to all registrants informing them of this consultation a plethora of excuses came back to why not to let registrants know of a consultation that will ultimately affect their contract with Nominet. It was interesting that these same excuses were not used when I was told that registrants will be notified by email when the contract changes, even though the same environmental conditions apply.

Conclusion: Nominet talk the talk, but don't walk the walk and do the minimum they are legally obliged to do so. If Nominet truly wanted open participation of the most important group of people to Nominet, i.e. the registrants, they would have emailed every registrant to invite them to participate in the consultation. Emily's opening address at the event on the 6th February 2007 is in direct contradiction to Nominet's actions on this issue.

A recording of the event can be found here:

http://www.yourfilehost.com/media.php?cat=audio&file=nominet_drs_consultation_06_02_07.mp3

It was also noted by one panel member that the majority of attendees at the event seemed to be Lawyers – I guess they network quite well. It's a shame that Nominet didn't try to even out the balance and make any real effort to include its registrants as a whole to participate in the DRS debate – but maybe we are seeing Nominet's true colours and bias here.

Detailed Response:

Question 1: Please give us feedback on our proposals that the DRS should include:

(a) protection for words which have a distinctive character as a result of the use made of them.
(b) dictionary words which are protected by registered trade marks or good will.

Answer 1.

They should not include either suggestion (a) or (b)

It needs to be made clear that a party obtaining a Trademark in a word does not provide them with a monopoly in the use of the word as a domain name. Trade Marks in such words are granted with care and only to cover limited classes, therefore protection for complainants should only extend as far as Trade Mark law allows – i.e. the threshold for the DRS should be made higher, especially given the limited nature of the Nominet DRS.

Question 2: Please give us your feedback on our proposal that the DRS should include the following as examples of things that are not necessarily evidence of abuse:
a general offer to resell a domain name
sale of traffic (i.e. visitors to the domain name)
registering many domains

Answer 2.

They in themselves are not abusive activities – whereas Trademark infringement and passing off are – the distinction needs to be made!

Question 3: Please give us feedback on our proposal that the DRS should include a statement that, where the evidence is finely balanced, the weaker the rights that the complainant has, the less likely it is that abusive registration or use will be inferred.

Answer 3.

Where the evidence is "finely balanced" the Policy should direct the Expert to reject the Complaint. The place for finely balanced disputes and arguments is the Court system – not a paper based system limited to 2,000 words (for the Respondent) where a pleading has to be presented within 15 working days.

Fees

Question 4: Please tell us which payment option you would prefer and why: no change; a small upfront fee; or loser pays?

Answer 4

None of the suggestions.

There should be a £250 'upfront' fee for initiating a complaint, or whatever covers Nominets costs for providing the mediation stage and the administration costs of the DRS. It is unfair that a complainant gets what is in effect 'a free ride', without providing any useful contribution to Nominet.

Question 5: How would you enforce any system of refund (outlined in option 3)? Which section of the community would you imagine would most benefit from a refund system?

Answer 5

It is clear that in most cases the complainant would be the most likely benefactor from such a system.

The idea of introducing 'looser pays' will only put further undue pressure on individual Registrants and is unacceptable.

From a consumer point of view I feel that his proposal will be most likely unenforceable, if not illegal.

Question 6: Do you have any comments about the proposals to change aspects of the procedure, payment, drafting, appeals, expert decisions, abusive registrations or miscellaneous issues?

Answer 6

Procedure

Reply stage – get rid of it. It gives the Complainant twice the opportunity to make their case compared to the Registrant.
Format of Documents – show greater flexibility. For example, if a signature or statement of truth is missing – give the party the chance to remedy it. Improve/replace the terrible software that currently turns submissions into a single unformatted paragraph; miscounts the total number of words and so wrongly rejects submissions; does not allow electronic annexes (which in any event need limiting); etc.. get a system in place that has a professional look and feel and does the job properly. It is remarkable that the .uk registry requires hard copy (in triplicate!) submissions - rather than allowing electronic submissions, which would at least save a few trees!

