

DISPUTE RESOLUTION SERVICE

D00016192

Decision of Independent Expert

Chris Matthews t/a Crown Hosting

and

Mr Edward Borton

1. The Parties:

Lead Complainant: Chris Matthews t/a Crown Hosting
40A High Street
Hampton Wick
Kingston
Surrey
KT1 4DB
United Kingdom

Respondent: Mr Edward Borton
Spring Park
Westwells Road
Hawthorn
Corsham
Wiltshire
SN13 9GB
United Kingdom

2. The Domain Name(s):

crownhostingdc.co.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.

05 July 2015 17:42 Dispute received
06 July 2015 14:03 Complaint validated
06 July 2015 14:09 Notification of complaint sent to parties
23 July 2015 02:30 Response reminder sent
23 July 2015 15:46 Response received
23 July 2015 15:47 Notification of response sent to parties
27 July 2015 12:09 Reply received
27 July 2015 12:09 Notification of reply sent to parties
27 July 2015 12:09 Mediator appointed
30 July 2015 11:26 Mediation started
01 September 2015 15:22 Dispute suspended
23 October 2015 12:12 Dispute opened
23 October 2015 14:45 Mediation failed
23 October 2015 14:46 Close of mediation documents sent
04 November 2015 01:30 Complainant full fee reminder sent
09 November 2015 11:35 No expert decision payment received
19 November 2015 01:30 Respondent full fee reminder sent
20 November 2015 10:37 Expert decision payment received
27 November 2015 In accordance with paragraph 13a of the DRS Procedure the appointed expert by Procedural Order requested that the Complainant provide evidence of the nature and extent of the Complainant's claimed use of the name CROWN HOSTING supporting the claim in the Complaint that the Complainant has "been trading under the crownhosting name for over ten years."
30 November 2015 The Complainant filed its response to the paragraph 13a request.
4 December 2015 The Respondent filed its comment on the Complainant's response to the paragraph 13a request.

4. Factual Background

The Complainant registered the domain name crownhosting.net in 2004 and established a website at that address in 2005. He subsequently registered the domain name crownhosting.co.uk on 16 August 2013.

The disputed domain name crownhostingdc.co.uk was registered on 23 February 2015.

The Respondent is the Information Technology Manager of Ark Data Centres Limited ("Ark"), and he registered the disputed domain name in that capacity.

The Respondent's company entered into a joint venture project with the Crown Office which commenced trading on 19 March 2015 under the name 'Crown Hosting Data Centres'.

On 5 April 2015 Complainant filed an application to register CROWN HOSTING with the UKIPO which was registered as a UK registered trade mark registration no. 3102604 on 3 July 2015.

5. Parties' Contentions

The Complaint

In the very brief Complaint, Complainant claims to have been trading under the crownhosting name for over ten years and asserts that the Complainant is the owner of the domain name crownhosting.co.uk which was registered in 2013 and which "is part of crownhosting.net registered in 2004".

The Complainant further submits that it is the owner of the registered trade mark CROWN HOSTING UK00003102604.

The Complaint alleges that the Respondent is trading on the Complainant's established name and is receiving the Complainant's web traffic by registering and using a domain name which simply adds the letters "dc" to the end of the Complainant's "crownhosting" domain name.

The Complaint further alleges that the disputed domain name is an Abusive Registration as it "has been used to confuse Internet users who will think crownhostingdc.co.uk is part of crownhosting.co.uk."

The Response

The Respondent is the Information Technology Manager of Ark Data Centres Limited ("Ark"), and he registered the disputed domain name in that capacity. Ark is party to a joint venture with the UK Cabinet Office which provides data centre co-location services to the public sector under the name 'Crown Hosting Data Centres'.

On 18 July 2014, the Cabinet Office published a Notice to Tender in the Official Journal of the European Union seeking a private sector partner for a proposed joint venture to establish and operate data centre co-location services to the public sector, to be known as the 'Crown Hosting Service'.

