

DISPUTE RESOLUTION SERVICE

DRS 7254

Decision of Independent Expert

Wolf Lingerie

and

Persons or an entity unknown
t/a “Online Lingerie Store”

1. The Parties:

Complainant:	Wolf Lingerie
Address:	2 Rue Alfred Kastler La Wantzenau
Postcode	F - 67610
Country:	France
Respondent:	Persons or an entity unknown t/a “Online Lingerie Store”
Address:	40 Cheviot Close London
Postcode:	EN1 3UZ
Country:	United Kingdom

2. The Domain Name(s):

<rosylingerie.co.uk> (the “Domain Name”)

3. Procedural History:

- 3.1 The Complaint entered Nominet’s system on 15 May 2009. The Complaint was validated under Nominet’s dispute resolution service policy (the “Policy”)

and sent to the Respondent on 19 May 2009 by recorded delivery and also by email (a) to the email address recorded by Nominet in its registrant database; and (b) to the email address postmaster@rosylingerie.co.uk. The letter sent by recorded delivery was returned to Nominet as “refused” and Nominet received a delivery failure in relation to the email sent to postmaster@rosylingerie.co.uk.

- 3.2 The letter enclosing a copy of the Complaint informed the Respondent that it should file any Response by no later than 10 June 2009. No Response was filed by that date.
- 3.3 Mediation not being possible and the Complainant having paid the relevant fee, the Complaint was referred to me. I confirmed that I was not aware of any reason why I could not act as an Independent Expert in this case and I was appointed as such on 2 July 2009.

4. Factual Background

- 4.1 As is described under the heading Parties’ Contentions below, the documents filed by the Complainant are very limited. That and the fact that the Respondent served no response means that that little is known of the factual background in this matter.
- 4.2 The Complainant appears to be a French company (Société Anonyme) engaged in the sale of lingerie. It is the owner of Community Trade Mark No, 2660124 for the word ROSY in classes 3, 24, 25 and 38 with a filing date of 11 April 2002.
- 4.3 The WhoIs details record the Domain Name as having been registered on 29 May 2008. The Domain Name was recorded as having been registered in the name of a “non-trading individual” using the name “Online Lingerie Store”. However, “Mehdi Rahmati” was the name recorded on the Nominet database as the administrative contact for the Domain Name.
- 4.4 It would appear that on 3 March 2009 and 2 April 2009, the Paris office of Winston and Straw, as legal representatives of the Complainant, sent letters before action in respect of the Domain Name to “Lucy Gnap” of the “Rosy Lingerie Store” at an address in West Kensington, London. The letters also seemed to imply that the use of the term “Rosy” in the Domain Name and on a website operating from the Domain Name involved criminal conduct.
- 4.5 As at the date of this decision no website or web page appears to be operating from the domain name.

5. Parties’ Contentions

- 5.1 The Complainant claims that it is the owner of various French and Community trade marks but the only mark identified is Community Trade Mark No, 2660124.
- 5.2 The allegation of abusive registration and use is very short and it is easiest simply to repeat it in full. It reads as follows:

“Rosy Lingerie Store reserved the domain name "rosylingerie.co.uk" and exploits a website with this URL address. Rosy Lingerie Store has no previous or current right, especially trademark, to use the term “ROSY” in its domain name.

This website sells lingerie, clothes, associate items, and obviously shoes from different brands but not Rosy Lingerie.

The reservation and the use of the domain name "rosylingerie.co.uk" constitutes a violation of WOLF LINGERIE’s rights, and notably an act of counterfeiting of the trademarks of my client and an act of unfair competition towards WOLF LINGERIE.

Despite two registered letters sent to Rosy Lingerie Store, rosylingerie.co.uk is still online without any change and without any answer or explanation to WOLF LINGERIE.”

- 5.3 The Complaint does not attach a copy of the website, but does attach a copy of the two letters to which it refers, These are the letters before action sent to “Lucy Gnap” of the “Rosy Lingerie Store” on 3 March 2009 and 2 April 2009.
- 5.4 As described above, the Respondent did not submit any Response.

