

Nominet UK Dispute Resolution Service

DRS 4100

LOCKHEED MARTIN CORPORATION v UK SKUNKWORKS LTD

Decision of Independent Expert

1. Parties

Complainant: Lockheed Martin Corporation
Address: 6801 Rockledge Drive
Bethesda
Maryland
Postcode: 20817
Country: USA

Respondent: UK Skunkworks Ltd
Address: 52 Avenue Road
Bexleyheath
Kent
Postcode: DA7 4EG
Country: GB

2. Domain Name

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

3. Procedural Background

The Complaint was lodged with Nominet on 19 October 2006. Nominet validated the Complaint and informed the Respondent on 19 October 2006 that the Dispute Resolution Service ("DRS") had been invoked and that the Respondent had 15 working days (until 10 November 2006) to submit a Response. The Respondent filed a Response on 23 October 2006. The Complainant filed a Reply on 3 November 2006. On 18 December 2006 the Complainant paid Nominet the appropriate fee for a decision of an expert pursuant to paragraph 7 of the Nominet DRS Policy Version 2 ("the Policy").

On 28 December 2006 Nominet appointed Andrew Clinton ("the Expert"). The Expert has confirmed to Nominet that he knows of no reason why he could not properly accept the invitation to act as Expert in this case, and further confirmed that he knows of no matters which ought to be drawn to the attention of the parties, which might appear to call into question his independence and/or impartiality.

4. Outstanding Formal/Procedural Issues (if any)

None.

5. The Facts

The Complainant, Lockheed Martin Corporation, is (according to the press cuttings supplied by the Complainant) the world's largest defence contractor and operates a research and development division that has for many years been known as Skunk Works. The Complainant has the benefit of registered trade marks for the mark SKUNK WORKS. The Skunk Works division is engaged in the design and manufacture of high performance military aircraft and is the birthplace of various aircraft including the U-2 high-altitude plane, the SR-71 high-speed jet, the F-117 NIGHTHAWK fighter jet.

The Respondent is a limited company that was incorporated on 14 June 2004 and operates a business selling hydroponics and smoking paraphernalia. The Respondent describes itself as a specialist retailer in a niche market. As well as its on-line business it also operates from a shop premises in Kent.

The Domain Name was registered in the name of the Respondent on 27 September 2005.

The Complainant says, amongst other things, that the Respondent has no rights or legitimate interest in the Domain Name. The Respondent disputes this and says that it has rights to use the Domain Name to offer its products that are different in nature to those offered by the Complainant.

6. The Parties' Contentions

Complainant

The Complaint, so far as is material, is as follows:-

1. Complainant, Lockheed Martin Corporation, is the owner of the registered trademark SKUNK WORKS. The SKUNK WORKS ® mark has been in continuous use by Complainant and its predecessor in interest, Lockheed Corporation, since the mid 1940s. It also owns nearly two hundred domain names that include the mark or a phonetic variant of the mark. Furthermore, the SKUNK WORKS ® mark has achieved renown, as has been recognised in numerous Panel decisions.
2. Attached hereto as Annex 1 is a list of trademark registrations, together with a printout from the website of the Office for Harmonization in the Internal market ("OHIM") concerning Community trade mark ("CTM") 1560663 and CTM 1541424, and of UK registration no. 2022075. The Complainant's predecessor in interest remains the record owner of the UK registration, but is in the process of being transferred to the Complainant. A list of registered marks and copies of registration certificates issued by the United States Patent and Trademark Office are attached as Annex 2.
3. Common Law - The Applicant is

