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I. INTRODUCTION

Most users of the Internet do not possess a domain name. Nonetheless, as domain naming is one of the essential prerequisites of an Internet service all users benefit directly from the existence of the domain name system ("DNS"). The universal nature of the DNS also means that it may be perceived as a mechanism by which those who abuse the Internet may be subjected to a sanction. This article explores the ways in which the United Kingdom national domain registry may be encouraged to enforce rules of "netiquette" or to recognize, by the use of public law remedies, trademark or other legal rights relating to the registration of domain names.

II. NOMINET: THE U.K. DOMAIN REGISTRY

Since July 1, 1996, the ".uk" top level domain has been administered by Nominet UK, a private company limited by guarantee.1 Before this date, domain registration in the United Kingdom including the provision of root servers was administered voluntarily by the United Kingdom Education and Research Networking Association ("UKERNA") and a group of Internet Service Providers ("ISP"s), and the .uk domain was person-
ally delegated to Dr. William Black, an employee of UKERNA. Dr. Black is now managing director of Nominet. The .uk domain is divided into a number of sub-domains including the following: .co.uk, intended for commercial use; .org.uk, available for non-profit organizations; .ac.uk, used by educational institutions (apart from schools, which are registered under .sch.uk); and, .gov.uk, in which governmental components are registered. UKERNA retains a delegated responsibility for registrations in the .ac.uk and .gov.uk subdomains. UKERNA is a company which was set up in 1993 to manage the United Kingdom’s academic network and to implement the policy of the Joint Information Systems Committee of the Higher Education Funding Councils, and as such clearly discharges a governmental function. Since the sub-domains for which UKERNA is responsible are less likely to give rise to disputes, this article will concentrate on the obligations owed by Nominet. Some of the points asserted will, however, be relevant to UKERNA.

The Domain Name System is defined by a core Internet standard: STD 13. This describes a hierarchical and distributed database within which the names of Internet hosts and their correlative Internet Protocol (“IP”) numbers are stored. The hierarchy requires a number of top-level domains (“TLD”s). These are of two types. International Top Level Domains (“iTLD”s), such as .com, .net, and .org are administered by Network Solutions, Inc. (“NSI”) on behalf of the InterNIC, which is in turn a “cooperative activity between the National Science Foundation, Network Solutions, Inc. and AT&T.” Alongside with iTLDs, are a number of...
TLDs corresponding to the two-letter country codes designated in the International Organization for Standardization’s ISO-3166. These are delegated by the Internet Assigned Numbers Authority ("IANA") on an ad hoc basis. Subject to IANA delegation, the rules governing the registration of named domains under the TLDs are made and administered only by the manager of the TLD. Those managers may make a number of choices about sub-domains and rules for naming which need not refer to the policies and rules of any other domain provided they do not break the DNS Request for Comments ("RFC"s).

Nominet inherited a TLD which already contained a large number of registered domain names within a range of sub-domains. All of those registrations had been made without cost to the registrant. The creation of a single body responsible for the administration of the majority of the .uk sub-domains permitted a more formal structure to be imposed on the domain registration process and enabled a charge to be levied for domain registration. Nominet based this charge on its costs that include, among other things, a root server for the .uk domain as well as an WHOIS server. Consequently, all registrations since August 1, 1996 in the sub-domains administered by Nominet have been subject to a charge of £100 for the first two years of registration, to be followed by an annual fee of no more than £50 for subsequent years in which the registration is maintained.

The billing system, however, is not as straightforward as it first appears. Nominet is open to membership by organizations, companies or individuals. 

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8. There are, in fact, three exceptions to this assertion. The ISO-3166 code for the United Kingdom is actually GB. In addition, IANA permitted the allocation of TLDs to the Channel Islands of Jersey and Guernsey which do not currently have ISO country codes. According to information published by Island Networks Ltd., who administer the new domains, the codes chosen (.je and .gg) correspond to codes reserved in ISO-3166 for Jersey and Guernsey. Island Networks Ltd., Channel Isles Name Registry Launched (last modified Aug. 14, 1996) <http://www.isles.net/pr960809.html>; Island Networks Ltd., Island Networks Background Information FAQ (last modified Sept. 7, 1996) <http://www.isles.net/bgfaq.html>.

9. The principles for the delegation of TLDs are described in RFC 1591 and more generally in Jon Postel, IANA Policy on Delegated Domains (last modified Oct. 21, 1993) <ftp://rs.internic.net/rfc/iana.top.level.domain.policy>.

10. Thus, the .uk domain has developed a detailed set of rules governing allocation of domain names within sub-domains, whereas the .de domain is used in a "flat" fashion—with all domain names appearing directly under .de. Deutsches-Network Information Center (visited Dec. 14, 1996) <http://www.nic.de/>.

11. The WHOIS command allows the searching of information about registrations held in the DNS directory. See G. Kessler & S. Shepard, A Primer on Internet and TCP/IP Tools (RFC 1739, 1994); Paul Mockapetris, Directory Services, in INTERNET SYSTEM HANDBOOK 469 (Daniel C. Lynch et al., 1993).

individuals, by paying an annual fee. These members are entitled to a 40% discount on the cost of domain registration in exchange for responsibility for billing their customers (who would actually own the domain names). The cost of subscribing to Nominet may depend on the number of domain registrations undertaken during a qualifying period. Thus, presently, those who registered domains between April 1, 1995 and March 31, 1996 should pay a subscription fee according to Table 1. Those who do not qualify under this criterion are permitted to subscribe at the minimum rate only. Subscribers at the higher rates are entitled to additional voting rights at company meetings.

**Table 1: Categories of Nominet Membership**

<table>
<thead>
<tr>
<th>Domains Registered</th>
<th>Votes</th>
<th>Subscription Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>fewer than 50</td>
<td>1</td>
<td>£500</td>
</tr>
<tr>
<td>50-99</td>
<td>2</td>
<td>£1000</td>
</tr>
<tr>
<td>100-199</td>
<td>4</td>
<td>£2000</td>
</tr>
<tr>
<td>200-299</td>
<td>6</td>
<td>£3000</td>
</tr>
<tr>
<td>300-399</td>
<td>8</td>
<td>£4000</td>
</tr>
<tr>
<td>more than 400</td>
<td>10</td>
<td>£5000</td>
</tr>
</tbody>
</table>

This arrangement suggests that members of Nominet act as Nominet's agents in the execution of contracts for domain registration. This is confirmed by the terms and conditions of Nominet's contract to provide domain registration. The first clause of the terms and conditions states:

> It is recognized that Nominet UK will have recourse to the ISP in the first instance for the payment of the fees and delivery of the signed contract. However, the Applicant should note that the ISP is not a party to this contract and the ultimate responsibility rests with the applicant.

