

**DISPUTE RESOLUTION SERVICE**

**D00008527**

**Decision of Independent Expert**

Ryanair Limited

and

Robert Tyler

**1. The Parties**

Complainant: Ryanair Limited  
Corporate Head Office  
Dublin Airport  
County Dublin  
Ireland

Respondent: Robert Tyler  
21 Wingfield Road  
London  
E17 9NN  
United Kingdom

**2. The Domain Name**

ihateryanair.co.uk ("the Domain Name")

**3. Procedural History**

The Complaint was filed with Nominet on 19 April 2010. Nominet validated the Complaint on 20 April 2010 and notified the Respondent by post and by email, informing him at the same time that he had until 12 May 2010 to file a Response. The Respondent filed a Response on 11 May 2010. Nominet notified the Complainant that it had until 18 May 2010 to file a Reply, and the Complainant did so on 19 May 2010.

The Informal Mediation procedure failed to produce an acceptable solution for the parties and so on 18 August 2010 Nominet informed the Complainant that it had until 2 September 2010 to pay the fee for the decision of an Expert pursuant to paragraph 7 of the Nominet Dispute Resolution Service Policy ("the Policy"). On 25 August 2010 the Complainant paid Nominet the required fee.

On 14 September 2010 the undersigned, Jane Seager ("the Expert"), confirmed to Nominet that she knew of no reason why she could not properly accept the invitation to act as an Expert in this case and further confirmed that she knew of no matters which

ought to be drawn to the attention of the parties which might appear to call into question her independence and/or impartiality.

#### **4. Outstanding Formal/Procedural Issues**

The Complainant filed the Reply a day late. However given the difficulty of this case the Expert feels it would be wrong not to take it into consideration and so has done so.

#### **5. Factual Background**

The Complainant is a well known European airline that was founded in the Republic of Ireland in 1985. In 2009 it had operating revenues of over €2.9 billion and carried over 59 million passengers. According to the Complainant's 2009 Annual Report, it is determined to lower the cost of air travel. In 2009 its average fare was €40.

The Complainant has a number of registered trade marks in the term RYANAIR.

The Respondent is a private person who registered the Domain Name on 13 February 2007. It currently points towards a website containing content that is heavily critical of the Complainant. The website also contains links to competing airlines (British Airways and Virgin Atlantic) under the heading "*Sites we like*". From January to May 2010 the website also displayed various commercial links to third party websites offering travel insurance and foreign currency. These links earned the Respondent a total of £322. The links were removed by the Respondent on 11 May 2010 (the date the Response to the Complaint was filed).

#### **6. Parties' Contentions**

##### **Complaint**

##### **Complainant's Rights**

The Complainant underlines that it is the largest European airline (according to traffic rankings published by the International Air Transport Association) with an operational presence in 41 locations around Europe and Morocco across 26 countries. It currently provides airline services to 154 destinations and attaches extracts from its 2009 Annual Report to underline these facts.

The Complainant also points out that it offers a range of ancillary services to complement its core airline business and derives a significant proportion of its revenue through such services. These ancillary services include travel insurance services, credit card services, car hire booking services and hotel and accommodation booking services.

The Complainant states that its RYANAIR trade mark is well-known and emphasises that it enjoys a high degree of consumer and media recognition. The RYANAIR brand name is synonymous with the Complainant.

The Complainant argues that it has Rights as defined in the Policy. It has established very substantial goodwill and reputation in its trade mark as a result of operating its business under the RYANAIR brand for many years. It also owns various Community trade mark registrations for the trade mark, including:

- Community Trade Mark number 4 168 721 for RYANAIR (word mark) registered on 5 December 2005 in respect of the following services, amongst others:

insurance, financial affairs, monetary affairs, insurance services and credit card services in class 36 and transport, airline transport services and travel arrangement in class 39.

- Community Trade Mark number 338 301 for RYANAIR (device mark) registered on 17 November 1999 in respect of the following services, amongst others: insurance services and credit card services in class 36 and air transportation and travel arrangement in class 39.

Printouts of these trade marks are attached to the Complaint. The Complainant argues that the Domain Name is similar to its trade mark because it is well-established that in assessing whether or not a name or mark is identical or similar to a domain name, it is appropriate to discount the domain name suffix.

In the Complainant's view, RYANAIR is the core distinctive element of the Domain Name. The Respondent has combined the entirety of the trade mark with the non-distinctive term "ihate" and so the addition of the non-distinctive term to the trade mark does not override the clear similarity of the Domain Name to the trade mark. The Complainant therefore argues that it has Rights in a trade mark that is similar to the Domain Name.

### **Abusive Registration**

In the Complainant's opinion the Domain Name is an Abusive Registration (as defined in the Policy). It was registered and has been used in a manner that both takes unfair advantage of and is unfairly detrimental to the Complainant's Rights.

The Complainant points out that the website to which the Domain Name resolves is a criticism site. According to the Complainant, the home page of the website displays the headline "*I hate Ryanair*" with an accompanying strapline, "*what a bunch of filthy thieving bastards!*" (printouts are attached). In the Complainant's opinion the editorial content of the website contains "*vitriolic and highly disparaging*" comments about the Complainant. Towards the end of January 2010 the Complainant became aware of a number of particularly damaging and defamatory articles about the Complainant on the website.

The Complainant argues that the alleged defamatory material contained a number of false comments about the Complainant's safety, maintenance and operating standards, including the following:

*"We say this is obviously yet another shambolic example of Ryanair pilots making mistakes whilst in a hurry - all because the boy racer pilot was speeding"* published under the headline, "*Two Ryanair planes crash into each other at Girona airport*", on 14 January 2010.

*"Ryanair has been involved in yet another incident which raises serious questions over the pressure it is putting on its pilots to turn its aircraft around after each sector as quickly as possible"* published under the headline, "*Ryanair pilot crashes plane in hurry to take off*", on 16 December 2009.

*"Ryanair regularly put passenger's lives at risk by under-fueling (sic) their aircraft in the name of efficiency. Pilots are regularly loading less fuel than is legal in an attempt to cut costs. One way around declaring an emergency it would seem, is to request priority landing, something which is common practice with Lyingair pilots"* published under the headline, "*Ryanair under-fueling (sic) aircraft and putting lives at risk*", on 19 November 2009.

Other examples of alleged defamatory material are attached to the Complaint with the alleged defamatory statements underlined in each document.

The Complainant states that, immediately upon becoming aware of the alleged defamatory material, its representative wrote to the Respondent's representative on 2 February 2010 to request its removal. Following an exchange of correspondence with the Respondent's representative, the Respondent removed the defamatory material. Copies of the correspondence between the parties on this issue are attached to the Complaint.

The Complainant argues that the Domain Name is unfairly detrimental to the Complainant's Rights. In the Complainant's opinion the material published on the website goes significantly beyond fair comment and is unlawful and damaging to the Complainant. The Complainant argues that it is an abuse of the Complainant's Rights in its trade mark to use RYANAIR as part of the Domain Name to attract visitors to the website to promulgate such material.

In the Complainant's opinion, it is clearly the Respondent's intention to unfairly disrupt the Complainant's business by publishing such unlawful material on the website, as described by paragraph 3(a)(i)(C) of the Policy.

