

# Nominet UK Dispute Resolution Service

DRS 04100

## Lockheed Martin Corporation v UK Skunkworks Ltd

### Decision of Appeal Panel

Dated 23 April 2007

#### 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

On 19 October 2006 Nominet received the signed hard copy of the complaint dated 5 October. Nominet validated the complaint and forwarded it to the Respondent on 19 October 2006.

Nominet notified the Respondent that it had until 10 November to respond to the complaint. A response was received on 23 October. The Complainant's reply to that response was received on 3 November and was forwarded by Nominet to the Respondent on 6 November. Informal mediation followed.

On 5 December Nominet wrote to the parties to say that, as the dispute had not been resolved by mediation, the matter would be referred for an expert decision if the Complainant paid the appropriate fee by 19 December. The fee was received on 18 December and on 28 December Andrew Clinton was appointed as the expert.

On 17 January 2007 Nominet notified the parties that the expert had dismissed the Complaint and explained that the Complainant had 10 working days to signal its intention to appeal. Notice of intention to appeal was received on 30 January, which meant the Complainant had until 20 February to submit its full appeal notice.

By letter dated 7 February, the Complainant requested that additional evidence should be admitted in the form of a National Arbitration Forum decision issued on 16 November 2006 in a parallel dispute (between the same parties) over the domain name ukskunkworks.com.

Nominet received the full appeal notice on 20 February. The Respondent responded to the appeal notice on 6 March.

On 12 March 2007 Claire Milne, Veronica Bailey and Mark de Brunner were appointed to form the Panel of Appeal ("the Panel") all three having confirmed their independence and willingness to act.

#### **4. Nature of the Appeal**

The Panel is required by paragraph 10 of the Policy to consider appeals on the basis of a full review of the matter and may review procedural matters. Accordingly, this appeal will proceed as a re-determination of the merits of the case by the Panel. The Panel does not propose to undertake a detailed analysis of the original expert's decision and will only refer to it where the Panel feels that it might be helpful to explain where the Panel agrees with the expert or differs in approach.

#### **5. Outstanding Formal/Procedural Issues**

According to paragraph 18(h) of the Procedure the Appeal Panel should not normally take into consideration any new evidence presented in an appeal notice or an appeal response unless the Appeal Panel believes that it is in the interests of justice to do so.

The additional evidence submitted by the Complainant is the decision of the National Arbitration Forum ("NAF") dated 16 November 2006 which relates to the domain name ukskunkworks.com. The Complainant puts forward two reasons why this new evidence should be admitted:

- (i) the NAF decision was not available at the time the Complainant issued its original complaint; and
- (ii) it is in the interests of natural justice to admit the additional evidence and that exceptional circumstances exist given the relevance of the .com case which was not available when the original complaint was lodged by the Complainant.

The Panel agrees with the approach taken by the appeal panel in mercer.co.uk (DRS03733) which concluded that for the complainant to be permitted to file new evidence it must show exceptional circumstances.

The Complainant's request for this additional evidence to be taken into account asserts that exceptional circumstances exist given (i) the relevance of the .com case and (ii) the fact that the decision had not been rendered at the time when the complaint was lodged against ukskunkworks.co.uk. In the opinion of the Panel, these points do not amount to exceptional circumstances, and neither do the interests of natural justice require admission of the additional evidence.

The Panel finds that irrespective of the date of the NAF decision, it is of very limited relevance to the current case. There are differences between the UDRP rules under which the NAF case was determined and the Nominet DRS Policy and Procedure which applies in this case. The NAF decision was made on different considerations, including whether the domain name was confusingly similar; whether there were legitimate interests in the ukskunkworks.com domain name; and whether the respondent registered that name in bad faith. All these UDRP considerations differ materially from the provisions of the Nominet DRS Policy and Procedure. Importantly, also, in that case the respondent failed to file a response, leaving it open for the panel to decide the proceedings on the basis of the claimant's undisputed representations. In the

present case the Respondent has filed a response to the complaint and to the appeal notice.

