

DISPUTE RESOLUTION SERVICE

D00019115

Decision of Independent Expert

Gumtree.com Limited

and

Searl Derman

1. The Parties:

Complainant: Gumtree.com Limited
107 Cheapside
London
EC2V 6DN
United Kingdom

Respondent: Searl Derman
57 Hout Street, Cape Town, 8001
Cape town
Western Cape
8001
South Africa

2. The Domain Name(s):

guntree.org.uk (“the Domain Name”).

3. Procedural History:

The Complaint was submitted to Nominet on 7 July 2017 and was validated and notified to the Respondent by Nominet on 11 July 2017. The Respondent was informed in the notification that it had 15 working days, that is until 1 August 2017 to file a response to the Complaint.

On 1 August 2017, the Respondent filed a Response. On 8 August 2017, the Complainant filed a Reply to the Response and the case proceeded to the mediation stage on 14 August 2017. On 24 August 2017, Nominet notified the Parties that mediation had been unsuccessful and, pursuant to paragraph 10.5 of Nominet's Dispute Resolution Service Policy Version 4 ("the Policy"), invited the Complainant to pay the fee for referral of the matter for an expert decision. On 31 August 2017, the Complainant paid the fee for an expert decision. On 7 September 2017, Andrew D S Lothian, the undersigned ("the Expert"), confirmed to Nominet that he was not aware of any reason why he could not act as an independent expert in this case. Nominet duly appointed the Expert with effect from 12 September 2017.

4. Factual Background

The Complainant is a wholly owned subsidiary of eBay Inc.. It operates an online classified advertisement and community website under the GUMTREE mark using the URL <www.gumtree.com> and related URLs under various country code domain names.

The Complainant was founded in London in 2000. It has built a substantial online presence and is active not only at its own websites but also via social media forums where it has grown its fanbase to hundreds of thousands of fans and followers. These forums include Facebook, Twitter, YouTube and LinkedIn. Each uses dedicated GUMTREE pages.

The Complainant provides a range of statistics and reports demonstrating the significant current popularity of its website including the fact that in May 2017 it was the 23rd most visited website in the UK and the 412th most visited website globally, with 60.8 million visits. The Complainant's Internet presence under the GUMTREE mark appears to have steadily grown over the years as demonstrated by a sample of past website traffic figures for the month of November 2010 which shows monthly qualifying worldwide traffic of 14.78 million unique browsers and average unique browser visits of 777,677 per day.

The Complainant is the proprietor of various registered trade mark rights for the GUMTREE mark in connection with online classified advertisements including EU Trade Mark no. 003930989 for the word mark GUMTREE, for services in Nice classes 35, 39 and 43, registered on 23 September 2005.

The Complainant's website policy, as demonstrated by an extract from <help.gumtree.com> dated 4 July 2017 prohibits the sale of firearms, ammunition and hunting equipment on its website.

The Respondent is based in South Africa and registered the Domain Name on 9 May 2013. The Respondent has used the Domain Name for a website which provides online classified advertisements allowing users to purchase a variety of guns, ammunition and related accessories including sights, bayonets and rifle bags. The period of use has not been demonstrated in the evidence before the Expert. Example screenshots produced by the

Complainant show that the Respondent's website appears to allow the selection of three regions, namely, United States of America, South Africa and the UK. The screenshots also show ten advertisements in the UK region for shooting ranges and training facilities in the UK. A note of the number of "views" which each such advertisement has received is provided by the site and on the Complainant's sample these range from 2,492 to 3,944 per advertisement.

5. Parties' Contentions

Complainant

The Complainant submits that it has rights in a name or mark which is similar to the Domain Name and that the Domain Name, in the hands of the Respondent, is an Abusive Registration.

The Complainant notes that the words "gumtree" and "guntree" are identical save for the letters "m" and "n", adding that this difference is found in the middle of each word and that both start with the same letters. The Complainant submits that the difference is therefore easily lost, particularly as the letters "m" and "n" are visually and orally similar, sounding almost the same if spoken. The Complainant states that its GUMTREE mark is inherently distinctive in relation to the services provided by the Complainant and that it has become well-known and acquired a strong reputation and goodwill in relation to the online classified advertisements industry. The Complainant contends that its mark enjoys broader protection than marks with less distinctive character.

