

DRS Consultation Response

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DISCLAIMER

This is a response to the current DRS consultation. It may not reflect the views of any other organisations I may be involved in.

Question 1: Words with distinctive character / Dictionary Words

I support the suggestion that the DRS should accept rights for words with a *distinctive character* (e.g. British Petroleum, Orange) as a result of *the way they are used*, and *dictionary words protected by a registered trademark or good will*.

It is important to note however that it may be difficult if not impossible to show a 'blocking' registration of trademarked dictionary words. This should not allow legitimately competing uses of generic words from being successfully challenged (e.g. The mobile phone company called Orange should not in theory be able to challenge orange.co.uk if it was registered by someone engaging in a non-mobile related industry.)

Question 2: Protection for secondary market

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'.

A general offer to resell a domain name, selling traffic to a domain name and registering domains should not *automatically* result in the domain registration being considered abusive. This should however be up to the judgement of the panellist(s).

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 circumstance be considered abusive if the content was generated by the domain owner. If a PPC site (by explicit/automated choice or otherwise) advertises services which cause confusion, this should be allowed to be considered as evidence of abuse in the same way as any other registrant-generated content.

Registration of a large number of domain names should not in itself be considered abusive, although the nature of those names may show a pattern which indicates abuse.

Question 3: Strength of rights vs. Abuse

I support the suggestion that where the evidence is finely balanced, the weaker the rights the complainant has, the less likely it is that an abusive registration or use should be inferred.

Question 4: Fees

Initial Case Fees

It is important to ensure that the DRS system is used for the right purposes. I would propose that the full £750 case fee be taken up front as a deposit when the case is filed. If the case is resolved by mediation (both parties agree to a solution), it should be refunded in full. If there is no resolution, this fee should go forward to a decision. This will protect registrants against spurious complaints whilst ensuring that successfully mediated cases incur no fee.

DRS cases should only be filed if the complainant is prepared to go through the case, and not simply as a way to test the water to see if the registrant will give in. Another option would be to request 50% of the fee in advance, however if there is no agreement following mediation, and the complainant does not pay the remaining fee, a decision 'in default' should be made against the complainant. This also encourages complaints to be set out on their merits in the first place.

I am neutral as to whether Nominet should recover any costs associated with mediation and am happy for the returns of deposits to be amended to include a non-refundable element if Nominet so desires which is in line with the cost of providing the mediation service.

Appeal Fees

It is contrary to the interests of justice for a registrant who is successful in appeal to have to pay for the cost of correcting a mistake. This is even more unjust if the original decision itself is fundamentally flawed rather than simply a source of disagreement on the balance of evidence.

I would propose that the appeal cost should be met by the **losing party** of the appeal. I believe this is fair because when submitting a DRS case, you are accepting the risk that you may lose. If a registrant who loses an initial decision wishes to appeal, both parties may be expected to deposit the £3000 appeal fee with Nominet, and the winner is refunded their fee. If the complainant does not deposit the appeal fee, there should be an automatic overturning of the decision without cost.

I believe these would balance the interests of both the complainant and the registrant.

Question 5: System of refund

I do not believe there should be a 'refund' system (with the possible exception of successful appeals by registrants against a DRS case if the complainant is not made to pay as per my suggestion above. In this case, if my recommendation is not adopted, Nominet may wish to pay for the appeal as it is Nominet's system which has caused the registrant to be out of pocket. I however believe my suggestion in Question 4. is fair to all parties including Nominet.

I am assuming that this question is not to address operational matters about returning of deposits since this should be relatively straight forward.

Question 6: Further proposals

Allowing respondents to pay for a decision

In principle I see no problem although I would point out that in my proposal on fees this would already be paid by the complainant.

Drafting of “Abusive Registration” as “Unfair Registration”

I believe this particular change would cause more problems than it fixed. The notion of something being ‘unfair’ is a non-legal and emotional one. I think ‘abusive’ has less of this connotation and would be understood to have a defined meaning better.

Appeal Times

I don’t see a huge need for shortening the appeal time nor am I strongly objected to it. If this is seen as a problem, perhaps asking for a higher deposit amount may resolve it.

Additional evidence in appeals

I support the suggestion that new evidence should only be introduced in Appeals where this is ‘necessary’ to deal with the case fairly.

Submitting responses/process

I believe that the respondent should have the last submission in any process. Therefore, four submissions should be available (complaint, response, complainant’s second response, respondent’s final response). Non-standard submissions outside this scope should be left up to the expert.

Legal rights against untrue statements

It seems common sense to give both parties legal rights against each other if they make untrue statements in submissions.

Amendment of decisions

Any amendments to decisions should be provided as additional notes to a decision and never an amendment to the original text. Any appeals should be allowed on the basis of either the original decision excluding any amendments or any amended decision.

Guidance on past decisions

I support providing guidance to experts *and* the public about former decisions which are likely to have a bearing on any future decisions. It is necessary to include full references and experts should ensure in each case by reference to the original decision that the facts are sufficiently similar and not rely on any summaries in making their decisions.

Long delays in bringing a case

I strongly oppose the suggestion that long delays in bringing a case could lead to any significant difficulty in proving an abusive registration as such, although it should be accepted that delays may make a case weaker. The use of a domain may change or only becomes significant at a point it becomes noticeable to the appropriate audience. The complainant will need to weigh the costs of abuse against the £750 and £3,000 fees which may not justify a complaint immediately.

Test of confusion

I supposed including a 'likelihood of confusion' (soften test at 3(a)(ii) to show 'has confused').

On-going abuse

I suppose the suggestion that abusive use does not have to be ongoing for the purposes of Policy 3(a)(iii) as long as it has occurred in the past. I also support retaining the concept abuse does not need to occur at time of registration but can occur at any time thereafter.

Service of documents

A DRS case is sufficiently important that sending documents about it by first class post is not adequate. I would propose that for UK (including Northern Ireland) addresses, Nominet should send them by Royal Mail Special Delivery or other courier service which requires a signature on delivery. It would be up to the registrant to ensure if they wished for this to take place, they provide a UK/NI address.

In addition, I would recommend that a 'drs-email' and 'drs-faxno' field be added to the automaton (allowing at least 2 fax numbers and 5 e-mail addresses per domain) which is specifically for use in DRS communications for the domain in question. Also, tagholders should be notified by e-mail on a specific agreed address of DRS cases against domains on their tags. I expect this electronic move which will can be entirely automated will help to ensure DRS documents are treated with the appropriate priority.

Question 7: Further issues

Finding abuse for reasons not spelled out in the complaint

The respondent is required to submit a response to a specific complaint and their response (and choices within mediation) may vary depending on the content of the complaint. It would be unfair for additional allegations of abuse to be brought in by the expert to which the respondent had not had the opportunity to address at the earlier stages.

Without Prejudice

In principle, it should I believe be left up to the expert to determine if they consider documents marked Without Prejudice. Legitimate offers to try and resolve the case should not be counted against a respondent, but using Without Prejudice as a guise for abuse should not be allowed.

Independence of Experts

The problems of experts being in the business of submitting DRS cases and thus having an indirect conflict of interest in the general outcome of the DRS decisions as a whole could be addressed by paying each an annual retainer to be an expert. This would provide an incentive to stay up to date without the extra business needed from submitting complaints. I am undecided as to whether this is a problem however it may be in Nominet's interests to establish a process which appears more independent than some may consider it to be.

DRS and relation to contract

I believe that the DRS should form part of the contract and only be updated at renewal time (on the basis that registrations are no longer than two years before a renewal is necessary). Changes should be consulted on in full.

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