

BOTSWANA COMMUNICATIONS REGULATORY AUTHORITY



Dispute Resolution Service Policy

Introduction

The purpose of this Dispute Resolution Policy is to provide a cheaper, speedier alternative to litigation for the resolution of disputes between the registrant of a .bw domain name and a party with competing rights in the domain name. This Policy should be read with the Dispute Resolution Service Procedure.

1 Definitions

Abusive Registration means a Domain Name which either:

- i. was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights;

or

- ii. has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights;

BOCRA means Botswana Communications Regulatory Authority

Complainant means a third party who asserts to BOCRA the elements set out in paragraph 2 of this Policy and according to the Procedure, or, if there are multiple complainants, the 'lead complainant' (see Procedure paragraph 3(b));

Day means unless otherwise stated any day other than Saturday, Sunday or public holiday in the Republic of Botswana;

Decision means the decision reached by an Expert and where applicable includes the summary decision and decision of an appeal panel;

Dispute Resolution Service or DRS means the service provided by BOCRA according to this Policy and the Procedure;

Domain Name means a domain name registered in any sub-domain of the .bw domain and which is the subject of dispute between the Parties according to this Policy and the Procedure;

Expert means the expert BOCRA appoints under paragraph 8 of the Procedure;

In Person Hearings means hearings called by an Expert where both the Complainant and Respondent can present their case verbally (including hearings by conference call, video conference and web conference);

Informal Mediation means impartial mediation which BOCRA conduct to facilitate an acceptable resolution to the dispute;

Party means a Complainant or Respondent and Parties has a corresponding meaning;

Procedure means the procedure for the conduct of proceedings under the DRS;

Respondent means the person (including a legal person) in whose name or on whose behalf a Domain Name is registered and against whom the Complainant makes a complaint;

Rights include, but is not limited to, rights enforceable under the Botswana law. However, a Complainant shall be unable to rely on rights in a name or term which is wholly descriptive of the Complainant's business;

2 Dispute Resolution Service

- a. A Respondent must submit to proceedings under the DRS if a Complainant asserts to BOCRA, according to the Procedure, that:
 - i. The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
 - ii. The Domain Name, in the hands of the Respondent, is an Abusive Registration.
- b. The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities.
- c. BOCRA strongly recommends that both Parties use BOCRA's guidance and help information, which can be found on the BOCRA web site.

3 Evidence of Abusive Registration

- a. A non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration is as follows:
 - i. Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:
 - A. for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;
 - B. as a blocking registration against a name or mark in which the Complainant has Rights; or
 - C. for the purpose of unfairly disrupting the business of the Complainant;
 - ii. Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant;

iii. The Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names (under .bw or otherwise) which correspond to well known names or trade marks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern;

iv. It is independently verified that the Respondent has given false contact details to BOCRA; or

v. The Domain Name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:

A. has been using the Domain Name registration exclusively;
and

B. paid for the registration and/or renewal of the Domain Name registration.

b. Failure on the Respondent's part to use the Domain Name for the purposes of email or a web site is not in itself evidence that the Domain Name is an Abusive Registration.

4 How the Respondent may demonstrate in its response that the Domain Name is not an Abusive Registration

a. A non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration is as follows:

i. Before being aware of the Complainant's cause for complaint (not necessarily the 'complaint' under the DRS), the Respondent has:

A. used or made demonstrable preparations to use the Domain Name or a domain name which is similar to the Domain Name in connection with a genuine offering of goods or services;

B. been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name;

C. made legitimate non-commercial or fair use of the Domain Name; or

ii. The Domain Name is generic or descriptive and the Respondent is making fair use of it;

iii. In relation to paragraph 3(a)(v); that the Respondent's holding of the Domain Name is consistent with an express term of a written agreement entered into by the Parties; or

iv. In relation to paragraphs 3(a)(iii); that the Domain Name is not part of a wider pattern or series of registrations because the Domain Name is of a significantly different type or character to the other domain names registered by the Respondent.

b. Fair use may include sites operated solely in tribute to or in criticism of a person or business.

c. Trading in domain names for profit, and holding a large portfolio of domain names, are of themselves lawful activities. The Expert will review each case on its merits.

d. Sale of traffic (i.e. connecting domain names to parking pages and earning click-per-view revenue) is not of itself objectionable under the Policy. However, the Expert will take into account:

i. the nature of the Domain Name;

ii. the nature of the advertising links on any parking page associated with the Domain Name; and

iii. that the use of the Domain Name is ultimately the Respondent's responsibility.

5 Informal mediation

a. After BOCRA has received the Parties' submissions under the Procedure, BOCRA will initiate and conduct a period of Informal Mediation under paragraph 7 of the Procedure.

6 Without prejudice

a. Documents and information which are 'without prejudice' (or are marked as being 'without prejudice') may be used in submissions and may be considered by the Expert except that the Expert will not consider such materials if:

- i. they are generated within Informal Mediation; or
- ii. the Expert believes that it is in the interests of justice that the document or information be excluded from consideration.

