

~ **Updating the DRS** ~
Consultation Response

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INTRODUCTION

Whether one owns just one domain name or 35,000, all registrants must be treated equally under Nominet's Terms and Conditions and therefore, the DRS. The rules must apply to one and all whether they be an ordinary Registrant, a Registrar, or a Domainer.

The nature of adversarial systems is that they will never please all of the people all of the time, but contrary to what some people would have us believe, there is as much controversy within the UDRP as there is within the DRS. Where there's a winner, there's a loser, and losing hurts, no matter what the circumstances.

If one trades in domain monetisation, the odds of a complaint being made against them increases exponentially to the volume of domains held in their portfolio. The nature of the domain monetisation business model itself attracts this risk. The fact that many DRS cases involve domainers is only proof of what I have just said; that the risk of complaint increases exponentially to the amount of domain names one holds in their portfolio.

It is therefore disingenuous to suggest the DRS is in some way biased against domainers. It is possibly biased towards complainants but that is one of the reasons for this consultation; to try to make the system fairer to 'one and all'.

Point of info: For anyone reading this who does not understand the terms "monetisation" or "domainer" here is a brief explanation. Domain monetisation is the practice of registering large numbers of domain names for the primary purpose of capturing as much internet traffic as possible to maximise advertising revenue. The advertising revenue is generated from PPC (Pay per Click) pages. Each time a visitor to these pages clicks a link, the domainer makes a small amount of money from the click-through. A domainer may hold hundreds, thousands, or tens of thousands of domain names, within their portfolio. Hence, domain monetisation can be a highly lucrative business.

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.

Answer: In my opinion, both (a) and (b) should be included in any future policy. My reason is simple. Just as the courts must decide on the evidence presented by both plaintiff and defendant, so the DRS must decide on the evidence presented by complainant and respondent. One party's rights may end up outweighing the other's but there must be enough latitude within the policy to allow those making the decisions a reasonable degree of discretion in the pursuit of justifiable decisions.

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

Answer: None of the above may constitute evidence of abuse on their own. However, it seems reasonable to suggest that taken with other factors (within a complaint) that abuse; or the intention to abuse; may become evident.

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: If evidence is so finely balanced, so much so that the Expert cannot decide 'for or against', then the Expert really only has one choice. Take no action. So I am not quite sure if this statement adds anything at all to the policy, except perhaps confusion.

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

Answer: I will answer in reverse order. "Loser pays" is not an option. Even if it was introduced, it could never be enforced. In any event, it would cause all sorts of injustice in that individuals and small companies would be forced to capitulate before even going the distance; they simply would not be able to gamble on losing £750. Whilst I am mindful of the view that £750 is not a large sum when compared to the court system, we are not talking about a trademark dispute in court; which can cost upwards of £40,000; we are talking about a dispute resolution service that Nominet promised would provide a cheap, fair and quick way of dealing with these disputes.

I am also not in favour of "no change". Having thought about the nuances of DRS as opposed to other forms of mediation, arbitration, and the courts, I am of the view that the full £750.00 should be payable upfront by the complainant. It has already been suggested (many times) that the quality of complaint is often dismal. It would seem fair and reasonable to suggest that if time and resources are being wasted by poor quality submissions, that it would be a huge incentive to ensure a quality submission if the £750.00 was payable upfront. If the complaint is then settled during the informal stage the £750.00 could be returned to the complainant.

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: You can't. It would create more problems than it seeks to solve. See my comments above under Question 4.

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: **Procedure. (Remove or alter the Reply stage).**

Currently the complainant gets to reply to the respondent. I believe it is inherently unfair that the respondent only has one chance to submit whilst the complainant has two. That's 2 to 1 against. Let's do what Nominet says and provide "a cheap, fair and quick way of dealing with these disputes". In my opinion, there is nothing "fair" about favouring the complainant in this way.

Payment. (Allow respondents the opportunity to pay for a decision.)

Whilst I cannot see the advantage, I would not be against this. I cannot see the advantage because it is conceivable, that in the future, another complainant may emerge who alleges rights in the same domain name.

Drafting. (Re. Abusive as opposed to Unfair registration.)

My personal view is that "unfair" is too subjective a term. I would therefore favour retaining "Abusive Registration" in the terminology.

Appeals. (Timelines and allowing of new evidence.)

I am in favour of keeping the 'notice of intention to appeal' as 3 weeks. Any less will simply place more stress in an already stressful situation. Let's be "fair" to all parties. As for new evidence; I cannot see why the learned Experts seem to have difficulty allowing new evidence if the evidence is pertinent to, and strengthens the case of, either party. I would respectfully remind us all again, the DRS is not the courts. If we accept Nominet's promise of a "a cheap, fair and quick way of dealing with these disputes" as being a measure of the purpose of the DRS, then surely we must do our best to accommodate the nuances inherent in this unique dispute resolution service.