The Complainant states that it anticipates that the Respondent will defend the Complaint on the grounds that he is making legitimate non-commercial or fair use of the Domain Name (under paragraph 4(a)(i)(C) of the Policy) in the context of a criticism website, as envisaged by paragraph 4(b) of the Policy. If such an argument were to be raised, the Complainant submits that it should not succeed.

In the Complainant's opinion, use of the Domain Name for the purposes of publishing defamatory material cannot constitute "fair use". Moreover, paragraph 4(b) of the Policy is clear that the "fair use" defence only applies to a criticism website if the website is solely operated in criticism of an individual or a business.

The Complainant points out that the meaning of paragraph 4(b) of the Policy was discussed by the Nominet Appeal Board Panel in *Hanna-Barbera Productions, Inc -v- Graeme Hay, DRS 00389 (Scooby Doo)*. The Panel concluded that "*the clear meaning of this rule is that such a registration is prima facie abusive, unless the Respondent can show otherwise*".

In the Complainant's opinion, it is plain that the Respondent has derived an unfair advantage from his use of the Domain Name. On or around 10 March 2010, the Complainant became aware that the Respondent was using affiliate marketing tools on the website. According to the Complainant, the effect of these affiliate marketing tools is twofold. First, they disrupt the Complainant's business by attracting web users to the website through the Respondent's use of the trade mark and then offering web users services that are identical and/or similar to those offered by the Complainant. Second, they enable the Respondent to take unfair advantage of the Complainant's Rights to generate personal commercial gain through the website.

The Complainant states that the affiliate marketing tools operate as follows. The website features a section (entitled "*Blogroll*") that provides links to third party websites. It can be seen from screen shots attached to the Complaint that when a web user clicks on the links to "Columbus Direct Travel Insurance" or to "FairFX Pre-paid mastercard", the web user will be redirected to the following corresponding websites via an intermediary service provider at "clkuk.tradedoubler.com":

- www.columbusdirect.com, which is operated by a UK-based travel insurance provider, Columbus Direct Travel Insurance Limited; and

- [www.fairfx.com](http://www.fairfx.com), which is operated by FairFX PLC. FairFX PLC is a UK-based foreign currency exchange provider. The specific service offered relates to the payment of foreign currency directly on to customers' credit cards.

(The Complainant terms these websites the "Affiliate Websites" for the purposes of the Complaint).

The Complainant understands that the intermediary "[clkuk.tradedoubler.com](http://clkuk.tradedoubler.com)" provider through which the web user is redirected is operated by Trade Doubler. Trade Doubler is an affiliate marketing service which enables website operators to generate revenues from websites through web traffic.

In addition, the Complainant further states that the website previously displayed an advertisement for travel insurance services offered by Columbus Direct Travel Insurance (as referred to above). The advertisement consisted of a short animation clip which was followed by the advertisement strapline "*Ski insurance for £15 per trip - Columbus Direct*" (as per a screen capture supplied by the Complainant). When web users clicked on the feature advertisement they were automatically redirected to [www.columbusdirect.com](http://www.columbusdirect.com).

The Complainant also asserts that the website contains links to websites operated by competitors of the Complainant's airline business such as British Airways and Virgin Atlantic (as once more evidenced by the Complainant's screenshots). The Complainant concludes that the purpose of these links is to encourage internet users to purchase services from the Complainant's competitors.

The Complainant's representative wrote to the Respondent's representative on 12 March 2010 to request the removal of the links to the Affiliate Websites. The Complainant states that the Respondent's representative confirmed in its letters of 17 March 2010 and 30 March 2010 that the Respondent would not remove the links to the Affiliate Websites and attaches the relevant correspondence.

In the Complainant's view, the Affiliate Websites, the advertisement and the links to third party airline websites disrupt the Complainant's business. They have been so selected by the Respondent to direct potential customers of the Complainant to purchase identical and/or similar services from the Complainant's competitors.

The Complainant asserts that the Respondent relies on his use of its trade mark in the Domain Name to attract interest amongst web users in the Complainant and the website. Although web users recognise that the website is not operated by the Complainant, in the Complainant's opinion it is the use of the trade mark in the Domain Name which draws web users to the website. By then redirecting potential customers of the Complainant to its competitors, the use has (and is intended to have) an unfairly disruptive and detrimental effect on the Complainant's business.

In the Complainant's opinion, not only has the Respondent registered the Domain Name for the purpose of unfairly disrupting the Complainant's business but then, through the affiliate marketing links on the website, he is also seeking to take unfair advantage of the Complainant's Rights.

According to the Complainant, the Respondent's representative's letter of 17 March 2010 confirmed that the Respondent did generate income from the links to the Affiliate Websites. The Complainant states that, in its letters of 17 March 2010 and 30 March 2010, the Respondent's representative maintained that any income derived from the Domain Name and website was not greater than the costs that the Respondent had incurred in operating the website. But in the Complainant's opinion it is the existence of an advantage (and not the level of any profit generated) that is relevant (as per the decision in *Scooby Doo*). In the Complainant's view there can thus be no question that,

in the circumstances, the Respondent derives an advantage through the existence of affiliate marketing tools on the website.

In conclusion the Complainant is of the opinion that the Domain Name was registered and has been used in a manner which takes unfair advantage of and is detrimental to the Complainant's Rights. This use is not "fair" and is not "solely" in criticism of the Complainant. The Complainant therefore requests that the Domain Name be transferred.

## **Response**

### **Complainant's Rights**

As far as the Complainant's Rights in the RYANAIR trade mark are concerned, whilst the Respondent accepts that the Complainant has, in strictly legal terms, some goodwill and reputation, it states that the Complainant has also built up a substantial and growing amount of dissatisfaction with the services it provides. According to the Respondent, in a recent survey carried out by Tripadvisor (attached to the Response), Ryanair came in last place.

In the Respondent's opinion such is the disdain for the way in which the Complainant has developed its services that the brand RYANAIR has now become synonymous with treating customers in an appalling manner and generally trying to obtain maximum money from customers with some very unappealing revenue generating techniques.

Various recent press coverage of the Complainant is also attached to the Response. The Respondent submits that any positive goodwill and reputation that the Complainant claims to own is today counterweighted by the negative connotations arising from the brand RYANAIR. In the Respondent's opinion this is an important issue when considering whether the Complaint should be successful.

The Respondent denies that the Domain Name is similar to the Complainant's trade mark (although it is accepted that the suffix .co.uk should be discounted when considering whether there is similarity between the Domain Name and the trade mark).

In the Respondent's opinion the Complainant puts its case far too strongly when it suggests that the words I HATE are non-distinctive. These words appear at the beginning of the Domain Name and, in registered trade mark terms, words appearing at the beginning of a sign / trade mark are afforded more weight in terms of distinctiveness.

In the Respondent's opinion the Complainant has been deliberately vague and overly brief in setting out the precise nature of its claimed Rights. The Respondent states that the Complainant appears to be relying on rights derived from the following areas of law:

- registered trade mark law (pursuant to Council Regulation (EC) No. 40/94 ("the Regulation") given that the Complainant has referenced Community Trade Marks); and
- the English common law of passing off.

The Respondent asserts that neither under registered trade mark law or the law of passing off would mere similarity between the trade mark and the Domain Name be enough to grant the Complainant Rights. Instead, the Complainant would need to establish more in accordance with, for example, Article 9 of the Regulation or the leading case law on passing off.

