Panel Decision for dispute CAC-ADREU-007049

Case number	CAC-ADREU-007049
Time of filing	2015-12-21 10:58:23
Domain names	www.pixie.eu

Case administrator

Lada Válková (Case admin)

Complainant

Organization

Respondent

Organization	OEEO Networks Limited

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

The Panel is not aware of any other legal proceedings.

FACTUAL BACKGROUND

Complainant Oystershell is a Belgian pharmaceutical company specialized in the innovation of consumer healthcare products. Complainant is the owner of the Benelux Trademark PIXIE with registration number 0964504 filed on 24 October 2014 and a registration date of 16 July 2015. Complainant also owns the Community Trademark PIXIE with filing number 013930094 filed on 10 April 2015 and a registration date of 18 August 2015.
The disputed domain name <pixie.eu> (“the Domain Name”) was registered on 7 June 2006.

On 1 October 2015 the ADR proceeding commenced and notification was issued to Respondent that its Response was to be submitted within 30 working days of that date.
Respondent did not comply with the deadline indicated in the Notification of Complaint and Commencement of ADR Proceeding for the submission of a formal Response and the Czech Arbitration Court notified Respondent of its default on 13 November 2015.
Respondent did not challenge Provider’s notification of Respondent’s default by written submission to the Provider filed within five days from receiving the notification of Respondent’s default pursuant to Paragraph B3(g) of the .eu Alternative Dispute Resolution Rules ('ADR Rules').

Following an invitation to serve on the Panel in this dispute, the Panel accepted the mandate and submitted the Declaration of Impartiality and Independence in due time. The Czech Arbitration Court duly notified the parties of the identity of the Panel appointed on 25 November 2015. In accordance with Paragraph B4(e) of the ADR Rules the date by which a decision on the matter was due was specified as 21 December 2015.

In the absence of a challenge to the Panel's appointment by either Party according to Paragraph B5 (c) of the ADR Rules, the Czech Arbitration Court transmitted the case file to the Panel on 30 November 2015.

On 2 December 2015 Respondent's legal representative submitted three nonstandard communications (“NSC”) stating that there appeared to have been an error in communications. Respondent submitted a request that the Annex 2 to its first non-standard communication be treated as its Response, including Annex 3, an index of exhibits attached to Annex 2.

On 10 December 2015 the Secretary of the Czech Arbitration Court decided that the proceeding be continued and that the Panel was duly appointed. The Court considered in its decision denying the request of Respondent that according to its online platform, and taken into account the internet browser history submitted by Respondent as part of its NSC’s, (1) Respondent’s access to the platform was

confirmed as per 1 October 2015, (2) that no Response had been filed on 12 November 2015, and (3) that Respondent did not challenge the notification of 13 November 2015 of Respondent's default.

A. COMPLAINANT

According to the complaint Complainant Oystershell is a Belgian pharmaceutical company specialized in the innovation of consumer healthcare products. One of her products is being marketed under the brand PIXIE and in order to protect this unique brand Complainant filed several trademark registrations. Complainant asserts that according to the Benelux Convention on Intellectual Property and the Community Trademark Regulation (EC) No. 207/2009 Complainant has a right recognized and established by national and Community law for the trademark PIXIE.
Complainant submits that the Domain Name is identical to Complainant's PIXIE trademark.

