Panel Decision for dispute CAC-ADREU-006458

Case number	**CAC-ADREU-006458**
Time of filing	**2013-07-25 09:22:47**
Domain names	**ekash.eu**

Case administrator

Lada Válková (Case admin)

Complainant

Organization	**Smart Voucher Ltd t/a Ukash**

Respondent

Organization	**eKash International**

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

No legal proceedings are known to the Panel in connection with the disputed domain name.

FACTUAL BACKGROUND

The Complainant, Smart Voucher Ltd t/a Ukash, Mr. Jamie King (formerly known through its subsidiary as Universal e-Cash Limited) is a UK based company founded in 2001 and trading under the name Ukash. The Complainant is an online company that provides alternative online cash payment services under the brand UKASH since 2005. The Complainant's UKASH brand is regulated by the UK Financial Services Authority (FSA). The technology behind UKASH is protected by patents. The Complainant has a noticeable international presence and in particular, its e-commerce brand, UKASH is available globally in 420,000 outlets in 50 different countries. The Complainant's logo is prominently featured in payment terminals and retail outlets wherever it is available.

The Complainant's UKASH brand has been awarded with different honours, like the Queens Award for Enterprise in the International Trade category (in 2011 and 2012), inclusion in the Sunday Times Microsoft Tech Track 100 (in 2011 and 2012), the Payments Company of Year in 2012 at the B2B eGaming Review Awards, the Paybefore Awards Europe winner in the Most Innovative Prepaid Programme category in March 2013.

The Complainant has registered and has been using the domain name "ukash.com". The Complainant is the owner of several Community Trademarks containing the element "Ukash" or "U kash (fig.)", the first one filed on December 19, 2006.

The Respondent, Cyprian company eKash International, Wendy Kessie, has registered the domain name "ekash.eu" on August 16, 2011. The Respondent has set up the website www.ekash.eu.

On March 12, 2012 the Complainant forwarded the formal Cease and Desist Letter to the Respondent informing the Respondent about the infringing use of the disputed domain name and requesting the transfer of the domain name. As a result of the letter, the Respondent made slight modifications on the website excluding the references to the Complainant, but the content still remained without further actions.

On March 25, 2013 the Complainant filed the present Complaint.

In accordance with the ADR Rules, Paragraph B2(a), the Czech Arbitration Court formally notified the Respondent of the Complaint, the proceedings commenced on April 9, 2013. Neither the written notice of the Complaint nor the advice of delivery by postal mail (on April 16, 2013) thereof was returned to the Czech Arbitration Court by the Respondent. In accordance with Paragraph A2(e)(3) of the ADR Rules the CAC considered the written notice delivered to the Respondent on April 29, 2013, requesting the Respondent to file the

Response by June 17, 2013.

The Respondent did not submit any Response, and accordingly, the CAC notified the Respondent's default on June 18, 2013.

The Panel was appointed on June 27, 2013.

A. COMPLAINANT

The Complainant seeks the transfer of the disputed domain name.

1. The Complainant contends that he is the owner of Community Trademarks "Ukash" (No. 005598297, Classes 9, 16, 36, filed 19 Dec 2006); "U kash (fig.)" (No. 005623814, Classes 9, 16, 36, filed 02 Jan 2007), "U kash (fig.)" (No. 005619556, filed 27 Dec 2006), "UKASH IT'S EMONEY" (No. 010744068, Classes 9, 16, 36, filed 08 Mar 2012), and owner of US trademark "UKASH" (Reg. No. 77205457, filed 13 Jun 2007).

Thus, the Complainant considers that the domain name in dispute is confusingly similar to its UKASH mark, since "UKASH" is a uniquely coined phrase derived from the Complainant's subsidiary Universal e-Cash Ltd., the consumers associate the 'e' with the electronic exchange of money and Complainant is known as the Global e-Money Network operating in over 50 countries across 6 continents and processing in excess of £500m eMoney transactions each year. Also the dominant features of the UKASH mark are the use of a 'K' in the spelling of 'cash', and capitalized 'U' which has merely been replaced with a lower case 'e', a practice known as typo squatting. The Respondent has clearly used the term EKASH to create an association with the Complainant's UKASH mark especially when taking into account the Complainant's reputation and use of the mark in relation to electronic money services.