Payment

Respondent able to pay for a decision – yes. Better still, make the Complainant pay upfront and if they want to walk away, give the Respondent the right to use the fee for a decision. You need to cut down speculative claims.

Drafting
No – unfair registration is no more clear than abusive registration. Rather I would prefer to see you revert to "bad faith" – which was removed under pressure from the IP rights community in the 2001 drafting phase. It works well enough in the UDRP and the bar needs to be raised – no lowered.

Appeals
Time table for Appeals is OK – although if anything quite tight to make an informed decision.
I appreciate the argument for encouraging well crafted initial submissions. However the bounce.co.uk case – where my firm represented the Appellant – showed up what I would call an unfortunate lack of flexibility on the part of the Appeal Panel. I think if there is any doubt, the Policy should steer the Experts to accepting new evidence – but this should not be seen as an alternative to making proper initial submissions.

Expert decisions
Clarify how experts review evidence, how they weight evidence, and how to deal with issues raised by the experts performing their own research.
Experts should stick to the grounds included in the Complaint – in fact Procedure 3(c)(v) actually requires this. Experts seem to forget it – but only when correcting mistakes in Complaints. I have yet to see an Expert improve on a Response where the Complainant is a large corporate – but there are plenty of examples where the opposite is true.
Clarify how decisions can be corrected or amended - for example, to correct typographical errors.
Typos should be checked for prior to publication.
Errors by the Expert – such those found in finecheeses.co.uk where the Registrant did not have sufficient financial interest to pay £3,000 + VAT to Appeal – should be subject to a review panel of appropriate professionals who are not Experts – and who should have the power (at Nominet's request) of overturning a flawed decision or requiring a re-hearing.
Incorporate tests set out in previous decisions that experts routinely rely or are likely to rely on (because they were in appeal decisions) so the information is in one place.
Agreed.

Abusive registrations
Include a likelihood of confusion as evidence of an abusive registration i.e. soften the test at 3(a)(ii) ('has confused').
No – this should be a simple fact based service. Proof of intention to confuse should be added – but the need for actual confusion should remain and Experts instructed to stick to it. If a party wants to argue a legal concept like "likelihood of confusion" – which means likelihood of deception anyway – they should go to Court.
State that the abusive use does not have to be ongoing for the purposes of Policy 3(a)(iii) - it is enough that abusive use has occurred in the past.
No. Registrants who are not engaged in any ongoing abusive behaviour or who have remedied behaviour complained about, should not be subject to further complaint – otherwise there is no incentive to desist from the behaviour complained of.

Clarify that a long delay in bringing a DRS case, where there is no adequate explanation, is likely to damage a complainant's chance of success.
A strict time limit of say 2 years from either registration or abusive use starting – similar to the NZ and Chinese models. If someone wants to complain after this time limit has passed – they can still go to court. Prompt use of the service should be encouraged to the point of making it mandatory.
Clarify when rights have to exist to complain and to prove abuse.
The existence of the provision to protect non-UK enforceable rights is perverse for a .uk registry. One could not go to Court in this country to enforce rights that do not exist here – so why should the DRS be any different. Limit it to UK enforceable (registered and unregistered) trade mark and contractual rights.

Miscellaneous
Include anti-avoidance provisions for the 'three strikes' rule (Policy 3(c)).
Don't understand this to be a problem.
Change the provisions dealing with communication and service of documents to take into account the new and potential extra online services.
Get rid of the paper based system that you now use – electronic only submissions should be used.
Give both parties legal rights against each other if they make untrue statements in submissions.
If the suggestion is to make "statements of truth" the equivalent of Court documents or evidence, then if there is a untruth then this may be used (where appropriate) by the other party. However I would be cautious of creating a form of perjury in the DRS.

