Panel Decision for dispute CAC-ADREU-003499

Case number	**CAC-ADREU-003499**
Time of filing	**2006-11-24 09:43:22**
Domain names	**britishswimming.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**British Swimming, Ashley Dominic Cox**

Respondent

Organization / Name	**Zheng Qingying**

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 which are pending or decided and which relate to the disputed domain name.

FACTUAL BACKGROUND

The Respondent, who is resident in the UK, registered the domain www.britishswimming.eu on 25 July 2006. The Respondenet states that the domain is to be used in connection with her hobby website, which features pictures of swimming-related topics.

The Claimant seeks the revocation and transfer of the domain, on the basis of Art 21 of Regulation 874/2004. The Complainant is the National Governing Body for Swimming, Diving, Synchronised Swimming, Water Polo and Open Water in Great Britain.

A. COMPLAINANT

The Complainant is the National Governing Body for Swimming, Diving, Synchronised Swimming, Water Polo and Open Water in Great Britain.

The Complainant seeks the revocation of the domain www.britishswimming.eu on the basis of Article 21 of regulation 874/2004 and requests that the domain be transferred to the Complainant on the basis of the Complainant's fulfillment of the requirements of Article 4 of Regulation 733/2002.

The Complainant asserts that it has established rights, which are recognised by National and/or Community Law on the following basis:-

(a) The Complainant is an incorporated company limited by guarantee in accordance with the Companies Act 1985 and therefore subject to the laws of Great Britain.

(b) The Complainant is recognised as an incorporated company and is registered with Companies House, initially with the company registration number – 4322832 – Certificate of Incorporation dated 14 November 2001, which following a Special Resolution and Change of Name the Complainant was registered with company registration number – 4092510 – Certificate of Incorporation of Change of Name dated 24 January 2006, which can be confirmed on Companies House website at www.companieshouse.gov.uk.

(c) The Complainant provided the Memorandum of Association and Articles of Association of the cited companies in support of the above claims.

(d) The Complainant also provided details of a UK registered Trade Mark - registration number – 2,271,770, registered on 6th June 2001.

The Complainant submits that the domain name www.britishswimming.eu is identical and confusingly similar to the rights afforded to the Complainant under National and Community Law, as described above. The Complainant also considers the www.britishswimming.eu domain name to be confusingly similar to the current British Swimming/Amateur Swimming Association website, which is www.britishswimming.org.

The Complainant submits that the domain name www.britishswimming.eu is subject to revocation on the basis of Article 21. Specifically, the Complainant submits:-

1. That the domain name holder cannot demonstrate a legitimate interest in the domain name in that the domain name holder has not used the domain name or a name corresponding to the domain name in connection with offering goods or services or has made any demonstrable preparation to do so. [(21(2)(a)]

2. That the domain name holder cannot demonstrate, being an undertaking, organisation or natural person, commonly known by the domain name, even in the absence of a right recognised or established by National and/or Community law. [(21(2)(b)]

3. That the domain name holder cannot demonstrate that the domain name holder is making a legitimate use of the domain name, that the domain name holder cannot demonstrate that the domain name holder is making fair use of the domain name without misleading consumers and therefore harming the reputation of the Complainant on which a right is recognised or established by National and/or Community law. [(21(2)(c)]

4. That the domain name registered is a personal name for which no demonstrable link exists between the domain name holder and the domain name registered. [(21(3)(e)]

B. RESPONDENT

The Respondent asserts that it has a right or legitimate interest with respect to the domain. The Respondent states that she has created a “swimming gallery for her hobby using the name "British Swimming Gallery" since February 2006”. The website can be found at http://www.5.org.cn. The Respondent cites aspects of the site, such as sections on "Baby Swimming", "Animals Swimming" and "Club Activity". The Respondent asserts that “most of the pictures are published before the domain name registered, which is the date July 25, 2006.” The respondent provided screenshots in support of this statement.