In the Respondent's opinion Article 9 gives proprietors of Community Trade Marks "exclusive rights", but these exclusive rights only have any effect if there is an act of infringement, pursuant to Article 9(1)(a)-(c) of the Regulation. If there is no infringement,

then the proprietor (i.e. the Complainant) has no preventative rights and should not have any Rights under the Policy either.

The Respondent presumes that the Complainant is claiming rights under Article 9(1)(b) and Article 9(1)(c) of the Regulation. In order to have rights under Article 9(1)(b) of the Regulation, the Respondent states that the trade mark must be identical or similar to the Domain Name (and be used in relation to identical or similar services) and use of the Domain Name must also give rise to the likelihood of confusion.

In this regard the Domain Name is clearly not identical or similar to the trade mark and there is no likelihood of confusion. The likelihood of confusion must be assessed by taking into account all factors relevant to the circumstances of the case. In the Respondent's opinion the registered trade marks referred to in the Complaint, and specifically the services quoted, are dissimilar from the services offered under the Domain Name, thus depriving the Complainant from protection pursuant to Article 9(1)(b) of the Regulation.

The Respondent remarks that internet users will come across the Domain Name in a variety of different ways: through search engines, by links or by typing the Domain Name directly into the URL bar. Whatever route an Internet user takes to come into contact with the Domain Name, it is submitted that the vast majority of Internet users will be savvy enough to identify the website as a protest site which is aimed at reporting criticism of the Complainant. This is particularly so given the prominent use of the words I HATE.

The Respondent points out that the Complainant has not supplied any evidence of confusion between the trade mark and the Domain Name and surmises that this is because it is not credible to claim that an internet user would be likely to be confused. In the Respondent's view the Complainant has therefore failed to prove, on the balance of probabilities, that it has any rights pursuant to Article 9(1)(b) of the Regulation.

The Respondent also explains why he believes that the Complainant has no rights pursuant to Article 9(1)(c) of the Regulation, inter alia because the Complainant has failed to establish the required link between the trade mark and the Domain Name.

Furthermore the Respondent is of the opinion that the Complainant has failed to prove that the use Domain Name would constitute an act of passing off. For example, there is no explanation of what conduct constitutes an actionable misrepresentation in this respect.

In conclusion, the Respondent is of the opinion that the Complainant does not have Rights under the Policy. Even if such Rights are held to exist, it is denied that they are similar or identical to the Domain Name.

### **Abusive Registration**

As far as Abusive Registration is concerned, the Respondent underlines that the Complainant claims that the Domain Name is unfairly detrimental to its Rights on the basis that there is comment which is defamatory on the website.

The Respondent points out that the Complainant has no ruling of the courts to justify describing any content on the website as being definitively defamatory. In the Respondent's opinion the true position is that the Complainant has merely made certain allegations that content on the website is defamatory.

The Respondent submits that it is not for the Expert to decide issues of defamation (or issues of trade mark infringement or passing off) per se. These are matters for the courts. The Expert should be concerned solely with whether the Domain Name is an

Abusive Registration under the Policy (*Evans Textile (Sales) Ltd v. Myles King, DRS 3710*). Previous cases decided under the Policy suggest that even proven defamatory content does not mean that any given domain name registrations are abusive (*Rayden Engineering Ltd v Diane Charlton, DRS 06284*, Decision of Appeal Panel).

The Respondent is of the opinion that the Complainant has put forward a highly partial rendition of the exchange of correspondence concerning its allegations of defamation. For the avoidance of doubt, the Respondent has denied all allegations of defamation made by the Complainant concerning content published on the website. The Respondent states that the Complainant's attempt to describe the Respondent's decision to remove certain material from the website as some kind of admission of liability is unfounded.

The Respondent submits that the true position is that on receipt of a very threatening letter before action, sent to an individual, the Respondent decided to remove such content before receiving any legal advice. The material has not since been re-posted, so as not to unduly antagonise the Complainant and the Respondent has made no admissions of liability or given any undertakings to the Complainant during the course of the correspondence between the parties with respect to any content on the website. A letter written by solicitors acting for the Respondent setting out the Respondent's position in response to the allegations of defamation is annexed to the Response.

Whilst the Respondent's position is that defamatory content on the website should not decide whether the Domain Name is an Abusive Registration, the Respondent nevertheless responds to the Complainants' allegations and states that the articles published on the website are derived from stories published elsewhere on the internet. In the Respondent's opinion, any editorial comment introduced by the Respondent should be considered "fair comment" pursuant to the laws of defamation applying to England and Wales.

The Respondent points out that there are also various user-generated comments posted directly by users onto the website. Therefore, in the Respondent's opinion, the website merely acts as a repository of articles criticising the Complainant, which is why the Complainant objects. A list of original source material is attached to the Response together with the corresponding story on the website and the Respondent argues that a comparison of the original source document with the corresponding story on the website shows that the defence of fair comment has more than a probable chance of succeeding.

In the Respondent's opinion, it is also telling that the Complainant has not issued proceedings for defamation. The Respondent does not ask that an inference should necessarily be drawn against the Complainant in this respect, but does submit that the Complainant's failure to issue proceedings shows that the Complainant's presentation of the content on the website as being definitively defamatory is unfounded and overstated.

The Respondent points out that the Complainant has also described content on the website as "*vitriolic and highly disparaging*". In the Respondent's opinion content which is vitriolic, disparaging and/or even offensive does not support a finding of Abusive Registration. In the Respondent's view it is hardly surprising that the Complainant finds content on the website "*vitriolic*" and "*disparaging*" as the website was set up as a criticism site against the Complainant. The Respondent is therefore of the opinion that the attempt by the Complainant to suppress such content is a clear attempt to censor a criticism website that is critical of the Complainant.

The Respondent underlines the fact that the Complainant argues that it is an abuse of the Complainant's Rights in the trade mark to use RYANAIR as part of a domain name to attract visitors to the website. In this regard the Respondent explains that the Domain Name was selected by the Respondent because it was considered ideal for use in



connection with a criticism website about the Complainant. The Respondent submits that use of the trade mark within the Domain Name is critical to communicating the nature of the site, namely that it is a criticism site of Ryanair. In such circumstances, the Respondent argues that the Domain Name should not be considered an Abusive Registration.

In the Respondent's opinion, the Complainant also overstates the importance of the trade mark in the Domain Name (and domain names in general) for determining search engine optimisation, which is the way most Internet users will come across the website. The Respondent submits that there are other more important factors which result in the website being so highly ranked in Google for a search of RYANAIR (a document supposedly illustrating this is attached). In the Respondent's opinion, in reality it is the high search ranking of the website (combined with the presence of critical content) that is the real driver of the Complaint. However in the Respondent's opinion high Google rankings are not indicative of an Abusive Registration.

The Respondent submits that the Complainant is using Nominet's Dispute Resolution Service ("DRS") in order to try and censor critical content about the services it offers. In the Respondent's opinion, the Respondent should be free to use the trade mark within the Domain Name and within content on the website as long as such use does not involve an act of registered trade mark infringement and/or an act of passing off (and in the Respondent's opinion the Complainant's case in these respects is open to more than considerable doubt).

The Respondent points out that the Complainant claims that the publishing of critical comment on the website unfairly disrupts its business. In this regard the Respondent argues that it should be allowed to publish material on the website as long as it is not defamatory. In the Respondent's opinion if the publication of "fair comment" or other non-defamatory material on the website disrupts the business in any way (which is not accepted by the Respondent or proven by the Complainant) then this is something which the Complainant will have to accept as a consequence of running a company in a free and open society, particularly a company which has attracted widespread press criticism in recent times.

