

Dear Nominet:

I would like to take this chance to thank Nominet for encouraging feedback in the form of this consultation and for instituting this review of the Dispute Resolution Service Policy (DRS Policy). While the DRS Policy, and the similar Uniform Domain-Name Dispute-Resolution Policy (UDRP), was originally launched with the important and necessary task of protecting trademark holders from exploitative domain registrations, the limitations created by short-sighted drafting continue to cause unintended consequences for domain owners, complainants and related businesses alike. While all trademark owners are entitled to cost-efficient means to dispute flagrant abuse of well know marks incorporated into domain names, the trademark community is not the only stake holder entitled to a fair and unbiased forum for resolving disputes. The internet has opened doors to new and exciting industries which stand to push the boundaries network technology and yet current domain dispute resolution services seem intent on preserving the competitive advantage of existing industry. The English language is a diverse and beautiful tool of communication and trademark law is designed to balance the need to protect business identifiers with the rights of the public to a robust public domain of free expression.

Sedo GmbH (Sedo), headquartered in Cologne, Germany, provides domain-related services to nearly half a million domain owners around the world, including close to 50,000 users located in the United Kingdom. Sedo offers a domain marketplace platform for users to buy and sell pre-registered domain names and a variety of other services designed to support the free trade of domain names, such as domain appraisals, domain parking, and promotion. Domain parking has emerged as a vital tool for domain owners to analyze a domain's natural traffic, visitor origin, and search preferences. In addition, domain parking allows a domain owner to receive the domain equivalent of "rent" by allowing advertisers to reach the targeted consumers visiting the domain. To prevent the abuse of third-party intellectual property rights through the use of Sedo's services, Sedo maintains strict terms of use and policies forbidding the use of our services for any infringing purpose. Furthermore, Sedo's Rights Protection Program is an easy to use procedure for trademark holders to notify Sedo of potential violations. By working closely with trademark owners, Sedo's internal legal department has assisted hundreds of trademark owners in protecting their rights online.

Sedo users have listed more than 7 Million domains for sale on the Sedo domain marketplace and more than 300.000 .CO.UK domains are listed for sale at any given time. The market for .CO.UK domains is one of the strongest in the world and Sedo believes that this growth shows no sign of slowing. In order to preserve its legitimacy and to ensure its long-term relevancy, it is Sedo's belief that the DRS Policy must be updated and revised to account for non-infringing uses of domain names and the legitimate commercial interests that have developed to serve the domain name market. Please find below the detailed response of Sedo to the questions presented by the consultation. Questions with which Sedo maintains no opinion have been indicated as such. If you have any questions regarding this response, please contact me at any time.

**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.**

One of the frustrations Sedo users have experienced with domain dispute resolution services is that panelists often appear eager to recognize rights in a word but then forget to apply the various limitations that exist under statutory and common law to balance these rights. While I understand that panelists must confine their decisions to the scope of the policy, it appears that panelists have an expansive view of rights and a restrictive view of legitimate use. If the DRS Policy is expanded to recognize third party rights in words that are descriptive but distinctive in character, the policy must also make it clear that a complainant bears the burden of establishing that the term is in fact distinctive. Furthermore, while Sedo understands Nominet's goal of maintaining a low threshold of "rights," the phrase "distinctive character as a result of the use made of it" must be adequately defined or illustrated to prevent frivolous claims based on nominal or questionable "use" of descriptive or generic terms. Brief or local use of a descriptive mark should not grant a complainant the right to a domain name absent specific evidence the registrant used the domain to target the customers of the complainant. The threshold for "distinctive character as a result of the use made of it" must be set sufficiently high.

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

As with question (a) above, Sedo does not believe that the DRS should exclude any claimant who would otherwise have rights according to applicable trademark and unfair competition law. However, rights associated with dictionary or descriptive terms have proven to be a contentious issue in the past and any expansion of the definition of "rights" must be adequately balanced with additional checks to ensure that a third party may not utilize the DRS as a means to challenge the ownership of a domain absent specific and concrete proof of intent to profit from third party trademark rights associated with such term. This can be addressed with revisions to the existing definition of "Abusive Registration" and the illustrative "Evidence of Abusive Registration."

The proposal outlined in Question 2 below represents a good start, but a necessary addition would be inclusion of language instructing a panelist that dictionary words that are not famous in the eyes of the general consuming public should be presumptively weak and that a complainant bears the burden to show that their rights were singled out and intentionally exploited to establish a finding of abusive registration. Previous decisions by DRS panelists have made broad presumptions as to the knowledge of domain owners of the existence of third party rights, especially in the case of unregistered marks, and must be remedied in the instructive provisions of the DRS Policy.

