

DISPUTE RESOLUTION SERVICE

DRS8774

Decision of Independent Expert

Health Professions Council

and

Mr Andrew Cheshire

1. The Parties:

Lead Complainant: Health Professions Council
184 Kennington Park Road
London
SE11 4BU
United Kingdom

Complainant: Mrs Jacqueline Ladds
Park House
184 Kennington Park Road
London
UK
SE11 4EU
United Kingdom

Respondent: Mr Andrew Cheshire
Greenside Road
Shepherd's Bush
London
W12 9JQ
United Kingdom

2. The Domain Name(s):

cpsm.org.uk

3. Procedural History:

The Complaint was submitted to Nominet on 12 July 2010. On 13 July 2010, Nominet validated the Complaint and notified it to the Respondent by post and email to the applicable addresses in the Nominet register database and also by email to postmaster@[the Domain Name]. The Respondent was informed in the notification that it had 15 working days, that is, until 3 August 2010 to file a response to the Complaint. The Respondent did not file a response to the Complaint and Nominet duly notified the Parties of this fact by post and email on 4 August 2010. In the absence of a response the case did not proceed to the mediation stage. On 5 August 2010 the Complainant paid the fee for referral of the matter for an expert decision pursuant to paragraph 8 of Nominet's Dispute Resolution Service Procedure Version 3 ("the Procedure") and paragraph 7 of the corresponding Dispute Resolution Service Policy Version 3 ("the Policy"). On 12 August 2010, 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 13 August 2010.

4. Factual Background

The Lead Complainant (referred to in this Decision as "the Complainant") is the Health Professions Council, a body corporate constituted by The Health Professions Order 2001, UK Statutory Instrument No. 254/2002. It is the statutory successor of The Council for Professions Supplementary to Medicine which was constituted by the Professions Supplementary to Medicine Act 1960. The principal function of the Complainant is to maintain a register of various health professionals such as, for example, occupational therapists and radiographers, to establish standards of education, training, conduct and performance for members of the relevant professions and to ensure the maintenance of those standards. The Council for Professions Supplementary to Medicine had similar responsibilities until its functions were transferred to the Complainant on 1 April 2002.

The Domain Name was originally registered to the Complainant and was used for an information website relating to the Complainant's statutory functions but the Complainant failed to renew it and it expired. The Respondent registered the Domain Name on 17 June 2009. After registration by the Respondent, the Domain Name pointed to a website which republished content taken from the Complainant's original website but with the addition of various hyperlinks for commercial websites. As at the date of this Decision, the website associated with the Domain Name gives rise on the Expert's web browser to an advisory provided by Google Inc. which states that the website is listed as 'suspicious' because several pages resulted in malicious software being 'downloaded and installed without user consent'.

5. Parties' Contentions

Complainant

The principal contentions in the Complaint may be summarised as follows. The Complainant contends that it has rights in the name CPSM by having succeeded to the rights of The Council for Professions Supplementary to Medicine, also known by its initials 'CPSM' from 1960 to 2002. The Complainant notes that the Domain Name was the home of the CPSM website for more than a decade and was used by the Complainant to redirect the public to its new website at www.hpc-uk.org from 2002.

The Complainant contends that the Domain Name is an Abusive Registration because the Respondent is using it to deceive and confuse Internet users. The Complainant asserts that the Respondent is displaying information on the associated website which is factually wrong and extremely confusing for the public. This information conveys the fact that the CPSM is still the regulatory body for the professions listed. It also contains a new addition of the term 'Psychotherapist' on the list of regulated professions which the Complainant submits is a clear deception as this profession was never regulated by the CPSM and is still not a regulated profession. The Complainant also notes that the website associated with the Domain Name has a hyperlink to the website of a private practice for psychotherapy, and a link to a site providing assistance with accident claims, and that as such the Respondent appears to be using the site for commercial purposes.

Respondent

The Respondent did not respond to the Complainant's contentions.

6. Discussions and Findings

Preliminary

The Respondent has failed to submit a response to Nominet in time in accordance with paragraph 5(a) of the Procedure.

Paragraph 15(b) of the Procedure provides *inter alia* that "If, in the absence of exceptional circumstances, a Party does not comply with any time period laid down in the Policy or this Procedure, the Expert will proceed to a Decision on the complaint."