The Respondent submits that the Complainant has a long history of attempting to censor free speech using the DRS and gives the example of *Ryanair Limited v Michael Coulston*, DRS 3655, in which it was stated that one of the Complainant's key concerns was that existing customers might email the Complainant "@ryanair.org.uk". In this regard the Respondent submits various printouts from the website at [www.ryanaircampaign.org](http://www.ryanaircampaign.org), which aim to demonstrate that the Complainant does not appear to have taken any steps to redirect such emails. In the Respondent's opinion, the Complainant's prior justification for making a previous DRS complaint seems to have been insincere. As a result, the Respondent submits that much of the Complainant's present Complaint should be viewed with appropriate resulting scepticism.

The Respondent argues that the Appeal Panel in *Scooby Doo* stated that whether the registrant had chosen an identical domain name to the trade mark (which is not the case here) was an important consideration in its overall findings. In the Respondent's opinion, *Scooby Doo* endorsed the selection of a domain name for a criticism site which added further identifying material (as is the case with the Domain Name) to identify it as a tribute or a criticism site. The Respondent selects various quotes from the *Scooby Doo* decision to illustrate the point.

The Respondent points out that the Complainant submits that the Respondent should not be entitled to claim that the Domain Name has been used in connection with a criticism website on the basis that the "fair use" defence only applies to a criticism website if the website is solely operated in criticism. However in this regard the Respondent highlights

the wording of paragraph 4(b) of the Policy which provides that fair use "may" include sites operated solely in tribute to or in criticism of a person or business. Accordingly, the Respondent submits that paragraph 4(b) is merely indicative of what may constitute fair use. In the Respondent's opinion it does not state that if a site falls outside this definition then it will definitively be considered an Abusive Registration, as the Complainant contends.

The Respondent underlines that the Complainant has pointed to alleged commercial use of the website as evidence that there is no fair use of the Domain Name and relies on *Scooby Doo* to illustrate the point. The Respondent submits that *Scooby Doo* was made on entirely different facts and involved a domain name that was identical to the trade mark in question and one which was overtly commercial in nature such that there was a risk that internet users could be attracted to the website "in their belief that they were visiting an authorised/licensed site".

The Respondent submits that in the current case, it is inconceivable that a significant proportion of internet users could arrive at the website without realising that the website was a criticism site. The words I HATE RYANAIR are unambiguous in describing the website effectively as a criticism site. The Respondent adds that when internet users arrive at the website, they will also immediately have any initial views confirmed that the website is a criticism site and thus confusion with the Complainant is extremely unlikely at any stage, unlike in *Scooby Doo*.

The Respondent points out that the Complainant has also argued that the Respondent has claimed an unfair advantage. In support of this contention, the Complainant has referred to various affiliate links on the website. The Respondent denies that the website has been used for commercial gain, personal or otherwise. The Respondent states that the website has been active since 13 February 2007 and the affiliate links to which the Complainant refers were introduced in around January 2010. During the period when the links were present the Respondent states that they generated less than £350. A payment report from TradeDoubler Ltd in support of this contention is attached. The Respondent asserts that he has spent more than this amount on hosting fees for the website. In addition, the Respondent states that he has had to pay legal fees incurred in responding to letters from the Complainant's lawyers concerning the website. As a result, the Respondent states that he has paid out far more in keeping the website active than he has received from affiliate links. In the Respondent's opinion there has accordingly been no commercial gain.

The Respondent asserts that the Domain Name was not registered with a view to commercial gain. Indeed, the website did not contain affiliate links for a long period prior to the Complaint, and in the Respondent's opinion this is relevant when properly assessing whether there has been an Abusive Registration under the Policy.

With reference to paragraph 4(a)(i)A of the Policy, the Respondent argues that he did use the Domain Name before becoming aware of the Complaint in connection with a genuine offering of services, namely the service of providing a website criticising the Complainant.

With reference to paragraph 4(a)(i)C of the Policy, the Respondent argues that he did make legitimate non-commercial use of the Domain Name. In the Respondent's view any commercial use by way of affiliate links was minor when viewed in its proper context.

With reference to paragraph 4(a)(i)C of the Policy, the Respondent argues that he did make fair use of the Domain Name before being made aware of a potential complaint. Paragraph 4(b) of the Policy states that fair use may include a site operated solely in criticism of a business. In this regard the Respondent asserts that criticism of the Complainant is the sole purpose of the website. In the Respondent's opinion, the

existence of affiliate links for a short period of time on the website did not change the purpose of the website. The Respondent states that, in order to prove that the affiliate links were an irrelevant aspect of the website, they were withdrawn from the website on 11 May 2010. The Respondent points out that he has no intention of re-instating such affiliate links and states that he has offered the Complainant a binding undertaking in this respect, as shown in correspondence attached to the Response.

The Respondent adds that a further point which can be made about paragraph 4 of the Policy, and all the sub-paragraphs referred to above, is that they set out a non-exhaustive list of factors that may show that there has not been an Abusive Registration. In the Respondent's view there is nothing to suggest in paragraph 4 that if the Respondent's use of the Domain Name does not strictly fall within the list, for example due to use of affiliate links for a short period of time, then it shall be considered an Abusive Registration, as the Complainant contends. Instead, as the list is non-exhaustive, the Respondent asserts that the Expert can use the list to give guidance as to what type of domain name use is not an Abusive Registration.

In addition the Respondent argues that paragraph 4 does not state that every single page of the website must have always been non-commercial or have made fair use of the Domain Name. Instead, paragraph 4 just states that the Respondent must prove that there has been (some) non-commercial or fair use of the Domain Name and that this use must have been made before the Respondent became aware of the possibility of a Complaint.

The Respondent submits that a historic review of all use of the Domain Name in connection with the website should be made in line with previous case law such as *Scooby Doo*. In the Respondent's opinion, given all the content which is still available on the website, it is clear that the Respondent has made more than a sufficient amount of non-commercial and/or fair use of the Domain Name since the launch of the website.

Lastly, the Respondent believes that the Complainant is attempting to substitute a DRS Complaint for a defamation claim (together with a poorly pleaded registered trade mark and passing off claim). In the Respondent's opinion, if the DRS allows the Complainant to subvert the court process and use the DRS to stifle free speech on a genuine criticism site, then this has worrying public policy implications for the role of the DRS. One of the great strengths of the internet is that it gives individuals and customers, and not just large corporations like the Complainant, a voice that can be heard. It would damage the highly valuable free and open nature of the internet if complainants were allowed to stifle such free speech simply by using the DRS.

The Respondent concludes that if the internet is just left with what he refers to as the "*nausea-inducing officially approved customer feedback*" which he asserts may be found on the Complainant's official website (screen captures are attached), then the internet will be a poorer place because of it. The Respondent therefore requests that the Complaint be rejected.

## **Reply**

### **Complainant's Rights**

The Complainant points out that the Respondent accepts in his Response that the Complainant has registered (in the form of Community trade mark registrations) and unregistered rights accruing from its use of RYANAIR in the course of business. RYANAIR is a global brand. The Complainant asserts that it has undoubtedly shown that it has Rights in the term RYANAIR.

