

Dispute Resolution Service – Policy Review

From: Bruce Clement

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PREAMBLE:

Having read through the Dispute Resolution Service (DRS) policy and the published expert decisions I believe that when the expert is given a sufficiently complete claim, the policy and the decisions reached under that are reflecting the correct balance between the "first come first served" principle for reasonably generic names and the genuine intellectual property rights of those complainants who are the victims of cybersquatting and other unfair use of names.

I note that the Domain Name Commission (DNC) website contains a page for listing decisions from appeals under the DRS at <http://dnc.org.nz/drs/index.php?clsid=1014> As this page is empty it is reasonable to assume that the losing parties largely accept that the experts are reaching the correct decision.

While the policy is excellent & is being administered and implemented in what I believe to be the correct manner my experience makes me believe that there are some aspects of the process that should be improved.

BACKGROUND:

I live in Auckland and currently have over 1,200 names registered in the .NZ registry. I have been the respondent for two DRS complaints (both of which were settled without requiring an expert determination), in one of those cases I simply agreed to surrender the domain name & yet actually ended up retaining it for about six months because the complainant was never able to co-ordinate between their Australian head office and their New Zealand subsidiary sufficiently to send me the change of registrant form required to effect the transfer.

Some people will be aware that I have subsequently become involved with an organisation which has been created to assist victims of cybersquatting, but this submission is a personal one and I am not writing on behalf of that trust or any other entity.

I am now much more careful than I was initially to ensure that my domain names really are generic in nature but in my earlier, less prudent, period I feel I gained some valuable insight into the ways that things can go wrong for businesses and domain owners.

The vast majority of my names are previously registered names I acquired through "drop catchers" after a prior registration of the name expired. In the

nearly three years I have been active I have personally been approached at least a dozen times by the former registrant of a name with a tale of woe about how they lost the name through incompetence or skulduggery by a web developer, [former] business or life partner, and in one case the death of a business associate. These people had waited patiently for their domain name to expire and release only to discover I'd grabbed it at 12:34 AM. Usually I've allowed them to have the name back in exchange for the drop catcher's fee I paid. Exceptions include one where I simply chose to donate the name back to the charity that previously owned it, one where the domain name was simply the usual name of a common disease and used as a doorway to the website matching their business name, and the other where the first communication was an abusive email. Finally special mention goes to the gentleman who has contacted me twice about the same domain with two quite different and equally unbelievable stories.

Most of these people seemed genuine and were quite shocked that they could lose a valuable business asset so easily. Having heard horror stories of cybersquatters and outrageous demands they were truly surprised to discover that they could have their name back so cheaply. I've often wondered how many other names I have picked up where a similar story could have been told by the prior owner had they bothered to get over their fear outrageous demands and contact me.

OPINION:

1) Having spoken to or exchanged email with the victims of misadventure mentioned above and also read through all the published DRS expert decisions, I have formed the opinion that simple and fair as the DRS is, it is still too complicated for many individuals and small businesses to successfully initiate.

In the January .nz newsletter (http://www.dnc.org.nz/content/jan_08_newsletter.pdf) the comment "One issue raised by the Experts relates to the quality of the complaints received, in that the information required to prove the two elements (rights in the name, and that the registration in the hands of the respondent is unfair) is often lacking in sufficient detail to make the case. This issue is one of education [...]" was made. I see this as a confirmation of my belief.

In Nominet's submission (http://dnc.org.nz/content/drp_sub_1_nominet_uk.txt) to the 2006 consultation before the [NZ] DRS was implemented they said 'We believe that this means that many people who would otherwise "suffer in silence" are helped by the [UK] DRS who would not be helped by the UDRP.' Although the [NZ] DRS is designed to be better than the UDRP for them, my experience indicates that there are still too many people "suffering in silence".

While it is unlikely that it will help much in the case of vindictive parties, it is to be hoped that a more simply initiated dispute procedure would help people who have lost domain names through incompetence by their business or personal associates.

2) Having had a situation where the transfer of a name was held up for an unreasonable period of time by the other party in a resolved dispute I believe that the transfer of names following mediation or other concession by the registrant needs to be simplified.

The current policy (<http://dnc.org.nz/drs/index.php?clsid=1012> section B2.3.9 requires the text "I acknowledge that if the Expert orders a transfer of the domain name(s) to me or at my request, I will need to select an Authorised .nz Registrar to provide me with the necessary .nz registry and other services in respect of domain names(s). I will advise the DNC of my decision on request." as part of the complaint. I believe and propose below that this selection should be made earlier.

3) Having had a name in locked status for over 6 months I believe that the effects of the locked status should be modified. Although I have not been able to find the policy requiring this, while the domain is locked it doesn't seem possible to alter the contact details for the domain, nor to change the nameservers of the domain. In my case this meant I was unable to action my offer to change the nameservers on the domain to point at the complainant's hosting while they sorted their internal issues, in other cases where the complaint is dismissed or abandoned (as many of them are) the respondent's asset may be unusable by them for a period of time, or should they change address they may be forced to leave an old address on the domain with unknown consequences.

As the domain registry is actually a centralised database run by New Zealand Domain Name Registry Limited & ultimately under the control of the DNC, there is little point restricting changes to it. If a ruling is given transferring the domain name it can be got back from wherever it is by a simple database update. The only real advantage I can see to locking the name during a dispute is to prevent the sale of the disputed name to an innocent third party that is unaware of the dispute and as long as that protection is preserved locking seems to have no real benefit.