Complainant submits that Respondent has no rights or legitimate interest in the Domain Name. The Domain Name was registered on 7 June 2006. According to the use history of the Domain Name Respondent never made any use of the Domain Name in connection with any kind of products / services, nor has there been any non-commercial or fair use of the Domain Name. According to screen prints there is evidence that no content was/has been linked to the Domain Name since at least 2012. Non-use of a domain name for more than three years cannot be justified. Complainant submits that there is consequently nothing to suggest that Respondent has used or ever intended to use the name PIXIE for any aspect of its business activities. Further, Respondent is not commonly known under the PIXIE name. In that respect, Complainant enclosed a copy of a search report for trademark and company names in the name of Respondent via the database of Thomson Reuters. This almost worldwide search did not reveal any pertinent hit for PIXIE. Further, Complainant conducted Google searches combining Respondent's name Michael Kopinski and OEEO Networks with the name 'pixie', which did not reveal any pertinent hit showing that the Respondent would have any legitimate interest in the Domain Name. Finally, Complainant adds that in other ADR procedures involving Respondent for three completely different domain names (<ethercat.eu>, <petrobras.eu> and <noonan.eu>) Respondent did not submit a response, did not show any legitimate interest in or business under the concerned name and that all three domain names were transferred to Complainant. This clearly indicates that Respondent also has no legitimate interest in this Domain Name.

According to Complainant the Domain Name has been registered or is being used in bad faith. Complainant submits that the Domain Name was registered in 2006 and that since then no active website or content was linked to the Domain Name. The Domain Name was always offered for sale and the Domain Name is currently offered for sale by the intermediary organization "Igloo Domain Advisors". Complainant has already tried to obtain the Domain Name by contacting the Igloo organization and by offering the minimum offer price of USD 2000 (as requested on the website). The offer was however immediately rejected because "the seller wants net $ 5000" according to the Igloo organization.
According to Complainant the fact that Respondent never made any use of the Domain Name and has tried to sell the Domain Name for the unreasonable and excessive amount of USD 5000, clearly evidences that Respondent is acting in bad faith. It is also very obvious that the Domain Name was solely registered for the direct commercial purpose of reselling the Domain Name for an unreasonable price. There is consequently no doubt that this is a speculative registration of the Domain Name. Complainant asserts that according to earlier ADR decisions such behaviour evidently demonstrates registering / using the Domain Name in bad faith: the intention of making money by registering various domain names and selling the domain name for a much higher fee (than the relatively low cost of registering a domain name). In that respect, Complainant mentions that it found – as mentioned above - other ADR procedures involving Respondent and for completely different domain names which in its opinion clearly evidences that Respondent has a practice of speculative and abusive registration of domain names.

B. RESPONDENT

Preliminary observation. As the Panel will elaborate in more detail below as part of its Discussion and Findings, in accordance with article B8 of the ADR Rules the Panel will admit the statements and documents ("statements") submitted by Respondent as Annexes 2 and 3 of its first non-standard communication of 2 December 2015. However, these statements are not considered to be a Response as per article B3 of the ADR Rules.

Respondent submits that PIXIE is not a unique trademark term, that it is widely used in domain names and that it was and is commonly used on the Internet. According to Respondent Complainant has provided no evidence that it ever used the trademark PIXIE upon which it relies.

According to Respondent it used the Domain Name for advertising purposes. Examples of unformatted historical advertisements from Archive.org are provided. Examples of static images from screenshots.com are also provided. While not all of the results are directly related to the dictionary definition of "pixie", the advertisements cannot be said to be irrelevant given the evidence of wide-spread divergent pejorative use. Most importantly, there is no evidence that any of the advertising pages conflict with Complainant or any

asserted trademark. Respondent's listing the Domain Name for sale cannot be said to be targeting Complainant. The Domain Name is a common word and was clearly not associated with any trademark. The sale listing existed long before Complainant applied for its trademark and was open to any member of the general public. That Respondent rejected Complainant's offer is not evidence of bad faith. That Respondent's preferred sale price may be higher than what Complainant thought reasonable is not determinative. Respondent's requested price reflected its opinion of the inherent non-trademark value of a 5-character common English word domain name. In fact, Complainant's "offer" could be easily seen as false and misleading. Complainant made no effort to identify itself. Rather, Complainant falsely represented that it was a husband and wife team that had recently started a business but had yet to select a domain name. By email dated 1 September 2015, Complainant admitted the Domain Name <pixie.eu> was not important as they could easily select another one stating: "If I cannot buy this domain name, I should look out for a new name (and this time first for a free domain name)". Respondent adds that Complainant's "offer" did not assert trademark rights and did not set out any of the arguments it presently makes. While asserting that a business had been started, no evidence or other facts were provided which would indicate that any "prior rights" existed. Respondent cannot be said to have known it was dealing with the holder of an asserted trademark and its negotiations to sell cannot thus have been in bad faith.