7 Appointment of Expert and Summary Decision

a. If the Respondent has submitted a response, and an acceptable resolution has not been found through Informal Mediation, BOCRA will notify the Parties that it will appoint an Expert when the Complainant has paid the applicable fees set out in paragraph 21(a) of the Procedure and within the time specified in paragraph 21(c) of the Procedure. The Expert will come to a written Decision.

b. If, by the time for appointment of an Expert under paragraph 8 of the Procedure, the Respondent has not submitted a response, the Complainant may apply for a summary decision under paragraph 5(d) of the Procedure.

c. The Expert will only grant a request for a summary decision where he or she is satisfied that:

- i. BOCRA has sent the complaint to the Respondent in accordance with paragraphs 2 and 4 of the Procedure;
- ii. The Complainant has, to the Expert's reasonable satisfaction, shown that he or she has Rights in respect of a name or mark which is identical or similar to the Domain Name and the Domain Name is an Abusive Registration; and
- iii. No other factors apply which would make a summary decision unconscionable in all the circumstances.

8 Notification and publication

- a. BOCRA will communicate a Decision to the Parties according to paragraph 17 of the Procedure and will publish all Decisions in full on the BOCRA web site.
- b. Fees are payable by the Complainant or otherwise according to paragraph 21 of the Procedure only if an acceptable resolution has not been reached by Informal Mediation and/or once BOCRA has notified the Parties that an Expert is to be appointed.
- c. Decisions may contain the contact details of the Parties and the Parties consent to contact details being displayed in this way.

9 Exclusion of liability

- a. Neither BOCRA nor its directors, officers, employees or servants nor any Expert shall be liable to a Party for anything done or omitted in connection with any proceedings under the DRS unless the act or omission is shown to have been in bad faith.

10 Appeal, repeat complaints and availability of court proceedings

- a. Either Party will have the right to appeal a Decision under paragraph 18 of the Procedure. The appeal panel will consider appeals on the basis of a full review of the matter and may review procedural matters.
- b. BOCRA may refer questions of interpretation of the Policy and Procedure to the appeal panel. Any decision rendered as a result of BOCRA's referral will not affect any Decision previously made under the DRS.
- c. BOCRA will publish decisions of the appeal panel. Appeal decisions will not have precedent value, but will be of persuasive value to Experts in future decisions.
- d. The operation of the DRS will not prevent either the Complainant or the Respondent from submitting the dispute to a court of competent jurisdiction.
- e. If a complaint has reached the Decision stage on a previous occasion it will not be reconsidered (but it may be appealed, see paragraph 10(a) and Procedure paragraph 18) by an Expert. If the Expert finds that the complaint is a resubmission of an earlier complaint he or she shall reject the complaint without examining it.
- f. In determining whether a complaint is a resubmission of an earlier complaint, or contains a material difference that justifies a rehearing the Expert shall consider the following questions:

- i. Are the Complainant, the Respondent and the domain name in issue the same as in the earlier case?
 - ii. Does the substance of the complaint relate to acts that occurred prior to or subsequent to the close of submissions in the earlier case?
 - iii. If the substance of the complaint relates to acts that occurred prior to the close of submissions in the earlier case, are there any exceptional grounds for the rehearing or reconsideration, bearing in mind the need to protect the integrity and smooth operation of the Policy and Procedure?
 - iv. If the substance of the complaint relates to acts that occurred subsequent to the close of submissions in the earlier decision, acts on which the re-filed complaint is based should not be, in substance, the same as the acts on which the previous complaint was based.
- g. A non-exhaustive list of examples which may be exceptional enough to justify a rehearing under paragraph 10(f)(iii) include:
- i. serious misconduct on the part of the Expert, a Party, witness or lawyer;
 - ii. false evidence having been offered to the Expert;
 - iii. the discovery of credible and material evidence which could not have been reasonably foreseen or known for the Complainant to have included it in the evidence in support of the earlier complaint;
 - iv. a breach of natural justice; and
 - v. the avoidance of an unconscionable result.

11 Implementation of expert decisions

a. If the Expert makes a Decision that a Domain Name registration should be cancelled, suspended, transferred or otherwise amended, BOCRA will implement that Decision by making any necessary changes to its domain name register database according to the process set out in paragraph 17 of the Procedure. BOCRA will use the details set out in the complaint form unless you specify other details to us in good time.

12 Other action by BOCRA

a. BOCRA will not cancel, transfer, activate, deactivate or otherwise change any Domain Name registration except as set out in paragraph 11 above and as provided under the Domain Life Cycle Policy.

13 Transfers during a dispute

a. A Respondent may not transfer a Domain Name registration:

i. whilst proceedings under the DRS are ongoing in relation to the Domain Name or for a period of ten (10) Days after their conclusion, unless to the Complainant as a result of a settlement reached between the Parties and approved by us whether or not pursuant to Informal Mediation; or

ii. whilst a court proceeding in respect of the Domain Name registration is ongoing in a court of competent jurisdiction.

BOCRA reserves the right to reverse any transfer of a Domain Name registration which does not comply with this paragraph.

b. A Respondent may not without the Complainant's consent (which the Complainant will not unreasonably withhold) transfer the hosting of a Domain Name to another registrar whilst proceedings under the DRS are ongoing in relation to the Domain Name or for a period of ten (10) Days after the conclusion of the DRS.

14 Modifications to the Policy and Procedure

a. The Internet is an emerging and evolving medium and the regulatory and administrative framework under which we operate is constantly developing.

For these reasons BOCRA reserves the right to make reasonable modifications to the Policy and Procedure at any time. BOCRA will only do so when it has good reason. Except where BOCRA is acting in pursuance of a statutory requirement or a court order, changes will be implemented following the Policy Development Framework (PDF). Each such change will be published as prescribed in the PDF on our web site:

<http://www.nic.net.bw> and shall become binding and effective upon the date specified therein.

b. The Respondent shall be bound by the Policy and Procedure which are current at the time the DRS is commenced until the dispute is concluded.