involved in licensing others to use its mark on products other than those for which registration has been obtained. 4. Domain Names - The Complainant owns, directly or beneficially, a large number of domain names containing SKUNK WORKS ® or spelling variants, including all of the nearly two hundred domain names attached hereto as Annex 3. Many have been ordered transferred in domain name dispute resolution proceedings, with the most recent having been ordered transfer by decision dated April 10, 2006. (These decisions are attached at Annex 4). 5. Fame of the Mark - The mark represents the goodwill of the Complainant associated with the birthplace of the U-2 ® high-altitude plane, the SR-71 ® high-speed jet, the F-117 ® NIGHTHAWK ® fighter jet, and many other famous aircraft. In addition, the mark has been used to identify the source of other technical services and many products. The Complainant's SKUNK WORKS ® division and the goods and services produced therein have been the subject of numerous books, articles and television programmes, including the books Skunk Works, by Ben R Rich and Leo Janos (Little, Brown & Co., 1996); Lockheed Martin's Skunk Works, by Jay Miller (Specialty Press, 1996); and Lockheed Secret Projects: Inside the Skunk Works, by Dennis Jenkins (MBI, 2001). Each of the books is in print and is currently available through Amazon.com, as shown on Annex 5, which are results from a search conducted on September 27, 2006 Some examples of the many newspaper and magazine articles that have referred to the SKUNK WORKS ® Mark are attached at Annex 6. This selection is intentionally limited to popular sources operating mainly outside the field of aviation and aeronautics; the number of references within the field is too abundant to be attached. Those attached include articles from Fortune, Business Week, and People magazines as well as from The Miami Herald and Popular Mechanics. Dating from 1985 to the recent past, these articles speak of the "famous", "well-known", "celebrated" and "fabled" Lockheed Martin Skunk Works Division. To give a few examples, on October 4, 2004, The Miami Herald carried an obituary of Willis M. Hawkins, designer of the C-130 HERCULES transport plane, referring to "Lockheed's famous 'Skunk Works' operation." Annex 6, first article. Fortune magazine's June 28, 2004 issue had an article by Stuart F. Brown, Mine's Faster Than Yours; Planemakers are trying to hatch an aircraft that no mogul could do without. This article refers to the "fabled Lockheed Martin Skunk Works." Annex 6, second article. An undated article, "The Secret CIA UFO Files," available in the Science section of the Popular Mechanics website, speaks of a mock-up of an aircraft which "was trucked from the famous Lockheed Skunk Works, in Palmdale, California, to Groom Lake, Nevada." Annex 6, third article. Internet articles posted recently mention the "famed" and "famous" Skunk Works programs and facility in Palmdale, California. Annex 6. According to one biography of the famous employee who managed the enterprise: President Lyndon Johnson best summarized Kelly Johnson's career and impact on aviation when the President presented the National Medal of Science to Kelly at the White House in 1966, "Kelly Johnson and the products of his famous Skunk Works epitomize the highest and finest goal of our society--the goal of excellence..." Annex 6, sixth article. Thus, Complainant's SKUNK WORKS® mark has status as a well-known mark under the definition at Part 1, Article 2 of the WIPO Paris Union Joint

Recommendation Concerning Provisions on the Protection of Well-Known Marks. Among other things, this mark has been recognized by numerous third parties as being closely associated with the Complainant, it has been used and registered over a wide geographic area, and efforts to enforce the mark have been successful in numerous prior UDRP Panel decisions. Annex 7. Fifteen separate Panels have considered Complainant's rights with respect to the SKUNK WORKS® mark. In Lockheed Martin Corp. v. Deborah Teramani, WIPO Case No. D2004-0836 (December 1, 2004)(Ordering the transfer of eight SKUNK WORKS variant domain names to Complainant), the Panel said: [There] is absolutely no doubt in this Panel's mind that these Marks have achieved fame ... Given the fame these Marks have attained, the Complainant's Marks are entitled to broad protection from injury to and misappropriation of its reputation that would otherwise result from cybersquatting. All Panels have recognized Complainant's rights in and to the SKUNK WORKS® mark. 6. To the best of the Complainant's knowledge, there is no prior relationship between the Registrant and the Complainant. We attach at Annex 8 copies of letters sent to the Registrant. This includes a letter to Respondent dated July 6, 2006, referencing Respondent's domain name <ukskunkworks.co.uk> and informing Respondent of Complainant's rights. The Respondent acknowledged this notice by telephone and by a letter dated July 12, 2006 alleging that he "will fight this matter" and that this will be "a very public matter" due to the Respondent's contacts at Reuters and Respondent's "friends in the media industry." Although stating that he had hired an "International Trademarks expert," none was identified, nor has any legal counsel contacted the representative of the Complainant. The Respondent then made a very thinly disguised attempt to gain monetary advantage by asking if the Complainant "would be interested in negating [sic] an out of court settlement." Annex 9. Respondent's July 12 letter also informed Complainant that he registered two other names, <ukskunkworks.eu> and the name that is the subject of this Complaint. All of the names resolve to the same website. Annex 9. The Respondent made no reply to the Complainant's offer of £50 per domain name, an amount which is well above the expected cost of registration of a domain name. 7. We believe that the domain name ukskunkworks.co.uk is an abuse of registration in the hands of the Respondent for the following reasons: 8. It is clear that the name forming the domain name is a name in which the Complainant has established substantial goodwill and reputation over a number of many years. The Complainant has numerous trade mark registrations as documented and has made substantial usage of the name SKUNK WORKS in the United Kingdom. 9. The Registrant has established no legitimate business under the domain name. The Complainant submits that in the hands of the Respondent the domain name is an abusive registration as defined in paragraph 1 of the Policy, namely that it was registered or otherwise acquired in a manner which, the time when the registration was made, was unfairly detrimental to the Complainant's rights. The Complainant further submits that the Respondent's primary purpose in registering the domain names falls within paragraphs 3a. 1. B and C of the Policy. The Complainant further submits that the Respondent registered the domain name long after the Complainant had established its rights in SKUNK WORKS.