Question 7: Do you have any other changes you would like to see within the DRS, or topics within the DRS that you wish to comment on? In particular, if you have any views about any of the following topics which have been the subject of discussion, please let us know:

Answer 7:

Length of submissions and word limits.
2,000 words is tight – maybe one shot each but 5,000 words like UDRP. Excessive annexes are also an increasingly common feature in pleadings from big corporate and need to be dealt with.
Whether experts can find a registration abusive for reasons not spelled out in the complaint.
This is currently prohibited under Procedure 3(c)(v). It should be made crystal clear that Experts can not do this. If they do so, they act as prosecutor, judge and jury – without giving the parties a chance to comment or make submissions on their findings. This is most commonly done when a Complaint has failed – e.g. bounce.co.uk Appeal where the grounds pleaded failed – and is a breach of natural justice. A Respondent should only

have to deal with the pleading in front of them – not second guess what a remote arbiter decides to add to it.
Whether there have been any practical problems with the treatment of 'Without Prejudice' material.
There is nothing wrong with the proper application of the "without prejudice" rule and the exclusion of it (to prevent material that would not in any event be covered by the properly applied rule) is very unhelpful if a party makes an approach to buy a domain and then everyone is very nervous of engaging in proper w/o prejudice negotiation. Remove the reference to it or make it clear that the "proper" without prejudice rule will be applied.
Whether experts should be able to represent parties in other disputes, and if not how to keep the quality of experts high.
Yes – although I have some reservations when the panel is dominated by representatives of "city" law firms whose client base is typically made up of IP rights holders. Spread the net a bit wider – or do what they have done in NZ and appoint a smaller panel of very high quality adjudicators such as retired high court judges and QCs.
Whether the detail of the DRS can be taken out of the contract and updated more regularly.
Maybe – but I would invite Nominet to consult all registrants directly when conducting any future consultations. It is their terms and conditions that are being altered after all.

Other Issues

Why does Nominet (pay) to run an ADR system in-house – when WIPO/NAF run UDRP and variants for a large number of country code domains. I think it takes Nominet too close to the fire – see the bounce case as an obvious example. What is more it costs money to keep lawyers like Ed and other staff just to run a DRS – which is certainly not demonstrably better than using a variant of UDRP.

ADR systems were introduced to deal with the problem of classic "cybersquatters". Such examples – and typosquatters – still show up on the complaints lists. However far more common now are much more "shades of grey" cases – which such rough and ready paper based systems are ill equipped to deal with. Arbiters/Experts look at some papers, bring their own institutional bias to bear, and make a snap decision on something that may not be as clear cut as it first seems. Errors happen in all systems, they are more likely to happen in this type of system than in more rigorous ones. This is especially so when - as the Respondent in the Pringles.co.uk case said - there exists a system that is the equivalent of the police sitting on the jury and the bench in criminal cases. That is what exists with the make up of the DRS Expert panel.

The Panel reviewing the decisions is a good start to sorting out some of the problems– but it needs to be made up of non-Experts who are equipped to review the cases with rigour and without favour. I would nominate someone like www.IPKat.com author Jeremy Phillips as a possible chair. Such a committee is also pointless unless it can either overturn decisions where they feel there has been a palpable error (of either procedure or policy); and where they can either criticise, reprimand and if necessary remove an Expert

from the Panel. This would reduce the chances of a bounce type case going to Court. They should also act as an appointments panel.

Alternative – not Additional Dispute Resolution. ADR is meant to stand for Alternative Dispute Resolution – but in the DRS it means Additional Dispute Resolution. If a complaint is brought – at the very least the result should give rise to certainty. However cases such as xenical.co.uk and game.co.uk show that the DRS can be used by those with deep pockets as a "free swing of the bat" and if they lose they just run off to Court. DRS is not a right for a Complainant, so if they want to use they should (as with other arbitration systems) relinquish the vast majority of their rights to bring an action in Court on the same facts. One or the other – it is meant to be a cheaper alternative to litigation – not an additional burden on the party who wins and then finds himself in the High Court anyway. The parties must choose their forum and then accept the result. Nominet should admit that the DRS is paper-based arbitration.

