

## Detailed analysis of the DRS review consultation

The DRS paper agreed at the June Board meeting for discussion at the PAB provoked considerable comment.

As a result we have decided to consult further on one of the elements of the revised service: the default transfer mechanism.

At the same time, we respond to requests to give further analysis of the consultation results, and of our reasoning to leave appeal fees unchanged.

### Section 1: Consultation responses regarding a default transfer

1. Perhaps the only feasible system would be for the DRS to be updated so that the loser pays in defended cases with undefended cases being awarded to the complainant by default.
2. After the initial DRS letter has been sent, we would like to see a regulation introduced whereby a rebuttal is required rather than optional. Upon no receipt of rebuttal, it should be considered uncontested and the rights to the domain removed.
  1. Sites should be suspended if response is not received within a set period of time.
  2. Make it easier for an existing domain name owner to hand the domain name to the complainant.
  3. It should be mandatory for the respondent to respond to the claim, if there is no reply the domain name is transferred.
  4. There should be a method (akin to default judgment) for a quicker, cheaper resolution to disputes where the respondent submits no evidence or does not otherwise take part in the DRS. Currently a respondent can sit back and make the complainant go through the motions of mediation and decision and incur the full expert's fee.
  5. Respondent should pay a small fee to defend a complaint. If no response/ defence fee is paid the complaint would automatically be found for the complainant. This would spare small businesses the full £750+VAT presently required to pursue abusive registrations by domainers who typically make no effort to respond or to take part in mediation, simply to delay the final decision and to make the complainant pay the full cost.
  6. The option of making a modest up front charge of £x to complainants seems to be widely favoured, in the interests of improving complaint quality. It would seem fair to complainants to offer something in return for this. In case of no response the complainant could have a new option of requesting a no response rights only decision for a lower fee. If the complainant chose this option then Nominet would notify the registrant accordingly, making additional efforts to ensure that the registrant received the notification, including where possible phoning the registrant.
  7. Where a respondent does not reply and there is evidence that correspondence has been received, the domain name contested should be made publicly available without the need for further use of the DRS.
  8. The lack of reply from the current domain holder should not need to trigger an expert decision.

9. As the system presently operates, cyber squatters can register abusive registrations in the knowledge that the legitimate owner of the domain name will either have to pay the cyber squatter an amount for the domain name or pay £750 plus VAT to Nominet to recover the domain name through the DRS.

## **Section 2: Appeal fees and detailed consultation responses**

### **1. Introduction**

We have been asked to provide a more detailed analysis of the consultation responses, and of the reasoning behind our decision to make no change to appeal fees.

This paper responds to these requests.

### **2. Consultation responses**

The paper which we took to the 11 July PAB meeting gave our summary and analysis of the consultation responses.

There were numerous and varied comments and suggestions made in the consultation responses. They are published in full at:

<http://www.nominet.org.uk/policy/consultations/previous/updatedrs/>

For ease of reference the responses have been summarised in Appendix A to this paper. Note that we have tried to capture the spirit, intent and diversity of the comments made and some comments are paraphrased instead of copied out verbatim. We have also tried not to repeat multiple suggestions but to show the full range of responses.

### **3. Appeal fees**

In the consultation responses, a number of people suggested that where an appeal overturns the initial decision, then the appeal fees should be refunded by Nominet or by the party losing the appeal. It has been suggested that although an expert decision is not Nominet's as such, Nominet should take responsibility for "wrong" decisions and refund the appeal fees of £3,000 plus VAT.

Many other suggestions were made in relation to fees and it is clearly an area in which opinions are strongly held and sharply divided.

We considered "loser pays" and variations of that theme. The principle is logical and would follow the approach of most UK courts. However, a number of those who responded to our consultation felt a "loser pays" system was not appropriate in the context of the DRS. Quite apart from the obvious difficulties of enforcement, we feel that the DRS should be concerned solely with the registration of domain names. Claims for damages, costs and expenses should be left to the courts. The same arguments apply to appeal fees and ordinary decision fees.