The Complainant notes the date of registration of the Domain Name and describes the content of the Respondent's associated website and the relative screenshots produced. The Complainant submits that as at the date of registration of the Domain Name, it is inconceivable that the Respondent was not aware of the Complainant or its rights, adding that by that date the Complainant had already become well-known through 13 years of extensive use in the UK and South Africa, where the Respondent is based, as well as many other countries throughout the world. The Complainant states that it gained considerable goodwill over that period in relation to online classified advertising and adds that the Respondent is using the Domain Name in precisely the same industry.

The Complainant submits that the effect of the Domain Name is to cause a loss of goodwill and reputation on the part of the Complainant as a provider of high quality, safe and trusted online classified advertisements, a negative association and tarnishing of its GUMTREE brand by use of the Domain Name for a website supplying goods which are strictly prohibited on the Complainant's website and a loss of Internet traffic, resulting customers and sales opportunities as a result of misdirection of internet users.

The Complainant asserts that the registration of the Domain Name blocks the Complainant from registering it, adding that while it would not offer guns on its website, trade mark owners often register typographical variants of their name. The Complainant notes by way of example that it owns domain names formed of the stems <gumtre>, <gumtee> <gumtreee> and <gum-tree>.

The Complainant contends that the Respondent has registered the Domain Name with knowledge of the Complainant and its rights, with a view to benefitting from the "pulling

power” of the Complainant’s trade mark. The Complainant notes that the Respondent could conduct its business by using a domain name which does not consist of a term nearly identical to the Complainant’s mark. The Complainant states that the Respondent must have been aware that the sale of guns and ammunition is strictly prohibited on the Complainant’s website due to the Complainant’s desire to ensure that its goodwill and reputation as a provider of high quality, safe and trusted classified advertisements is maintained, adding that the majority of users in the UK have a negative association with guns and other weapons which could affect their perception of the Complainant and its services or could put them off using the Complainant’s services entirely. The Complainant submits that users looking for the Complainant’s website could be confused as to whether the Respondent’s website is connected to the Complainant for the purposes of offering the specific goods which are expressly prohibited from the Complainant’s other website or whether there is some other connection between the Complainant and Respondent.

The Complainant argues that the Domain Name may cause initial interest confusion due to its similarity to the Complainant’s mark and domain name and that there is a risk that search engines, asked to search for the Complainant, may produce the Domain Name high up on their lists. The Complainant adds that Internet users might thereby visit the Domain Name expecting to find a website owned, operated or otherwise connected to the Complainant and thus will have been deceived by the Domain Name. The Complainant adds that initial interest confusion is compounded by the content found at the Domain Name because the Respondent’s website makes clear that it is an online classified advertisements website at the top of the page.

Respondent

The Respondent requests that the Complaint be denied. The bulk of the Respondent’s submissions consist of blanket denials of the Complainant’s submissions and large passages of content repeated multiple times. So far as substantive contentions are concerned, the Respondent’s case may be summarised as follows:-

The Respondent disputes the extent of the Complainant’s reputation and goodwill, noting that the numbers are not substantial and that most of the Complainant’s evidence is not relevant as it post-dates the registration of the Domain Name. The Respondent asserts that there are sufficient dissimilarities between the Domain Name and the Complainant’s mark to prevent confusion, adding that no instance of confusion has occurred in the last four years. The Respondent states that “gun” is descriptive of its services whereas “gum” has no relevance to the Complainant’s business. The Respondent contends that anyone who visits the different websites will see the difference and cannot be confused or misled, adding that confusion will be impossible or highly unlikely. The Respondent notes that its logos, colours, layout and website design are different from those of the Complainant. The Respondent states that the Complainant’s arguments only support the notion that customers will quickly realise that they are on the wrong website and hence confusion cannot arise.

