

Nominet UK Dispute Resolution Service

DRS 05006

QSoft Consulting Limited and Jolene Krapper

Decision of Independent Expert

1. Parties

Complainant: QSoft Consulting Limited
Address: 1 The Green
Richmond
Surrey
TW9 1PL
United Kingdom

Respondent: Jolene Krapper
Address: 54 Bexley Grove
Leeds
West Yorkshire
LS8 5NZ
United Kingdom

2. Domain Name

gaydarsexfactor.co.uk

3. Procedural Background

On 3 September 2007 the Complaint was lodged with Nominet. In accordance with the Dispute Resolution Service Policy hard copies of the Complaint were received in full on 4 September 2007.

On 4 September 2007 the Complaint documents were generated for service upon the Respondent.

On 26 September 2007 a Response was received. On 8 October 2007 a Reply was received from the Complainant.

On 14 December 2007 Mr Clive Thorne was selected as the expert. He has confirmed his independence and willingness to act.

The Expert has seen evidence that the necessary fees were received from the Complainant. There are no interlocutory or interim matters outstanding.

The Expert notes that this case was merged with Complaint's member 05037 and 05038 at request of the Complainant on 18 October 2007. However, on 23 November 2007 the cases were no longer merged. The Expert therefore proceeds to determine Complainant no. 05006 only.

4. Facts

The factual background is summarised in the Complaint. At Annex 3 to the Complaint the Complainant sets out the factual background to its rights. The Complainant's business was launched in November 1999 and has expanded rapidly to become a network of complementary new media brands including the worlds' leading gay and lesbian websites and the on-line digital radio station, GaydarRadio. The Complainant's business was co-founded and initially run by Mr Gary Frosch and Mr Henry Benhorst. Within a few months of beginning operations there were enough paying members of the dating service at gaydar.co.uk that the co-founders had to employ additional staff. Membership has since grown rapidly so that the network of websites operated by the Complainant now has over 3 million members in 23 territories worldwide.

The growth of the Complainant's business into a network of brands and websites which now serve more than 300,000,000 page impressions per month to over 3 million registered and audited users began in earnest in November 1999. In 2001, the Complainant added GaydarRadio to its business and in February 2002 the Sky service for GaydarRadio was launched.

According to Hitwise, the on-line competitive intelligence service, Gaydar.co.uk is now the UK's largest gay and lesbian dating website with 43.94% of the market in October 2006. In the period July to September 2006, www.gaydar.co.uk won the Hitwise no. 1 website and www.gayradio.com and www.gaydargirls.com were positioned within the Hitwise top 10 websites in the same period.

The Complainant owns a number of registered trade marks details of which are set out in Annex 1 to the Complaint. These include CTM registrations for GAYDAR, GAYDAR plus logo and GAYDARRADIO and logo. In particular, CTM registration no. 002127264 for the mark GAYDAR registered in classes 35, 38 and 42 was applied for on 13 March 2001 and registered on 9 January 2003.

The Complainant also has a group of relevant registered domain names a full schedule of which is set out at Annex 2 to the Complaint, including inter alia gaydar.co.uk, gaydar.com.au and gaydar.net.

GAYDAR is the Complainant's core brand and is used as a house mark together with words or elements to designate the Complainant's related services or sub-brands. Therefore the public is accustomed to seeing the GAYDAR mark both alone and in combination with other words or elements (for example GaydarGirls, GaydarRadio and Gaydarsexfactor). The Complainant asserts that the public associates the GAYDAR "family" of marks with the Complainant.

In particular, the Complainant asserts that Gaydarsexfactor which is used by the Complainant consists of the exact combination of words which makes up the disputed domain name. The Complainant has operated the annual "Gaydar Sex Factor" through GaydarRadio since December 2004. This competition has gained acclaim and popularity through GaydarRadio promotions and other

marketing campaigns in the Gay and Lesbian community around the UK and Republic of Ireland. Additionally, there is the Gaydar Sex Factor feature on Gaydar.com which encourages members to vote for the Gaydar Sex Factor top 10 list on a monthly basis. The Gaydar Sex Factor brand is now well known and recognised as being part of the Gaydar family of marks.