2. The Complainant claims that the disputed domain name was registered without rights or legitimate interest, since:

- the disputed domain name has been registered by the individual Wendy Kessie, based in Nicosia, Cyprus. The search in the UK Companies House Register reveals that Wendy Kessie is in fact an appointed Director of Kash Mart UK Ltd (www.kashmart.com) and CEO of Kash Mart Americas. The Respondent operates under various company names including but not limited to Ekash Panama, Groupe Ekash Corp, EKash UK Ltd, eKash International, Kash Mart International and KASHFX. All these companies are associated through their websites and key members. Google search reveals the fraudulent activities conducted by them in relation to EKASH (see Ripoffreports.com).
- Respondent through ekash.eu domain name claims to be regulated by the Financial Crimes Enforcement Network (FINCEN one of the U.S. Department of Treasury's lead agencies in the fight against money laundering), the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) and the HM Revenue & Customs (HMRC). A thorough search of these institutions registers does not return any results which relate to the Respondent or their associated companies.
- Respondent claims to be operated by Complainant and is a registered trademark of the Complainant. Complainant asserts that the Respondent has not been licensed by the Complainant or authorized in any way to use a mark confusingly similar to its mark. Moreover the Respondent is not affiliated with the Complainant in anyway whatsoever and could not make any legitimate use of the domain name given the fame, reputation and goodwill associated with the Complainant's brand.
- Thorough examination of the Respondent's website it is evident that it does not provide the goods or services that it promotes such as prepaid cards or "ECHIPS". The business model used by the Respondent is identical to the Complainant's, on closer inspection of the site and through Respondent's "live chat" provision it becomes clear that no such services exist.
- The mere registration of a domain name with a web page which gives the false impression of a business cannot be enough to constitute a legitimate right or interest for the purpose of the policy; for Respondent to rely on the provisions of the policy he must firstly be making some actual use of the domain name, and that such use shall be bona fide offering of goods and services.
- The Respondent further claims from the ekash.eu domain to be available in over 420,000 + payment terminals and available across over 100 countries worldwide. If any of this is to be believed then Respondent should be able providing sufficient evidence showing that a business operation does in fact exist.
- Knowingly taking advantage of the rights of a competitor and then using their goodwill and reputation to obtain a financial gain cannot be considered to give rise to a legitimate right.

3. The Complainant contends that the disputed domain name should be considered as having been registered or being used in bad faith. The Complainant believes that the domain name was intentionally used to attract Internet users, for commercial gain to the Respondent's website or other on-line location, by creating a likelihood of confusion, and that the domain name was registered primarily for the purpose of disrupting the professional activities of a competitor.

The Complainant refers that the Respondent's website is full of misrepresentations and presents a distortion of fundamental facts that if relied upon by consumers would lead them into believing that there is a business connection with the Complainant, or that they are in

fact the Complainant. Further, the Complainant asserts that the fundamental design elements have been copied in some form or another, e. g. the logo, the layout, the structure, the content and the juxtaposition of the words on Respondent's website have all been copied and are evident in the Complainant's website. It is Respondent's clear intention to further exacerbate the confusion with the intention to mislead consumers into believing that the Complainant and itself are one of the same. The likelihood of confusion goes even beyond, covering the legal formalities outlined in the Complainant's terms of service and Affiliate scheme, e. g. the Respondent has incorporated the Complainant's land based address in the text of its Terms of Service document. Respondent did not stop at just the name in order to attract Complainant's audience but rather he approximated the Complainant's partners, Complainants patented technology, concept, design and even company address. Consequentially Respondent's actions have the potential to damage the Complainant's reputation.

The Complainant has supported his arguments with earlier WIPO UDRP cases and CAC ADR cases.

B. RESPONDENT

The Respondent has failed to file the Response to the Complaint, despite of the timely reminders and official notification of default.

DISCUSSION AND FINDINGS

Article 21(1) of Regulation (EC) No. 874/2004 (hereinafter "Regulation") states:
"A registered domain name shall be subject to revocation, using an appropriate extra-judicial or judicial procedure, where that name is identical or confusingly similar to a name in respect of which a right is recognized or established by national an/or Community law, such as the rights mentioned in Article 10(1), and where it:
(a) has been registered by its holder without rights or legitimate interest in the name; or
(b) has been registered or is being used in bad faith."

Paragraph B11(a) of ADR Rules states:
"A Panel shall decide a Complaint on the basis of the statements and documents submitted and in accordance with the Procedural Rules."

Further, according to ADR Rules, Paragraph B10(a), in the event that a Party does not comply with any of the time periods established by these ADR Rules or the Panel, the Panel shall proceed to a decision on the Complaint and may consider this failure to comply as grounds to accept the claims of the other Party. The Respondent and the Complainant were informed by the case administrator of the Respondent's default. The Respondent did not react even within the following five days after receiving this notification (ie did not challenge the notice of Respondent's Default according to Paragraph B3(g) of the ADR Rules). In this case the Panel decides that there is a reason to accept the claims of the Complainant.

