

DISPUTE RESOLUTION SERVICE

D00019532

Decision of Independent Expert

Moosetools

and

Mr Carlo Albelli

1. The Parties

Complainant: Moosetools
veldstraat 16
4261TB Wijk en Aalburg
Noordbrabant
4261TB
Netherlands

Respondent: Mr Carlo Albelli
117 Leehove
De Lier
Westland
2678MB
Netherlands

2. The Domain Name

<moosetools.co.uk> ("the Disputed Domain Name")

3. Procedural History

The Complaint was filed with Nominet on 14 November 2017. Nominet validated the Complaint on the same day and notified the Respondent by post and by email, stating that the Response had to be received on or before 12 December 2017. The Response was filed on 12 December 2017. On the same day Nominet notified the Complainant that a Reply had to be received on or before 20 December 2017. A Reply was received on 18 December 2017 and the mediator was appointed on 20 December 2017.

The Informal Mediation procedure failed to produce an acceptable solution for the parties and so on 11 January 2018 Nominet informed the Complainant that it had until 25

January 2018 to pay the fee for the decision of an Expert pursuant to paragraph 13 of the Nominet Dispute Resolution Service Policy ("the Policy"). On 18 January 2018 the Complainant paid Nominet the required fee.

On 24 January 2018 the undersigned, Jane Seager ("the Expert"), confirmed to Nominet that she was independent of each of the parties and that, to the best of her knowledge and belief, there were no facts or circumstances, past or present (or that could arise in the foreseeable future) that needed to be disclosed, which might be of such a nature as to call in to question her independence in the eyes of one or both of the parties.

4. Outstanding Formal/Procedural Issues

On 20 December 2017 the Respondent issued a second Response. Although it was sent after the procedural deadline to submit the Response, the Expert decided to consider it in the interests of the fairness. However, given the import of the existing submissions, the Expert did not consider it necessary to ask the Complainant to submit any further statement.

5. Factual Background

The Complainant is listed as Moosetools, the trading name of Hennie Meijndert. Mr Meijndert runs a website at www.moosetools.nl selling used machinery and equipment.

Nothing is known about the Respondent, an individual called Carlo Albelli.

The Respondent registered the Disputed Domain Name on 1 November 2017. It currently points towards a website containing a lion logo, the words "D-DAY" and icons allowing the website to be shared via various social networks.

At the time that the Complaint was filed, the Disputed Domain Name was pointing to a website appearing to criticise Mr Meijndert and his business.

6. Parties' Contentions

Complaint

The Complaint is very short and mainly consists of extracts taken from the website to which the Disputed Domain Name was pointing at the time that the Complaint was filed (screen captures were also attached).

The Complainant asserts that the Disputed Domain Name is an abusive registration as its primary purpose is to disrupt the Complainant's business and personal life. The Complainant also states that the Respondent is spreading slander and defamation and that an official complaint about this will be filed with the police.

In answer to the question "Are there any web pages that support this dispute?" the Complainant refers to www.moosetools.nl. The Complainant asks for the Disputed Domain Name to be transferred.

Response

The Response is very short and as such may be reproduced in its entirety, as follows:

"The complaint has no legal right to the name Moosetools. Example, Dot com is free, .de .es .us .cn .ru etc etc. Moosetools.net is also being used.

Furthermore to the allegations by the complaint, we did our own investigation. The complainant has NOT contacted the police, as claimed. Feel free to ask the complaint for the police report etc.

If your complaints wishes to speak to our legal dept', then we are more than willing to assist.

Therefore, we reject all the complaints claims. And is not an abuse of registration under your terms, or naming terms."

Reply

The Complainant argues that the content of the website is libel and slander and therefore punishable throughout Europe. In the Complainant's opinion, the fact that the content of the website has since been removed illustrates that the Respondent knows this. The Complainant also contends that the Respondent is operating under a false name.

Second Response

The Respondent states that the Complainant's claim of slander is unfounded because slander only refers to the spoken word. In the Respondent's opinion, it is not illegal to share information that is already in the public domain, and the Complainant simply wants to prevent this.

