

Nominet UK Dispute Resolution Service

DRS No. 5421

The Dr Marilyn Glenville Clinic v. Digital Assets Inc

Decision of Independent Expert

1 Parties

Complainant: The Dr Marilyn Glenville Clinic LLP and Dr Marilyn Glenville
Address: 14 St Johns Road
Tunbridge Wells
Kent
Postcode: TN4 9NP
Country: GB

Respondent: Digital Assets Inc
Address: Unit 2982c
34 Eglinton Avenue West
Toronto
Ontario
Postcode: M4R 2H6
Country: CA

2 Domain Name

<marilynglenville.co.uk> (the "Domain Name")

3 Procedural Background

The Complaint entered Nominet's system on 30 January 2008. Hard copies of the Complaint were received by Nominet on 31 January 2008. The Complaint was validated and sent to the Respondent on 1 February 2008. No response was received within the deadline for response of 26 February 2008 and therefore no response was forwarded to the Complainants. Mediation not being possible and the Complainants having paid the relevant fee, the Complaint was referred to me. I confirmed that I was not aware of any reason why I could not act as an Independent Expert in this case and I was appointed as such on 12 March 2008.

4 Outstanding Formal/Procedural Issues (if any)

4.1 On reviewing the case file it became apparent to me that there were a number of issues with the way in which the Complainants had put their case. First, it was unclear who exactly the Complainants were in this case. The Complaint was initially issued in the name of "The Dr Marilyn Glenville Clinic" and the Complaint included the statement "The complainant has right to the domain name because it is not registered at Companies House in the name of The Dr Marilyn Glenville Clinic LLP and has been since 13.10.05". The assertion here is somewhat garbled but appeared to constitute a claim that "it" (i.e. the name relied upon) was "The Dr Marilyn Glenville Clinic" and that it was the LLP (i.e. the Limited Liability Partnership) in that name that had brought the proceedings. However, later in the Complaint was to be found the assertion that "It is the personal name of the complainant and has been since birth". Presumably the "it" in this sentence intended to refer to the name "Marilyn Glenville" and this seemed to suggest that proceedings had been brought by Dr Marilyn Glenville herself.

4.2 In fact, it seemed moderately clear from the material submitted with the Complainant that regardless of whoever was exactly the intended "complainant", the LLP was the

entity through which Dr Glenville now conducted at least her clinical activities, and that for the purposes of this Complaint they could probably be treated as one and the same entity. Nevertheless, they are as a matter of law different entities and it was preferable that exactly who was the complainant or complainants in this case be clarified.

- 4.3 Second, and far more important, was the fact that there was a fundamental gap in the way in which the Complainants had put their case. Whilst extensive evidence was submitted as to the scope of the Complainants activities, no evidence whatsoever was provided as to how exactly the Domain Name had been used. As is explained later on in this decision in greater detail, there was an assertion that the Domain Name had been used by the respondent “in a way which already has confused people into thinking that [it] was controlled by [Dr Glenville]”, but no explanation was given as to what was meant by this nor any evidence of how the Domain Name was being used.
- 4.4 Arguably on that basis alone the Complaint should have failed. Paragraph 2(b) of the Dispute Resolution Policy (the “Policy”) states that it is for a complainant to prove both elements of paragraph 2(a) of the Policy and the second element to be proved is that the Domain Name in the hands of the Respondent is abusive. It is hard to see how a complainant can satisfy that burden of proof (even perhaps in a case where the circumstances set out in *Chivas Brothers Limited -v- David William Plenderleith* DRS 00292 might be said to be present) if the complainant does not even describe in the most basic fashion how the domain name has been (or has not been) used.
- 4.5 However, when I looked at the web page then operating from the Domain Name, it appeared to me that the Domain Name was being used for the purposes of a “domain name parking service”. What exactly this involves is something that is explained in greater detail later on in this decision. Nevertheless, it seemed to me that there was a good chance that it was this sort of usage about which complaint was being made.
- 4.6 Therefore, on 19 March 2008 I issued a procedural order (the “Procedural Order”) to which a copy of the web page operating from the Domain Name was attached. The full text of the Procedural Order was as follows:

“I have reviewed the Complaint submitted in this matter. Having done so I note the following:

(i) It is unclear whether the Complainant in these proceedings is The Dr Marilyn Glenville Clinic LLP or Dr Marilyn Glenville (or both).

(ii) The Complainant alleges that the Domain Name has been used in a way which has led to confusion, but no description or evidence is provided by the Complainant as to nature of this alleged confusing use.

(iii) It is a complainant that bears the burden under Nominet’s Dispute Resolution Policy of proving the registration or use of a domain name is abusive. A mere assertion on the part of a complainant that a domain name has been used in a confusing manner without further evidence in support will usually be insufficient to satisfy that burden and may result in the complainant’s failure.

