

Nominet UK Dispute Resolution Service

DRS 10075

Philosophy Inc.

v

Velvet Enterprises Limited

Decision of Appeal Panel

Dated: 10 January, 2012

1. Parties:

Complainant:

Philosophy Inc.

3809 East Watkins Street
Phoenix
Arizona
85034
USA

Respondent/Appellant:

Velvet Enterprises Limited

12A York House
York House Place
London W8 4EY
UK

In this decision, for simplicity's sake, Philosophy Inc. is referred to as "the Complainant" and Velvet Enterprises Limited as "the Respondent".

2. Domain Name in dispute:

<philosophy.co.uk>

This domain name is referred to below as the "the Domain Name"

3. Procedural Background:

The Complaint was received by Nominet on 14 July, 2011 and notified to the Respondent on 20 July, 2011. Nothing having been heard from the Respondent, a reminder was sent to the Respondent on 8 August, 2011, but no Response was received (in

time or at all). The Complainant having paid the appropriate fee, on 23 August, 2011 the Expert was appointed to provide a summary decision pursuant to paragraphs 5(d) and 5(e) of version 3 of Nominet's *Dispute Resolution Service Procedure* ("the Procedure"). The decision was issued by the Expert on 16 September, 2011. The decision was issued to the parties by Nominet on 19 September, 2011. On 3 October, 2011 the Respondent notified Nominet of its intention to appeal and paid the requisite £300 deposit. 24 October, 2011 was set as the date by which Nominet should receive the Appeal Notice and the balance of the Appeal fee. Nominet received the Appeal Notice at 23:56 on 24 October, 2011, but did not receive the balance of the Appeal fee until 25 October, 2011 a few minutes after the deadline.

Detailed correspondence ensued between Nominet and the parties over whether the Appeal Notice was admissible. For reasons which will become apparent, it is unnecessary for the Panel to consider that correspondence in any detail, save to record that a retroactive extension of time is required by the Respondent if the Appeal is to be entertained and that Nominet has left it to the Panel to decide whether or not that extension of time should be granted.

Nominet awarded the Complainant an extension of time until 15 November, 2011 within which to file the Appeal Response. The Appeal Response (erroneously dated 15 September, 2011) was received by Nominet on 15 November, 2011.

Further correspondence ensued and the matters raised therein are dealt with below.

On 21 November, 2011 Tony Willoughby, Anna Carboni and Philip Roberts were appointed to the Appeal Panel

Tony Willoughby, Anna Carboni and Philip Roberts (the undersigned, "the Panel") have each individually confirmed to the Nominet Dispute Resolution Service that:

"I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of a such a nature as to call in to question my independence in the eyes of one or both of the parties."

This is an Appeal against a Decision at first instance in favour of the Complainant. The Panel was appointed to provide a decision on or before 11 January, 2012. This process is governed by version 3 of the Procedure and the Decision is made in accordance with version 3 of the *Dispute Resolution Service Policy* ("the Policy").¹ Both of these documents are available for inspection on the Nominet website at:

<http://www.nominet.org.uk/disputes/drs/policyandprocedure>.

¹ Version 3 of each of the Policy and the Procedure apply to all disputes filed on or after 29 July 2008, regardless of the date of registration of the domain name concerned.

Following receipt of the papers in this case, it came to the Panel's attention that the Respondent was incorporated two years after the Domain Name was registered and could not therefore have been the original registrant as the Appeal Notice seemed to indicate. On 19 December, 2011 the Panel issued a Request for Further Information from the Respondent. The Respondent was requested to inform the Panel of the circumstances under which the Domain Name was acquired by the Respondent, the circumstances under which it was acquired, from whom and on what date.

The Respondent replied to that Request on 29 December, 2011. The response went into a number of matters going well beyond the scope of the Request. The only information provided within the scope of the Request was that the Domain Name was purchased by the Respondent in April, 2008 through Sedo.com for the sum of £10,000.

The Complainant responded to that submission on 6 January, 2012 and did not dispute the information provided by the Respondent as to the circumstances of purchase.

The Complainant correctly observes that these submissions are in large part irrelevant to the issue as to whether or not the Respondent's use of the Domain Name has been abusive. Nonetheless, the Panel has read both submissions in full to ensure that any erroneous factual impressions gained from the Appeal Notice are corrected.