We considered whether the appeal stage should be abolished. However, aside from the costs issue there did not seem to be any appetite for this approach.

Having carefully evaluated the alternatives, our decision is to make no change, for the following reasons:

- An appeal of a DRS decision is generally a re-examination of the submissions and evidence originally filed. However further submissions may be admitted, which

may result in a successful appeal. A reversal of the original expert's decision does not therefore mean that the first expert was wrong or made a mistake. A different set of experts may simply disagree with the decision or weigh evidence differently. The cases going to appeal tend to be closely fought and complex, and the appeal panel decisions are not always unanimous.

- It has been suggested that Nominet itself should reimburse the appeal fees to the winning party, for example if it is felt that the original expert's decision was incorrect or flawed in some way. However, a reversal of the original expert's decision does not mean that the first expert was wrong or made a mistake. A different set of experts may simply disagree with the decision or weigh evidence differently. The cases going to appeal tend to be closely fought and complex, and the appeal panel decisions are not always unanimous.
- To address concerns which were expressed over the consistency and quality of a small minority of expert decisions, we have decided to enhance the role of the expert review group stage as described in the July PAB paper.

In conclusion, we have carefully evaluated the consultation responses, which are grouped thematically in the Appendix to this paper. We note that a number of people who responded would like Nominet to pay appeal fees to the parties in certain situations. Having reviewed the options, we believe that, with some improvements detailed in this paper, the current system works well and that the changes called for could introduce anomalies without sufficient compensating benefits.

## APPENDIX A

### Summary of Suggestions from DRS Consultation

#### a. Protection for words which have a distinctive character and dictionary words

1. Didn't realise that these were not clearly covered already, they should be.
2. Agreed.
3. I support the suggestion that the DRS should accept rights for words with a distinctive character as a result of the way they are used, and dictionary words protected by a registered trademark or good will.
4. These are already adequately protected.
5. Sounds fair.
6. Protection for words which have a distinctive character should only be done where the company or organisation has traded for maybe 10 or more years. Dictionary words should have no protection.
7. Any words that are protected by registered trademarks should automatically be transferred to the trademark holder in case of dispute.
8. The DRS already provides protection for words in respect of which a complainant can show rights. As a matter of trade mark law, rights exist in words which have a distinctive character as a result of the use made of them in relation to the goods and services for which they are used, and dictionary words which are protected by registered trade marks or goodwill. Consequently , it is a matter of fact that the DRS already does provide protection for such words.
9. I believe that Nominet should recognise trademarks for descriptive terms e.g. British Gas. I do not believe single dictionary words should be protected in any way. Decisions like game.co.uk and bounce.co.uk should be avoided at all costs if the DRS is to be respected and trusted by the domain name community.
10. These two suggestions will not make a great deal of practical difference to the existing requirements under the first stage of the DRS.
11. Yes they definitely should and in fact do at present as interpreted by experts.
12. I am not sure to what extent the policy need to be revised in this respect.
13. I agree with the experts view in this case: "The mere fact that a generic word happens also to be a trade mark cannot lead to the trade mark owner monopolising all uses of the word."
14. There should be no protection for either categories of words.
15. This would accord with the law and the practice of experts.
16. Such words are already covered by the DRS. Accordingly to the extent that this is said to be a proposal, it is not a proposal for change, but a proposal for clarification. I support any attempt to clarify the DRS.

17. No. Both these proposals are superfluous.
18. It needs to be made clear that a party obtaining a trade mark in a word does not provide them with a monopoly in the use of the word as a domain name. Trade marks are granted with care and only to cover limited classes.

