

# Nominet Dispute Resolution Service

## Changes to Policy and Procedure

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### 1. Executive Summary

#### Background

Nominet's Dispute Resolution Service (DRS) offers an efficient and transparent method of resolving disputes in the .uk Top Level Domain. Through the DRS we seek to settle .uk domain disputes through mediation, and where this is not possible, through expert decision.

The DRS was relaunched in September 2001 and the current Policy and Procedure (Version 2) applies to all disputes filed on or after 25 October 2004. Our aspiration is that the DRS remains quick, simple, fair and approachable for all who use it, and that it keeps abreast of changes in the external environment.

As part of our strategy to periodically review and update the service, we held an open, public consultation on "Updating the .uk Dispute Resolution Service". The consultation ran from 17 November 2006 to 16 February 2007.

As part of the consultation process, we published our proposals, along with a summary, on our web site. We also introduced an online survey to enable people to respond more easily. We wrote to all those who had been involved in a DRS case since 2001. We held an outreach event on 6 February 2006 in London, which was attended by over 50 people. A report of the event is published on our web site. We also publicised the consultation to relevant online and offline media.

#### Consultation responses

A total of 128 written responses were received from a broad range of people, varying from Nominet members, registrants, corporations with an interest in protecting well-known trade marks and law firms, together with current DRS independent experts and Nominet's Policy Advisory Body. This is by far the highest number of consultation responses we have received, reflecting the high profile of the DRS and the breadth of its stakeholders.

We would like to thank all participants for taking the time and effort to respond to the consultation.

Many of the responses were detailed and thoughtful. To do justice to those who took the time to respond, we have reviewed their comments in detail.

However, it is important to note that there were few areas of overall consensus. Views remain deeply divided on all the substantive issues in the consultation.

In deciding how to respond to the consultation feedback, we have sought to balance all of the views expressed. Overall, our objectives are to strengthen the service, keep it up to date, and retain those aspects of the service which are working well.

### Summary of major changes

- **Most of the elements of the current DRS will continue unchanged**
- **A nominal fee of £10 will be required to commence a DRS case**
- **A new default transfer process will be introduced where the registrant files no response**
- **An Expert Review Group will be formed to improved the quality of expert decisions**
- **Our online forms will be overhauled in an effort to improve the quality of submissions**

## 2. DRS policy, procedure or service?

During the course of the consultation, a number of commentators raised issues relating to certain aspects of the DRS as a service. Unlike the substantive issues under consultation, there was a high level of consensus on these points, including:

1. The poor quality of submissions in many cases
2. The high level of “no response” cases
3. Whilst the vast majority of expert decisions are excellent, there are some valid concerns in relation to the quality and consistency in the expert decisions
4. The number of decisions now published on our web site warrants an improved search facility
5. Whether experts should be allowed to act as representatives in DRS cases
6. That there needs to be a mechanism which enables new individuals to enter the pool of experts

To meet these concerns, we have decided to make the following operational changes:

1. We will make the online forms more user-friendly, and introduce formatting in the output which follows the DRS Policy and Procedure. This should be a helpful guide to parties and assist them in presenting their cases logically and effectively.
2. In reviewing possible reasons for poor quality decisions, we found that the majority of recent decisions (about 70 %) have been “no response” cases (i.e. cases where no response is filed on behalf of a registrant following a complaint). In these no response cases, poor quality complaints remain unchallenged. As no evidence is presented to refute the complainant’s version of events, it is difficult for the expert to make a sound decision. We are therefore introducing a major change – see Default Transfer below.

3. We have already formed an Expert Review Group, whose function is to read and report to us on every decision taken. We will develop the role of this group, which will perform a peer review function prior to decisions being issued. Its purpose will be to highlight inconsistencies, errors, and to act as quality control. For example, if the group comes across errors, they can refer the decision back to the expert for correction. Tony Willoughby, the current Chairman of our panel of experts, has agreed to lead this group. Members of the Expert Review Group will no longer take decisions under the DRS, nor will they personally represent parties to the DRS.
4. We will introduce a searchable database of DRS decisions
5. Other than the Expert Review Group, DRS experts will continue to be able to represent parties in the DRS, subject to existing rules regarding conflicts of interest. Whilst there were some very vocal opponents of experts being able to represent parties, the fact remains that the law and practice in domain name registration and entitlement is a relatively niche specialism and we do not want to automatically rule out the leading practitioners from being DRS experts. Experience in court litigation shows that, for example, deputy district judges are practising solicitors or barristers, and continue to represent clients who may appear before their colleagues. Similarly, judges are promoted from the ranks of barristers, and are accustomed to hearing the submissions of their colleagues in chambers in court actions. The counterbalance is the rigorous declaration of conflicts of interest (real or perceived). DRS experts are subject to strong requirements to declare conflicts – and our experience shows that they are extremely professional in applying those conflict rules. We will inform experts of the number of their colleagues who have stood down for reasons of conflict, so that this information can appear in DRS decisions, making the operation of the cab-rank more transparent. We also hope that the creation of the Expert Review Group, who will not participate in making decisions, will temper this concern.
6. We will advertise for new DRS experts before the end of 2007. As currently, we will encourage applications from both lawyers and non-lawyers alike, subject to a rigorous appointment procedure to select the candidates who can best meet our requirements of technical ability and service excellence.

