Decision for dispute CAC-UDRP-101392

Case number	CAC-UDRP-101392
Time of filing	2017-04-18 13:21:40
Domain names	xn--cestujlevn-9nb.com

Case administrator

Organization	Iveta Špiclová (Czech Arbitration Court) (Case admin)

Complainant

Organization	Cestujlevne.com s.r.o.

Complainant representative

Name	Mgr. Václav Kacálek

Respondent

Name	Tomas Rundt

OTHER LEGAL PROCEEDINGS

The Panel is not aware of any other legal proceedings which are pending or decided and which relate to the disputed domain name.

IDENTIFICATION OF RIGHTS

The Complainant is the owner of the Czech trademark registration no. 350227 cestujlevne.com & design, registered on December 16, 2015 and applied for on May 15, 2015. The trademark registration covers services in classes 35, 39, and 43.

FACTUAL BACKGROUND

FACTS ASSERTED BY THE COMPLAINANT AND NOT CONTESTED BY THE RESPONDENT:

The Complainant operates a website at <cestujlevne.com> since 2012, on which it offers low-cost travels.

The Respondent registered the disputed domain name and operates a website under the disputed domain name, which is identical to the Complainant's website with regard to the target group, the language, as well as the content.

The Complainant sent a cease and desist letter to the Respondent on January 20, 2017, which remained unanswered.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS

COMPLAINANT

The Complainant contends that the disputed domain name is confusingly similar to the Complainant's trademark.

Furthermore, the Complainant contends that the Respondent has no rights or legitimate interests in the disputed domain name. In this regard, the Compainant states that it is not aware of any evidence that:

1. Before any notice to the Respondent of the dispute, the Respondent used the disputed domain name, or a name corresponding to the disputed domain name, in connection with a bona fide offering of goods or services; or

2. The Respondent (as an individual, business, or other organization) has been commonly known by the disputed domain name, even if the Respondent has acquired no trademark or service mark rights; or

3. The Respondent is making a legitimate non-commercial or fair use of the disputed domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

In the circumstances, the Complainant underlines that the burden of proof passes to the Respondent to show rights or legitimate interests in the disputed domain name.

Finally, the Complainant contends that the disputed domain name was registered and is being used in bad faith. It contends that the disputed domain name is being used intentionally to attract Internet users to the Respondent's website for commercial gain by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation or endorsement of the website or the products promoted on it.

RESPONDENT

The Respondent filed a Response on May 3, 2017. The Respondent only stated that the disputed domain name has been registered prior to the Complainant's trademark right and therefore has not been registered and used in bad faith.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights (within the meaning of paragraph 4(a)(i) of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

In the light of the Panel's finding with regard to bad faith, it is not necessary for the Panel in this regard either to come to a decision.

BAD FAITH

The Complainant has not shown the disputed domain name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy).

PROCEDURAL FACTORS

The Panel is satisfied that all procedural requirements under UDRP were met and there is no other reason why it would be inappropriate to provide a decision.

PRINCIPAL REASONS FOR THE DECISION

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.

The Panel accepts that the disputed domain name is confusingly similar to the Complainant's trademark as it fully includes such trademark, except for a few deviations (omission of the TLD ".com" included in the Complainant's trademark and addition of a diacritical sign on the word "cestujlevne"). However, the Complainant's trademark is recognizable as such within the disputed domain name and therefore confusingly similar under the Policy.

The disputed domain name, however, was not registered in bad faith.

It is consensus view, that when a domain name is registered by the Respondent before the Complainant's relied-upon trademark right is shown to have been first established (whether on a registered or unregistered basis), the registration of the domain name would not have been in bad faith because the registrant could not have contemplated the Complainant's then non-existent right.

In the present case, the disputed domain name was registered on July 26, 2013 and the Complainant's trademark was filed and registered in 2015. Therefore, the Respondent could not have registered the disputed domain name in bad faith with regard to the Complainant's registered trademark rights.

With regard to common law trademark rights, the Panel finds that the Complainant failed to provide sufficient evidence that it can rely on such rights under the Policy. It is consensus view that common law trademark rights may be sufficient for the purposes of establishing rights under paragraph 4(a)(i) of the Policy. However, the Complainant must show that the name has become a distinctive identifier associated with the Complainant or its goods or services. Relevant evidence of such “secondary meaning” includes length and amount of sales under the trademark, the nature and extent of advertising, consumer surveys and media recognition. A conclusory allegation of common law or unregistered rights (even if undisputed) would not normally suffice. In fact, specific assertions of relevant use of the claimed mark supported by evidence as appropriate would be required.

The Complainant has not provided any evidence whatsoever with regard to its business activities, except two undated screenshots of its website. No claim regarding a secondary meaning has been brought forward by the Complainant, and absolutely no evidence in support of such claim has been presented to the Panel. The Panel therefore cannot but find that on the record of these Policy proceedings the Complainant failed to establish common law rights and that the disputed domain name was registered in bad faith with regard to such rights.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Rejected

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

1. **XN--CESTUJLEVN-9NB.COM**: Remaining with the Respondent

PANELLISTS

Name	**Peter Müller**

DATE OF PANEL DECISION 2017-05-24

Publish the Decision