

BILETA Response to the Nominet Review of Domain Registration Policy

(See: <http://www.nominet.org.uk/how-participate/policy-development/current-policy-discussions-and-consultations/review-domain>)

This is a collaborative submission from a group of academics based in the UK with expertise in Information technology law and related areas. The preparation of the response has been funded by the British and Irish Law Education Law and Technology Association.

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This response has been approved by the Executive of BILETA (the British and Irish Law, Education and Technology Association <http://www.bileta.ac.uk/default.aspx>) and is therefore submitted on behalf of BILETA.

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Background

Domain names have traditionally been allocated on a first-come, first-served basis. According to Nominet's latest figures, there are a total of 10,460,115 .uk domain names on its register, with monthly new registrations measuring some 181,969 and monthly renewals at 281,402.¹ Domain names have generated high financial values in some cases. It is reported that the domain name sex.com was sold for \$13 million in 2012 and porn.com for \$9.5 million in 2007. This could not have been envisaged when Nominet was first established and its role has therefore had to change to accommodate the DRS in order to deal with disputes concerning such high value assets.

Anecdotal evidence suggests that sex and gambling web domain names are the most highly sought after globally, and that Internet safety concerns has perhaps been one of the prime drivers of this consultation. Rogers perhaps identifies these concerns clearly:

The ease of accessing and downloading material from the Internet presents a range of problems. Parents and guardians are faced with a dilemma between allowing their child the opportunity to explore the riches of the Internet, and feeling naturally concerned about the material they could come into contact with.³

Two recent news items illustrate both sides of this equation:

On 21 October 2013 www.bbc.co.uk reported that "Research by the charity Safe and Secure Online suggests that nearly one in five nine- to 11-year-olds have met with someone they had first encountered on the internet."⁴

On the reverse side of that, the BBC reported that "Internet forums and chatrooms can have positive effects that should be more widely acknowledged, experts say", in an article titled 'Internet chatrooms can help those in distress, says study'⁵

The article concluded by quoting Joe Ferns of the Samaritans,

¹ <http://db.nominet.org.uk/> <accessed 25/10/13>

² <http://www.businessinsider.com/the-20-most-expensive-domain-names-2012-12>

³ Kevin M Rogers, *The Internet and the Law* (Palgrave Macmillan, 2011)

⁴ Rory Cellan-Jones, 'Children aged nine 'taking risks' online', <<http://www.bbc.co.uk/news/technology-24606107>>, accessed 30/10/13

⁵ 'Internet chatrooms can help those in distress, says study', <<http://www.bbc.co.uk/news/technology-24726520>>, accessed 31/10/13

We should acknowledge that many people are using suicide forums and chatrooms to anonymously discuss their feelings of distress and despair, including suicidal thoughts, which may have a positive impact on the individual. They may be expressing feelings that they have never disclosed to anyone in their offline lives. Rather than concentrating primarily on ways of blocking and censoring such sites, we should think about online opportunities to reach out to people in emotional distress.

The fundamental question for this consultation is whether Nominet should now take a further evolutionary step to deal with issues of offensiveness in the registration process? In other words, has the Internet environment sufficiently changed since the mid-1990s and more importantly are other methods of tackling any problem proving to be ineffective? In relation to domain name hijacking and abuse, the answer to both these questions was in the affirmative which made the establishment of the DRS a logical step. It is not so evident that the same situation has been reached with regards to offensive domain names.

Responses to Questions

1. Do you believe that some terms and expressions should be blocked completely, and if so how do you propose such a list could be drawn up and maintained?

No - We do not believe that words or expressions which are considered to be offensive should be blocked completely by Nominet by means of a list.

To do so would fundamentally change the role of Nominet within the Internet community of the United Kingdom. It should not be placed in a position where it has to make decisions about the appropriateness or otherwise of a proposed name and to balance the competing interests around freedom of expression. Although Article 10 of the European Convention on Human Rights protects freedom of expression, this is qualified in Art 10(2) where a balance needs to be struck between that freedom and the duty and responsibility to protect for example morals or the reputation of others. According to paragraph 2, such restrictions require to be 'prescribed by law'. In *Sunday Times v UK*⁶, the importance of the precision of such restrictions was emphasised. As a result, those within society who are subject to any restrictions can adapt their behaviour.

⁶ (1979) 2 EHRR 245

In terms of the consultation, this underlines two important points. Firstly, any change in policy by Nominet must be clearly articulated and consistently applied. Secondly, in balancing these interests it is actually preferable to leave such determinations to the courts which can apply established legal principles to deal with matters which might be broadly labelled 'offensive' (see further below).

