Panel Decision for dispute CAC-ADREU-005249

Case number	CAC-ADREU-005249
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Domain names	zappmedia.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	zappmedia GmbH, zappmedia Holding GmbH, Ulrich Scheffler

Respondent

Organization / Name	Mandarin & Pacific Services Limited, Gerald Mwanyika

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

There are no other legal proceedings of which the Panel is aware that are pending or decided and that relate to the disputed domain name.

FACTUAL BACKGROUND

The Complainants are

(1) zappmedia GmbH, a German limited liability company,

(2) zappmedia Holding GmbH, another German limited liability company owning 100% of the shares in zappmedia GmbH, and

(3) Mr. Ulrich Scheffler, who is the majority shareholder of zappmedia Holding GmbH and a managing director of both zappmedia GmbH and zappmedia Holding GmbH.

Mr. Ulrich Scheffler is the registered proprietor of the German trademark no. 30457944 “zappmedia” (word) and of the European Community trademark no. 5322557 “zappmedia” (word). The domain names “zappmedia.de”, “zappmedia.com”, “zappmedia.net”, “zappmedia.org” and “zappmedia.co.uk” are either registered in the name of Mr. Ulrich Scheffler (according the Complaint) or in the name of zappmedia GmbH with Mr. Ulrich Scheffler as its representative (according to the WHOIS database records provided as annexes to the Complaint).

A. COMPLAINANT

Complainants contend that the “zappmedia” trademarks and the two company names “zappmedia GmbH” and “zappmedia Holding GmbH” are identical to the disputed domain name.

Complainants also contend that Respondent has no rights or legitimate interest in respect of the disputed domain name. Specifically, Complainants contend that

(1) Respondent does not use and has never used the disputed domain name or a similar name in connection with the offering of any goods or services (particularly because the URL www.zappmedia.eu does not resolve to an active website), and Respondent has not made any demonstrable demonstrations to do so; and

(2) Respondent is not commonly known by the name “zappmedia”.

Complainants further contend that Respondent has never used the disputed domain name since it was registered on 7 June 2006, which is more than 2 years before the Complaint was filed on 7 July 2008.

Complainants finally contend that they have sent to Respondent a letter to cease and desist, but that Respondent has not responded to this letter in any way.

Based on these arguments Complainants request transfer of the disputed domain name to zappmedia GmbH.

B. RESPONDENT

No Response or other communication has been received from Respondent in respect of the Complaint.

DISCUSSION AND FINDINGS

1. Multiple Complainants

The present Complaint was not initiated by one, but by three different Complainants. The Panel in CAC Case No. 4881 JETPILOT has held in its decision that the .eu Alternative Dispute Resolution Rules (the "ADR Rules") do not allow multiple (unrelated) entities to file a single complaint as co-complainants, and therefore decided to consider only one of these co-complainants as “the Complainant” of its case. This handling of multiple complainants is somewhat similar to the approach taken in a decision under the Uniform Domain Name Dispute Resolution Policy (UDRP) in the case Sanofi-aventis, Sanofi-Aventis Deutschland GmbH v. Andrey Mitrofanov, WIPO Case No. D2007-1772.

In various other UDRP decisions, however, the respective panels have accepted complaints by multiple complainants based on agency, licensing, or affiliate relationships (see, for example, Staples, Inc., Staples The Office Superstore, Inc., and Staples Contract and Commercial, Inc. v. SkyLabs Corporation and DL Enterprises, WIPO Case No. D2004-0220; ITT Manufacturing Enterprises, Inc., ITT Corporation v. Douglas Nicoll, Differential Pressure Instruments, Inc., WIPO Case No. D2008-0936; Costco Wholesale Corporation and Costco Wholesale Membership Inc. v. Yezican Industries and Domains By Proxy, Inc., WIPO Case No. D2007-0638). In the decision Ken Done, Ken Done & Associates Pty Ltd., and Ken Done Down Under Pty Ltd. v. Ted Gibson (eResolution Case No. AF-0638) the Panel held that a UDRP complaint may be submitted by multiple related parties if there are common interests in a single domain name – a condition that is clearly satisfied in the present proceeding.