Paragraph 15(c) of the Procedure provides that "If, in the absence of exceptional circumstances, a Party does not comply with any provision in the Policy or this Procedure or any request by us or the Expert, the Expert will draw such inferences from the Party's non compliance as he or she considers appropriate." In the view of the Expert, if the Respondent does not submit a Response the principal inference that can be drawn is that the Respondent has simply not availed himself of the opportunity to attempt to demonstrate that the Domain Name is not an Abusive Registration. This does not affect the primary requirement upon the Complainant, on whom the burden of proof rests, to demonstrate Abusive Registration, nor does it in the Expert's view

entitle an expert to accept as fact all uncontradicted assertions of the Complainant, irrespective of their merit.

General

In terms of paragraph 2(b) of the Policy the primary onus is on the Complainant to prove to the Expert on balance of probabilities each of the two elements set out in paragraph 2(a) of the Policy, namely that:

- (i) The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
- (ii) 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'. In the present case, the Complainant contends that its statutory predecessor was known by its initials CPSM from 1960 to 2002, that the Complainant inherited these rights and that it continued the use of the Domain Name which itself contains the same initials and had been employed by it and its predecessor for more than a decade in the promotion of their statutory functions.

There is no doubt in the Expert's mind that the Complainant inherited its statutory predecessor's functions; this is made clear by the transitional provisions laid out in the Statutory Instrument noted in the Factual Background section above. In these circumstances the Expert also accepts the Complainant's contention that the Complainant inherited any rights in the name CPSM possessed by its statutory predecessor. The Complainant has provided evidence that it continued to use the name CPSM, both in the Domain Name itself and in an associated logo which the Expert presumes was the logo of its statutory predecessor, from and after 2002, in order to assist the public with the transition of functions to the Complainant.

The expert in the case of *The Royal Horticultural Society v Mr Stephen Ballard*, DRS 3845, noted "Whilst the use of three initials as a name may not carry the same distinctive character as a made-up word, there is no reason why, with sufficient use, goodwill and reputation cannot be acquired in a specific field of business." The Expert agrees and considers that the same may be equally applied to the use of four or more initials. In the Expert's view the Complainant has demonstrated that it and its statutory predecessor have made sufficient use of the initials CPSM that it has acquired the requisite degree of goodwill and reputation such that it would be entitled to protect this by way of an action of passing off. In these circumstances the Expert

finds on the balance of probabilities that the Complainant has established that it has Rights in the name CPSM within the meaning of the Policy. Comparing that name to the Domain Name, and disregarding the top level domain '.uk' and the second level domain '.org' as is customary in cases under the Policy, the Expert finds that the Complainant has Rights in a name which is identical 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. 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 3 of the Policy which provides a non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration. These include paragraph 3(a)(ii):-

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

Paragraph 4 of the Policy provides a similar non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration.

In the present case paragraph 3(a)(ii) of the Policy describes almost exactly the use to which the Respondent has put the Domain Name. The Respondent has published a website which repeats the Complainant's original content but with some subtle additions which appear to be designed to further the Respondent's commercial interests. This will be highly confusing and misleading to members of the public who are searching for the Complainant's website with reference to the name of its statutory predecessor. The Complainant notes that when it was the registrant of the Domain Name it received considerable traffic to its new website from that source. This indicates that members of the public who arrived at the Domain Name were indeed looking for the Complainant's website. It is reasonable to conclude that the Respondent is now the beneficiary of similar levels of traffic from similar visitors to its website.

The Complainant has provided evidence that the Respondent has added a number of new hyperlinks to the original content including the link 'Accident Claims' and the term 'Psychotherapists' on the list of regulated professions. The Respondent has also linked the site to commercial websites which appear to offer related services. In the Expert's view this use of the Domain Name for republishing and manipulation of the content of the Complainant's original website is a dangerous abuse which would

undoubtedly lead to confusion on the part of the public and which, if allowed to remain in place, might possibly have more serious consequences.

In terms of paragraph 16(a) of the Procedure the Expert is entitled (but not obliged) to look at any website referred to in the Parties' submissions. Accordingly, the Expert visited the website associated with the Domain Name. When he did so, the warning message from Google was displayed as noted in the Factual Background section above indicating that malicious code had previously been downloaded via the site. That the public might not only be confused by the website at the Domain Name but might also download malicious code therefrom is a further indication of abusive use on the part of the Respondent.

In all of the above circumstances, the Expert has no hesitation in finding on the balance of probabilities that the Domain Name, in the hands of the Respondent, constitutes an Abusive Registration within the meaning of the Policy.

7. Decision

The Expert finds that the Complainant has proved that it has Rights in a name or mark which is identical 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 23 August, 2010
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