Panel Decision for dispute CAC-ADREU-006393

Case number	CAC-ADREU-006393
Time of filing	2013-02-25 17:50:11
Domain names	amway-bg.eu

Case administrator

Lada Válková (Case admin)

Complainant

Organization	Alticor, Inc.

Respondent

Name	Cenka Gencheva

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

None of which this panel is aware.

FACTUAL BACKGROUND

The Complainant is one of the world's largest direct selling companies. It was founded in 1959 as Amway Corporation, changing its name to its present name in 2000. It sells its products through a network of over 3 million independent business owners ("IBOs"), and its sales under the AMWAY brand and other brands in more than 80 countries exceeded US$10.9 billion in the year ended 31 December 2011.
The Complainant's product line sold under the brand AMWAY includes more than 450 products for personal care, nutrition and wellness, home care, home living and commercial products. Examples of its products include cosmetics and skin care products. It also uses the AMWAY brand for various services including hotel and real estate.
The Respondent is an individual who operates a website at the disputed domain name which offers products bearing the mark AMWAY, and other products which bear various of the Complainant's other marks such as NUTRILITE, ARTISTRY, SATINIQUE, and PROTIQUE.
The Complainant says that it has no records of the Respondent being listed as part of its authorised network of IBOs. The Complaint was originally filed on15 November 2012. However, after it was pointed out by the CAC that it was lacking in respect of some formalities, the Complaint was amended and refiled with those formalities corrected on 29 November 2012. The Respondent has subsequently failed to respond to the refiled Complaint within the time permitted by the ADR Rules. On 20 February 2013 the Panel was appointed as a single member panel.

A. COMPLAINANT

Rights.
The Complainant says that it has extensively marketed and promoted its AMWAY brand throughout the world by a variety of methods, such as direct mailings and literature, brochures, presentations and internet webpages. It holds 38 trademark registrations and 13 applications for registration in the United States that include the word element AMWAY, in a variety of classes of products and services. It also holds 2000 trademark registrations in over 150 countries containing the word element AMWAY on its own, including 10 international marks which cover Bulgaria, and 16 Community Trademarks which are valid for Bulgaria, covering a wide range of goods and services. The Complainant also owns over 1300 generic top level domain names incorporating AMWAY, including amway.com.

Registration and use of the disputed domain name.
The Complainant says that it has no record of the Respondent on its lists of IBOs, and that to the best of its knowledge the Respondent has never been authorised to sell its products. Even if it were an IBO, the Complainant says that it does not allow its IBOs to use its trade marks for their domain names, nor on web pages, without the Complainant's prior consent.
The registration of the disputed domain name on 20 May 2011 was long after the Complainant had acquired and used the AMWAY

marks, including extensive use on the internet.
The disputed domain name is being used for a website which sells products bearing the mark AMWAY, as well as other marks owned by the Complainant, and as such the site will lead consumers to the confusion that the Respondent is either a part of, is authorised by or is connected with the Complainant, and the use of the mark AMWAY will lead to the confusion that the Respondent is a subsidiary or affiliate of the Complainant, which is not the case.
The Complainant says that the disputed domain name is identical or confusingly similar with the AMWAY mark, because the addition of the generic top-level domain to the end of the mark, -bg (Bulgaria), does not distinguish the domain name from the identical mark AMWAY, and also lacks distinctiveness. The Complainant cites previous authority from the UDRP in support of its arguments.
The Complainant says the Respondent has no rights or legitimate interest regarding the disputed domain name, because it has never been authorised to use the AMWAY mark and the disputed domain name, nor is it a subsidiary or affiliate of the Complainant. Further, selling or distributing the Complainant's products gives it no rights or legal interests to register a domain name containing the AMWAY mark (the Complainant again cites UDRP precedent in support). Offering goods on a website where the origin of the goods from the Respondent cannot be identified is not a bona fide offering of goods or services, nor legitimate non-commercial or fair use. The Complainant also invites the panel to treat the absence of any response as an admission in its favour.
In relation to use in bad faith, the Complainant points to the extent of the reputation of its AMWAY mark, and that it has no other meaning than as the Complainant's mark, as it is "fanciful". Therefore, the choice of the name must have been to try to benefit from association with the Complainant and its mark. The use of a domain name which is confusingly similar to a mark with a reputation is itself proof of bad faith, and the Respondent acts in bad faith by creating the impression that it is authorised by or affiliated with the Complainant. Again, UDRP precedent is cited in support of these contentions.
The Complainant seeks the transfer to it of the disputed domain name.