The Response is brief. Ms Jolene Krapper confirms that she is the registered owner of the domain name "gaydarsexfactor.co.uk". She denies that she is using the domain name to disrupt the Complainant's business in any way and that she has no involvement in any of the services offered by the Complainant which targets the gay and lesbian market place. She attaches the Wikipedia destination of Gaydar and appears to dispute that the Complainant has sole rights in the mark GAYDAR.

She also annexes a print of the website gaydar.com which also appears to offer gay related services in relation to men. She also annexes a print of the website "sexfactor.nl" showing ladies in sexually provocative positions.

5. Discussion and Findings

Under paragraph 2(a) of the DRS Policy a Complainant must show that:

1. The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and
2. The Domain Name, in the hands of the Respondent, is an Abusive Registration.

The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities. The Expert therefore proceeds to deal with each element in turn.

(i) The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name

The Expert has considered the evidence of registered and unregistered trade mark rights produced by the Complainant and referred to in 4 above. On the basis of that evidence he is satisfied that the Complainant has registered rights in the mark "GAYDAR" and unregistered trade mark rights in the mark "Gaydarsexfactor". It has acquired the unregistered rights through use of "Gaydarsexfactor" as evidenced in particular by Annex 14 and Annex 15 to the Complaint both of which consist of promotional use of "Gaydarsexfactor". Annex 14 consists of a promotion of the "Gaydarsexfactor Top 10" feature whilst Annex 15 is a print out from the Gaydar Radio website advertising the "Gaydarsexfactor" tour and competition together with advertisements and print outs from "Boyz" and "3sixty" magazine advertising the competition.

It is not entirely clear what points the Respondent is attempting to make in its Response with regard to the Complainant's rights. It refers to the Wikipedia definition of Gaydar as not making any reference to the Complainant. In the Expert's view this is immaterial once evidence is adduced by the Complainant as to its trade mark rights. The Respondent also adduces evidence of the website gaydar.com and sexfactor.nl and submits that neither appears to be connected to

the Complainant. The Expert's view is that this is also immaterial once evidence is before the Expert as to the Complainant's trade mark rights.

Having found that the Complainant has rights in respect of the marks "GAYDAR" and GAYDARSEXFACTOR it is necessary for the Expert to decide whether these marks are identical or similar to the domain name.

The disputed domain name is "gaydarsexfactor.co.uk". This is identical to the mark GAYDARSEXFACTOR. Even if the Expert was wrong and the Complainant did not have trade mark rights in "gaydarsexfactor" (and it has no registered rights in Gaydarsexfactor) the Expert would still find that the domain name in dispute is similar to the Complainant's registered mark "GAYDAR". This is because in the Expert's view the phrase "sexfactor" is essentially descriptive and qualified by the non-descriptive element of the mark "GAYDAR".

Accordingly, the Expert finds that the Complainant has rights in respect of a name or mark which is identical or similar to the domain name in dispute.

(ii) The Domain Name, in the hands of the Respondent is an Abusive Registration

"Abusive Registration" is defined in paragraph 1 of the DRS Policy as meaning a domain name which either:

- (1) 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
- (2) Has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainant's rights.

At paragraph 3 of the DRS Policy is set out a non-exhaustive list of factors which may evidence that the domain name is an Abusive Registration.

These are as follows:

Paragraph 3(a)(i)

Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily;

- A for the purpose 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;

Paragraph 3(a)(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;

Paragraph 3(a)(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;

Paragraph 3(a)(iv)

It is independently verified that the Respondent has given false contact details to (Nominet);

The Complainant relies upon paragraphs 3(a)(i), 3(a)(ii), 3(a)(iii) and 3(a)(iv) to support its contentions.

Paragraph 3(a)(i)

A The Complainant submits that the Respondent is not using the disputed domain in connection with a bona fide offer of goods and services. Rather it submits that the disputed domain name resolves to a site run by a connected party which offers the disputed domain name for sale. It refers to a letter dated 9 February 2006 from its solicitors Olswang to APN Limited giving notice that the Complainant has recently become aware APN Limited has registered a number of domain names including gaydarsexfactor.net. The letter sought to recover the domain names by paying the Respondent its official fees. This offer was rejected.

