

## **ADMINISTRATIVE PANEL DECISION**

Crop's nv v. DigiMedia.com, L.P.

Case No. D2010-2219

### **1. The Parties**

The Complainant is Crop's nv of Ooigem, Belgium, represented by Eubelius, Belgium.

The Respondent is DigiMedia.com, L.P. of Stillwater, 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 <crops.com> is registered with Tucows Inc.

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on December 17, 2010. On December 20, 2010, the Center transmitted by email to Tucows Inc. a request for registrar verification in connection with the disputed domain name. On December 20, 2010, Tucows Inc. transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details. The Center verified that 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 paragraphs 2(a) and 4(a) of the Rules, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on December 23, 2010. In accordance with paragraph 5(a) of the Rules, the due date for Response was January 12, 2011. The Response was filed with the Center on January 12, 2011.

On February 1, 2011, the Center received a supplemental submission from the Complainant.

The Center appointed Brigitte Joppich, Flip Jan Claude Petillion and William R. Towns as panelists in this matter on February 7, 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 paragraph 7 of the Rules.

On February 21, 2011, the Center received a supplemental submission from the Respondent.

#### 4. Factual Background

The Complainant was established in 1948 and is doing business in the field of growing and freezing fruits and vegetables. The Complainant's name is derived from the last name of the founder of the Complainant. In 2008 through 2009, the Complainant achieved a consolidated turnover of over 180 million Euros.

The Complainant is registered holder of numerous trademark applications and registrations containing the term "Crop's" in various countries, including the U.S., where the Respondent is located. The Complainant's first trademark was applied for in 1993 and has been registered in the Benelux countries (Belgium, Netherlands and Luxembourg), Austria, Germany, Switzerland, Spain, France and Portugal. Furthermore, the Complainant is the holder of registered rights in CROP'S The natural choice in the European Community since 2005 and applied for registration of CROP'S The natural choice in the U.S. on November 16, 2006. The U.S. trademark is not registered and no first use in commerce is claimed in the application. The Complainant's trademarks (the "CROP'S Marks") mainly cover food and beverages.

The disputed domain name was first registered on April 17, 1998, and is currently used to redirect Internet users to the website at "www.yeah.com".

The Complainant sent cease and desist letters to the Respondent on December 5, 2008 and January 2, 2009. The Respondent replied to the first letter on December 26, 2008, stating that "crops" is a generic term, and that the disputed domain name was registered based on the agricultural background of the Respondent's principal, a certain Mr. Day.

#### 5. Parties' Contentions

##### A. Complainant

The Complainant contends that each of the three elements specified in paragraph 4(a) of the Policy is given in the present case:

- (1) The Complainant asserts that the disputed domain name is identical to the Complainant's registered and unregistered rights in the term "Crop's".
- (2) The Complainant contends that the Respondent has no rights or legitimate interests in the disputed domain name as the Respondent is not commonly known by the disputed domain name and has not acquired trademark or service mark rights in the name "Crop's", as the Respondent is not a licensee of the Complainant or otherwise authorized to use the CROP'S Marks, as the Respondent has not made any use of, or demonstrable preparations to use the disputed domain name in connection with a *bona fide* offering of goods or services, as the Respondent has done nothing with the disputed domain name for more than 12 years, as the Respondent is making an illegitimate passive use of the disputed domain name by diverting Internet users to an unrelated template page, and as the Respondent is not using the domain name in connection with its generic value. The Respondent states that the disputed domain name has never been used in a way reflecting the generic value of the term "crops".
- (3) The Complainant maintains that the disputed domain name was registered and is being used in bad faith. The Complainant contends that the disputed domain name has not been used for any type of business relating to the generic qualities of the word "crops" for more than 12 years, and that the disputed domain name has not been used in connection with any *bona fide* offering of goods or services. The Complainant argues that the Respondent's failure to make any good faith use for a substantial period of time suggests that the disputed domain name was registered without a *bona fide* intent of good faith use, and thus was registered in bad faith. The Complainant further contends that

the Respondent's aim is to attract web traffic by creating confusion with the Complainant's marks. The Complainant maintains that the Respondent registered the disputed domain name without investigating the possibility of trespassing on third parties' rights, is misusing an allegedly generic term to harm the Complainant and to prevent its legitimate use by the Complainant, and has acted in bad faith by blocking the domain name completely. The Complainant also argues that the Respondent's failure to positively respond to the Complainant's efforts to make contact and the refusal to voluntarily transfer the domain name strongly support bad faith registration and use.

## **B. Respondent**

The Respondent denies the Complainant's contentions.

