

Proposals to amend Nominet’s Dispute Resolution Service Policy and Procedure

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1 Executive Summary

Nominet is consulting on proposed revisions to its Dispute Resolution Service.

This paper sets out background material in relation to four key issues, namely:

Tribute/Criticism sites

Without prejudice

Appeals

Web designer cases

Specific proposals are repeated at the end of each section to which they relate, with additional, more general questions at the end of the document. Your views are sought in relation to all the proposals.

In summary, we seek your views in relation to the following:

1. It is proposed that:
 - a. the DRS Policy continues to make it clear that fair use may include tribute/criticism sites; and
 - b. the proviso in paragraph 4(b) of the DRS Policy (which reverses the burden of proof) is deleted.
2. It is proposed that the DRS Policy and/or Procedure be amended to make it clear that in reaching their decisions, DRS experts will not have regard to the “without prejudice” rule of litigation, and will be entitled to take into consideration any materials or evidence contained within or annexed to the submissions.
3. It is proposed that:
 - a. The standard of appeal should be a full review by the appeal panel; it should continue to be possible for the appeal panel to review the procedure.
 - b. the DRS procedure should provide for a notice of appeal, and a response to be made. Each should be no longer than 1,000 words, and should contain no new evidence or attachments. There should be no provision for a reply.
 - c. The appeal fee should remain at its current level, and should be distributed equally between the parties.
 - d. The timetable for lodging an appeal should be amended, as follows:
 - i. 10 working days for appellant to request an appeal, and lodge a non-refundable 10% deposit (£300);
 - ii. the appellant has a further 18 working days in which to lodge full notice of appeal plus balance of fee.
 - iii. Other side has 10 working days to file a response.
 - iv. Decision to be delivered within 30 working days, with scope for a single extension of up to 10 working days.
 - e. With regard to precedent value, no change should be made to the Policy, which states that appeal decisions have “persuasive” value.
4. It is proposed that the following be added to the non-exhaustive list of factors tending to indicate an abusive registration set out in paragraph 2 of the DRS Policy:
 - a. the complainant:

- has been using the domain name registration exclusively; and
 - paid for the registration and/or renewal of the domain name registration.
- b. In addition, a respondent (web designer etc) in such cases should be able to defeat a complaint by showing that it was agreed that the domain name should be held in the name of the respondent.
5. We ask for your views on the following questions:
- a. Definition of Rights. Do you believe this is adequate for the purposes of the DRS?
 - b. Paragraph 3(a)(iii) of the DRS Policy. Do you think this is an adequate way of dealing with “pattern of abuse”? If not, how would you suggest that the Policy deal with the issue.
 - c. The introductory phrase in paragraph 4(a)(i) emulates a similar provision in paragraph 4(c) of the UDRP. Some panellists in UDRP cases have indicated that the relevant time period is any time prior to the date of filing the complaint. An alternative view is that the relevant period is prior to the time when the respondent became aware of the complainant’s cause for complaint. What do you think should be the relevant period for which the respondent should demonstrate that the factors set out in the paragraph apply?
 - d. Quality and presentation of submissions. Is it necessary to boost the DRS Policy or Procedure to encourage the parties to take greater care in the preparation of submissions?
 - e. In your view, should there be provision within the DRS for joint complainants to bring a case?
 - f. In your view, should DRS experts be able to represent parties in DRS disputes, provided there is no conflict of interest?
 - g. What steps should Nominet take to investigate the correct address for service for the Respondent, beyond serving the address recorded on Nominet’s .uk database, and any addresses supplied by the complainant?
 - h. At what point do you think that a domain name registration which is the subject of a dispute should be “frozen” in respect of transfers or tag changes: (a) at the point when Nominet is first notified of the complaint (even though it may not be valid)? (b) at the point when Nominet first informs the respondent of the complaint? or (c) if neither, please specify your proposal.
 - i. A recent appeal 01295 (bravissimo.co.uk) followed the reasoning adopted in decision number 01136 (1and1.co.uk). Both cases involved a complaint which had gone through the DRS twice. In both cases the complainant and the respondent were the same, but the complainant chose to go through the DRS again, rather than appeal. The decision sets out very narrow criteria under which a second complaint would be acceptable. Do you think these criteria are correct? If so, should they be incorporated into the DRS Policy? If not, what criteria (if any) would you suggest to excuse a second complaint?