The Complainant states that it is regularly acclaimed for its low cost airline service and frequently receives nominations for industry awards. It operates a transparent pricing policy with a focus on consumer choice. Thus any suggestion whatsoever that it treats its customers in an "*appalling manner*" as stated by the Respondent is emphatically refuted, as is the Respondent's implication that the highly selective press coverage referred to in the Response bears any relevance to the Complaint.

To satisfy paragraph 2(a) of the Policy, the Complainant must show that it has Rights in a name that is similar to the Domain Name. The Complainant argues that RYANAIR is instantly recognisable and distinctive within the Domain Name when compared to the ordinary English words, "I" and "hate", and the .co.uk suffix. In the Complainant's opinion it is plain that RYANAIR is similar to the Domain Name.

There is no requirement on the Complainant to show that it has Rights in a name that is confusingly similar to the Domain Name or that the Respondent's registration of the Domain Name falls foul of passing off principles. The Complainant therefore states that the arguments raised on this issue in the Response are misconceived and irrelevant.

### **Abusive Registration**

The Complainant points out that the Respondent argues that the Complainant's failure to bring a defamation claim against the Respondent should in some way count against the Complainant. The Respondent relies on extracts from the Decision of the Appeal Panel in *Rayden Engineering* to support an argument that the Complainant's decision not to pursue civil proceedings is detrimental to its Complaint.

The Complainant's position on this is clear. It maintains that the material published on the website was defamatory and, at its request, the offending material was promptly removed from the website. The Complainant therefore chose not to pursue a defamation action in respect of those materials.

In the Complainant's opinion the extracts from *Rayden Engineering* that the Respondent relies on are of no help to him. In fact, when the extracts are read in their proper context, it is clear that the Appeal Panel intended the decision to mean the opposite and thus the Complainant's decision not to bring a separate civil action for defamation should have no bearing on the outcome of the Complaint.

According to the Complainant, the key issue in the Complaint is not whether the material posted was defamatory. It is whether or not it is fair for the Respondent to use RYANAIR to promulgate offensive material and, importantly, to derive a commercial benefit from those activities.

The Complainant states that the Complaint is based on the following:

- The Respondent publishes highly damaging and, the Complainant argues, defamatory material on the website. In the Complainant's opinion that material goes beyond fair criticism.
- The inclusion of RYANAIR (a name in which the Complainant has Rights) in the Domain Name attracts web users to the website (including web users who otherwise may not have been interested in the website) to view this material.
- The Respondent derives revenue from his affiliate marketing links as a result of the increase in web user traffic. The Complainant asserts that that web user traffic, and the resulting revenue, is greater than it otherwise would be if the Domain Name did not include RYANAIR.

- Under the Policy, use of such a domain name for a website may be permissible if it is operated for the sole purpose of (fair) criticism, but will not be permissible if it is operated for commercial gain (irrespective of whether or not that gain yields a profit).

In the Complainant's opinion the Response does not deal with any of these issues convincingly.

The Complainant asserts that the Respondent acknowledges that RYANAIR, a name in which the Complainant has Rights, was intentionally selected to draw web users to the website. The Complainant then states that the Respondent seeks to rely on a survey without providing any basic information about the survey, including the source, meaning of defined terms used and methodology. The survey appears to relate to the Google ranking of websites, but it does not shed any light on the impact that a brand name will have on a consumer's web activity. The Complainant therefore requests that no weight should be attached to the survey. In the Complainant's opinion any suggestion that RYANAIR does not play a significant role in attracting web users to the website must be rejected.

The Complainant states that the Respondent's reference to a previous Nominet complaint in which the Complainant successfully sought the transfer of <ryanair.org.uk> is misconceived and irrelevant.

Paragraph 4 of the Policy explains that a Domain Name may not be an Abusive Registration if the Respondent has made fair use of the Domain Name. It goes on to say that "*fair use may include sites operated solely in tribute to or in criticism of a business*". The Complainant asserts that the Respondent relies on this wording seemingly to suggest that "*fair use*" may also include sites which are not operated solely in tribute to or in criticism. The Complainant believes that this interpretation is misconceived and plainly incorrect, and asserts that the Policy clearly intends to exclude any sites which are not solely in tribute to or in criticism of a business.

The Complainant states that in recognising that a website may be permissible if it is operated solely in tribute to or in criticism of a business, the Policy provides a regime within which web users are free to criticise others. In the Complainant's opinion this is a case which falls outside the Policy's regime.

The Complainant strongly denies any assertion that the Complaint was brought with the intention of stifling free speech and quotes the correspondence between the parties to evidence this.

The Complainant points out that the Respondent argues that the Complainant relies on the "*alleged commercial use of the Website as evidence that there is no fair use of the Domain Name*". However the Respondent has, on his own evidence, derived an income from the affiliate marketing links on the website in the period January to May 2010. This is commercial use. In the Complainant's view such commercial use immediately takes the Respondent outside the scope of a criticism site operated solely in criticism. For the avoidance of doubt, the Complainant does not argue that this is an impersonation or initial interest case, like *Scooby Doo*. Rather it relies on *Scooby Doo* as clarifying a clear principle that the unauthorised use of a name (in which the Complainant has Rights) to attract web users to a website for commercial gain is unfair.

Despite previous requests in correspondence, the Complainant notes that the Respondent waited for the Complainant to issue a DRS Complaint before removing the affiliate marketing links referred to in the Complaint. The Respondent argues that he merely needs to show that the Domain Name has at some stage in the past been used for "*some*" fair purpose. In the Complainant's view this argument must be rejected. If the

Domain Name has been or is being used to obtain an unfair advantage, the Complaint must succeed.

The Respondent argues that the Expert should not focus on its use of the Domain Name in the period January to May 2010 during which time the affiliate marketing links were active. He relies on *Scooby Doo* to support this argument. However, the Complainant asserts that *Scooby Doo* does not support him whatsoever. Rather, the passage referred to in *Scooby Doo* addresses a different point. It affirms that the Respondent's decision to remove the affiliate advertising links after the issuance of the Complaint does not exclude the Expert from considering whether or not the use of the affiliate marketing links was in principle fair.

Finally, the Complainant points out that the Respondent has offered to provide undertakings that he will not use affiliate marketing links for services similar to those offered by the Complainant if the Complainant withdraws the Complaint. In the Complainant's opinion the fact that the Respondent has sought to limit its offer to affiliate marketing offerings of services similar to those offered by the Complainant suggests that the Respondent may intend to use the website for further commercial activities in other areas in the future. The Complainant asserts that web users who were previously drawn to the website, and subsequently generated revenue for the Respondent, may equally be drawn to other future commercial offerings.

The Complainant is of the view that the Respondent's offer underlines that the website is not intended for the sole purpose of criticism but for commercial activity. In the Complainant's opinion, were the website a sole criticism website, the Respondent would not have sought such specific limitations on its offer to address the Complainant's concerns. In addition the offer also fails to provide the Complainant with any assurances as to future ownership, control and use of the Domain Name, which means that the Respondent could transfer the Domain Name to a related party and re-commence commercial activity. The Complainant therefore asserts that the offer of an undertaking should not be taken to support the Respondent's case.

## **7. Discussions and Findings**

### **General**

Under paragraph 2(a) of the Policy, for the Expert to order a transfer of the Domain Name the Complainant is required to demonstrate, on the balance of probabilities, both of the following elements:

- "(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."*

It is for the Complainant to make out its case and not for the Respondent to prove otherwise.