4. The Nature of This Appeal:

Paragraph 10(a) of the Policy provides that: *"the appeal panel will consider appeals on the basis of a full review of the matter and may review procedural matters"*. The Panel concludes that insofar as an appeal involves matters other than purely procedural complaints the appeal should proceed as a re-determination on the merits. The decision under appeal was a summary decision given without reasons, so the Panel is in any event effectively starting with a clean sheet.

In addition to the decision under appeal, the Panel has read the Complaint dated 14 July, 2011 (with annexes), the Appeal Notice (unsigned version) filed on 24 October, 2011, the Appeal Notice (signed version) filed on 14 November, 2011, the Appeal Response filed on 15 November, 2011 and the additional submissions and correspondence referred to above.

5. Formal and Procedural Issues:

Issues arise from the following undisputed facts:

1. The Respondent failed to respond to the Complaint within the time specified by paragraph 5 of the Procedure, or at any stage prior to the Decision.
2. The Appeal Notice puts before the Appeal Panel facts and matters which were not before the Expert.
3. The balance of the Appeal fee was received by Nominet on 25 October, 2011 about 4 minutes out of time.
4. The signed version of the Appeal Notice was not received until 14 November, 2011, 3 weeks out of time.

The Nominet DRS is a procedure which is intended to provide a fast and relatively low-cost resolution of domain name disputes. If an 'innocent' respondent fails to respond, necessarily such a respondent is immediately at a disadvantage. This is because the Expert has only 'heard one side of the story' and the Expert is entitled to draw inferences from the failure to respond (paragraph 15(c) of the Procedure), which may well be adverse to the respondent.

There is an argument for the proposition that respondents who fail to respond should not be permitted to appeal. Not least, the complainant is put to unnecessary additional expense dealing with an appeal, which might not have ensued if the matter had been put fully before the expert.

However, paragraph 5(f) of the Procedure explicitly provides that:

"f. If the Expert grants the Complainant's application for a summary decision ... the normal procedures as to ... appeal, under paragraph 18, shall apply."

Moreover appeals in such situations have been entertained in the past (e.g. DRS Case No. 5861 <greengiant.co.uk>).

The Complainant correctly observes that paragraph 18(f) of the Procedure provides that an Appeal Notice *"should contain no new evidence or annexes"*. However, the Procedure recognises that this may nonetheless occur because paragraph 18(h) provides that *"The appeal panel should not normally take into consideration any new evidence presented in an appeal notice or appeal notice response, unless they believe that it is in the interests of justice to do so."*

Were the Appeal Panel to decline to look at the facts and matters set out in the Appeal Notice, the Appeal would almost certainly fail, as there is nothing to weigh in the balance against the matters raised in the Complaint. In the view of the Panel, the Expert had little alternative on the evidence before him but to decide the case as he did.

In this case the basic facts are not in dispute. The potentially relevant new matters raised are that the Respondent claims to have been unaware of the existence of the Complainant prior to

receipt of the Complaint, that the offending links appearing on the Respondent's parking page were placed there by a third party and without the Respondent's knowledge and that, even if the Respondent had been made aware of the offending links at an earlier stage, there was nothing about those links to alert the Respondent to the fact that they might be causing offence to anyone.

These further contentions have not added significantly to the paperwork and have not called for any significant extra work from the Complainant. They do, however, raise issues which the Panel believes ought in the interests of justice to be considered.

A more fundamental question is whether this Appeal should be entertained at all, given the failure of the Respondent to comply with the time limits set down by the Procedure. Time limits are important. If the Policy and the Procedure are to provide the desired swift and efficient alternative to litigation, time limits need to be adhered to.

The Respondent's representative's excuse for failing to adhere to the time limits raises a number of questions, but the Panel sees no merit in exploring that aspect any further. The fact of the matter is that the failure to comply was in substance relatively trivial, although the subsequent correspondence has led to a delay of several weeks.

The Panel concludes that in all the circumstances of this case, as a matter of natural justice, it would be unjust for this Appeal not to proceed on the basis of all the materials now before the Panel.