Complainant's Benelux and CTM trademarks were registered on 16 June 2015 and 24 August 2015, respectively. According to Complainant it is generally considered negligent to file trademark applications without conducting a relevant search to determine the presence of conflicting trademarks and other common law uses (such as domain names). It is thus reasonable to conclude that Complainant was well aware of the Domain Name prior to having filed its trademark application. Complainant intentionally waited until 29 August 2015 before embarking on its scheme to buy the Domain Name on 29 August 2015. When it could not purchase the Domain Name for its desired price, Complainant immediately filed this ADR in an attempt to interfere with Respondents rights and abscond with its property.

In response to the statements and allegations made in the Complaint Respondent argues as follows. Trademarks do not grant exclusive rights to use the relevant term for all purposes. Rather, trademark rights are recognized only in connection with the classification of goods/services for which they were registered. Complainant relies entirely upon its 2015 trademark registrations, which are limited to classes 5 and 10 (pharmaceutical wart removal). Complainant's failure to have ever used its trademark precludes it from now asserting expansive rights beyond the registered goods/services. Turning to the case at hand, Complainant has admitted the limitation of its asserted trademark. Complainant's lack of use of the trademark precludes a finding that any consumer would be expecting to encounter Complainant's products when typing "pixie.eu" in the browser. The website itself bears no relationship to Complainant or its non-existent product and it is clear that no confusion could possibly exist. Respondent's website does not appear in any search engine, which precludes consumer confusion as a result of any search for Complainant's yet-to-be product. Respondent's use has never conflicted with any right asserted by Complainant.

Respondent submits it has rights in the Domain Name. Respondent argues that the burden of proof rests entirely with Complainant who must provide evidence establishing that Respondent lacks rights or a legitimate interest in the Domain Name. Respondent submits that it registered the Domain Name during the post-sunrise period during which domain names were available to the general public on a first-come-first-served basis without regard to a claim of prior rights. Respondent has openly held the registration rights to the Domain Name pursuant to a valid registration agreement in existence since June 2006. The Domain Name is a common English word widely used outside of any trademark context. Respondent did not register (and has not used) the Domain Name to target anyone. Respondent has not undertaken any action, which would render its rights improper or invalid.

Respondent continues as follows: "What Is Speculation And How Is It Addressed by The Regulation?" According to Respondent it is true that panels have often referenced the term "speculative registration"; however, the vast majority, if not all, cases doing so were default cases in which no contrary argument was put forward. Respondent refers to the decision in Noonan Services Group, Tomas MacGinley v. OEEO Networks Limited, Michael Kopinski, CAC Case 05578 <noonan.eu>, in which case the issue was addressed; according to Respondent the panel in this decision did not engage in a complete analysis and thus did not reach a correct decision. The fact that "speculative registration" is not expressly defined does not warrant an expansive definition. To understand the term, one must look to the Regulation. A proper review of the Regulation shows that speculation is addressed exclusively in Article 21(3)(b) of Regulation (EC) No. 874/2004 of 28 April 2004. The Regulation intentionally distinguished itself from the UDRP in two important ways. First, it created a "sunrise" period during which only holders of prior rights could register domain names. Second, it discarded the conjunctive operation of the UDRP (requiring both no legitimate interest and bad faith) and instead permitted a complainant to establish lack of rights, or legitimate interests, or bad faith registration or bad faith use. We also know that no qualitative wording appears in Article 21(1)(a). The reference to "speculative and abusive registrations" in Recital (16), the heading of Article 21 and in Article 22(11) does not give license to insert language where none exists. "Rights" and "legitimate interests" are not intended to duplicate the provisions of Article 21(1)(b) or Article 21(3). Speculative registrations are instead addressed by Article 23(3)(b), which provides a balance between the registrant's right to register a domain name and the complainant's right to prevail in an ADR. The balance is reflected in conditions of Article 21(3)(b) which requires that the complainant show that (i) the domain name was registered to block complainant from using his mark in a

