

We are pleased to respond to the Nominet consultation on the Dispute Resolution Service.

We are a small company and have been a member of Nominet for several years. We register .uk domain names for end users (both individuals and corporate) and for our own use.

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.

**It is important to recognise that any trademark (be it registered or not, UK or not) does not give rise to a complete monopoly on the mark text, be it a dictionary word or otherwise. We would like to see this explicitly recognised and we would also like to see the rights hurdle raised from its current level which appears to be “barely just off the ground”.**

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

**We support these proposals but we feel that there should be quite detailed clarification on these because experience shows that Experts can be somewhat liberal in their interpretations when applying the policy. For example, how many domains is “many” domains? If you leave this to the judgement of the Experts then it will always be open to selective interpretation.**

**Where many domains are registered by a respondent it should not be the case that the respondent has to justify each registration (unless those domains are those being decided upon). Responses are restricted by word limits and it seems entirely unreasonable to present a list of other domain registrations over and above those which are part of the complaint and expect the respondent to justify each one. It also seems entirely unreasonable for Experts to pass judgement based on additional domains when those domains haven’t been subject to a DRS themselves.**

**It should be acknowledged that one abusive registration within a portfolio of domain names should not place the rest of the portfolio at risk.**

**With regards domain parking and/or the use of pay per click advertising on web pages, we strongly believe that the policy should include provision for circumstances whereby the domain registrant is not responsible for the advertising that appears on the website. It should be acknowledged that the adverts displayed on a parking page may actually be entirely controlled by the**

**domain parking company / advertising agent based on an algorithm (more on this later).**

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.

**We agree with this.**

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

**We believe that an upfront fee should be paid when the complaint is filed. This fee should be a reasonable proportion of the DRS fee in order to deter against vexatious complaints. We suggest that an amount not lower than £250 would be appropriate.**

**Loser pays is going to be very difficult to enforce and legally dubious in its punitive nature and hence we do not support it – either in concept or in practise.**

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?

**We do not support any system of loser pays, but ...**

**We have heard various rumours whereby DRS case losers (as respondents) have been paid sums of money by Nominet following DRS cases. Such rumours need to be taken with a pinch of salt, most notably because any settlement will undoubtedly be covered by a confidentiality agreement.**

**In broad and unspecific terms, however, we did confirm the existence of such payments with Nominet management at a recent Member Lunch event. The exact number of payments made and the amount of the payments was not discussed.**

**As an outsider looking in, and without any specific information to go on, these payments could be considered to be anything from “refunds” to “compensation” to even “silence money”. Either way we feel that the fact that these payments have been made and that they were made outside of the existing policy and under confidentiality agreements only serves to undermine the policy and the Experts.**

**Those charged with reviewing the DRS policy should ensure that, where such payments have been made in the past, the circumstances are understood and taken into account so as to ensure that this simply does not happen in the future.**

**Despite the above we do believe that appeal fees should be refunded should the paying party win the appeal. This should be funded by Nominet as part of the fees charged to enter into a DRS (we believe the DRS should be run on a cost recovery basis - see later).**

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
  - 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.

**It would seem obvious to deal with this in two ways – either allow the respondent a second response, or cut out the complainant's response. We support the former.**

- As a counter-balance to altering the reply stage, strengthen and clarify the provisions relating to non-standard submissions (Procedure 13(b)).

**Without any detail on "strengthen and clarify" it is difficult to comment.**

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

**Clarity is always good but again there isn't enough information here to comment on. In general terms we feel it to be unfair that evidence may be discounted by an Expert because of a minor failure to follow the rules and or due to a misunderstanding in procedure.**

Payment

- Allow respondents the opportunity to pay for a decision.

**We have no problem with 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'.

**We see no need to rename Abusive to Unfair. We believe that the DRS should be rewritten in Plain English on the basis that the DRS should be open and understandable to anyone regardless of representation or intellect.**

## Appeals

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

**Why – what’s the benefit? What’s a week in the context of this?**

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

**This is a tricky one. We have no firm opinion either way.**

**However given that just over 50% of appeals result in the original decision being overturned, it is clear that appeals are an important part of the process because bad decisions are made under the DRS. It is important to understand how/why those “bad” decisions were made and what can be done to avoid them happening in the future.**

## 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.

**As a general point we do not feel that it is appropriate for Experts to conduct their own research. One recent example saw an Expert putting words into an internet search engine and then drawing conclusions from the results. If one side in the DRS wants to do this then fine – this then allows the other side to review and dispute the findings accordingly, but the expert doing so does not and seems very unfair.**

- Clarify how decisions can be corrected or amended - for example, to correct typographical errors.