According to the Respondent, prior to the registration of the disputed domain name, the Complainant obtained limited rights in Europe in the possessive noun "Crop's" but demonstrated no rights in the word "crops". Furthermore, the Respondent argues that the removal of the apostrophe, regardless of whether it can be represented in a domain name, changes the meaning and the impression conveyed by the mark, by turning what might be assumed to be the possessive form of a company name into a generic term basic to the entire endeavor of agriculture.

The Respondent maintains that it has historically used the domain name in direct relation to its agricultural significance as a generic term and that such use is legitimate. Furthermore, the Respondent states that it has never used the domain name to represent itself as the Complainant, or hold itself out as a provider of prepared food products in those European countries where the Complainant held limited rights in the possessive noun "Crop's" prior to the registration of the disputed domain name.

With regard to bad faith, the Respondent asserts that the "bad faith" criterion is an element of specific intent directed towards the Complainant, arising from rights known by the Respondent to belong to the Complainant at the time the disputed domain name was registered. The Respondent states that the disputed domain name is comprised of a dictionary word and was registered by the Respondent's principal, motivated by the significance of "crops" as a generic term and its value as a fundamental agricultural term. The Respondent contends that it had never heard of the Complainant before it was recently contacted by the Complainant. Finally, the Respondent denies a lack of interest in selling the domain name or any alleged desire to "block" the Complainant.

## **6. Discussion and Findings**

The first point to be dealt with is the admissibility of the Complainant's supplemental submission. The Rules do not allow the parties to file supplemental submissions on their own volition, and paragraph 12 of the Rules provides that a panel may in its sole discretion request further statements or documents from either of the parties. Thus, no party has the right to insist upon the admission of additional arguments or evidence. Grounds justifying new submissions are generally those regarding the existence of new pertinent facts that did not arise until after the complaint was filed. In particular, if the respondent raises objections that reasonably could not have been anticipated when the complaint was filed, a panel can give the complainant a right to reply to the submission or may accept the complainant's unsolicited additional submission (cf. *Universal City Studios, Inc. v. G.A.B. Enterprises*, WIPO Case No. D2000-0416; *QNX Software Systems Ltd. v. Future Media Architects, Inc. and Thunayan K AL-Ghanim*, WIPO Case No. D2003-0921; *Goldline International, Inc. v. Gold Line*, WIPO Case No. D2000-1151). The Complainant does not cite any exceptional circumstances necessitating further submissions, nor does the Response itself disclose any new facts or new legal authority unavailable at the time the Complaint was submitted. Instead, the Complainant appears to have made the supplemental filing solely to reply to the Response. In the present case, such a reply is not justified under the Rules (cf. *AT&T Corp. v. WorldclassMedia.com*, WIPO Case No. D2000-0553; *Universal City Studios, Inc. v. G.A.B. Enterprises*, supra; *AIB-Vincotte Belgium ASBL, AIB-Vincotte USA Inc./Corporation Texas v. Guillermo Lozada, Jr.*, WIPO Case No. D2005-0485). Therefore, the Panel elects not to accept the Complainant's supplemental submission and has not relied on it in reaching this Decision.

As a consequence, the Panel has not considered the Respondent's supplemental submission, a reply to the Complainant's supplemental submission, either.

Under paragraph 4(a) of the Policy, the Complainant must prove that each of the following three elements is present:

- (i) the domain name is identical or confusingly similar to the Complainant's trade mark; and
- (ii) the Respondent has no rights or legitimate interests in respect of the domain name; and
- (iii) the domain name has been registered and is being used in bad faith.

#### **A. Identical or Confusingly Similar**

The disputed domain name fully incorporates the Complainant's word marks "Crop's". It is well established that the specific top level domain name generally is not an element of distinctiveness that can be taken into consideration when evaluating the identity or confusing similarity between the complainant's trademark and the disputed domain name (cf. *Magnum Piering, Inc. v. The Mudjackers and Garwood S. Wilson, Sr.*, WIPO Case No. D2000-1525; *Rollerblade, Inc. v. Chris McCrady*, WIPO Case No. D2000-0429; *Phenomedia AG v. Meta Verzeichnis Com*, WIPO Case No. D2001-0374). As a result, the disputed domain name is identical to the Complainant's word marks "Crop's" for purposes of paragraph 4(a)(i) of the Policy.

