

**Nominet UK Dispute Resolution Service**

**DRS 01515**

**Revlon (Suisse) SA -v- Alastair May**

**Decision of Independent Expert**

**1. Parties:**

Complainant: Revlon (Suisse) SA  
Address: c/o John O'Shea,  
Revlon Inc  
237 Park Avenue  
New York  
New York  
Postcode: 10022  
Country: US

Respondent: Alastair May  
Address: 8 The Cedars  
Dove Close  
Birmingham  
Postcode: B25 8XZ  
Country: GB

**2. Domain Name:**

almay.co.uk (“the Domain”)

**3. Procedural Background:**

A brief chronology is as follows:

26 January 2004: Complaint lodged with Nominet electronically  
28 January 2004: Hardcopy complaint received by Nominet  
2 February 2004: Nominet forwarded complaint to Respondent  
11 February 2004: Nominet forwarded complaint to Respondent’s new address  
23 February 2004: Response lodged with Nominet electronically  
23 February 2004: Hardcopy response received  
23 February 2004: Nominet forwarded response to Complainant  
4 March 2004: Reply lodged with Nominet electronically  
4 March 2004: Hardcopy reply received  
5 April 2004: Fee received from Complainant

On 14 April 2004 I, Adam Taylor, the undersigned, confirmed to Nominet that I knew of no reason why I could not properly accept the invitation to act as expert in this case and further confirmed that I knew of no matters that ought to be drawn to the attention of the parties which might appear to call into question my independence and/or impartiality.

4. **Outstanding Formal/Procedural Issues:**

None.

5. **The Facts:**

The undisputed facts are as follows.

The Complainant, a Swiss company, is a wholly-owned subsidiary of Revlon International Corporation, which in turn is a wholly-owned subsidiary of Revlon, Inc. and is part of the Revlon group of companies. The Complainant or its group established the Almay brand in 1931 as a brand of cosmetics and toiletries suitable for every day use by persons with sensitive skin. The brand has been used in the UK for many years in relation to a wide range of toiletry products and products for the protection, care or beautification of the body, which are marketed, inter alia, on the basis that they are “hypoallergenic, gentle and pure”. The products are available in a many retail outlets including large chains such as Boots, Superdrug, Lloyds Pharmacy as well as independent pharmacies.

The Complainant holds numerous UK and Community trade mark registrations for the word ALMAY both on its own and in conjunction with other words including UK trade marks for A L M A Y in class 03, number 839166 (12 September 1962) and ALMAY in class 03, number 1427766 (31 May 1990). The Complainant owns various domain names with the word ALMAY including almay.com and almayonline.co.uk.

The Respondent registered the Domain on 6 February 2000.

The Complainant wrote to the Respondent on 27 December 2000. At that point the website at the Domain was not active. The Respondent declined to transfer or cancel the Domain and explained that it was constructed of his name combining the first syllable of his first name with the whole of his last name.

On 24 June 2002 the Respondent forwarded to the Complainant an email addressed to “info@almay.co.uk”, saying “I’m getting some mail that is not for me. What do you want me to do with it?”

The Complainant has produced a printout of a website at the Domain as of 25 April 2003. The metatitle on the homepage is “ALMAY.CO.UK – Women, Vomiting and Ugly people”. The page states “Welcome to the home pages of Alastair May ...” followed by the prominent heading “ALMAY.CO.UK”. On either side of that heading are the statements “They have fantastic figures, and good personalities, probably” and

“Though admittedly a couple of them are \*”. There are then blank slots for images not yet available to view followed by this: “Sorry it took so long to get this site up and running, but we’re still working on loads of new ides (sic). Hopefully (sic) this should wet (sic), your appetite, Complete upload of files will take place over the next few days”. There are links to other pages: “Vomiting”, “Ugly people”, “The WOMEN page”. Pages to follow are listed as “1. Paralytically drunk people 2. Spotty bastards 3. Hairy arses 4. Ingrown toe nails 5. and more...”. There is an invitation to email comments to “alastair@almay.co.uk”.

The metatitle of a separate page on the theme of vomiting is “ALMAY – Vomiting page”.

A third page has the metatitle “ALMAY – Ugly people”. The page is headed prominently: “UGLY PEOPLE @ ... ALMAY.CO.UK”.

On each page of the site there are blank slots for images not yet available to view, many of which include titles such as “uglybird” and “fat gizzard”. No images in fact appear anywhere on the website.