6. Discussions and Findings

General

- 6.1 To succeed under the Policy, the Complainant must prove on the balance of probabilities, first, that it has Rights in respect of a "name or mark" that is identical or similar to the Domain Name (paragraph 2(a)(i) of the Policy) and second, that the Domain Name is an Abusive Registration in the hands of the Respondent (paragraph 2(a)(ii) of the Policy). The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities (paragraph 2(b) of the Policy).
- 6.2 Abusive Registration is defined in paragraph 1 of the Policy in the following terms:

"Abusive Registration means a Domain Name which either:
 - (i) was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights: OR
 - (ii) has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant 's Rights."
- 6.3 The failure by the Respondent to file a substantive submission in response to the Complaint does not entitle the Complainant to the equivalent of a default judgment on these issues. The Complainant still has to make out its case on

the balance of probabilities under the Policy to obtain the decision it wants. However, in the absence of any exceptional circumstances I am entitled to draw such inferences from the Respondent's non-compliance with the Policy or the procedure for the conduct of proceedings under the Policy (the "Procedure") as I consider appropriate (paragraph 15(c) of the Procedure).

- 6.4 I will consider each of these requirements of the Policy in turn, but before I do so, it is convenient first to address a procedural point arising out of a deficiency in the Complaint and its potential impact on the notification of these proceedings to the Respondent.

Notification of the Complaint

- 6.5 As has already been described, it is clear from the Complaint that the Complainant's lawyers sent letters before actions in relation to the Domain Name to "Lucy Gnap" and the "Rosy Lingerie Store" in West Kensington. What is not clear is the exact relationship between this individual and business and the registered holder of the Domain Name.
- 6.6 The Domain Name was registered in the name of "Online Lingerie Store". No legal person or entity is identified in the publicly available register and it is not clear whether "Online Lingerie Store" is intended to be a trading name or simply a description of the Respondent's activities. As the registrant claimed that it was a "non-trading individual", no further information was made publicly available by Nominet on its WhoIs database. However, neither "Lucy Gnap" nor "Rosy Lingerie Store" are names that are recorded on Nominet's underlying database.
- 6.7 Perhaps the Complainant obtained the names "Lucy Gnap", the "Rosy Lingerie Store" and the West Kensington address from the website that the Complainant alleges at one point operated from the Domain Name (a point to which I return later in this decision). However, whatever the source of these names and this address, there would appear to have been a failure by the Complainant to comply with paragraph 3(c)(iii) of the Procedure. This provides that a Complainant must set out in the Complaint:

"the Respondent's contact details which are known to the Complainant"

This must be done clearly and unambiguously in the body of the Complaint.

- 6.8 The reason why it is important for a Complainant clearly to identify in the Complaint all contact details that it has for a Respondent is that under paragraph 2(a) of the Procedure Nominet is required to send a copy of the Complaint to the Respondent. Paragraph 2(a)(iii) lists one of the ways in which it may do so as:

"sending the complaint to any addresses provided to us by the Complainant under paragraph 3(c)(iii) so far as this is practicable".

- 6.9 Since the Complainant did not properly comply with paragraph 3(c)(iii), this raises the procedural question whether these proceedings should be stayed for a period to allow a copy of the Complaint to be reserved on the Respondent at the address set out in the Complainant's lawyers' letters.

6.10 Ultimately, I have concluded that this is not necessary. Notwithstanding the Complainant's failure, I have little doubt that Nominet has been able to comply with its obligations under paragraph 2(a) of the Procedure. Sending the Complaint to an address supplied under paragraph 3(c)(iii) of the Procedure is simply one of a number of options open to Nominet under the Procedure. The primary means is set out in Paragraph 2(a)(i) that provides for the:

“sending [of] the complaint by first class post, fax or email to the Respondent at the contact details shown as the registrant or other contacts in our domain name register database entry for the Domain Name;”.

6.11 Having been provided by Nominet in this case with extracts from its underlying database, it is clear that paragraph 2(a)(i) was complied with in this case. Given that there was no “bounce back” from the email addresses recorded in Nominet's database for the Domain Name, I have no reason to believe that the Respondent did not receive a copy of the Complaint. In any event, it is for the Respondent to ensure that the register contains up-to-date and accurate contact details so as to enable notification of a complaint (see for example, the comments in *Ebel SA v Sm@rtNet Limited* [2002] DRS251 to this effect as endorsed by the Appeal Panel in *The Procter & Gamble Company -v- Michael Toth* [2006] DRS-03316).