In the present case, also, the Complainant has already submitted a large body of supporting evidence including 15 UDRP cases. The Panel therefore takes the view that there are no exceptional circumstances and natural justice does not require the admission of additional evidence to the appeal, and decides that the new evidence will not be admitted.

Because of the differences between the UDRP and Nominet's DRS, the 15 UDRP cases submitted also have limited relevance to the current case. Nonetheless, the Panel has examined them.

## 6. The Facts

The Complainant, Lockheed Martin Corporation (LMC), is a well known manufacturer of defence and aviation products based in the United States of America.

The Complainant is the owner of numerous UK and Community trade mark (CTM) registrations for the mark SKUNK WORKS and has numerous domain name registrations incorporating that mark or variations of it. The website at [www.skunkworks.com](http://www.skunkworks.com), run by LMC and bearing a distinctive skunk logo, explains how the term 'skunk works' was used to describe LMC's special secret wartime product development centre, and that LMC's 'Skunk Works' today are known as its Advanced Development Programs (ADP).

Submitted with the complaint are copies of 15 UDRP decisions, aspects of which are given in the table below (in the order in which they have been supplied to the Panel).

Case reference	Disputed domain name(s)	Response?	Repondent's location	Outcome
D2000-0799	skunkworx.net mp3skunkworks.com	Yes	West Virginia	transfer
D2003-0859	skunkworksrc.com	No (respondent deceased)	California	transfer
D2004-0235	skunk-work.com	No	British Columbia	transfer
D2004-0431	skunkwrx.net	Yes	Minnesota	transfer
D2004-0836	aa-skunk-works.com and 7 others	No	Illinois	transfer
D2004-0705	skunkwerxmotorsports.com	No	Florida	transfer
FA04090000323762	skunkwerxmotorsports.us	No	Florida	transfer
D2004-0690	skunkworksent.com skunkworksentertainment.com	No	California	transfer
D2004-0823	skunkworksaviation.com	No	Arkansas	transfer
D2004-0824	skunkworxcc.com	Yes	Ohio	denied
D2005-0045	theskunkwerx.com	No formal response	Tennessee	denied
D2005-0361	skunkworkstractor.com	Yes	Illinois	transfer
FA0508000531611	rumfordskunkworks.com	Yes	Maryland	transfer
FA0511000593037	Suzies-skunkworks.com	No	New York	transfer
FA0602000649534	hdyskunkworks.net	No	Maryland	transfer

The Respondent is a private limited company registered in the United Kingdom on 14 June 2004 with company number 05152399. The Respondent registered

the Domain Name on 27 September 2005. At the website [www.ukskunkworks.co.uk](http://www.ukskunkworks.co.uk) the Respondent runs an online store selling 'lifestyle accessories', including cannabis seeds and smoking paraphernalia. The home page bears a picture of a physical shop in outer London called 'skunkworks', with its telephone number and opening hours, the motto 'In the Leaf we trust', and a border of images of cannabis leaves, as well as links to sites of related interest.

## **7. The Parties' Contentions**

The contentions below have been distilled from both the original submissions and the submissions on appeal, insofar as they are relevant to the dispute.

### Complainant

The Complainant says it has rights in a name which is identical or similar to the domain name.

It argues that the domain name is an abusive registration because

- (i) the Respondent is trying to sell the domain name for an amount that exceeds its costs.
- (ii) the domain name is a blocking registration.
- (iii) the domain name has been registered unfairly to disrupt the Complainant's business.
- (iv) the Respondent's use of the domain name is bound to cause people to be confused into believing that the name is connected to the Complainant.
- (v) the Respondent's business is not legitimate and the domain name is being used in bad faith to tarnish the Complainant's goodwill and reputation. The expert gave insufficient weight to the detriment that could be suffered by the Complainant because of the association with the Respondent's business. Indeed, the expert inferred wrongly that detriment would only be possible if the Respondent's activities were found to be illegal.
- (vi) the expert gave insufficient weight to the Complainant's rights.
- (vii) the list in paragraph 3 of the Policy of factors which may be evidence of an abusive registration is non-exhaustive.
- (viii) the expert was wrong to conclude that the Domain Name is not 'virtually identical' to the name in which the Complainant asserts rights. Indeed, the Domain Name is so closely similar to the name in which the Complainant asserts rights that the burden of proof should shift to the Respondent to show that this is not an abusive registration. (The Complainant cites the decision in DRS01056 relating to the domain name [generalmedicalcounsel.co.uk](http://generalmedicalcounsel.co.uk).)
- (ix) the Respondent has not denied that he was aware of the Complainant's Rights, and has not explained why he chose the name (the Complainant cites DRS 03670, [ukessays.co.uk](http://ukessays.co.uk)).
- (x) the expert placed unnecessary reliance on the absence of any connection between the Complainant's and the Respondent's respective businesses.