B. RESPONDENT

The Respondent had not responded to the Complaint.

DISCUSSION AND FINDINGS

Standing.
Although the Complainant is a company incorporated outside the European Union, it is clear that it has standing to bring this Complaint, as "any person or entity" can do so, under ADR Rules B.1(a). However, the Complainant does not meet the general eligibility criteria set out in Paragraph 4(2)(b) of Regulation (EC) No 733/2002 for a transfer of the disputed domain name to it (as it has requested), as it has not established that it has a presence within the European Union. Paragraph 4(2)(b) requires a registered office, central administration or principal place of business within the European Union, or an organisation established within the European Union, and the Complaint does not suggest that any of those conditions is met. Therefore, if the Complaint were to succeed, the only remedy available to the Complainant under ADR Rules B.11(b) is that of revocation.

Absence of a response.
The ADR Rules permit the panel to reach a decision on a Complaint where there has been no response by the Respondent, and the panel "may" regard failure to comply by the Respondent as a reason to accept the claims of the Complainant (ADR Rules, B.10(a)). In this case, although the Complainant has asked for the absence of a response to be treated as an admission by the Respondent, the panel proposes to follow the approach taken by the majority of previous panels, namely that, even in the absence of a response, it is incumbent upon the Complainant to establish a prima facie case, although in the absence of a challenge, the facts asserted by the Complainant will normally be accepted.

Rights.
Has the Complainant established that there is a right in a name which is recognised or established by the national law of a Member State and/or Community law (ADR Rules, B.11(d)(1)(i))? The Complainant has given details of trademark registrations for AMWAY which cover both Bulgaria and the European Union, and the panel therefore considers that has been established (without it being necessary to decide whether the US trademark registrations cited have any bearing on that question).

Identical/confusing similarity.
Is the disputed domain name identical or confusingly similar to AMWAY (ADR Rules, B.11(d)(1)(i)? The panel agrees with the Complainant that the addition of the generic top-level domain to the end of the mark, -bg (Bulgaria), does not distinguish the domain name from the mark AMWAY, and also lacks distinctiveness. In doing so, the panel has largely disregarded the UDRP authority quoted, which does not seem to it to be particularly helpful, as it refers to decisions which were not concerned with the ADR Rules. Therefore, the panel considers that the disputed domain name is confusingly similar to AMWAY (although not identical).

Respondent's rights in the domain name.