The Respondent states that it did not require the authority of the Complainant to register the Domain Name. The Respondent adds that it and the Complainant provide services to completely different fields of interest which do not overlap and that therefore the Respondent could not and never has had an intention to abuse any rights of the Complainant. The Respondent contends that its use of “guntree”, which it describes as a trade mark, has been drawn from other sources of visual content and “derived from the artistic concept of a tree made of guns or an artistic gun made of wood”. In support of this

contention, the Respondent provides a link to a Google images page using the search “gun+tree” which returns various depictions of guns arranged in the shape of trees. The Complainant states that numerous different images influenced its selection of the term “guntree” and argues that such images are used worldwide whether online and in international museums in relation to pro and anti-gun campaigns or advertisements. The Respondent asserts that it has used its trade mark predominantly for printed classified advertisements as well as online. The Respondent states that the terms “tree” and “gun” both have a meaning in relation to the Respondent’s services in that a tree with its many branches provides a matrix of various gun products and related goods.

The Respondent concludes that the Complainant should launch trade mark infringement proceedings in South Africa rather than making a Complaint under the Policy. The Respondent also suggests that other websites such as “www.cumtree.com” are causing substantial damage to the Complainant’s reputation and that the Complainant should concentrate on these rather than the Respondent.

Complainant’s Reply to Response

The Complainant points out that its trade mark was registered on 13 July 2004 and that its evidence of very high levels of traffic in 2010 is illustrative of its reputation before the Domain Name was registered. The Complainant produces additional evidence supporting the reputation of its GUMTREE mark.

The Complainant notes that the Respondent offers no evidential support for its assertion that the Domain Name has been used for four years to offer classified listings nor that it has at any time been commonly known by the name “guntree”.

With regard to the Respondent’s assertions on the difference between “guntree” and “gumtree”, the Complainant submits that this ignores the significant visual and oral similarities, the fact that the “m” and “n” are adjacent on the qwerty keyboard and that both coincide in the element “tree”, which the Respondent notes is the distinctive element of “guntree” in relation to the Respondent’s business.

The Complainant submits that the Respondent’s explanation regarding its selection of the term “guntree” is not plausible and that no reason has been provided why an artistic concept of a tree made of guns or wood would lead the Respondent to select the name for its services. The Complainant asserts that the term “gun tree” has no meaning in relation to guns or classified advertisements which would lead to its adoption by the Respondent. The Complainant points out that the Google image search results reveal a very small number of completely unconnected images, noting that any two words can be put into a Google image search to generate a list of results which Google’s algorithm considers to be an image combining those terms. The Complainant asserts that this does not support or justify the selection of a name, adding that this constitutes an effort to offer some justification therefor when the only reason for adoption of “guntree” in relation to classified advertising services is a reference to the Complainant’s famous brand.

The Complainant notes that it is not aware of any actual confusion although adding that this is not surprising given the nature of the Respondent’s use and that evidence of actual confusion is not required under the Policy. The Complainant states that the Respondent is most likely to be aware of actual confusion and to have benefitted from it.

With regard to the Respondent's submission that the Parties' services do not overlap, the Complainant points out that both of the Parties provide classified advertisements over a website with the only difference being the products, some of which such as archery equipment, rifle scopes and hunting accessories also overlap. The Complainant asserts that the fact that the Respondent offers guns and other weapons which are not permitted on the Complainant's site does not show that the services do not overlap. The Complainant states that the Respondent has not addressed damage that will be suffered by the Complainant due to dilution of the GUMTREE brand, diversion of Internet users and the negative association created in the minds of the Complainant's consumers by the Respondent's advertising of weapons on its website.

With regard to the Respondent's reference to the "www.cumtree.com" website, the Complainant comments that the Respondent offers no analysis in support of its conclusion but notes that the Respondent explicitly accepts that the domain name concerned is substantially damaging the Complainant's reputation. The Complainant states that it is reasonable to assume that the Respondent's conclusion is based on the similarities between "cumtree" and "gumtree" which only differ by one letter in relation to content with which the Complainant does not wish to be associated. The Complainant asserts that this is precisely the same situation as in relation to the Domain Name. The Complainant submits that the existence of the <cumtree.com> domain name is irrelevant to the proceedings but that the Respondent's logic in pointing it out supports that Complainant's case against the Domain Name.

6. Discussions and Findings

General

In terms of paragraph 2.2 of the Policy the onus is on the Complainant to prove to the Expert on the balance of probabilities each of the two elements set out in paragraphs 2.1.1 and 2.1.2 of the Policy, namely that the Complainant 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.

