

DRS Consultation

Firstly, I would like to make it clear that I am grateful for Nominet's Dispute Resolution Service. It is an essential alternative to the legal route which involves huge amounts of time and money. The DRS is needed to protect individuals and small businesses (acting as complainants or respondents) from the large deep-pocketed companies. However, the DRS has many problems which I hope can be resolved through this consultation.

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.**

(a) I believe that Nominet should recognise trademarks for descriptive terms e.g. 'British Gas'. The complainant would still have to prove that the registration was abusive. However, before these changes are implemented I strongly believe that evidence of an abusive registration should not include the offer of resale, sale of traffic or large portfolios (as covered in Q2) to avoid more decisions like finecheeses.co.uk.

In the example given I believe that Nominet should recognise the rights of British Gas to the domain name britishgas.co.uk because of the use made of the term and the goodwill built up. However, I believe descriptive terms should only be protected if a trademark is established on the exact term and was registered prior to the registration of the domain name.

(b) I do not believe single dictionary words should be protected in any way. Single dictionary words are descriptive by definition and no one should be able to claim rights to the domain name regardless of any registered trademarks. 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.

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**

I strongly agree that the DRS should not consider the general offer to resell a domain name, the sale of traffic or a large domain name portfolio as evidence of an abusive registration. Domain name investment is a genuine business and individuals and companies should be free to monetise their investment through the sale of the domain names and sale of traffic through Pay-Per-Click and domain name parking without this use being considered as abusive.

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.

All complainants should have to satisfy the rights test before the evidence of an abusive registration is even considered. If the complainant can not prove rights to a domain name the case should be dismissed at that point. I agree that if the complainant's rights are weak, it should be less likely that registration would be classed as abusive.

Fees

It has always been free to file a DRS complaint and the money paid for expert decisions is passed on to the independent experts. We do not charge for our administration and mediation services. Some people have suggested that the free system encourages poor quality complaints and we should perhaps charge an upfront fee.

Our proposed options on fees are:

- 1. No change**
- 2. Introduce an upfront non-refundable fee (£50-100) and reduce the expert decision fee accordingly, to keep the change cash-flow neutral**
- 3. Introduce a system where the losing party pays for the decision**

Question 4

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

I believe an up front fee is essential to prevent complainants wasting the time of Nominet and the respondent. From the given options I would agree with a 'small upfront fee'. This fee should be as high as possible to ensure that the complainants are serious.

I would prefer a system which would require the complainant to make a deposit of £750 to start a dispute (as suggested by Sebastien Lahtinen, NetConnex Ltd) and refunded if it is resolved in mediation. This would ensure that every complaint was a serious one and that if the complainant didn't have £750 they couldn't make a complaint. Currently, if the complainant doesn't have £750 they can still make a complaint for free. If the respondent defends their case or does not respond and no progress is made in mediation, the case goes no further and the whole process is a waste of everyone's time. This should be stopped.

I strongly disagree with the 'loser pays' option. If we look at this from the point of a person with a portfolio of 1000 domain names - they would essentially be liable to pay £750,000 in total if each of their domain names was taken from them in a DRS dispute. I realise that these circumstances are extremely unlikely but the past has taught us that no domain name is safe from a DRS decision. The complainant should always have to pay the fee for the decision.

Appeals

In the case of an appeal where the original registrant has had to appeal to claim their domain name back after an incorrect DRS decision (e.g. mercer.co.uk) I believe that all fees should be refunded to the original registrant.

Whenever a DRS decision is overturned the ruling expert on the original decision should be re-trained or dismissed to prevent incorrect decisions in the future.

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?

I strongly disagree with the 'loser pays' option. However, if this was implemented I think it would be very difficult to enforce and I can see no reasonable way of doing so. I think it's obvious that the complainants would benefit from a refund system and I am sure that this would greatly increase the amount of DRS cases started by people who do not understand the DRS system and believe they can win a dispute when they do not have enough supporting evidence.

Question 6

Further proposals

I see no point in renaming the term 'Abusive Registration' to 'Unfair Registration' – the existing term is recognised and is clear.

I support any attempt to rewrite any policy in 'Plain English'.

I support any information which shows how experts review and weight evidence. This might help us all understand some of the decisions made.

I do not believe new issues or new evidence should be raised by experts – they should act totally impartially and should not bring new evidence which supports the case of the complainant or the respondent.

I do not believe that 'a likelihood of confusion' should be used as evidence of an abusive registration. Confusion needs to be proved without question before this can be considered as evidence.

I agree that a significant delay in the start of a DRS case after domain registration without adequate explanation should weaken the case of the complainant.

Question 7

Additional changes

I believe that the 'three strikes' rule should apply to complainants as well as registrants. If a complainant starts three unsuccessful DRS complaints this should be considered by an expert when making any future decisions where that entity is the complainant.

I look forward to a much fairer, predictable Dispute Resolution Service.

Elliott Brown

Tag Holder & Registrant