6. The Facts:

The Complainant is the proprietor of the PHILOSOPHY brand of cosmetic products, which it claims to have launched in the UK in 2006. It has produced substantial evidence of UK promotional effort from about 2008 leading to a significant level of media coverage.

The Complainant is the registered proprietor of various trade mark registrations featuring the name "Philosophy", the earliest of which are Community Trade Mark registration no. 002736155 filed on 14 June, 2002 (registered 3 January 2007) PHILOSOPHY (word) in classes 3, 35 and 44 for various goods and services relating to the sale of cosmetic and other related goods and UK Trade Mark registration no. 2303208 filed on 19 June, 2002 (registered 27 October 2006) PHILOSOPHY (word) in the same classes for a similar range of goods and services.

The Domain Name was registered on 5 March, 1997 and since at least September 2005 it has been in continuous use to generate pay-per-click ("PPC") revenue. However, the Respondent did not acquire the Domain Name until April 2008. The Respondent acquired it for the sum of £10,000.

Between September 2005 and today the advertising links appearing on the PPC parking pages connected to the Domain Name have varied. The evidence of use of the Domain Name is largely based upon pages cached at the Internet Archive Wayback Machine (www.archive.org/web/web.php). The Panel understands that, while the fixed elements of those pages will accurately reflect the appearance of the page at the date identified, the variable elements of the page, such as the advertising links, may well not reflect the links as at that date.

Nonetheless, it is not in dispute that the nature of the links on the pages to which the Domain Name has been connected has been influenced by the growing exposure and reputation of the Complainant's brand, such that a high proportion of the links related to that brand or competing products.

At some stage following receipt of the Complaint the Respondent blocked the PPC feed providing the links to cosmetics-related websites. Currently, the Domain Name does not appear to resolve to an active website.

7. The Parties' Contentions:

The Complainant

The Complainant contends that its PHILOSOPHY trade mark is identical to the Domain Name.

It further contends that the Domain Name in the hands of the Respondent is an Abusive Registration in that:

- (a) the Respondent is and has been using the Domain Name in a way that is likely to have confused people or businesses into believing that the Domain Name is registered to, operated or authorised by or otherwise connected with the Complainant; and
- (b) the Domain Name was primarily registered for the purposes of unfairly disrupting the business of the Complainant;

The Complainant contends that there can be no justification for using the Domain Name for a website relating to beauty and skincare products, which are not those of the Complainant.

The Complainant contends that it is plain that the Domain Name has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's rights and that the decision of the Expert was correct and should be upheld by the Appeal Panel.

The Respondent

The Respondent failed to respond to the Complaint, but contends by way of its Appeal Notice as follows:

- (a) its failure to respond to the Complaint was an accidental oversight;
- (b) the Domain Name was registered because of its "*obvious and overwhelming generic and descriptive meaning*";
- (c) it has been in continuous use since it was first registered on 5 March 1997;

- (d) the Respondent had no knowledge of the Complainant and its products until it received a copy of the Complaint;
- (e) the Respondent is the registrant of a large number of generic domain names and *"we develop revenue generating websites on our domains that legitimately capitalise on their generic meanings"*;
- (f) the Respondent's plan for the Domain Name is to develop a site for it, but that plan has to take its turn, the Respondent's priorities lying elsewhere, and in the interim the Respondent has placed the Domain Name with a parking provider *"to generate PPC revenue from its inherently attractive generic nature"*;
- (g) the Respondent has no connection with the cosmetics industry and has never had any abusive intent toward the Complainant.

The Respondent accepts that the Complainant has limited rights in respect of the word "philosophy", but not such as to afford it a monopoly in the word.

The Respondent denies that it registered the Domain Name in order to block the Complainant. It points out that the Domain Name was first registered long before the Complainant acquired any rights in respect of "philosophy".

It contends that the sole basis for the Complaint is the fact that the parking page featured cosmetics-related links, a fact of which it was unaware until it received the Complaint. It asserts that if the Complainant had drawn this to the Respondent's attention, it would have blocked those links, which it says it is now doing.

The Respondent states that it does not control the content of the PPC feed, which is provided by the Respondent's parking company.

The Respondent draws attention to the Appeal Panel decision in the <oasis.co.uk> case (DRS 6365) and points to the fact that *"parking results can be manipulated (legitimately or otherwise) by a number of factors outside the control of the registrant – including purchasing of a term by a company, its distributors or its competitors"*. It is convenient to note here that the Complainant expressly denies having purchased "philosophy.co.uk" as a metatag or as a keyword in paid advertising.

