

Updating the Dispute Resolution Service for .uk domain names

With permission & Utilising wording from the replies Andrew Bennett of whois-search.com gave; I have similar input to make for questions 1, 3, 6 & 7, and he has worded exactly what I wanted to say so much clearer than I could.

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) Also in the DRS appeal case of **bounce.co.uk** the experts found:

"The mere fact that a generic word happens also to be a trade mark cannot lead to the trade mark owner monopolising all uses of the word. Certainly for the purposes of complaints under the DRS Policy there has to be something more." DRS 03316

http://www.nominet.org.uk/digitalAssets/10081_bounce_appeal.pdf

This sums up exactly what I think on the matter

b) I believe someone has the right to keep a dictionary word domain IF the person does not have something on the website that infringes the complainant's trademark. (The registrant should also not be held accountable for any TM infringement that occurs as a result of the registrar automatically parking the domain name and serving up their own PPC ads whilst the buyer decides how to develop a site. The registrant will have no immediate control over this until nameservers are changed or site is hosted.

I also believe someone has the right to register a dictionary term for no-use and just to keep it as an investment.

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

I agree. This shouldn't be classed as abuse, especially if it's the complainant themselves or their representative/s that makes the initial contact to enquire if a) the domain is for sale, b) to solicit an asking price from the registrant.

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

I can't understand how a claimant could claim abuse or object to the use of the domain names natural type-in traffic being used to generate PPC revenue, and class it as abuse, when they themselves will also benefit from any natural traffic as visitors to any website they might create. This would however not be the case if the domain was an 'intentional' typo.

- registering many domains

Free Market! Where does it say in Nominet's Terms and conditions that large portfolio's are not to be created/held? It's no good classing lots of domain registrations as evidence of abuse or a pattern of abuse, especially in retrospect applying this rule to those already holding large portfolio's of names.

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*

I believe this proposal could have been used in the following DRS cases:

DRS 3747 Finechesses.co.uk
http://www.nic.uk/digitalAssets/8799_finecheeses.pdf

DRS 03886 SussexSkips.co.uk
http://www.nic.uk/digitalAssets/9598_sussexskips.pdf

Had this proposal been implemented at the time would the DRS cases have gone the other way? I.e. the respondent got to keep the name.

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

1) No Change - No

2) *small upfront fee* – YES! I would prefer to see a (Non-Refundable) upfront fee of about £250+vat, and reduce the expert fee accordingly. This would help prevent spurious, malicious and ill-prepared claims. If a fee was introduced to start a claim, then this would improve the standards of submissions by the complainant, and thus eventually save time; and the need for further replies after the respondent had replied. It would also improve the chances of both parties working out an amicable deal before the DRS system was ever utilised.

3) *loser pays* – I've never heard anything so ludicrous and ill thought-out ever come out of Nominet.... Totally counter productive and un-enforceable. Registrants would just use false contact details, normal registrants would cease to register any domain names for fear of being landed with £750+vat fines esp. if someone else took a shine to their website name. This would not be good for Nominet's financial 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 don't see any system of refunds being beneficial.

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?*

Procedure

I feel the respondent should either have the right to reply again (complainant shouldn't have the last word), or there shouldn't be an extra reply allowed by the complainant after respondent has made his response. Experts should not be allowed to do their own research in order to bolster a complainant's poorly or incomplete evidence. This in itself would also help improve claims if it had to be done right the first time. The current system is heavily biased towards complainants as not only do they get a second chance to reply, but are also being allowed to introduce new evidence

(regardless of whether the expert actually says they are not considering it) + fill in any wholes exposed by the respondent.

Payment

If a respondent wants to pay the DRS fee VOLUNTARY then fair enough. Does this apply to the appeal fee to?

Drafting

'Unfair Registration' is even more of a confusing and wishy-washy phrase than 'Abusive registration' - any claimant is going to say its 'unfair' that they don't have the name they are complaining about. Whose interpretation of 'Unfair' are we going to use? One mans 'Unfair' is another mans 'Legitimate'.

Appeals

The Appeal timeline should be kept the same. How long does it take to contact someone abroad? How long does it take for someone to find £3000 + VAT?

See Nominet apology on bounce.co.uk Appeal DRS 03316

http://www.nominet.org.uk/digitalAssets/10081_bounce_appeal.pdf

Allowing new evidence to be introduced in Appeals should make things "interesting" to say the least!

Expert decisions

These proposals are very important to introduce.