The consultation runs from 19 April to 19 July 2004. In order to give input, please email pab-feedback@nominet.org.uk clearly marking your email with ‘DRS consultation’ in the subject line. All consultation responses will be published on Nominet’s web site at <http://www.nominet.org.uk/Pab/PabConsultationPapers/DRSConsultation/Responses.html> . We reserve the right to remove any materials which in our reasonable opinion are defamatory, offensive or unintelligible.

2 Background

Since 1997, Nominet has run a Dispute Resolution Service for .uk domain name disputes. In September 2001, following extensive consultation through the PAB and the wider .uk internet community, Nominet relaunched its DRS.

Key features of the relaunched service include:

- Free mediation is offered to the parties, facilitated by Nominet staff
- Decisions are made by a panel of independent experts
- The parties to a dispute have the right to appeal an expert decision. The appeal body is a panel of three independent experts.

The service has been running smoothly for two years: more than 1,400 cases have been processed, and mediation achieves settlement in over 55% of cases in which it is attempted.

In the course of operating the revised service, and in discussions with the experts, a number of issues have arisen which require better explanation or clarification within the Policy.

The purpose of this paper is to introduce a series of issues and proposals on which it is proposed to consult.

The PAB is requested to consider the issues and to give its reaction to the proposals, and is requested to highlight and give its views on any other issues relating to the DRS which are not covered in this paper.

3 The issues in detail

As a result of discussions with the experts, and a review of their discussion notes (which are set out at Appendix A), it is proposed to consult on the proposals set out in this paper.

In addition, responses are requested to a number of specific questions (set out at 3.5.1).

3.1 Tribute/criticism sites

3.1.1 The issues

The DRS makes special provision for tribute and protest sites. During the original consultation process, in 2001, a strong view was expressed that the Internet was an important vehicle for freedom of expression, and that the DRS should make it clear that fair criticism or fan sites were not in themselves abusive.

At the same time, others felt that there was a difference between using someone's exact name for the purposes of a tribute/criticism site, and choosing instead a domain name which hints at a site's content (eg [name]sucks.co.uk or for[name]fans.co.uk).

The original solution was to include the following provisions at paragraph 4(b) of the DRS policy:

b. Fair use may include sites operated solely in tribute to or criticism of a person or business, provided that if:

i. the Domain Name (not including the first and second level suffixes) is identical to the name in which the Complainant asserts Rights, without any addition; and

ii. the Respondent is using or intends to use the Domain Name for the purposes of a tribute or criticism site without the Complainant's authorisation

then the burden will shift to the Respondent to show that the Domain Name is not an Abusive Registration

In practice, strong differences of opinion have arisen as to the effect of the reversal of the burden of proof in these circumstances.

Some experts have expressed the view that if the burden of proof reverses, it ought to be possible for the respondent to discharge the burden and defeat the complaint. This view was expressed in the first instance decision of *scoobydoo.co.uk* (DRS 00389), but was reversed on appeal.

The alternative view is that in circumstances where the domain name is identical to the name in which the complainant has rights, and there is a tribute/criticism site, the domain name will almost certainly be abusive. This latter view is primarily based on the belief that taking someone's identical name effectively amounts to impersonation, and the fact that in such cases confusion is highly likely to occur, for example if e-mails go astray. Another factor is that the respondent is likely to benefit from a high volume of traffic to such a site; many of the visitors will initially have been confused into believing that they may be visiting the complainant's site; and are likely to be interested in the contents of the site, even if it is critical of the complainant. This view was expressed in the *scoobydoo.co.uk* appeal, and has been followed in subsequent tribute/protest site cases, for example: *mistralinternet.co.uk* (DRS 00909), *generalmedicalcouncil.co.uk* (DRS 01056), and *gameconservancy.org.uk* (DRS 01104).

