

DISPUTE RESOLUTION SERVICE

D00009178

Decision of Independent Expert

Lockheed Martin Corporation

and

Frank Arthur Limited

1. The Parties

Complainant: Lockheed Martin Corporation
6801 Rockledge Drive
Bethesda
Maryland
20817
United States

Respondent: Frank Arthur Limited
112 Hanbury Street
London
E1 6QR
United Kingdom

2. The Domain Name

lockheed-martin.co.uk

3. Procedural History

Nominet checked that the complaint dated 15 October 2010 complied with its UK Dispute Resolution Service Policy ('the Policy') and the Procedure for the conduct of proceedings under the Dispute Resolution Service ('the Procedure'). It then notified the Respondent of the complaint. The response is dated 5 November. The Complainant replied to the response on 15 November. Informal mediation was attempted but was not successful. On 6 December, Nominet told both parties that, if it received the appropriate fee, the case would be referred for an expert decision.

On 13 December I, Mark de Brunner, agreed to serve as an expert under the Policy and Procedure. I subsequently confirmed that I am independent of each of the parties and that there are no facts or circumstances that might call into question my independence.

4. Preliminary procedural issues

There are two procedural issues that need to be dealt with at the outset. They concern:

- the admissibility of evidence newly put forward at the reply stage; and
- changes to the content of the web pages at the domain name, made after the complaint.

Evidence newly put forward at the reply stage

The Complainant seeks to introduce new evidence at the reply stage. In the complaint, it draws attention to a small but important change to some material in the web pages at the domain name that is otherwise a mirror of its own web content. The email address for media enquiries is changed from an address linked to a domain name that the Complainant controls, to an address connected to the domain name at issue here, controlled by the Respondent. In its reply to the Respondent, the Complainant seeks to amplify this point by referring to an email apparently sent from the Respondent's email address at the domain name and purporting to be from the Complainant. The Complainant says that, given its business and that the email was sent to a member of the House of Lords in order, ultimately, to gain sensitive information, this evidence should, exceptionally, be admitted – essentially on grounds of national security.

The basic rule on the scope of the reply stage of the Dispute Resolution Service ('DRS') is set out at paragraph 6 b of the Procedure:

Any reply by the Complainant must be restricted solely to matters which are newly raised in the Respondent's response and were not raised in the Complainant's complaint as originally submitted to us. If an Expert is appointed and the reply extends to other matters, the Expert may declare it inadmissible to the extent that it deals with matters going beyond those newly raised in the Respondent's response.

This is not a matter newly raised in the Respondent's response (and arguably it was raised in the original complaint, although admittedly it was raised as a possibility created by the inclusion of an incorrect email address within the content at the domain name, rather than in support of a current claim that there has been an actual attempt to deceive a third party). Obviously the evidence tends to strengthen the Complainant's case and, had it been available at the complaint stage, it would doubtless have formed part of the complaint. As it did not, though I am not obliged to disregard this evidence, the presumption is that I will not take it into account.

National security could conceivably justify a very wide range of exceptions to proceedings under the DRS. In these particular circumstances, however, I am not persuaded that the Complaint has made out a sufficiently detailed or strong case for displacing the presumption that this evidence should not be admitted. I therefore propose to decide this case without regard to it.

Changes to content made after the complaint

The Complainant notes that, since the complaint, the Respondent has made changes to the content of the web pages at the domain name. The effect of these changes is to turn the website from a near mirror of the Complainant's own web pages (which was the position as set out in the complaint) into a collection of material that is openly critical of the Complainant and its business (the position described in the response).

The Procedure says (paragraph 16 a):

The Expert will decide a complaint on the basis of the Parties' submissions, the Policy and this Procedure.

Given that, in its reply, the Complainant has had an opportunity to address the material newly raised by the Respondent in its response, I propose to look either side of the change and make my decision by reference to the use of the domain name as it is described in both the complaint and the response.

5. Factual Background

At 19 December 2010, the domain name at issue did not resolve to anything, but I have visited the Complainant's web pages at lockheedmartin.co.uk and lockheedmartin.com. From the complaint, the response, the reply and those visits I accept the following as facts.

The Complainant, incorporated in the United States, is a global security company principally engaged in the research, design, development, manufacture, integration and maintenance of advanced technology systems, products and services. It employs around 136,000 people worldwide. Sales in 2009 were some \$45 billion. Lockheed Martin UK Limited is the Complainant's wholly owned subsidiary in the United Kingdom.

The Complainant has used the name Lockheed since at least 1926 and the name Lockheed Martin since 1968. It has UK, European and global trademark registrations for the name Lockheed Martin. It holds domain name registrations for lockheedmartin.com and (since July 1998) lockheedmartin.co.uk.

The Respondent appears from its name to be a limited company, but is shown on Nominet's records as a non-trading individual.

The domain name was registered on 6 September 2010. Evidence submitted with the complaint shows that at 14 October it resolved to web pages that were similar to the web pages at the Complainant's own websites at lockheedmartin.co.uk and lockheedmartin.com. There was at least one important difference. The contact for media enquiries at the Complainant's web pages is a Chris Trippick, with the email address shown as chris.trippick@lmco.com. In the material at the domain name at issue, Chris Trippick's email address is shown instead as chris.trippick@lockheed-martin.co.uk.

