

DISPUTE RESOLUTION SERVICE

D00019829

Decision of Independent Expert

ELEVATIONE

and

Elevatione UK

1. The Parties:

Complainant: ELEVATIONE
222 Regent Street
London
W1B5TR
United Kingdom

Respondent: Elevatione UK
210 Great Portland Street
Concord
W1W 5BQ
United Kingdom

2. The Domain Name(s):

elevatione.uk (the disputed domain)

3. Procedural History:

I can confirm 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.

06 February 2018 13:36 Dispute received
06 February 2018 15:24 Complaint validated
06 February 2018 15:43 Notification of complaint sent to parties
23 February 2018 01:30 Response reminder sent
28 February 2018 10:27 No Response Received
28 February 2018 10:28 Notification of no response sent to parties
12 March 2018 01:30 Summary/full fee reminder sent
15 March 2018 09:29 Expert decision payment received

4. Factual Background

4.1 The substantive content of the complaint in this dispute is a mere two paragraphs which in total contain just over 100 words. It is the shortest complaint I have seen. There is no response. For simplicity, rather than attempt to summarise the facts, I shall reproduce the operative part of the complaint in full:

What rights are you asserting?

We Elevatione Time Stops own the trademark Elevatione as well as the only license to sell skin care products using the Salvador Dali name, and the content such as the melting clock. This website elevatione.uk is blatantly ripping off our name, selling our products (or similar products) and offering treatments utilizing our name, without permission from our brand.

Why is the domain name an Abusive Registration?

The domain is misrepresenting our brand, acting as a member of our own, using our logo, content, name, and product images and descriptions. They are not a representative of our brand. We are the sole owners of www.elevatione.com and elevatione.co.uk and this domain is being challenged as violating our trademark and doing so intentionally to misrepresent the brand when in fact they are not the brand.

4.2 I have done a little additional research to enable me to understand the content of the complaint. Attached to the complaint are two documents. The first is a copy of the EUIPO registration certificate for trade mark no. 012611216 ELEVATIONE in Class 3 of the EU Trade Marks Register for a variety of personal and skin care products. The registration certificate says that the mark was registered on 11 July 2014 and gives the name and address of the proprietor as Erez Zabari, Carmel 66A, 7630558, REHOVOT, Israel. No information has been provided to link the complainant as named in the complaint or the organisation “Elevatione Time Stops” named in the text above to Erez Zabari. Despite this, I presume for the purposes of this decision that Mr Zabari is in fact associated with the complainant and has authorised it to use the trade mark ELEVATIONE and the domain elevatione.com as, according to the

ICANN WHOIS, he is the registrant of that domain. Curiously, the registrant of elevatione.co.uk is named on the Nominet WHOIS as RE4MA Limited which has an address at a serviced office in Oxford Street. Elevatione.co.uk, however, resolves to elevatione.com so I must presume that the two domains are under common control.

4.3 The second document attached to the complaint is a letter on the headed notepaper of a firm of advocates and notaries in Tel Aviv, Firon & Co. The letter is signed by Dr Sarah Presenti, who is according to the legal directory, *Legal 500*, a member of the firm. The letter states that the writer is legal counsel to V S Marketing (2005) Ltd. The writer confirms that V S Marketing is the owner of the intellectual property rights to merchandize the individual paintings of the work of Salvador Dali titled “el triomf i el rodoli de la Gala i en Dali” and is fully entitled and authorized to grant exclusive licenses with respect to the merchandising of such intellectual property rights and the use thereof in connection with different products including cosmetics. The letter does not state that the complainant (or anyone else) has in fact been granted such rights. Nor does it explain how such rights relate, if they do, to the name ELEVATIONE. I am therefore left entirely in the dark about its relevance to the present dispute.

4.4 The respondent has not answered the complaint. The registrant of the disputed domain is shown in the Nominet WHOIS as “Elevatione UK” of type “unknown” and the result notes that Nominet has not been able to verify the registrant’s name and address against a third party source.

4.5 The disputed domain resolves to a website hosted on the domain smoothyou.co.uk which offers primarily the services of beauty parlours in Dalston, Great Portland Street and Kensington and through which Elevatione Time Stop beauty products are being offered. There is nothing on the website to lead to the conclusion that those products are anything other than genuine products produced by or for the complainant. On the contrary, the terms of the complaint suggest that this is precisely what they are. On the home page of the website there is a quotation said to be from Salvador Dali: “Time is not a constant. It can be manipulated, stretched, stopped or even reversed.” That quotation does not to my mind suggest either that Salvador Dali’s estate has authorised the use of the quotation or that the website is in any way commercially associated with the producers of the products which are offered for sale through the website. It is simply a retailer.

4.6 The above, then, is the totality of the information on which I am expected to determine the present dispute. I find it extraordinary that the complainant appears not to have taken the trouble either to find out what the DRS requires nor even to explain coherently the nature of its complaint. However, I shall do my best to work out what the complaint is about and determine it accordingly.

4.7 Finally, I note for completeness that the corporate or other nature or status of the parties is unclear. I simply assume for the purposes of this decision that they are legally recognised entities of some kind as it does not seem to me to make any difference to my determination whether they are or are simply trading names or styles for something which is.

5. Parties' Contentions

5.1 The complainant's complaint appears to be that it is the owner of the trade mark ELEVATIONE for personal care products and that the respondent is presenting itself as a franchisee offering those products for sale. There does not appear to be an allegation that the respondent is offering counterfeit products. If such an allegation is intended, it is both unparticularised (no products have been identified) and unsupported by any evidence. The high prices of the products on the smoothyou.co.uk website are such as to suggest that these are genuine luxury products.