6.12 Further, given the Respondent's failure to respond to the Complainant's letters of 3 March 2009 and 2 April 2009, it seems doubtful that even if Nominet had chosen to send a hard copy of the Complaint to the West Kensington address of the “Rosy Lingerie Store”, it would have made any difference.

6.13 In the circumstances, I believe that notwithstanding the Complainant's procedural failure, I can and should proceed to a decision in this case.

Complainant's Rights

6.14 The Complainant has identified a registered trade mark simply comprising the word “ROSY”. That mark is registered, inter alia, in class 25 in relation to articles of clothing including various items that might be described as lingerie. The most sensible reading of the Domain Name is as the words “rosy” and “lingerie” combined together with the “.co.uk” suffix. I therefore have little difficulty in concluding that the Complainant has rights in a trade mark that is similar to the Domain Name.

6.15 In the circumstances, the Complainant has made out the requirements of paragraph 2(a)(i) of the Policy.

Abusive Registration or Use

6.16 The way in which the Complainant has prepared its Complaint in this case is problematic. There are various assertions of abusive use of the Domain Name in connection with a website, but this is not backed up by any documentary evidence. In a case where a complainant contends that the use of a domain name since registration in connection with a website is relevant to

the assessment of abusive registration, it is not unreasonable to expect it to have submitted copies of that website with its complaint.

6.17 Nevertheless, I have reached the conclusion on the balance of probabilities that there has been abusive registration and use in this case. The reasons for this are as follows:

(i) Administrative proceedings under the Policy are not equivalent to a court process. They are intended to be a relatively simple, user-friendly method of adjudicating domain name disputes. As a consequence there are no formal rules of admissible evidence and experts are granted a wide discretion as to the assessment of admissibility, relevance, materiality and weight of material submitted (paragraph 12(c) of the Procedure). Against this background, assertions of fact contained within a statement filed by a party, particularly when those statements are not inherently incredible and can reasonably be expected to be within the knowledge of the party making the statement, can be treated as “evidence” for the purposes of these proceedings. They may not constitute strong evidence and may well be easily outweighed by evidence to the contrary. Nevertheless, they are material that I can take into account in the context of this decision.

(ii) In light of (i) above, I am entitled to and do take into account the Complainant’s assertion that the Domain Name has been used to link to a website that sells “lingerie, clothes, associate items, and ... shoes” that are not products bearing the Complainant’s mark. Such use prima facie falls within the scope of paragraph 3(a)(ii) of the Policy: i.e. there are:

“Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant”.

(iii) As I have already described, the most sensible reading of the Domain Name is as the words “rosy” and “lingerie” in combination. Whilst the word “rosy” may well be an ordinary English word, its combination with the term “lingerie” is an unusual one. In the absence of any evidence or argument to the contrary, I am prepared to accept that it is more likely than not that the registrant had the Complainant and its business in mind when registering the Domain Name.

6.18 This is sufficient to justify a finding in the Complainant’s favour. In the circumstances, the Complainant has made out the requirements of paragraph 2(a)(ii) of the Policy.

6.19 I would also add that if the Complainant’s assertions as to use are correct, the Respondent would appear to have falsely represented to Nominet that it is a “non-trading individual” in order to avoid providing public contact details on the Nominet register. Further, there is the use of the name “Online Lingerie Store”, which suggests that the Respondent has failed properly to reveal its true identity to Nominet. The Complainant has not taken these points in its

Complaint and therefore they do not form part of the reasoning of my decision in this matter. Nevertheless, it is worth noting that in an appropriate case these are also factors that can point to a finding of abusive registration.

7. Decision

- 7.1 I find that the Complainant has Rights in a trade mark, which is identical or similar to the Domain Name, and that the Domain Name, in the hands of the Respondent, is an Abusive Registration.
- 7.2 I, therefore, determine that the Domain Name should be transferred to the Complainant.

Signed Matthew Harris

Dated 15th July 2009