Thus, apart from their part in the governance of Nominet, the only function of the members of the company is to reduce the load on Nominet's administration by taking responsibility for billing and other financial matters. In return for this function, they enjoy privileged access to do-

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14. *See Articles of Association*, supra note 1 (suggesting that Nominet's Article 19 provides for a qualifying period that will remain in place until August 31, 1997, whereafter subscriptions and voting rights "will be related to the member's relative commercial involvement in the .uk domain service").
main registration. Non-members may register domain names directly with Nominet, but are expected to pay the full cost of registration.\textsuperscript{17}

The policies followed by Nominet in allocating domain names reflect conventions established prior to its existence, but do not appear to take into account the difficulties faced by NSI in relation to disputes between trademarks and domain names, which have led to a comprehensive, if not uncontroversial, domain name dispute policy.\textsuperscript{18} Nominet's policies were prepared by a technical working group prior to approval by the company's Steering Committee.\textsuperscript{19} The policies fall into two categories. The first consists of the rules governing selection of a domain name and conditions for registration, and the second concerns the conditions under which a domain may be suspended or withdrawn.\textsuperscript{20} The technical working group originally proposed rules for the registration of domain names ranging in character from the technical to the quasi-legal.

Nominet's current policy shies away from the less technical rules. Thus, there is a ban on the future registration of domain names which consist of only two letters.\textsuperscript{21} The justification for this rule is to avoid confusion with the ISO-3166 country codes.\textsuperscript{22} A similar justification applies to the ban on the use of other iTLD suffixes—net.org.uk, com.ac.uk, and mil.co.uk will not be registered. These restrictions minimize the DNS lockup problems which might occur with badly configured domain name servers. The technical requirement that there be two nameservers available for the domain name at the time of registration is imposed for similar reasons.\textsuperscript{23}

\textsuperscript{17} It is likely that very few non-members will wish to register domain names directly with Nominet, given that the marginal cost of membership becomes minimal after only a few names have been registered and that Nominet members may offer a value-added domain service for those who only wish to register one or two domains.

\textsuperscript{18} NSI, \textit{Domain Name Dispute Policy} (last modified Sept. 9, 1996) <ftp://rs.internic.net/policy/internic.domain.policy>.


\textsuperscript{21} The domain bt.co.uk was registered before Nominet came into being. It and similar domains are explicitly allowed to continue in existence until their domain owner relinquishes them or until some other factor requires that their registration be terminated or suspended.

\textsuperscript{22} Nominet, \textit{Rules}, supra note 20, pt. 3.

\textsuperscript{23} \textit{Id.} As yet, Nominet has not had to invoke an automatic check for lame delegations in the way envisaged in InterNIC. \textit{The InterNIC Lame Delegation Policy—DRAFT} (visited Dec. 15, 1996) <ftp://rs.internic.net/policy/internic/internic-domain-5.txt>. 
At the other extreme, the working group originally proposed that domain names containing sequences of letters making up a "rude" or otherwise contentious word would be rejected. When Nominet's Steering Committee met on July 25, 1996, it decided that the exclusion of "potentially offensive" words was too subjective a requirement, and, therefore they did not carry the rule forward into the published policy. A more significant omission is the absence of provisions on trademarks and domain names. Nominet simply registers domain names which comply with the technical requirements on a first come, first served basis.

Whilst the rules for the acquisition of domain names are primarily technically-based, and permit little discretion on Nominet's part, the conditions for the suspension or withdrawal of a domain name are much more vague. These conditions are found in two places—in the rules for the .uk domain and in Nominet's standard terms and conditions. The latter document is primarily intended to protect Nominet from legal action and provides that:

either party may cancel a registration in exceptional circumstances by notice in writing to the other. In the case of a cancellation by NOMINET UK, such circumstances include, in particular, where to maintain the registration would put Nominet in conflict with statutory obligations or the terms of a Court Order, or where NOMINET UK reasonably believes that the registration infringes the legal rights of a third party.

In the domain rules, a number of circumstances are listed which would entitle Nominet to withdraw or suspend delegation of a domain name. These again include technical concerns, such as "if the name is administered in such a way as to endanger operation of the DNS," but also encompass non-technical matters, such as the name "being used in a manner likely to cause confusion to Internet users" or the commencement of legal action regarding the use of the name. The rules also allow withdrawal or suspension "where Nominet UK is of the opinion that one of the above events is likely to occur." Unless Nominet is responding to a court order, there is no guarantee in any of its documents or policies as to the propriety of the procedures which might be used to withdraw or suspend a domain name. How might that procedural or, indeed, substantive propriety be ensured? Before turning to that question, it is useful to examine the place of domain registries in a system of Internet regulation. This in turn resolves into two issues: is domain re-

26. Terms, supra note 16, cl. 5.3.
27. Nominet, Rules, supra note 20, pt. 3.
28. Id.
III. IS DOMAIN REGISTRATION A PURELY PRIVATE FUNCTION?

Apparently Nominet in common with other domain registries, which tend to operate similar policies, adheres to the view that it is exercising a private function within a largely private networking system. If this is true, it would be pointless to investigate the possibility of external obligations being imposed on domain registries. Conversely, if domain registration is one of a range of public functions within a network that has become ubiquitous, then we might be justified in seeking to identify the demands which may be made of such functions.

A. THE EXTREMES ON THE CONTINUUM OF PRIVATE & PUBLIC FUNCTIONS

There is no clear distinction between public and private functions, nor is it necessarily the case that a public function must be regulated by an external body. It is straightforward to locate certain activities in the public domain, such as the creation of constitutions or legislative or judicial rules within the context of the organization of a nation-state, because they will create general and inalienable obligations. Equally, it is not difficult to see that interactions between persons (whether natural or legal) where no other parties are concerned are rightly private to those persons.

B. OTHER FUNCTIONS ON THE CONTINUUM

The act of placing other functions and activities on the continuum between those two extremes may be inherently difficult. For example, the state may also be a landowner. Is the disposition of that land a private function which is outside the normal methods of state regulation (but clearly within the general rules governing such transactions), or should it be treated as an exercise of public power and regulated accordingly? The answer may depend on the behavior of the state actor. In Wheeler v. Leicester City Council, a local authority’s decision which forbade a rugby club from continuing to practice on the city’s sports fields because three of the players had played in South Africa, was quashed on the grounds that the council had no power to punish the club for its players’ behavior. Private landowners have no such fetters on their discre-

A public body is thus constrained in what it can do by the powers which have been conferred upon it.

For some bodies, these constraints may be minimal. In the United Kingdom, for example, ministers of the crown are able to rely on the royal prerogative as a source of power that, although limited in scope by the judiciary, is sufficiently open to interpretation to allow a degree of flexibility which may enable the statutory allocation of responsibilities to be ignored. Likewise, the powers enjoyed under the common law generally will be less clearly circumscribed than those that are derived from prerogative or statute.

In the same way that the state may be more akin to a private actor in some circumstances, it may be seen that some private institutions may exercise powers which have a public character. Some of these are regulatory bodies. Others are more closely aligned with the state itself.