For example how can an expert base a decision on a Google search:

"Indeed a Google Search for "Fine Cheese" discloses only the Complainant (and not the Respondent) and includes recommendations from such culinary worthies as Delia Smith. A search for "fine cheeses" provides a similar result." DRS 3747

http://www.nic.uk/digitalAssets/8799_finecheeses.pdf

Correcting "typographical errors" is one thing. However for Nominet to delete whole sentences is another thing altogether! See the case DRS 03195 [sundeckvip.co.uk](http://www.sundeckvip.co.uk)

<http://www.acorndomains.co.uk/domain-name-disputes/5229-warning-nominet-can-doctor-drs-results.html>

By the phrase "Incorporate tests set out in previous decisions" I believe you are referring to things like the Tony Willoughby four stage test. See DRS 00292

chivasbrothers.co.uk

http://www.nic.uk/digitalAssets/1027_chivasbrothers.pdf

"Where a Respondent registers a Domain Name:-

- 1. which is identical to a name in respect of which the Complainant has rights; and*
- 2. where that name is exclusively referable to the Complainant; and*
- 3. where there is no obvious justification for the Respondent having adopted that name for the Domain Name; and*
- 4. where the Respondent has come forward with no explanation for having selected the Domain Name,"*

I am not a lawyer so I don't know if this should be included in DRS policy or not.

Miscellaneous

Please could you introduce a system allowing people to submit DRS cases (all material) online instead of having to submit three paper copies?

Also should experts be allowed to express their disagreement on appeals?

DRS 02201 [vikingdirect.co.uk](http://www.vikingdirect.co.uk)

http://www.nominet.org.uk/digitalAssets/10082_vikingdirectappeal.pdf

“Dissenting Opinion of Tony Willoughby

I regret that I am unable to agree with my colleagues. Had the decision been left to me, I would have allowed the appeal and directed that the Domain Name be transferred to the Complainant”.

This type of dissent serves only one purpose, and it’s not in Nominet’s best interest.

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.*

No Comments

- *The impact of Internationalised Domain Names, if introduced.*

No Comments

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

This is yet another instance of experts making decisions based on evidence not presented to them. They should have no right to fill in missing evidence pieces in order to bolster-up the complainant’s chances. More and more DRS decisions are having references made to the ‘experts’ own use of Google searches and Archive.org to assist them in improving the chances of a pro-complainant decision. If a complainant doesn’t put it in his/her evidence then it shouldn’t be considered!

- *Whether there have been any practical problems with the treatment of ‘Without Prejudice’ material.*

On the bottom of <http://www.nominet.org.uk/disputes/drs/legalissues/>

You say:

““Without Prejudice” is a legal label used on letters and emails which are part of a genuine attempt to settle a legal case. Without Prejudice material can (in most cases) be kept secret from the court, so that parties can talk about ways of avoiding litigation without ruining (or ‘prejudicing’) their case. However, in cyber squatting cases, the offer to sell a domain name for an exorbitant amount of money is actually often the main evidence of abuse - yet it could be hidden behind the “Without Prejudice” label”.

How does this fit in with Question 2 “A general offer to resell a domain name”?

I believe that if the term ‘Without Prejudice’ is used in any correspondence between complainant (or representative) and respondent, then that should not be admissible at all, as evidence in a DRS case.

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

I want to see clear rules on how experts can represent complainants:

DRS 02505 royalandancient.co.uk

http://www.nominet.org.uk/digitalAssets/3646_royalandancient.co.uk.pdf

“The Complaint, which is dated the 29th March 2005, is made and verified by Willoughby and Partners, solicitors, acting on behalf of the Complainants”.

DRS 01649 hedonism.org.uk

http://www.nominet.org.uk/digitalAssets/3971_hedonism.pdf

**“represented Messrs. Willoughby & Partners”
The Pitman Case**

<http://www.nominet.org.uk/disputes/courtcases/pitman/>

“Ms. Emma Himsworth (instructed by Messrs. Willoughby & Partners”.

Who are also involved with UDRP cases:

WIPO Case No. D2006-091 waynerooney.com

<http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0916.html>

“Tony Willoughby - Sole Panelist”

That quotes a .co.uk domain which is under DRS:

“On the same day he registered the domain name <waynerooney.co.uk>”

DRS 03844 waynerooney.co.uk

http://www.nominet.org.uk/digitalAssets/9378_waynerooney.pdf

Referring back to Question 6 – ‘Miscellaneous’ if experts are allowed to publish their dissent regarding decisions made by other expert panellists, even in the case of appeals; then all that serves to do is generate more work for the dissenting expert, as complainants might see them as a ‘safe pair of hands’ when dealing with their DRS complaint.

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

I think it is important that “registrants” are notified of DRS contract changes at the time of renewal or registrations.

Maybe Nominet needs to either email all registrants or ask its registrars to put notices on their websites? How will registrants be notified to changes of the current DRS contract?