The Respondent asserts that *"Abusive Registration of this domain requires more than merely inadvertent appearance of adverts for cosmetics on our PPC feed, which we were unaware of and which we will now take steps to block"*.

8. Discussion and Findings:

The factual background to the reasoning below is to be found in section 6 above.

General

In order for the Complainant to succeed it must (pursuant to Paragraph 2 of the Policy) prove to the Panel, on the balance of probabilities, **both** that:

*It has Rights in respect of a name or mark which is identical or similar to the Domain Name; **and***

the Domain Name, in the hands of the Respondent, is an Abusive Registration as defined in Paragraph 1 of the Policy.

The meaning of 'Rights' is clarified and defined in the Policy in the following terms:

Rights means rights enforceable by the Complainants, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning;

There is no dispute between the parties that the Complainant has trade mark rights in respect of the mark "philosophy" in relation to cosmetics and related goods and services.

Accordingly, the Panel finds that the Complainant has rights in respect of a mark which (absent the generic '.co.uk' suffix) is identical to the Domain Name.

It remains therefore for the Panel to determine whether the Domain Name, in the hands of the Respondent, is an Abusive Registration.

An Abusive Registration is defined in the Policy as follows:

Abusive Registration means a Domain Name which either:

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 Complainants' Rights; OR

has been used in a manner which took unfair advantage of or was unfairly detrimental to the Complainants' Rights;

On the face of the Appeal Notice the impression given was that the Respondent registered/acquired the Domain Name prior to the Complainant's brand coming into existence. Had this appeal proceeded on that basis, the Panel would have found that, to the extent that the Complainant contends that the Respondent registered the Domain Name with any form of abusive intent directed at the Complainant, the contention had to be incorrect. However, as a result of the Panel's enquiry, the Respondent has belatedly disclosed that it acquired the Domain Name nearly two years after the claimed launch of the Complainant's PHILOSOPHY brand. So the chronology now renders such a contention viable.

In the Appeal Decision in DRS 4331 (<verbatim.co.uk>) the members of this Panel set out their views on the approach to be

taken in relation to 'knowledge' and 'intent' in DRS complaints. The Panel remains of the view that:²

'knowledge' and 'intention' are pre-requisites for a successful complaint under all heads of paragraph 3(a)(i) of the Policy. The wording of that paragraph expressly calls for the relevant intent, which cannot exist without the relevant knowledge."

and that:

"when a Respondent denies all knowledge of the Complainant and/or its Rights at the relevant time, that denial is not necessarily the end of the matter. The credibility of that denial will be scrutinised carefully in order to discern whether, on the balance of probabilities, the relevant degree of knowledge or awareness was present."

The factors which seem to the Panel arguably supportive of the Complainant's contention that the Respondent registered the Domain Name with a view to riding on the back of the fame of the Complainant's brand are the following:

1. The Respondent acquired the Domain Name in 2008 at a time when the Complainant was undertaking a substantial promotional campaign (see section 6 above). The timing may not have been coincidental.
2. The Respondent paid £10,000 for the Domain Name, which is indicative of a domain name of high value and that value could have stemmed to a degree from the fame or expected fame of the Complainant's brand.
3. One might have expected the Respondent to have investigated the prior usage of the Domain Name to verify the source of the £10,000 value and, while one cannot be certain of the links then appearing on the PPC parking page connected to the Domain Name, it seems likely to the Panel that some of the links would have been cosmetics-related.
4. From the Complainant's exhibits it appears that at some date between January 2006 and November 2008 the style and content of the Respondent's parking page changed, albeit remaining a PPC parking page, and it could have changed following the Respondent's acquisition of the Domain Name.³

² DRS 4331, paragraph 8.13(2) and (5).

³ The Panel notes that, while the latest submission from the Complainant purports to annex pages from intervening dates in 2007 and 2008, the dates in the title bars and footers for the resultant printouts all refer to 11 January 2006.

5. The fact that the Respondent claims to have acquired the Domain Name with the intention of developing a website for it appropriate to its dictionary meaning, but has not yet, over three years later, got around to developing the site.