The Respondent states that Nominet is a Registry and not a legal courtroom and advises the Complainant to read the Policy. In particular the Respondent refers to Paragraph 8.2, which provides that "*Fair use may include sites operated solely in tribute to or in criticism of a person or business.*"

Given this, the Respondent states that he will continue to share public information on any media platform and/or other websites, be it in a digital format, print or otherwise. In the Respondent's opinion, pursuing legal action against someone for simply sharing publicly available information would be absurd, and the Complainant has no right to a transfer of the Disputed Domain Name.

7. Discussions and Findings

General

Under paragraph 2.1 of the Policy, for the Expert to order a transfer of a Disputed Domain Name, the Complainant is required to demonstrate, on the balance of probabilities, both of the following elements:

"2.1.1 *The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and*

2.1.2 *The Domain Name, in the hands of the Respondent, is an Abusive Registration."*

Complainant's Rights

The Policy defines Rights as "*rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning*".

By far the easiest way to demonstrate Rights under the Policy is usually the provision of a registered trade mark. However the Complainant has supplied no evidence that he owns any registered trade marks.

The question thus arises as to whether the Complainant has any other Rights in the term MOOSETOOLS. Given that the Complainant has not supplied evidence of any registered trade marks, the issue is whether the Complainant has established that he has any unregistered rights in the term, by virtue of having used it in the course of trade, which would amount to Rights for the purposes of the Policy. In this regard it should be noted that Section 2.3 of the Experts' Overview provides that the first hurdle is intended to be a relatively low-level test, and that the objective for a complainant is simply to demonstrate a *bona fide* basis for making a complaint.

Thus in view of the fact that the first hurdle is intended to be a relatively low-level test, the Expert is satisfied that the Complainant has Rights in the term MOOSETOOLS, given the evidence shown on the Complainant's website at www.moosetools.nl as to the Complainant's use of this term as a trading name.

In addition, the Expert has also consulted the links listed in the Complaint that previously appeared on the website to which the Disputed Domain Name was pointing, in particular:

<https://www.marktplaats.nl/verkopers/17451139.html>

and

<https://www.machineseekeer.com/Haendler/48277/AGN-Swiss-BV-Wijk-en-Aalburg>

The links point to e-commerce platforms in both Dutch and in English offering industrial tools for sale. Both contain items put on sale by the Complainant and on both the Complainant's profile is represented by the name "MOOSE TOOLS" and the Complainant's distinctive logo with a moose's muzzle and antlers containing the words "MOOSE TOOLS" in large font with the words "INDUSTRIAL LIQUIDATORS" below in smaller font. The Expert notes that on the first website, in Dutch, the Complainant's profile is active, with offers posted in February 2018, and on the second website, in English, the Complainant has been registered since 2013. These observations support the Expert's conclusion that the Complainant has Rights in the trading name MOOSETOOLS.

Furthermore, the Policy stipulates that the name or mark in which the Complainant has Rights (MOOSETOOLS) must be identical or similar to the Disputed Domain Name (<moosetools.co.uk>). It is accepted practice under the Policy to discount the ".co.uk"

suffix, and so the Complainant's trade name and the Disputed Domain Name are thus identical to one another.

Therefore the Expert finds that paragraph 2.1.1 of the Policy is satisfied and that the Complainant has Rights in respect of a name which is identical to the Disputed Domain Name.

Abusive Registration

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"

As an initial remark it should be stressed that Nominet's Dispute Resolution Service (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. Thus the Expert has simply considered whether the Complainant has succeeded in making out his case in relation to the Disputed Domain Name under the terms of the Policy.

Paragraph 5.1 of the Policy sets out a non-exhaustive list of six factors which may be evidence of Abusive Registration. The Complainant seems to be basing his case mainly on paragraph 5.1.1.3, which reads as follows:

"5.1.1 Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily: (5.1.1.3) for the purpose of unfairly disrupting the business of the Complainant."

Paragraph 8.1 of the Policy sets out a non-exhaustive list of factors which may be evidence that the Disputed Domain Name is not an Abusive Registration. The Respondent appears to rely on the following:

"8.1.1 Before being aware of the Complainant's cause for complaint (not necessarily the 'complaint' under the DRS), the Respondent has: (8.1.1.3) made legitimate non-commercial or fair use of the Domain Name".