However, I also note that the Domain Name currently resolves to a web page which takes the form attached. It may be this sort of use upon which the Complainant relies.

In the circumstances, I make the following order (pursuant to paragraphs 12 and 13 of the Dispute Resolution Procedure):

1. *The Complainant should by no later than 6pm on 26 March 2008 submit (by email to drs@nominet.org.uk) a further statement in which it should:*
 - (a) *clarify whether these proceedings have been brought by The Dr Marilyn Glenville Clinic LLP or Dr Marilyn Glenville (or both); and*
 - (b) *provide a proper description of, and evidence of, the use of the Domain Name by the Respondent upon which the Complainant relies for the purposes of these proceedings.*
2. *The Respondent can, if it so wishes, by no later than 6pm on 28 March 2008, submit (by email to drs@nominet.org.uk) a further statement that is limited to the issues raised in any statement submitted by the Complainant under paragraph 1 of this order (including the admissibility of the Complainant's statement in these proceedings).*
3. *Any statement pursuant to paragraphs 1 or 2 of this order should identify a named individual who is responsible for the content of that statement and include a sentence as follows:*

"The information contained in this statement is to the best of [insert name of individual responsible for the statement]'s knowledge true and complete".
4. *Time for provision of a decision in this case shall be extended until 1 April 2008."*

- 4.7 On 26 March 2008, the Complainants filed a further submission that took the form of an email. In that email the Complainants confirmed that the Complaint had been brought by both The Dr Marilyn Glenville Clinic LLP and Dr Marilyn Glenville and this decision proceeds on this basis.
- 4.8 Further, in the email the Complainants also make a number of statements about the content and nature of the website operating from the Domain Name. These statements are set out in greater detail under the heading of the Complainants' submissions below. Whilst this is not quite expressly asserted, it appears to me that this email proceeds on the assumption that the Complainants do indeed complain about the use by the Respondent of the Domain Name in the manner and form attached to the Procedural Order.
- 4.9 The Respondent has not sought to argue that this further submission by the Complainants should not be considered in these proceedings (notwithstanding the fact that it was provided with an express opportunity to do so under paragraph 2 of the Procedural Order). In the circumstances, this decision again proceeds on the assumption that I can and should take this additional material into account.
- 4.10 It is worth noting, however, that in this case I exercised the powers granted to me under paragraph 13 of the Dispute Resolution Service Procedure (the "Procedure") to call for further submissions and documents from the parties. Experts have a broad discretion whether or not to exercise these powers in a particular case and are not obliged to do so. Given paragraph 2(b) of the Policy clearly places the burden of proof in proceedings under the Policy on a Complainant, other experts might in similar circumstances have been less willing to call for such evidence.

5 The Facts

- 5.1 As has already been described, the Complainants are (i) The Dr Marilyn Glenville Clinic LLP a limited liability partnership registered with Companies House in the United Kingdom in October 2005; and (ii) Dr Marilyn Glenville.
- 5.2 Dr Marilyn Glenville is a nutritional therapist and chartered psychologist and specialises in “nutritional health for women”. She has been trading for 25 years and operates a health clinic in Tunbridge Wells. Since October 2005, Dr Glenville has undertaken a large part (if not all) of her trading activities through The Dr Marilyn Glenville Clinic LLP.
- 5.3 The Complainants (or one of them) also operates a web site in respect of their activities from the domain name <marilynglenville.com>.
- 5.4 The Respondent appears to be a corporation with an address in Canada.
- 5.5 The Domain Name was registered on 30 April 2007 in the name of the Respondent (by whom it continues to be held). At the some point prior to the date of the Procedural Order, the Domain Name was linked to a web page that bears all the tell tale signs of having been generated by a domain name parking service. In particular, the web page has the title “marilynglenville.co.uk” in the top left hand corner and underneath is to be found the sub-heading “what you need when you need it”. Whilst the exact form of the page displayed changes from time to time, in all cases there is to be found underneath these headings lists of “related searches” and “popular categories” with links with such names as “Menopause”, “Osteoporosis”, “Sleep Apnea”, “Bloating”, “Anus Castus” and “Lose Weight”. When these links are clicked upon they take the internet user to further web pages that provide a number of “sponsored links” to various commercial websites.
- 5.6 The domain name parking pages continue to operate at the date of this decision.