The response to the complaint introduces further material from the website (raising one of the procedural questions dealt with in section 4 above). This material takes the Complainant's own content as its starting point but changes and adds to it for satirical purposes. For example, the 'About Us' page at the Complainant's website at lockheedmartin.co.uk contains the following text:

The special relationship between the United States and United Kingdom has led to a large number of alliances in both defence and commercial programmes. On July 1, 1999 Lockheed Martin UK Limited was created. Based in London, it combines all of Lockheed Martin's United Kingdom defence, civil and commercial business interests under a single UK-registered company.

According to the Respondent, by the time of the response the equivalent text at lockheed-martin.co.uk was:

The extra special relationship between the United States and United Kingdom has led to a large number of corrupt and self-serving alliances in both defence and commercial programmes. On July 1, 1999 Lockheed Martin UK Limited was created. Based in London, it combines all of Lockheed Martin's United Kingdom war-mongering, death-spreading and business interests under a single UK-registered company.

6. Parties' Contentions

Complaint

The Complainant says it has rights in a name that is identical or similar to the domain name. It argues that the domain name is an abusive registration because:

- (i) the similarity between the domain name at issue, the name in which it has rights and its own domain names – together with the unauthorised reproduction of its own content and the embedded links from the content at the disputed domain name back to the Complainant's own web pages – all serves to make it likely that internet users will be confused into thinking that there is some connection between the domain name and the Complainant. In addition, to the extent that there is such confusion, the fact that some of the links are broken will convey a poor image of the Complainant.
- (ii) the potential for confusion also creates the likelihood that internet users looking for the Complainant's website will be misled and diverted, causing disruption to the Complainant's business. The likelihood of such diversion is increased by the inclusion of false contact information among the otherwise faithful (if unauthorised) reproduction, at the domain name, of the Complainant's own content.
- (iii) there has been no legitimate non-commercial or fair use of the domain name (and, in particular, the website is not being operated 'solely' in criticism so the Respondent cannot claim that this represents fair use).
- (iv) the registration details provided to Nominet, and the Complainant's own researches, suggest that the Respondent has been using false contact information and is generally acting in bad faith.

The Complainant also claims that the Respondent is unable to demonstrate that the domain name is not an abusive registration because there is evidently no genuine offering of goods or services through the website and because the

domain name is not a name by which the Respondent is known or with which it is legitimately connected, nor is it generic or descriptive.

Response

The Respondent argues that

- (i) there is no evidence of actual confusion and the likelihood of confusion is extremely low because there is hardly any traffic to the website at the domain name. Using the domain name as the search term on popular search engines, the only hits are for the Complainant's own domain names.
- (ii) there is no evidence that the Respondent has registered or otherwise acquired the domain name primarily in order unfairly to disrupt the Complainant's business.
- (iii) the domain name is connected to a website that is being used solely in criticism of the Complainant – and that represents fair use.

The Respondent also says that there is no evidence that the Respondent has registered or otherwise acquired the domain name primarily to sell it to anyone at a profit or as a blocking registration.

Reply

In reply (and disregarding the evidence the Complainant seeks to introduce about whether the Respondent's use of the domain name is in fact causing confusion or disruption – covered in section 4 above), the Complainant makes the following points. (The numbering here corresponds to the numbering in the 'Complaint' and 'Response' sections above.)

- (i) The evidence offered by the Respondent does not support its assertion that there is no web traffic to the domain name. It merely shows that the domain name is not picked up by one particular internet source. Popular search engines using the domain name as the search term do in fact find lockheed-martin.co.uk rather than just the Complainant's websites. In any event, internet traffic does not all arrive through links provided by search engines and it is entirely probable that users would simply try the Respondent's domain name, wrongly guessing that it is the Complainant's.
- (iii) The website at the domain name has not been used solely in criticism: at the time of the complaint, it mirrored almost exactly the content on the Complainant's own websites – the key exception being a small but important change to some contact details. The more significant differences

between the Complainant's and the Respondent's websites, referred to in the response, have been made since the complaint and – in any event – are comparatively minor. The Respondent's website as a whole is still misleading because the critical elements are relatively small and as a result the critical purpose does not stand out. Even if the website were being operated solely in criticism, the criticism would be based on impersonation of the Complainant, which remains unacceptable and unfair.

- (iv) The response is filed by a Tim Arthur but the Respondent is Frank Arthur Limited and there is no evidence that Tim Arthur is Frank Arthur Limited's authorised representative. This adds weight to the suggestion that the Respondent is acting in bad faith.

7. Discussions and Findings

To succeed in this complaint, the Complainant must prove, on the balance of probabilities, that

- it has rights in respect of a name or 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.

Rights

The Complainant has been using the name Lockheed since 1926 and the name Lockheed Martin since 1968. It has registered the name Lockheed Martin as a trademark in the United Kingdom, in Europe and more widely. It evidently has both registered and unregistered rights in Lockheed Martin.

