

DISPUTE RESOLUTION SERVICE

D00013955

Decision of Independent Expert

Geoff Monk and Associates t/a Mountain Weather
Information Service

and

Mr Andy Ross

1. The Parties:

Lead Complainant: Geoff Monk and Associates t/a Mountain Weather
Information Service
The Weather Centre
Laurieston
Castle Douglas
Kirks
DG7 2PW
United Kingdom

Complainant: Mr Roland Chaplain
An Sealladh
Balmaclellan
Castle Douglas
Kirks.
DG7 3QE
United Kingdom

Respondent: Mr Andy Ross
20 Park Road
Blackridge
West Lothian
EH48 3SX
United Kingdom

2. The Domain Name(s):

mwis.org.uk

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.

19 March 2014 16:36 Dispute received
20 March 2014 09:41 Complaint validated
20 March 2014 09:47 Notification of complaint sent to parties
08 April 2014 02:30 Response reminder sent
09 April 2014 16:19 Response received
09 April 2014 16:19 Notification of response sent to parties
14 April 2014 02:30 Reply reminder sent
17 April 2014 08:02 Reply received
17 April 2014 08:15 Notification of reply sent to parties
17 April 2014 08:15 Mediator appointed
24 April 2014 11:24 Mediation started
14 May 2014 10:09 Mediation failed
14 May 2014 10:53 Close of mediation documents sent
19 May 2014 11:54 Expert decision payment received

4. Factual Background

From the submissions and evidence submitted by the parties, I find the following facts for the purposes of this decision:

- i. The Lead Complainant had worked as a research scientist and forecaster for the Met Office for some 25 years before joining a private weather forecasting business in Scotland in 1999.
- ii. The Lead Complainant set up the Mountain Weather Information Service ("MWIS") in around 2002 or 2003 so as to provide enhanced weather forecasts in Scotland with a view to improving mountain safety (the "MWIS undertaking").
- iii. Since then, the MWIS undertaking has produced 2 page downloadable pdf weather forecasts.
- iv. The MWIS undertaking was envisaged as a non-profit making enterprise that would seek public funding as well as private sponsorship.
- v. Forecasts for the MWIS undertaking are provided by volunteers, who invest a good deal of time so as to produce their forecasts.

- vi. The MWIS undertaking then makes these forecasts available to the general public by a website which uses the Domain Name (the “MWIS website”).
- vii. However, being a voluntary enterprise, there was no formal structure to regulate the activities or organisation of the MWIS undertaking and there appear to have been no formal, written contracts in place between the Lead Complainant and the various volunteer forecasters, or between the Lead Complainant and the Respondent in particular.
- viii. This means that the MWIS undertaking is not and never has been a limited company, or even a partnership but rather seems to be a loose, *ad hoc* and informal collection of individuals all of whom seem to have accepted the Lead Complainant’s authority to guide and direct the affairs of the MWIS undertaking.
- ix. The Respondent approached the Lead Complainant in 2004 with a view to assisting with providing the IT aspects of the provision of the forecasts and, in particular, by the provision of the MWIS website. He has provided IT support from then until January 2014.
- x. In particular, the Respondent applied for and obtained in his own name the registration of the Domain Name effective on 14 January 2004, which he has maintained in his own name since then.
- xi. The Respondent developed the various iterations of the MWIS website to which the Domain Name resolves over the course of the 10 years he was doing so for the Lead Complainant.
- xii. However, there was evident friction between the Respondent and the Lead Complainant, with the Lead Complainant becoming increasingly dissatisfied with the Respondent’s performance across a wide number of areas, including his dedication to the aims of the MWIS undertaking, timeliness in producing updates to the MWIS website and, latterly, his commitment to the public and non-profit making nature of the MWIS undertaking.
- xiii. Accordingly, in late 2013, the Lead Complainant asked the Respondent to cease all involvement with the MWIS undertaking, which the Respondent did at the end of January 2014.
- xiv. The Respondent asserted his rights to the Domain Name at that point and has continued to do so against the Lead Complainant’s request for it to be transferred to the Lead Complainant.