Disregarding the generic .co.uk suffix and the prefix uk, the domain name is identical and confusingly similar to the Complainant's trading name and trade marks. The existence of this domain name not only acts as a potential block in registration against the name in which the Complainant has a legitimate and valid right in the United Kingdom but also is designed to confuse internet users. The Complainant contends that the registration and use of the domain name not only blocks the Complainant from registering the domain name themselves, but also takes an unfair advantage of the Complainant's rights and is unfairly detrimental to those rights. It is possible that an advantage is being made by way of a commercial gain. 10. Moreover, the Complainant asserts that Respondent's use of the domain name is manifestly in bad faith. Respondent has made clear his intention to tarnish the good will and reputation of the Complainant and the Complainant's famous SKUNK WORKS trademark. Respondent's July 12, 2006 letter to Complainant's representative states, "this is a win-win situation we have entered, the publicity would be extremely good for us, but how about LMC?" The domain name skunkworks.co.uk, mentioned by the Respondent in his letter, is in the process of being transferred to Complainant pursuant to a written agreement with its former owner. Respondent's use of the domain name in connection with the sale and offering of products that foster illegal acts and illegal substances dilutes the strength of the SKUNK WORKS® trademark by tarnishing the reputation that Complainant has built up around it. Tarnishment of a trade mark is actionable under the UK Trade Marks Act 1994 under the provision of Sections 5(3) and 10(3) of the Act. The Complainant refers to the decision in the case Visa Condoms. Annex 10. The Respondent has no rights or legitimate interests with respect to the domain name. The domain name resolves to a website for "UK SKUNK WORKS LIMITED" which is an on-line retail store offering drug paraphernalia and the means to grow illegal drugs. There is also a physical store location in the United Kingdom. On the information and belief, the UK Skunk Works Ltd store opens in or about 2005. Thus it cannot be said that the Respondent has rights or legitimate interest in the domain name. On the contrary the Respondent is offering goods to further the illegal activities of marijuana growing and usage. The Respondent is not authorized or licensed to use the Complainant's name or trade mark and is not using the mark in connection with a bona fide offering of goods or services. The Respondent therefore has no rights or legitimate interests in the name. Prospective purchasers are likely to be confused when they search the Internet for services and products provided by Complainant or licensed by Complainant and find the domain name <ukskunkworks.com>. "Internet users are highly likely to mistakenly assume that Respondent's disputed domain names are associated with Complainant. This principle is firmly settled in UDRP precedent." Lockheed Martin Corp. v. Jarosz, WIPO Case No. D2005-0361 (May 10, 2005) (ordering the transfer of <skunkworkstractor.com> to Complainant). They are likely to assume that there is a connection to the owner of the famous mark when seeing it used in combination with a two-letter prefix. 11. Respondent's registration and use of <ukskunkworks.co.uk> puts the valuable good will associated with the Complainant's mark at risk. It constitutes a false designation of origin, likely to deceive prospective purchasers and

others into believing that Respondent's website is in some way connected with the Complainant and SKUNK WORKS ® brand products and services, and as a consequence is likely to divert purchasers and potential licensees of the mark away from Complainant. Furthermore, it may dilute the distinctive character of the famous mark by tarnishing the good will and that Complainant and its predecessors have cultivated for decades.

The Complainant seeks a transfer of the Domain Name.