Ignoring the .co.uk suffix, the domain name comprises the two words in which the Complainant has rights, separated by a hyphen.

I accept that the Complainant has rights in a name which is identical or similar to the domain name.

Abusive registration

As defined by the Policy, an abusive registration is a domain name which:

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

The Policy contains a non-exhaustive list of factors that may be evidence that a domain name is an abusive registration. Between them, the complaint and the response mention most of those factors, but the main arguments are around the potential for confusion and disruption and whether the Respondent's operating a criticism site at the domain name constitutes fair use.

Confusion and disruption

The Respondent argues that, in the absence of actual confusion or disruption, the likelihood of both is low – not least because the website at the domain name is getting little traffic. I do not find that argument convincing. Given that the domain name is (but for the hyphen) identical to the Complainant's trading name, I consider that the potential for confusion and disruption is high.

That was evidently so when most of the content at the domain name was an unauthorised reproduction of the material on the Complainant's own websites, disguising a small but critical change to an email address. With the subsequent, more noticeable changes to the website content, I accept that the potential for confusion (and arguably disruption) was lower: internet traffic would be reasonably clear, once it arrived, that it was not at a domain name connected with the Complainant. But there remains the manner in which such traffic will have been drawn in. Section 3.3 of the *Experts' Overview* says:

Commonly, Internet users will visit web sites either by way of search engines or by guessing the relevant URL. If the domain name in dispute is identical to the name of the Complainant and that name cannot sensibly refer to anyone else, there is bound to be a severe risk that a search engine, which is being asked for the Complainant, will produce high up on its list the URL for the web site connected to the domain name in issue. Similarly, there is bound to be a severe risk that an Internet user guessing the URL for the Complainant's web site will use the domain name for that purpose.

In such cases, the speculative visitor to the registrant's web site will be visiting it in the hope and expectation that the web site is a web site

‘operated or authorised by, or otherwise connected with the Complainant’. This is what is known as ‘initial interest confusion’ and the overwhelming majority of Experts view it as a possible basis for a finding of Abusive Registration, the vice being that even if it is immediately apparent to the visitor to the web site that the site is not in any way connected with the Complainant, the visitor has been deceived.

Overall, then, the potential for confusion and disruption here was high – even if, with the changes to the content, any confusion was short-lived.

Fair use as a criticism site

The Policy is clear that ‘fair use’ may be evidence that a domain name is not an abusive registration. Paragraph 4(b) provides that ‘fair use may include sites operated solely in tribute to or in criticism of a person or business’. In fact it appears that the website at the domain name has not been operated ‘solely’ in criticism of the Complainant: for at least some of the time it seems to have been essentially a trap intended to divert media queries away from the Complainant. But even if it had been used solely for criticism, that is not conclusive of the character of the registration. Section 4.8 of the *Overview* says:

the use of the word ‘may’ means that even if a site is operated solely as a...criticism site it is still open to the Expert to find that it is abusive...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.

On the Complainant’s original submission, the Respondent is largely reproducing the Complainant’s content. On the Respondent’s submission, there are changes to the Complainant’s content that make clear that the material at the domain name is critical of the Complainant. But either way, the Respondent is impersonating the Complainant – whether that is so that a small change to some contact details goes unnoticed, or so that web traffic is drawn unexpectedly to some explicit criticism of the Complainant.

Having considered the main arguments around confusion, disruption and fair use, I can now deal briefly with the other points raised by both sides. The Complainant says that there are enough questions and inconsistencies in the contact details offered by the Respondent to suggest bad faith. I accept there are unanswered questions – not least about why a Frank Arthur Limited is listed as a non-trading individual. But all that falls short of independent verification that

the Respondent has given Nominet false contact details. In any event, the Policy and the Procedure refer only to Complainants who act in bad faith: nothing in them explicitly turns on the question of faith as it applies to the Respondent. Of course, bad faith by either party might be a factor shedding light on the nature of a domain name registration. But I draw no adverse inferences about the Respondent from the unanswered questions here.

I accept the Complainant's submission that the Respondent is unable to point to a genuine offering of goods or services through the website. Equally, the domain name is not a name by which the Respondent is known or with which it is legitimately connected, nor is it generic or descriptive.

As for the Respondent's other arguments, I accept that there is no evidence that the Respondent has registered or otherwise acquired the domain name primarily to sell it to anyone at a profit or as a blocking registration. But I think the character of the registration is already clear from the other evidence before me.

The Respondent has chosen a domain name that (with the exception of a hyphen) is identical to the Complainant's trading name. In my judgement, it has done so in order to mislead internet users and disrupt the Complainant's business. In response to the complaint, it attempted to make the content at the domain name openly critical of the Complainant but in its choice of domain name it was attracting attention to its criticism by impersonating the Complainant. That cannot be fair. On that analysis, it is clear that both registration and use of the domain name by the Respondent has taken unfair advantage of the Complainant's rights.

8. Decision

I find that the Complainant has rights in respect of a name which is identical or similar to the domain name and that the domain name, in the hands of the Respondent, is an abusive registration.

In the light of that, I direct that the domain name be transferred to the Complainant.

Mark de Brunner

8 January 2011