Therefore, in practice, the *scoobydoo.co.uk* appeal decision has been followed, and the result is that the wording of the policy may set up a false expectation of success for respondents in such cases.

3.1.2 The experts' views

We asked the experts the following questions:

- *Do you think that using a domain name which is identical to someone else's name or trade mark in connection with an unauthorised tribute or protest site is abusive within the meaning of the DRS Policy? Please explain the reasons for your views.*
- *Do you think that there is any difference in using a name such as *iloveabc.co.uk* or *abcsucks.co.uk* and the name *abc.co.uk* in connection with an unauthorised tribute/protest site, where ABC is the complainant's name? If so, please explain why.*
- *In what circumstances do you think that using a domain name identical to the complainant's name for an unauthorised tribute/protest site would not be abusive?*
- *In your view, does it make any difference if an unauthorised tribute/protest site is used to sell something, or is non-commercial?*
- *Do you think that Nominet's DRS policy should provide for tribute/protest sites?*
- *Do you see any difficulties in having the burden of proof reverse in cases involving tribute and protest sites, but not in other cases where the domain name is identical to the name or mark in which the Complainant has rights? If so, how do you think this could be resolved?*

The experts' response, which can be seen in full at Appendix A, can be summarised as follows:

Overall, the experts felt that it was necessary for the Policy to include a statement to the effect that use for a tribute/criticism site could amount to fair use.

The experts agreed that there is a difference between registering a domain name identical to the complainant's name and using it for a tribute/criticism site, and registering a domain name which in itself suggests tribute or criticism. However, the experts did not believe that the key factor in deciding such cases was whether or not the domain name was identical. They said that singling such cases out for special treatment was likely to cause as many problems as it solved. In their view, many factors were important in cases involving tribute and protest sites, for example how close the domain name was to the complainant's name, the SLD in which the domain name was registered (eg .org.uk for an obviously commercial company), and the nature of the complainant or the way in which the name in question was being used. The experts did not feel that commercial activity within an unauthorised tribute or protest site necessarily amounted to abuse: it would be possible, for example, to sell campaign T-shirts or similar materials.

3.1.3 Proposals

It is proposed that:

1. the DRS Policy continues to make it clear that fair use may include tribute/criticism sites; and
2. the proviso in paragraph 4(b) of the DRS Policy (which reverses the burden of proof) is deleted.

3.2 Without Prejudice

3.2.1 The issues

In litigation, there is a procedural rule, "without prejudice", the effect of which is that a judge will not see any correspondence whose purpose is to achieve a settlement. The rule is derived from public policy, as it is intended to encourage parties to litigation to settle disputes, and to make concessions or admissions without fearing that their strict legal rights will be prejudiced as a result.

In the context of the DRS, an offer to sell a domain name for an amount in excess of the purchase price can indicate an abusive registration. The question is whether a DRS expert is permitted to take such an offer into account if it is "without prejudice".

The question is whether or not the DRS experts should apply the "without prejudice" rule within the DRS, or whether they should ignore it, and view all correspondence.

In practice, this is a question on which the experts' views differ, and the different approaches are illustrated in two of the appeal decisions, *scoobydoo.co.uk* (DRS 00389 appeal), and in *parmaham.co.uk* (DRS 00359 appeal).

In the *scoobydoo.co.uk* appeal decision, the panel stated that if applied within the DRS, the without prejudice rule would allow respondents to "run a coach and horses" through the DRS, simply by adding the "without prejudice" label to all offers to sell a domain name registration. The panel noted that, unlike court proceedings, the costs of defending a DRS case are negligible, and Nominet's mediation service provides an opportunity to settle, and therefore many of the public policy elements of the "without prejudice" rule do not apply.

