

Using the Dispute Resolution Service for .uk domain names online survey

Submit date : Feb 16, 2007

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.

I agree that the DRS should apply to words that have become distinctive of a particular person or entity as a result of their use of them. Arguably, such words are already covered since they are not "wholly descriptive" of the complainant's business, but it may be worth clarifying this. I am not convinced that type (b) words need to be expressly dealt with, since there is nothing to say currently that dictionary words cannot be protected as words in which a complainant can have "rights".

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

These are all logically correct, but I am not convinced of the need to spell out lots of things that might or might not be evidence of an abusive registration. For example, someone who registers many domains that all happen to include well-known brand names SHOULD have that fact held against him, in my view; whereas someone who registers lots of generic names as domain names clearly should not.

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.

Again, that makes logical sense and is probably worth spelling it out. Arguably it will make it easier for experts to find in favour of respondents in circumstances where the 'evidence' of abuse is minimal and the name or word concerned is very descriptive.

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

I am in favour of option 1 - no change. As an expert and a barrister, I have a clear conflict in the case of option 2: I already spend significantly more time on most decisions than I would have to spend to earn the same fee from client work, and reducing the fee further would risk Nominet losing some very good experts and/or would cause remaining experts to rush the job.

I also can't see that 50-100 pounds would necessarily improve the quality of complaints. Option 3 strikes me as being hard to police and would involve Nominet in chasing non-payers after the event, which would be particularly pointless in the case of the losing respondents who do not even participate in the process.

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?

The community that is likely to benefit most is the group of brand owners whose trade marks are most frequently ripped off by cybersquatters. But they are likely to be the complainants with the most funds; and the cybersquatters are likely to be those who will go underground as soon as they are pursued. That is why I don't really see the point.

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?

Reply stage: I would not remove or alter the Reply stage. This is absolutely standard in systems of dispute - both mainstream court litigation and in arbitration and other forms of alternative dispute resolution. The reason it makes sense is that, it is only after the respondent has stated his case that the complainant will know what the 'defence' arguments are. Also, if the complainant really does throw in something totally new, which should have been dealt with at the outset, it is always open to the respondent to try to make a non-standard submission and explain why it is fair to accept it (though I would not generally encourage that).

Drafting: I would be inclined not to introduce a new set of defined terms. For every change that is made to clarify an ambiguity, there will be a new ambiguity introduced, unless the current wording creates obvious difficulties. I prefer 'abusive' to 'unfair' registration, since it highlights the fact that domain names will only be taken away from registrants if their behaviour is sufficiently blatantly wrong as against the complainant, and not just a bit unfair.

Appeals: How do you decide whether new evidence is 'necessary' to deal with the appeal without actually dealing with it? That doesn't make sense. If what you mean is that the new evidence will change the result, then obviously it was necessary for a fair result, but I am not sure if that is what you mean. New evidence should only be allowed if it really is new, i.e. was not available when the complaint was originally brought. I agree that 'likelihood of confusion' should be included at 3a.ii. If by 'anti-avoidance' provisions you mean provisions that will stop those who use different names to make multiple abusive registrations (for example), then I agree.

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:

- Length of submissions and word limits.
- The impact of Internationalised Domain Names, if introduced.
- Whether experts can find a registration abusive for reasons not spelled out in the complaint.
- Whether there have been any practical problems with the treatment of 'Without Prejudice' material.
- Whether experts should be able to represent parties in other disputes, and if not how to keep the quality of experts high.
- Whether the detail of the DRS can be taken out of the contract and updated more regularly.

I am unhappy with the current without prejudice rule, and I disagreed with the appeal decision that I believe led to that rule. I do not believe that it is appropriate for documents and information that are genuinely without prejudice to be relied on in Nominet disputes.

These cases may subsequently go to court, and it seems to me that such without prejudice material will have lost that status as a result of use in these proceedings. I do appreciate, however, that some documents marked 'without prejudice' are not properly marked as such, and I understand the difficulty for non-lawyer experts in having to deal with this.

The only reason that I have not mentioned it before is that it has never come up in any case that I have done. I believe that experts should be able to find a registration abusive for reasons not spelled out in the complaint, provided that those reasons are clear from the evidence that has been presented. But, if an expert plans to reach a decision based not only on that evidence but also on his/her own research, then I believe that the parties should be given the opportunity to comment on the fruits of that research before the decision is issued.

I do not see a problem with experts being allowed to represent parties in other disputes, as long as they stay away from parties who have been involved in disputes that they have decided (and do not decide disputes involving parties whom they have represented). Note that it is common for barristers to sit as deputy judges and to be representing parties in the same courts. Similarly, solicitors and barristers act as mediators one day and as party representatives in mediations (or in litigation) on another.

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