Respondent

The Response, so far as is material, is as follows:-

I am writing to confirm our position on the matter of the apparent trademark of Lockheed Martin Corporation. We are not in agreement that we should move our website and cease trading under www.ukskunkworks.co.uk as we do not sell or offer military services, stealth bombers, yo-yos, decorations for Christmas trees or any other goods or services listed in the nice classifications 12,25,28,35,42. We sell hydroponics and smoking paraphernalia and are a specialist retailer with a niche market. Ukskunkworks Limited has built up an excellent reputation over the years and by changing our trading name will cost us valuable custom and loss of trade. If LMC would be interested in negating an out of court settlement, we would consider offers, but we value our business highly and we would expect these offers to match our expectations. I hope we can resolve this issue as quickly as possible. Ukskunkworks Limited is in belief that we have the right to use this name to operate a business and wont be bullied by a big corporation when we clearly will not affect them in anyway.

Reply

The Reply, so far as is material, is as follows:-

Firstly, the respondent has confirmed the nature of the business associated with the domain name. Further, he has not denied the claim of tarnishment as set out in paragraph 10 of the complaint form. Reference is made to the respondent's website on websites associated with the sale of cannabis, an example of which is attached at Annex 13.

Secondly, the respondent has reiterated their interest in transferring the domain name for a sum of money which we anticipate will exceed the nominal costs of registering or transferring the domain name to the complainant.

Finally, the respondent has not denied that the domain name is an abusive registration as defined in paragraph 1 of the Policy.

7. Discussion and Findings:

General

Under paragraph 2 of the Policy the Complainant has to prove on the balance of probabilities; firstly, that it has Rights in respect of a name or mark which is identical or similar to the Domain Name; and secondly, that the Domain Name, in the hands of the Respondent, is an Abusive Registration.

Complainant's Rights

Rights are defined in the Policy as including, but not limited to, rights enforceable under English law. This is usually demonstrated by reference to a trade mark registration or active trading using the mark in question. There is no real dispute about the issue of Rights in this case. The Respondent refers to the "apparent" trade mark of the Complainant but has not denied that the Complainant has rights in the mark SKUNK WORKS.

The Complainant says that it has established substantial goodwill and reputation in the mark SKUNK WORKS over many years. The Complainant has produced evidence to show that it has registered trade marks for the mark SKUNK WORKS in many jurisdictions. UK Trade mark 2022075 for the mark SKUNK WORKS was registered on 8 March 1996 in the name of Lockheed Corporation (said to be the Complainant's predecessor in interest) in class 42 being "engineering, technical consulting, and advisory services with respect to designing, building, equipping and testing commercial and military aircraft and related equipment".

The Complainant also relies upon its common law rights in the mark SKUNK WORKS and refers to a number of books, articles and television programmes that make reference to the Complainant's SKUNK WORKS division and the goods and services produced therein. The Complainant has supplied supporting evidence in the form of advertisements for the books and copies of the articles and press cuttings. The Complainant also owns, directly or beneficially, a large number of domain names that contain the mark SKUNK WORKS or spelling variants.

The Complainant undoubtedly has rights in the mark SKUNK WORKS by virtue of the registered trade marks as well as common law rights derived from extensive trading and other activities associated with that mark.

The Domain Name and the mark SKUNK WORKS are not identical as the Domain Name has the prefix "uk" and there is no space between the word SKUNK and the word WORKS but the Domain Name and the mark are similar.

The Expert therefore finds that the Complainant has rights in respect of a mark that is similar to the Domain Name and, therefore, the first limb of paragraph 2 of the Policy is satisfied.

Abusive Registration

Abusive Registration is defined in paragraph 1 of the Policy to mean 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.

Non-exhaustive factors – paragraph 3 of Policy

A non-exhaustive list of factors which may be evidence of an Abusive Registration is set out in paragraph 3a of the Policy as follows:

- (i) Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:
 - A. for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;
 - B. as a blocking registration against a name or mark in which the Complainant has Rights; or
 - C. for the purpose of unfairly disrupting the business of the Complainant;
- (ii) Circumstances indicating that the Respondent is using the Domain Name in a way which has confused people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant;

- (iii) The Complainant can demonstrate that the Respondent is engaged in a pattern of registrations where the Respondent is the registrant of domain names (under .uk or otherwise) which correspond to well known names or trade marks in which the Respondent has no apparent rights, and the Domain Name is part of that pattern;
- (iv) It is independently verified that the Respondent has given false contact details to Nominet; or
- (v) The domain name was registered as a result of a relationship between the Complainant and the Respondent, and the Complainant:
 - (A) has been using the domain name registration exclusively; and
 - (B) paid for the registration and/or renewal of the domain name registration.