Complainant's Rights

Paragraph 1 of the Policy provides that Rights means "rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning".

The requirement to demonstrate Rights under the Policy is not a particularly high threshold test. Rights may be established in a name or mark by way of a trade mark registered in an appropriate territory, or by a demonstration of unregistered so-called 'common law rights'.

Under this heading, the Complainant focuses primarily upon its registered trade marks including that noted in the factual background section above for the word mark GUMTREE. The Expert finds that the Complainant has Rights in that mark within the meaning of the Policy.

The Expert then turns to compare this mark to the Domain Name, noting that the first and second levels of the Domain Name (taken together, constituting the suffix .org.uk) are

typically disregarded for the purposes of comparison under the Policy on the grounds that these are wholly generic and required for technical reasons only. This leaves a comparison between the third level of the Domain Name, “guntree” with the Complainant’s GUMTREE mark.

The Expert notes that the Complainant’s mark is alphanumerically identical to the third level of the Domain Name, with the exception of a substitution of the letter “n” in the Domain Name for the letter “m” in the mark. The Expert agrees with the Complainant that this difference is insufficient to dispel a substantive similarity between the two terms. In the first place, the terms present a very similar visual impression due to the closeness in appearance of the letters “m” and “n”. Secondly, if each of the terms “gumtree” and “guntree” are spoken, they are aurally similar in that the impression on the ear of the listener is largely the same. Indeed, it is necessary to take great care in pronunciation in order to communicate a difference in aural impression, requiring the speaker to pause slightly and exaggerate the “m” and “n” at the end of the first syllable in each term. In the Expert’s view, this exaggerated pronunciation is not likely to be typical of most people and in casual speech the two terms sound more or less identical. The Expert pauses to note here that the Complainant refers to the terms being “orally similar” which the Expert takes to amount to much the same as “aurally similar”, one expression focusing on the spoken aspect and the other on the impression made upon the ear of the listener.

Finally, on this topic, the Expert notes that both of the terms “gumtree” and “guntree” end in the identical syllable “tree”, and further, it is worthy of note that it would be easy to mistype the one for the other due to the proximity of the letters “m” and “n” on the qwerty keyboard.

Turning to the Respondent’s submissions, the Expert does not find any support for the contention that the terms “gumtree” and “guntree” are dissimilar to any material extent. The Respondent focuses on whether any perceived similarity provokes or has occasioned confusion, which is not the test under this element of the Policy. The Complainant must show identity or similarity under paragraph 2.1.1 of the Policy and is not required to go beyond this to show any particular consequences.

In all of these circumstances, the Expert finds that the Complainant has proved on the balance of probabilities that it has Rights in the mark GUMTREE within the meaning of the Policy and that such mark is similar to the Domain Name.

Abusive Registration

Paragraph 1 of the Policy defines “Abusive Registration” as 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. is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights;*

This general definition is supplemented by paragraph 5.1 of the Policy which provides a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive

Registration. Paragraph 8.1 of the Policy provides a similar non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration.

The principal thrust of the Complainant's contentions on this topic is that the Respondent registered the Domain Name with knowledge of the Complainant, and with the Complainant's rights in mind, with a view to benefitting from substantial Internet traffic which would result from confusion. The thrust of the Respondent's case is that it registered the Domain Name without knowledge of the Complainant's rights or intent to target these, that it has not taken unfair advantage of the Complainant's rights, that there has been no unfair detriment and that the use of the Domain Name has not led and could not lead to any confusion.

The first issue is whether the Respondent is likely to have known of the Complainant's rights when it registered the Domain Name. The Respondent notably does not expressly deny this, although the Expert considers that the Respondent's general denials and its challenge to the extent of the Complainant's goodwill and reputation in 2013 are most appropriately treated as a denial of knowledge. In considering this question, the Expert is mindful of the recent thinking of experts under the Policy that an assertion of lack of knowledge on its own, however accurate or honestly made, cannot be taken as definitive on the question of abusiveness. As the expert in *HRworks GmbH v. Garth Piesse* (DRS 18610) comments, a denial is not "a complete answer for a respondent". If the Domain Name contains a well-known mark, "an element of objectivity may play a part". Although in the present case, the Domain Name is not an exact match to the GUMTREE mark under discussion, it is extremely close. As discussed below, the mark itself does appear to be well-known, based on its substantial Internet presence. In these circumstances, before making a determination on Abusive Registration, the Expert will consider all of the facts and circumstances of the case including, though not exclusively, the Respondent's likely knowledge of the Complainant or its rights at the relevant time.