Presumably, the idea of a list is to facilitate a speedy electronic screening process at the point of registration. One of the strengths of an open registration system is the short time frame within which entrepreneurs and others can set up an online presence. Losing this aspect of the registration process would be a heavy price to pay to deal with a perceived problem caused by a minority of inappropriate domain names. The problem is that no matter how much effort or care is expended in drawing up such a list of words or expressions, it would be pitted against the creative ingenuity of those who would seek to circumvent it. Similar efforts are made by people in order to tease a collection of numbers and letters on a car registration plate in order to make it look like a particular name or perhaps a closer parallel is where participants of online games or discussion forums use letter substitution in order to evade swear filtering software. In both cases, although a precise spelling of the word is missing the reader can usually decode the message which is being conveyed. Putting aside the issue of whether Nominet is appropriately placed to act on behalf of society as the arbiter of what is or is not appropriate for registration, a list will never be exhaustive and therefore the system will never be fit for purpose.

The technical challenge of drawing up a list of offensive words is complicated further by the multi-cultural character of the UK. In 2011, the census reported that 9% of households did not speak English as a first language.⁷ In order to be comprehensive, any attempt to control offensive words should not be limited to the English language. Although it is probably inadvertent, the restaurant chain which has chosen its business name and registered zizzi.co.uk has in fact utilised a French slang expression for penis. Similar inadvertently risqué domain registrations have been popularly reported across the Internet, although the origins of them may be based more on myth than fact⁸. A

⁷ <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/stb-2011-census-key-statistics-for-england-and-wales.html#tab---Household-language>

⁸ E.g. powergenitalia.com, molestationnursery.com, expertsexchange.com

mechanism would need to be in place to ensure that registration could not be blocked absolutely by just cross referencing to a list. In the case of *zizzi* for example, the company in question has successfully registered a trademark in that name and would no doubt robustly pursue its right to the same domain name.

Placing restrictions within the .uk domain ignores the borderless nature of the Internet. Websites that wish to use the words from any banned list under .uk registration will simply base themselves in another jurisdiction. Evidence of how minor a role the UK plays in the hosting of offensive websites was revealed that from the estimated 100,000 websites that contain indecent images of children⁹, Lesley Cowley, the Chief Executive of Nominet has noted that to the best of her knowledge, Nominet has never been asked by the IWF to suspend a .uk domain name associated with child abuse images.¹⁰

In the Terms of Reference for this policy review, it was stated that the Nominet open registration approach was shared with the .eu domain. This is not entirely true as a closer analysis of the legal framework for the establishment of the .eu domain reveals. Moreover, such analysis underlines the weakness of attempting to block certain domain names by reference to a list.

The .eu domain was created by Regulation 733/2002¹¹ and under Art 3, a not for profit Registry was established for administration purposes.¹² Article 5(2) allows a mechanism whereby a Member State can effectively place certain words beyond the scope of registration:

...Member States may notify to the Commission and to the other Member States a limited list of broadly-recognised names with regard to geographical and/or geopolitical concepts which affect their political or territorial organisation that may either:

(a) not be registered, or

⁹ *Internet Filter Review, 2006*

¹⁰ Letter headed 'Domain name registrations containing offensive or abusive terms', from Lesley Cowley, OBE, Chief Executive of Nominet, to the Hon. Ed Vaizey MP, Minister for Culture, Communications and Creative Technologies, dated 29/7/13

¹¹ Regulation (EC) No 733/2002 Of The European Parliament And Of The Council of 22 April 2002 on the implementation of the .eu Top Level Domain [2002] OJ L 113/1

¹²[http:// www.eurid.eu](http://www.eurid.eu)

(b) be registered only under a second level domain according to the public policy rules.

An important point to note about this provision is that the window within which member states could make a submission to the list was three months, after which the list effectively crystallised and could not be supplemented. This raises an issue for Nominet as to how finite any proposed list should be. In any event, it appears that only a few member states have actually made a contribution to the list¹³ judging by the language of the words contained within it. For the purposes of this response, it is interesting that there are numerous blocked names relating to Nazi Germany. For example 3-reich, 3reich, drittesreich, 4-reich, 4reich and viertesreich are all contained on the list. Clearly, some trouble has been taken in order to envisage the number of permutations around such a theme which has been considered by Germany to be worthy of a ban but the problem is that such an approach can never be sufficiently robust against an inventive registrant. According to a .eu Registrar both reichnummerdrei and reichnummervier are currently available to register¹⁴ and which may, (albeit crudely) circumvent the best efforts of German control.