- (xi) the expert's conclusion that the domain name might be considered a 'whimsical reference' to the Respondent's business was unfounded and, even if correct, would not justify the choice of a domain name containing a name in which the Complainant has rights.
- (xii) the National Arbitration Forum decision in relation to ukskunkworks.com supports the Complainant's case that the domain name in the present dispute is an abusive registration. Other UDRP decisions and court decisions in trade mark disputes also support the Complainant's case.

### Respondent

The Respondent argues that:

- (i) the scope of its business is completely unconnected with the scope of the Complainant's business.
- (ii) it has built up goodwill in a name identical or similar to the domain name.
- (iii) the name in which the Complainant asserts rights ('Skunk Works') and the name in which it has rights ('UK Skunkworks Limited') are readily distinguishable.
- (iv) "skunkworks" has a dual meaning that it is entitled to draw on.
- (v) its use of the domain name is not part of a web traffic scam but is part of a genuine business.
- (vi) The Complainant has used its size, resources and financial position to employ "bullyboy" tactics against the Respondent which is a very small company.

## **8. Discussion and Findings**

### Scope of review

The Panel is considering this appeal on the basis of a full review of the evidence as detailed in paragraph 4 above.

### What needs to be proved

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.

### Complainant's Rights

Rights are defined in paragraph 1 of the Policy in the following terms:

"Rights includes, but is not limited to, rights enforceable under English law. However, a Complainant will be unable to rely on rights in a name or term which is wholly descriptive of the Complainant's business."

The Complainant has numerous registered trade marks for the mark "SKUNK WORKS" and it (or its predecessor in title) owns the UK trade mark 2022075 in class 42. In addition the Complainant has numerous domain names incorporating the mark or variations of the mark SKUNK WORKS. The Complainant has provided substantial evidence of its use of the mark.

The Domain Name is not identical to the mark "SKUNK WORKS" in that the Domain Name has the prefix "uk" and no space between the words "skunk" and "works". However, as a result of the Complainant's trade mark registrations and its extensive use of the mark the Panel finds that the Complainant has rights in the name SKUNK WORKS which is similar to the Domain Name and that the requirements of paragraph 2a (i) of the DRS Policy have been met.

#### Abusive Registration

Below, the Panel gives its views on each of the parties' contentions as listed in section 7 above.

#### *The Complainant*

- (i) the Respondent is trying to sell the domain name for an amount that exceeds its costs.

The basis for this claim appears to be an offer by the Respondent (in a communication to the Complainant dated 12 July 2006) to engage in out-of-court negotiations "to settle this in the most diplomatic way possible". The Panel cannot agree that this offer amounts to an attempt to sell the domain name.

- (ii) the domain name is a blocking registration.
- (iii) the domain name has been registered unfairly to disrupt the Complainant's business.
- (iv) the Respondent's use of the domain name is bound to cause people to be confused into believing that the name is connected to the Complainant.

The Panel will deal with contentions (ii), (iii) and (iv) together.

The Complainant's arguments rely heavily on the fame of its use of the name 'skunk works', attested by a collection of articles from magazines. Underlying these three contentions there appears to be an assumption by the Complainant that this fame is such that anyone seeing the name must have prior awareness of LMC's use.

The Panellists in many of the UDRP cases cited have not questioned this assumption. However, it is important to note that the respondents in all those cases were located in North America. The Panel's view is that at least in the United Kingdom, there is no such general awareness. Apart from the assumption of general awareness, the Complainant has supplied no specific evidence which has a bearing on the Respondent's intentions at the time of registration. The Panel is therefore reliant on its assessment of the Response.