Ark submitted a successful tender. The joint venture agreement with the Cabinet Office was finalised in March 2015 and received substantial press coverage, particularly in publications focused on the IT industry. The joint venture commenced trading on 19 March 2015 with three founder customers, the Department for Work and Pensions, the Home Office, and the Highways Agency, under the name 'Crown Hosting Data Centres', and the website to which the disputed domain name resolves went live at that time.

The Respondent had registered the disputed domain name on 23 February 2015 in preparation for the launch of the joint venture. On 6 July 2015 the Respondent received a copy of the Complaint, which had been filed on 5 July 2015.

The Respondent does not dispute the fact that the domain name crownhosting.net was registered in 2004, or that the Complainant's website at crownhosting.co.uk appears to offer website hosting services. However, the Respondent argues that the Complainant has not provided any evidence that it actually commenced trading in 2004 or that the name 'Crown Hosting' has become associated with its business in the minds of consumers. By way of example, the Complainant has not provided any evidence of its turnover, customer numbers, or marketing activities using the name 'Crown Hosting'.

The Respondent argues that the Complainant simply seeks to rely on the bald statement that it has "been trading under the crownhosting name". It is therefore clear that the Complainant has not established that it has acquired enforceable rights through the use of its .co.uk website.

In addition, the Respondent argues that the Complainant's crownhosting.net site appears to be targeted at a North American audience (for instance, the prices are all shown in US dollars). It is therefore not relevant to the question of whether the Complainant can establish that it has rights to the name 'Crown hosting' or that the Domain Name is an Abusive Registration, particularly given that the Respondent's business is targeted at a select UK audience.

The Respondent submits that the Complainant's trade mark registration is not relevant to these proceedings as the application was filed approximately 2 weeks after the joint venture commenced trading and some 18 months after the Cabinet Office's proposed 'Crown Hosting' service was first announced. The Respondent submits that the trademark application demonstrates opportunism and mischievousness on the part of the Complainant.

The Respondent submits that in light of the above, it is clear that the Complainant has not established any relevant rights.

The Respondent submits that the disputed domain name is not an Abusive Registration. The Nominet DRS Policy sets out at paragraph 4 a "non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration" which includes at paragraph 4(a)(i)(A): "Before being aware of the Complainant's cause for complaint (not necessarily the 'complaint' under the DRS), the Respondent has used or made demonstrable preparations to use the Domain Name [...] in connection with a genuine offering of goods or services".

The Respondent submits that it is using the disputed domain name in connection with a genuine offering of services and its partner in the joint venture is commonly referred to as 'The Crown'. The joint venture partners were not aware of the Complainant's business until 6 July 2015, when the Respondent received a copy of the Complaint by Nominet. By this time the joint venture had been trading for almost four months under the name 'Crown Hosting Data Centres', and around 20 months had elapsed since the Cabinet Office announced that it would establish the 'Crown Hosting Service'.

Furthermore the Respondent submits that the disputed domain name is descriptive and the Respondent is making fair use of it. He argues that the disputed domain name is

composed of three elements: the word 'Crown' which is used descriptively to denote the government's mandate from the monarchy; 'hosting' which is descriptive of the co-location services for data centre hosting provided by the joint venture; and the letters 'dc' which stand for 'data centres'.

The Respondent denies that the use of the disputed domain name has taken unfair advantage of or been unfairly detrimental to the Complainant's Rights. The services provided by the joint venture and the Complainant are entirely distinct. The joint venture provides co-location services for data centre hosting, whereas the Complainant appears to provide domain name hosting services. In addition, the joint venture's services are provided exclusively to the public sector whereas the Complainant appears to provide its services to private clients. There is therefore a clear delineation between the respective parties' services and target markets, which further decreases the likelihood that consumers would believe that the respective parties' domain names are in some way connected. The Complainant's contention that the Respondent is "trading on [the Complainant's] established name and getting [the Complainant's] web traffic" is simply not plausible, and it is evident that the Respondent's use of the disputed domain name is in no way detrimental to the Complainant's business.

