

### **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.**

**Answer:** I think that some protection is necessary but that care should be taken not to allow what has become known as 'reverse hijacking'. So if a registrant has owned a domain name prior to another individual/company establishing rights in the word concerned then the original registration should take precedence over any subsequent claims, unless it can be shown that the registrant is engaged in 'passing off'.

**(b) dictionary words which are protected by registered trade marks or good will.**

**Answer:** If there is trademark protection then it becomes more complex. My (*unqualified - JANAL*) opinion is that as TM law consists of several classes then it should not be possible for a complainant who establishes TM rights in a dictionary word in one class to automatically be awarded a domain name using that word. For instance – "Orange" is an established trademark in the areas of mobile telephony and, more recently, provision of broadband services. IMO, that should not give the company the right to orange.co.uk should that domain be registered by someone using it for purposes not connected to the businesses of the Orange phone company. I am increasingly worried that possession of a TM in any class may be seen as justification for claiming a domain that incorporates a word or phrase that has been trademarked – irrespective of the use to which the domain has been put.

### **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**

**Answer:** I would agree that this should not necessarily be seen as evidence of abuse.

- **sale of traffic (i.e. visitors to the domain name)**

**Answer:** I have mixed feelings on this. Personally I do not like PPC sites and if I accidentally stumble across one I leave ASAP. But whilst this remains a legitimate business model under Nominet policy then it is hard to argue that using domains in such a way should be seen as evidence of abuse. Exceptions would be use of domains that deliberately target those seeking a domain in use by another company (e.g. typos such as barc1ays.co.uk or marksandspenver.co.uk) or use of a domain such as orangeconnectivity.co.uk where the PPC page points to telecommunications sites.

- **registering many domains**

**Answer:** I would agree that this should not necessarily be seen as evidence of abuse.

### 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.

**Answer:** I would agree with this proposal.

### Question 4:

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

**Answer:** Much as I am tempted by 'loser pays' I feel that it is unworkable. I would like to see a system with a small, non-refundable, up-front fee (not more than £50).

### 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?

**Answer:** The area where the present fee system most concerns me is that of the £3000 appeal fee. I would like to see Nominet establish a fund so that anyone who won on appeal could be refunded their £3000. It strikes me as very unfair that those who do choose to pay to go to appeal and who subsequently win on appeal are left £3000 out of pocket to retain/gain a domain name that the appeal panel has judged they have a right to use. Enforcing any other system of refund strikes me as unworkable unless both parties to the dispute are required to lodge £3000 – and that seems to me to be an unreasonable barrier to many.

### **Further proposals in brief**

A number of other changes are also proposed. If you have any particular views on the following topics, please tell us as part of this consultation.

### Procedure

#### • Remove or alter the Reply stage of the DRS

**Answer:** I think this is currently weighted in favour of the complainant. I am in agreement with the PAB response which stated “One proposal is that following mediation, both the complainant and the respondent be given an opportunity to make one further statement before the papers are sent to the expert for a decision.” [NOTE: *this should not be taken to indicate that I necessarily disagree with other responses made by the PAB sub-committee – this is my private response*].

#### • Clarify processes for dealing with documents submitted out of time or in an invalid format.

**Answer:** Yes, I feel that some clarification is needed.

### Payment

- Allow respondents the opportunity to pay for a decision.

**Answer:** I would be in favour of this.

### 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'.

**Answer:** Yes please.

### Appeals

- Shorten appeal timelines, so that a Notice of Intention to Appeal gives another two weeks, not another three weeks.

**Answer:** I would be nervous about shortening this time period as two weeks is not very long – especially for those who may be on holiday and therefore out of email contact.

- Allow new evidence to be introduced in Appeals, only if such new evidence is 'necessary' to deal with the case fairly.

**Answer:** I would agree with this.

### 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.

**Answer:** I would agree with all of the above.

### 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.

Answer: I would agree with all of the above.

#### 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.

Answer: I would agree with all of the above.

#### 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?

Answer: see above

#### 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.

Answer: I have no strong opinion.

- The impact of Internationalised Domain Names, if introduced.

Answer: The mind boggles as to how DRS will cope with this. I have been assured that it will not be a problem but I remain to be convinced.

- Whether experts can find a registration abusive for reasons not spelled out in the complaint.

**Answer:** Ultimately the answer to this has to be 'yes'. But if the complainant hasn't spelled out a reason cited by the expert, I would be reluctant to award the domain to the complainant. There is a perception that the experts go out of their way to find in favour of complainants and I would not want any change in DRS policy to encourage this perception.

• **Whether there have been any practical problems with the treatment of 'Without Prejudice' material.**

**Answer:** I am not knowledgeable enough to comment.

• **Whether experts should be able to represent parties in other disputes, and if not how to keep the quality of experts high.**

**Answer:** I think it is inevitable that in order to keep the quality of experts high it must be accepted that the experts may, on occasion, represent parties in other disputes.

• **Whether the detail of the DRS can be taken out of the contract and updated more regularly.**

**Answer:** This would make sense to me.

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