5. Parties’ Contentions

The Complainants make the following submissions and provide the following information:

- i. The Lead Complainant founded the Mountain Weather Information Service in 2002/3 so as to provide enhanced safety information for those on the mountains in Scotland.
- ii. The name was developed after discussion between the Lead Complainant and the SportScotland Avalanche Information Service (SAIS).

- iii. Having spent 25 years as a research scientist and forecaster in the Met Office, the Lead Complainant adopted the name "Geoff Monk and Associates" as the name of his business after working for a small private weather company in Scotland.
- iv. The Lead Complainant appreciated the need for obtaining public funding so as to develop the service to be offered by the MWIS undertaking; in fact, funding from the Scottish Government was obtained as from 2007.
- v. The MWIS undertaking has been very successful over the last 7 years, being quoted in outdoor publications and in the press.
- vi. Forecasts are expensive to produce in terms of time demanded of forecasters.
- vii. The Lead Complainant was known for his public speaking on mountain weather and for some the MWIS undertaking is still known as "Geoff Monk's weather".
- viii. The Respondent approached the Lead Complainant in about 2004 with a view to assisting the MWIS undertaking by the provision of his expertise in IT, an offer of help which the Lead Complainant accepted.
- ix. At the Lead Complainant's request, the Respondent applied for and registered the Domain Name in 2004, and transferred the existing website to the Domain Name.
- x. The Lead Complainant had requested that the Domain Name for MWIS should be ".org.uk" to underline its nature as non-profit making and had further requested that it should be in his name.
- xi. At the time of registering the Domain Name in his personal name, the Respondent assured the Lead Complainant that ownership of MWIS remained vested in the Lead Complainant.
- xii. Very soon after the initial approach, the Respondent suggested some form of partnership with the Lead Complainant, which the latter declined.
- xiii. The Respondent provided his own server for hosting the MWIS website and the Lead Complainant permitted him to make enquiries about obtaining commercial sponsorship.
- xiv. The Lead Complainant provided the wording for the website, and until 2008, the MWIS website made it clear that it belonged to the Lead Complainant.
- xv. Since around 2008, the Respondent's involvement in MWIS has declined and his timeliness in delivering software development for the MWIS website has been poor.
- xvi. Over the past 10 years, the Respondent's work product has been poor, as exemplified by the failure to provide email password details, failure to provide information to interested third parties, failure to provide for website backups, his provision of poor quality development for a database for the MWIS website, the Respondent's failure to save forecast data, and his failure or delay to deal with software errors.
- xvii. The Respondent has failed to act with appropriate decorum with regard to the finances of the MWIS undertaking, while he has made private income from commercial sponsorship for which he has failed to account to the Lead Complainant.

The Respondent makes the following submissions and provides the following information:

- i. The Lead Complainant has no enforceable right to the Domain Name, having failed to obtain any form of registration or protection for it or for the MWIS undertaking.
- ii. The Lead Complainant has held himself out as having an association with operations under the name of “Mountain Weather Information Service” or “MWIS” but this gives the Lead Complainant no proprietary rights in either name.
- iii. The Respondent has owned the Domain Name since it was registered in 2004, and he has run the MWIS website since building it in 2004.
- iv. The Lead Complainant has known since at least 2006 that the Domain Name is registered to the Respondent since 2004, but has never challenged it or sought to enforce any rights over it.
- v. The Respondent has never acknowledged any right of anyone other than himself to the Domain Name or to the website operated by the Respondent.
- vi. The production of forecasting on the MWIS website is separately funded being provided from sources other than the operation of the MWIS website.
- vii. The Lead Complainant and the Respondent have provided a public service in a joint project, with the Lead Complainant providing forecasts to the Respondent without charge, and the Respondent without charge disseminates these on the MWIS website using the Domain Name.
- viii. Each of the Lead Complainant and the Respondent has been responsible for sourcing their own funding, the Lead Complainant doing so from the Scottish Government and the Respondent from private sponsorship.
- ix. The Lead Complainant has never funded the Respondent’s work in any way.
- x. The Lead Complainant continues to provide forecast data for publication on the MWIS website using the Domain Name.
- xi. The Lead Complainant is seeking without justification to get control of the Respondent’s website, and the ownership and control of such is a matter for the courts to determine.