**b. Examples of things that are not necessarily evidence of abuse**

1. The offer to sell a domain name at a significant margin above market is “Abuse”. Registering many domain names is a clear indication of intent to abuse. Particularly when the registrant cannot give evidence of legitimate reason for the name.
2. With regard to unfair registrations, we agree that pay-per-click advertising doesn’t necessarily imply an abusive registration.
3. Having a large portfolio of domain names should have no bearing over an abusive registration claim.
4. The sale of traffic almost always [is abuse] in my experience, trying to gain from people coming to the site who are expecting to get something else (probably the complainant’s site!)
5. I totally agree. Sales offers, sale of traffic or registration of multiple domain should not constitute abuse.
6. Generally, I do not see why “domainers” require additional safeguards unless they are prepared to voluntarily agree to hand over names they know have been abusively registered. Sales of domain names and traffic, multi registrations etc almost always have an abusive registration.
7. I am not convinced of a general need to “protect” the secondary market, but it may need to be clarified that the secondary market does not in itself constitute “abuse”.
8. There should be no loophole created to allow PPC traffic to be used to earn income from abuse of a name which would in any other circumstances be considered abusive.
9. No issue with registering many domains as long as the owner personally uses them and they do not have a for-sale sign placed on them in order for the owner to make unfair profit on names “real estate”.
10. I agree. None of these is necessarily evidence of abuse.
11. It is particularly the habit of registering domain names speculatively that is a problem. The registration of a name – purely to sell on – because they got there first – should be stopped.
12. A general offer to resell domain names should never be classed as abuse. Traffic to a domain should never be for sale and reselling or introducing visitors for a fee should be classed as serious abuse. Registering of many domains should be allowed.
13. I think the word “necessarily” is the key here.

14. I agree with your proposal completely. Reselling is (usually) a legitimate business.
15. I believe that registration of many domains and offer to resell such are generally an abuse.
16. It is possible that a general offer to resell and sale of traffic or registration of many domains by themselves may not amount to proof of abusive registration, but experience suggests that these do very frequently demonstrate a deliberate in intention by some so called domainers to profit by unfair exploitation of the goodwill, rights and reputation established by genuine businesses.
17. No as drafted I think it gives the wrong impression that doing these things in relation to any names will be ok.
18. I would like this proposal to be implemented however I don't want the term "domainers" to be used..
19. There should be a regime in place similar to UK trademark law that the domain must be used or that there must be a bona fide intention to use. It is not acceptable that people should be sitting on hundreds or unused domain names which they hold merely for the purposes of trafficking.
20. This is simply a proposal for clarification. Even now none of these situations is of itself a basis for finding abusive registration under the DRS policy. There is nothing inherently objectionable in trading in domain names for profit, in linking domain names to parking pages with a view to deriving pay per click revenue or in holding large portfolios of domain names. All depends on the motives of the registrant at the time of registration and/ or at time of use.
21. I feel that this is something that could be introduced within DRS guidance notes rather than within the policy itself.

**c. 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**

1. I completely agree with this statement.
2. I was not attracted to incorporating explanations as to how experts weigh evidence – this could greatly complicate the process.
3. Agreed in principle, but my experience of the “experts” is that they are protecting the rights of the registrant – and “finely balanced” therefore becomes very subjective.
4. Good idea.
5. No. It should be done on the balance of probabilities.
6. Not sure.
7. Seems entirely logical.
8. I'm not entirely certain as to what this means.
9. This effectively gives the squatter greater rights than the complainant.

10. I disagree. If the evidence is finely balanced then there should be no case.
11. I think this is unhelpful. A weak case is self evident.
12. The implementation of this proposal would confuse the DRS procedure and muddle up the two limbs of the policy.
13. The question is unclear.
14. This is obviously the case.
15. I disagree. The rights may be weak but the abuse blatant.
16. I believe this proposal could have been used in the DRS cases finecheeses.co.uk and sussexskips.co.uk.
17. The weaker the complainant's rights the more difficult it will be for the complainant to establish abuse; this is common sense and reflects the law. If the evidence is so finely balanced that the expert is uncertain which way to go, this ought ordinarily to result in the complaint failing for the burden of proof is on the complainant.
18. Where 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 the pleading has to be presented within 15 working days.