relevant domain name, and (ii) the domain has not been used “in a relevant way”. The Regulation does not preclude the non-use of a domain name unless the registration was undertaken as a blocking attempt AND the domain name owner has not used the domain name “in a relevant way”. Article 21(3) thus prevents speculative registrations but only in a manner, which reflects the overall balance of the Regulation as evidenced by the combined Sunrise, followed by the express declaration that post-sunrise registrations would be allocated on a first-come-first-served basis. Merely holding a domain name alone is not bad faith in the absence of other factors showing that the trademark was targeting or taking an unfair advantage of the trademark.

Under the facts of this case, Complainant cannot show that the registration is speculative. There is no evidence that the registration was undertaken to block Complainant – whose trademark did not exist. There is no evidence that the Domain Name currently blocks Complainant’s trademark use. Complainant itself admitted it could easily select another domain name, including one more appropriately descriptive of a wart removal product. Respondent concludes that it has thus established a “right” within the meaning of Regulation 874/2004.

Respondent also argues that Respondent’s use has been legitimate. According to Respondent Article 21(2)(a) states that rights or legitimate interests may be shown by pre-complaint use of the domain name “in connection with the offering of goods or services”. Unlike the UDRP, there is no qualitative reference as to what goods or services must be shown. The word “bonafide” does not appear in Article 21(2)(a).
According to Respondent non-conflictive PPC use of a common word is legitimate.
Respondent has historically used the Domain Name to provide advertising services. That the advertising results are not directly related to the dictionary definition of “pixie” does not mean Respondent lacks rights or legitimate interests. Use in a definitional sense is merely evidence that unfair advantage was not undertaken. Substantial evidence exists to indicate that Respondent’s use did not unfairly target Complainant or any trademark.
According to Respondent holding a domain name for sale to the general public is also legitimate. Respondent submits that having a contractual right to hold the Domain Name, the law recognizes that Respondent holds a corresponding right to sell it at a price Respondent deems appropriate, unless the registration or use is separately shown to have been in bad faith under Article 21(3).

Respondent submits that it has not acted in bad faith. There was no bad faith registration. Complainant cannot show that the Domain Name was registered in bad faith because the asserted trademark did not exist at the time the Domain Name was registered. Respondent did not register intending to sell to Complainant. Complainant has argued that Respondent registered the Domain Name for the primary purpose of selling it to Complainant; the fact that registration occurred over 8 years prior to Complainant’s trademark precludes such a conclusion. Any listing for sale was open to the general public without qualification except as to price. Complainant did not identify itself in its emails and made no claim to having held a trademark. Indeed, Complainant’s email of August 29 indicates that it would easily select a new domain name if Respondent would not reduce its price. According to Respondent it did not register the Domain Name to prevent Complainant from reflecting its asserted trademark in a relevant domain name. The relevant timing of Domain Name registration vs. trademark registration precludes a finding under Article 21(3)(b). Complainant has not used the trademark in any sense and no reference to the word “pixie” is found on its website. Complainant has not shown that it is unable to obtain any relevant domain name containing the term “pixie”. The fact that Respondent’s registration of the Domain Name prevents Complainant from holding it is not sufficient to establish “blocking”. If it were, all ADRs would be resolved in favour of trademark holders.