The deficiency of a list of banned words is further exposed as it fails to recognise the borderless nature of Internet activity. Although the domain 4reich.eu is banned, 4reich is currently available as .co.uk, .org.uk, .net, .biz and .info amongst others. The .eu banned list has been drawn up through the submissions of a number of member states looking at the issue through the lens of their native language. The result being that if 1000jaehrigesreich is translated in to an English equivalent it moves from being a banned expression to one where 1000yearreich.eu is available for registration. Although the .eu banned list focuses on political and geographic restrictions, the same drawbacks would be evident if a ban on certain words were to be drawn up on some other basis such as offensiveness.

The terms of reference for this consultation also point out that .ie names face the added burden of an offensiveness test. The Singaporean (.sg) domain also places similar restrictions on names which:

¹³ <http://www.eurid.eu/files/var/blocked.txt>

¹⁴ <https://www.123-reg.co.uk/order/domain?X-CSRF-Token=1dfc726626505ee186b22c7cf6cc512f9bb72b89&domain=reichnummerdrei>

are or contain words or references which are obscene, scandalous, indecent or contrary to law or morality in any language¹⁵

The .ie domain and its registry (IEDR) were placed within a specific legal framework in Part 4 of Communication Regulations (Amendment) Act 2007 and many of its functions were taken over by the state communications regulator, COMREG. In Singapore, the registry is a private company, but one which is wholly owned by Infocomm Development Authority of Singapore which is a statutory body. Whilst both domains determine issues relating to the offensiveness of domain names, they equally share a position within their respective territories which is more closely aligned to the state underpinned by the specific legal framework within which they exist. This is a different to proposition to the independence enjoyed by Nominet within the UK. Its position leaves it ill-suited to undertake the role of determining relative offensiveness when other legal methods can be used to deal with websites which the state considers to be offensive or otherwise contrary to public policy.

Laws already exist to deal with criminal content contained in websites for example:

- Obscene Publications Act 1959
- Protection of Children Act 1978
- Protection from Harassment Act 1997
- Criminal Justice and Immigration Act 2008
- Coroners and Justice Act 2009

It should be noted that this consultation is focused on restricting certain words from featuring in domain names, which does not by itself have a great impact on the actual content of any websites.

Individuals who feel that their reputation has been damaged by the content of a website may, for example, bring an action in defamation. The fact that somebody can register a domain name which might be defamatory would probably not face any action until a website went live with content. It will always be that an examination of a domain name in the context of

¹⁵ .sg Registration Policies Procedures and Guidelines available at: <http://www.sgnic.sg/sites/default/files/rppg.pdf>

the content displayed on its pages will be the true indicator of the intentions of any registrant. The same would be true in relation to any criminal offences relating to content.

In our view, a domain name which has been registered cannot be offensive if there is no web presence associated with it and once there is a web presence any issues of inappropriateness can be dealt with by the state according to established law.

We do not believe that names should be banned at the point of registration on a case by case assessment of offensiveness either.

In the context of the law relating to trade marks, there are statutory provisions in place which may mean that words which are considered offensive will not be registered. Moreover, each application is considered objectively on a case by case basis rather than by reference to a list of proscribed words or expressions, the deficiencies of which were highlighted above. This may on the face of it appear to provide a solution to the problem of inappropriate domain names but this system too would suffer from inherent drawbacks which would make its effective implementation impossible.

Section 3(3) of the Trade Marks Act 1994 states:

- (3) A trade mark shall not be registered if it is—
 - (a) contrary to public policy or to accepted principles of morality

The practical effect of this provision falls mostly on the initial registration process which is administered by the Intellectual Property Office as the government body responsible for sifting applications. As a consequence of this and the other requirements of an application, the cost and duration of the process is markedly higher and longer than the one currently in place for domain names. An examination of the organisational infrastructure in place for the IPO gives some indication of the layers of complexity which might need to be added to any similar domain name registration process (the cost of which would inevitably be borne by the applicant). For example, a named examiner will be allocated to each application and direct communication with the applicant can if necessary be established during the process. The volume of applications is, however, greatly different and therefore underlines the administrative challenges which Nominet might face if an offensiveness test were to be added in a similar way. In 2012, the IPO

dealt with 41150 trade mark applications¹⁶ in contrast to the 1.98million new .uk registrations in the same period¹⁷.