There are links to other sites such [www.bigbreasts.com](http://www.bigbreasts.com), [www.hugetits.com](http://www.hugetits.com), [www.massivejugs.com](http://www.massivejugs.com), <http://www.ugly.com>, <http://www.buttugly.com>, <http://www.dork.com> which include pictures of women engaged in various forms of sexual behaviour.

On 13 May 2003 an independent investigator acting for the Complainant emailed the Respondent on the pretext of having an interest in buying any domains that he might have available. The Respondent replied the same day saying “I have already been contacted by Revlon, who own the ALMAY brand name, but would be interested in what you had to say. Alastair”. On 4 June 2003, in response to the investigator’s request to identify the domains available for sale, the Respondent emailed: “domain name is Almay.co.uk. As it is a worldwide brand name, I would hope it is marketable. Cheers. Alastair”. On 6 June 2003 the investigator offered the Respondent £250 for the Domain but the Respondent did not reply.

In October 2003 a UK consumer complained to the Complainant’s UK Customer Services complaining about “your Almay.co.uk sight (sic)”.

## 6. The Parties’ Contentions:

### Complaint:

1. The Complainant has a strong reputation and goodwill in the ALMAY brand.
2. The UK sales figures for ALMAY products between 1998 and 2002, in US\$’000, are: 1998: 9,087; 1999: 6,050; 2000: 6,878; 2001: 7,462; 2002: 10,651. UK advertising: 1998: 2,037; 2000: 422; 2001: 1,755; 2002: 1,033.
3. The ALMAY brand has been advertised in magazines with considerable UK circulation, on TV, at UK press events and by retailers via the internet.

ALMAY products and/or the ALMAY name have also featured in films and on television. The Complainant is frequently referred to in news, financial and business publications and websites.

4. Toiletries and cosmetics are generally promoted with regard to cleanliness, freshness and appearance. The positive association of such attributes with the brand contributes to its success.
5. The [almay.co.uk](http://almay.co.uk) website contains offensive material. It is not always possible to access the pictures or links provided in the [almay.co.uk](http://almay.co.uk) website but the text which appears on the links show that the website is pornographic. The language is offensive and distasteful and deals with subjects such as drunk people, spotty bastards, hairy arses, vomiting, ugly people and “big jugs”, a euphemism for large female breasts. The content suggests that further pornographic material will appear at a later stage.
6. There is no reason for a visitor to know at first sight that the site is not a legitimate site for the ALMAY brand. Cosmetic websites include images of women. The website shows that there are images of women which are not yet available to view. It refers to aspects of appearance. Links are provided to further offensive pornographic websites which link with pornographic pop-up advertisements.
7. The website associates ALMAY with the words UGLYPEOPLE@. Use of [almay.co.uk](http://almay.co.uk) in the website associates a valuable and well known trade mark which is usually associated with purity with offensive and distasteful material.
8. The Respondent’s name is not ‘Almay’. ALMAY is not a useful or legitimate way of representing a first name and surname since the term is composite. The website indicates that Mr. May uses the name Alastair and not “Al”.
9. Customers seeking information about the ALMAY brand will use ‘ALMAY’ as a search term. They will expect the .co.uk domain to be associated with the well known brand. They will be misled into visiting the [almay.co.uk](http://almay.co.uk) website and disturbed by its content. [Almay.co.uk](http://almay.co.uk) is not merely used as an address for the website. It appears prominently on the first page of the site and thus as a reference for sexual material as well as an address.
10. The content of the website will confuse ALMAY consumers. Numerous examples have already occurred. Mr. May is willing to forward misdirected emails showing that he expects further confusion.
11. The Respondent’s comments to the Complainant’s investigator about [almay.co.uk](http://almay.co.uk) being marketable as it is a worldwide brand name show that he considers the domain name to have substantial value because of its interest for Revlon and in view of Revlon’s worldwide registration.
12. Mr. May has adopted the ALMAY name in bad faith. He has no entitlement to use the domain. The domain is an abusive registration which is unfairly

detrimental to the long established registered trade marks and common law rights established in the trade mark ALMAY in the United Kingdom.

13. Mr. May is not using the domain for any legitimate purpose. The domain has not been updated or developed for a considerable period of time. The ALMAY brand is so well known that it cannot be used as a domain name by anyone other than the owner of the brand in good faith. The adoption of a well known name and use in this manner will inevitably result in confusion and damage to the ALMAY brand.