Respondent submits that neither advertising use nor offering the Domain Name for sale is bad faith. Complainant asserts that the Domain Name is not “used”. According to Respondent the Domain has been historically used to provide advertising services. The advertising services, including loans, education, etc., are reasonably related to the types of use for “Pixie” reflected in both historical and current Google searches. Unless Complainant can establish the requirements of Article 21(3)(b), neither the non-use nor holding of the domain for sale can be considered “speculative or abusive”. Indeed UDRP decisions issued under the auspices of WIPO reflect a widely accepted policy concluding that the non-use of domain names does not constitute bad faith unless the asserted trademark was pre-existing and famous. As concerns sales, WIPO panelists have consistently held that the sale of a domain name which is generic/descriptive in nature does not constitute bad faith unless respondent is shown to have been aware of the complainant’s trademark and undertook efforts to target or otherwise take unfair advantage.

Finally, Respondent asserts that other ADR proceedings involving Respondent do not evidence bad faith. Complainant argues that Respondent was involved in three other ADR procedures. According to Respondent <ethercat.eu> (ADR 03565) and <noonan.eu> (ADR 05578) were both defaults. Respondent has no record of receiving notification and it is possible that notifications were lost in email spam filters. In <petrobras.eu> (ADR 06152 -decision not found on ADR website), Respondent immediately responded by stipulating to the transfer and the panel, treating it as a default, issued a decision based entirely upon the complaint. These are insufficient to establish a pattern of inappropriate conduct, particularly in light of the substantial nature of the present statements.

DISCUSSION AND FINDINGS

1. Preliminary

As noted above, Respondent did not comply with the deadline for the submission of a Response within 30 working days from the delivery of the notification of commencement of the ADR Proceeding and default was duly notified by the Czech Arbitration Court on 13 November 2015. Respondent did not challenge the notification of Respondent's default in terms of Paragraph B3(g) of the ADR Rules. On 2 December 2015 Respondent filed three non-standard communications, one which containing a detailed response to the Complaint. As noted above, the Secretary of the Czech Arbitration Court decided on 10 December 2015 that these non-standard communications were not a properly filed Response and that the Panel was duly appointed.

The Panel must therefore consider the admissibility of the communications of 2 December 2015 within the framework of the ADR Rules. Article B8 of the ADR Rules states: "In addition to the Complaint and the Response, the Panel may request or admit, in its sole discretion, further statements or documents from either of the Parties." In the exercise of such discretion the Panel is required to ensure that the Parties are treated fairly and with equality (Article B7(b) of the ADR Rules).
The Panel has decided to admit the substantive (excluding procedural) statements and documents submitted by Respondent as Annexes 2 and 3 of its first non-standard communication of 2 December 2015 for the following reasons:
a. The substantive statements contained in Annex 2 of the first non-standard communication constitutes in all respects a properly prepared response to the Complaint which, had it been filed on time, would not unlikely have been judged to be administratively compliant by the Czech Arbitration Court while Annex 3 contains several exhibits to Annex 2;
b. It appears that the Annexes 2 and 3 were not properly filed on time due to a technical mistake and/or misunderstanding on the part of clerical staff of the legal representative of Respondent while there appeared to be willingness to submit the filing on time;
c. Complainant did not seek to oppose the non-standard communications and, bearing in mind the requirements of fairness and equality, the Panel does not identify any prejudice which might result to Complainant by the treatment of the substantive statements contained in Annexes 2 and 3 of the first non-standard communication as further statements as per Article B8 of the ADR Rules.

2. Applicable provisions

This Complaint is brought under the auspices of Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration ("Regulation 874/2004"). Article 22(1)(a) of Regulation 874/2004 allows any party to initiate an ADR procedure where the registration is speculative or abusive within the meaning of Article 21.

Article 21(1) states that a registered domain name may be subject to revocation where that name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/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.