However, the Respondent denies that it was aware of the Complainant or its brand prior to receipt of the Complaint and there is no evidentiary support before the Panel that the Complainant's brand was well-known prior to 2008. The Panel is unable to make a finding on the evidence before it that the Complainant's brand was so well-known at that stage that the Respondent must have been aware of it. Indeed, the members of the Panel were unaware of the existence of the brand prior to receipt of the papers in this case. Moreover, it may be that at April 2008 (the date of acquisition of the Domain Name by the Respondent) the PPC parking page links to cosmetics-related sites were not so prominent as to alert the Respondent to the existence of the brand, even if the Respondent had investigated the position.

As to the value of the Domain Name, it is well-known that dictionary words tend to have a high value irrespective of any potential secondary meaning. As to the apparent change of style of the parking page, there is insufficient evidence before the Panel to conclude that (a) it occurred after the Respondent's acquisition of the Domain Name and (b) the motivation was sinister. As to the delay in developing the planned website, there is nothing to counter the Respondent's explanation for that delay, namely other priorities.

Since the Panel is not persuaded that the circumstances of the Respondent's original acquisition of the Domain Name point to it being an Abusive Registration, the case turns on the nature and circumstances of the use that the Respondent has made of the Domain Name since acquiring it in April 2008.

The Respondent is correct in pointing out that the only basis for complaint centres on the PPC links generated on the Respondent's parking page since the Complainant's brand achieved prominence.

The PPC parking page with sponsored listings relating to cosmetics depicted in the 14 July, 2011 screenshot presented by the Complainant is, taken at face value, a compelling indication of the use of the Domain Name in a manner which has taken advantage of and been detrimental to the Complainant's rights. There is no dispute between the parties that the Respondent's income generated from the PPC feed to the parking page will have been influenced to an increasing degree by the fame of the Complainant's brand. Nor, in the view of the Panel, can there be any dispute that to the extent that the Respondent's parking page has pointed visitors to the Complainant's competitors, that will have been detrimental to the Complainant's business and therefore its rights.

However that is the beginning rather than the end of the analysis. The determination of whether a Domain Name is an Abusive Registration in the hands of the Respondent is a balancing exercise which takes into account a number of different considerations. This is why paragraphs 3 and 4 of the Policy set out non-exhaustive lists of factors which may be evidence that the Domain Name is (para 3) or is not (para 4) an Abusive Registration.

As the Panel sees it, there are two further questions to be answered: First, is the Respondent to be held responsible for the content of the parking page? Secondly, if the answer to that question is in the affirmative, are there any countervailing considerations to be taken into account which indicate that the Domain Name is not an Abusive Registration? The Panel addresses those questions in turn.

(1) Is the Respondent to be held responsible for the content of the parking pages to which the Domain Name has been connected since April 2008?

The Panel cannot be certain as to the PPC links in place at April 2008, given the vicissitudes associated with the WayBack Machine, which is the source of the only evidence on the topic (the printouts from which do not with any certainty show the parking page as it stood between January 2006 and November 2008). However, the Panel is ready to accept that the links will have been a mix, some relating to the Complainant's brand, Philosophy, and cosmetics generally and some relating to philosophy.

As at the date of the Complaint the content of the page was predominantly cosmetics-related, some of it referring to the Complainant's brand and much of it referring to the goods and services of the Complainant's competitors.

For the purposes of this decision, the Panel is prepared to accept the following three points:

- a. that the provision of the content of the parking page was left, as the Respondent claims, to the company employed by the Respondent for that purpose;
- b. that as the Complainant's brand achieved recognition in the UK in the course of 2008 and 2009, the goods and services featured in the sponsored listings on the Respondent's parking page will have gradually converged on the Complainant's area of activity, that being the usual way in which the revenue maximising algorithms underlying PPC parking pages operate; and
- c. that until the Complaint was received, the Respondent was unaware of the existence of the Complainant and was also unaware that the content of the parking page was of concern to the Complainant.

However, in relation to the last point, the Panel does not regard the Respondent's ignorance alone as sufficient to let it off the hook for the *prima facie* abusive PPC use. Those using domain names for commercial gain must be taken to have knowledge of how their domain names are being used and how their commercial gain is being achieved.