**Response:**

1. In May 1998 I registered my only email address almay69@yahoo.com as I was, and still am, known as Al May. Over 18 months later I registered almay.co.uk consistent with my name and email address. This is the only domain name I have ever had. I chose it for personal reasons rather than a play on a brand name of which I was unaware.
2. I want to learn web design. However, I became a trainee chartered accountant in September 1999 and did not pass the exams until September 2003. This project took a back seat during this period. I intend to develop my web skills further this year.
3. From asking a group of my peers, not one male recognised Almay as a brand name. I would be surprised if the brand recognition rate amongst males aged 20 to 25 years of age (my age on registration) was higher than 10%. No-one I have spoken to can recall any television advertisements for Almay. Almay advertises in womens magazines and those exhibited post date my registration of almay.co.uk on 6 February 2000.
4. The main heading on my website makes it immediately clear that it is my personal web page. There have never been any images of women, or anything else, on the entire site, so it is hard to see how the confusion arises.
5. The language on the website is in keeping with the high street men's magazines (not necessarily 'top-shelf') and also comparatively tame considering some of the items on the internet today.
6. The linked websites were believed to consist of images that might appear on 'Page 3' of a national tabloid newspaper, and therefore not particularly offensive. However, I see from the complaint that those websites have changed and I have already removed the links to satisfy my own tastes.
7. No attempt has ever been made to sell the domain name. "When approached by Revlon's independent investigator in 2003, who I was led to believe to be a third party, I was interested to know the value of my asset. To present every known detail, I said that I had been contacted by Revlon. I would not have known about the brand name if he approached me before Revlon's contact in 2000.

8. I did not enter into any further discussion after the investigator's £250 offer, demonstrating that I used this service to value my asset rather than to sell it.
9. In good faith I forwarded all emails received by mistake, though I can only remember this confusion arising on 2 or 3 occasions. As the address was registered four years ago, the degree of confusion is minimal. It appears that only one person has taken offence to the website and been confused as to who was responsible. Assuming that this is a legitimate customer, this is an isolated incident.
10. I have been commonly known by a name which is identical or similar to the domain name. Evidence confirms I have been known as 'Al' for a number of years and still am. Since 'almay' is the closest domain name to Al May, this undoubtedly gives me the right to the domain name. Alastair is easy to spell incorrectly. The Complainant has misspelt it in the formal complaint. Al is an agreeable shortening.
11. The evidence comprises:
  - 11.1 Twelve postmarked letters and postcards received between 1995 and 1998 from 10 different individuals, proving I was known as Al by my friends. Each calls me 'Al' in the main body of the text though the postal addresses are sometimes more formal to enable accurate delivery.
  - 11.2 Postcards showing that I called myself Al in postcards to other people.
  - 11.3 Personal emails from 1998 proving that I was actively using my almay69@yahoo.com address, and therefore identifying myself as almay for internet purposes, and also that I was known as Al.
  - 11.4 Emails to my work address and evidence that managers at work call me Al.
  - 11.5 A formal job appraisal in which I am referred to as Al 6 times.
  - 11.6 A document showing that I have traded on Ebay as almay1976.
  - 11.7 1996 photos with a group of friends wearing T-shirts including reference to me as Al "Ginger" May, on account of my hair colour.
12. I work in a professional environment and like most people use my full birth name on many occasions. The fact that I can use both 'Al' and 'Alastair', however, does not mean that I do not use 'Al', the name by which I am commonly known.

**Reply:**

1. Only one of the examples of third party use of Al May shows an address known to Nominet and that is addressed to "Alastair May". There is a significant difference between Al May and Almay. The Respondent's name is not Almay nor is the friendly name allegedly used by his contacts.
2. The Respondent's straw poll is irrelevant. Brand recognition can be derived from the Complainant's evidence. It is not necessary for the male population to be confused about the origin of the Almay brand. The advertisements

provided are mere examples and the advertising figures reflect similar expenditure in earlier years.