In addition to bodies which are closely related to government by virtue of a funding relationship or by the power of ministers to appoint their members, some institutions which are even more remote from government may have an influence in the public sphere. Perhaps, treating all of these types of bodies as exercising public functions of one sort or another is appropriate, but public character does not necessarily lead to regulation as a matter of course.

32. R. v. Secretary of State for the Home Department, ex parte Northumbria Police Authority, 1989 Q.B. 26 (Eng. C.A. 1987), the prerogative power to keep peace in the realm was interpreted to allow the Home Secretary to issue baton rounds and CS gas to a police force despite the fact that the police authority which had statutory responsibility for the force had refused its permission.
34. In the legal field, for example, the Law Society has the function of regulating the solicitors' profession and the General Council of the Bar fulfills the same function for barristers.
37. Such institutions may be termed para-governmental organizations. DELIVERING PUBLIC SERVICES IN WESTERN EUROPE: SHARING WESTERN EUROPEAN EXPERIENCE OF PARA-GOVERNMENT ORGANIZATION (Christopher Hood & Gunnar Folke Schuppert eds., 1988).
C. THREE JUSTIFICATIONS FOR GOVERNMENT REGULATION

Grant Jordan has identified three justifications for governmental intervention to regulate otherwise market-driven activities. These justifications follow: (1) in the event of market failure or where the “short-run benefits of competition are outweighed by longer-run costs;” (2) where there is a need for regulation to prevent behavior which would discredit the idea of the market or to provide a framework for efficient competition; and (3) where free operation of the market might have harmful externalities. In the absence of explicit governmental action to regulate private activities, the courts could also undertake regulation where appropriate.

If we adhere to Jordan’s threefold justification for regulation, the task to confirm that the activities of Internet institutions have a public character and that they are suitable for regulation is relatively straightforward. We may, however, be less confident about the proper locus for that regulation. Although the market in network standards has not failed (since there is no compulsion to use the Internet Protocols), the Internet has become the prevailing network protocol for a variety of purposes. It may be necessary for the de facto monopoly in Internet standards to be subjected to some form of regulation. Likewise, it is possible that decisions taken about the network (such as decisions relating to IP number allocation, domain registry or routing priorities) are likely to have both positive and negative externalities. If commercial interests are to be balanced with the public interest on a global scale, necessarily one should consider where such a balance or regulation should take place. The Internet is currently “governed” by a range of institutions, such as at central registries (the Internet Society (“ISOC”), the Internet Engineering Task Force (“IETF”) and IANA), at regional IP registries (InterNIC for the Americas, RIPE-NCC for Europe, and APNIC for Asia and the Pacific Rim), and at national domain registries at the periphery. For the most part, this system of governance has worked well in the past, but the growth of the Internet from an essentially private system into a major international infrastructure on which a range of commercial activities rely heavily means that serious consideration must now be given to formal regulation according to established constitutional principles.

38. JORDAN, supra note 36, at 185-86 (deriving its analysis from WYN GRANT, BUSINESS AND POLITICS IN BRITAIN 1-2 (1987)).
39. JORDAN, supra note 36, at 186.
40. See infra Part V.
41. COORDINATION OF THE INTERNET (Brian Kahin & James Keller eds., forthcoming 1997) (exploring these issues).
42. Mark Gould, Governance of the Internet: A UK Perspective, in COORDINATION OF THE INTERNET (Brian Kahin & James Keller eds., forthcoming 1997) (exploring these issues). The nature of those principles is outside the scope of this article.
There are good reasons for keeping any system of formal regulation within the context of the existing Internet institutions rather than relying on national judicial or regulatory frameworks. In the first place, the efficient operation of the network is an essential consideration in such regulation—it would be unwise to ignore the purposes for which the network was designed when addressing issues of its regulation. The operation of the network is best understood by those who are most familiar with it. Further, if the network is regulated in different ways in different countries, then there is a risk of regulatory arbitrage or of a lack of harmony in the development of the network across the world.

The European Community has responded to similar risks by centralizing its dispute resolution and legislative functions. In addition, the European Court of Justice has developed the doctrines of direct effect and primacy of Community law to prevent national interests in regulation from interfering with those matters which are properly regulated by Community law.

In a similar fashion, the Internet would be most efficiently regulated by centralized institutions. However, where a specific regulatory mechanism is currently absent from the Internet system, national institutions must be able to fill the gap. Otherwise, there is a risk that genuine grievances would not be redressed.

Given the lack of a dispute-resolution mechanism within the Internet structure at present, litigants are turning to national courts for the resolution of their Internet-related disputes. The disputes are concerned primarily with the registration of domain names which conflict with trademark rights. Where a domain registry is more closely linked with a geographical territory than the iTLDs, the jurisdiction of the courts in that territory to decide disputes relating to those domain names should be less controversial. Curiously, it might actually be in the interests of those who wish to promote the merits of IP and the architectural principles of the Internet to submit to a degree of regulation, since the process of creating a national information infrastructure will


inevitably require some regulatory convergence. Without representation in that process of convergence, the interests of the Internet community are likely to be ignored.

IV. WHAT OBLIGATIONS MIGHT BE IMPOSED ON DOMAIN REGISTRIES?

If it is accepted that domain registration is a suitable matter for regulation (whether judicial or governmental), it is necessary to ascertain what the domain registry might be required to do as part of that regulation. Further, it is necessary for the putative regulator to recognize that the domain registry operates as part of a wider enterprise, and therefore to take account of two, possibly competing, conceptions of the “public interest.” In addition to the public interest which is rooted in the national constitution or system of governance, domain registration must fit with the requirement of network efficiency which underpins the Internet “constitution.” Otherwise, its exercise of power will not be legitimate. What, therefore, should a domain registry be required to do to comply with these constitutional interests?

The answers to this question may depend on the standpoint of the questioner. From an objective perspective, however, it must be a minimal requirement that registries adhere to their published policies, and to the procedures outlined therein as a matter of legal certainty. Where there are no clear procedures, it is appropriate to consider what kind of processes should be used or what the proper principles might be to determine those processes. Further, domain registries will not be allowed to violate the law. However, exactly what is required by the law will depend on the degree to which the functions of domain registration may be characterized as public or private. To explore these questions, it will be helpful to use the following scenarios:

Scenario 1

Widget Ltd., decides to obtain a domain name for its commercial use. Having found that the domains widget.com and widget.co.uk, have already been taken, the company decides to apply for widget.org.uk. Nominet registers that domain, with Widget Ltd. as the owner.

49. HOUSE OF LORDS SELECT COMMITTEE ON SCIENCE AND TECHNOLOGY, INFORMATION SOCIETY: AGENDA FOR ACTION IN THE UK ¶4.203 (HL 77, 1995-96) (suggesting that “[f]ull exploitation of the broadband superhighway would probably require the involvement of over a dozen regulatory bodies in the United Kingdom”).