The Respondent also cited the "Most viewed" section of the site, where “some pictures have viewed over 700 times” and to a number of pictures which “have voted by the Internet visitors”. The Respondent also provided screenshots in support of these statements.

The Respondent insists that the website was created “only for her hobby”. The Respondent also states that “Although the domain name britishswimming.eu is unimportant for the Respondent. But it's clear the Respondent has a name corresponding to the domain britishswimming.eu in connection with offering services, this said at Article 21(2)(a) of Commission Regulation (EC) No 874/2004.”

The Respondent submits “that "swimming" is a very common word in English, the right of the word "Swimming" belongs to public and anyone has right or legitimate interest on the word "Swimming". The Respondent submits that the Respondent is living in Great Britain. The domain britishswimming.eu is common generic expression. The Gallery website hasn't any commercial advertisement on it. The Respondent created the website only for her hobby in swimming. The Respondent hasn't provided any related goods or services conflicted to the Complainant's trademark. The Respondent hasn't any intention to conflict rights of any 3rd party.”

The Respondent also cited a number of WIPO decisions in support of her claims regarding the generic nature of the domain in question.

The respondent states that “The Gallery website hasn't any commercial advertisement on it, so the Respondent is fair use of the domain name without misleading consumers and therefore harming the reputation of the Complainant, this said at Article 21(2)(c) of Commission Regulation (EC) No 874/2004.”

The respondent also rejects the claims of bad faith in that “because "Swimming" is a common and general word in English and the domain britishswimming.eu is common generic expression, so it isn't a personal name. It's reasonable that the Respondent registered the domain for her hobby in swimming”

DISCUSSION AND FINDINGS

The Complaint centers around the provisions of Article 21 of Regulation 874/2004, specifically subsections 21(1)-(3).

My approach to Article 21(1) is a two-step process. First, looking at the demonstration of the rights on which the Complaint rests and, second, the issue of any claim the domain name holder may have to legitimate or good faith usage. I shall deal with these two aspects in turn.

Looking at the rights established by national or community law, the Complainant has based its claim on both its company name and its registered trade mark rights. The Respondent has not challenged or questioned the Claimant's rights in either respect.

The Complainant appears to have confused the relationship and identities of the respective companies cited (namely, registration no's 4322832 and 4092510). However, looking at the information submitted, it seems clear enough that the correct company is registration number 4092510, which was previously The Amateur Swimming Association of Great Britain Limited but which changed its name to British Swimming Limited on 24th January 2006. The Complaint is therefore correctly made in the name of British Swimming and the rights in respect of the company name are supported by the evidence.

Regarding trade mark rights, the Complainant provided a copy of the registration certificate for registered trade mark no. 2271770, registered on 6 June 2001. The registration certificate cites the owner as the Amateur Swimming Association of Great Britain Limited, which changed its name as explained above. Although the Complainant has omitted reference to "Limited" in its Complaint, it appears on balance that the Complainant is the owner of the registered trade mark.

It is clear from Article 21(1) (which refers, in turn, to Article 10(1)) that a registered trade mark will suffice as prima facie proof of a national or community right. However, the trade mark cited by the Complainant is a combined word and device mark, consisting of the words "British Swimming" and a stylized 'wave' device. Section 19 of the Sunrise Rules offers us some guidance in how to view such combined marks. Although concerned with Prior Rights, Section 19 states that if a right is claimed in a composite sign, it will only be accepted if "the word element is predominant, and can be clearly separated from the device element". Having considered the form of the mark, as depicted on the registration certificate submitted by the Complainant, I consider that the word element is indeed the predominant part of the mark and is clearly separable from the device component.