In the *parmaham.co.uk* appeal decision, although the majority of the panel adopted the approach taken in the *scoobydoo.co.uk* appeal, one of the panellists dissented on the issue of "without prejudice", stating that the DRS should respect the "without prejudice" rule, partly so that the approach is consistent with that of the courts, and so that parties can have certainty that admissions or offers for sale which are marked without prejudice will not be held against them under the DRS.

If the rule is to apply within the DRS, the question arises as to how it is to be implemented. Who is going to sift through the correspondence to exclude without prejudice correspondence? It cannot be the expert, unless a second expert is appointed in each case to screen for and remove “without prejudice” correspondence. It cannot be Nominet’s administrative and mediation staff, who are not legally trained.

3.2.2 The experts’ views

We asked the experts the following questions:

- Do you believe that the “without prejudice” rule should apply within Nominet’s DRS? Please explain your views.
- If your answer is “yes”, how do you say the rule should be implemented?

The majority of the experts expressed the view that the “without prejudice” rule should not apply within the DRS, and that experts should be free to view all correspondence.

3.2.3 Proposals

It is proposed that the DRS Policy and/or Procedure be amended to make it clear that in reaching their decisions, DRS experts will not have regard to the “without prejudice” rule of litigation, and will be entitled to take into consideration any materials or evidence contained within or annexed to the submissions.

3.3 Appeals

3.3.1 The issues

The appeal process was a late addition to Nominet’s DRS Policy and Procedure, and was included as a reaction to consultation responses. Although the Procedure as a whole sets out a defined timetable for each stage of a dispute, no timetable is included for appeals.

The Policy and Procedure make the following provisions:

- The appellant triggers the process by lodging a notice of appeal (up to 2,000 words in length), but there is no provision for a response or reply to be made.
- Paragraph 9(a) of the Policy states that an appeal may be made “on the facts” or “that the procedure has not been correctly followed”.

There have been four appeal cases to date, all of which took place during 2002. These cases have highlighted a number of procedural issues. In particular, appeal panels have not been certain whether to call for further submissions, or whether they are required to review the original expert’s decision, or to review the case afresh on the basis of the submissions.

The level of appeal fees has also been debated. The experts feel that £3,000 provides a poor return given the time that delivering an appeal decision has taken (more than 60 hours in one case). However, parties high. One issue is the short time (5 working days) by which an appeal notice and the fee must be delivered. This gives little time for those who would have to raise money from third parties to fund an appeal.

3.3.2 The experts’ views

We asked the experts the following questions:

- What do you think the standard for appeal should be? Should it be a full review of the facts, or should it be a critique of the expert’s original decision? Should it be

restricted to allegations that the process has not been properly followed? Please give reasons for your views

- Do you think that the appeal process should allow for further submissions to be made? Please give reasons.
- If you believe that a further submission(s) is necessary, do you think it is sufficient for a brief notice of appeal to be lodged by the appellant, or that both parties should have the opportunity to make an additional submissions? Do you think that the appellant should also have the opportunity to file a reply?
- What level of fees would you consider fair for appeal cases, balancing the preparation time required by experts against Nominet's desire to provide an affordable service?
- How would you split the appeal fees between the panellists?

The experts expressed the view that the notice of appeal should be briefer than is currently provided for in paragraph 18 of the Procedure. They also addressed the remaining procedural issues, and their proposals are set out below. In addition, they addressed the question of whether or not appeal decisions should have formal precedent value.

3.3.3 Proposals

It is proposed that:

- The standard of appeal should be a full review by the appeal panel; it should continue to be possible for the appeal panel to review the procedure.
- the DRS procedure should provide for a notice of appeal, and a response to be made. Each should be no longer than 1,000 words, and should contain no new evidence or attachments. There should be no provision for a reply.
- The appeal fee should remain at its current level, and should be distributed equally between the parties.
- The timetable for lodging an appeal should be amended, as follows:
 - 10 working days for appellant to request an appeal, and lodge a non-refundable 10% deposit (£300);
 - the appellant has a further 18 working days in which to lodge full notice of appeal plus balance of fee.
 - Other side has 10 working days to file a response.
 - Decision to be delivered within 30 working days, with scope for a single extension of up to 10 working days.
- With regard to precedent value, no change should be made to the Policy, which states that appeal decisions have "persuasive" value.