As highlighted by the Respondent in his second Response, Paragraph 8.2 of the Policy also provides that *"Fair use may include sites operated solely in tribute to or in criticism of a person or business."*

The Nominet Experts' Overview Version 3 (paragraph 4.9) provides helpful guidance on whether or not using a domain name to point to a criticism website may be seen as fair use, and underlines that the use of the word "may" at 8.2 means that, even if a site is operated solely as a tribute or criticism site, it is still open to the Expert to find that it is abusive and that each case will depend upon its own facts. Paragraph 4.9 of the Experts' Overview goes on to state:

"The appeal decision in DRS 06284 (rayden-engineering.co.uk) confirmed the consensus view among experts today that the nature of the domain name is crucial to the exercise. A criticism site linked to a domain name such as <lhateComplainant.co.uk> has a much better chance of being regarded as fair use of the domain name than one connected to <Complainant.co.uk>. The former flags up clearly what the visitor is likely to find at the site, whereas the latter is likely to be believed to be a domain name of or authorised by the Complainant. [...]"

In DRS 06284 (rayden-engineering.co.uk) the domain name was identical to the name in which the Complainant had rights. A modified name that made it clear that this was a protest site would presumably have been less successful in drawing the protest to the attention of customers of the Complainant. The Panel concluded there was a balance to be drawn between the right to protest (which could be effected via a modified name) and the Complainant's rights in its own name, and that in this case at least the latter outweighed the former. Note that the Panel did not rule that use of an identical name would always and automatically be unfair, but did conclude that it was only in exceptional circumstances that such use could be fair. The Panel declined to find that such exceptional circumstances existed in the case in question."

The Foreword to the Experts' Overview also provides the following:

"While there is no system of precedent under the DRS Policy, for the DRS Policy to be effective there has to be a measure of consistency in the decisions and the panel of Experts does its best in that regard, although, as will be seen below, there are a few areas where differing views prevail. If anyone involved in a dispute under the DRS Policy proposes to rely upon the rationale of any previous DRS decision, the more recent decisions (whether at first instance or appeal level) are more likely to represent current thinking."

Taking this information into account, the Expert notes that the Disputed Domain Name simply replicates the name by which the Complainant is known and does not contain any indication that the website to which it points is not owned or operated by the Complainant. As may be seen by previous decisions under the Policy, and particularly the appeal decision in DRS 06284 (<rayden-engineering.co.uk>), in these circumstances most (if not all) Experts would order a transfer under the Policy of the domain name at issue, and the Expert in this case sees no exceptional reason to diverge from this course of action.

In the Expert's opinion, internet users will likely be confused by the Disputed Domain Name and may logically assume that it belongs to the Complainant and thus points to the Complainant's website. Even if it is abundantly clear upon arrival at the corresponding website that there is no link between the operator of the website and the Complainant, users will still have been directed there as a result of the confusing nature of the Disputed Domain Name, and this may be unfairly detrimental to the Complainant's business (in accordance with paragraph 5.1.1.3 of the Policy).

In this regard, the actual content of the website in question at the time that the Complaint was filed is irrelevant, and the Expert has not taken it into consideration in making this decision. The content of the website may or may not be detrimental to the Complainant's business, but whether such content is fair or unfair is not the issue. What is unfair in the Nominet context is the use of the Disputed Domain Name, which is identical to the Complainant's trading name, to attract visitors to a website about the Complainant. In

view of this then logically the use of another domain name that is not confusing to point to the same website will likely not fall foul of the Policy.

For the sake of completeness, the Respondent is of course clearly free to criticize the Complainant, provided such criticism stays within the law (for example with regard to defamation) and to highlight information that is already in the public domain. In this regard the Expert draws no inferences whatsoever from either party's conduct (in particular the Respondent's removal of certain content from the website further to correspondence with the Complainant) and makes no comment on the content of the website.

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 Disputed Domain Name is an Abusive Registration in accordance with paragraph 2.1.2 of the Policy.

8. Decision

The Expert finds that the Complainant has Rights in a name which is identical to the Disputed Domain Name, and that the Disputed Domain Name, in the hands of the Respondent, is an Abusive Registration. The Disputed Domain Name should therefore be transferred to the Complainant.

Jane Seager

10 February 2018