5.2 I have found the reference in the complaint to "offering treatments utilizing our name" impossible to follow. The treatments being offered on the smoothyou.co.uk website are offered under the branding Smooth You Beauty Centres and Smooth You Town Spa. These names are not the subject of the complaint. The name ELEVATIONE is used only on the products offered through the online store. As noted above, those appear to be genuine products.

5.3 I shall therefore proceed on the basis that the only ground of complaint is that the disputed domain is being used so as to indicate that it is owned or operated by the complainant or an associated entity, contrary to the fact.

6. Discussions and Findings

The DRS Policy

6.1 The DRS Policy applicable to this dispute is Version 4 in force since 1 October 2016. Paragraph 1 defines an 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) is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant’s Rights”.

In the same paragraph Rights are defined as:

“rights, enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning”.

6.2 Paragraph 2 of the DRS Policy provides as follows:

“2 Dispute to which the DRS applies

2.1 A Respondent must submit to proceedings under the DRS if a Complainant asserts to us, according to the Policy, that:

2.1.1 The Complainant has Rights in respect of a name or mark which is identical or similar to the Domain Name; and

2.1.2 The Domain name, in the hands of the Respondent, is an Abusive Registration.

2.2 The Complainant is required to prove to the Expert that both elements are present on the balance of probabilities.”

6.3 Paragraph 5 of the DRS Policy contains a non-exhaustive list of factors which may be evidence that a domain name is an Abusive Registration. They include:

“5.1.2 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 by, or otherwise connected with the Complainant.”

This appears to me to be the only factor which is relevant to the present dispute. The commonly made allegations that a domain has been registered as a blocking registration or in order unfairly to disrupt the business of the complainant or to sell the domain to the complainant do not appear to relate to the factual allegations made in the complaint.

Rights

6.4 The first question in any DRS dispute is whether the complainant has “Rights” as defined by the DRS Policy. This is a threshold test and readily satisfied. Such rights include rights to a registered trade mark. On the assumption that the trade mark registration certificate supplied with the complaint relates to the complainant, which assumption I make for the purposes of this decision, the complainant passes this threshold test. If my assumption is wrong, then the absence of Rights would provide a further basis for the conclusion I have reached.

Abusive Registration

6.5 The complaint says that “the website elevatione.uk is blatantly ripping off our name”, “misrepresenting our brand”, “acting as a member of our own, using our logo, content, name and product images and descriptions. They are not a representative of our brand”. What does this mean? A retailer is entitled to use the logo, images and product descriptions created by the manufacturer of the products he sells. He must by implication at least have a licence to do so in order to promote the products. Only if he goes beyond this and represents in some way that he is an authorised or franchised dealer in the products who has a commercial relationship with the manufacturer going beyond merely dealing in the manufacturer’s products can it be said that he is “acting as a member of our own” or falsely presenting himself as “a representative” of the manufacturer’s brand.

6.6 In order for the present complaint to succeed under the DRS, the complainant would have to establish on the balance of probabilities that the way in which the respondent is using the disputed domain is such as to be likely to confuse the public into thinking that the website hosted on the smoothyou.co.uk website is “registered to, operated by or otherwise connected with” the complainant. Bearing in mind the analysis in the preceding paragraph, it seems to me that this requires the complainant to show that the respondent’s use of the disputed domain is such as to lead the public to think that the smoothyou.co.uk website is a franchised or

authorised reseller of ELEVATIONE TIME STOP products with whom the manufacturer is commercially associated.

6.7 I can see nothing on the way in which that site appears or behaves when accessed by typing in the disputed domain to indicate to any reasonable internet user that the site is in some way commercially associated with the manufacturer of the ELEVATIONE TIME STOP products which are offered for sale through it. As I have explained above, the site appears to be primarily one offering the services of beauty parlours or salons which also sells a range of beauty products. If one were to arrive at the site other than by directly typing in the disputed domain, there could in my view be no reason to think that the site was connected with the manufacturer of the products offered for sale. It is simply a retail site through which they may be purchased. Thus, if one were to search for the name ELEVATIONE TIME STOP and obtain the smoothyou.co.uk website as a result, that would simply be because that site sells those products, just as, for example, currys.co.uk sells Panasonic electronics products and will come up as a search result for Panasonic or Panasonic products.

6.8 The question I have to decide, therefore, is whether the fact that directly typing in the domain name elevatione.uk and having it resolve to the website at smoothyou.co.uk would lead a reasonable internet user to the opposite conclusion. Looking at the matter purely analytically, by asking the question whether this fact alone would make a reasonable person think that there is a trade connection, when faced with a website which on its face has no connection with ELEVATIONE other than being a retailer of ELEVATIONE TIME STOP beauty products, it seems to me that the answer to this question must be no.

6.9 Were there evidence that people have in fact been so confused, such as complaints or queries directed to the complainant that arose from the activities of the respondent, it might be possible to conclude that there is a real likelihood of confusion which has led to confusion occurring. In the absence of such evidence, however, there is no basis for a conclusion that confusion of the public is likely. I should also point out that any such evidence would need to be scrutinised with considerable care as a few anecdotal instances may not be representative of the behaviour of the general public.

6.10 Accordingly, it seems to me that, on the very limited and unsupported assertions set out in the complaint, and notwithstanding the assumption that I have made in the complainant's favour concerning its

identity and ownership of Rights, there is no justification for concluding that the disputed domain is an Abusive Registration.

7. Decision

I determine that the domain elevatione.uk is not an Abusive Registration. I therefore dismiss the complaint and direct that no action is taken in relation to the domain elevatione.uk.

Signed

Dated 20 March 2018