Panel Decision for dispute CAC-ADREU-003924

Case number	CAC-ADREU-003924
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Domain names	xango.eu

Case administrator

Name	Tereza Bartošková

Complainant

Organization / Name	DBC, LLC, Mr James Fish

Respondent

Organization / Name	Angelos Mpethavas

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 relating to the disputed domain name.

FACTUAL BACKGROUND

The Complainant is the proprietor of Community registered trademarks for the word “Xango” and a logo comprising the word “Xango” in respect of skincare preparations, soft drinks and various other goods. The logo mark is also registered in respect of vitamins and other dietary supplements. The Complainant’s parent company, based in Utah in the United States of America, has used the mark “XANGO” since 2002 and has a website at www.xango.com.

The disputed domain name, xango.eu, is being used to promote nutrient gels supplied by an entity called Agel, also based in Utah.

A. COMPLAINANT

The Complainant contends that the disputed domain name is identical or confusingly similar to its registered Community trademarks; that the Respondent registered it without any rights or legitimate interests in the name; and that it was registered in bad faith to prevent the Complainant from using it.

The Complainant, a US company, requests transfer of the disputed domain name to its subsidiary XanGo UK Limited which satisfies the general eligibility requirements in article 4(2)(b) of Regulation 733/2002.

B. RESPONDENT

The Respondent did not submit a Response.

DISCUSSION AND FINDINGS

In accordance with article 22(11) of Regulation 874/2004, the Panel must determine whether the registration of the disputed domain name is speculative or abusive as defined in article 21 of that Regulation. According to that definition a registration of a domain name is speculative or abusive if the domain name is identical or confusingly similar to a name in respect of which a right is recognised or established by national or Community law and at least one of the following applies: (a) it has been registered by its holder without rights or legitimate interests; or (b) it has been registered in bad faith; or (c) it is being used in bad faith.

It may be noted that the last three elements are alternatives, in contrast to the Uniform Domain Name Dispute Resolution Policy (UDRP) adopted by the Internet Corporation for Assigned Names and Number (ICANN), under which similar requirements are cumulative conditions.

In the view of the Panel, the disputed domain name is identical to the Complainant's "Xango" word mark and confusingly similar to its logo mark, both of which are registered as Community trade marks and in which the Complainant has rights recognised or established by Community law.

In making the required comparisons, the Panel considers that the Community legislation probably intended that the generic .eu suffix should be discounted. However, even if the suffix is not wholly discounted, the distinctive and dominant features of the disputed domain name and the Complainant's Community trademarks are the same, and a finding of confusing similarity, if not identity, is inevitable in this case. Accordingly, the first requirement of the definition of speculative or abusive registration is satisfied.

It remains to consider whether one (or more) of the further alternative conditions is satisfied.

The Respondent has not filed a response and has not answered the Complainant's evidence that the Respondent has no right or legitimate interest in the disputed domain name. On the other hand, it appears that the Respondent has used the domain name in connection with an offering of goods or services.

According to article 21(2)(a) of Regulation 874/2004, "a legitimate interest may be demonstrated where, prior to any notice of an …. ADR procedure, the holder of a domain name has used the domain name … in connection with the offering of goods or services ….". In contrast to the corresponding provision of the UDRP, there is no explicit requirement that the offering be "bona fide". On the other hand, again in contrast to the UDRP, the Regulation states that a legitimate interest may (not shall) be demonstrated by such use.

The Panel considers that the use must be fair in order to create a legitimate interest; unfair use would only create an illegitimate interest. Accordingly, the issue is whether the Respondent has acquired a legitimate interest by fair use of the domain name.

The Complainant's evidence that the Respondent's use is unfair and that the Respondent does not have any right or legitimate interest has not been disputed.

Article 22(10) of Regulation 874/2004 provides that failure of any of the parties involved in an ADR proceeding to respond within given deadlines may be considered as grounds to accept the claims of the counterparty.

Rule 10(a) of the ADR Rules adopted by the ADR provider states that in the event of a default, the Panel shall proceed to a decision and may consider the default as grounds to accept the claims of the other party. Rule 10(b) of the ADR Rules further states unless otherwise provided, the Panel shall draw such inferences from a default as it considers appropriate. Rule 11(a) of the ADR Rules provides that a Panel shall decide a Complaint on the basis of the statements and documents submitted and in accordance with the ADR Rules, the Supplemental ADR Rules and Regulations 733/2002 and 874/2004.

Although Regulation 874/2004 does not explicitly confer a power on the ADR provider to adopt binding procedural rules, its article 22(5) provides that complaints and responses must be made in accordance with that Regulation and the ADR provider's published supplementary procedures; and it appears to be implicit that the ADR provider may adopt appropriate rules to regulate the procedure for determining disputes.

The Panel therefore considers that it is appropriate to apply the above-mentioned ADR Rules in evaluating the evidence. On the basis of these Rules and article 22(10) of Regulation 874/2004, the Panel finds that the Respondent has no right or legitimate interest in the disputed domain name.

It is therefore unnecessary to consider whether the domain name was registered or is being used in bad faith. However, it appears to the Panel on the evidence that the domain name was registered and is being used in bad faith, in that the circumstances set out in article 21(3)(c) and (d) of Regulation 874/2004 exist.

The Complainant requests transfer of the disputed domain name to its UK subsidiary which satisfies the general eligibility requirements in article 4(2)(b) of Regulation 733/2002. This request cannot be accepted: article 22(11) of Regulation 874/2004 provides that the domain name shall be transferred to the complainant if the complainant applies and satisfies the general eligibility requirements. There is no provision for transferring the domain name to another legal entity, even if it is a subsidiary of the complainant. The domain name must therefore be revoked.

DECISION

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

the domain name XANGO be revoked by 31 March 2007.

PANELISTS

Name	**Jonathan Turner**

DATE OF PANEL DECISION 2007-03-06

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant is the proprietor of registered Community trade marks for the word “Xango” and a logo incorporating this word. The disputed domain name xango.eu is being used to promote a competitor’s products similar to some of those for which the marks are registered and which the Complainant’s parent company has sold under the mark in the USA since 2002. The Complainant, a US company, asks for transfer of the domain name to its UK subsidiary.

The Panel finds that the domain name is identical to a name in which the Complainant has a right recognised by Community law and that the Respondent has no right or legitimate interest in it. The registration is therefore speculative or abusive. However, there is no provision to transfer the domain name to an entity other than a successful Complainant. It must therefore be revoked.