

ADMINISTRATIVE PANEL DECISION

Coöperatie Univé U.A. v. Ashantiplc Ltd / c/o Domain Name Privacy LLC
Case No. D2011-0636

1. The Parties

The Complainant is Coöperatie Univé U.A. of Arnhem, Netherlands, represented by Novagraaf Nederland B.V., Netherlands.

The Respondent is Ashantiplc Ltd of Wanchai, Hong Kong, SAR, China and Domain Name Privacy LLC of Newark, Delaware, United States of America, represented by John Berryhill, Ph.d. Esq., United States of America.

2. The Domain Name and Registrar

The disputed domain name <unive.com> is registered with Backslap Domains, Inc.

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on April 19, 2011. On April 19, 2011, the Center transmitted by email to Backslap Domains, Inc. a request for registrar verification in connection with the disputed domain name. On April 19, 2011, Backslap Domains, Inc. transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to the Complainant on April 20, 2011 providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amendment to the Complaint on April 21, 2011. The Center verified that the Complaint together with the amendment to the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy" or "UDRP"), the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on April 28, 2011. In accordance with the Rules, paragraph 5(a), the due date for Response was May 18, 2011. The Response was filed with the Center on May 18, 2011.

The Center appointed Andrew D. S. Lothian, Eduardo Machado and Richard G. Lyon as panelists in this matter on June 16, 2011. The Panel finds that it was properly constituted. Each member of the Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is a non-profit making cooperative association operating as an insurance company in the Netherlands. The Complainant claims approximately 1.3 million insurance customers who have taken out a total of about 3.7 million insurance policies. The Complainant has a network of thirty two mutually independent offices with a network of approximately 150 branches across the Netherlands. The Complainant is the proprietor of *inter alia* Benelux trademark number 0490148 for the word mark UNIVÉ registered on February 8, 1991 in international class 36.

The disputed domain name was created on August 10, 2000. It is not known on what date the Respondent registered or otherwise acquired the disputed domain name. However, it is known that the Respondent transferred the disputed domain name between registrars in July 2003 and thus was in possession of the disputed domain name on or before that date. The Respondent uses the disputed domain name in connection with paid search advertising relating to university education.

5. Parties' Contentions

A. Complainant

In the Complaint, the Complainant contends the following: The disputed domain name is confusingly similar to a trademark in which the Complainant owns rights; the Respondent has no rights or legitimate interests in the disputed domain name; and the disputed domain name was registered and is being used in bad faith.

The Complainant notes that it is the owner of registered trademarks for the mark UNIVÉ, including the registered trademark noted in the Factual Background section above. The Complainant also asserts that it has trade name rights dating back to 1949. The Complainant states that it has owned *inter alia* the domain names <unive.nl> since April 29, 1996 and <unive.eu> since June 13, 2006.

The Complainant asserts that it registered the disputed domain name on August 10, 2000 and that it failed to pay its renewal fee on or about August 10, 2010. The Complainant alleges that the Respondent registered the disputed domain name in August 2010.

The Complainant briefly submits that the Respondent lacks rights or legitimate interests in the disputed domain name because it has no trade name rights in the name UNIVE, does not own any trademark registration for UNIVE and has never been known under the name UNIVE.COM. The Complainant states that it did not give permission to the Respondent to register and use the disputed domain name and submits that the Respondent is not a licensee of the Complainant.

The Complainant states that the aim of the Respondent in registering and using the disputed domain name was to take advantage of the confusion between the disputed domain name and the Complainant's rights to the name and trademark UNIVÉ. The Complainant further argues that the disputed domain name has been or is being used for commercial gain because of the Respondent's provision of sponsored links or pay-per-click advertising and that confusion arises in regard to the source, sponsorship, affiliation or endorsement of the website associated with the disputed domain name. The Complainant claims that it is "inconceivable" that the Respondent coincidentally picked the disputed domain name, which would be nearly identical to Complainant's well known trade name and trademark UNIVÉ.

B. Respondent

The Respondent argues that the disputed domain name relates to a truncated form of the word “university”. The Respondent contends that the Complainant’s allegation that it failed to renew the disputed domain name in August 2010 and that it was thereafter registered by the Respondent is false. The Respondent attaches a tax invoice from the Registrar Fabulous.com Pty Limited dated July 23, 2003 showing that, at that time, the Respondent had registered and was in the process of transferring the disputed domain name. The Respondent also attaches what it states is the earliest screenshot from the DomainTools archive showing that the Respondent was using the disputed domain name as a search directory for university resources in January 2010.