Neither Commission Regulation (EC) No 874/2004 (the “Public Policy Rules”) nor the ADR Rules, like the UDRP, do expressly contemplate multiple complainants. This Panel believes that it is usually in the interest of procedural efficiency if a comprehensive set of facts that gives rise to a dispute is addressed (and ideally finally settled) within a single ADR proceeding, even if this involves multiple complainants, multiple respondents, and/or multiple domain names. Paragraph B1(c) of the ADR Rules states that a complaint may relate to more than one domain name “provided that the Parties … are the same”, but this requirement should not be construed in a too restrictive way. In my view Paragraph B1(c) of the ADR Rules – like Paragraph 3(c) of the UDRP Rules, although this UDRP provision admittedly only refers to “the same domain-name holder” and not to the “same Parties” – is primarily designed to prevent a potential “bundling” of unrelated disputes into a single proceeding (e.g. for cost-saving purposes, cf. CAC Case No. 2301 WHITELIGHT). Technical restrictions of the on-line platform of the Czech Arbitration Court, which currently does not provide any fields to enter the name and address of more than one complainant, are no problem at all if the multiple complainants all have the same address (as it is the case in this proceeding) and can otherwise be overcome by the use of nonstandard communications.

After all, allowing all three Complainants in this proceeding to claim their respective rights is unlikely to result in prejudice to the Respondent. The Panel therefore accepts the Complaint as submitted.

2. Respondent’s failure to reply

Respondent has failed to submit any Response to the Complaint. In Accordance with Paragraph 10(a) of the ADR Rules the Panel nevertheless proceeds to a decision as follows.

3. Merits of the case

According to Article 21(1) Public Policy Rules and Paragraph B11(d)(1) ADR Rules Respondent’s registration of the disputed domain name is considered abusive and speculative if

(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.

The domain name “ZAPPMEDIA” is identical to Mr. Ulrich Scheffler’s trademarks, and is also confusingly similar to the company names “zappmedia GmbH” and “zappmedia Holding GmbH”, which both grant a corresponding right to the respective company under German law (cf. Section 5(2) Markengesetz, German Trademark Act). The additional elements “GmbH” and “Holding GmbH”, respectively, are purely descriptive indications of a German limited liability (holding) company. Both company names are therefore dominated by the element “zappmedia”, which is identical to the disputed domain name.

Furthermore, on the evidence made available to the Panel and in the absence of any Response from Respondent the Panel is convinced that Respondent does not have any rights or legitimate interest in the disputed domain name. Respondent is in particular not commonly known by the name “ZAPPMEDIA”, and there is no evidence of any domain name use at all (whether non-commercial or in connection with the offering of goods or services) by the respondent.

While it is generally Complainant who bears the burden of proof regarding Respondent’s rights or legitimate interest (or rather the lack thereof), Complainant’s contention that the obvious facts do not demonstrate a right or legitimate interest of Respondent in the disputed domain name are sufficient in this regard. Based on these contentions the onus shifts to Respondent to produce factual evidence for a right or legitimate interest (see CAC case no. 2035 WAREMA, sub 8.1; CAC case no. 2888 GERMANWINGS; and the detailed discussion in CAC case no. 3444 OCUNET, sub 2). Respondent has not even claimed any right or legitimate interest in this regard.

On the evidence made available to the Panel and in the absence of any Response from the Respondent the Panel is further convinced that Respondent has registered the domain name in bad faith pursuant to Article 21(3)(b)(ii) Public Policy Rules, Paragraph B11(f)(2)(ii) ADR Rules. As Respondent has not even claimed any right or legitimate interest in the domain name the mere fact that the domain name was not used in a relevant way for a period of more than 2 years appears to be sufficient to assume that the domain name has been registered in order to prevent the Complainants from reflecting their “zappmedia” name(s) in a corresponding domain name (cf. CAC case no. 5208 HAUG; CAC case no. 5231 BOLTZE).

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the ADR Rules, the Panel orders that the domain name ZAPPMEDIA be transferred to the Complainant zappmedia GmbH.

This decision shall be implemented by the Registry within thirty (30) days after the notification of the decision to the Parties, unless the Respondent initiates court proceedings in a Mutual Jurisdiction (see Paragraphs B12(a) and B14 of the ADR Rules).

PANELISTS

Name	**Thomas Schafft**

DATE OF PANEL DECISION 2009-03-04

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Panel held that the three different (but affiliated) Complainants were entitled to file a single Complaint concerning the disputed domain name ZAPPMEDIA.

The Panel further held that this domain name was identical to the trademark “zappmedia” and confusingly similar to the company names “zappmedia GmbH” and “zappmedia Holding GmbH”.

Complainant had contended that Respondent did not have any rights or legitimate interest in the disputed domain name, and specifically contended that the examples for a legitimate interest provided in Article 21(2) Public Policy Rules were not given in the present case. On the basis of these contentions and in the absence of any Response from the Respondent the Panel accepted that Respondent did not have any rights or legitimate interest in the disputed domain name.

The Panel also held that Respondent registered the domain name in bad faith because it was not used in a relevant way over a period of 2 years.

The Panel therefore ordered that the domain name ZAPPMEDIA be transferred to the Complainant.