Decision for dispute CAC-UDRP-101571

Case number	CAC-UDRP-101571
Time of filing	2017-06-22 13:26:09
Domain names	FITNESSPEOPLE.COM

Case administrator

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

Complainant

Organization	Fitness People B.V.

Complainant representative

Organization	Bird & Bird Advokatpartnerselskab

Respondent

Organization	Fit2B LLC, Mickey Jezzard

OTHER LEGAL PROCEEDINGS

There are no other legal proceedings, pending or decided relating to the disputed domain names.

IDENTIFICATION OF RIGHTS

The Complainant states that it has common law rights (unregistered trademarks).

FACTUAL BACKGROUND

The Complainant is an online retailer of sport and fitness supplements, and offers consumers the opportunity to purchase products at the actual cost prices, if the consumers become members of FitnessPeople Club. The Complainant is based in the Netherlands and was founded on August 1, 2016. The Respondent is registered as Mickey Jezzard from the organization Fit2B LLC. He is the former CEO of the Complainant, Jes Hvid P. Mikkelsen, who is using the cover name Mickey Jezzard.

PARTIES CONTENTIONS

The Complainant held that he negotiated the purchase of the disputed domain name from its former owner (Raymond T. Furlong) in August and September 2016. Patrick Drew who is the current CEO and founder of the Complainant, represented the Complainant during these negotiations.

The purchase of the disputed domain name was finalized by the former CEO of the Complainant Jes Hvid P. Mikkelsen. The payment of the transfer of the disputed domain name was made through credit card payment of EUR 1000 wired to

escrow.com in September 2016. After the dismissal of Jes Hvid P. Mikkelsen of the position as CEO of the Complainant in March 2017, Jes Hvid P. Mikkelsen decided to start another company, offering exactly same goods and services as the Complainant offers. Jes Hvid P. Mikkelsen registered a confusingly similar domain name <FITNESSPEOPLE.CLUB> on July 30, 2016 using GoDaddy.com as the Registrant.

Jes Hvid P. Mikkelsen, who was still in control of the source codes regarding the disputed domain name after his dismissal, copied the original website of the Complainant (as it looked on the disputed domain before March 2017 where Jes Hvid P. Mikkelsen was dismissed) to his new domain <FITNESSPEOPLE.CLUB>.

The Complainant has held that he has a common law trademark right to the FITNESSPEOPLE trade name. Since the Respondent has no rights or legitimate interests in the disputed domain name, the Complainant has held that the requirements of paragraph 4(a)(i) and (ii) are met.

The Respondent held that he has been owning and running the company FitnessPeople ApS in Denmark since 2013, he has in September 2016 personally purchased and registered, in his personal name J.H.P. Mikkelsen, the disputed domain name. The domain name <fitnesspeople.com> has been registered in his personal name and/or in my company Fit2B Ltd only, and have at no point been registered by any other person or company. He held that he had over the years purchased and registered several fitnesspeople domains; i.e. <fitnesspeople.com>, <fitnesspeople.dk>, <fitnesspeople.eu>, <fitnesspeople.be>, <fitnesspeople.se>, <fitnesspeople.club>, <fitnesspeople.cz>, <fitnesspeople.pl>. He has been the owner of several of the above-mentioned domains for more than 10 years, and several of the domains are in use.

RIGHTS

The Complainant has, to the satisfaction of the Panel, not 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). The Complainant has not proved that he has an unregistered trademark right. According to former UDRP decisions , the Complainant must show that the name has become a distinctive identify associated with a complaint of its goods or services The evidence of such “secondary meaning” includes length and amount of sales under the trademark, the nature and extent of advertising or consumer surveys. The name “FITNESSPEOPLE” is almost generic by its nature.

To establish unregistered or common law rights as a trademark, the Complainant must show it acquired secondary meaning, i.e., that the public associates the asserted mark with Complainant’s goods and services. See CPP, Inc. v. Nokta Internet Technologies, WIPO Case No. D2008-0591 (holding that when relying on unregistered or common law rights in UDRP proceedings, “the Complainant must adduce sufficient evidence to demonstrate that the claimed mark has in fact been used as a mark labeling goods or services and, through its use, attracted significant goodwill and reputation associated with the Complainant’s goods or services in a definable market”). Relevant evidence of such ‘secondary meaning’ includes length and amount of sales under the mark, the nature and extent of advertising, consumer surveys and media recognition. Please also see this relevant jurisdiction for details: The Carphone Warehouse Limited and The Phone House B.V. v. Navigation Catalyst Systems, Inc., WIPO Case No. D2008-0483, <thecarephonewarehouse.com> inter alia, Continental Casualty Company v. Andrew Krause / Domains by Proxy, Inc., WIPO Case No. D2008-0672, <continentalcasualty.com>l;Thomas Pick aka Pick Inc. v. EUROPREMIUM LTD, Elaine Maria Gross, WIPO Case No. D2008-1010, <bs.com>; Mancini's Sleepworld v. LAKSH INTERNET SOLUTIONS PRIVATE LIMITED, WIPO Case No. D2008-1036,<mancinissleepworld.com>.

The disputed domain name consists of the words “fitness“ and “people“. A search within Google shows that there is no clear link with the Complainant. Apparently the name “fitness“ and “people“ is commonly used and describes fitness situations in various contexts.

The Complainant refers to the dismissal of the Respondent as former CEO of the Complainant. The Respondent however has told a different story including the fact that he owns several fitness-related domain names since longer times. Therefore the situation cannot be decided within the quick UDRP context generally only made for consultations with a clear trademark

background by the Respondent acting in bad faith. Or in other words, the Complainant failed to make a prima facie case here.

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have rights or legitimate interests in respect of the disputed domain name (within the meaning of paragraph 4(a)(ii) of the Policy). He is working within the fitnees business for a Danish company called "Fitness people".

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the disputed domain name has been registered and is being used not in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy), but for good reason.

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

The Complainant has not shown that he has an unregistered trademark right related to the disputed domain name.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Rejected

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

1. **FITNESSPEOPLE.COM**: Remaining with the Respondent

PANELLISTS

Name	**Thomas Hoeren**

DATE OF PANEL DECISION 2017-08-03

Publish the Decision