Does the Respondent have any rights or legitimate interest in the disputed domain name (ADR Rules, B.11(d)(1)(ii))? In this respect, the Complainant says that the Respondent has not been identified as an authorised IBO,although it is not clear whether the Complainant accepts that the Respondent's website is selling genuine AMWAY products (and the great majority of the text of the website screen-shots provided is in untranslated Bulgarian, which the panel is not familiar with). The Complainant also asserts, without supporting evidence, that even if the Respondent is an IBO, the terms of appointment would not have allowed the registration of a domain name containing the AMWAY mark. In both of these respects, the panel accepts what the Complainant has said is the factual position, in the absence of any response. The panel agrees that the use of the domain name on a site which (as the Complainant asserts), does not clearly distinguish the origin of the goods in question would not be a bona fide offering of goods or services, although this an issue which has more relevance to the question of bad faith use, rather than the question of whether the Respondent does not have rights or legitimate interest in the domain name. A translation of the web pages in question would have been helpful (and the panel would have been entitled to request one in accordance with ADR Rules A.3(c)). However, the panel is conscious that this Complaint is not contested, and the Respondent has decided not to challenge this factual point. Asking for an English translation of several pages of Bulgarian in such circumstances would seem to be disproportionate. The panel therefore accepts the Complainant's assertion that the website does not clearly distinguish the origin of the goods in question. The panel also notes that the domain name itself is just a combination of the Complainant's mark and the country code -bg, and there is nothing in the domain name itself (such as a description of the services offered) to suggest that the Respondent is independent from the Complainant. There appears to be relatively little precedent under the ADR Rules on the question of whether a reseller (authorised or not) of genuine branded goods can have rights or legitimate interest in such a domain name. In the case of harrypotterlego.eu CAC 5957, it was concluded that it would be possible for a Respondent to do so, following UDRP precedent. However, that case involved an aggregator (not a reseller as such), who apparently clearly identified the etailers whose sites were being linked to (making it clear that they were etailers, and not Lego itself). There was also a response in that case (whereas there has been none here). As noted above, in the absence of a response, the panel is applying the test of asking whether the Complainant has made out a prima facie case on this point. The panel is satisfied that it has, not least by the absence of any differentiator from the Complainant (other than -bg) in the domain name itself. The panel therefore finds that the Complaint succeeds on this point.

Bad faith.
Turning to bad faith, it is not strictly necessary to make a finding on this point in view of the finding above as to rights/legitimate interest, as the two grounds are alternative reasons for the Complaint succeeding. The panel nevertheless proposes to address that point. Both the domain name itself, and the content of the website (according to the Complainant's explanation), are likely to create the false impression of a connection with the Complainant, when no such connection exists. There appear to be no relevant differentiators which would enable a user to distinguish the Respondent's website from the Complainant. Alternatively, it would appear that the Respondent has hoped to profit from confusion in that respect. On the basis of assessing whether the Complainant has made out a prima facie case (in the absence of a response), the panel concludes that it has clearly done so, and therefore finds that the Complaint also succeeds on that ground.

Remedy.
For the reasons explained earlier, the Complainant is not entitled to transfer of the disputed domain name, and the only remedy available is revocation.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that the domain name AMWAY-BG.EU be revoked.

PANELISTS

Name	Robert Elliott

DATE OF PANEL DECISION 2013-02-21

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

I. Disputed domain name: amway-bg.eu

II. Country of the Complainant: United States of America, country of the Respondent: Bulgaria

III. Date of registration of the domain name: 20 May 2011

IV. Rights relied on by the Complainant (Art. 21 (1) Regulation (EC) No 874/2004) on which the Panel based its decision:
1. numerous trademarks including the word AMWAY registered in Bulgaria and within the European Union in respect of a wide variety of goods and services, e.g. word CTM, reg. No. 000193888, for the term AMWAY, filed on 1 April 1996, registered on 2 February 1999 in respect of goods and services in classes 3; 5; 16; 21; 25; 35.

VI. Domain name is confusingly similar to the protected rights of the Complainant

VII. Rights or legitimate interests of the Respondent (Art. 21 (2) Regulation (EC) No 874/2004):
1. No
2. Why: lack of connection with the Complainant, failure by the Respondent to differentiate in the domain name itself from the Complainant, and failure to identify in the Respondent's website the origin of the goods sold by reference to the Complainant's brand AMWAY

VIII. Bad faith of the Respondent (Art. 21 (3) Regulation (EC) No 874/2004):
1. Yes
2. Why: creation of a false impression of a connection with the Complainant when none exists, alternatively hoping to profit from confusion as to the same, by virtue of both the Respondent's website, and the domain name itself.

IX. Other substantial facts the Panel considers relevant: This was a no response case, so the panel came to the above conclusions based on requiring the Complainant to establish a prima facie case, and also accepting certain facts as established, given that they were uncontested.

X. Dispute Result: Revocation of the disputed domain name

XI. Procedural factors the Panel considers relevant: None