However, we cannot conclude the discussion regarding the trade mark without considering the Respondent's claim that the mark is generic. In this respect, the Complainant cited a number of WIPO decisions which relate to the issue of the rights in respect of generic or descriptive marks. I do not have the scope to consider these decisions in detail here but I have reviewed them and have taken them into consideration . I am also aware of WIPO's guidance in this respect; namely that "If the complainant makes a prima facie case that the respondent has no rights or legitimate interests, and the respondent fails to show one of the three circumstances under Paragraph 4(c) of the Policy, then the respondent may lack a legitimate interest in the domain name, even if it is a domain name comprised of a generic word(s)". I therefore do not consider that any descriptive content in the mark is sufficient to either undermine the Complainant's rights entirely or to prevent a proper consideration of the legitimacy or otherwise of the Respondent's use of the domain.

The Claimant maintains that the Respondent has no legitimate interest in the name pursuant to Article 21(2)(a)-(c) and/or has demonstrated bad faith pursuant to Article 21(3)(e) and requests that the domain be revoked under Art 21(1).

The Respondent's response to the Claim rests, in the most part, on the website which the Respondent has developed and which is located at www.5.org.cn. The Respondent asserts that this website, which is entitled "British Swimming Gallery", was created as a hobby and demonstrates that she has rights or legitimate interests in the domain, it has no commercial advertisements on it and will not mislead consumers. The Respondent states that the website has provided services but she has not explained what these services are. We are therefore concerned with Art's 21(2)(a) and (c), as the Respondent has not submitted evidence in support of legitimacy pursuant to Art 21(2)(b).

The Respondent, who appears to be a Chinese woman resident in the UK, makes no other claims to a legitimate interest in the name and would appear to have no personal, company or other connection with the name apart from the website referred to and any related services.

I have therefore looked at the cited website very closely. It is a kind of posting site, where those interested in swimming or swimming pools may post photographs. It also contains a facility to enable users to make comments or post messages but this facility does not seem to have been used to any great degree. The majority of the photos on the website seem to be of children swimming but there are also some pictures of animals swimming and also some pictures of various types of swimming pools. The site itself appears to be a standard, free, readily downloadable version available from http://coppermine-gallery.net. The photos also appear to be of the type readily downloadable from the internet and the site appears to have little personalization or real active input. Somewhat unusually, the postings to the site are prominently dated, appearing to be from times both prior to and after the application for or ownership of the domain in question.

Overall, I am not convinced by the website. It has the look and feel of something put together quickly, with little or no real traffic or interested activity. I am not convinced by it as any kind of genuine demonstration of legitimate interest or right in the name. There are no goods offered or sold via the site and I consider it would be stretching things to say that the site provides services. The Respondent herself has said that "the domain name britishswimming.eu is unimportant for the Respondent." It strikes me that there is nothing specifically British about the site, other than perhaps the fact that the respondent is based there. The Respondent could easily, and perhaps more appropriately, have applied for domains which referenced the name 'British Swimming Gallery'; which domains appear to be available in all forms at the time of writing this decision, including .com and .co.uk versions.

While the Claimant has established its rights, I consider the Respondent has failed to demonstrate any legitimate interest or right in the domain name. I have therefore decided that the domain should be revoked.

The Claimant has also asked for the transfer of the domain but I cannot agree to do so. The Claimant is listed as British Swimming and Ashley Cox. Mr Cox has not proven his locus standii and the while I have exercised a degree of discretion concerning the Claimant being shown as British Swimming, it would not be appropriate to transfer the name until British Swimming Limited alone has applied in a full and accurate manner via an approved registrar. The request for transfer is therefore denied.

Finally, the Claimant's claims in relation to Art 21(3)(e) appears to be poorly founded. The domain name is not a personal name and the Claimant's claims in this respect are rejected. I also consider that the Complainant's claims with regard to rights in the domain www.britishswimming.org have no merit.

DECISION

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

the domain name BRITISHSWIMMING be revoked

PANELISTS

Name	**James Mitchell**

DATE OF PANEL DECISION 2007-02-13

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

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My approach to Article 21(1) is a two-step process. First, looking at the demonstration of the rights on which the Complaint rests and, second, the issue of any claim the domain name holder may have to legitimate or good faith usage. I shall deal with these two aspects in turn.

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