**Corrections or amendments should never be necessary if the process is working correctly. Surely all decisions are reviewed prior to publication?**

**If Experts are producing decisions with typographical or other errors, they shouldn’t really be serving as Experts.**

- 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.

**We wholly agree with this, but there should be some rules as to when these precedents are and are not appropriate. Use of these precedents or tests should not necessarily be at the discretion of the expert – perhaps**

**they should be mandatory in specific circumstances so as to ensure a level playing field?**

#### Abusive registrations

- Include a likelihood of confusion as evidence of an abusive registration i.e. soften the test at 3(a)(ii) ('has confused').

**We feel that this is a bad idea as it will result in a greater reliance on the judgement of the expert rather than on hard evidence produced as part of the DRS. If anything the confusion test should be hardened, not softened.**

**As an example, we feel that one email from an ill informed internet user (seemingly unconnected with the complainant) saying "oh I went to this other site and I thought it was you" should not constitute proper evidence of confusion. These sorts of correspondence are all too easy to produce, lacking in substance and are very weak evidence in the scheme of things.**

**Would a multil million pound passing off legal action turn on an otherwise anonymous email from a "customer"? No, and nor should a DRS case.**

- 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.

**We disagree with this. It is possible that any potential abuse may not have been intentional – perhaps through non-knowledge of a complainant's business, or maybe through dodgy keyword bidding by competitors that leads to abusive adverts being shown on a domain parking page. To clarify, we define "dodgy keyword bidding" as businesses carrying out PPC advertising on their competitors' brand names, misspellings, etc.**

**Where potential abuse has been suggested by a complainant and then stopped (with no admission of abuse) by a respondent, this should be viewed favourably towards the respondent as only a genuinely abusive registrant would continue potentially abusive use after due notification.**

- 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.

**We agree with this, but suspect that it will be used selectively by the DRS experts without any detailed guidance to advise otherwise.**

- Clarify when rights have to exist to complain and to prove abuse.

**We agree with this, but you have not provided sufficient information to comment on – what form will the clarification take and what will be constituted as proof of abuse? Surely this needs to be stated now in order to get the most out of the consultation?**

#### Miscellaneous

- Include anti-avoidance provisions for the 'three strikes' rule (Policy 3(c)).

**Agreed.**

- Change the provisions dealing with communication and service of documents to take into account the new and potential extra online services.

**Agreed.**

- Clarify the role of representatives.

**Again – more information needed to comment here.**

- Add provisions to clarify how a DRS dispute and any processes arising out of the Industry Standards consultation could interact.

**Again – more information needed to comment here.**

- Give both parties legal rights against each other if they make untrue statements in submissions.

**This raises an interesting issue – what happens if, after a DRS decision is made, the losing party becomes aware of false statements made in submissions? Especially if the decision turned on those statements? Should the policy allow a Nominet based recourse for this and should time limits apply?**

**Also, going back to the point of new evidence in appeals – what happens if an untrue statement is made during the DRS submissions and then the evidence to prove it is procedurally disallowed in an appeal? We have no answers to these questions, but we think they should be considered when evaluating these issues.**

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?

**While we understand the need to keep the process short and speedy, there is some considerable inequity in the fact that respondents only have a short window (14 days) in which to respond to a complaint that may have been prepared over a very long period of time. We believe respondents should be allowed 28 days to respond as standard and should be allowed additional time (a further 28 days) upon written request.**

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 specific comments either way.**

- The impact of Internationalised Domain Names, if introduced.

**No specific comments.**

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

**This could probably only happen in really blatantly abusive cases, but care needs to be taken so as to ensure that this is not based on the Expert's own research or that the expert is not filling in the gaps for the complainant.**

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

**We have never been party to a DRS and hence cannot firmly report on whether there have been any practical problems. However we do have some concern that the ability of a DRS expert to consider Without Prejudice material was established in "DRS precedent" at a very early stage of the DRS, was done so without any external policy consultation and has remained in force ever since.**

**In the previous DRS consultation, it was noted by Experts that "unlike court proceedings, the costs of defending a DRS case are negligible, and Nominet's mediation service provides an opportunity to settle, and therefore many of the public policy elements of the 'without prejudice' rule do not apply." This is simply not the case – it fails to take into account the costs involved in preparing a robust DRS response as it is now almost inevitable that professional advice is required when preparing a response – professional advice that DRS Experts are more than happy to provide at a sky high hourly rate!**

**Also, we believe this bullet point has been phrased in this way because it has already been decided that without prejudice correspondence should remain allowable under the DRS, rather than being a serious point for consultation. Surely this should be part of the consultation?**

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

**We suggest some form of "entrance exam" in the form of a case study based on real DRSs for Experts. They would need to consider the facts/evidence and then decide the outcome with full justification. This**

could form the basis of standards for not only new Experts but also existing ones.