Furthermore, the disputed domain name is also confusingly similar to the Complainant's "CROP'S The natural choice" marks. The fact that some of the Complainant's trademarks contain additional elements, namely the additional words "The natural choice" and graphical elements, does not preclude a finding of confusing similarity. As a general rule confusing similarity between a trademark and a disputed domain name is not dissipated merely by the fact that the trademark includes additional graphical elements (cf. *Sweeps Vacuum & Repair Center, Inc. v. Nett Corp.*, WIPO Case No. D2001-0032; *EFG Bank European Financial Group SA v. Jacob Foundation*, WIPO Case No. D2001-0036; *Sydney Markets Limited v. Nick Rakis trading as Shell Information Systems*, WIPO Case No. D2001-0932). Nor is confusing similarity avoided merely because the trademark includes additional generic elements that are not incorporated into the disputed domain name (cf. *La Société des Autoroutes Paris Rhin Rhône v. Keyword Marketing Inc.*, WIPO Case No. D2006-1270: omission of the word "autoroutes"; *Corcom, Inc. v. Jazette Enterprises Limited*, WIPO Case No. D2007-1218: omission of the word "sports"; *Shell Vacations LLC, Shell Vacations Club, L.P. v. Pluto Domain Services Private Limited/PrivacyProtect.org*, WIPO Case No. D2008-1713: omission of the word "club").

Therefore, the Panel finds that the disputed domain name is identical to the Complainant's word marks "Crop's" and confusingly similar to the Complainant's "CROP'S The natural choice" marks and that the Complainant has satisfied the requirements of paragraph 4(a)(i) of the Policy.

#### **B. Rights or Legitimate Interests**

In the light of the Panel's finding below (cf. 6.C.) it is not necessary for the Panel to come to a decision in this regard.

#### **C. Registered and Used in Bad Faith**

Paragraph 4(b) of the Policy sets out four illustrative circumstances, which are evidence of the registration and use of the domain name in bad faith for purposes of paragraph 4(a)(iii) of the Policy, i.e.:

- (i) circumstances indicating that the respondent has registered or acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trade mark or service mark or to a competitor of that complainant, for valuable consideration in excess of the respondent's documented out-of-pocket costs directly

related to the domain name; or

- (ii) the respondent has registered the domain name in order to prevent the owner of the trade mark or service mark from reflecting the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct; or
- (iii) the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- (iv) by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to its website or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's website or location or of a product or service on its website or location.

On the balance of evidence in this case, the Panel is not convinced that the Respondent registered the disputed domain name in bad faith.

The Complainant provided evidence of trademark rights based on its European trademark registrations, and the Complainant's rights in some of the CROP'S Marks predate the Respondent's registration of the disputed domain name by five years. However, the Complainant did not demonstrate business activities in the U.S., neither at the time of the registration of the disputed domain name nor at present. It applied for the registration of the trademark CROP'S The natural choice with the USPTO in 2006, however, without claiming any use in commerce. Furthermore, the Complainant does not state it was well known in the U.S. at the time of the registration of the disputed domain name (or even that it is well known there today). The Respondent is based in the U.S., while protection of the Complainant's CROP'S Marks is limited to the European Union. As a result, in the Panel's view, the Complainant's submissions are not sufficient to establish that the Respondent knew of the Complainant's trademark rights (or the Complainant's existence, e.g. through its website) in 1998 and that it registered the disputed domain name in bad faith.

In English, the term "crops" is a generic or dictionary word, the plural of "crop", meaning the yield from plants in a single growing season. The Respondent relies on the generic meaning of "crops" and states that its principal registered the disputed domain name because of his relation to agriculture without having heard of the Complainant before receiving the first cease and desist letter. The Respondent provided evidence that the disputed domain name was used in connection with agriculture-related advertising links at least in 2003 and 2004.

As a result, it seems to be more likely than not to this Panel that the Respondent acquired the disputed domain name because of its generic meaning and not with a view to the Complainant and its CROP'S Marks.

Finally, as the disputed domain name has in fact been used in connection with an active website with advertising links, the record in this case is not indicative of passive holding sufficient to evidence bad faith (cf. *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Case No. D2000-0003; *Jupiters Limited v. Aaron Hall*, WIPO Case No. D2000-0574; *Ladbroke Group Plc v. Sonoma International LDC*, WIPO Case No. D2002-0131). That the Respondent over a period of 12 years may not have used the disputed domain name exclusively in its generic sense does not support a finding of bad faith registration in the absence of any indication in the record that the disputed domain name has ever been used by the Respondent in its trademark sense.

Accordingly, the Panel concludes that the first condition of the third requirement of the Policy has not been established. This Complaint must therefore be rejected.

**7. Decision**

For all the foregoing reasons, the Complaint is denied.

**Brigitte Joppich**  
Presiding Panelist

**Flip Jan Claude Petillion**  
Panelist

**William R. Towns**  
Panelist  
Dated: February 21, 2011