Article 10(1) states that " 'prior rights' shall be understood to include, inter alia, registered national and community trademarks, geographical indications or designations of origin, and, in as far as they are protected under national law in the Member-State where they are held: unregistered trademarks, trade names, business identifiers, company names, family names, and distinctive titles of protected literary and artistic works."
Article 21(2) contains a list of non-exhaustive examples whereby Respondent's rights or legitimate interest may be demonstrated (echoed in Paragraph B11(e) of the ADR Rules), while Article 21(3) provides examples whereby bad faith may be demonstrated within the meaning of Article 21(1)(b) (similarly echoed in Paragraph B11(f) of the ADR Rules).
With this in mind the Panel addresses each of the constituent parts of Article 21(1) of Regulation 874/2004.

3. Identical or confusingly similar Domain Name.

Complainant has demonstrated that it possesses registered Benelux and Community trade marks for PIXIE. The Domain Name comprises this term alone combined with the .eu TLD.

Regulation 874/2004 has a foundation in European legislation. It is therefore somewhat different than the contract based ADR processes that operate in relation to other types of domain names. Nevertheless, Regulation 874/2004 has a number of common elements with the Uniform Dispute Resolution Policy ("UDRP"). The wording "identical or confusingly similar" is one of the phrases that has been taken from the UDRP. The test required by the words "identical or confusingly similar" has been described as a "threshold" or "standing" test under the UDRP, and there is no reason why it is should be understood differently as far as Regulation 874/2004 is concerned.

In this rather simple test it does not matter whether or not there is confusion (as asserted by Complainant), whether or not the word “Pixie” is a common generic word often used on the Internet or whether or not the trademark PIXIE is actually used by Complainant (as asserted by Respondent).

The Domain Name <pixie.eu> incorporates the entirety of the PIXIE trademarks as its distinctive element. The Panel finds that Complainant has proven that the Domain Name is identical to Complainant’s existing Benelux and Community trademarks. It is consensus view (see the Overview of CAC Panel views on several questions on the alternative dispute resolution for .eu domain name disputes, III.1, p. 30; “the CAC Overview”) that the .eu suffix can be disregarded. The fact that the trademarks of Complainant have been registered after the registration of the Domain Name is also irrelevant in deciding that the Domain Name is identical to the PIXIE trademarks, in particular as Article 21(1) of Regulation 874/2004 contains no specific reference to the date on which Complainant must have acquired the rights (see also CAC Overview II.5, p. 26).

4. Rights or Legitimate Interest

Before proceeding to an analysis of Complainants’ submissions regarding the possible lack of rights or legitimate interest in the Domain Name on the part of Respondent it is necessary to evaluate the content of the website to which the Domain Name resolves.

Complainant submitted as Annexes C1-3 to its Complaint three screen prints taken from Archive.org (“the WayBack Machine”) of 5 August 2012, 6 January 2014 and 2015. Respondent submitted as Annex 9 to its Annex 3 of its first NSC the same screen prints of 5 August 2012 and 6 January 2014 and added as Annex 10 a screen print taken from “Screenshots.org” of 5 October 2013.

The screen print of 5 August 2012 (submitted by Complainant and Respondent) contains the following text:

“pixie.eu
• finance
• investing
• credit cards
• credit report
• insurance
pixie.eu is available...get it now!
See Listing
We think this is a great domain name too!
Build your brand around this domain or one of the other great finds at Aftermarket.com
With features like:

Make an Offer
Domain Auctions Buy Now
Private Domain Auctions
We have the perfect domain name for your budget. Not to mention, we're simple, secure and fast. We'll walk you through the escrow process and deliver your domain in no time.”

The screen print of 6 January 2014 (submitted by both Complainant and Respondent) contains the following text: “PIXIE.eu. Buy this domain at Aftermarket.com” and pictures of a calculator and a cheque-book.
The 2015 screen print submitted by Complainant contains the text: “Purchase domain Pixie.eu; Minimum Offer Price: $ 2,000.00”.
The 2013 screen print submitted by Respondent contains the text: “Buy this domain name at Aftermarket.com”; it also contains several links.

