

As the subject of a recent controversial and subsequently following appeal demonstrated to be incorrect DRS decision on the mercer.co.uk domain name, the review of the DRS is in my opinion something which is much needed and that I welcome.

From what I can see from “Updating the .uk Dispute Resolution Service” web page on Nominet.org.uk the proposals seem to place emphasis on the informing of the complainants and respondents using the DRS as to DRS policy and as to what should constitute the two pillars of any decision under the policy, Rights to a domain name, and Abusive Registration. However whilst this is clearly important and necessary I think of much greater importance to increasing the quality and effectiveness of the DRS as it stands is informing and improving the overall standards and performance of the appointed experts. A more clearly delineated policy with a detailed set of published standardised guidelines for experts relating to key areas would help achieve this and would also be of assistance to respondents and complainants in their cases. This along with a number of other improvements are required in order to help achieve a consistent, fair and accurate DRS procedure for both sides, particularly in the less clear cut instances.

A fair and accurate DRS procedure is something which is a prerequisite for the viability of some of the proposals put forward such as making losing party pays costs. In principle this is a good idea, but essential to the fairness of this proposal is that expert decisions must be fair and correct in the first place. Otherwise it will just add to the injustice the respondent in a bad DRS decision must suffer, the insult to injury of not only losing their domain name but having to pay for the complaint that produced this unfair outcome as well - terrible. In looking at a large number of past cases I can see that although the majority are okay there are a significant number of cases where this fair and correct outcome for both the respondent and complainant has clearly not been achieved. At the moment there are just too many bad decisions and inconsistencies particularly amongst the less clear cut cases disillusioning both sides and appointed experts demonstrate a clear lack of the necessary expertise on too many occasions. Nearly 50% of all appeals have resulted in the overturning of the original expert decision; this statistic tells a story as to validity of original expert decision stage in these instances, it is simply not good enough. Whilst the total number of appeals is small it seems inevitable many further decisions would have been overturned had more respondents been able to afford this excessively priced procedure.

The Nominet DRS - Experts Review Group - with regards to this whilst I commend the introduction of this and it's aims in principle and the fact it illustrates some recognition of a need for improvement; and see it could potentially help lead to at least some of the improvements I advocate. I was however disappointed to see that this group was not independent and consisted of some experts who have themselves the evidence suggests produced flawed DRS decisions in the recent past. For example amongst the members of this group, David King who ordered transfer of my companies domain name mercer.co.uk based on a flawed decision and reasoning, a decision criticised and overturned by appeal. To see him as part of the Experts Review Group casts some severe doubts in my mind as I am sure it does for many others as to the value and validity of this committee in producing much needed critical evaluation, quality control and

improvement of standards,. The stated restricted scope of this review group also means it will not it appears take any active intervention where mistakes have occurred or even publicly acknowledge those that have, this seems wrong. Reflecting on my own recent experiences once more for example, whilst I am sure they would recognise the incompetence in the initial expert decision in this case, it does not help me recoup the three and a half grand that I lost as a consequence of this error (a refund would be nice!), nor would it help the many people who have simply lost out to incorrect decisions because they could not or did not wish to appeal on grounds of the large and unrecoverable costs involved. Some accountability for recognised bad decisions and intervention in these circumstances should be considered.

Greater knowledge of the intricacies of the area and the secondary market in particular by the experts is in many cases apparently necessary, and so too it appears on many occasions is a bit more effort and motivation to achieve a just and fair outcome and also in some instances too it seems a greater degree of impartiality. As an example one of the areas singled out in the new proposals relating to the secondary market is that of PPC advertising. For example some PPC advertisers deliberately and clearly abusively target companies established brands and trading names and develop directory or PPC pages whose content is related to the relevant product area etc. Where there is an established well known business for instance “Bob Shoes Ltd” trading at bobshoes.co.uk advertisements for shoes deliberately placed on a PPC webpage bobshoes.co.uk may be abusive. If the registrant for example creates a web page design incorporating pictures of shoes etc. placed on bobshoes.co.uk which he has just registered. In these circumstances it would appear he has deliberately targeted this company, is passing off as them and registered the domain name for this purpose, indeed on the balance of probabilities this would be highly likely.