3. Women's magazines are regularly read by men. The Complainant also advertises in more mainstream media such as The Mail on Sunday, a UK TV advertisement in 1995 and billboards.
4. The Complainant's registrations substantially pre-date the Respondent's purchase of the domain name.
5. Many people may not connect the words Alastair May with almay.co.uk. If anything they may consider that the Respondent is connected with Almay. The website reflects 7879 visitors to the site. Approximately half are likely to be females. A large number of these visitors may be Almay customers or prospective customers.
6. There is nothing on the website to distinguish Alastair May from the well known brand Almay. The page headed "Ugly People at ..." is immediately followed by the words almay.co.uk with nothing to distinguish it from the Almay brand.
7. The language on the website when the complaint was filed was offensive. The Respondent invites comments to Alastair@almay.co.uk suggesting that Alastair is an individual at the company Almay.
8. Mr. May may have removed the third party links but it is inconceivable that he only become aware of their content after the filing of the complaint. The Respondent is responsible for his website and the links therein. By his own admission he has not appropriately monitored the website. He may re-establish the links or open other similar links. The context of his website makes it clear that this is the kind of material he proposes to place on the website.
9. He is willing to take advantage of the fame of the Almay brand. He encouraged the investigator to believe that the domain name had value because it "is a worldwide brand name". This was not an honest attempt to value it. The Almay brand cannot increase its value unless the domain were sold to the brand owner or for misuse by someone else.
10. The number of e-mails received on the website is not an indication of the extent of confusion. Many visitors will not contact the address because the website is offensive. Customers and potential customers may refrain from further searches in case they end up back at the website or are connected with further offensive material.
11. The Respondent could register a domain name using his name without infringing the Complainant's rights in the ALMAY mark. AlastairMay.name would be more appropriate. AlastairMay.info is also available as is AlastairMay.uk.com.

12. Many of the examples show that that the Respondent is known as and uses the name Alastair. He may avoid the name Al May professionally due to a reputation in distasteful material on the almay.co.uk website. He signs his name on the complaint and on his business documents as Alastair May.
13. The Respondent's use of Almay69@yahoo.com as a user name does not have the same impact as a domain name or website. Almay69 is the user name and is not a commercial use.
14. The continued registration of almay.co.uk is abusive. Almay is not the Respondent's name. The domain name was acquired and has been used in a manner which took unfair advantage of and was unfairly detrimental to the Complainant's earlier rights in its trade mark registrations and under common law.
15. The continued use of the domain name will result in severe damage to the Complainant's valuable trademark rights. The use of offensive material is detrimental to the brand and may affect sales of Almay products. The domain will continue to be used in this way. Regard should be given to the clear intent of the website and the placing of offensive material and links to highly offensive sites. The valuation of the domain name in the context of third party worldwide rights shows that the Respondent is prepared to use his domain name in a way which takes advantage of the Complainant's rights.

## 7. Discussion and Findings:

### General

To succeed, the Complainant has to prove in accordance with paragraph 2 of Nominet's DRS Policy ("the Policy) on the balance of probabilities, first, that it has rights (as defined in paragraph 1 of the Policy) in respect of a name or mark identical or similar to the Domain and, second, that the Domain, in the hands of the Respondent, is an abusive registration (as defined in paragraph 1 of the Policy).

### Complainant's Rights

The Complainant has registered UK and Community trade marks for the word ALMAY. The Complainant has also established common law rights in that name.

The Complainant has rights in a name which is identical to the Domain.

### Abusive Registration

Is the Domain an abusive registration in the hands of the Respondent? Paragraph 1 of the Policy defines "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 took unfair advantage of or was unfairly detrimental to the Complainant's Rights."

The Complainant relies on both limbs of the definition of abusive registration. I will deal with each in turn.

## REGISTRATION

The key issue here is the Respondent's purpose in registering the Domain on 6 February 2000. The Complainant does not mention any of the non-exhaustive factors in paragraph 3a of the Policy which may be evidence that the Domain is an abusive registration eg registration for sale to the Complainant (3aiA) or as a blocking registration (3aiB). The Complainant appears to rely principally on the alleged fame of its trade mark and the alleged confusion / damage caused by the subsequent use of the Domain.

The Respondent invokes paragraph 4aiB of the Policy (one of the non-exhaustive factors which may be evidence that the Domain is not an abusive registration):

*"i. Before being informed of the Complainant's dispute, the Respondent has:*

*B. been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name ..."*

The Respondent has produced evidence - such as postcards from 10 different individuals - that he has used, and been known by, the name "Al May" since at least the mid 1990s and therefore well before registration of the Domain in February 2000.

The Respondent has in my view established that before being informed of the dispute he has been commonly known by a name "Al May", which is identical, or at least similar, to the Domain.