For all practical purposes the above screen prints confirm the following:
a. there is no proof that the Domain Name was used at all in a website between its registration in June 2006 and August 2012, thus for over six years;
b. the website to which the Domain Name resolves advertises the Domain Name for sale for a minimum price of USD 2.000; and
c. the website to which the Domain Name resolves is intended to advertise that the Domain Name is for sale and the website also contains various so-called pay-per-click links.

In the opinion of the Panel, Complainant has made a prima facie case that Respondent lacks rights or legitimate interest in the Domain Name. Based on the evidence provided by Complainant, the website to which the Domain Name resolves is a “pay-per-click” parking website on which website the Domain Name is offered for sale for a minimum price of USD 2.000. This cannot be considered use of the

Domain Name in connection with the offering of goods and services. This is true notwithstanding the fact that there is no proof that Complainant currently uses the PIXIE trademarks as such use by Complainant is not a condition in finding a lack of legitimate interest on the part of Respondent.

The Panel adopts and accepts the extensive reasoning of the panel in a very similar case against the same Respondent: Noonan Services Group, Tomas MacGinley v. OEEO Networks Limited, Michael Kopinski, CAC Case 05578 <noonan.eu>. In this case the registration of the domain name predated the incorporation of complainant and there was no suggestion that the domain name was chosen or was being used by respondent with any specific association with complainant in mind. The panel in CAC Case 05578 explained that the purpose of Regulation 874/2004 was to have a more narrow definition of what constitutes legitimate interest and concluded as follows: "With this in mind I reach the conclusion (notwithstanding the paucity of the evidence brought forward by the Complainant on this issue) that in the circumstances of this particular case the Complainant has shown that the Respondent lacks rights or a legitimate interest under Article 21 of the Regulation. There appears to be no separate business use by the Respondent of the Domain Name beyond use in connection with a pay-per-click website. There are also offers to dispose of the Domain Name. This, in the absence of any argument or evidence on the part of the Respondent to the contrary, is sufficient to justify a finding of a lack of a legitimate interest."

The argument of Respondent that "speculative registration" is addressed exclusively in Article 21(3)(b) (= bad faith registration or use) is incorrect as the heading of Article 21 "Speculative and abusive registration" applies to the entire Article 21 and thus also the part of Article 21 dealing with a lack of legitimate interest.
The Panel also notes that according to the CAC Overview (IV.9., p. 36) a "pay-per-click" parking website does not in itself confer rights or legitimate interests.
Having established that there is a lack of legitimate interest, it is not necessary for the Panel to consider Respondent's submission on its possible rights.

The Panel concludes that on the balance of probabilities the Domain Name falls within the scope of Article 21(1)(a).

5. Bad Faith Registration or Use

Article 21(3) of Regulation 874/2004 contains the following language:
"Bad faith, within the meaning of point (b) of paragraph 1 may be demonstrated, where:
(b) the domain name has been registered in order to prevent the holder of such a name in respect of which a right is recognised or established by national or Community law […] from reflecting this name in a corresponding domain name, provided that:
(i) a pattern of such conduct by the registrant can be demonstrated; or
(ii) the domain name has not been used in a relevant way for at least two years from the date of registration;".

As mentioned above both Complainant and Respondent submitted screen prints of August 2012. The Panel finds that there is no proof that the Domain Name was used in any way between June 2006 and August 2012, thus for over six years. This is considerably more than the two year non-use period mentioned in Article 21(3)(b)(ii) of Regulation 874/2004. In this respect it should be noted that the two year non-use period is specific to Regulation 874/2004; it is not found in the UDRP which means that decisions based on the UDRP - as mentioned by Respondent - are not relevant to the present case.

The text of Article 21(3) of Regulation 874/2004 on bad faith does not require for a finding of bad faith that there is a "prior right" in order for a Complainant to be successful; only a trade mark or other right recognised in national or Community law is sufficient. "Prior rights" were only relevant during the so-called "sunrise period". The fact that the Domain Name was registered well before the registration of the trademarks by Complainant is thus no bar to the present Complaint as it prevents Complainant as the holder of the PIXIE trademarks recognised in national and Community law from reflecting the trademarks in a corresponding domain name.

