Dispute Resolution Process Submission

From: Nominet UK
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Consultation on possible NZ DRP system

We have read your consultation document on the future of the dispute resolution system for *.nz*. Naturally we have spoken before about the *.uk* DRS system, and we are honoured to note that it is being considered as a possibility for the *.nz* system.

Some potential draw-backs of the *.uk* system are listed in the consultation paper and responses, and two of the five consultation responses posted so far have asked for an indication of the volume of complaints that are likely, expressing doubt that there is a problem to solve.

Volume of Cases and Cost of Operation

Since we have to hand the statistics for the *.uk* system, we are able to address some of the points raised, assuming that all other factors, such as the (un)willingness of parties to go to the courts, are equal.

One of the main points raised in the document and responses submitted so far is that the number of cases expected has not been quantified. It is possible to extrapolate from the *.uk* figures to get an idea of how many cases a *.nz* version of the UK system could expect. The main thing to say is that the number of civil court litigations, or number of UDRP cases involving citizens of New Zealand is not an accurate indicator of the number of DRS cases that would be received (or, we think, of the underlying disputes).

Disputes affect about 1 in 5000 *.uk* domain names per year or 1 in 2000 over the lifetime of the registry so far. This led to 722 DRS cases last year (2004), which is about 60 per month. Our database is currently around 3.8 million names. On those numbers, the *.nz* system could expect a caseload of 33 cases per year (around 2.5 per month) based on the current level of registrations, which your website statistics show as being around 174,000 (as at December 2004).

It is worth noting that the UK DRS process encourages a higher number of cases per thousand domains than the UDRP does. In 2004 the UDRP handled around 2,258 cases, which is around 3 times as many as the DRS, yet it handles cases for something over 44 million domain names, i.e. nearly 12 times as many.

Of course this could be explained another way – if the British court system was particularly difficult to use and so ADR systems more popular, for example. Yet the UDRP statistics show that British complainants appear in 571 of the 6818 UDRP cases so far, and 589 of the respondents have British

addresses. The UDRP statistics do not tell us what the overlap is, but it is clear from the high use of the DRS as opposed to the UDRP that there is something specific about the DRS process that makes it more heavily used. Equally, because of the DRS, Nominet sees very few cases that have to go to the civil courts – we act on perhaps six court orders a year, and (without wishing to tempt fate!) have not been joined as a defendant in a civil case for years.

We believe (and this is an impression not the result of scientific analysis) that this high volume arises for two reasons.

- The first is that, because it is free to apply, and offers a free forum for mediation, many people who would never enter the UDRP (because of the up-front entry free) come into the DRS. We believe that this means that many people who would otherwise 'suffer in silence' are helped by the DRS who would not be helped by the UDRP. For Nominet this is significant, because if we switched to the UDRP tomorrow, we believe that we would still have to deal with those people and their disputes, so the actual cost of the staff to operate the DRS has to be weighed against two factors: (a) the publicity and goodwill that the DRS brings and (b) the legal costs that we would incur if we did not have the DRS. We also believe that the prime beneficiaries of this are individuals and small businesses, who represent a major part of the DRS's users (70% of business users have under 100 employees). It is also worth noting at 85% of parties at the mediation stage are not represented by anyone, and 90% are not represented by lawyers.

- The second is that, because our system deals with a much wider range of rights than the UDRP, it naturally brings in more cases. As a more flexible system, it can deal with a more disparate range of complaints, and therefore receives more of them.

We would suggest, therefore, that the cost of operating a *.uk* style DRS is not necessarily higher than the UDRP would be, even if the administration is provided free of charge (and one should not underestimate the goodwill that this brings). Certainly if the system you choose does include mediation, it will have to be administered locally because time zones would make mediation operated from elsewhere difficult.

Role of the DRS

The volumes that pass through the DRS mean that it is not a minority system which trade mark holders need to fear, or which they will find difficult to use. The DRS is designed to be easy to use even if you have no representation at all, and is widely used by trade mark holders of all sizes. The DRS is being copied, or considered for use, in several countries, and therefore we would dispute the suggestion raised in the response by the International Trade Mark Association that use of a UK-style DRS would disadvantage rights holders, or that New Zealand should be forced to follow the US-style UDRP simply to conform.

As an aside, we would also take issue with their use of the word ‘arbitrator’ to describe the DRS Experts. The DRS is not an arbitration: for example, it does not oust the jurisdiction of the courts, and does not allow appeal to the courts on a point of law. To do this would be to lose much of the speed, simplicy and efficiency that benefits the DRS. Incidentally, our understanding is that WIPO does not see the UDRP as being an Arbitration either.

Experts and Conflict

Nominet currently has 37 Experts for its DRS, which means that each receives 3 or 4 cases per year. Since *.nz* would expect only 5% as many cases as the DRS, there would only be a requirement for around 3 Experts. If that number was raised to 5 or 6, it should be possible to give each a sufficient number of cases, avoid conflict and have sufficient for an appeal panel. In terms of conflict, we find that Experts rarely have to bow out because of a conflict, and we cannot recall when we have had two in a row do so (excluding holiday absences).

In relation to finding sufficient people keen to be Experts, we have found no problem. Our initial recruitment for around 40 places in 2001 attracted hundreds of applications and our applications round in 2003 for 7 posts produced over 70. The hardest part was choosing between them.

Confusion

One consultation response has asked that whichever system is chosen includes a provision to deal with cases of ‘confusion’, and points out that the UDRP deals with this. For completeness, we should mention that this dealt with by the DRS at 3(a)(ii) of the Policy.

Summary

We hope that the above information is helpful to you and the stakeholders of *.nz* in your discussions about the future of your dispute provision, and we wish you every success with it, whichever route you take.

Yours faithfully
Nominet UK