The Respondent alleges it has not been using the disputed domain name in any connection with the Netherlands or in connection with insurance services. The Respondent submits that the term “unive” is more commonly connected to subject matters relating to universities. The Respondent asserts that the term “unive” is neither regionally distinctive, as indicated by the use of the domain name <unive.it> by the Università Ca’ Foscari Venezia, in Italy nor broadly commercially distinctive, as indicated by the presence of a US semiconductor concern at <unive-inc.com>. The Respondent alleges that Complainant has not demonstrated that the term “unive” is *per se* distinctively associated with the Complainant. The Respondent submits that the overwhelming search association of the term “unive” is to subject matter relating to universities including more than one reference to “Univ e” meaning electronic university resources.

Regarding rights or legitimate interests, the Respondent asserts that the disputed domain name consists of the common abbreviation of the word university, “Univ.” pre-pended to the letter “e” which commonly designates resources available in electronic form. The Respondent states that it has held the disputed domain name since at least 2003 and has been using the disputed domain name in association with paid search advertising relating to university education. The Respondent submits that this is a legitimate use of the disputed domain name and that it is deriving revenue from the disputed domain name in a manner which bears no relation to the Complainant’s claimed trade mark rights in association with insurance.

Regarding bad faith registration and use, the Respondent states that the Complainant has made deceptive statements about the circumstances and date of the Respondent’s acquisition of the disputed domain name. The Respondent asserts that the Complainant omits any mention of the fact that the Complainant’s failure to renew the disputed domain name occurred at least nine years ago.

The Respondent states that it strongly appears that the Complainant is attempting to convey the impression that it held the disputed domain name from August 2000 to August 2010 and that this impression is false. The Respondent notes that the Complainant’s counsel has been admonished in respect of similar conduct by a panel in a previous case under the Policy, namely *Credit Europe Bank N.V. v. Peter Yu*, WIPO Case No. D2010-0737. The Respondent submits that in the present case bad faith may be imputed to the Complainant in its submission of a Complaint containing a significant factual inaccuracy.

The Respondent states that nine years ago it obtained a seemingly abandoned domain name which had an apparent relation to the general subject of universities and electronic education and that thereafter it has been using the disputed domain name in good faith. The Respondent asserts that nine years of inaction following failure to renew the disputed domain name likely satisfies the relevant legal criteria of abandonment in most jurisdictions and that the Complainant’s delay does not suggest that the registration of the disputed domain name significantly disrupted its business.

6. Discussion and Findings

To succeed, the Complainant must demonstrate that all of the elements listed in paragraph 4(a) of the Policy have been satisfied:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the

Complainant has rights;

(ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name; and

(iii) the disputed domain name has been registered and is being used in bad faith.

While the conventional approach in cases under the Policy is to consider each of these elements in turn, the requirements of paragraph 4(a) of the Policy are conjunctive. A consequence of this is that failure on the part of a complainant to demonstrate that the disputed domain name has been registered and is being used in bad faith will result in failure of the complaint in its entirety. The Panel so finds in the present case.

The record shows that “unive” is a term in widespread use both as a truncation of ‘university’ and with other meanings. Furthermore, it is clear to the Panel that, while the term can refer to the Complainant’s trademark, the overwhelming search association of the term “unive” is to subject matter relating to universities.

Moreover, the Panel finds that there is nothing in the Complaint (including annexes) to indicate that (i) the Respondent was or should have been aware of the Complainant or its mark when it registered the disputed domain name, (ii) the Respondent ever used the disputed domain name for any insurance-related matter or directed its contents to Internet users in The Netherlands, or (iii) the Respondent targeted the Complainant or its trademark in any way at any time.

The Complaint contains no allegation of facts from which bad faith on the part of the Respondent could reasonably be inferred, and absolutely no evidence of such. The Complainant effectively asserts that any person who uses the term “unive” in any way is *ipso facto* acting in bad faith, solely by virtue of the Complainant’s trademark. The Complainant does not describe or provide evidence of the use to which Respondent put the disputed domain name other than a screenshot of the website associated with the disputed domain name, which incidentally supports the Respondent’s contention that it uses the term in connection with its association with universities. The Complainant merely asserts that the Respondent’s use is “commercial”.