At the same, the Panel has checked the existence of the Community trademark rights on which the Complainant has based its Complaint and confirms the existence of these rights which were also in full effect at the time of the Complaint (see CAC Case No. 06049, topreality.eu)

Identical or Confusingly Similar

The Complainant owns the Community trademark registrations, inter alia, for the wordmark "Ukash" and for the combined marks "U kash (fig.)" where the letter 'U' is placed separately above or in left from the word "kash". By the Panel's view, the element "kash" in these combined marks can be clearly separated and distinguished from the letter 'U' in these marks (see CAC Case No. 05208, haug.eu), where the word "kash" may be considered decisive in these combined marks.

In contrary, the disputed domain name "ekash.eu" incorporates the word element "kash" of the Complainant's trademarks. Although, the English term "cash" may be regarded descriptive and could raise the questions concerning the confusing similarity issue, still, the contained element "kash" in the disputed domain name shall be regarded as coined word. The inclusion of the ccTLD denomination ".eu" shall be disregarded for the purposes of these proceedings.

In the same way, the presence of the prefix "e" does not elude the risk of collision between these two names, since the Panel considers that the prefix "e" is descriptive in reference to the electronic services, the concept of which is that the consumer can buy products or services online, and that the only dominant and distinctive element in the expression "ekash" is "kash" (see CAC Case No. 04318, e-airfrance.eu). Moreover, the content of the Respondent's website www.ekash.eu show the Respondent's intentions to provide the electronic services online, at the same using the element also in form "eKash".

Therefore, the Panel finds that the disputed domain name is confusingly similar to the Complainant's trademarks.

The identity or confusing similarity requirement in the Regulation, Article 21(1), is therefore fulfilled.

Rights or Legitimate Interest

Under Article 21(2) of the Regulation (corresponding Paragraph B11(e) of ADR Rules), the legitimate interest condition is considered to be fulfilled in particular but without limitation when:
(a) prior to any notice of an alternative dispute resolution (ADR) procedure, the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so;
(b) the holder of a domain name, being an undertaking, organisation or natural person, has been commonly known by the domain name, even in the absence of a right recognised or established by national and/or Community law;
(c) the holder of a domain name is making a legitimate and non-commercial or fair use of the domain name, without intent to mislead consumers or harm the reputation of a name on which a right is recognised or established by national and/or Community law.

The Complainant alleges that the Respondent has no right or legitimate interest in the disputed domain name. Once the Complainant makes a prima facie showing of the Respondent's lack of rights or legitimate interests to the disputed domain name, the burden of proof shifts to the Respondent to come forward with the evidence of rights or legitimate interests in this respect. However, the Respondent has not rebutted this allegation. The Respondent has failed to file the Response in which the right or legitimate interest could be asserted and proved.

The Panel finds that the Respondent was using the contested domain name before receiving any notice of the dispute. However, the Panel notes that the wording of Art 21(2)(a) fails to state whether the 'use' should be in connection with a 'bona fide' offering of goods or services in order to demonstrate a legitimate interest, notwithstanding the absence of the words 'bona fide'. In the previous ADR cases, the Panel has hold that the logical conclusion is that such use should be 'bona fide' for there to be a legitimate interest (see CAC Case No. 04213, enterpriserentals.eu; CAC Case No. 04296, alterian.eu). As a result, the Panel finds that the Respondent's such use shall not be regarded as bona fide offering of services in accordance with Article 21(2)(a) of the Regulation, neither such use may be viewed as a legitimate noncommercial or fair use under Article 21(2)(c) of the Regulation. Such a conclusion may be made based on the arguments and evidences made available to the Panel.

At the same, to the knowledge of the Panel, the Respondent is not commonly known by the disputed domain name as regulated under Article 21(2)(b) of the Regulation, while the Respondent has not presented any arguments and evidences that could prove the contrary.

Therefore, on the evidence made available to the Panel, and in the absence of any formal Response from the Respondent, it appears to the Panel that the Respondent does not have any rights or legitimate interest in the Domain Name.

The requirement of the Regulation, Article 21(1)(a), is also considered fulfilled.

Registered or Used in Bad Faith

Lastly, the Panel evaluates the alternative ground as regulated under Article 21(1)(b) of the Regulation, ie whether the disputed domain name has been registered or is being used in bad faith. Article 21(3) of the Regulation (corresponding Paragraph B11(f) of ADR Rules) sets out, by way of example, a number of circumstances which may be taken as indicative of bad faith.

To establish registration in bad faith ordinarily requires the Complainant to show that the Respondent had actual knowledge of the Complainant and its marks when the disputed domain name was registered, and that the disputed domain name was selected expressly to target the Complainant to take advantage of its marks (see WIPO Case No. DAM2010-0001, ieee.am; WIPO Case No. D2007-1902, goldmedal.com).