### **3. Default Transfer**

In addition to the above operational changes, we are introducing a new default transfer mechanism. This concept was suggested by a number of consultation responses and our analysis indicates that there is merit in introducing this change for the following reasons:

1. As above, “no response” cases make for poor decisions.
2. The idea of a default transfer borrows from the well-established court procedure of default judgment, whereby if the defendant in court proceedings does not enter any defence then the claimant wins. A defendant who has a default judgment made against them can apply to have the case restarted if he or she can demonstrate a good reason for not replying to the claim (e.g. the claim form was not received).
3. We consider that there is no proper examination of a case where only the complaint is available to the expert. The public policy basis for the default

judgment court process is that both parties need to make their arguments for a full judgment to be obtained.

4. In “no response” cases submitted to the DRS since 1 October 2006, only three decisions (including one where the expert effectively allowed a late response in the 13b submission) were not resolved in favour of the complainant. This represents a success rate for complainants of over 95 %. (For comparison, the success rate in DRS cases where a response is filed is 62 %.)
5. Currently, about 70 % of expert decisions are for “non response” cases. This means that claimants are paying £750 plus VAT a time for an expert to make a decision based on one side of the case only and which invariably is decided in the complainant’s favour. We do not think this is a good use of either the complainant’s money or the expert’s time.

#### **Summary of the impact of default transfer**

- A nominal fee of £10 plus VAT will be required to commence a DRS case.
- Once the period for filing a response has expired, if no valid response has been received by us a complainant may apply to obtain a default transfer.
- There will be a fee for obtaining a default transfer of £200 plus VAT. This represents a significant reduction in the fee that is currently charged to obtain an expert’s decision.
- For a one month period following a default transfer it would be straightforward for the respondent to set aside a default transfer, for example by showing that they did not receive notice that the DRS complaint had been made. A fee of £100 plus VAT will be payable to set aside a default transfer.
- Money raised through the upfront fee and the default transfer will be put towards development of the DRS service, for example by contributing to the increased cost of the Expert Review Group.
- During the one month period following a default transfer, the domain name would be suspended (so neither party could use it).

#### **4. Way forward on the other consultation issues**

Here is a summary of what people said on the major issues, and how we intend to proceed.

##### **How we handle descriptive terms within the DRS**

- Some felt that the DRS should not include protection for descriptive terms
- Others felt that the DRS should include protection for descriptive terms
- Others felt the DRS gave sufficient protection already, and did not need to be changed.

*We will clarify the DRS policy, to recognise that rights may exist in descriptive terms that have acquired a secondary meaning.*

##### **Safeguards for the secondary market**

- Some agreed that offering to resell a domain name, sale of traffic and the registration of many domains were legitimate business activities, and that the DRS should be amended to include them

- Others felt that the DRS should not become overly detailed to meet specific cases, and should not provide potential loopholes for abusive use
- Some welcomed the proposal to introduce a statement that the weaker the rights that the complainant has, the less likely it is that abusive registration or use will be inferred if the evidence is finely balanced. Others felt it would confuse the operation of the DRS by introducing a further test.

*We will clarify that certain activities are not in themselves abusive, but that cases of this kind will depend on their particular facts.*

## **Fees**

- All three options proposed (no change; upfront fee; loser pays) enjoyed some support. Those who preferred an upfront fee differed in their view of how large or small it should be.

*With the feedback balanced, we propose to introduce a nominal fee of £10 to start a DRS case, and we will not introduce a “loser pays” mechanism. Appeal fees will also remain unchanged. We will introduce a fee of £200 for the new default transfer mechanism, together with a fee of £100 to set aside a default transfer, as set out above.*

## **Procedural issues**

- A minority of participants commented on the procedural aspects of the consultation. Those who gave their opinions on these issues held widely differing views.

*We will make the following changes:*

- *The DRS will be amended to make it clear that the Reply stage is purely an opportunity to respond to new matters raised in the respondent’s response.*
- *Non-standard submissions will be retained.*
- *We will clarify the procedure with regard to non-standard submissions. We will only copy the explanatory first paragraph to the parties, unless the expert requests sight of the full submission.*
- *Respondents will be able to pay for an expert decision, if the complainant declines to pay*
- *The term “abusive registration” will be retained*
- *We will review the Policy and Procedure and make Plain English amendments. Some participants urged that, in doing so, we should not alter terms which have come to represent a particular meaning through DRS decisions – we will therefore keep amendments to the minimum possible so as not to introduce inconsistency.*
- *The time limit for submitting appeals will be unchanged*
- *We will introduce a “likelihood of confusion” factor and make it clear that threatened use of a domain name may be evidence of an abusive registration. This reflects the interpretation which has consistently been made in expert decisions, and reflects English law.*
- *We will increase the word limit for submissions to 5,000 words*
- *We will make no changes in relation to without prejudice correspondence, as this is already reflected in the Scoobydoo.co.uk appeal decision.*

## **5. Next steps**

We will publish the text of the amended DRS Policy and Procedure, fuller details of operational changes, together with an implementation plan (including a timetable for technical development) by the end of August 2007.