Additional Submissions In accordance with paragraph 13a of the DRS

In accordance with paragraph 13a of the DRS Procedure this Expert requested that the Complainant provide evidence of the nature and extent of the Complainant's claimed use of the name CROWN HOSTING supporting the claim in the Complaint that the Complainant has "been trading under the crownhosting name for over ten years..." and allowed the Complainant the opportunity to comment.

In response to the request, the Complainant furnished archive copies of his website and the Respondent re-iterated that the Complainant had not produced any evidence of trading to support its claim that it had acquired any relevant Rights in the CROWN HOSTING name.

6. Discussions and Findings

In order for the Complainant to succeed in this Complaint, paragraphs 2.a and 2.b of the DRS Policy require the Complainant to prove on the balance of probabilities that

- i. the Complainant has Rights in respect of a name or mark which is identical or similar to the disputed domain name; and
- ii. the disputed domain name, in the hands of the Respondent, is an Abusive Registration.

The Complainant claims rights at common law based on its claimed use of the name CROWN HOSTING since 2005 and ownership of UK registered trade mark CROWN HOSTING registration no. 3102604.

The Respondent registered the disputed domain name on 23 February 2015 in preparation for the launch of the joint venture between the Respondents company and the Cabinet Office. The joint venture agreement was finalised in March 2015 and the joint venture commenced trading on 19 March 2015.

The Complainant's UK trade mark CROWN HOSTING registration no. 3102604 was not filed until 5 April 2015 and was not registered until 3 July 2015 which was two days before this Complaint was filed.

As the Complainant's rights in the registered trademark post-date registration of the disputed domain name on 23 February 2015 and the commencement of trading by the joint venture with the Crown Office on 19 March 2015, the relevant Rights for the purposes of this Complaint are therefore the Complainant's claimed rights at common law through the claimed use of the CROWN HOSTING name since 2005 rather than his registered trade mark.

On the evidence adduced, the Complainant registered the crownhosting.net domain name in 2004 and he subsequently registered the domain name crownhosting.co.uk on 16 August 2013. The Complainant has furnished archive data to show that he had established a website offering web hosting services at the crownhosting.net address in 2005 and has maintained that website since that date.

While the Complainant asserted that he had "been trading under the crownhosting name for over ten years." he did not however provide any evidence that he carried on any business in the UK or anywhere. His only evidence was archive data which showed that the website was accessible on the Internet but it does not follow that he had any business to back up the offers on his website.

As the Complaint was very brief, in the interest of fairness, this Expert issued a Procedural Order pursuant to paragraph 13a of the DRS Procedure requesting that the Complainant provide evidence of the nature and extent of his claimed use of the name CROWN HOSTING.

Despite having been given a second opportunity to do so, the Complainant merely furnished archive copies of his website and did not provide any evidence of business activity to support his claim that he "had been trading under the crownhosting name for over ten years."

Maintaining a website that purports to offer hosting services is not sufficient in itself to create a protectable goodwill. In order to succeed in the first element of the test in paragraph 1 of the DRS Policy on the basis of common law rights in a trademark, a complainant must provide evidence that he/she/it has a protectable reputation in the marketplace created by an actual business activity. In the present case the Complainant, despite having been given a second opportunity so to do, has failed to meet that burden of proof.

As the Complainant has therefore failed to prove that he has Rights in respect of a name or mark which is identical or similar to the disputed domain name, his application must be refused.

It is not necessary in these circumstances to consider whether the disputed domain name is an Abusive Registration.

7. Decision

Because the Complainant has failed to prove that he has Rights in respect of a name or mark which is identical or similar to the disputed domain name this Expert directs that the domain name registration crownhostingdc.co.uk will remain with the Respondent.

**Signed James Bridgeman
Expert**

Dated: 10 December 2015