It is clear from the wording of the Policy that the list of factors at paragraph 3 is non-exhaustive and that a Complainant can succeed in proving Abusive Registration without proving that any of those factors are present. However, in order to do so it is necessary to prove that the definition of Abusive Registration, as set out in paragraph 1 of the Policy, has been satisfied.

Non-exhaustive factors – paragraph 4 of Policy

There is a list of non-exhaustive factors which may be evidence that the Domain Name is not an Abusive Registration at paragraph 4 of the Policy.

The most relevant factor in this dispute is paragraph 4 a (i) A which is that before being aware of the Complainant's cause for complaint the Respondent has used or made demonstrable preparations to use the Domain Name in connection with a genuine offering of goods and services.

Discussion and findings regarding Abusive Registration

The Complainant has raised a number of points (which are summarised below) against the Respondent in support of the assertion that the Domain Name is, in the hands of the Respondent, an Abusive Registration. The Complainant refers to the concept of "bad faith" that is taken from the Uniform Domain Name Dispute Resolution Policy ("UDRP") and has produced copies of a number of UDRP decisions. The UDRP has no application to this dispute which is to be determined under the terms of the Nominet DRS Policy. The

Complainant agreed to be bound by the rules of the DRS when making the Complaint and the Respondent is bound by the rules of the DRS as part of Nominet's terms and conditions. An expert appointed under the DRS has to decide a relatively narrow set of issues. The Policy requires the Complainant to prove, on the balance of probabilities, that the definition of Abusive Registration has been satisfied.

The Complainant's case on Abusive Registration can be summarised as follows (the references below to paragraph numbers are to the relevant paragraph in the Complaint):-

- There is no prior relationship between the Complainant and the Respondent (para 6) and the Respondent is not authorised or licensed to use the Complainant's trade mark (para 10).
- The Respondent has no right or legitimate interest with respect to the Domain Name (para 10).
- The Respondent is not using the Domain Name in connection with a bona fide offering of goods and services (para 10) and has established no legitimate business under the Domain Name (para 9).
- The Domain Name points to a website offering (i) drug paraphernalia and the means to grow illegal drugs (para 10) and (ii) goods to further the illegal activities of marijuana growing and usage (para 10). The Complainant also refers to the Respondent's use of the Domain Name in connection with the sale and offering of products that foster illegal acts and illegal substances that dilute the strength of the mark by tarnishing the reputation that the Complainant has built up around it (para 10).
- The Domain Name dilutes the distinctive character of the famous SKUNK WORKS mark by tarnishing the goodwill (para 10). The Complainant points out that the Respondent did not, in its Response, deny the claim of tarnishment set out in the Complaint.
- The existence of the Domain Name acts as a potential block in registration against the name in which the Complainant has a legitimate and valid right (para 9).
- The Domain Name is designed to confuse internet users (para 9), internet users are highly likely to mistakenly assume that the Domain Name is associated with the Complainant (para 10) and the Domain Name is likely to divert purchasers and potential licensees of the mark away from the Complainant (para 11).

- It is possible that an advantage is being made by way of a commercial gain (para 9).
- The Respondent made a very thinly disguised attempt to gain monetary advantage by asking if the Complainant would be interested in negotiating an out of Court settlement (para 6) and, in the Response, reiterated its interest in transferring the Domain Name for a sum of money which the Complainant anticipates will exceed the nominal costs of registering or transferring the Domain Name.
- The Respondent made no reply to the Complainant's offer of £50 per domain name (para 6).
- The Respondent has referred to the publicity that may be generated (para 6).

The Respondent's case on Abusive Registration can be summarised as follows:-

- The Respondent has the right to use the Domain Name to operate its business and its activities will not affect the Complainant in any way.
- The Respondent is a specialist retailer in a niche market selling hydroponics and smoking paraphernalia.
- The Respondent does not sell or offer for sale military services, stealth bombers, yo-yos, decorations for Christmas trees or any other goods or services listed in classifications 12, 25, 28, 35 and 42.
- The Respondent says that it will consider offers if the Complainant is interested in negotiating an out of court settlement.

The Complainant argues that the Respondent has established no legitimate business under the Domain Name although it is clear from the evidence that the Respondent is operating both an on-line business and a shop. The Complainant says that it believes that the shop opened in or about 2005 which accords with a statement made by the Respondent on the website.