### **Complainant's Rights**

The Policy defines Rights as "*rights enforceable by the Complainant, whether under English law or otherwise*". It is well established under the Policy that registered trade mark rights fall within this definition and that nothing further, such as proof of trade mark infringement, is required.

The Complainant has demonstrated that it holds Community trade marks in the term RYANAIR by supplying relevant printouts, in particular in relation to Community Trade Mark number 4 168 721 for RYANAIR (word mark). The Expert is therefore satisfied that the Complainant has Rights in this term under the Policy.

Furthermore, the Policy stipulates that the name or mark in which the Complainant has Rights (RYANAIR) must be identical or similar to the Domain Name (<ihateryanair.co.uk>). It is accepted practice under the Policy to discount the .co.uk suffix, and so the only difference between the Domain Name and the Complainant's trade mark is the additional phrase "I HATE" placed before the trade mark.

The Complainant's trade mark and the Domain Name are clearly not identical and so the question before the Expert is whether they can be said to be "*similar*" within the meaning of the Policy. Exactly what degree of similarity is required? In this regard question 2.3 of the *Expert's Overview* (available on the Nominet website) provides some useful background:

*"Those responsible for the drafting of the Policy were aware of some of the difficulties arising under the UDRP (the policy covering disputes in the gTLDs) as a result of its wording, "identical or confusingly similar". The wording of the Policy is broader and less restrictive, which matches the reality that the first hurdle (i.e. proving the existence of rights in a relevant name or mark) is intended to be a relatively low-level test. Issues relating to confusion are best addressed under the second hurdle. The objective behind the first hurdle is simply to demonstrate a bona fide basis for making the complaint."*

Countless previous decisions under the Policy have held that domain names containing a trade mark in its entirety are similar to that trade mark, no matter what the addition. It has to be said, however, that more often than not the additional element is a descriptive word relating to the Complainant's trade mark (see for example *DRS 06973* in relation to <veluxblind.co.uk>).

However in this case the additional words do not encourage confusion but rather make it clear that there is very unlikely to be a connection between the Domain Name and the trade mark holder. Should this alone be enough to lead the Expert to make a finding of non-similarity and thus for the Complaint to fall at the first hurdle? After some hesitation the Expert thinks not.

A panel deciding this case under the UDRP may well have found for the Respondent on the basis that the Domain Name is not "*confusingly similar*" (see for example *Wal-Mart Stores, Inc. v. Traffic Yoon, Case No. D2006-0812*), but the Policy deliberately sets a different test and there is no requirement for confusion. In the Expert's opinion such a finding at this stage would be contrary to general practice under the Policy, which is different to the UDRP, and go against the stated aim of the *Expert's Overview*, which provides that paragraph 2(a)(i) should merely be a low-level test to ensure that the Complainant has a *bona fide* basis for making the Complaint.

As a result the Expert finds that paragraph 2(a)(i) of the Policy is satisfied and that the Complainant has Rights in respect of a mark which is similar to the Domain Name.

### **Abusive Registration**

Moving on to paragraph 2(a)(ii) of the Policy, Abusive Registration is defined in paragraph 1 of the Policy to mean a Domain Name which:

"(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."*

### **Legality of Website Content**

The Expert has carefully read all of the documents supplied by both parties and the authorities referred to therein, as per the somewhat lengthy arguments summarised above. As an initial remark it should be stressed that the DRS is essentially a fast, simple procedure designed predominantly for clear cut cases of Abusive Registration under the Policy (often referred to as "cybersquatting"). It is not intended to deal with complex points of English law, for example in relation to defamation, which are best left to a court of competent jurisdiction.

It is with this in mind that the Expert has not made any detailed consideration of the parties' discussions and prior correspondence concerning the allegations of defamatory content on the website to which the Domain Name is pointing. In this regard the Expert draws no inferences whatsoever from either party's conduct (in particular the Complainant's failure to issue proceedings or the Respondent's removal of certain content from the website further to correspondence with the Complainant). Instead the Expert has simply considered whether the Complainant has succeeded in making out its case under the terms of the Policy.

### **Evidence of Abusive Registration - Paragraph 3(a)(i)(C) of the Policy**

Paragraph 3(a) of the Policy sets out a non-exhaustive list of five factors which may be evidence of Abusive Registration. The Complainant seems to be basing its case mainly on paragraph 3(a)(i)(C), which reads as follows:

- "(i) *Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:*
- (C) *for the purpose of unfairly disrupting the business of the Complainant."*

The Complainant's arguments on this point appear to be threefold. First, it focuses on the actual website content and argues that this is unlawful and damaging. As outlined above, it is not for the Expert to decide on the lawfulness or otherwise of the website content, and the Expert has simply observed that such content is critical of the Complainant. As the Appeal Panel in *Rayden Engineering* commented:

*"We consider that there is a limit to how much significance can be placed on the content of the protest website by an Expert. As countless Experts and Appeal Panels have remarked, the DRS is intended to be a relatively simple, low cost and efficient system for resolving domain name complaints. The system does not contemplate a detailed analysis of factual disputes or the forensic weighing up of conflicting accounts. There is limited scope for adducing witness evidence or for the Expert to test the truthfulness of the evidence being presented in cases where it is bitterly contested. Protest sites classically carry personal, emotive versions of events, often expressed in deliberately shocking or vitriolic terms intended to attract attention to the cause. The statements may well be libellous in legal terms, but it is unlikely to be possible or appropriate for the Expert to determine in the context of the paper based DRS whether the statements are in fact true so that the defence of justification would be available."*

The Expert accepts that the critical website content could well disrupt the Complainant's business by encouraging those accessing the website to use a different airline. However, mere disruption is not all that is required under the Policy – such disruption has to be unfair. In the Expert's opinion in a free and open society internet users should



generally be able to post comments on their recent experiences or on current events, as long as such postings do not fall foul of the law. Any resulting disruption as a result of criticism appearing on a website (or in any other media for that matter) is merely something that businesses have to deal with on a daily basis. It cannot be said to be unfair.

Secondly, the Complainant argues that the links to rival airlines are also unfairly disruptive of its business. Again the Expert finds this to be stretching a point when applied to a criticism website, where it is perhaps to be expected that information on alternative options will be made available. It would be different if the Respondent was using the Complainant's brand to attract website users who may potentially do business with the Complainant and then redirecting them to other services for his own commercial gain, but this is not the case when considering the links to third party airlines. Third party airlines may benefit from the links, but no evidence has been put before the Expert to suggest that the Respondent himself does. Any resulting disruption to the Complainant's business thus cannot be said to be unfair.

Thirdly the Complainant argues that the commercial links unfairly disrupt its business. This argument does have some merit outside of the limited context of paragraph 3(a)(i)(C) and so is dealt with further below.

However in the Expert's opinion all the Complainant's arguments in relation to paragraph 3(a)(i)(C) fail anyway because the exact wording of the Policy provides that the Respondent must have registered or acquired the Domain Name primarily for the purpose of unfairly disrupting the Complainant's business. Given the surrounding facts and evidence in this case, the Expert is convinced that the Respondent's sole intention upon registering the Domain Name was to use it to point towards a criticism website. In particular the commercial links did not appear until almost three years after the Domain Name was registered.