Finally, the Panel requires to address the Complainant’s alleged attempt to mislead the Panel as to the date of the Respondent’s registration of the disputed domain name, as contended by the Respondent.

The Panel finds that the Complainant’s conduct in this regard is inexcusable. The Complainant failed to provide any evidence that it had registered the disputed domain name in 2000 or that it had used it between 2000 and 2010. On the contrary, the Complainant provided evidence (Annex 9 to the Complaint) of an email exchange between the Parties dated December 21, 2010 that contained the Respondent’s assertion that it had held the disputed domain name since 2000. The Complainant forwarded this email to its representative on April 8, 2011. The Complainant’s representative was thus on notice more than two weeks before it filed the Complaint that the dates during which the Complainant claimed to hold the disputed domain name were in doubt yet it appears to have made no investigations regarding this and was prepared to certify the allegations in the Complaint as true. Had the Respondent not replied to the Complainant’s contentions, the Complainant’s submission might well have misled the Panel on an issue directly relevant to the merits of the case.

The Panel is mindful of the concurring opinion in *Credit Europe, supra*, a case featuring the same professional representative as the Complainant’s representative in the present case. The panelist who wrote the concurring opinion, a member of the Panel in the present case, noted therein that the complainant in that case had misled the panel *inter alia* in its description of the facts upon which the complaint was based and called for “the limited censure available to the Panel under the Policy and the Rules, if only to deter similar conduct in future.” The Panel in the present case considers that it is lamentable that the Complainant’s representative appears to have failed to address these concerns and thus has brought two cases under the Policy within a year in which there is a real prospect that it has either deliberately sought to mislead the panel or has been inexcusably careless in the manner in which it has pled its client’s case. The Panel is unanimous that this deserves censure.

Turning to the question of Reverse Domain Name Hijacking, the WIPO Overview of WIPO Panel Views on

Selected UDRP Questions, Second Edition (“WIPO Overview 2.0”) provides *inter alia* as follows:

“Paragraph 15(e) of the Rules provides that, if “after considering the submissions the panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding”. Reverse Domain Name Hijacking is defined in paragraph 1 of the Rules as “using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain name”.

“WIPO panels have found that the onus of proving complainant bad faith in such cases is generally on the respondent, whereby mere lack of success of the complaint is not itself sufficient for a finding of Reverse Domain Name Hijacking. To establish Reverse Domain Name Hijacking, a respondent would typically need to show knowledge on the part of the complainant of the complainant’s lack of relevant trademark rights, or of the respondent’s rights or legitimate interests in, or lack of bad faith concerning, the disputed domain name. Evidence of harassment or similar conduct by the complainant in the face of such knowledge (*e.g.* in previously brought proceedings found by competent authorities to be groundless, or through repeated cease and desist communications) may also constitute a basis for a finding of abuse of process against a complainant filing under the Policy in such circumstances.”

“WIPO panels have found Reverse Domain Name Hijacking in circumstances including where: the complainant in fact knew or clearly should have known at the time that it filed the complaint that it could not prove one of the essential elements required by the UDRP ” *Id.*

Allegations of reverse domain name hijacking have been upheld in circumstances where a respondent’s use of a domain name could not, under any fair interpretation of the facts, have constituted bad faith, and where a reasonable investigation would have revealed the weaknesses in any potential complaint under the Policy; see *Jazeera Space Channel TV Station v. AJ Publishing aka Aljazeera Publishing*, WIPO Case No. D2005-0309. Furthermore, the fact that a complainant may have attempted to mislead the panel has been held to be grounds for Reverse Domain Name Hijacking; see *Shoebuy Franchise B.V. v. Shoebuy.com, Inc. / SHOEBUY.COM*, WIPO Case No. D2010-2142. The Panel in the present case considers that the circumstances contemplated by both *Jazeera, supra* and *Shoebuy, supra* apply here. The Complainant failed to provide any argument or evidence which could support its Complaint and its attempt to mislead the Panel and/or its willful recklessness in making incorrect factual allegations is a clear demonstration of bad faith. Given the circumstances, the Panel finds that the Complaint was brought in bad faith, in an attempt at Reverse Domain Name Hijacking, and constitutes an abuse of the administrative proceeding.

7. Decision

For all the foregoing reasons, the Complaint is denied.

Andrew D. S. Lothian
Presiding Panelist

Eduardo Machado
Panelist

Richard G. Lyon
Panelist
Dated: June 30, 2011