One of the factors showing the bad faith as contained in Article 21(3)(d) of the Regulation may be demonstrated where "the domain name was intentionally used to attract Internet users, for commercial gain to the Respondent's website or other on-line location, by creating a likelihood of confusion with a name on which a right is recognized or established, by national and/or Community law, or it is a name of a public body, such likelihood arising as to the source, sponsorship, affiliation or endorsement of the website or location or of a product or service on the website or location of the Respondent".

It is the Panel's view that the Respondent had the Complainant and the Complainant's trademarks in mind when registering the disputed

domain name. The Panel finds that the Respondent registered the disputed domain name in order to exploit the Complainant's right in the marks through the creation of initial interest confusion. Considering the confusing similarity of the disputed domain name to the Complainant's trademarks, the Respondent's connections to the UK where specifically the Complainant and its trademarks have obtained recognition, the prominent display of the Respondent's logo on its website that in design and in color is similar to the Complainant's logo, the identical business model to the Complainant, all the misleading information included in the Respondent's website creating impression to have connections with the Complainant, while no such connections with the Complainant exist in fact, leads the Panel to conclude that the disputed domain name has been registered and has been used by the Respondent in bad faith (see CAC Case No. 04296, alterian.eu). The disputed domain name and the Respondent's website appear to be internationally registered and designed to capture the impression with the Complainant, for the purposes of capitalizing or otherwise taking advantage of the Complainant's trademark rights, through the creation of Internet user confusion.

It is therefore evident to the Panel that the Respondent is intentionally attempting to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's marks.

Therefore, the Panel finds that the disputed domain name was registered or is being used in bad faith.

Considering all the facts, the Panel therefore finds that the requirement of the Regulation, Article 21(1)(b), is also fulfilled in this case.

The Complainant has asked the transfer of the disputed domain name to the Complainant. The Complainant is the company entered into the UK Companies House Register and having its principal place of business in the United Kingdom, therefore, the Complainant satisfies the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No. 733/2002.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that

the domain name EKASH.eu be transferred to the Complainant.

PANELISTS

Name	**Riina Pärn**

DATE OF PANEL DECISION 2013-07-24

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

I. Disputed domain name: ekash.eu

II. Country of the Complainant: Great Britain, country of the Respondent: Cyprus

III. Date of registration of the domain name: 16 August 2011

IV. Rights relied on by the Complainant (Art. 21 (1) Regulation (EC) No 874/2004) on which the Panel based its decision:

1. European Community Trademark "Ukash" CTM No. 005598297
filed on 19 December 2006, registered on 30 January 2008
in respect of goods and services in classes 9, 16, 36.

2. European Community Trademark "U kash (fig.)" CTM No. 005623814
filed on 02 January 2007, registered on 30 November 2007
in respect of goods and services in classes 9, 16, 36.

3. European Community Trademark "U kash (fig.)" CTM No. 005619556
filed on 27 December 2006, registered on 19 November 2007
in respect of goods and services in classes 9, 16, 36.

V. Response submitted: No.

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: Although the Respondent has set up the website www.ekash.eu, and as evidences submitted by the Complainant show the setting up of the named website prior before the notice of the current dispute, the Panel still holds that such use performed by the Respondent shall be bona fide offering of goods or services in order to demonstrate a legitimate interest. Since the Panel has found the Respondent lacking of any such bona fide use, and as no other factors exist that could show or prove the Respondent's rights or legitimate interests to the disputed domain name, therefore, the Panel has considered the second requirement fulfilled.

VIII. Bad faith of the Respondent (Art. 21 (3) Regulation (EC) No 874/2004):
1. Yes
2. Why: Based on the arguments and evidences made available to the Panel, the Panel has concluded that the Respondent is intentionally attempting to attract, for commercial gain, Internet users to its website www.ekash.eu by creating a likelihood of confusion with the Complainant's marks and with the Complainant. Therefore, the Panel has found the disputed domain name being registered or being used in bad faith.

IX. Other substantial facts the Panel considers relevant:
Considering the confusing similarity of the disputed domain name to the Complainant's trademarks, the Respondent's connections to the UK where specifically the Complainant and its trademarks have obtained recognition, the prominent display of the Respondent's logo on its website that in design and in color is similar to the Complainant's logo, the identical business model to the Complainant, all the misleading information included in the Respondent's website creating impression to have connections with the Complainant although no such connections exist in fact, has led the Panel to conclude that the disputed domain name has been registered and has been used by the Respondent in bad faith.

X. Dispute Result: Transfer of the disputed domain name.

XI. Procedural factors the Panel considers relevant:
Absence of the Respondent's response, while neither the written notice of the Complaint nor the advice of delivery thereof was returned to CAC. In accordance with par. 2(e)(3) of the ADR Rules the CAC has considered the written notice delivered to the Respondent.

XII. Is Complainant eligible? Yes.