50. These examples are hypothetical; none of the domains discussed were registered at the time of writing.
Scenario 2

The law firm, Smith & Jones, applies for the domain smithjones.co.uk. Nominet registers the domain, but at a later date it discovers that there is no nameserver for the domain.

Scenario 3

An Internet Service Provider ("ISPCO") registers the domain isp.net.uk, and starts to register customer hostnames under that domain.

Scenario 4

Spamco, a marketing company, registers the domain spamco.co.uk. Spamco begins by using that domain for unsolicited commercial e-mail. When other Internet users complain, it becomes clear that there is no postmaster account for the domain and that the contact details for the domain owner held in Nominet's database are no longer valid.

These situations raise a variety of issues, some of which constitute a breach of Nominet's published policies, whilst others infringe wider conceptions of network etiquette. How should Nominet proceed when faced with a complaint raising these wider issues? What principles should it consider when making decisions on such matters?

A. Scenario 1

In the first scenario, there is an apparent breach of the rules governing the sub-domains. Nominet states that "The org.uk domain is intended to be a domain for those organizations which do not satisfactorily 'fit' into any of the other sub-domains of uk. This includes, charities, trades unions, political parties, community groups, educational councils, professional institutions, etc." However, this statement is not part of the rules for the domain, which are as follows: "Only 1 domain per organization/body name; The name should reflect the name of the requesting organization; Minimum of three characters without human intervention; At least 2 nameservers serving the name within 24 hours of the request; Subject to the above criteria, first come first served."

On the face of it, there is no requirement to prove that an organization requesting a domain name under .org.uk is legitimately entitled to do so. However, if one reads the description of the sub-domain together with the general rules on the .uk domain, and specifically the provision that "Nominet UK may withdraw or suspend delegation of a name; ... if it is drawn to Nominet UK's attention that the name is being used in a manner likely to cause confusion to Internet users," one might con-

52. Id.
53. Nominet, Rules, supra note 20, pt. 3.
clude that Nominet would be entitled to refuse to register widget.org.uk for a commercial entity. To do otherwise would render the use of sub-domains otiose. It could also be argued that registration of a non-commercial domain by a company with commercial objects would be a breach of United Kingdom's company law.54

If there is a reasonable expectation that Nominet would refuse to register a domain name in the "wrong" sub-domain, how is the registry to reach the decision that a potential registrant is not entitled to use that sub-domain? As a private organization, Nominet is free to refuse to contract with any potential registrant. If, however, one takes the view that Nominet exercises a public or monopoly power it may be correct to impose a special obligation to investigate all claims for registration before arriving at a decision to contract or not to contract. In particular, it may be deemed appropriate to involve potential registrants in the decision-making process by allowing them to make representations as to their entitlement to a domain name in a particular form. Inevitably, such participation will increase the costs of the decision-making process.

B. Scenario 2

The second scenario fits more neatly with Nominet's preference for technical rules governing registration. In particular, the failure to provide nameservers once the domain name has been registered falls afoul of the requirement to administer the name "in a way likely to endanger operation of the DNS"55 and would also entitle Nominet to suspend or withdraw delegation on the ground that "the basis on which the name was registered has changed."56 Despite this, it is still not clear what procedures should be followed, either when taking the decision to withdraw or suspend the domain name or in the resolution of the (possibly inevitable) dispute. Further, it is less than clear in this or the earlier scenario whether, and under what conditions, third parties would be able to invoke Nominet's power to withdraw or suspend delegation.

C. Scenario 3

The vagueness of Nominet's own rules may be contrasted with the clarity of some RFCs. As an example, RFC 1591 provides that the .net iTLD, "is intended to hold only the computers of network providers, that is the NIC and NOC computers, the administrative computers, and the network node computers. The customers of the network provider would

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54. Companies Act 1985, §§ 348-51. A limited company is required to make its status clear on all significant publications. Id. Whether the courts would treat registration of a .org.uk domain as a breach of the spirit of those rules is moot. Id.
55. Id.
56. Id.
have domain names of their own not in the NET TLD.”57

Nominet borrowed this rule explicitly when establishing the .net.uk sub-domain.58 It is also given the status of a rule, unlike the more vague standards applied in the .org.uk sub-domain. On this basis, it would be much more straightforward for the domain in the third scenario to be refused, or for it to be withdrawn or suspended. There are still some evidentiary problems, however. So long as ISPCO uses the ispco.net.uk name for its own computers, it will remain within the terms of the rules governing registration in the .net.uk sub-domain. Given that the domain name does not exist and individual hostnames cannot therefore be registered in the DNS until the domain name itself is registered, the circumstances which might lead to a breach of the naming rules can only come into existence once the domain has been registered. At that point, given that there exists a contract between Nominet and ISPCO, the use of the domain name would have to fall outside the contract so that Nominet exercises its power to withdraw or suspend delegation. Is that decision simply a matter for Nominet?

Reading the terms and conditions together with the naming rules would suggest that it is a matter for Nominet. Nominet is permitted to withdraw or suspend delegation “where [it] is of the opinion that one of the [qualifying] events is likely to occur.”59 One of the qualifying events is the name “being used in a manner likely to cause confusion to Internet users.”60 Nominet is therefore placed in a position of great power, since it alone appears to be responsible for assessing the conditions which would lead to a repudiation of the contract. The fact that suspending the domain name would have consequences for third parties, i.e., those customers of ISPCO who had registered hostnames under the disputed domain name, would not appear to be a concern for Nominet who “accepts no responsibility for the use of any domain name.”61 Should Nominet be allowed to disclaim any responsibility for innocent third parties?

D. Scenario 4

The final scenario is perhaps the most difficult for Nominet. It involves a breach of an Internet standard, albeit one which is not related to the DNS. RFC 82262 (which is incorporated into STD 11) requires that

57. RFC 1591, supra note 6, pt. 2.
59. Nominet, Rules, supra note 20, pt. 3.
60. Nominet, Rules, supra note 20, pt. 3.
61. Terms, supra note 16, cl. 5.4.
the address, postmaster@domain, must be valid and routed to a person or group of people so that queries may be addressed to a site without knowing any of the mailnames at the site. Failure to adhere to this rule can cause problems at a human level, but may also be risky for computers.\textsuperscript{63} If Nominet were minded to enforce this rule, difficulties might arise in regard to giving notice. Without accurate contact details (and there is no suggestion that it maintains a constant check on the accuracy of changes made to domains), Nominet would find it hard to give notice of any change in the status of the domain name.\textsuperscript{64} From the perspective of Internet users whose mailboxes might be filled with unsolicited e-mail from Spamco and of ISPs who would have to incur the costs of handling that e-mail, it would seem obvious that without a legal remedy the only sanction would lie with the domain registration authority and Spamco's connectivity provider. If the provider cannot be identified with certainty, or is unwilling to terminate a customer's account at the instigation of a third party, it is likely that Nominet would bear the brunt of these complaints.