Expert decisions.

I am a great believer in openness and transparency. No surprise therefore that I am favour of clarifying all aspects of how experts reach decisions and how they may correct or amend published decisions. On a further note regarding how experts 'do their own research'. In America, it was recently discovered that in an alleged 100 cases, Judges had used Wikipedia as a reference tool even though it is a free encyclopedia that anyone can edit and is notoriously inaccurate because of that. So I would express concern at the methodology of Experts who do their own research and would urge them to put their research to both parties to a given dispute, allowing them to respond to such research, before making a final decision that may well be life-changing for both parties (especially the losing party).

Abusive registrations.

I believe "a likelihood of confusion" should be allowable within policy. My reasoning is this. One has to allow for the possibility that confusion is intended just as one has to allow for the possibility that it is not intended. If someone is using a domain name in a manner that does confuse or mislead, the question to be answered is "why"? If the answer does not stand on its own merits, then it is quite possibly an abusive registration. I also believe it is enough that abusive use has occurred in the past (if actually shown to have occurred) and does not have to be ongoing.

Re. "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."

Initially, I agreed with this suggestion, now I don't. Having thought about the implications, and having had a read through the other responses, I am now of the opinion that

abuse can occur at any time; now, in 3 years, in 10 or in 20. Why therefore make a policy that could effectively muddy the waters on what is or isn't regarded as abuse within the DRS? If a domain name is being used in an abusive manner whether at inception or years in the future, it may still be abusive, and the DRS should include the possibility.

Miscellaneous.

I am not a great fan of the 3 strikes rule though I can see why it is there. I believe therefore this is probably best left to the discretion of the Expert deciding the case. But quite how a DRS Policy could "give" legal rights against each other is beyond me. Here we are saying the DRS is not the courts but suggesting *we give legal rights* which each party already has in any case. It may be better just to give each party the right of redress (within the DRS) if the other party is subsequently found to have lied in their submissions.

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.

Length of submissions.

I cannot see how one can adequately present an entire case in 250 words. So I would be in favour of allowing more flexibility in this regard.

The impact of IDN.

There must be some provision for disputes raised in connection with Internationalised Domain Names; and frankly, the mind boggles!

Whether experts can find a registration abusive for other reasons.

No. If the complainant has not identified why they think it is an abuse of their perceived rights, the Expert should look at the evidence only as presented. Otherwise we run the risk of seeing decisions where the Expert was unfairly biased towards the complainant and the DRS must be seen to be fair to both parties to the dispute.

Without prejudice.

Without prejudice can be abused and often is. Having said that, I believe it should be at the discretion of the Expert presiding.

Experts representing parties in other disputes.

I have previously been of the opinion that experts should not represent parties in other disputes, but having thought about the issue, I find myself agreeing with Tony Willoughby. It is only the rather biased perception of some stakeholders (and stakeholder groups) that casts doubt on the integrity of the solicitors and barristers who are bound by professional ethics even when acting as DRS Experts. Already I hear the wailing and gnashing of teeth from various quarters but the fact is, professional people are called professional because they can act professionally even in the face of conflict or conflicts of interest. And as Mr Willoughby says; "Risking our professional integrity in this way would spell professional ruin and would make no sense", and it doesn't; at least not to this stakeholder. Add to that the fact that

Nominet would indeed have a very difficult task finding alternative Experts to adjudicate anything if we prohibited DRS Experts from representing other parties in other disputes. This would also make no sense.

Whether the DRS can be taken out of the contract.

Presumably this means taking the DRS out of the contract of registration (Terms and Conditions)? I would be in favour of being able to update the DRS as and when it was deemed necessary, so I would have no objection to taking it out of the contract. Indeed, I am sure certain people will see advantages in this.

CONCLUSION:

All my responses above are based on Nominet retaining its control over the DRS.

However, whilst I am strongly in favour of Nominet continuing its Informal Mediation Service, I strongly believe that to be seen as truly independent, the formal part of the DRS should be administered by an outside body or bodies.

ICANN do this fairly successfully with their appointments of independent UDRP bodies. I say "fairly successfully", because unlike Nominet's DRS, the UDRP has not changed much at all (if at all) since 1999 and many observers suggest it is in need of a long overdue facelift.

However, it seems I am in a minority on the issue of an outside body handling the formal DRS, though I remain convinced that to be truly independent, the DRS must be just that; truly independent.

James Conaghan
[Individual Nominet Member]