**d. Fees**

1. All fees should be paid up front.
2. Loser should pay and enforcement would be by cancellation of all domain registrations of the losing party.
3. Perhaps there needs to be some system so that registered charities, private individuals or sole traders can pay a little less and for-profit organisations pay a little more.
4. Loser pays is eminently fair but may be hard to enforce.
5. Loser pays would lead to speculative complaints of valuable domains.
6. Loser pays would be totally unfair.
7. It seems unfair that non-recoverable costs can be incurred against a party with absolutely no case, and so we are in favour of some kind of "loser pays" system.
8. Loser should pay with no involvement of Nominet, the winning party can chase via the small claims courts.
9. Loser pays will pave the way for claims for legal costs, this is a can of worms.
10. Current system works against the good guys. In our case, we already have costs and will have to pay for an expert if the other party does not respond, yet an abuser can register a domain for as little as 9p and simply ignore your letter. Both parties should pay full DRS costs up front to enforce loser pays.

10. A system of loser pays would be almost unenforceable under the present system.
11. The courts are the correct venue for monetary matters.

**b. Expense of DRS and access to justice**

1. There must be a way to make sure the rightful registrant should not pay high fees for justice.
2. The fee for a decision was high enough to put it out of my reach.
3. It is beyond the means of ordinary people or small firms to pay £750 to get back their domains from companies which cease trading but have not been wound up.
4. To force a complainant to pay £800 fees for a dispute that the respondent chooses to ignore is unfair.

**c. Default transfer**

1. Perhaps the only feasible system would be for the DRS to be updated so that the loser pays in defended cases with undefended cases being awarded to the complainant by default.
2. After the initial DRS letter has been sent, we would like to see a regulation introduced whereby a rebuttal is required rather than optional. Upon no receipt of rebuttal, it should be considered uncontested and the rights to the domain removed.
3. Sites should be suspended if response is not received within a set period of time.
4. Make it easier for an existing domain name owner to hand the domain name to the complainant.
5. It should be mandatory for the respondent to respond to the claim, if there is no reply the domain name is transferred.
6. There should be a method (akin to default judgment) for a quicker, cheaper resolution to disputes where the respondent submits no evidence or does not otherwise take part in the DRS. Currently a respondent can sit back and make the complainant go through the motions of mediation and decision and incur the full expert's fee.
7. Respondent should pay a small fee to defend a complaint. If no response/ defence fee is paid the complaint would automatically be found for the complainant. This would spare small businesses the full £750+VAT presently required to pursue abusive registrations by domainers who typically make no effort to respond or to take part in mediation, simply to delay the final decision and to make the complainant pay the full cost.
8. The option of making a modest up front charge of £x to complainants seems to be widely favoured, in the interests of improving complaint quality. It would seem fair to complainants to offer something in return for this. In case of no response the complainant could have a new option of requesting a no response rights only decision for a lower fee. If the complainant chose this option then

Nominet would notify the registrant accordingly, making additional efforts to ensure that the registrant received the notification, including where possible phoning the registrant.

9. Where a respondent does not reply and there is evidence that correspondence has been received, the domain name contested should be made publicly available without the need for further use of the DRS.
10. The lack of reply from the current domain holder should not need to trigger an expert decision.
11. As the system presently operates, cyber squatters can register abusive registrations in the knowledge that the legitimate owner of the domain name will either have to pay the cyber squatter an amount for the domain name or pay £750 plus VAT to Nominet to recover the domain name through the DRS.

**d. The DRS process**

1. Make the DRS completely separate from Nominet
2. It is essential that DRS proceedings continue to be operated by Nominet.
3. The arbitration process worked particularly well and needs to remain at the core of the process.
4. The DRS as it stands is nothing short of a disgrace [continues in similar vein for several paragraphs].
5. Protection of small businesses and organisations is essential.
6. I was very happy with both the treatment and the fairness of the Nominet service. The site is clear and straightforward and the system is very fair.
7. The Reply stage should be removed or the respondent should be allowed a second submission.
8. DRS documents should be sent registered post.
9. DRS email fields should be added to the automaton to ensure DRS emails are not caught by spam filters.
10. The time periods need to be adequate, two weeks over the summer or Christmas holidays is not enough.
11. Dictionary words should have no protection.
12. Words which are registered trademarks should automatically be transferred to the trademark holder in case of dispute.
13. The respondent should have the opportunity to pay for a decision where the complainant withdraws in order to force a conclusion e.g. in cases of suspected reverse hi-jack.
14. It should be possible to rely of likelihood of confusion test as evidence of abusive registration.