The Respondent has argued that the term "guntree" is descriptive or generic and the Expert agrees that this is at least superficially the case given that it consists of two common words. As discussed in *HRworks*, in the case of a generic or descriptive term the onus is on the Complainant to demonstrate how well-known its mark is and therefore build a convincing case, even if only inferential, that the Respondent had actual or constructive notice of its rights at the time of registration.

Much evidence of recent dates has been produced by the Complainant of the current fame of its GUMTREE mark in association with classified advertisements but this is of limited value regarding the Respondent's state of mind in May 2013 when it registered the Domain Name. However, the Expert notes that the independent certificate of activity for the Complainant's "www.gumtree.com" website and associated subdomains dated November 2010 pre-dates the Domain Name's registration by two and a half years and is therefore highly relevant to that issue. The report shows figures for worldwide traffic amounting to 777,677 daily average unique browsers and monthly qualifying worldwide traffic of almost 14.8 million unique browsers.

If the numbers in the 2010 report are translated into customers or potential customers being drawn to the Complainant's website operating under the GUMTREE mark, even taking account of the caveat provided in the report itself that not every unique browser is necessarily a unique Internet user, they demonstrate a considerable volume of daily Internet visits being achieved some two and a half years before the Respondent selected and

registered the Domain Name. In the absence of countervailing evidence, this appears to the Expert to provide adequate support for the Complainant's contention that it had achieved a substantial market presence before 2013 whereby it is reasonable to infer that its GUMTREE mark was well-known. Assuming steady growth in traffic, which it is reasonable to do in light of the Complainant's 2016 traffic figures, it could also be presumed that at the time of the Respondent's registration of the Domain Name in 2013 the Complainant's presence was even more substantial than that demonstrated in 2010. Accordingly, the Complainant's evidence on this topic calls for an answer from the Respondent. That answer is merely a blanket denial together with a comment that the numbers are "not substantial". The Respondent does not offer any context or other support for its observation and, in the absence of such, this is of no assistance to the Expert.

In response to the Respondent's criticism of the 2010 report, the Complainant produced further evidence with the Reply. This consists of first, a national newspaper article dated 7 April 2013 discussing turning surplus goods into cash and suggesting the Complainant's website as one of several possibilities; secondly, a national newspaper article dated 6 February 2013 listing the Complainant's website as eighth out of the ten best money saving websites for students; thirdly, an article from advertising industry publication *Campaign* dated 31 August 2012 calling for agencies to handle the Complainant's £3 million advertising account; fourthly, an item on the BBC News website dated 5 July 2007 reporting on the fact that eBay had launched a "Gumtree for the US"; and finally, an entry from the online encyclopaedia "Wikipedia" relating to the Complainant and its history. For the reasons discussed above, the Expert has taken the view that the 2010 report is sufficient on its own to demonstrate the substance of the Complainant's web presence under the GUMTREE mark at that date, such that it calls for an answer from the Respondent which is lacking in the Response. It is not therefore necessary for the Expert to place any weight on the additional material produced with the Reply on which the Respondent has not had the opportunity to comment. The Expert would in any event have disregarded the "Wikipedia" entry on the ground that such content is not subject to fact checking and is based on a user-editable resource.

The Expert is mindful that the Respondent appears to be based in South Africa and accordingly has considered whether or not its location might provide any support for its general denial of knowledge of the Complainant's rights. The geographic separation of parties to a domain name dispute is not always meaningful in and of itself, given that a web presence such as the Complainant's can be accessed worldwide and may be presumed to have more than mere local reach. Nevertheless, the extent of that reach is not explored in the Complainant's evidence and despite the Complainant asserting that it has developed considerable goodwill and reputation in South Africa in connection with online classified advertisements, no material was produced to support that specific averment.