The Panel finds entirely plausible the Respondent's claim that it registered the domain name for the purpose of conducting its own business on the internet, a business which is totally unconnected with the Complainant. The record suggests no intention of harming the Complainant, whether by blocking or by

disruption. In his response to the Appeal, the Respondent says that he had never heard of the Complainant or its subsidiaries before being contacted about the Name. Furthermore, the general lack of awareness in the UK of the Complainant's use of the name means that users of the Respondent's website would be highly unlikely to associate it in any way with the Complainant. The Panel sees almost no likelihood even of initial interest confusion on reading the domain name, and none at all of actual confusion once people have visited the Respondent's website.

- (v) the Respondent's business is not legitimate and the domain name is being used in bad faith to tarnish the Complainant's goodwill and reputation. The expert gave insufficient weight to the detriment that could be suffered by the Complainant because of the association with the Respondent's business. Indeed, the expert inferred wrongly that detriment would only be possible if the Respondent's activities were found to be illegal.

It has not been shown by the Complainant that the activities of the Complainant are illegal or that the Respondent has been prosecuted for illegal activities. The 'legal disclaimer' on the Respondent's website clearly exhorts its customers to stay within the law, claiming that seeds are sold as souvenirs, unless for use in jurisdictions where their cultivation is permitted.

It is clear to the Panel that the Respondent is carrying on a genuine business using the domain name. The actual legality of all the Respondent's activities (as with those of any other domain registrant) is of course a matter for the appropriate law enforcement authorities, not for this Panel.

Naturally, the Panel can sympathise with LMC's desire to avoid association with activities that people may object to, even if the activities are within the law. As stated elsewhere in this Decision, the Panel does not expect LMC to be associated with the business carried on by UK Skunkworks Ltd. It is LMC's choice of a skunk as emblem that is the source of possible unsavoury associations, since the skunk's strong smell has led to the term 'skunk' being applied to a strain of cannabis. As is shown by its inclusion in the 10<sup>th</sup> Edition of the Concise Oxford Dictionary (published in 1999), this usage clearly predates and is much wider than the Respondent's adoption of the name 'UK Skunkworks' for his business and subsequent registration of the domain name.

Whatever the finding of this Panel, dual usage of the term 'skunk' will persist. LMC's original use of the name 'skunk works' was humorous, and a sense of humour may be appropriate to this situation. There may be some comfort for LMC in the fact that many people have as little wish to be associated with military aircraft as have LMC to be associated with illegal drug use. The risk of 'contamination by association' therefore seems low.

Previous decisions under the DRS have shown that it is not necessary for a complainant to show real detriment in terms of evidence. The Panel agrees that evidence of real detriment is not always required for a complaint to succeed. However, in the current case not only is there no real detriment, but also the Panel takes the same view as the original expert, namely that detriment is exceedingly improbable as well as unintended by the registrant.

The Complaint cites a case in which Visa International succeeded in protecting its trade mark against unauthorised use to brand a make of condom. That case, of course, differs from the current one in several material respects. For example, the defendant in the Visa case imitated the well-known Visa logo, as if to take advantage of Visa's reputation, while in the current case there is no imitation at all.

Further, the Visa case dealt with a trade mark, not a domain name. The Panel agrees with decision in of the Appeal Panel in *Seiko UK Ltd v. Designer Time/Wanderweb* [2002] DRS 00248 in which it was stated:

“The question of trade mark infringement is, as both parties (and the Expert) agree, one for the courts to decide. The question of abusiveness is for the Expert to decide. The two jurisdictions co-exist alongside each other, and no doubt there will be considerable overlap. However, there may well be factual scenarios in which an abusive registration under the Policy would not be an infringement of trade mark under the 1994 Act, and where an infringement of trade mark under the 1994 Act would not be an abusive registration under the Policy. The safest course for parties and Experts is simply to address the terms of the Policy.”

(vi) the expert gave insufficient weight to the Complainant's rights.