If Nominet is a private actor within the Internet system, there may be little that third parties can do to require it to adhere to standards of decision-making and enforcement of netiquette and other rules. If, however, the courts take the view that it is in fact in a position of public power, then third parties may be able to enforce Nominet's public duties. Before assessing the likelihood that the English courts might take this step, an outline of the judicial context is appropriate.

V. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN ENGLISH LAW

Disputes between Nominet and domain owners will naturally be resolved according to the law of contract. Contractual remedies are not available to third parties who may have a legitimate grievance against Nominet. Similarly, there may be some remedies which are not available in contract at all, but which a domain owner may wish to use. In the event of failure of a contractual claim, it is likely that litigants will turn to the principles developed by the courts under the head of judicial review. In England, judicial review of administrative action is a creation of the common law. The current procedures have been derived from the supervisory power of higher courts over inferior courts and tribunals,

\begin{footnotesize}
\textsuperscript{63} See, for example, the description of "SMTP chicken" in Mark Gould, \textit{Rules in the Virtual Society}, 10 INT'L REV. L. COMPUTERS & TECH. 199, 207-8 (1996).

\textsuperscript{64} There is a problem with this scenario. It is not necessary to have a domain name to send e-mail messages. All that is required is a computer with an IP number, connected to the network. From a commercial perspective, however, the permanence of a domain name is more meaningful than a changeable IP number.
\end{footnotesize}
which became the exclusive jurisdiction of the King's Bench, applying the prerogative writs of prohibition, mandamus and certiorari, as well as a variety of other remedies, each with its own rules of procedure.\textsuperscript{65} In 1977, a unified procedure was created, and called the "application for judicial review". It is now to be found in Order 53 of the Rules of the Supreme Court,\textsuperscript{66} and in section 31 of the Supreme Court Act 1981.\textsuperscript{67} The judicial review process now strives to balance private rights with the public interest in good and efficient decision-making by a variety of means.

For the most part, the balancing of public and private interests is also a balance between the procedural and substantive requirements of judicial review. Generally speaking, the substantive grounds on which judicial review is available require a higher standard of decision-making than might be required of private bodies. In return for these controls, bodies which are susceptible to judicial review are protected from applicants using the process in an unduly restrictive fashion. Thus, Order 53 provides a two-stage process which is designed to filter out the less well-founded applications. Before proceeding to the application for judicial review proper, applicants must first obtain leave to apply for judicial review.\textsuperscript{68}

The leave requirement requires a judge to examine the prima facie merits of the application based primarily on an affidavit provided by the applicant and to decide whether the application should proceed to a full hearing.\textsuperscript{69} One of the questions which may be resolved at the leave stage is the question whether the applicant has a sufficient interest, or standing, to bring the application.\textsuperscript{70} Where it is impossible to separate this question from consideration of the merits of the application itself, the court may leave it to be decided together with the merits.\textsuperscript{71}

Whilst the standing requirement may appear to be a restriction on the availability of judicial review, it is only restrictive insofar as it pre-

\textsuperscript{65} See J.H. Baker, An Introduction to English Legal History 164-175 (3d ed. 1990)
\textsuperscript{68} Supreme Court Act 1981, § 31(3); Order 53, supra note 66, rule 3(1).
\textsuperscript{69} The leave requirement is controversial. It is thought by some to be an unjustified restriction on the availability of judicial review. See Andrew Le Sueur & Maurice Sunkin, Applications for Judicial Review: The Requirement of Leave, 1992 Pub. L. 102.
\textsuperscript{70} Supreme Court Act 1981, § 31(3); Order 53, supra note 66, rule 3(7).
\textsuperscript{71} R. v. Inland Revenue Comm’rs, ex parte Nat’l Fed’n of Self-Employed & Small Businesses Ltd., 1982 App. Cas. 617 (appeal taken from Eng.).
VENTS ANY MEMBER OF THE PUBLIC FROM INVOKING THE HIGH COURT'S SUPERVISORY JURISDICTION. PROVIDING SOME REAL PROXIMITY OF INTEREST CAN BE SHOWN, THE COURT WILL RECOGNIZE THE APPLICANT'S STANDING. IT MAY STILL BE DIFFICULT FOR INDIVIDUALS TO CHALLENGE THE DECISIONS OF PUBLIC BODIES EXCEPT WHERE THEY HAVE A PERSONAL INTEREST IN THE CHALLENGED DECISION, BUT THE COURTS HAVE RECOGNIZED THAT PRESSURE GROUPS MAY HAVE A LEGITIMATE GENERAL CLAIM TO BRING ACTIONS WHERE APPROPRIATE.  

A FINAL LIMITATION ON THE AVAILABILITY OF JUDICIAL REVIEW IS THE REQUIREMENT THAT APPLICATIONS FOR JUDICIAL REVIEW MUST BE BROUGHT WITHIN THREE MONTHS OF THE GROUNDS FOR THE APPLICATION FIRST ARISING. THIS REQUIREMENT IS IMPOSED FOR THE BENEFIT OF THE PUBLIC BODY Whose DECISIONS MIGHT OTHERWISE BE LEFT UNCERTAIN FOR TOO LONG, BUT THE RIGHT OF THIRD PARTIES NOT TO BE UNDULY AFFECTED BY SUCH UNCERTAINTY IS Also RECOGNIZED.  

THE JUDICIAL REVIEW PROCEDURE OFFERS A RANGE OF REMEDIES, AND ALSO PERMITS THE COURT TO PROVIDE A REMEDY WHICH WAS NOT Sought IN THE ORIGINAL APPLICATION. The former prerogative writs have been transformed into the prerogative orders. Where a public power is abused, or exercised ultra vires, an order of certiorari will quash any decision made, and an order of prohibition will operate to prevent future wrong-doing. Mandamus, used to enforce the performance of a public duty according to law, was historically a residual remedy, and only available where no other legal remedy existed. This led to the remedy being overshadowed by the other prerogative writs, until the reforms of the judicial review process brought its renascence. Mandamus now forms a valuable means of preventing wrongful inaction, thus complementing prohibition and certiorari, which are concerned with wrongful actions. The utility of the prerogative orders is reinforced by the power of the courts to combine them with relief by way of declaration, injunction or damages. The remedies available by way of judicial review are clearly comprehensive. However,
all are available only at the discretion of the court. Ultimately, therefore, if the court has good reason for denying relief to an applicant, then no relief will be available. The following are reasons to deny relief: the behavior of the applicant in bringing the application out of time, or having previously acquiesced in an ultra vires decision; the nature of the decision being one which is not suitable for judicial review; the fact that the relief would be otiose; or, the public interest in relief not being given. In the same way that the judicial review procedure is a balance between public and private interests, so is the availability of remedies.