There is little transparency over the selection, briefing and training for Experts. We believe that Experts may have additional materials available to them that make their representation of DRS parties in other cases somewhat unfair to the other (presumably unrepresented) side.

Things that may tip this balance may include: internal Nominet guidance on how to decide judgements, Nominet guidance on precedents of past cases that is not available to the general public, the receptive ear of the Nominet in-house legal/DRS team and even personal contact with other experts. We do not know if such material exists but, if it does, it would seem extremely unfair to allow the holders of such material to be allowed to advise/assist in the drafting of DRS complaints/responses against other parties.

Furthermore, we believe that this imbalance could extend further in cases where DRS parties are advised by Partners in the same legal Firm as a DRS expert. How can we be assured that the relevant Chinese Walls are in place to ensure that the Expert and/or their training material is not compromised?

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

We would need more information before commenting on this.

Additional comments

## 1. Evidence

We feel that evidence involving some “deception” should not be permitted under the DRS.

An extreme example of such evidence would include that presented by the complainant in DRS 02426 (subsequently appealed) – a report by a 3<sup>rd</sup> party private investigator. We do not believe that such evidence should be allowed in a DRS as it widens the gap between the large corporation and the “little guy”/small business.

A more common example would be where a domain owner is contacted by a random 3<sup>rd</sup> party so as to be duped into offering a domain for sale. The random 3<sup>rd</sup> party then turns out to be someone working for the complainant but using an anonymous webmail account. We do not believe

that it is fair to use such evidence where the domain registrant is entrapped in this way.

## 2. Fairness

The whole point of the DRS is to provide an easy to understand, fair and accessible way of resolving .uk domain name disputes – a viable low cost alternative to the courts that a layman can use - isn't it?

Notwithstanding our comments in this response, it seems clear that the DRS as it stands is far from being easy to understand and we have severe concerns that the DRS is not really accessible to the layman. The additional revisions to the DRS that will take place following this consultation will further complicate matters and will increase the need for DRS participants (both complainants and respondents) to seek independent advice. In most cases, such advice will have to be paid for.

We feel that this takes us to a position whereby the DRS is actually not wholly accessible to the whole .uk internet community and its stakeholders.

If we are not careful, the DRS will evolve into a complex monster incapable of being understood by all and with little transparency. Having had recent experience of several Employment Tribunal cases, we strongly agree with the following extract from David Blunt QC's response to this consultation: "If you want an example of what can go wrong look at Industrial Tribunals - designed to be cheap and simple in which there would be no need for lawyers - now a vast and complex industry with stringent rules which only specialist lawyers can cope with". We would hate to see the same said of the DRS in the future.

## 3. Nominet's involvement in the DRS

It has been said in the past that the DRS should not remain controlled/run by Nominet. Our initial view on this was to disagree – better the devil you know being one of the key reasons.

However, in reading the other responses and in preparing this response, we are increasingly seeing the advantages in taking the DRS process out of Nominet's control and into the hands of a truly independent 3<sup>rd</sup> party.

This is a very complex issue and there are many things to consider such as funding, legal status, etc.

While we are not definitive in this, we do feel that it is worthy of investigation and further consultation.

In addition, as Nominet members, we do have some concerns as to how much the running of the DRS actually costs Nominet. Given that everything else seems to be run on a cost recovery basis, should the DRS fees not fund the administration and costs behind it? The consultation document says "Nominet does not intend to start charging for its own services in relation to the DRS, i.e. administration and mediation service." – why was this matter not part of the consultation, surely it is an important policy decision? Our view is that the DRS fees should fund the provision of the DRS service.

#### **4. Mediators**

We have always believed that the DRS mediation was conducted by a 3<sup>rd</sup> party. We were recently surprised to learn that the mediators are in fact Nominet employees and are the same individuals who are involved in the day to day administration of the DRS.

We believe that this is a bad idea and that they should be separate so as to ensure that the impartiality (both perceived and actual) is beyond question.

**Servitor Limited  
15 February 2007**