The extent of the fame of the Complainant's GUMTREE mark in South Africa in 2013 is not therefore known to the Expert. However, its substantial Internet presence in the UK prior to that date has been established such that the matter can be looked at another way by asking whether the Respondent itself had any interest in the UK despite being based elsewhere. It is worthy of note that the Respondent selected a .uk country code for the Domain Name as distinct from, for example, a .za domain denoting South Africa. In the absence of any alternative explanation from the Respondent, this demonstrates to the Expert that the Respondent already had a focus on the UK, given that the Domain Name is the gateway to the Respondent's website. Secondly, the Respondent's website itself appears to have been designed to contain a UK regional component as one of three possible regions. This indicates

an intention on the Respondent's part to seek classified advertisements from UK advertisers. Thirdly, the Respondent either published or attracted actual advertising from businesses in the UK as demonstrated by the Complainant's screenshots of the websites at the Domain Name. If the advertisement view counts are accurate, these advertisements have each attracted several thousand viewers, presumably from Internet users who are interested in UK businesses. In all of these circumstances, the Expert has reached the conclusion that there is an obvious UK focus of the Respondent's activities which transcends its geographic location. That UK focus necessarily has an adverse impact upon the Respondent's general denials regarding the Complainant's UK activities and/or any implied denial of the Respondent's awareness of these.

In addition to its general denials, the Respondent argues that its selection of the term "guntree" for a classified advertisements website was itself wholly independent of and unconnected to the Complainant's use of the GUMTREE mark. The Respondent states that it sought to use the term "gun" descriptively, combining this with the word "tree" in light of an artistic representation of a tree made of guns, as can be seen in a Google image search. The Expert considers that this explanation is tenuous to say the least. No evidence has been brought forward to show that there is any such thing as a "gun tree" or that the words are often placed together into a common phrase or term which the Respondent might have been referencing generically.

The Respondent's Google image search, being the only evidence produced with the Response (by way of a URL in the text) does not provide anything by way of support for the Respondent's case; the Expert agrees with the Complainant that any two terms could be searched in this manner and the algorithm will still attempt to match these in a single image. Perhaps if a very large number of images had been returned from a Google search indicating that a "gun tree" is a generally accepted object, this might have lent a limited amount of credibility to the Respondent's position, particularly if supported by other non-image based evidence or if the term could be shown to have some specific relevance to classified advertising.

In the absence of a more credible explanation, the Expert considers that the selection of the "guntree" term for substantively the same use as the already demonstrably popular use of the GUMTREE mark in connection with classified advertising is simply too much of a coincidence to have been the result of an unconnected choice based on "gun" and "tree". The Respondent's Google image search has the flavour for the Expert of something which has been "reverse engineered" for the purposes of the Response rather than genuinely being the origin of the Domain Name.

When the unconvincing nature of the Respondent's explanation for its selection of the Domain Name is taken together with the evidence of the Complainant's substantial Internet presence for online classified advertisements under the GUMTREE mark before the Domain Name was registered along with the Respondent's evident interest in the UK for its classified advertising business, the Expert finds that it is reasonable to infer that the Respondent knew of the Complainant and its rights when it registered the Domain Name. Furthermore, the nature of the Respondent's website and the lack of credibility in its general denials and explanation for its registration and use of the Domain Name renders it more probable than not in the Expert's opinion that the Respondent's motivation for registering and using the Domain Name was to capture, by way of confusion or apparent association with the Complainant, some of the substantial traffic generated by the Complainant's online presence under the GUMTREE mark for its own website. This is a paradigmatic form of

‘taking unfair advantage’ of the Complainant’s Rights, and strongly points in the direction of Abusive Registration.

Turning to the use of the Domain Name, the Expert is unpersuaded by the Respondent’s argument that there is no Abusive Registration because no actual confusion has been demonstrated. As the Complainant points out, it does not require to show that actual confusion has occurred in order to make out a case on Abusive Registration in terms of paragraph 5.1.2 of the Policy. What the Complainant must show is 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” [Expert’s emphasis]. Given the strong similarity between the Domain Name and the Complainant’s domain name, the Expert considers that the Domain Name is bound to generate confusion and is likely to entice and misdirect visitors seeking the Complainant’s substantial Internet presence.