Whilst the remedial and procedural aspects of judicial review are regulated by statutory rules and judicial decisions, the actual grounds on which judicial review are given are entirely a creation of the common law. There have been a variety of efforts to rationalize these grounds. Of particular note are the obiter dicta of Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service79 and the report of the Justice-All Souls Review of Administrative Law in the United Kingdom.80

Lord Diplock provided a classification of the grounds for judicial review into three categories—illegality, irrationality, and procedural impropriety.81 Whilst this classification may be helpful in some regards, it also has the potential to be abused by being adhered to in too rigid a fashion. Further, by concentrating on the rectification of decisions which are in breach of the requirement to be legal, rational and procedurally proper, Lord Diplock's classification does not offer decision-makers any real guidance as to what is required of them.

At the other extreme, the Justice-All Souls Review provides a detailed critique of the process of judicial review, including the procedural and substantive aspects. As regards the latter, their report recommends the creation of a set of Principles of Good Administration,82 and the imposition of a general duty to give reasons for decisions.83 These would be substantial changes to the culture of English administrative law. Currently, however, the only guidance that administrators get as to what is acceptable in the decision-making process is derived from a close study of

78. See Lord Justice Bingham, Should Public Law Remedies be Discretionary?, 1991 Pub. L. 64 for a discussion of these reasons.
82. ADMINISTRATIVE JUSTICE, supra note 80, at 21-3.
83. ADMINISTRATIVE JUSTICE, supra note 80, at 69-74.
judicial precedent, which is far from offering a coherent body of standards. Likewise, there is no duty at common law to provide reasons for decisions.\(^{84}\)

### A. What is the Scope of Judicial Review?

Whatever one concludes as to whether the domain registration function is public or not, there remains a separate legal question. Do the actions of a domain registry have a sufficiently public character to render them suitable for judicial review? As outlined above, judicial review may offer remedies which are not otherwise available and to parties who would be excluded from any other form of action. Domain owners who are concerned about the procedures used to withdraw their domain names may find it impossible to bring an action in contract to challenge those procedures. An application for judicial review may, therefore, be perceived as a suitable alternative. Likewise, judicial review may offer relief to those who do not have a contract with Nominet, such as unsuccessful domain registrants and third parties with an interest in the conduct of domain registration.

Many of the principles which are currently applied by the courts in applications for judicial review were developed before the Order 53 process was established. Since the procedural reforms in judicial review, it has become much more significant whether an action is brought as an application for judicial review or by some other means in private law. This distinction was made even more crucial by the decision of the House of Lords in *O'Reilly v. Mackman*.\(^{85}\) This decision found that to allow an action brought by writ or originating summons against a public body raising issues of public law to continue would be an abuse of the process of the court. Following this decision, the distinction between public law and private law has become fundamental.\(^{86}\) The primary justification for this distinction is that to allow actions to be brought in private law would undermine the protections offered to public bodies by the judicial review procedure. It has therefore become essential for those wishing to avail themselves of judicial review principles to find some way of arguing that the body which they are pursuing is a suitable subject for judicial review.

In a similar way, bodies whose decisions are challenged under private law may wish to argue that the proper authority for such challenges is Order 53, and thus that the private law challenge should be precluded. That argument was the defendant's position in *Law v. National Grey-

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The Court of Appeals held unanimously that the decision of a company which regulated the conduct and discipline of greyhound racing in Britain to suspend the license of a greyhound trainer could be challenged by way of originating summons. The basis for this decision was that "such powers as the stewards had to suspend the plaintiff's licence were derived from a contract between him and the defendants." In addition, the jurisdiction of the club was voluntary—there was no compulsion to submit to its rules, and there was even a suggestion that the club did not hold a monopoly over greyhound racing.

After the Law case, a series of decisions contributed to a set of standards which are to be applied to decide whether a body or function is susceptible to judicial review. These standards are by no means complete, however, and some speculation is necessary to assess whether Nominet could be judicially reviewed. The decision in R. v. Panel on Take-Overs and Mergers, ex parte Datafin represents a high point in the availability of judicial review. Here, the Court of Appeal held that the power to regulate take-overs exercised by a self-regulatory body could be the subject of judicial review. In doing so, it relied on the nature of the power exercised, rather than the source of that power. Indeed, the source of the power was unclear. Lord Donaldson M.R. called the Panel "a truly remarkable body, performing its function without visible means of legal support." In practical terms, the decisions of the Panel were enforced indirectly by the Stock Exchange. The Panel itself was part of a complex and partially statutory system of merger and investment regulation, and it could be said that the decision not to create a statutory body exercising the powers of the Panel constituted a de facto incorporation of the Panel into the government's "regulatory network."

Despite its recognition that the regulation of public power may be more appropriate than the traditional concentration on the control of specific powers, ex parte Datafin has not been followed in subsequent cases. The reason for this may be found in the cases themselves. In general they have been concerned with bodies or individuals who regulate discrete activities away from the core public functions, such as professions, sports or religions. It is apparent, however, that the courts

87. 1 W.L.R. 1302 (Eng. C.A. 1983).
88. Id. at 1307.
89. Id. at 1311.
90. 1 Q.B. 815 (Eng. C.A. 1987)
91. Id. at 834.
92. Id. at 835-36.
94. See R. v. Disciplinary Comm. of the Jockey Club, ex parte Massingberd-Mundy, 2 All E.R. 207 (Q.B. Div'l Ct. 1993); R. v. Jockey Club, ex parte RAM Racecourses Ltd., 2 All
might look more favorably on bodies which have a more governmental character. In *R. v. Chief Rabbi of the United Hebrew Congregations of Great Britain & the Commonwealth, ex parte Wachmann*, Simon Brown J., reasoned that, to say of decisions of a given body that they are public law decisions with public law consequences means something more than that they are decisions which may be of great interest or concern to the public or, indeed, which may have consequences for the public. To attract the court’s supervisory jurisdiction there “must not be merely a public, but potentially a governmental interest in the decision-making power in question.”

Further, in *R. v. Disciplinary Comm. of the Jockey Club, ex parte Aga Khan*, Sir Thomas Bingham M.R. recognized that the decisions of the Divisional Court in *R. v. Disciplinary Comm. of the Jockey Club, ex parte Massingberd-Mundy* and *R. v. Disciplinary Comm. of the Jockey Club, ex parte RAM Racecourses Ltd.* not to allow judicial review of the Jockey Club were bound by the precedent in *Law* despite the fact that the applicants in those cases did not have a contractual relationship with the Jockey Club. There is a clear implication that had those decisions been appealed, the decision in *Law* might have been reconsidered. The door to judicial review of decisions of the Jockey Club (and by implication other sporting bodies) was left open:

> It is unnecessary for the purposes of this appeal to decide whether decisions of the Jockey Club may ever in any circumstances be challenged by judicial review and I do not do so. Cases where the applicant or plaintiff has no contract on which to rely may raise different considerations and the existence or non-existence of alternative remedies may then be material.