The Domain Name points to a website that shows a photograph of a shop front with details of the opening hours. The website also has an on-line store that offers a variety of products described as lifestyle accessories including hydroponics and smoking equipment. There is a "Legal Disclaimer" on the website that says it is not the intention to condone, promote or incite

the use of illegal or controlled substances and there is reference to the UK Misuse of Drugs Act 1971 that makes it an offence to cultivate any plant of the genus cannabis.

The Complainant says that the products being offered foster illegal activities. There is no evidence before the Expert that the products and services being offered by the Respondent are themselves illegal and the Expert therefore proceeds on the basis that the Respondent is entitled to sell, and to offer for sale, its range of products. Clearly, if there is evidence of illegality then that would be a matter for the relevant authorities.

The Complainant refers to paragraphs 3 a (i) B and C of the Policy. Paragraph 3 a (i) B relates to circumstances indicating that the Respondent registered the Domain Name primarily as a blocking registration against a mark in which the Complainant has rights and paragraph 3 a (i) C relates to circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily for the purpose of unfairly disrupting the business of the Complainant. It is therefore necessary to consider the Respondent's purpose in registering the Domain Name.

In the case of *Consorzio Del Prosciutto Di Parma v Vital Domains Limited* (DRS 00359) the Appeal Panel said that the requirement under paragraph 3 a (i) B has to involve some deliberate intent at the time of registration. There is no evidence that the Respondent registered the Domain Name with the intention of blocking the registration of the Domain Name by the Complainant. The Respondent company was incorporated on 14 June 2004 and the shop opened in 2005. The Domain Name was registered on 27 September 2005. In the Response the Respondent says that it has built up a reputation over the years. The evidence is that it registered the Domain Name in order to offer its goods and services on-line and not with the primary purpose of blocking the Complainant or causing unfair disruption to its business.

The Complainant argues that the Domain Name is designed to cause confusion and internet users will mistakenly assume that the Domain Name is associated with the Complainant and will divert purchasers and potential licensees. There is however no evidence of any actual confusion nor is there any evidence of diversion of the Complainant's purchasers or potential licensees. In *Seiko UK Limited v Designer Time* (DRS 00248) the Appeal Panel said that if there was support in the evidence for the suggestion that the Domain Name makes, or is liable to be perceived as making, a representation that there is something approved or official about the website that would constitute unfair advantage or unfair detriment. In that case the disputed domain name was registered as a means of promoting and selling Seiko's products.

This is not a case in which the Respondent has registered a domain name that is identical or virtually identical to the mark in which a Complainant has rights and is using that domain

name to offer goods and services that are either (i) connected with the Complainant or (ii) in competition to those offered by the Complainant. In such cases (in the absence of an argument that the parties have competing legitimate rights in the same name) it may be easy to draw the inference that the choice of name was a deliberate attempt to “piggy back” on the goodwill and reputation of the mark holder.

The facts in this case are different. The Respondent is an unconnected third party that is using the Domain Name to offer dissimilar goods and services that are not in any way connected to the Complainant. The uses and users of the respective goods offered by the parties are no doubt rather different and they are unlikely to be sold from the same outlets. There is no nexus between the respective products. The Complainant is not active in the market in which the Respondent operates. There is no complaint that the Respondent has attempted to “borrow” any aspect of the Complainant’s branding. It is not clear (and there is no supporting evidence) that internet users will be confused and believe there is an affiliation with the Complainant. In a letter dated 17 July 2006 to the Respondent (annexed to the Complaint) it is said that the fact that the Respondent does not offer anything that might be directly associated with the Complainant is, to a large extent, irrelevant and infringement can still arise in relation to dissimilar goods. Whilst that may be the case it is not the role of the Expert to determine whether there has been an infringement of a registered trade mark as that is not the relevant test under the DRS Policy.

The evidence does not indicate that the Respondent intended to, or did in fact, target the Complainant or its business in any way. In the Respondent’s letter received on 12 July 2006 the Respondent points out that the Domain Name is unlike the examples of other domain name cases the Complainant has referred to since they are blatant web traffic-scams aimed at maximising profits at the cost of the Complainant whereas, in this case, the Domain Name is relevant to the Respondent’s business and products. The Respondent says that it does not receive any money from web traffic.