4) There is currently a presumption in the DRS system that the registrant will oppose the transfer. Sometimes a domain can be registered on the basis of insufficient diligence and on reading the complaint the registrant may find themselves agreeing with the complaint, it has happened that the first the registrant was aware of a dispute is when the notice of the DRS complaint arrives. This may have changed since April last, but my recollection of the part of the DNC website for respondents to reply to the complaint only allows for them submitting a defence. I believe it should be

expanded to allow for the case where the registrant is willing to transfer, even before mediation.

PROPOSALS:

Each proposal is independent of the others. Text in brackets "[..]" is explanatory.

PROPOSAL 1: Additional first round to the DRS process.

[This is intended to make life easier for complainants who are individuals or small businesses both with regard to starting the process and hopefully to improve the quality of the formal submissions sent for expert determination. It may also be of benefit to respondents as it affords the opportunity of mediation before they need to go to the expense of creating a formal response. One obvious negative of this proposal is that it does increase the delay before the expert is asked to make a determination and possibly the final transfer of the domain name.]

Before registering a full statement of claim including a complete recitation of the claimed rights in the name which may ultimately be the basis of the expert determination, the complainant should give notice together with a brief summary of claimed rights that they intend to lodge a formal claim. This brief claim would be without prejudice to the full claim and in the same way that the current policy does not allow information raised in mediation to go to the expert would not be available to the expert. There would be no obligation on the part of the complainant to state all their claimed rights at this stage.

On receipt of this notice by the DNC, the registry entry would be locked & the current registrant would be notified of the existence of a dispute as at present.

The respondent would be given the chance to indicate that they agree to transfer on the basis of the claim, request mediation, state that they intend contesting the full claim when it is made or doing nothing. Only one mediation attempt sponsored by the DNC should be available. If both parties request or agree to mediation at this point it is an alternative to mediation after the formal claim.

Once the respondent states they intend contesting the full claim or the period for receipt of a response ends, the DNC would notify the complainant that they may now proceed to a full claim. This notification should repeat the two points they are required to prove (rights to the name & unfair registration) and should strongly suggest that they seek expert advice on preparing their claim.

Subsequent rounds of the DRS are unchanged. The respondent would still have the opportunity to lodge a defence to the full claim etc.

PROPOSAL 2: Simplified and cheaper alternative to DRS for domains pending release.

[This proposal is designed to help businesses, charities, and individuals regain control of names lost through misbehaviour or incompetence of associates as they are cancelled. Unfortunately this process is open to fraud and with some domain names fetching over \$3000 in drop catching auctions I would imagine someone will eventually make a fraudulent claim. The requirement that the connection & rights existed before the registration expired is an attempt to minimise fraudulent use of this mechanism, as is the second optional part]

There should be a much simplified form of the DRS or a parallel scheme for use when a domain is in "Pending Release" status. In this form of "claim", the complainant would effectively lodge an "Ex Parte" application against the domain name & would be required to show that before the domain went into "Pending Release" status they had some reasonable connection to the domain name and some right or rights with regard to the name.

If the claim is accepted and the name is not redeemed by the existing registrant during the grace period the DNC would direct the relevant registrar to register it to the claimant.

[Optional] As there is effectively no respondent there is also no need for a formal determination by an expert & deciding if sufficient rights exist could be an administrative function within the DNC further reducing the fee required of the claimant.

[Optional] All successful claims under this process should be published and if there is a subsequent DRS relating to the domain name, proof that a false statement was made as part of the claim and that the claimant should have known it to be false would also be proof of unfair registration.

PROPOSAL 3: Simplified procedure for transferring a domain following successful mediation or respondent conceding without mediation.

[This is largely in response to my personal experience and expands on the DNC's proposal from the newsletter mentioned above. There is already a requirement on successful complainants to select a registrar following an expert decision in their favour]

When a complaint under the DRS is initiated, the complainant supplies the name of an authorised registrar who has agreed to provide registration services for the

complainant together with sufficient information for the registrar to identify the complainant (e.g. a customer number).

[The existing B16.3.3 states "In the event of the DNC being satisfied that a judgment, decision or award has been made directing or requiring that a Domain Name be cancelled, suspended, transferred or otherwise amended, the DNC will implement that Decision by causing any necessary changes to the Register to take place and the dispute resolution service proceeding will be terminated."]

A paragraph similar to B16.3.3 should be inserted in the appropriate place in the policy for the case where the parties agree to the transfer, suspension, or cancellation.

PROPOSAL 4: Provide a clear process for respondents who wish to surrender the domain name.

[Obviously whatever process exists would need to be relatively free of fraudulent possibilities. The following is just one mechanism for achieving this, and probably needs tuning. It suggests a fairly simply implemented two factor authentication.]

When mailing the notification of the dispute to the respondent, the DNC will enclose a "secret code" which the domain owner can use to agree to surrender the domain. If a fax number has been provided at the time of registration, a different number will be sent there.

If the respondent does not wish to contest the transfer they can inform the DNC of this by email and supply any two of the following:

- * The domain UDAI,
- * The mailed "secret code",
- * The faxed "secret code",

- * An agreement to make a verbal acknowledgement in a phone call by the DNC to the respondent's telephone number as listed on the domain registration.

PROPOSAL 5: Change to the effects of locked status.

[This is to ensure that the respondent can continue to use their domain pending final determination of its status and (for example) change nameservers if a hosting company ceases business]

When the electronic complaint is received, the DNC will record the current registration record. This record will be considered to be the definitive copy of the registration for the purposes of the expert deliberation.

The record will then be locked as at present.

While the record is locked, all fields on the record may be changed except:

- * The registrar,
- * The registrant's legal name and,
- * The registrant's contact name

The existing clause 15.3 is unmodified by this proposal.

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