3.4 Web designer cases

3.4.1 The issues

In addition to the above, we asked the experts to consider a category of cases for which there is currently no express provision within the DRS, but which we believed may fall within the DRS' ambit. These are cases in which we are contacted by a person (A) who claims to have asked a web designer, internet service provider or other agent (B) to register a domain name for (A), but for whatever reason the domain name has been registered in the name of (B) instead.

In many of these cases, by the time Nominet becomes involved, (B) cannot be contacted (but has not officially been dissolved at Companies House or become bankrupt). Mediation is

therefore impossible. Frequently, the would-be registrant (A) is a start-up business with limited resources, who fails to pay the £750 fee.

Usually, it is clear that (A) did request that the name be registered, but there may be no evidence to suggest what agreement (if any) was in place between (A) and (B) as to who would be recorded as the registrant. It is possible that the parties agreed that (B) would register the domain name in its own name until completion of a project, as a way of ensuring that it is paid.

One view is that registrations of this kind are mistakes which can be corrected by Nominet on suitable declarations by (A).

Another view is that resolving cases of this kind involves a transfer of the registration from (B) to (A), and should therefore only be done either by way of transfer form (if (B) consents) or by way of a DRS complaint (if (B) does not consent or cannot be contacted).

If the matter is to be dealt with by way of the DRS, does it fall within the ambit of the current DRS Policy and Procedure? There have been a small number of DRS cases on this issue, which reach different conclusions. In *leedsmela.co.uk*, (DRS 00188) *andrewmitchell.co.uk* (DRS 00854) and *mchapmanautoservices.co.uk* (DRS 01012), the expert took the view that the registrations were abusive, because the complainant would have expected the registrations to have been made in its own name rather than that of the respondent. In two cases (*cityid.co.uk* (DRS 00692), and *callstream.co.uk* (DRS 01037)) the complaint failed, mainly because of the poor quality of the submissions.

Sometimes, the web designer (B) is responsible for a large number of registrations, and at the point when (B) goes out of contact, Nominet is asked to intervene in many cases on which the facts are identical. Currently there is no formal mechanism for joint complainants or class actions under the DRS.

3.4.2 The experts' views

We asked the experts the following questions:

- Do you think that “absent web designer” cases should be dealt with by way of the DRS?
- If so, do you think that the current DRS Policy and Procedure is sufficient to cover such cases? What, if any, changes would you recommend in order to deal with such cases?
- If not, how would you propose that Nominet deal with such cases?
- Would it be desirable, in your view, to offer a lower cost option in such cases?
- Would it be desirable, in your view, to allow “class actions” which would allow many registrants to share the cost of a DRS decision?
- Would it be desirable for Nominet to apply a single DRS decision to other cases with identical facts?
- In the case of registrants of multiple ‘abusive’ names, should some sanction or special rule apply?

The experts' views are set out in full in Appendix A. In summary, they felt that such cases did fall within the ambit of the current DRS Policy and Procedure, but that additional wording could be added to make this clearer. They did not feel that any special treatment (either by way of reduced fee, or simplified rules or procedure) should be given to complainants in such cases.

3.4.3 Proposals

It is proposed that the following be added to the non-exhaustive list of factors tending to indicate an abusive registration set out in paragraph 2 of the DRS Policy:

the complainant:

- has been using the domain name registration exclusively; and
- paid for the registration and/or renewal of the domain name registration.

In addition, a respondent (web designer etc) in such cases should be able to defeat a complaint by showing that it was agreed that the domain name should be held in the name of the respondent.