Evidently a criticism website may indirectly result in some disruption to the Complainant's business (although as underlined above such disruption cannot really be said to be unfair in relation to the website content and the links to other airlines), but in the Expert's opinion this was certainly not the Respondent's primary intention upon registration of the Domain Name, as required by the Policy. Indeed it could be argued that the main driver behind many criticism websites is not to disrupt the business in question, but instead to draw attention to problems with the aim of having them resolved. Paragraph 3(a)(i)(C) is thus of no assistance to the Complainant.

#### **Other Factors Indicating Abusive Registration**

None of the other factors listed in paragraph 3 of the Policy illustrating Abusive Registration may be said to be relevant, and the Complainant does not cite any of them in argument. However, the list is only meant to give illustrative examples and other factors may be of relevance when considering whether the Respondent's behaviour falls within the definition of Abusive Registration as set out in the Policy.

As a reminder and in summary, the definition of Abusive Registration basically requires the Complainant to prove either unfair advantage or unfair detriment, and this must either relate to the Respondent's behaviour upon registration of the Domain Name (limb (i)) or during later use (limb (ii)). Each of these four issues is discussed in turn below.

As far as unfair detriment upon registration is concerned, no concrete evidence has been supplied in relation to the Respondent's intentions at the time that the Domain Name was registered back in February 2007 and, as outlined above, the Expert is convinced that the Respondent's sole intention upon registration of the Domain Name was simply to use it to

point towards a criticism website, and not to cause the Complainant to suffer unfair detriment (by, for example, unfairly disrupting its business).

As far as unfair advantage upon registration is concerned, it is of relevance here that the commercial links to third party websites which generated income for the Respondent only appeared in January 2010, almost three years after the Domain Name was registered. Nothing would therefore suggest that the Respondent had such links in mind at the time when the Domain Name was registered. Indeed given the evidence presented and the surrounding facts it seems more than probable that the Respondent only had the idea of introducing commercial links once the traffic to the website reached a certain level because the website had increased in popularity.

Nothing in limb (i) of the definition of Abusive Registration therefore assists the Complainant and so the Complaint wholly turns on whether the Domain Name has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's Rights in accordance with limb (ii).

The Complainant's arguments concerning the Respondent's use of the Domain Name and unfair detriment in relation to the actual content of the website and the links to third party airlines may be dismissed for reasons closely linked to those previously outlined above in relation to paragraph 3(a)(i)(C) and unfair disruption of the Complainant's business.

In short, using the Domain Name to point to critical content may in fact be detrimental to the Complainant's Rights because, for example, it may cause potential customers to purchase services elsewhere. However the effects of criticism cannot be said to be unfair *per se*. Indeed dealing with criticism could be said to be the price paid in return for living in an open and democratic society. Again it should be stressed that by reaching this conclusion the Expert is making no findings in relation to the legality or otherwise of any of the content on the actual website because this goes beyond the scope of this proceeding - the DRS is not a suitable forum for such debate.

Similarly the links to third party airlines may well be detrimental to the Complainant's Rights as they may cause internet users to go elsewhere. Again in the context of a criticism website the Expert feels that such links are not particularly unfair, especially because the Respondent does not appear to be drawing any personal commercial advantage from them. Alternative options are just one of the components of an open discussion on air travel.

The Complainant's final argument concerning unfair detriment relates to the commercial links to third party websites. On the face of it, for the average internet user, there is no difference between these links and the links to other airlines, as they are not aware that the Respondent receives payment for one but not for the other. However it is exactly this that makes them problematic. It is the very nature of a criticism website that discussion should be open and not influenced by commercial concerns. Thus, whilst the links to other airlines may be seen as genuine recommendations as part of an ongoing discussion about air travel, commercial links cannot. In the Expert's opinion commercial links have no place on a criticism website, and any detriment the Complainant may suffer as a result of use of the Domain Name to attract internet users to click on such links is unfair.

The fourth and final question in relation to whether the Domain Name has been used in a manner which has taken unfair advantage of the Complainant's Rights is closely linked to the question of unfair detriment above. The Respondent does not contest that he earned money as a result of the links to third party websites, and indeed supplies a payment report from TradeDoubler Ltd to illustrate this. However the Respondent argues that this does not constitute a financial advantage because such income may easily be set off

against the other costs of the website, such as hosting costs, and the costs of responding to letters from the Complainant's lawyers.

The Expert remains unconvinced by the Respondent's set off argument as its success depends entirely on the advantage earned being smaller than the disadvantage suffered, which is entirely arbitrary. The Respondent should not be able to successfully argue that he has taken no financial advantage merely because he happened to pay out more on apparently related matters. Furthermore, if the Complainant had not complained it seems unlikely that the Respondent would have removed the links and thus the amount earned would almost certainly have increased over time. In this regard it is of note that the Respondent only removed the links upon the filing of the Response and has only agreed to offer the Complainant an undertaking to cease using links which relate to certain services, namely those allegedly competitive with the Complainant's ancillary services, such as travel insurance. This suggests that the Respondent may ultimately wish to continue using commercial links to a wide range of other services and thus his argument that any financial gain has so far been minimal certainly carries less weight.

In the Expert's mind there is undoubtedly a link between the Respondent's financial advantage and the Respondent's use of the Complainant's trade mark in the Domain Name. The Respondent only earned money because of the traffic to the website, and such traffic must have been influenced by the Domain Name. It cannot be fair to take advantage of the reputation attached to another party's trade mark in this manner, whether it be good or bad, and in the Expert's opinion the Respondent has therefore effectively taken unfair advantage of the Complainant's Rights in order to gain a financial advantage.

This is still the case even though the Domain Name itself is not identical to the Complainant's trade mark and contains clear additional wording to ensure that there is no confusion. If the Respondent had used a domain name which did not contain the Complainant's trade mark (for example <myeastfavouriteairline.co.uk>) then it is unlikely that the financial advantage earned would have been as significant. Similarly it is unlikely that the detriment suffered by the Complainant due to the diversion of potential business would have been as great (although unlike unfair advantage, unfair detriment is less easily quantifiable).

#### **Evidence of Non Abusive Registration - Paragraphs 4(a) and (b) of the Policy**

Paragraph 4(a) of the Policy contains a non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration. In this regard, the Expert notes that the relevant provisions relied on by the Respondent are 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;.....or*

*(C) made legitimate non-commercial or fair use of the Domain Name"*

The Respondent argues in passing that his use of the Domain Name is a genuine offering of services under paragraph 4(a)(i)(A), but in the Expert's view this argument doesn't carry any weight. Strictly speaking it seems doubtful that a criticism website could be termed an offer of services under the Policy, but in any event the commercial links present on the website before the Respondent became aware of the Complainant's cause for Complaint put paid to this.

In respect of fair use of the Domain Name under paragraph 4(a)(i)(C), paragraph 4(b) of the Policy provides clarification as to what in fact this means in the context of a criticism website, as follows:

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

The parties seem to have tied themselves in knots over the exact meaning of this phrase based in part on the Appeal Panel's observations in *Scooby Doo*. However it is worth noting in passing that *Scooby Doo* was decided under an older version of the Policy which provided for the burden of proof to be reversed in certain specific circumstances, but this is no longer relevant under the current version of the Policy. In the Expert's opinion the phrase simply means that pure criticism sites are quite likely to be classified as fair use, although the Expert still has a wide discretion to decide what is and what is not fair. Websites that are not operated solely in criticism of a person or business are not necessarily completely excluded under the Policy, but it is less likely that they will be seen as fair, although each case will turn on its own facts, in particular the nature of the Domain Name used to point to the website in question.