In the view of the Panel the very extensive period of over 6 years of non-use of the Domain Name is thus considered bad faith registration of the Domain Name as per Article 21(3)(b)(ii) of Regulation 874/2004. This conclusion would also be true in the event the more recent use of the Domain Name after August 2012 - consisting of pay-per-click links and advertising for sale - would have been considered to be legitimate use.

Contrary to the text of Article 21(3)(a) the text of Article 21(3)(b) does not require a need to demonstrate that at the time of registration of the Domain Name it was undertaken to block Complainant or that the Domain Name was acquired primarily for the purpose to sell the Domain Name to a holder of a trademark. The admission by Complainant that it could select another domain name does not mean that at the moment in actual practice Complainant is prevented from reflecting its valid Benelux and Community trademarks in a corresponding domain name unless it would be prepared to pay the sum of USD 5.000, a figure considerably in excess of normal

registration fees.

There is a second reason why the Panel decides that there is bad faith registration. The Panel notes that there is a consistent pattern of conduct on the part of Respondent to register domain names in order to prevent right holders from reflecting their trademark or other rights in a corresponding domain name as per Article 21(3)(b)(i).
The Panel refers to the following decisions:
(1) Noonan Services Group, Tomas MacGinley v. OEEO Networks Limited, Michael Kopinski, CAC Case 05578 <noonan.eu> ;
(2) Mills Brothers B.V. v. OEEO Networks Limited, Michael Kopinski, CAC Case 04725 <thesting.eu>;
(3) Hans Beckhoff v. OEEO Networks Limited, Michael Kopinski, CAC Case no 03565 <ethercat.eu>, and
(4) Petróléo Brasiliero S/A v. OEEO Networks Limited, Michael Kopinski, CAC Case 06152 <petrobras.eu>.
All four decisions can be found on the ADR.eu website. The argument of Respondent that two of the cases are default cases is irrelevant as many ADR cases are default cases. In particular it does not mean they are not relevant in deciding that there is a consistent pattern of conduct as Respondent would have had the opportunity to file a response in the cases mentioned.

Under the circumstances of the case the Panel concludes that on the balance of probabilities the Domain Name falls within the scope of Article 21(1)(b).

DECISION

For all the foregoing reasons, in accordance with article 22(11) of Regulation (EC) 874/2004 and article B12(d) of the ADR Rules, the Panel orders that the Domain Name <pixie.eu> shall be transferred to Complainant as Complainant satisfies the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No 733/2002.
The decision shall be implemented by the Registry within thirty (30) calendar days of the notification of the decision to the Parties, unless Respondent initiates court proceedings in a Mutual Jurisdiction.

PANELISTS

Name	**Dinant T.L. Oosterbaan**

DATE OF PANEL DECISION 2015-12-21

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

I. Disputed domain name: <pixie.eu>

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

III. Date of registration of the domain name: 7 June 2006

IV. Rights relied on by the Complainant (Art. 21 (1) Regulation (EC) No 874/2004) on which the Panel based its decision:
1. word trademark registered in Benelux, reg. No. 0964504, filed on 24 October 2014, registered on 16 July 2015.
2. word CTM, reg. No. 0139300094, filed on 10 April 2015, registered on 18 August 2015.

V. Response submitted: No; further statements and documents admitted (see discussions and findings above).

VI. Domain name is identical to the protected right/s of the Complainant

VII. Rights or legitimate interests of the Respondent (Art. 21 (2) Regulation (EC) No 874/2004):
1. No.
2. Why: see decision.

VIII. Bad faith of the Respondent (Art. 21 (3) Regulation (EC) No 874/2004):
1. Yes.
2. Why: see decision.

IX. Other substantial facts the Panel considers relevant: no.

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

XI. Procedural factors the Panel considers relevant: see decision.

XII. Is Complainant eligible? Yes.