The frontline decision maker in terms of offensiveness therefore lies with the examiner who may be required to make difficult and nuanced value judgments. The IPO publishes a manual (based upon relevant case law) which provides some transparency to the process and which may be of some aid to the examiners in their assessment of offensiveness¹⁸ but it is undoubtedly challenging for any member of staff to consistently reach a standard where:

In order to make this assessment, the examiner must be objective, not subjective. Objectivity means being neither out of date nor a trend setter; not setting some kind of moral standard but also not being insensitive to public opinion.¹⁹

It must also be remembered that the staff carrying out this sensitive function are a relatively lowly Civil Service B1 grade (paid £19,059 - £21,580). It still may be possible for the IPO to reach an objective standard (at least within the limits of the team of examiners) through effective triaging and team management but this may be more difficult to emulate in the context of the scale of domain name registration. We do not therefore believe that individual testing of domain name applications against an objective standard of offensiveness would be either desirable or workable.

A similar system exists in the registration of company names²⁰ which are considered to be offensive. It is striking that in comparison to the IPO, little guidance is available publicly from Companies House as to how this provision is administered. This opacity does not build confidence that the decisions taken are rooted in objectivity. As a public body established under statute, its decisions and processes are of course subject to the double scrutiny of judicial review and the freedom of information which aids transparency but that would not as readily be the case with Nominet.

¹⁶ <http://www.ipo.gov.uk/about-anrep1213.pdf>

¹⁷ <http://db.nominet.org.uk/page/the-uk-in-detail/>

¹⁸ <http://www.ipo.gov.uk/tmmanual-chap3-exam.pdf>

¹⁹ Ibid 92

²⁰ Companies Act 2006, s.53(1)(b)

2. If you do not believe that any restrictions should be introduced at the point of registration, should a post-registration complaints procedure be introduced, and if so, what should the criteria be for a complaint to be upheld, and what remedies should be available?

No

It might be tempting to consider whether Nominet's Dispute Resolution System (DRS) could have its remit widened to consider a registration complaints procedure. This human-regulated interface might potentially overcome the challenges alluded to earlier regarding the automated ban on certain words deemed offensive, as a judgment will have to be made during the complaints stage on whether a particular web domain name should be banned/removed from the .uk register. The vast majority of registrations will pass unchallenged which means that the speed of open registration is retained. Whilst this human intervention solves the problem of the automatic ban on words, it does however raise its own issues in that the decision could be highly subjective. There is also the issue of which parties have the necessary standing to bring the matter before the DRS, and who bears the costs of the process.

Again, an examination of the situation regarding trade marks is helpful to illustrate the potential difficulties. The process of trade mark registration outlined above is not purely bilateral in nature. If the initial examination is successful, a two month cooling off period then follows the publication in the Trade Mark Journal which also provides an opportunity for members of the public to become involved in the process. Anybody may challenge (subject to a fee) one of the absolute grounds under section 3 of the Trade Marks Act which may lead to a situation where a mark deemed acceptable by an examiner is challenged by a sufficiently motivated individual who considers it to be immoral or in some way offensive²¹. Such challenges, brought in the public interest, may militate some of the criticisms levelled against the narrowness of a purely inhouse examination process attempting to accurately reflect wider societal values. If such an approach were to be adopted in the context of domain names, it would be uncertain as to how many individuals would seek to challenge registrations although undoubtedly it would be linked to any fee structure adopted.

²¹ See for example the decision in FCUK Trade Mark No 218454, 20/12/2005

There are difficult and complicated issues raised in any objection. In the case of the IPO it is a challenge to articulate to the public why it is possible to have a trademark in expressions such as FCUK and CNU^T and not in others such FOOK. The superficial guidance on the IPO website would not be particularly helpful to a layperson who was considering an application to object.

“We will not accept marks which are offensive e.g. marks containing taboo words²²”

In the context of domain names, Nominet would face a difficult task in order to create an open, transparent system for dealing with challenges which would create a consistent and readily understood body of decisions. It would also have to ensure that such challenges were not open to abuse by a vexatious individual or group intent on protecting society from itself.

As the real issues around offensiveness of a domain name will inextricably be linked to the content of any website, it is submitted that there are sufficient legal solutions both criminal and civil in order to effectively deal with it.