At the present time the commercial links have been removed and the website could thus be argued to be solely in criticism of the Complainant, which therefore makes it more likely that the use of the Domain Name would be viewed as fair under paragraph 4(a)(i)(C). However this unfortunately does not assist the Respondent because paragraph 4(a)(i) makes it clear that it is only possible to take into consideration the Respondent's behaviour before he became aware of the Complainant's cause for complaint.

Before the Complainant objected, the website contained various commercial links. Paragraph 4(a)(i)(C) refers to "*non commercial or fair use*", thus suggesting that, in certain circumstances, fair commercial use is possible. Indeed the majority of the Appeal Panel in *Scooby Doo* found that selling merchandise was not necessarily incompatible with a tribute website. Thus by analogy a criticism website with some commercial purpose may be acceptable. However, as already discussed above, the Expert is of the view that in this case the commercial use made of the Domain Name was not fair as the reputation attached to the Complainant's trade mark was what attracted internet users to the website in the first place. It was this traffic to the website that then allowed the Respondent to make a commercial gain. On this point the Expert believes that *Scooby Doo* may be distinguished because the Appeal Panel found that selling official *Scooby Doo* merchandise was a perfectly reasonable ancillary activity for a tribute website, but it does not follow that using commercial links is a perfectly reasonable ancillary activity for a criticism website, far from it. The Respondent's behaviour therefore rules out paragraph 4(a)(i)(C).

### **Other Factors Indicating Non Abusive Registration**

Given that paragraph 4(a) is non-exhaustive, it is open to the Expert to consider other general arguments in favour of the Respondent, such as the fact that the commercial links have now been removed. In the Expert's opinion it is not possible to simply discount previous use of a domain name and only consider its use after a complaint has been filed, except perhaps in exceptional circumstances. This is perfectly logical as otherwise domain name registrants would simply be able to rectify their behaviour once made aware of a cause for complaint and thus potentially escape any sanction. In general it would be unfair to find in a respondent's favour simply on the basis that the offending behaviour was no longer in evidence as this would require a complainant to monitor the situation and re-file a complaint if necessary, effectively giving respondents a second bite of the cherry.

In the Expert's opinion the situation at hand is not exceptional enough to merit discounting the Respondent's conduct during the period that the links were present and only considering the website as it now stands. This is because there is no evidence to suggest that this was merely an unfortunate error and that it will not happen again, especially as the parties have failed to come to agreement on the wording of the undertakings in relation to any future links. Therefore the fact that the commercial links no longer appear cannot assist the Respondent in this case.

After some considerable degree of reflection the Expert is of the opinion that the commercial links must bring the Respondent's behaviour within limb (ii) of the definition of Abusive Registration.

In summary, the Expert has considered the admissibility, relevance, materiality and weight of the evidence as a whole and is satisfied that the Complainant has succeeded in proving, on balance of probabilities, that the Domain Name is an Abusive Registration in accordance with paragraph 2(a)(ii) of the Policy.

### **Conclusion**

Despite the parties' somewhat lengthy arguments, this case quite literally turned on the Respondent's receipt of £322 and whether or not it was unfair. However, it also raises a point of general principle in terms of whether or not it is permissible to register a non confusing domain name which contains a company's brand and then point it to a criticism website with commercial links. The wording of the Policy leaves some room for doubt in this regard.

It would appear from the surrounding facts and evidence supplied that when the traffic to his website increased the Respondent simply realised that he could not only criticise the Complainant but also make some money off the back of such activity. However in the Expert's opinion, given the fact that the use of the Complainant's trade mark in the Domain Name was undoubtedly responsible for the level of traffic to the website, even though this was not in the least bit confusing, any subsequent advantage for the Respondent (or indeed detriment to the Complainant) as a result of the commercial links took the Respondent outside the terms of what is permitted under the Policy. The Respondent must now forfeit his Domain Name as a result.

To find otherwise could set a dangerous precedent as it would imply that commercial activity is acceptable in the context of a website criticising a company which uses a domain name containing that company's brand. Whilst each case turns on its own facts and the Policy does not expressly forbid this, it is difficult to conceive of a situation where it would be acceptable and the domain name registrant would not fall foul of the Policy in some way by taking unfair advantage of that company's rights. In the Expert's opinion criticism websites are essential in a democratic society, but if they draw in internet users by using a domain name containing a company's brand then they must be wholly devoted to honest criticism and open discussion and not potentially tainted by commercial concerns.

Given the above it should be made perfectly clear that if the commercial links had never appeared on the website then the Expert would have had no hesitation in finding for the Respondent on the basis that he was (and now is) making fair use of the Domain Name by pointing it to a non commercial website operated solely in criticism of a business. Again the Expert stresses that such a finding would have had no bearing on the legality of the actual content of the website to which the Domain Name is currently pointing (upon which the Expert makes no observations whatsoever apart from noting the critical content).

A finding in favour of the Respondent would have been all the more evident because the Domain Name itself makes it abundantly clear that there is no connection between the Domain Name and the trade mark holder and leaves internet users in no doubt as to what type of content to expect when accessing the corresponding website. The Domain Name does not exactly match the Complainant's trade mark and neither is it likely to cause any confusion in the minds of internet users.

It should be stressed that nothing in the Policy is intended to prevent internet users with an axe to grind from registering completely unambiguous domain names such as <ihatebrand.co.uk> or <ireallyhatebrand.co.uk> (there are endless permutations) and pointing them towards a non commercial website which is solely in criticism of that brand and which leaves no room for confusion. Indeed paragraph 4(b) of the Policy specifically envisages this situation, as do previous cases decided under the DRS (see for example *RTA (Business Consultants) Ltd v Ms Dawn Burdett, DRS 8580*). In *Rayden Engineering* the Appeal Panel ordered the transfer the domain names at issue because they were identical to the complainant's name, but commented as follows:

*"...it is open to the Respondent to carry on her campaign using a domain name that does not trespass on the Complainant's rights in its trade name in this way – either by using a different domain name altogether or by using one which includes a modifier such that the domain name is not confusingly similar to the Complainant's trade mark or one that made it quite apparent that the domain name was not associated with the Complainant but was being used for the purposes of a protest site. Indeed the Complainant accepts in its Appeal Notice that a name such as "raydenengineeringisdestroyingtheworld.co.uk" would be "nominative use" and hence not objectionable under the Policy."*

It is therefore with some regret that the Expert orders the transfer of the Domain Name in this case. It should be noted that this decision relates solely to the Domain Name itself and the Respondent's previous use of it and has no bearing on the existence of the website to which the Domain Name is pointing. The Expert has no authority with regard to the content of any website and complainants who are concerned about such matters must seek redress in a different forum. It should therefore go without saying that the Respondent is of course free to register any available domain names (whether under .co.uk or otherwise) and point them towards the same website and the Complainant is of course free to bring a further complaint or complaints in this regard.

## **8. Decision**

In light of the above findings, namely that the Complainant has Rights in a mark which is similar to the Domain Name, and that the Domain Name, in the hands of the Respondent, is an Abusive Registration, the Expert directs that the Domain Name be transferred to the Complainant.

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Jane Seager

7 October 2010