If the Respondent is to be believed, being an entity familiar with the workings of PPC algorithms it will have anticipated that the content of its site would be related to the "*obvious and overwhelming generic and descriptive meaning*" of the word, "philosophy". At some stage over the last three years, had it visited the site the Respondent would immediately have been alerted to the fact that Philosophy was a brand name for a range of cosmetic products.

The Respondent purports to disagree: "*Without knowledge of the Complainant, even if we had noticed the feed content (which we did not), we would have had no reason to be concerned about the content of the site, much less about adverts relating to cosmetics appearing.*"

On the balance of probabilities the Panel does not regard this as a credible stance. The fact that all the main links were cosmetics-related would have been enough to raise the question and the answer to the question would have been obvious given the presence on the site of links such as "Philosophy Skin Care Products", "Amazing Grace by Philosophy".

Clearly, somebody has to take responsibility for the content of the site and the domain name owner deriving no doubt the bulk of the commercial gain generated by that content is the prime contender. Indeed, Paragraph 4(e)(iii) of the Policy makes the point, namely "*that the use of the Domain Name is ultimately the Respondent's responsibility*".

In its Appeal Notice the Respondent states "*we do not control the content of the PPC feed*". While that may indeed be the case, it can clearly block the feed as elsewhere the Respondent states "*now that we know about them we will block such adverts appearing*". Given that the Panel has been unable to access any website associated with the Domain Name, it seems that the Respondent has indeed blocked the feed.

The Panel finds that in circumstances such as these where a domain name registrant is generating revenue from use of a domain name (and the Panel surmises that a domain name featuring a common dictionary word such as "philosophy" is likely to attract a large number of visitors and commensurate revenue), the registrant is to be taken to know how that revenue is being generated. The Respondent itself describes the Domain Name as "valuable" and the Panel agrees with the Complainant that of late that value will have resided to a significant degree in the links provided on the back of the fame of the Complainant's brand.

Thus, at some stage over the last 3 years the Respondent ought to have known that to a significant degree it was earning enhanced PPC revenue on the back of the fame of the Complainant's Philosophy brand.

On the basis of that imputed knowledge the Panel answers the first question in the affirmative. The Respondent has been responsible for the content of the parking pages which - as the Panel has found above - is such as to indicate that the Domain Name has been used in a manner which has taken advantage of and has been detrimental to the Complainant's Rights.

(2) Are there any countervailing considerations to be taken into account indicating that the Domain Name is not an Abusive Registration?

Another way of putting this question is to ask whether the advantage to the Respondent and the detriment to the Complainant that have both been found to be likely to have resulted from the use of the Domain Name, may nevertheless not be "unfair" notwithstanding the knowledge and responsibility that the Respondent has been held to have for the parking pages.

While the Panel has found that the Respondent ought to have known of the Complainant's brand, the Panel is prepared to accept that the Respondent may well not have had actual knowledge of the brand until it received the Complaint. As mentioned above, the members of the Panel were themselves not previously aware of the existence of the Complainant's brand. While it is now clearly a well-established brand in its field, Philosophy is not a mark with either the inherent distinctiveness or the huge renown of, for example, Coca-Cola or Kodak.

Does the absence of actual knowledge matter? On the particular facts of this case the Panel considers that it does. For this purpose the Panel considers that, on the balance of probabilities, the following findings of fact are made out on the materials before the Panel:

1. In 1997 an unidentified entity (not the Respondent) registered the Domain Name, an ordinary dictionary word, for no obviously objectionable purpose.
2. From at least as early as September 2005 the Domain Name has been connected to PPC parking pages. The algorithm used to provide the links would originally have focused on the generic meaning of the word. In the early days it had no meaning other than as a dictionary word.
3. In 2006 the Complainant launched its Philosophy brand in the UK and started building up goodwill in respect of the mark Philosophy in relation to cosmetics and related products.
4. The Respondent acquired the Domain Name in April 2008 for £10,000.
5. Pending creation of a website the Respondent placed the Domain Name in the hands of a parking page company which connected the Domain Name to a parking page generating PPC revenue.

