Panel Decision for dispute CAC-ADREU-007916

Case number	CAC-ADREU-007916
Time of filing	2020-07-13 11:40:40
Domain names	motoralkatrész.eu

Case administrator

Organization	Iveta Špiclová (Czech Arbitration Court) (Case admin)

Complainant

Organization	Best Motor Parts Kft.

Respondent

Name	Bohus Ákos

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 the Panel is aware.

FACTUAL BACKGROUND

The Complainant, Best Motor Parts Kft, is a company registered in Hungary. Its address is in Göd, District of Pest, Hungary, to the North of Budapest on the East bank of the Danube. It currently uses the domain name <motoralkatresz.eu> in connection with a website offering engines, parts and accessories for motorcycles. The Complainant attaches to its Complaint what appears to be a copy of freely available company register details provided by the Hungarian Ministry of Justice. The date of registration of the Complainant as a limited liability company is 4 January 2011.
According to the verification provided by EURid in connection with these proceedings, the disputed domain name <motoralkatrész.eu> was registered on 15 February 2019 in the name of Bohus Ákos. The Respondent appears to be an individual with an address in Budapest.
The disputed domain name currently resolves to a website at the domain name <motocad.eu>, which offers products (engines, parts and accessories for motorcycles) which appear to compete directly with those offered at the Complainant's website. The website is run by a company called Motocad Design Kft, whose headquarters is given as in Dunakeszi, also in the District of Pest.
The Complaint was originally filed in Hungarian on 15 April 2020, specifying Hungarian as the language of these proceedings. The verification provided by EURid showed that the language of the registration agreement is English, following which the Complainant filed an amended Complaint in English on 28 April 2020.

A. COMPLAINANT

The Complainant's website home page and other pages of its website feature the name Motoralkatresz.eu prominently, apparently as a brand name. In its Amended Complaint, the Complainant shows by way of a copy of a Whois entry that it registered this domain name on 2 July 2009. In its original Complaint the Complainant says that it has used that domain name for 10 years. The Complainant's domain name and the disputed domain name differ only by the addition of the "é" special character in the latter.
The Amended Complaint is very short. Apart from its motoralkatresz.eu website (see above), the Complainant provides no other information about the extent of its reputation, the size of its trading activities, or its historical background. The Complainant explains that it did not originally register the disputed domain name with the special Hungarian character "é" as it could not do so in 2009. Its competitor (another motorbike company) registered the disputed domain name in 2019 when special characters could be used in a domain name registration. As the Respondent trades under the Motocad name, as a competitor, its registration of the disputed domain name and use to point to its own website, "only puts the Complainant at a disadvantage".

B. RESPONDENT

The Respondent did not reply to the Complaint.

The Respondent did not file a Response. Therefore, pursuant to Paragraph B (10) “Default” of the ADR Rules:
“(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.
(b) Unless provided differently in these ADR Rules, if a Party does not comply with any provision of, or requirement under, these ADR Rules, the Supplemental ADR Rules or any request from the Panel, the Panel shall draw such inferences therefrom as it considers appropriate”.
According to ADR Rules Paragraph B11 “Basis of the decision”:
” A Panel shall decide a Complaint on the basis of the statements and documents submitted and in accordance with the Procedural Rules”.
Pursuant to ADR Rules paragraph 11 (d) “Basis for decision”:
“(d) The Panel shall issue a decision granting the remedies requested under the Procedural Rules in the event that the Complainant proves
(1) in ADR Proceedings where the Respondent is the holder of a .eu domain name registration in respect of which the Complaint was initiated that:
(i) The domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State and/or Community law and; either
(ii) The domain name has been registered by the Respondent without rights or legitimate interest in the name; or
(iii) The domain name has been registered or is being used in bad faith”.
A. The disputed domain name is identical or confusingly similar to a name of which a right is recognized or established by the national law of a Member State and/or Community law.
The Complainant relies on its prior use of the <motoralkatresz.eu> domain name which features prominently on its website. The domain name is shown in a stylized logo on the Home Page and on most of the other following pages (there is no other branding apparent denoting the operator of the website). The logo contains the name MOTORALKATRESZ.EU capitalised in large font in orange and white, against a background split horizontally between blue and black, with images of a motorcycle on either side of the name. The logo is completed by a semi-circular arrangement of what appear to be a shock absorber, piston head and motorcycle chain above the MOTORALKATRESZ.EU name. The website is only evidenced by a screenshot of a front page. No supporting material is supplied to give a better idea of the extent of the Complainant’s reputation and goodwill.
The Complainant’s domain name differs from the disputed domain name only in the addition of the special character “é” in the latter domain name. It is relevant to note that (according to Google Translate) a literal translation into English of “motoralkatrész” is “engine parts”. This is, of course, potentially a highly descriptive term in connection with the Complainant’s business. However, the Complainant’s domain name was first registered in 2009, and it is used prominently on the website as part of a logo. The Respondent has not challenged the Complainant’s assertion that it has used the domain name for last 10 years. The Panel therefore accepts that the Complainant has established a reputation in the use of the motoralkatresz.eu name as the dominant part of its logo which may be sufficient to establish the requirement of rights, if Hungarian law allows protection for unregistered trademarks (the Complainant does not rely upon registered trademark rights).
In the absence of registered trademark rights, although the Complainant has not addressed the question of whether unregistered trademarks are “recognized or established” under Hungarian law, this issue remains an essential part of the test that the Complainant must pass in order to succeed in its Complaint. Although CAC panels have generally been prepared to accept that unregistered trademark rights are sufficient to amount to “rights” for this purpose, the position varies by EU Member State (see the Overview of CAC Panel Views, version 2.0, section II, 6).
Although the Panel has no direct experience of the application of Hungarian unregistered trademark law, it is permitted by the ADR Rules to make independent enquiries (Paragraph B 7 (a) ADR rules – “The Panel is not obliged, but is permitted at its sole discretion, to conduct its own investigations on the circumstances of the case").
In this case, it would appear from a quick internet search (and in particular the Hungarian Competition Authority’s website, www.gvh.eu), that the Complainant should potentially be able to rely on an unregistered trademark under the provisions of Chapter II, Article 6A of the 1996 Hungarian Prohibition of Unfair and Restrictive Market Practices Act (updated to 1 January 2019). Article 6A inter alia prohibits unfair advantage being taken of a competitor’s reputation or market participants mistaking the undertaking for a competitor as a result of a statement or communication with the purpose of promoting the sale or use of products or services. In the absence of a response from the Respondent, the Panel is prepared to accept that the Complainant’s rights in an unregistered trademark such as the motoralkatresz.eu name as used in a logo on the Complainant's website are potentially protectable under Hungarian law.
Is the disputed domain name confusingly similar to the Complainant’s name? Although special characters are now permitted following the introduction of the IDNA (International Domain Names in Applications) protocols, those protocols are principally concerned with establishing ways in which computers can distinguish between characters – here, between the “e” and “é” accented letters. A distinction which is apparent to a computer does not mean that a consumer will make the same distinction. In the Panel’s view, the disputed domain name and the Complainant’s name are nearly identical. They are certainly confusingly similar.