Limit Lists in Policy Paragraphs 3 and 4 – In particular paragraph 3 is stretched by Experts – it's "non-exhaustive" after all. So where the policy talks of people having been confused – Experts routinely stretch this to their perceived likelihood of confusion. Give users certainty – if they can prove something on the list they are in – if they can not they go to Court and use that system. Likewise, if a Registrant can prove something in Paragraph 4 – then they have a valid defence. End of story. If it's tricky it should be in Court.

Time Limit and Service – Given the increasing complexity of many Complaints – 15 working days is not long enough – especially given that (unlike a court action) there is no going back to amend etc.. UDRP and EUrid allow longer – and also show more common sense where providing for service times globally, using couriers to ensure actual service. The Complaint can be drafted at leisure, the Response has 3 working weeks – which may also involve time lost instructing lawyers etc. from a standing start.

Appeal Costs – Something akin to the means test that is applied by the Courts is needed to deal with situations where a party can not afford £3,000 – but has a reasonable case. It's currently more expensive to represent yourself in the Nominet DRS than it is to pay to Appeal in the High Court – and for parties of limited means that is a significant barrier to justice.

There is a lack of QUALITY CONTROL within the Nominet DRS – This requires proper tests and boundaries to be set – Everyone would know where they stood then – Even Nominet, Experts and Complainants!

I say this as it seems to me that the one entity in all of this that is given very little regard is the Registrant (the recent Nominet Consultation Event highlights this). This is particularly odd, seeing as these are the people who are Nominet's customers and

ultimately is the reason Nominet exists at all. I would like to see in the contract with the Registrant a clear commitment to a predefined Quality Of Service!

Remove the horrendous amount of ambiguity and layers from the contract (including those which seem to be adopted but are not explicitly included), i.e. those aspects of particular Expert decisions that are seen to be useful to adopt should be integrated into the contract. The contract should be 'Crystal Clear', so as a reasonable person can understand it, i.e. the rules are clear for the Registrant, any Complainant and the Experts!

Review the DRS and to that matter the Contract on a regular and formal basis. This should be done 'at the very least' on a yearly basis, with a 6 monthly 'fast track' check for any deemed necessary updates. Based on my suggestions, this could remove the need to reference previous expert decisions, as the contract would now be dynamic, clear, with proper quality control procedures, including the necessary tests and boundaries being set.

A no brainer coming: Experts must NOT be able to alter there decisions! If when queried upon there are clear errors in a decision (i.e. it doesn't make sense, or the expert hasn't followed the rules), then the option to annul the decision and have it looked at again (at Nominet's cost) by another expert must exist! You could even have a system that would allow the recovery of the Expert fees (or a proportion thereof), if they were found to be lets say 'less than judicious' in there actions.

Another accountability issue: I see no excuse for negligence, in particularly the attempt in the Nominet Contract to relieve both itself and the Expert from it. I understand that Nominet feels somewhat 'piggy in the middle', but it needs to understand that its primary responsibilities is to its Registrants. To that end, as I've said before "keep it clear, keep it simple, keep it straightforward". Removing the ambiguity from the system will help everyone!

Finally, what this Consultations tells me is that a second round of reviewing should now be started – with much wider and more fundamental questions asked – starting with "Should Nominet run the DRS?". Don't rush through this review and limit the changes to the restricted areas that people have been guided to. Open up a proper and complete debate. The scale of responses and interest demands that.

To Sum Up Nominet and its DRS Needs:

Clear Rules – Clear Boundaries – Clear Customer Commitment – Effective Quality Control and FULL Accountability of BOTH the 'Experts' and Nominet!!!

Simon Bezant.

Registrant/Domainer/Web Developer and Concerned Member of the Public