6. As the fame of the Complainant's brand developed, the parking page algorithm will have begun to feed more and more links to the parking page influenced by the existence of the Complainant's brand. By at least mid-2011 all the main links were cosmetics-related, most of them being to sites relating to products of the Complainant's competitors. The Respondent refers to the <oasis.co.uk> appeal decision and to the fact that it may be possible for a brand owner to manipulate links on a parking page, but no evidence has been put before the Panel to suggest that that has been done here and the Complainant has issued an express denial.
7. When the Complainant became aware of the Respondent's website it did not send the Respondent a warning letter.
8. The Respondent did not have actual knowledge of the Complainant nor was it aware of the Complainant's cause for concern until receipt of the Complaint in this proceeding.
9. At some stage following receipt of the Complaint, the Respondent blocked the feed to its website. The Respondent says that it would have done so on receipt of a warning letter from the Complainant.
10. The cause for complaint (apart from the bare fact that the Domain Name remains registered in the name of the Respondent) has now ceased.

The Panel has found that the PPC revenue parking page is a compelling indication that the Domain Name has been used in a manner which has taken advantage of and has been detrimental to the Complainant's rights. The Panel has also found that the Respondent cannot simply evade responsibility on the basis that it was not in fact aware of the content of the parking page to which the Domain Name was connected. However, the following facts must be weighed in the balance: the Domain Name essentially comprises an ordinary dictionary word which is capable of a wide variety of lawful uses, which do not in any sense cut across the Complainant's rights; it was registered innocently by reference to its generic meaning; and it has only come to have a different connotation by virtue of the subsequent rise to prominence of the Complainant. These are the kinds of considerations covered by paragraph 4(a)(ii) of the Policy.

If the Complainant had sent the Respondent a warning letter and the Respondent had immediately blocked the feed and replaced the links with links generated on the back of the dictionary meaning of the word, it is quite possible that this Complaint would have failed unless there was reason to believe that the Respondent had intentionally targeted the Complainant and/or could not be trusted to stay away from the cosmetics arena.

In the Panel's view, the position that the parties are currently in is similar.

Taking into account all of the considerations set out above, the Panel believes that in the particular circumstances of this case the advantage and detriment that might be said to have been gained and suffered by the Respondent and Complainant respectively as a result of the use of the Domain Name cannot be said to have been *unfairly* gained and suffered. Further, when balancing the competing considerations, the Panel has reached the conclusion that it would be wrong to deprive the Respondent of the Domain Name, which is likely to be a domain name of inherent value distinct from the existence of the Complainant's cosmetics brand. Accordingly, the Domain Name is not to be regarded as an Abusive Registration in the hands of the Respondent.

The particular circumstances of this case which have led the Panel to allow this Appeal are:

1. The Respondent has no adverse track record in relation to domain names. It is the proprietor of <gambling.co.uk> which appears to resolve to a genuine gambling website.
2. 'Philosophy' is an ordinary dictionary word and the Panel accepts that the Respondent was probably not in fact aware of the Complainant's brand until it received the Complaint.
3. The Respondent appears to have blocked the feed bringing in the objectionable advertising links as soon as the problem was brought to its attention. In so saying the Panel acknowledges that there will have been something of a delay until the significance of the Complaint was drawn to the Respondent's attention.
4. There is nothing before the Panel to suggest that the Respondent will revert to the objectionable links.

In summary, the activity complained of was likely to have been inadvertent (as the Respondent contends) and the situation was rectified with reasonable promptitude.

If, however, the Panel is mistaken in taking this line, it will become apparent when the offending links reappear. In that event, it may well be that a re-filed complaint would be entertained.

One final matter arises by way of postscript. Paragraph 16(d) of the Procedure provides that if the Panel *"finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking, the [Panel] shall state this finding in the Decision."* In the highly unusual procedural context of this Complaint, which was caused and then exacerbated by the Respondent's repeated failures to comply with the Procedure, the Panel wishes formally to record its view that not only was the Complaint brought in good faith, but it is a matter of some regret that the Procedure does not make provision for the Complainant to be compensated for the additional expense to which it has been put as a consequence.

9. **Decision**

The Appeal is allowed. No action is called for in relation to the Domain Name. In so finding, the Panel reiterates that it had before it relevant information that was not before the Expert.

Anna Carboni

Tony Willoughby

Philip Roberts

Dated: 10 January, 2012