Post registration, a .eu domain is also capable of being blocked and ultimately revoked under the public policy rules laid down in Regulation 874/2004²³. Article 18 provides that the basis for such action is if the name has been considered to be ‘defamatory, racist or contrary to public policy’ and the matter has been determined as such by a court within any of the twenty eight member states. No information exists in the public domain to indicate the frequency of such an occurrence.

It is submitted that this approach is preferable to a post registration complaint scheme administered in some way by Nominet. The focus for any court action involving defamation would, for example, ensure a fuller examination of the content and context of the website in connection with a particular registered domain name rather than an examination of the name in isolation.

Although it would not really change anything in practice, perhaps as a matter of policy it might be useful to state something to similar effect in the Nominet Terms and

²² <http://www.ipo.gov.uk/types/tm/t-applying/t-before/t-requirements.htm>

²³ Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration [2004]

OJ L 162 / 40

Conditions. In other words to make explicit to a potential registrant that a domain name can be blocked for reasons other than following a decision under DRS if a court orders it happen.

3. Any further comments on this topic?

Testing domain names against restrictions on business names on a case by case basis at the point of registration

Whilst we do not consider it appropriate for Nominet to introduce restrictions relating to offensiveness into its rules for registration, it may be worth considering another more minor restriction at this time.

For most ordinary consumers, a .co.uk domain implies that the entity running a particular website is carrying on a business in the UK (irrespective of where the business is based in reality). The third level domain in this context is often therefore the hook by which the consumer may satisfy themselves that they recognise a familiar brand or are assured in some way as to the legitimacy of the business. The Dispute Resolution Service offers an effective mechanism to both protect rights holders and to prevent consumers from being duped. Its strength lies in the fact that rights holders have an active commercial incentive to scan the Internet for abusive registrations and if necessary to take appropriate action.

There are, however, some registrations which will not be picked up in this fashion and which have the potential to leave consumers exposed to activities which may leave them exploited. There have been reports²⁴ suggesting that websites which use domains implying a connection with a government agency such as the DVLA can exploit the open registration system to the detriment of the public. Such businesses, if their activities were confined to the physical world of the UK, may face legal restrictions on the business names that they can trade under.

Section 54 of the Companies Act 2006 limits the use of names which suggest a connection with government or a public authority. The Act goes further by also limiting

²⁴ <https://www.gov.uk/government/news/motorists-warned-when-applying-for-a-driving-licence-online>

the use of certain words or expressions as part of a name.²⁵ A list of sensitive words has been set out in a number of statutory instruments²⁶ and advice about the process of gaining permission to use a particular word or expression is contained on the Companies House website²⁷.

For example, according to the Companies House website, the term ‘adjudicator’:

“normally implies the company has a quasi-judicial role similar to decisions made by a court of law, an administrative tribunal, an official ombudsman or government officials.

You cannot use this word unless a government body or relevant body confirms (letter or email) that it has no objection.”

According to a WHOIS search, adjudicator.co.uk is registered to millionaire.co.uk Ltd. As far as Companies House is concerned, the word ‘millionaire’ will not have troubled the requirements of sections 54 and 55 and the process would have been blind to any future intention for that company to register the adjudicator domain.

Similarly, police-information.co.uk at its point of registration in 2001 will have done so on the basis of first come, first served open registration. If however, the registrant had chosen to incorporate the business using the same name, then he would have faced more significant hurdles under companies legislation.

We recommend that serious consideration be given to introducing restrictions on certain words in domain name registrations which mirror the requirements of companies legislation.

We do not believe that this would place onerous demands on the registration system as the list of words is finite (albeit that legislation can be amended periodically) and any potential registration could be checked through an automated check against a database of names listed by Companies House. The hurdle that any potential registrant of a name on the list would face could equally mirror the system used by Companies House i.e. in most cases this would amount to written approval from a particular body. This would

²⁵ Companies Act 2006, s.55

²⁶ The Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2009, SI 2009/2615 & The Company, Limited Liability Partnership and Business Names (Public Authorities) Regulations 2009, SI 2009/2982

²⁷ <http://www.companieshouse.gov.uk/about/gbhtml/gp1.shtml#appA>

therefore have no impact on the vast majority of domain names which would continue to benefit from speedy, open registration.

In any event, the Companies Act 2006 restrictions apply not only to the registered name but also to the business name under which the entity trades. In some cases, a domain name may have effectively become the business name. In the same way that Nominet has liaised with SOCA, The Metropolitan Police's e-Crime unit and Trading Standards bodies to suspend domain names in the event of criminal use, it might be prudent for it to open a channel of communication with Companies House.

End of submission