3.5 General questions

3.5.1 The issues

In addition, we asked the experts the following questions:

- Definition of Rights. Do you believe this is adequate for the purposes of the DRS?
- Paragraph 3(a)(iii) of the DRS Policy. Do you think this is an adequate way of dealing with “pattern of abuse”? If not, how would you suggest that the Policy deal with the issue.
- The introductory phrase in paragraph 4(a)(i) emulates a similar provision in paragraph 4(c) of the UDRP. Some panellists in UDRP cases have indicated that the relevant time period is any time prior to the date of filing the complaint. An alternative view is that the relevant period is prior to the time when the respondent became aware of the complainant’s cause for complaint. What do you think should be the relevant period for which the respondent should demonstrate that the factors set out in the paragraph apply?
- Quality and presentation of submissions. Is it necessary to boost the DRS Policy or Procedure to encourage the parties to take greater care in the preparation of submissions?
- In your view, should there be provision within the DRS for joint complainants to bring a case?
- In your view, should DRS experts be able to represent parties in DRS disputes, provided there is no conflict of interest?
- What steps should Nominet take to investigate the correct address for service for the Respondent, beyond serving the address recorded on Nominet’s .uk database, and any addresses supplied by the complainant?
- At what point do you think that a domain name registration which is the subject of a dispute should be “frozen” in respect of transfers or tag changes: (a) at the point when Nominet is first notified of the complaint (even though it may not be valid)? (b) at the point when Nominet first informs the respondent of the complaint? or (c) if neither, please specify your proposal.
- A recent decision, 01136 (1and1.co.uk), involved a domain name which had gone through the DRS twice. In both cases the complainant and the respondent were the same, but the complainant chose to go through the DRS again, rather than appeal. The decision sets out very narrow criteria under which a second complaint would be acceptable. Do you think these criteria are correct? If so, should they be incorporated into the DRS Policy? If not, what criteria (if any) would you suggest to excuse a second complaint?

3.5.2 The experts' views

The experts did not formally address all of the questions, but some informal responses were made as follows:

- One expert requested that provision be made for joint complainants
- The experts expressed the view that the current rules governing conflict of interest were sufficient protection for the parties, and that experts should not be prevented from representing parties to disputes. Comparisons were drawn to the English legal system, in which senior barristers are required to sit as part time recorders (judges), and Deputy District Judges usually also work as part time solicitors.

APPENDIX A: Notes of experts' recommendations

Tribute/Criticism sites

Present:

David Flint, Antony Gold, John Heaton, Cerryg Jones, Steven Maier, Claire Milne

Note by Claire Milne. Points in square brackets are CM's own additions, not from the group.

1. *Do you think that using a domain name which is identical to someone else's name or trade mark in connection with an unauthorised tribute or protest site is abusive within the meaning of the DRS Policy? Please explain the reasons for your views.*

Initial reactions: 3 maybe, 2 probably (but in both cases, "it depends"). See 3 below for more details.

2. *Do you think that there is any difference in using a name such as *iloveabc.co.uk* or *abcsucks.co.uk* and the name *abc.co.uk* in connection with an unauthorised tribute/protest site, where ABC is the complainant's name? If so, please explain why.*

Yes, obviously (unanimous).

3. *In what circumstances do you think that using a domain name identical to the complainant's name for an unauthorised tribute/protest site would not be abusive?*

Examples of where it might not be abusive:

If the complainant normally traded under and was normally known by another name, and had not bothered to register the "identical" name despite having had every opportunity to do so. Where the "identical" name was not a trademark or trading style, but a personal name (eg Paul Scholes) or arguably a concept (eg game conservancy).

The suffix does make a difference (eg using *abc.org.uk* for commentary on a commercial company *abc* that people would normally expect to find at *abc.co.uk*).

The general feeling was that being an identical name was only part of the story. A very small change (eg *tescos* rather than *tesco*) could mean a name was not viewed as identical; when in fact a bigger discrepancy (eg *tescostores*) could be just as close in spirit to identity. The real question was whether the registration was abusive.

4. *In your view, does it make any difference if an unauthorised tribute/protest site is used to sell something, or is non-commercial?*

Selling campaign materials (eg t-shirts) could be a normal part of a protest site. Very hard to draw a clear line between this and more generalised sales; probably better not to try [though if a clarification is included, as suggested at 5 below, it might refer to sites operated *primarily* as tribute/criticism sites (or "commentary sites"? or "for non-commercial reasons"?)]