15. I do not believe that “a likelihood of confusion” should be used as evidence of an abusive registration.
16. For .org.uk domains there should be a strong presumption in favour of the local communities.
17. Remove the Reply stage, 13b seems to work just fine.
18. Nominet needs better mediators, preferably not in house.
19. Anyone who registers a domain in the .uk space must make suitable provision to respond to a DRS within the existing time limits. It is not unreasonable for registrants to have a UK address or proxy where papers may be served quickly. This is a requirement in some ccTLDs including Germany where one point of contact must be located in the German jurisdiction.
20. The 3 strikes rule should be scrapped as it is unfair.
21. Misspellings should not be considered for abusive registration.
22. Improve the online form to allow for formatting.
23. Nominet should run monthly training sessions on how to file a complaint or how to submit a complaint response.
24. Nominet should introduce “Quality Control” checks before decisions are published, all decisions should be reviewed.
25. The opportunity to provide further relevant information once one has seen an outline of the case of the other side would enhance the chances of good decisions.
26. Nominet should offer an “honest broker” system for sale of domains.
27. Require both bad faith registration and use, as the UDRP does.
28. I think UDRP word limits could be adopted by Nominet.
29. The quality of complaints is often abysmal; I would welcome an ability for the expert to reject a complaint because of its lack of quality; sometimes it is almost impossible to see what the complainant is arguing or why. I would introduce a penalty for vexatious complainants.
30. We believe respondents should be allowed 28 days to respond as standard and should be allowed additional time upon written request.
31. Please introduce a system allowing people to submit DRS cases (all material) online instead of having to submit three paper copies.
32. I support the idea that the system should include anti-avoidance provisions for the 3 strikes rule but do not know how this would work.
33. I believe the complaint should be proven beyond reasonable doubt not judged on the balance of probability.

34. If someone brings a foolish DRS against you then decides not to pay for a decision, I think the registrant should be able to pay for it to prove no abuse has happened.
35. I would like to see complainants being required to write to a respondent before they are allowed to issue a complaint.

**e. Experts**

1. There should be more rotation of experts
2. There needs to be greater consistency between decisions.
3. An expert drawing a living by acting primarily for complainants cannot be impartial and should not be called upon to make decisions. As Nominet is not a court it should not publish decisions.
4. If Nominet is to retain the DRS they should replace the experts with retired Lord Justices.
5. Experts cannot represent parties, it will compromise them legally.
6. As an expert and a representative of clients in disputes, I do not feel in a position of conflict, and it certainly improves my performance as an expert to have had experience of acting for clients.
7. We suggest some form of “entrance exam” in the form of a case study based on real DRSs for experts.

**f. Appeals**

1. Too expensive and should allow new evidence to be presented.
2. Nominet should pay for appeal fees where the first decision is reversed.
3. Appeals for decisions for no action should not require the respondent to pay any fees.
4. Nominet should refund the appeal costs where the decision under appeal is clearly wrong.
5. No new evidence should be allowed in appeals unless the facts couldn't have been known at the time of the initial submission. The appeal panel should have the power to accept or reject new submissions as they see fit.

**g. Abusive registration**

1. Its too easy to register a name unfairly, there needs to be a genuine verifiable reason for registering a name.
2. Registration of many domains is a clear indication of abuse, particularly when the registrant cannot give evidence of a legitimate reason for the name.
3. It is particularly the habit of registering domain names speculatively that is a problem.