The Complainant relies upon this as evidence that the domain name was registered for the purpose of being transferred for valuable consideration in excess of the Respondent's out of pocket costs. That letter was sent to APN Limited. The Respondent Jolene Krapper denies any connection with All Points North Publications Limited or APN Ltd. This is disputed by the Complainant in its Reply pointing out that the Registrant i.e. Jolene Krapper has responded to other DRS Complaints filed at Nominet in relation to the domains gaydarthree.co.uk and gaydarshot.co.uk. These domain names are registered in the name of "APN Limited" or "All Points North Publications Limited". In the Expert's view the Complainant rightly points out that if the Registrant was not in any way connected to All Points North Publications Limited she would not have had the capacity to respond to those other complaints. The Expert is satisfied there is a connection between the Complainant and the two companies.

B The Complainant submits that the Respondent has registered domain names where the principal and distinctive elements of the disputed domain name are identical to "Gaydar" and "Gaydarsexfactor" and that

this constitutes a blocking registration. This has the effect of preventing the Complainant from registering domains which to a mark in which the Complainant has rights. The Respondent is therefore using the disputed domain name to unfairly disrupt the Complainant's business and to prevent the Complainant from registering or making fair or legitimate use of the disputed domain name.

This element of the Complaint receives no more than a denial in the Response where the Respondent states that she is "not using this domain to disrupt the Complainant's business in any way". She denies any involvement or beneficial interest in any of the services offered by the Complainant.

- C. The Complainant asserts that given the date of registration of the disputed domain name i.e. subsequent to the acquisition of rights by the Complainant, the nature of the businesses for the Complainant, the combination of the Complainant's marks and the use of the word GAYDAR it is inconceivable that the Respondent was not aware of the Complainant's rights. Additionally, it points out that it is inconceivable that the Respondent given its association with the connected parties i.e. APN Limited and All Points North Publications Limited and their involvement in businesses which target the gay and lesbian market places, the Respondent must have been aware that the disputed domain name would or could operate in competition with the Complainant's business based around the Gaydar marks. It submits that this is a bad faith attempt to attract internet users of the Complainant's domain names and services.

The Expert finds considerable force in submissions B and C which are supported by the evidence. It also takes the view that the Respondent's response to these submissions are inadequate and contrary to the evidence.

Taking all the above factors into account, the Expert finds evidence of an abusive registration within the factors set out in paragraph 3(a)(i) of the PRS Policy.

Paragraph 3(a)(ii)

The Complainant submits that the Respondent is using the disputed domain name in a way which will confuse people and businesses into mistakenly believing the disputed domain name is registered operated and authorised or used under licence from or otherwise connected to the Complainant. It submits that such confusion will result from similarity of the marks and the disputed domain name. It also relies upon the confusing links linking similar or identical goods or services to the business of the Complainant, the similarity of the target market and the reputation and success of the marks. It points out the Complainant suffers direct damage as a result of the Respondent's activities.

In the Expert's view there is force in these submissions which are supported by the evidence adduced by the Complainant. The Expert therefore finds that the Complainant has succeeded in proving an

abusive registration within the factors set out in paragraph 3(a)(ii) of the DRS Policy.

Paragraph 3(a)(iii)

The Complainant submits that it is clear from the registration of the domain name and nature of the domain names registered by the connected parties to the Respondents that it is a prolific cyber squatter registering domain names which are well known trade marks in which the Respondent has no apparent rights. It asserts that the Respondent has engaged in this pattern of activity over a sustained period since the disputed domain names were registered between 2002 and 2005. The Expert accepts this submission based upon the evidence of the filings of the domain names gaydarfree.co.uk, nowgaydar.co.uk, gaydarlinks.co.uk and gaydarshop.co.uk. These are currently the subject of complaints; numbers DRS 05038 and DRS 05037. In the Expert's view, based upon the evidence submitted by the Complainant they are registered by connected parties to the Respondent i.e. APN Limited and All Points North Publications Limited. Supporting evidence is set out in the Whois searches exhibited to the Reply.

It follows that the Expert has found abusive registration within the definition of paragraph 1 of the DRS Policy. It follows that the Complainant has succeeded in proving its Complaint.

6. Decision

The Complainant has requested that the disputed Domain Name should be transferred from the Respondent to the Complainant. Accordingly, the Expert orders that the Domain Name "gaydarsexfactor.co.uk" be transferred from the Respondent to the Complainant.

Clive Duncan Thorne
Expert

20 December 2007