6 The Parties’ Contentions

Complainants

- 6.1 The Complainants seek transfer of the registration of the Domain Name to the Complainants, on the grounds that it is identical or similar to a name or mark in which the Complainants have Rights and that the registration of the Domain Name in the name of the Respondent is an Abusive Registration.
- 6.2 The Complaint attaches evidence of the Dr Glenville activities. These include the publication of papers in professional journals and a number of books, such as “*The New Natural Alternatives to HRT*”, which appear to be aimed at a somewhat wider public. This last publication is described as “an international bestseller” and is said to have sold “over 250,000 copies” worldwide. According to material on the website operating from the Claimants own “marilynglenville.com” domain name (copies of which were attached to the Complaint), Dr Glenville has featured widely in various daily newspapers and magazines in the UK and has achieved a fair degree of coverage on television and radio. Copies of two magazine articles and a Sunday Express newspaper article in which Dr Glenville is featured are also appended to the Complaint.
- 6.3 The Complainants sole assertion in the original Complaint as to abusive registration was as follows:

marilynglenville.co.uk has been used by the respondent in a way which already has confused people into thinking that it was controlled by me. We have received

several complaints from customers who have searched for us and gone to this site in error.”

- 6.4 However, in a further email submitted in response to the Procedural Order the Complainants asserted as follows:

We have received complaints from customers who have come across the site marilyn-glenville.co.uk in error and have found it to be confusing and misleading, as the site's content does not have anything to do with the company or Dr Glenville which we feel has a negative effect on our business. The site also uses links in connection with health that are the same as those used on marilyn-glenville.com again appearing as though it is connected with Dr Glenville in some way. Once clicking on these links it takes you to other sites and products that are in no way linked to anything that Dr Glenville or her company would endorse. We feel that the site is misleading as it is using Dr Glenville's name but does not reflect anything to do with her or the company. We feel that for these reasons the site is being used in a confusing manner as there is no valid reason for them to be using the name Marilyn Glenville.

- 6.5 No further evidence or details of these alleged “complaints” are provided.

Respondent

- 6.6 The Respondent served no Response in these proceedings.

7 Discussion and Findings:

General

- 7.1 To succeed under the Nominet Dispute Resolution Service Policy (the "Policy"), the Complainant must prove on the balance of probabilities, first, that it has Rights in respect of a "name or mark" that is identical or similar to the Domain Name (paragraphs 2(a)(i) of the Policy) and secondly, that the Domain Name is an Abusive Registration in the hands of the Respondent (paragraph 2(a)(ii) of the Policy).

- 7.2 Abusive Registration is defined in paragraph 1 of the Policy in the following terms:

“Abusive Registration means 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.”

- 7.3 The failure by the Respondent to file submissions in response does not entitle the Complainant to the equivalent of a default judgment on these issues. The Complainant still has to make out its case on the balance of probabilities under the Policy to obtain the decision it wants.

Complainants' Rights

- 7.4 The Complainants do not appear to own any registered trade marks but it is not necessary for a Complainant to have a registered trade mark to have rights under the Policy. It has frequently been held that where a complainant has sufficient goodwill in England associated with a name that would permit it to bring proceedings under the English law of passing off, that is adequate to provide sufficient trade mark rights for the purposes of the Policy.

- 7.5 In the present case, the Complainants have maintained, and gone some way to demonstrating, (and it is not contested by the Respondent) that Dr Marilyn Glenville has acquired a strong reputation as a health expert in the UK over the past 25 years. It also seems clear that for at least two years The Dr Marilyn Glenville Clinic LLP has traded under the name "The Dr Marilyn Glenville Clinic" (and may well be the successor in business to a business carried on in that name by Dr Glenville prior to that date).
- 7.6 In the circumstances, I have little hesitation in concluding that Dr Glenville (and probably The Dr Marilyn Glenville Clinic LLP) has rights recognised for the purposes of the Policy in the name "Dr Marilyn Glenville". This is a name that is similar to the Domain Name and accordingly the Complainants have satisfied the requirements of paragraphs 2(a)(i) of the Policy.

Abusive Registration

- 7.7 Paragraph 3 of the Policy provides a non-exhaustive list of factors that may be evidence that a domain name registration is an Abusive Registration. The Claimants do not expressly refer to any of those factors in their Complaint but in substance appear to be making reference to paragraph 3(a)(ii) of the Policy. This refers to:

"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".

- 7.8 The Respondent has not put in a Response or otherwise attempted to give reasons as to why he has registered the Domain Name. However, it seems clear from the nature of the website operating from the Domain Name that the Respondent is attempting to obtain "click-through" revenue by using the Domain Name in conjunction with a "domain name parking" service. The way in which these services operate was briefly explained in the case of *The Royal Bank of Scotland Group Plc v John Wilfred* [2006] DRS 03952. In this case the expert stated:

"This website looks to be one of the increasingly popular "domain name parking" type websites which work by paying the owner of the domain name a fee every time the website is accessed. As the Complainant says it is likely that customers or prospective customers of the Complainant will visit this website in error because it contains the Complainant's name "RBS" and because of its similarity to one of the Complainant's actual domain names, rbs-online.co.uk. It follows that the Domain Name is likely to attract a relatively high volume of traffic and will consequently earn the Respondent a good income."