However and an issue that was raised in my case is people who use services like Google AdSense on their webpages do not target advertising content rather it is determined automatically by the relevant Google data and algorithm. So whilst advertises for shoes or even for “Bob’s Shoes” on for instance bob.co.uk or even bobshoes.co.uk as above may potentially appear in the advertisement’s content at one time or the other in Google AdSense, or Overture, Miva.com advertises etc. It does not necessarily mean abusive registration since it does not necessarily entail any intent or prior knowledge or awareness by domain owner of the ‘Bob’s Shoes’ company or that they were deliberately targeted. This is just one small example of the many relevant issues in these areas all appointed experts should and need to be aware of, after all they are meant to be experts in this field. However all too often as evidenced by many poor DRS decisions and the discussions set out within these many appear to clearly lack such necessary similar background knowledge to assess all situations and evidence properly and make the correct decision. Once more it seems there needs to be clear guidelines, relating to this area they would be what constitutes fair use of PPC and what is abusive, guidelines which will help produce fair and consistent decisions. In my recent case for example, the expert deemed my use of Google AdSense on this page as detrimental to complainant’s rights, even though the page was clearly branded as my company and no relevant advertises to complainant’s business or even their business area were placed on the page. His

reasoning for this conclusion was simply that it was possible some visitors may go there looking for the complainant's company and may happen to click on adverts (although all were unrelated) which would generate revenue for the registrant which would not go to complainant and thus were detrimental to complainants rights. By this logic all PPC adverts could conceivably be deemed abusive; hence the need again for clear guidelines as to what constitutes fair and acceptable use.

Trademarks on dictionary words are specifically mentioned in "Updating the .uk Dispute Resolution Service". With regards to my own recent experience one thing I think as one example there needs to be clearer definition of is what constitutes a "well known trademark" or trading name under DRS policy. There are thousands of trademarks on many words no one has even heard of the use of and that have not been actively applied or promoted (such as "Mercer" in my case) and many include highly generic terms, for example trademarks exist on terms such as "fire", "water" etc. This is a key issue that needs particular clarification; some objective test for what constitutes a well known trademark for instance would be valuable. In my instance the key element of my appeal success was this area, and the fact that none of the appeal panel had heard of the trademark, this is where it differed in appeal from other cases such as bounce.co.uk, but this key fact needed to have been appreciated in the initial expert decision as it does in future cases. One other observation I would like to make is that where no trademark exists the goodwill and other factors relating to a particular term are weighed up to assess the complainant's rights in this. However when the situation is reversed and a trademark for the term is held by the complainant the value and weight of this it seems is never questioned or evaluated, it always it seems to entail the presumption of strong irrefutable rights. For balance and fairness it seems the value in this respect of a trademark that is for example only days old, or that has never been promoted, marketed or actively used should also be explored.

With regards to an initial filing fee for DRS complaints I am in full agreement, but I do not feel the £50-£100 fee is sufficient to discourage those complainants who have ill considered, ill advised complaints or who want to pressurize registrants or simply just want to vent their frustration that a particular domain name they want is no longer available. I feel this fee should be set at least at the £200-£250 level and as proposed deducted from expert decision fee if proceeding. This would remove it could be thought the vast majority of timewasters who cost both Nominet and respondents much wasted time and expense, particularly since by the structure of the current system the respondent has no choice but to respond to all complainants seriously no matter how trivial or banal their complaint may be prior to mediation stage, in order not to potentially lose their domain name later (Mediation stage to positioned in process before response from respondent required could work well...). As the current DRS crucially does not allow them any further opportunity to present their case or evidence. This is something which stood out very much to me as particularly unfair and influential in my recent defence of DRS case. That is I think the present structure of the process and one which does not appear to be proposed as a change under new proposals, is flawed in that it is unfairly weighted in favour of the complainant. That is that at each stage of the process the

complainant is given the opportunity to have the last word even upon appeal, so they can have both the first and last word in the procedure overall. Overall through the DRS currently it seems clear to me that the burden of proof rather than being on the complainant is placed upon the respondent to defend their domain name, yet they are given little opportunity to do this. In my recent DRS case mercer.co.uk the complainant presented an argument in their complaint, in my response I pointed out the holes and weaknesses in their argument and evidence and why their claimed rights to the domain name and allegations of abusive registration were incorrect, however the complainant then was able to take the opportunity to use the content of my response, perhaps decisively, to bolster their response, improve their case and argument and provide additional evidence some of which was fabricated to fill in all the gaps, all of which was then accepted unquestioningly, without verification by the expert in question, in addition to what had come before. However I was not at any point allowed to provide any further argument or evidence in the process even upon paying £3525 for an appeal, surely this cannot be a fair arrangement.

Chris Clark

IMO International Limited