5. *Do you think that Nominet's DRS policy should provide for tribute/protest sites?*

Yes, but at most by clarifying that they may constitute fair use. Generally, the feeling was that there was no need to single them out for special treatment, and that doing so could create more problems than it solved. The issue was whether the registration was abusive.

6. *Do you see any difficulties in having the burden of proof reverse in cases involving tribute and protest sites, but not in other cases where the domain name is identical to the name or mark in which the Complainant has rights? If so, how do you think this could be resolved?*

Yes, this is inconsistent. Preferred solution is to drop 4b so there is no burden of proof reversal. However, if this is not done then the reversal should apply to all identical names

which in the expert's view are exclusively referable to the complainant [and this should appear next to 2b of the Policy, not in 4].

In principle, since decisions are meant to be based on balance of probabilities, if there is a response then where the burden of proof lies should make no difference to the expert's decision. The difference would mainly be where there is no response, when a reversal of the burden of proof means that the complainant would automatically win no matter how weak or ill-founded his complaint. This can't be a just outcome. [Though if we did go this route – wouldn't this be a case for "DRS lite"?)

7. *Are there any additional issues which your group would like to raise?*

No.

Without Prejudice

Syndicate members:

James Bridgemen (Chair), David King, Ian Lowe, Steve Ormand, Dawn Osbourne

Do you believe that the "without prejudice" rule should apply within Nominet's DRS?

The majority of the group believed that "without prejudice" should not apply to the parties submissions within the DRS. It was felt that the mediation stage of the process gave the parties an opportunity to make any "without prejudice" offers for settlement.

There was one dissenting voice within the group. He argued that not to apply the rule was unfair to unrepresented parties and was too far from the view of the courts.

If your answer is "yes", how do you say the rule should be implemented?

As the overwhelming majority did not want the rule to apply this was not discussed.

Appeal

Syndicate members:

Andrew Clinton, Keith Gymer, Kirsten Houghton, David Tatham (Chair), Tony Willoughby

Questions and Discussion

What do you think the standard for appeal should be? Should it be a full review of the facts, or should it be a critique of the expert's original decision? Should it be restricted to allegations that the process has not been properly followed?

Of the two slightly different approaches adopted in the SEIKO-SHOP and the SCOOBYDOO Decisions, the Syndicate were unanimous in preferring the latter, namely a full review of the entire case *de novo*, an approach which, it was noted, had also been followed in the only two subsequent appeals that have so far been heard.

Do you think that the appeal process should allow for further submissions to be made?

If you believe that a further submission(s) is necessary, do you think it is sufficient for a brief notice of appeal to be lodged by the appellant, or that both parties should have the opportunity to make an additional submissions? Do you think that the appellant should also have the opportunity to file a reply?

It was noted during the discussion on this question that:

- There would probably be a tendency for an Appeal to be lodged by a losing Complainant rather than by a losing Respondent, and in the majority of cases heard so far it was the Complainant who had succeeded.
- Nominet always has the power to intervene in a case and even to lodge an Appeal.

It was generally felt by the Syndicate that there was no need for a Complainant to set out his entire case afresh, especially if, as noted above, the Appeal Panel would be making a full review of the case. It could be argued that in these circumstances all an appellant needed to say was "I appeal". However the Syndicate felt that it would be very useful if an Appeal Panel were to have in front of it some guidance about the Appellant's grievance(s). Therefore the following was suggested:

Both the Appeal and any Response should be no longer than 1000 words and they should contain no new evidence and no attachments. There should be no provision for any further Reply.

What level of fees would you consider fair for appeal cases, balancing the preparation time required by experts against Nominet's desire to provide an affordable service?

How would you split the appeal fees between the panellists?

It was noted that, on the one hand for the amount of time spent on an Appeal the current fee level of £1000 to each member of a 3-person Appeal Panel falls a long way short of what an Expert could normally charge for his/her time, while on the other hand the attitude of many losing parties - admittedly often expressed in the heat of the moment to Nominet - was that the current figure is far too high.