The Complainants in reply make the following submissions and provide the following information:

- i. With regard to the lack of status of the MWIS undertaking, there are plans for it to become a Scottish charity and there are other plans under discussion.
- ii. The Respondent has used the Domain Name on the MWIS website since 2003 which shows that the Respondent believed that the Lead Complainant held the rights to Mountain Weather Information Service or MWIS.
- iii. The Respondent is no more than an agent for the Lead Complainant.

- iv. The Respondent was emphatic in stating that the Domain Name belonged to the Lead Complainant, hence why no further steps were taken to challenge the situation.
- v. The forecasts are prepared on a database which powers the MWIS website, so it is not the case that the Lead Complainant provides forecasts to the Respondent.
- vi. The Respondent has sourced funding on the back of the quality of the forecasting service offered by the MWIS website.
- vii. The Scottish Government provides funding to the Lead Complainant and MWIS on the basis that the forecasts are publicly made available.
- viii. After a period of time, the Respondent started to sell advertising space and so put money through his own bank account.
- ix. The relationship between the Lead Complainant and the Respondent has not changed since 2004, as the Lead Complainant started the MWIS project in 2002, naming it the Mountain Weather Information Service in late 2003; the Respondent was drawn to this service on the internet which was already in existence.
- x. The MWIS website is proceeding by funding more funding from private sponsors to roll out the service to England and Wales.
- xi. The Respondent ran the MWIS website on behalf of the Lead Complainant, it was not a partnership; the Respondent has continued to seek private sponsorship in order to gain personally.
- xii. The Respondent's holding of the Domain Name now is abusive and has nothing to do with internal disagreements or personal grievances.

6. Discussions and Findings

Any complainant in the Nominet DRS procedure must prove, on the balance of probabilities, that he has Rights and that the respondent's registration or continued registration of a domain name, is an "Abusive Registration". I shall look at both of these concepts in order.

Rights

"Rights" are defined in the DRS Policy 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*".

Under paragraph 2(a) of the DRS Policy, a complainant must show that it "*has Rights in respect of a name or mark which is identical or similar to the Domain Name*".

A trading name can thus become "Rights". It is established in other Nominet decisions that it is not necessary to have a registered trade mark, but a complainant must point to evidence sufficient to establish that it is entitled to some sort of legal protection. For this purpose, it is established by decisions under the DRS Policy that unregistered rights, such as right to bring an action in passing off, will suffice to establish Rights. The Respondent's initial line of defence, therefore, that the Lead Complainant has no official or registered

rights either in respect of the name “MWIS” or in respect of the wider MWIS undertaking, is not correct.

The evidence which the Complainant has provided to justify his having Rights in a name or mark similar to or identical with the Domain Name, is very slim. I do not accept that the acronym “MWIS” is for these purposes to be taken as being the same as the full name “Mountain Weather Information Service”: it is not obvious to the majority of the population that “MWIS” has the meaning “Mountain Weather Information Service” in the sense that everyone would know that “BBC” meant “British Broadcasting Corporation”. I therefore have looked through the evidence provided by the parties to see what evidence there is to support the Lead Complainant’s having Rights in “MWIS”.

Referring to the Annexes provided by the Lead Complainant, it is clear that the term “MWIS” was used from an early stage, indeed, from September 2004. This was maintained through 2005, although the copyright credit is changed to the Domain Name.

This name would have been seen by the people using the MWIS website and so it is clear that some sort of rights accrued by the public use of the term “MWIS”, when members of the public would have quickly come to associate “MWIS” with the MWIS undertaking. I accept that the brains behind the MWIS undertaking were those of the Lead Complainant, who was using the Respondent purely for his professed IT expertise. Those Rights therefore vested in the Lead Complainant.