Both the original expert and this Panel have recognised the Complainant's Rights. To succeed under Nominet's DRS it is however necessary to show Abusive Registration as well as Rights. Whatever weight is given to Rights, a complaint cannot succeed unless Abusive Registration is also established.

(vii) the list at paragraph 3 of the Policy of factors which may be evidence of an abusive registration is non-exhaustive.

The Panel agrees with this general assertion, but has not found other factors which are evidence of abusive registration.

(viii) the expert is wrong to conclude that the domain name is not 'virtually identical' to the name in which the Complainant asserts rights. Indeed, the domain name is so closely similar to the name in which the Complainant asserts rights that the burden of proof should shift to the Respondent to show that this is not an abusive registration. (The Complainant cites the decision in DRS 01056 relating to the domain name *generalmedicalcounsel.co.uk*.)

The 2003 case of *generalmedicalcounsel.co.uk* (DRS 01056) was decided under Version 1 of the DRS Policy which was in effect up to 24 October 2004. That case involved a criticism site. Version 1 of the DRS Policy, paragraph 4 set out how the respondent might demonstrate in its response that the domain name was not an abusive registration. In particular, Paragraph 4(b) provided that fair use might include sites operated solely in tribute or criticism of a person or business. It stated that if:

- “i the Domain Name was identical to the name in which the Complainant asserts rights, without any addition; and
- ii the Respondent is using the Domain Name for the purpose of a criticism site without the Complainant's authorisation

then the burden will shift to the Respondent to show that the Domain Name is not an abusive registration.”

Those considerations do not apply to the present case, which is to be determined under Version 2 of the DRS Policy (which no longer contains this reversal of the burden of proof) and in any case does not involve a 'tribute or criticism' site. The Panel finds that the Complainant's contentions citing the decision in the *generalmedicalcounsel.co.uk* case determined under Version 1

of the Policy are neither convincing nor supportive of the Complainant's case which must be decided in accordance with Version 2 of the Policy.

- (ix) The Respondent has not denied that he was aware of the Complainant's Rights, and has not explained why he chose the name (the Complainant cites DRS 03670, ukessays.co.uk).

In his Response to the Appeal, the Respondent disagrees that LMC's trademark "Skunk Works" is very well known, states that he had never heard of the Complainant or any of their subsidiary companies before being contacted with threats of legal action over the name, and refers to the dual meaning of "skunkworks" that he is entitled to draw on. The Panel agrees with the Respondent that LMC's trade mark is not very well known in the UK, and therefore accepts that on the balance of probabilities the Respondent was unaware of LMC's trade mark at the relevant time. As is discussed in more detail below, the Panel also accepts the dual meaning of "skunkworks". The Panel does not see the relevance to this case of DRS 03670, ukessays.co.uk. The outcome of that case depended on a close similarity between the Respondent's and the Complainant's websites. In the present case there is no similarity at all.

- (x) the expert placed unnecessary reliance on the absence of any connection between the Complainant's and the Respondent's respective businesses.

As stated earlier, this Appeal is a re-determination of the merits of the case by the Panel and it is not proposed to undertake a detailed analysis of the original expert's decision.

- (xi) the expert's conclusion that the domain name might be considered a 'whimsical reference' to the Respondent's business was unfounded and, even if correct, would not justify the choice of a domain name containing a name in which the Complainant has rights

The Panel finds it unnecessary to take a view about whether the reference to the Respondent's business in the domain name is 'whimsical'. More relevant is that the domain name does clearly refer to the Respondent's genuine business.

- (xii) the National Arbitration Forum decision in relation to ukskunkworks.com supports the Complainant's case that the domain name in the present dispute is an abusive registration. Other UDRP decisions and court decisions in trade mark disputes also support the Complainant's case.

For reasons set out earlier in this Decision, the Panel does not find the UDRP decisions supplied with this case persuasive. Their circumstances and conclusions differ so significantly from each other (as well as from the present case) that, taken together, they do not provide clear support for the Complainant.

Moreover, as recognised by the appeal panel in DRS 00248 Seiko UK Limited v Designer Time/Wanderweb, the UDRP and DRS Policy are different in their wording and approach. The question of bad faith which is essential in a UDRP decision is not an underlying consideration in the DRS Policy which is based on whether the domain name is an abusive registration and an analysis of "unfair advantage and unfair detriment".