I disagree with all of the Complainant's submissions on this point. It matters not in this context that the Respondent is not "Almay". Domains are case neutral and "almay" is a reasonable representation of his name in a domain name. The lack of a separator between "al" and "may" does not in my view render the Domain dissimilar to the Respondent's name.

It makes no difference that the Respondent also uses and is known by the full version of his name as 4aiB does not specify that the Respondent must be exclusively known by the relevant name. I also think it irrelevant that the Respondent could have registered a domain prefixed "alastairmay". More important is that the Respondent had a genuine reason for registering the Domain.

The registration could still be abusive if, notwithstanding that he was commonly known by the name, there was evidence that the Respondent also registered the Domain for the purpose of taking advantage from or cause detriment to the Complainant's trade mark. I cannot of course know what was in the Respondent's mind. All I can do is make my best assessment from the evidence filed.

The Complainant has not satisfied me on the balance of probabilities that the Respondent registered the Domain with a view to targeting the Complainant's mark or even that he was aware of it at that time. I have no reason to doubt the Respondent's denial of knowledge. It is obvious from the Complainant's advertising that its Almay products are marketed to women and there is no evidence that the Respondent - a male then aged early 20's - was likely to have been aware of the brand. Nor do I draw any conclusions about the Respondent's intentions on registration (6 February 2000) from the content of its website dated some three years later (25 April 2003).

The Complainant has not made out the first limb of the definition of abusive registration.

USE

That is not the end of the matter as it is possible that the Respondent acquired the Domain genuinely but later used it abusively.

The complaint focuses on likely / actual confusion of, and offence caused to, the Complainant's customers. In my view these matters are likely to be abusive in the circumstances here only if the Respondent used the Domain for the purpose of gaining advantage from or detriment to the Complainant's trade mark and not if he used it in a manner which was genuinely independent of the trade mark.

I do not place any weight on the Respondent's correspondence with the Complainant's investigator in 2003. It is too equivocal. Bearing in mind my conclusion that the Domain was genuinely acquired, I do not think it necessarily abusive that the Respondent invoked the Complainant's brand / interest in the context of what the Respondent thought was a valuation by, or perhaps even a sale to, a third party. The position might have been different had there been evidence that the Respondent believed that the third party had some illicit purpose vis a vis the Complainant.

Nor do I consider it relevant that the Respondent did not update or develop its site for a considerable period of time (not specified by the Complainant).

I do however think the following points are significant.

The Respondent launched its website at some point after it admittedly became aware of the Complainant's brand in December 2000.

As of April 2003 the site's main subject matter was ugliness and vomiting. The forthcoming pages were listed as: "1. Paralytically drunk people 2. Spotty bastards 3. Hairy arses 4. Ingrown toe nails 5. and more...".

The website appears designed to cause offence in relation to these various topics which have nothing in common except that they mainly concern negative aspects of the human body. It is difficult to think of themes more diametrically opposed to the

Complainant's brand which is concerned with beautification, care and protection of the body.

The metatitle of the site's home page as of April 2003 associates the site with women: "ALMAY.CO.UK – Women, Vomiting and Ugly people". (Metatitles are highly ranked by search engines and often appear in search results.)

The Respondent has used the Domain and the word ALMAY almost as if they were brand names and in a manner that is difficult to square with use simply derived from the Respondent's name. For example, one page states prominently "UGLY PEOPLE @ ... ALMAY.CO.UK". The metatitle of that page says: "ALMAY – Ugly people".

The website contains 38 blank slots for images, none of which have ever appeared on the site according to the Respondent. It is strange to say the least that most of those slots nonetheless contain titles signalling the kind of image that will or may be placed there.

The Respondent has not explained his purpose in producing a site of this kind.

My overall impression on reading the content of the Respondent's website, and in particular from the above factors taken together, is that the Respondent's website targeted the Complainant.

I conclude that, despite having acquired the Domain genuinely, the purpose of the Respondent's website was to associate the Complainant's trade mark with themes likely to cause concern or offence to the Complainant and its customers - for whatever ultimate motive. The Domain has therefore been used in a manner which was unfairly detrimental to the Complainant's rights.

The Complainant has proved that on the balance of probabilities the Domain is an abusive registration.

8. **Decision:**

The Domain should be transferred to the Complainant.

---

Adam Taylor

---

Date