Question 2: Please give us 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)**
- **registration of many domains**

Question two addresses an issue of significant concern for Sedo. A common fear of domain owners is that any offer to sell, even if not directed at any particular company (or their competitors), will automatically be viewed as evidence of abusive registration. This fear has led to the common practice of domain owners refusing to indicate an asking price for their domains and instead preferring to only respond to unsolicited offers. This unnecessary pattern of behavior undermines the effectiveness of online marketplaces and ultimately results in a poor experience for end users (which includes both large and small businesses, creative departments, individuals, and investors) seeking to purchase domains on the secondary market.

This concern applies to any presumptive treatment of the sale of traffic as well. Natural traffic is one of the most important factors referenced in any domain appraisal and the practice of “parking” an unused domain to earn revenue from such traffic has expanded into an international industry that is fueling the success of small and publicly traded companies alike. As domain owners have discovered the natural value of domain names, it was a logical evolution for domain owners to begin developing large portfolios of domains for such use. The negative treatment of owning large numbers of domains has caused legitimate businesses to conceal their portfolios for fear it will be used as evidence against them. The DRS Policy should be revised to allow legitimate and lawful companies to operate with efficiency and transparency.

The key concern for Sedo and many of our users is the negative presumptions made from engaging in otherwise legal and entrepreneurial activities. There is no evidence to suggest that maintaining a portfolio of domain names, monetizing the natural traffic from these domains, and listing these domains for sale on a secondary market is any indication of the likelihood that a domain owner is engaged in the abusive registration of one domain name. As mentioned above, Sedo maintains strict policies against the infringing use of domain names and we work closely with law enforcement and trademark holders to remove infringing domains from our marketplace.

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.

Sedo is in support of this proposal and believe that it should be strengthened to include a statement that, where the evidence is finely balanced, the weaker the rights that the complainant has, abusive registration or use will not be inferred. We put forth this modification for the following reasons: domain names are valuable and registration should not be stripped absent a finding of specific intent to capitalize on the domain’s similarity to a trademark. The weaker the rights of the complainant, the less likely a domain owner would have known of the existence of such rights or known of the related goods and services for which the mark was intended to identify. Furthermore, the weaker the rights of the complainant, the higher the likelihood that concurrent uses of the mark would be allowed under applicable law.

Sedo's primary concern with existing domain dispute resolution services is that a domain owner faces two outcomes in a dispute: win or lose their valuable domain name. These two potential results do not adequately address the myriad of factors involved in a trademark dispute. Contrary to popular portrayal, trademark law is complex and fact-specific and neither the DRS nor any other dispute resolution service is the proper venue for stripping ownership outside of circumstances of clear abusive registration. If a fact scenario is finely balanced, the DRS should recognize its inability to fairly decide the dispute and require the claimant to pursue an action before the high courts.

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

While Sedo supports an inexpensive and accessible dispute resolution service, we believe that placing the burden of payment on the complainant helps prevent frivolous or harassing claims against domain owners. It is Sedo's belief that complainants should be required to pay an upfront fee when filing a complaint. The complainant already enjoys the benefit of a dispute resolution service that offers the chance for direct results without the cost of initiating a claim before the high courts and paying an upfront fee is a nominal concern for a legitimate complainant.

Question 5: *How would you enforce any system of refund? Which section of the community would you imagine would most benefit from a refund system?*

Sedo has no comment on Question 5.

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?*

Please refer to the responses to Questions 1-4.

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.*

As discussed at length in previous consultations, the ability of panelists to preside over a dispute without bias is a significant concern of the domain community. While a panelist must have a strong understanding of domain names and the principles of trademark and unfair competition law, the DRS Policy should not grant panelists the flexibility to represent complainants in other disputes nor make a finding of abusive registration for reasons outside the scope of the DRS Policy. It is Sedo's belief that the potential pool of panelists should be expanded to include domain professionals, provided there is no direct conflict of interest. If current panelists are allowed to represent trademark owners and hear DRS disputes, this presents unacceptable conditions where conflicts of interest are bound to arise. The only equitable way to remedy this condition is to expand the potential pool of panelists to include domain experts, even if such experts do not have a specific legal background. The DRS Policy should be drafted in such a manner that anyone with a strong understanding of domain names and the fundamentals of the policy could consistently produce sound decisions.

One of the necessary conditions for business to thrive is a clear set of transparent and predictable legal frameworks by which everyone operates. Allowing panelists to revoke registration for reasons outside of the DRS Policy removes the condition of predictability and transparency and puts a domain owner at a significant disadvantage given the probability of a complainant being supported by legal counsel. Complainants always have the option to seek redress via the high courts and such an expansion of a panelist's power defies the nature and purpose of dispute resolution services. Without the safeguards present in the courtroom, domain owners run the risk of losing a valuable asset in inequitable and cloudy circumstances.

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