The first requirement of Article 21(1) of the Commission Regulation (EC) 874/2004 and of Paragraph B11(d)(1)(i) of the ADR Rules is therefore met.
B. Respondent registered the disputed domain name without rights or legitimate interests in the name
As noted above, the Respondent has not responded to this Complaint. The Complainant suggests that the Respondent's only legitimate interests are in trading as Motocad, and it would normally be incumbent on the Respondent to put forward a positive case on this aspect, if it wished to assert that it did have rights or legitimate interest in using the domain name. Therefore, in the absence of a response, the conclusion which the Panel draws is adverse to the Respondent, and the Panel finds that registration was without rights or legitimate interests in the name motoralkatrész. That in itself would be sufficient for the Complainant to succeed in its Complaint. However, for completeness, the Panel will also consider bad faith (below).
C. The disputed domain name has been registered or is being used in bad faith.
The disputed domain name is being used to point directly to the website at www.motocad.eu, which, although it is a functional website, only refers to Motocad and to its products and services. Those products and services appear to be in direct competition with those of the Complainant. There is no attempt on the website to inform a consumer that the website is not in any way connected with the Complainant's website and business. It is highly likely, in the Panel's opinion, that the Respondent will have been aware of the Complainant and its business, given their close geographical proximity, and the close similarity of their businesses. A possible explanation for the Respondent's choice of the disputed domain name might have been that it was only intending to use it to describe the goods and services it offers. However, this explanation (if offered) would be highly dubious, give the proximity of the businesses, and as noted above, the Respondent has not attempted to dispel the likely connection between its website and the Complainant in the minds of the consumer. Nor has it responded to this Complaint. Therefore, the Panel concludes that it is highly probable that the Respondent is seeking to mislead consumers looking for the Complainant's website into thinking that they have arrived at a site which is owned by or connected with the Complainant when the opposite is true. It is difficult to see that there is any plausible explanation that the registration and subsequent use of the disputed domain have not been in bad faith.
Although the Respondent has chosen not to respond to these proceedings, the majority view of previous panelists is that this should not of itself mean that the Complaint succeeds (see paragraph 20 of the Overview of CAC Panel views, 2.0 August 2016, section I, 20). The Complainant needs to do more than just rely on that failure, and in the Panel's view, it needs to establish at least a prima facie case. Here, although the Complaint is short and lacking in details, the Panel considers that it is clear enough to establish a likely case of the Respondent seeking to act both without legitimate rights or interests and in bad faith. That case goes well beyond the prima facie threshold and is unchallenged by the Respondent.
Therefore, the Panel finds that the disputed domain name was registered in bad faith, within the meaning of Article 21(1)(b) of the Regulation (EC) 874/2004 and of paragraph B11(d)(1)(ii) and (iii) of the ADR Rules.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that the disputed domain name <MOTORALKATRÉSZ.EU> be transferred to the Complainant.

PANELISTS

Name	Robert Elliott

DATE OF PANEL DECISION 2020-07-10

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

I. Disputed domain name: motoralkatrész.eu

II. Country of the Complainant: Hungary, country of the Respondent: Hungary

III. Date of registration of the domain name: 15 February 2019

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

7. unregistered trademark:

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: no obvious reason not to use its own business name Motocad, and to use the name of a competitor instead.

VIII. Bad faith of the Respondent (Art. 21 (3) Regulation (EC) No 874/2004):
1. Yes
2. Why: the registration and use of the domain name appears to be an attempt by the Respondent to deceive consumers into thinking that its own website, to which the domain name points, is somehow connected with or authorised by a competitor (the Complainant) when that is not the case.

IX. Other substantial facts the Panel considers relevant: -

X. Dispute Result: Transfer of the disputed domain name

XI. Procedural factors the Panel considers relevant: -

XII. Is Complainant eligible? Yes