The idea of awarding a greater proportion of the amount to the Chairman (on the ground that he/she did more work in preparing the final Decision) was considered but rejected because experience had shown that on the whole all 3 members of the Panel contributed equally to the final result.

Nominet had expressed a reluctance to further subsidise the appeal process, and the Syndicate accepted that this was a non-starter. However Nominet might like to consider awarding a higher fee to the panellists in cases of great complexity.

If it was true that some losing parties might wish to appeal but did not either because the 10 days allowed by the Policy for an Appeal was not long enough for them to raise the £3000 fee, or because they needed more time to consult with other like-minded persons who who could assist with finding the fee, then it was suggested that the following scenario might be more attractive:

A period of 10 days would remain for an Appeal to be filed at which point Nominet would request an unrefundable deposit of 10% of the fee, i.e. £300. The appellant would then have a further 18 days either to pay the remaining £2700 and justify the Appeal or to withdraw it. Assuming that the Appeal was maintained, the Respondent to the Appeal would then have 10 days to file a Response. After that the Panel would be appointed (if Nominet had not already approached its chosen Experts) and it would be granted the present 30 days to deliver its Decision, with scope for a single extension of this period of up to 10 days.

[In the above, all 'days' are 'working days'.]

Should Appeal Decisions have a precedent value?

The Syndicate were unanimously of the view that there should be no change in Paragraph 9c of the Policy, namely: *"Appeal Decisions will not have precedent value. but will be of persuasive value to Experts in future decisions."*

It was suggested during the discussion that perhaps there was scope for an 'enlarged' Appeal Panel of more than 3 persons when an appeal involved a question of how to interpret the Policy. It was believed that Nominet already had the right to appoint more than 3 persons, but the Syndicate felt that this could give the appeal process a complexity which it deliberately lacked at present and the idea was not adopted by the Syndicate.

Absent Web Designers

Overall approach to sorting things out

We were uncomfortable about treating all these cases as mistakes that could be rectified clerically. We thought there may be some where there was an obvious error that could be put right in that way, but that (perhaps especially in the typical 'no response' cases) there might well be issues of substance that needed sorting out with more than just clerical intervention. Our conclusion was that, where there is a dispute or no response (other than where there is an obvious error), cases should go through the DRS.

Are the current DRS policy and procedure sufficient?

There was a slight difference of view about whether the current DRS rules were sufficient to cope with these cases:

- Some thought they were adequate without change.
- Others suggested addressing such cases explicitly in the policy, by adding to the non-exhaustive list of factors that might be evidence of abusive registration to include circumstances where the complainant
 - Has been using the domain name exclusively; and
 - Paid for the registration

Would it be desirable to offer a lower cost option in such cases?

We were pretty clear that it would not, for two reasons:

The £750 is already set deliberately low, as the price of sorting things out. If complainants don't think it's worth it, that's their commercial choice.

Having a lower cost alternative would send out strange signals: why distinguish these 'no response' cases from others? We thought there would also be some awkward boundary issues, potentially.

Would it be desirable to allow "class actions" which would allow many registrants to share the cost of a DRS decision?

Would it be desirable for Nominet to apply a single DRS decision to other cases with identical facts?

We took these together. Whilst we could see there was potentially an efficiency advantage, we were concerned that bundling cases in this way would require a complicated mechanism for establishing that the facts and issues were identical. We did not think the outcome would be worth the cost of devising and administering such a complex set of processes.

In the case of registrants of multiple 'abusive' names, should some sanction or special rule apply?

We recognised that we already have an indicator for helping establish abusive registration by reference to patterns of abusive registration. Having identified these cases, though, we did not think it necessary to have a special sanction. (As a matter of policy we wanted to minimise the number of special rules requiring special application.) We thought the way to deal with these cases was simply to ensure that the mainstream DRS process for identifying them and putting things right worked speedily and without fuss.