Sir Thomas Bingham M.R.’s earlier remark that “if the Jockey Club did not regulate [horse racing] the government would probably be driven to create a public body to do so,” suggests that in order to ascertain whether judicial review is appropriate courts must consider both the


96. *Id.* at 1041.

97. *Id.*


100. 2 All E.R. 225 (Q.B. Div'l Ct. 1998).

101. The judges in those cases also made it clear that their decisions would have been different had there not been such a clear precedent. *See ex parte* Massingberd-Mundy, at 219; *ex parte* RAM Racecourses, at 246.

102. *Ex parte* Aga Khan, at 924.

103. *Id.* at 923.
source of the specific power exercised against the applicant for judicial review and the general source of the decision-maker's authority. Where the former is contractual, the latter may be largely irrelevant, but where it is not contractual, the court would have to examine the place of the decision-maker within a range of governmental activities. In those terms, the outcome of ex parte Aga Khan is not significantly different from that in ex parte Datafin.

What is the proper scope of judicial review? The judicial view is clearly a conservative one: judicial review should only be available where it is justified and where no other suitable remedy is available. Craig has identified three separate arguments to support this view. In the first place, a distinction is made between public power and exercises of private power which might have public consequences. Here, control may be exercised by some other means such as consumer protection or competition law. Secondly, the consequences of identifying an exercise of power as public may have inappropriate consequences. Craig refers here to the decision in the Football Association case, where Rose J. noted that, “to apply to the governing body of football, on the basis that it is a public body, principles honed for the control of the abuse of power by government and its creatures would involve what, in today's fashionable parlance, would be called a quantum leap.”

The third justification for restricting judicial review is caution. If review of one sporting body is permitted, should all such bodies be reviewable? The courts have been reluctant to expand judicial review except in clearly exceptional circumstances because they are fearful of the consequences. This certainly explains the courts' attitude to successive challenges to the authority of the Jockey Club, but it is not particularly useful in analyzing whether a body such as Nominet should be reviewable.

At the other extreme, some commentators take the view that judicial review should be available wherever the public interest is threatened. In her analysis of the application of judicial control to self-regulatory bodies, Julia Black relies heavily on theories of reflexive law. She argues that self-regulation has a collective aspect which is often ignored, especially in the courts' reaction to cases where there is a contractual relationship between the regulatory body and the regulated individual. For Black, the judicial equation of “public” with “governmental” is inadequate, and she suggests a system of “constitutionalised autonomy”

105. 2 All ER 833, 849 (Q.B. Div'l Ct. 1993).
106. Craig, supra note 100, at 572-3.
108. Id. at 27.
109. Id. at 40.
within which the function a body plays in mediating between different systems of society would be a determining factor in its publicness. On this analysis, judicial review of self-regulatory bodies is permissible insofar as it takes account of this more fragmented notion of the public and of the constitutional values promoted by the social systems regulated by such bodies and of other social systems which are affected by its decisions.

Black’s argument is a tempting one, and it would be readily applicable to the processes of Internet government, which parallel those of the nation-states within which the network finds its physical incarnation. However, she appears to imply that the absence of judicial review in the cases discussed equates to a complete absence of legal regulation. That is not the case. There is a long and virtuous history of judicial control of monopoly power. In 1787 Lord Chief Justice Hale held that a wharf (even in private ownership) to which all vessels sailing to a particular port had to be directed for practical reasons was thereby “affected with a public interest.” In succeeding centuries, it became commonplace that the common law would prevent those holding market power from charging unreasonable rates. It may be possible to extrapolate from this a general duty of reasonableness, which may in turn incorporate a duty to act fairly. The only obstacle to such a development is the jurisdictional distinction between public law and private law established in O’Reilly. As noted previously, the reasons for this distinction (the protection of public bodies from inappropriate judicial intervention) are valid. It would be better to return to the ex parte Datafin test, where the determining factor is a need for “public” control and an absence of rights or remedies in contract or elsewhere apart from judicial review.

B. Is NOMINET SUSCEPTIBLE TO JUDICIAL REVIEW?

Should Nominet be susceptible to judicial review? The power it exercises in administering the .uk domain is not derived from the contracts it concludes with domain name owners, nor the consensus of Internet users, but is delegated from IANA. In the Internet context, Nominet (in common with the other domain registries) exercises a governmental function. It is not, however, clear that this governmental quality can be

110. Id. at 51.
111. Id. at 52.
112. Christopher Forsyth, Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review, 55 Cambridge J.L. 122, 124 (1996) (citing De Portibus Maris, 1 Harg L. Tr. (1787)).
113. P.P. Craig, Constitutions, Property and Regulation, 1991 Pub. L. 538 (citing Alnutt v. Inglis, 12 East 527 (1810)). See also Breck P. McAllister, Lord Hale and Business Affected with a Public Interest, 43 Harv. L. Rev. 759 (1929-30).
114. Forsyth, supra note 112, at 125.
translated into a national legal system. Instead, it is necessary to refer to the rules of national law alone to determine whether Nominet's functions would be possible. That issue will, in turn, depend on the nature of the dispute before the courts. Returning to the scenarios posited above, it may be possible to arrive at some tentative conclusions.

If Nominet were to exercise its contractual power to withdraw a domain, it would appear, on the authority of *ex parte Aga Khan*, that the domain name owner would be unable to apply for judicial review of that decision. It may be possible, however, for an action in contract to be used to require Nominet to exercise its monopoly power in a reasonable fashion. It is not the case, however, that the domain name system is a bilateral agreement between registries and domain name owners. Nominet recognizes this fact in its domain rules, which are concerned with such matters as the technical efficiency of the network and the expectations of Internet users. Can Nominet be required by third parties to enforce the "public" provisions of its own rules, the rules of netiquette, or the law? A number of problems have to be addressed in answering that question. In particular, there are fundamental problems with standing, appropriate remedies and, perhaps most significantly, the place of Nominet in judicial review.

The current law relating to standing would tend in the absence of parties whose rights are directly affected to favor applications for judicial review brought by existing pressure groups or organizations. There are currently three significant groups which are concerned with the regulation and operation of the Internet in the United Kingdom. Central to the commercial organization of the Internet in the United Kingdom is the London Internet Exchange ("LINX"), which provides a physical interconnect point for the country's major network carriers. The Internet Service Providers Association ("ISPA") is a wider group of ISPs which exists as a point of contact for government and other interested parties. Not all U.K. ISPs belong to the organization, but it is a largely representative body. A newer group, the Internet Watch Foundation ("IWF"), was established in response to public and governmental concerns about pornography on the Internet. It serves as a liaison between the police and ISPs where allegations are made that unlawful material is being published via Usenet or Internet. There is not, as yet, an Internet users' group in the United Kingdom, nor a chapter of ISOC. It is likely that the courts would recognize the standing of any of these groups to bring a well-founded application for judicial review of Nominet's functions. Likewise, an individual or non-Internet-related organization which otherwise had a sufficient interest in a decision of Nominet will have standing to challenge it. However, the general public interest in Nominet's activities is
unlikely to be sufficient to ground an application for judicial review.\(^\text{115}\) Nominet may, therefore, be protected from judicial review simply by the shortage of sufficiently interested parties.