- 7.9 There is nothing per se abusive in using a domain name parking service to generate "click-through" revenue. However, it is quite a different matter to seek financial gain either for oneself or a third party by choosing and using a domain name that incorporates the name or mark of another business with a view to drawing traffic to a domain name parking service web page. Such activity has been found to be abusive in a number of cases under the Policy including *The Royal Bank of Scotland Group Plc v John Wilfred* [2006] DRS 03952 and *Newbury Building Society v Webster* [2006] DRS 3967.
- 7.10 I also have little doubt that it was with the Complainants' business and activities in mind that the Domain Name has been registered and used in this case. The Domain Name can only be sensibly understood as the names "Marilyn" and "Glenville" in combination and that combination strikes me as a relatively unusual one and (in the absence of any evidence to the contrary) can only sensibly be said to refer to the Complainant's business. Further, there was the existence of the Complainants' own

website from the domain name "marilyn-glenville.com". The Respondent would not have been obliged to check the corresponding ".com" domain name to the Domain Name, but in the absence of an explanation from the Respondent as to how and why it chose the Domain Name, it seems unlikely that it would not have done so.

- 7.11 Lastly, there is the appearance on the domain name parking pages of links connected in one way or another with women's health. The links that appear on a domain name parking service page are usually generated automatically by the domain name parking service. However, it does not follow from this that the content of those links cannot constitute evidence that a respondent was aware of the activities of a complainant. The reason is that many if not most domain name parking services allow a registrant to identify certain "key words" or "meta tags" when parking a domain name. That choice of "key words" will influence the links that appear on the page, and it is clearly in the interests of the registrant to try and make those links as relevant as possible to those who are likely to have typed the domain name into their browser. The more relevant the links, the more likely that the internet user will click on them and the greater the revenue, the registrant will receive.
- 7.12 Therefore, in the absence of an explanation and evidence to the contrary, it will frequently be possible to infer from the content of the links on a domain name parking page that the registrant was aware of the existence of the Complainant, even if the registrant did not directly choose any of the specific links displayed. This is particularly so in a case, such as the current one, where there is otherwise no obvious connection between the words to be found in a domain name and the links displayed. The names "Marilyn" and "Glenville" either separately or in combination do not of themselves suggest a connection with women's health and yet many links of this sort appear on the parking page.
- 7.13 The Complainants contentions regarding confusion are admittedly a little difficult to follow and on one reading can even be seen as contradictory. Nevertheless, the Complainants seem to be alleging that because the web-pages contain links that are health related, then internet users will think that the site is in some manner connected with the Complainants. I am doubtful whether this is really the case. The style and structure of these web pages are such that it strikes me as unlikely that any person reaching this page would think that the page was endorsed or controlled by the Complainants. Also, whilst the Complainants seem to refer to specific customers who are alleged to have been confused, it is noticeable that no further evidence is offered in support of this contention (notwithstanding the request for evidence in the Procedural Order).
- 7.14 However, I do not think that this matters. The fact that an internet user is likely to type in the Domain Name thinking that this is a Domain Name operated or authorised by the Complainants and will bring him or her to a site operated by the Complainants is sufficient. This "initial interest confusion", even if it is dispelled once the internet user reaches a website, is sufficient confusion for the purposes of paragraph 3(a)(ii) of the Policy, provided that the registrant has registered or is using the domain name with the intention of taking advantage of such confusion so as to draw users to the website.
- 7.15 I therefore find that the Complainant has made out a case of Abusive Registration pursuant to paragraph 2(a)(ii) of the Policy.

8 Decision

- 8.1 I find that the Complainants has Rights in the "Dr Marilyn Glenville" name, which is identical or similar to the Domain Name, and that the Domain Name, in the hands of the Respondent, is an Abusive Registration.
- 8.2 It is not quite clear as to which of the Complainants the Complainants wish the Domain Name to be transferred. However, it would appear that since October 2005

a large part of commercial activities of Dr Marilyn Glenville have been conducted through The Dr Marilyn Glenville Clinic LLP. In the circumstances (and in the absence of the Complainants designating pursuant to paragraph 3(b)(iii) of the Procedure the entity to which the Domain Name should be transferred), I determine that the Domain Name should be transferred to The Dr Marilyn Glenville Clinic LLP.

Matthew Harris

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1 April 2008