The words “skunk” and “works” are ordinary dictionary words. The Respondent says, in a letter received on 12 July 2006, that the single word “skunkworks” has an alternative meaning in the United States of America and is used as a business term. There is a suggestion (in one of the UDRP decisions produced by the Complainant) that the word “skunkworks” is a generic term for an unofficial research project. The word “skunk” is a term sometimes used in the press to describe a particular variety of the cannabis plant.

The Complainant refers to the fact that the Respondent has made mention of the publicity that might be generated if the matter is pursued. The Respondent has indeed referred to publicity (which it says cannot be good for the Complainant) in its letter received on 12 July 2006 but that appears to have been a direct response to the demand, made on behalf of the

Complainant, that it cease using the Domain Name. The Respondent characterises the dispute as a fight between an American multi billion dollar military global company and a small business. There is no suggestion that the Respondent has used the Domain Name (which is what the second part of the definition of Abusive Registration relates to) in order to malign the Complainant or to stir up publicity about the dispute.

The Complainant also refers to the “very thinly disguised attempt” by the Respondent to gain monetary advantage by asking if the Complainant would be interested in negotiating an out of court settlement. The Respondent refers to this possibility in its Response. This also appears to have been a response to the demand that it cease using the Domain Name. The Respondent points out that to change its trading name will cost valuable custom and a loss of trade but that it would consider offers that match its expectations of the value of its business. This is not, in the Expert’s view, evidence that the Respondent registered the Domain Name primarily for the purposes of selling the Domain Name to the Complainant for valuable consideration in excess of the Respondent’s documented out-of-pocket costs directly associated with acquiring or using the Domain Name. The evidence is that the Respondent’s intention was to register the Domain Name for the purposes of its business.

The issue in this case is whether there is evidence of a real, as opposed to a theoretical, possibility of unfair advantage being taken of, or unfair detriment being caused to, the Complainant’s rights resulting from the registration and use of the Domain Name for the purpose of the Respondent’s business. The DRS is not intended to have the sweeping effect of preventing the registration and use of any domain name that is similar to a trade mark. It is a matter of degree and on the available evidence the Expert is not satisfied that the Domain Name takes unfair advantage of the Complainant’s rights. The Complainant also says that the Domain Name has been used in a manner which was unfairly detrimental to its rights because the Domain Name is used in connection with the offering for sale of products that foster illegal acts. The issue here is whether the repute of the Complainant’s mark is likely to be reduced in a manner that is unfair by reason of the Respondent’s use of the Domain Name. The Complainant refers to the decision *Visa Trade Mark Application* under section 5(3) of the Trade Marks Act 1994 which is in slightly different terms to the relevant provision under the DRS and there are a number of other decisions under that section. This dispute must be determined in accordance with the DRS Policy, on its facts and in light of the evidence. The Expert is not satisfied on the available evidence that the Domain Name has been used in a manner which was unfairly detrimental to the Complainant’s rights.

The factors that the Expert has had regard to in arriving at the above findings are summarised as follows:-

- The Domain Name and mark (whilst similar) are not identical nor are they virtually identical.
- There is no evidence that the Respondent intentionally selected, and has since used, the Domain Name in order to trade off the Complainant's goodwill and thereby derive a benefit for its own business.
- The Respondent registered, and is using the Domain Name, for the purposes of a business that it also carries on from a retail shop and it has done so since 2005.
- The Respondent has no connection to the Complainant or its business and does not compete with the Complainant.
- The Complainant and the Respondent operate in entirely different markets and the Complainant has no interest in (and is dismissive of) the market in which the Respondent operates.
- There is no nexus between the respective products being offered by the Complainant and Respondent.
- It is unlikely (and there is no support in the evidence) that internet users will be confused and believe there is a connection between the Complainant and the Respondent.
- There is no evidence of a real, as opposed to a theoretical, possibility of unfair detriment being caused to the Complainant's rights.
- There is no conceptual connection between the Complainant's reputation for the design and production of military jets and the products that the Respondent trades in.
- The Domain Name might be considered as a whimsical reference to the Respondent's business.
- There is no evidence that the Respondent intended to block the registration of the Domain Name by the Complainant or cause unfair disruption to its business

The Expert is not satisfied on the available evidence that the Domain Name is, in the hands of this Respondent, an Abusive Registration.

8. Decision

The Expert finds, on the balance of probabilities, that the Complainant has Rights in a mark which is similar to the Domain Name but does not find that the Domain Name, in the hands of the Respondent, is an Abusive Registration. The Expert directs that no action should be taken in relation to the Domain Name.

Andrew Clinton

16 January 2007