If there is a sufficiently interested party, then the question arises as to the appropriate remedy to be applied. Clearly this depends to an extent on what Nominet has done or failed to do. If judicial review is required to challenge a decision already taken such as the decision to register a commercial organization under .org.uk then certiorari would naturally be sought. If, conversely, the intention is to require Nominet to make a decision, withdraw, or suspend a domain where, for example, the domain is being used in a way which endangers the operation of the DNS then mandamus would be the appropriate remedy. These remedies are only available at the discretion of the court, however, and there have been strong indications that the judiciary are unwilling to apply the more coercive remedies to bodies which are not at first blush organs of government. In \textit{ex parte Datafin}, Lord Donaldson was only willing to grant declaratory relief, adding that “the only circumstances in which I would anticipate the use of the remedies of certiorari and mandamus would be in the event, which I hope is unthinkable, of the panel acting in breach of the rules of natural justice—in other words, unfairly.”\(^\text{116}\) Procedural impropriety which merely amounts to a body's failure to follow its own procedures would not attract such opprobrium.

Finally, is it likely that Nominet would fall within the substantive boundaries of judicial review as understood by the courts? The functions it performs do have a regulatory character, but they are also part of the governance of the Internet. That in itself will not be sufficient to justify the intervention of judicial review. In addition, there is a question of legitimacy which will be considered later. The authorities suggest that a national governmental interest is necessary before the courts will exercise their supervisory jurisdiction. Is there such an interest? Two factors suggest that there is. In the first place, the central authority in the Internet, IANA, which is responsible for the delegation of national TLDs, has clearly assumed that national domains are administered on behalf of the nation, even if the national government itself is not responsible for that administration.\(^\text{117}\) It may be assumed from this that where there is no private or commercial interest in administering a national TLD, the relevant government will do so. The second factor is that the Internet has become an essential part of the infrastructure for commerce and gov-

\(^{115}\) See \textit{R. v. Secretary of State for the Env't, ex parte Rose Theatre Trust Co.}, 504 (Q.B. 1990) (discussing an organization created to protect site of Shakespearean theater has no standing to challenge the decision not to schedule the site as an ancient monument).


\(^{117}\) Jon Postel, \textit{ supra} note 9.
ernment alike. Even if there were no assumption on the part of the Internet institutions that domain registration should be a governmental activity, the fact that the Internet itself has become so central to commercial and other activities suggests that in the event of the failure of the domain registry the government would undertake to replace its function. If Nominet did not exist, the government would have to find an alternative independent registry, or fulfill the registration function directly. On that basis, Nominet is probably more governmental than the Disciplinary Commission of the Jockey Club.

If the conditions are right, then, there is a very strong argument that Nominet (or whomever fulfills the domain registration function in the United Kingdom) is susceptible to judicial review. With that in mind, it is to be expected that the decisions Nominet takes should consider the public nature of the function, and not simply regard registration as a contractual matter.

VI. WHAT IS THE PROPER FUNCTION OF NATIONAL COURTS WITH REGARD TO INTERNET INSTITUTIONS?

There remains a final problem. Is the control of Internet constitutional functions by national courts legitimate? Nominet performs a function for which it is responsible to two separate groups. In the first place, it is one of a large number of top-level domain registries. All these registries are collectively responsible for the efficient operation of the DNS. It is not open to any individual registry to take decisions which would threaten the DNS. That is a global matter—it makes no sense to talk of the United Kingdom’s DNS, since Internet users anywhere in the world need to have access to sites in the .uk domain on the same basis as they do to sites in their own domains. All registries do, however, have responsibilities to the domain owners with whom they have contracted. Further, national registries may have responsibilities to the nation, whether or not that is expressed as a responsibility to government. A tension may arise between national interests and the public interest in regard to the Internet. This tension is most likely to arise where a national government wishes to control Internet access or content. It will also occur where a national court requires a registry to behave in a particular fashion notwithstanding its responsibility to the wider Internet community. If different national courts and governments make decisions relating to the Internet without considering the needs of the network itself, then it is likely that the network will become fragmented.

National control of Internet institutions may therefore be problematic from the point of view of the network itself. There may also be a problem from the national perspective. Does the continual reference to “governmental” action in the cases on the availability of judicial review
conceal a judicial assumption that the courts may only address state action. Nominet functions within a non-state "constitution" and it may therefore be more appropriate for public law disputes to be resolved within that framework. This would also have the advantage that disparity of norms would be reduced. However, there is currently no comprehensive dispute resolution process within the Internet system, despite the fact that other organs of governance can be identified. In the absence of such a process national courts may find themselves faced with Internet-related disputes increasingly often. A strict reading of the requirement for national governmental interest would exclude such disputes from judicial review, although it would still be possible to resolve some of them as a matter of private law where appropriate.

VII. CONCLUSION

Despite these caveats about the legitimacy of national judicial intervention in Internet-related disputes, it remains that Nominet may reasonably be expected to fulfill a public role in the operation of the national domain registry and that it may, given an appropriate situation, be subjected to judicial review of this public function. In at least one state, therefore, it is possible that the existing rules of administrative law may be applied to this new form of human organization. At one level this is simply a reaffirmation of the adaptive power of the law. From the perspective of the domain registry, however, exercise of the judicial power to regulate its work may well be an unwanted intrusion. Even if one accepts that some form of regulation of domain registration is necessary and may actually protect registries from the consequences of resolving disputes in which they have no interest, it is reasonable to question whether the haphazard nature of such regulation is in the best interests of a developing global communications medium. Just as John Donne recognized our collective interest in the well-being of individuals, the regulation of a part of the Internet has an impact on all Internet users. This is not to say that national regulation of the Internet, whether by judges or politicians, is never acceptable. Such an attitude would be unreasonable. If, however, such regulation is undertaken purely by reference to national interests and traditions and without proper consideration of the functions of the network and the desires, however

118. See Gould, supra note 42.
119. John Donne, Devotions XVII, in COMPLETE POETRY AND SELECTED PROSE 537, 538 (John Hayward ed., 1990) (1624) ("No man is an illand, intire of it selfe; every man is a peece of the Continent, a part of the main; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any mans death diminishes me, because I am involved in Mankind; And therefore never send to know for whom the bell tolls; it tolls for thee.").
inchoate, of the global Internet community, then it is unlikely to be regarded as legitimate.

When it comes, the decision whether it is possible for judicial review to be available against decisions of Nominet should not be taken simply by analogizing with stock-market and sporting regulators. Rather, it should also be properly founded in an understanding of the place of the domain registry within the structure of the Internet. Paradoxically, that understanding may well provide a better foundation for judicial review than the existing authorities.