It is often said in decisions under the DRS Policy that the threshold for establishing Rights is a low one and, on the balance of probability, I am satisfied that the Lead Complainant has established Rights in “MWIS”

Abusive Registration

I should start by saying that the Complaint consists of a very large number of allegations against the Respondent, focusing principally on his conduct and alleged shortcomings in running the MWIS website, his alleged delays and lack of competence and even lack of personal probity. Nearly all of these assertions are irrelevant to the issue I have to decide, which is whether the Domain Name in the Respondent’s hands is an Abusive Registration.

Paragraph 3(a) of the DRS Policy sets out what it describes as a non-exhaustive list of factors which may be evidence that the registration or holding of the Domain Name by the Respondent was an “Abusive Registration”.

The DRS Policy 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. has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights;”*

As regards the latter paragraph, there is no evidence that the Respondent has used the Domain Name in a way inconsistent with the DRS Policy. As the Lead Complainant states, he is still uploading data to the MWIS website, and members of the public are still able to access it and use it. There may, of course, be a dispute around the Respondent's alleged use of the MWIS website to place advertisements so as to secure private income for himself, but that is a separate matter between him and the Lead Complainant and not one subject to the DRS Policy.

Turning then to paragraph 3 of the DRS Policy, none of the illustrations given there are entirely appropriate to this situation. There is no evidence that the Respondent acquired the Domain Name for the purpose of blocking the Lead Complainant's own registration of the Domain Name (paragraph 3(a)(i)(B)) or that he did so for the purpose of unfairly disrupting the Lead Complainant's business (paragraph 3(a)(i)(C)). Paragraph 3(a)(v) is closer, but the condition in sub-paragraph (B), that the Lead Complainant paid the Respondent for the registration, is not made out on the evidence. However, the opening words to paragraph 3 state that the list of situations presented there is non-exhaustive.

The emphasis, then, is on the first paragraph of the definition of Abusive Registration. I accept that the MWIS website has always been used for the purposes of carrying out the Lead Complainant's aims for the MWIS undertaking. The aim of obtaining the registration was for the same purpose. I accept the Lead Complainant's assertion that he asked the Respondent to do this for him: it is consistent with the Lead Complainant's having retained the services of the Respondent to help with IT matters.

The facts of this dispute are in fact very similar to one of my own recent decisions in DRS13566 <eyecareoptical.co.uk>. In that case, as part of a family run business, the Respondent had registered the domain name in dispute, though the business, a limited company, was effectively run by his uncle. Following serious family disagreements and the departure of the nephew from the business, the nephew retained the domain name against his uncle's wishes and refused to transfer it to complainant company.

I found in that case that the domain name should be transferred to the complainant. There are some earlier decisions which I noted where the same order had been made in similar cases.

In every case, it is necessary to go back to the words of the DRS Policy and assess whether the Respondent, by acquiring or refusing to transfer back to the Lead Complainant, is acting in a way which “has taken unfair advantage of

or has been unfairly detrimental to the Complainant's rights". This can be at the time of registration or subsequently by a respondent's use of the Domain Name. As I observed in DRS13566<eyecareoptical>, a respondent's personal intentions at the time of registration are irrelevant. In this case, the Respondent undertook the acquisition of the Domain Name at the request of the Lead Complainant and for the purpose of furthering the MWIS undertaking, which had already been established and was being run and still is being run by the Lead Complainant.

In line with my decision in DRS13566<eyecareoptical>, and in line with the other decisions under the DRS Policy I refer to there, I conclude that the Respondent's continued holding of the Domain Name after the Lead Complainant has severed his connections with him, is an Abusive Registration.

For completeness, I should add that I have considered whether under paragraph 4 of the DRS Policy any of the possible defences there set out apply in this case: I have concluded that they do not. I do not see that, looked at more broadly, there is any reason why the Respondent should retain the Domain Name.

7. Decision

I find that the Lead Complainant has Rights identical to the Domain Name and that the holding of the Domain Name by the Respondent is an Abusive Registration.

I direct that the Domain Name be transferred to the Lead Complainant.

Signed Richard Stephens

Dated 9 June 2014