*The Respondent*

The Respondent argues that

- (i) the scope of its business is completely unconnected with the scope of the Complainant's business.

The Panel agrees with the Respondent here.

- (ii) it has built up goodwill in a name identical or similar to the domain name.

The Panel notes that this assertion of the Respondent's is supported by little in the way of evidence. However, it is normal for a name change to be costly for a business, even if the business has existed only for a few years.

- (iii) the name in which the Complainant asserts rights ('Skunk Works') and the name in which it has rights ('UK Skunkworks Limited') are readily distinguishable.

The Panel agrees that the two names are readily distinguishable, particularly given the entirely different scopes of business involved. However, this view is compatible with the Panel's recognition of the Complainant's rights. The point has contributed to the Panel's judgement mainly by increasing its confidence in the Respondent's lack of interest in the Complainant.

- (iv) "skunkworks" has a dual meaning that the Respondent is entitled to draw on.

The Panel agrees that "skunk" has a generic meaning (indeed it appears to have two meanings – as a noun, "cannabis" and, as an adjective, "unofficial" – so that, in conjunction with "works", it refers to an unofficial research project) that the Respondent is entitled to draw on. The Respondent mentions as evidence of the generic use of "skunkworks" its occurrence in Bill Gates' autobiography, where Gates explains how he implemented skunkworks in Microsoft. Respondents to some of the UDRP cases supplied as evidence (for example D2004-0824 and D2005-0045) have made similar points, citing dictionary definitions of "skunk works".

The 10<sup>th</sup> Edition of the Concise Oxford Dictionary contains the following entry:

**skunkworks** pl.n. [usu. treated as sing.] *US informal* a small experimental laboratory or department of a company or institution. Origin: 1970s: allegedly from an association with the *Skunk Works*, an illegal still in the Li'l Abner comic strip.

The Panel's own experience confirms usage of this kind in a number of large companies of US origin, and the evidence supplied with the Complaint includes some helpful demonstrations of this point. For example, a *Time* article dated November 18, 1985 refers to business coaching sessions called Skunk Camp, while a general management article dated 1 November 2002 from *Global Cosmetic Industry* refers to the adoption of 'skunk works' practices (and sometimes the name) in many companies, 'to apply a special focus to product development projects'.

Through a social process, the term "skunk works" has clearly passed into general language.

The use of "skunk" to refer to a strong variety of cannabis is of course an entirely different usage (inspired by the smells involved), but equally has become common parlance in certain circles.

- (v) its use of the domain name is not part of a web traffic scam but is part of a genuine business.

Based on its examination of the Respondent's website, the Panel accepts this assertion.

- (vi) the Complainant has used its size, resources and financial position to employ "bullyboy" tactics against the Respondent which is a very small company.

The Respondent mentions "bullyboy tactics" by the Complainant. The Panel notes that Lockheed Martin Corporation has been zealous in its efforts to own domain names which are in any way similar to "skunk works", irrespective of the businesses pursued by other owners of such names, and without regard to the facts that (i) the term has passed into common language and (ii) awareness of LMC's usage of the term is far from universal, especially outside North America. But, having considered the submissions in the light of paragraph 16(d) of the Procedure, the Panel concludes that the Complainant is simply acting as it sees fit to protect its rights. Specifically, the Panel does not find that the complaint was brought in an attempt at reverse domain name hijacking, or otherwise in bad faith.

#### Conclusion on nature of registration

The Panel's view is that the Respondent registered the domain name to reflect its earlier registered business name, in the light of the use of the word "skunk" to mean "cannabis", and its now common coupling with the word "works". The Panel believes that neither the registration nor the use of the domain name has taken advantage of nor been detrimental to LMC's Rights in a similar name. Hence, the Panel agrees with the conclusion of the expert in the original decision, that the domain name in the hands of the Respondent is not an abusive registration.

#### **9. Decision**

The Appeal fails and the Panel directs that the domain name be left undisturbed.

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Claire Milne

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Veronica Bailey

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Mark de Brunner

Dated: 23 April 2007