

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.

The automatic assumption that a trademark (whether pre-existing or retrospective) generates the automatic right to the domain name of that trademark (single word, compound, or idiomatic) is an increasing occurrence and one which needs defining. The fact that generic words can have multiple thesauratic meanings, which could translate to trademarks across multiple classes is important.

The proposals have merit, but with significant caveats.

Just because a word is a dictionary word & trademarked is no evidence for bias towards the complainant. Responsibility for proof of policy 3a(i) & 3a(ii) is still determinant. The reality is that the majority of dictionary words are already registered and change hands on infrequent basis. The building of goodwill in a business can and often does occur in the absence of the domain name of the business, especially where the business may not be single occurrences of the term, and especially as internet presences of businesses is a relatively recent trend.

The examples given are of national and multi-national companies with public awareness of the meaning of the generic phrase in terms of business presence (e.g orange for mobile phones). This is a small minority. The majority are small parochial companies building goodwill in an often regional basis. The registrant should not and often could not know this.

By allowing more vagueness into the equation the DRS is open to more injustices. I would like to say the current DRS should allow for this with some common sense, but this has often been found lacking.

The scale of this proposal must be met with equal definitions of the scope of awareness that the generic word or phrase holds.

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

There should be a recognition that domains portfolios exist, and that domains per se should be treated as tangible assets with an intrinsic value as such (maybe even with an asset value on a company balance sheet).

Domain resale (within the boundaries of policy 3a(i)), domain monetisation, and portfolio holding are recognised legitimate business activities across multiple tlds especially those fostering the open non-residential registration policy such as .uk.

Proof of abuse should still be determinant, and monetisation of domains while actively passing off or obvious abuse of policy 3a(1) & (ii) should be deterred. This should also encompass typosquatting.

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.

What is being proposed here? The burden of responsibility is and should be on the complainant to prove both legitimate rights and abusive registration. The subjectiveness of this is a major criticism of the current DRS. While the proposal has merits there is a stronger case for pre-drs acceptance monitoring. Some DRS's should never even get to the mediation stage.

Question 4: Please tell us which payment option you would prefer and why: no change; a small upfront fee; or loser pays?

Propose the £750 be split into non-refundable £250, and £500 for expert witness. The £250 (possibly subsidised by Nominet) could be used for a peer-review like process to determine pre-response validity of a DRS claim. Only when passing this should a response be sought from the registrant. Though they should be informed.

This has merits in that:

1. The number of DRS that get to expert stage will be lower and will have a higher quality. Hopefully generating some expert consistency.
2. Deterrent to the 'it's free so lets give it a go' win-win philosophy which seems to be increasing.

It may extend the initial process slightly, but would reduce expert witness requirements.

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?

No refunds. Period.

Procedure

- Remove or alter the Reply stage of the DRS
 - At present, there is a reply stage, which allows the complainant to respond to new issues raised in the respondent's submission. Some perceive this to be an imbalance, allowing the complainant to have the last word.
- As a counter-balance to altering the reply stage, strengthen and clarify the provisions relating to non-standard submissions (Procedure 13(b)).
- Clarify processes for dealing with documents submitted out of time or in an invalid format.

1. No, but...
2. Yes, should be strengthened.

Having gone through the whole DRS process as respondent, the non-standard submission was important in justifying and countering obvious personal and professional attacks.

Payment

- Allow respondents the opportunity to pay for a decision.

Why?

Drafting

- Clarify some terms (e.g. rename 'Abusive Registration' as 'Unfair Registration' as was done by the New Zealand DRS), and rewrite generally in 'Plain English'.

Only where the definition of abusive vs. unfair doesn't mirror the differences in dictionary meaning and weaken the DRS. It still is a legal type document not Jackanory.

Appeals

- Shorten appeal timelines, so that a Notice of Intention to Appeal gives another two weeks, not another three weeks.
- Allow new evidence to be introduced in Appeals, only if such new evidence is 'necessary' to deal with the case fairly.

Yes. Hopefully the DRS has learnt from bounce.co.uk?

On that subject the due diligence in contacting the current registrant should be strengthened. Yes, the onus is on the registrant to provide correct info. But people move houses, mail servers have glitches. Life happens. A simple give up and go philosophy isn't acceptable. Other resources to contact the registrant have to be used.

Expert decisions

- Clarify how experts review evidence, how they weight evidence, and how to deal with issues raised by the experts performing their own research.
- Clarify how decisions can be corrected or amended - for example, to correct typographical errors.
- Incorporate tests set out in previous decisions that experts routinely rely or are likely to rely on (because they were in appeal decisions) so the information is in one place

I'm all for consistency. It's a major driving force in this DRS consultancy proposal. Boundaries should be set to which the experts are allowed to research and use that research. This also extends to information provided from Nominet internal resources e.g PRSS.

Try proofreading?

An updated expert manual? Why not. Would this be publicly available, or at least available to members/tag holders?

Abusive registrations

- Include a likelihood of confusion as evidence of an abusive registration i.e. soften the test at 3(a)(ii) ('has confused').
- State that the abusive use does not have to be ongoing for the purposes of Policy 3(a)(iii) - it is enough that abusive use has occurred in the past.
- Clarify that a long delay in bringing a DRS case, where there is no adequate explanation, is likely to damage a complainant's chance of success.
- Clarify when rights have to exist to complain and to prove abuse.

Setting more precedents? I would focus less on semantics and more on defining what confusion is! Doesn't matter how you define it when the complainant, registrant, and more often the expert don't share the same view of what it means.

How far back are we going here? Surely a DRS is brought about because the abuse is 'current'?

Miscellaneous

- Include anti-avoidance provisions for the 'three strikes' rule (Policy 3(c)).
- Change the provisions dealing with communication and service of documents to take into account the new and potential extra online services.
- Clarify the role of representatives.
- Add provisions to clarify how a DRS dispute and any processes arising out of the Industry Standards consultation could interact.
- Give both parties legal rights against each other if they make untrue statements in submissions.

Why?

Yes.
Needed?
If you say so.

Most definitely. Malicious intent should invalidate the DRS. From personal DRS experience the level of attack on my personal and professional character was bordering on libel.

Question 6: Do you have any comments about the proposals to change aspects of the procedure, payment, drafting, appeals, expert decisions, abusive registrations or miscellaneous issues?

See above on point by point basis.

Question 7: Do you have any other changes you would like to see within the DRS, or topics within the DRS that you wish to comment on? In particular, if you have any views about any of the following topics which have been the subject of discussion, please let us know:

- Length of submissions and word limits.
- The impact of Internationalised Domain Names, if introduced.
- Whether experts can find a registration abusive for reasons not spelled out in the complaint.
- Whether there have been any practical problems with the treatment of 'Without Prejudice' material.
- Whether experts should be able to represent parties in other disputes, and if not how to keep the quality of experts high.
- Whether the detail of the DRS can be taken out of the contract and updated more regularly.

Increase to 3000

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No. Just the facts ma'am just the facts. Allowing non-presented evidence to be allowed to form judgements is a dangerous precedent. It is just this type of woolly procedure which this consultation should aim to stamp out.

If it's presented and is relevant then it should be submissible.

A knowledge of the workings of the DRS is one thing but a conflict of interests is another. Experts should NOT be allowed to represent complainants in other cases while serving on the expert panel (or vice-versa, whichever is most relevant). Do experts have to be lawyers?

Yes

Submitted: 13/02/2007
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