Where the similarity between the Domain Name and the Complainant’s mark encourages Internet visitors to go to the Respondent’s website, it matters not that the site has a different appearance from that of the Complainant’s classified advertising site, as contended by the Respondent. Initial interest confusion will have resulted. As described in the Experts’ Overview Version 2, this is defined as the speculative visitor to the registrant’s website visiting it in the hope and expectation that the website is operated or otherwise connected with the complainant, the vice being that even if it is immediately apparent to such visitor that the site is not in any way connected with the complainant, the visitor has been deceived; the visitor may well be faced with a commercial website which may or may not advertise goods or services similar to those produced by the complainant. Initial interest confusion is regarded by the majority of experts as a possible basis for a finding of Abusive Registration.

The Respondent’s argument that the meanings within the Complainant’s mark and the Domain Name differ does not stand up to scrutiny. It is the Domain Name as a whole and its strong visual and aural similarity to the Complainant’s mark which is likely to give rise to initial interest confusion. The fact that, on the Respondent’s account, the Domain Name contains the descriptive element “gun” is something which can only be identified by Internet users in conjunction with the content of the Respondent’s website, if at all.

Furthermore, the Expert considers that it is not reasonable for the Respondent to argue that confusion is unlikely purely because the Respondent’s website contains advertisements for items unrelated to those listed on the Complainant’s website and indeed in many cases prohibited from sale there. The Domain Name has a strong similarity to the Complainant’s domain name, which the evidence shows is used daily by hundreds of thousands of visitors seeking classified advertisements for a variety of goods and services. A person viewing the website at the Domain Name may be unfamiliar with the detail of the Complainant’s listing rules or otherwise may simply presume that the Complainant has developed an alternative site covering classified advertising for these items. The common feature between the two sites in the Expert’s mind is the presence of classified advertisements, not the content or subject matter of those advertisements. The Expert therefore agrees with the Complainant that there is an overlap between the two sites which is likely to confuse Internet users.

The Respondent’s assertion that the Complainant should take action against other domain names which the Respondent regards as “serious” does not assist it. On the contrary, there is a similarity between the “serious” domain name identified by the Respondent and the

Domain Name itself in the sense that each is one letter different from the Complainant's mark. This arguably defeats the point which the Respondent seeks to make. In any event, as the Complainant points out, the existence of other domain names which may or may not target the Complainant's rights is irrelevant to the present proceedings.

The Expert does not find any of the non-exhaustive factors which may be evidence that the Domain Name is not an Abusive Registration to be present in this case. Any use of the Domain Name for an offering of goods or services which has at its root an intent to target the Complainant's rights, and its Internet traffic in particular, could not be regarded as genuine in terms of paragraph 8.1.1.1 of the Policy. There is no evidence in terms of paragraph 8.1.1.2 of the Policy that the Respondent has been commonly known by a name which is identical or similar to the Domain Name and its connection to the "guntree" mark could not be described as a legitimate connection for the reasons previously discussed. The evidence shows that the Respondent is making a commercial use of the Domain Name which could not be described as legitimate non-commercial or fair use in terms of paragraph 8.1.1.3 of the Policy. Although the Respondent made an argument that the Domain Name is generic or descriptive in terms of paragraph 8.1.2 of the Policy the Expert was unconvinced by this for the reasons outlined above. There is no written agreement between the Parties relating to the Domain Name nor has any pattern of registrations been raised in accordance with paragraphs 8.1.3 and 8.1.4 of the Policy respectively.

In all of these circumstances, the Expert has reached the conclusion on the balance of probabilities that the Domain Name, in the hands of the Respondent, is an Abusive Registration. The Expert adds for completeness that the Complainant's additional arguments on the Respondent's alleged registration for the primary purpose of blocking the Complainant or unfairly disrupting its business are not made out on the evidence of this case. Blocking or disruption may have been a consequence of the Respondent's activities but there is no evidence that either of these were the Respondent's primary motivation in registering the Domain Name as anticipated by paragraphs 5.1.1.2 and 5.1.1.3 respectively of the Policy.

7. Decision

The Expert finds that the Complainant has proved that it has Rights in a name or 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 therefore directs that the Domain Name be transferred to the Complainant.

Signed

Andrew D S Lothian

Dated 26 September, 2017