Decision for dispute CAC-UDRP-101865

Case number	CAC-UDRP-101865
Time of filing	2018-01-31 10:40:51
Domain names	simbasleep.org

Case administrator

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

Complainant

Organization	Simba Sleep Limited

Respondent

Name	Ye Li

OTHER LEGAL PROCEEDINGS

The Panel is not aware of any other legal proceedings relating to the disputed domain name.

IDENTIFICATION OF RIGHTS

Complainant Is the owner of the EU Trademark "Simba Sleep Limited" (word) with the registration no. 017287699 filed on 04/10/2017.and granted on 23/01/2018 in classes 3, 20, 22, 24.

FACTUAL BACKGROUND

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

The Complainant contends to be formed pursuant to the laws of the United Kingdom on 27 July 2015 and since then has adopted “Simba Sleep” as a trade name, and has continuously been using the Simba Sleep trade name, corporate name, business name and trading style throughout the intervening years.

The Complainant also claims to provide mattresses, bedding and products akin thereto in multiple countries across the world, and is registered as an incorporated business, in addi-tion to the UK, in Australia as Simba Sleep Pty Ltd and the United States in the state of Delaware as Simba Sleep Incorporated.

The Complainant further asserts that:

- the disputed domain name is identical or confusingly similar to the trademark in which the Complainant has rights;
- the Respondent is not commonly known by the disputed domain name;
- the Respondent was aware of the Complainant when registering and subsequently using the disputed domain name;
- the Respondent has registered the disputed domain name primarily for the purpose of selling, ren-ting, or otherwise transferring the domain name to the Complainant who is the owner of a trademark;
- the Complainant's managing director was contacted via email, referring the Managing Director to the website sedo.com where the disputed domain name was offered for sale;

- the Complainant has the word mark "Simba Sleep" in China currently under application, with a filing date of 24 August 2017 and that the Respondent registered the disputed domain name on 6 December 2017, over 3 months after the Chinese trademark application, and almost three years after the company Simba Sleep Limited in the UK was incorporated and 2 months after the company Simba Sleep Pty Ltd in Australia was incorporated.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

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

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the disputed domain name (within the meaning of paragraph 4(a)(ii) of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, 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 dispute settlement procedure must be regulated by language in order to enforce the "right to be heard" and to prevent possible unequal treatment of the parties. Priority should be given to the parties as they know best how to communicate with each other. They must explicitly agree on one language, since the wording of § 11(a) UDRP Rules does not allow the use of different languages side by side (procedural language). If the parties do not agree on a language - which is probably the rule - the procedure is bound to the language of the registration agreement of the disputed domain name, because the domain holder only agrees to the UDRP by registering the domain name. The proper language of this proceeding is therefore the Chinese language used in the registration agreement. This was pointed out to the Complainant by the ADR provider CAC. Therefore the ADR provider CAC asked the Complainant to request a change of the language into English or if the Complainant would prefer to proceed in Chinese, the ADR provider CAC would terminate the proceedings and reimburse the Complainant the full fee.

The Complainant filed the request to change the language in an Amended Complaint because, in his view, the dispute procedure is not a remotely contentious dispute as the Complainant is able to amply demonstrate that Simba Sleep Limited holds intellectual property rights in jurisdictions worldwide and that the Respondent has registered or used the disputed domain name in bad faith.

Prima facie both reasons are not valid for a change of language, as both reasons are requirements for transferring a domain name.

The ADR provider CAC did not notify the Respondent of the discrepancy between the language of the registration agreement and the Complaint in the Chinese language. To ensure that this failure does not lead to a procedural breach, the Panel instructed the ADR provider CAC to inform the respondent by email:

ADRSimba Sleep Limited

In the English language:

The proper language of this ADR proceeding is the Chinese language used in the registration agreement. The Complainant requested a change of the language of the proceedings into the English language. The Complainant argues that the procedure are not a remotely contentious dispute as the Complainant is able to amply demonstrate that Simba Sleep

Limited holds intellectual property rights in jurisdictions worldwide and that you registered or used the disputed domain name in bad faith. Please respond to the Complainant's request within one week. If no respond is received within the deadline, the panel will decide based on the currently known facts.

The Respondent did not comment on the request to change the language of the proceedings.

It is questionable whether the proceedings can nevertheless be continued in the English language. However, complaints are also formally accepted by Panels if they are not written in the language of the registration, if

(i) evidence showing that the respondent can understand the language of the complaint,
(ii) the language/script of the domain name particularly where the same as that of the complainant's mark,
(iii) any content on the webpage under the disputed domain name,
(iv) prior cases involving the respondent in a particular language,
(v) prior correspondence between the parties,
(vi) potential unfairness or unwarranted delay in ordering the complainant to translate the complaint,
(vii) evidence of other respondent-controlled domain names registered, used, or corresponding to a particular language,
(viii) in cases involving multiple domain names, the use of a particular language agreement for some (but not all) of the disputed domain names,
(ix) currencies accepted on the webpage under the disputed domain name, or
(x) other indicia tending to show that it would not be unfair to proceed in a language other than that of the registration agreement.

The Complainant could refer to (v) in the present proceedings, since the parties corresponded in English prior to the proceedings. However, it is doubtful if the mere use of the requested language in prior communications between the parties is sufficient as the Respondent is not a national of an English speaking country and especially if, as in the present case, it is doubtful whether the Respondent himself has sent an English-language e-mail to the Complainant. Nevertheless, the Respondent has been given the opportunity to comment on the language of the proceedings. Although the Complainant received a notice in the Chinese language, he did not comment within the deadline set.

The Panel decides to comply with the Complainant's request to change the language of the proceedings, in particular because the Respondant has not made use of the opportunity to reply to the notice in the Chinese language. In this case, the panel would have decided that the defendant is entitled to file all documents or assertions in Chinese, This would have enabled a fair balance between the interests of the parties, as both parties might then have been charged with translation costs.

PRINCIPAL REASONS FOR THE DECISION

According to paragraph 4(a) of the UDRP Policy the Complainant must prove for the requested transfer of the disputed domain name that:

(i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
(ii) the Respondent has no rights or legitimate interests in respect to the disputed domain name; and
(iii) the disputed domain name has been registered and is being used in bad faith.

There is no reasonable doubt that the Complaint complies with all these requirements:

(i)

The Complainant has established that it has rights in the trademark "Simba Sleep Limited". The Panel finds that the disputed domain name is confusingly similar to the Complainant's trademark, although "sleep" is in fact descriptive and generic for the goods concerned. The disputed domain name does not include the term "limited", but that is not sufficient to exclude the likelihood of confusion as "limited" is also a descriptive term. However, the catchphrase "Simba" is contained in the disputed

domain name, which is why a confusing similarity can be assumed.

(ii)

Furthermore the Complainant provided prima facie evidence that the Respondent has no rights or legitimate interests in the disputed domain name. As asserted by the Complainant (and unchallenged by the Respondent), the Respondent is not commonly known by the disputed domain name. The Respondent failed to provide any information and evidence that it has relevant rights or legitimate interests in respect of the disputed domain name (within the meaning of paragraph 4(a) (ii) of the Policy).

In lack of any response from the Respondent, or any other information indicating the contrary, the Panel concludes that the Respondent has no rights or legitimate interests in respect of the disputed domain name.

(iii)

For a Complaint to succeed, a panel must be satisfied that a domain name has been registered and is being used in bad faith ([Policy, paragraph 4(a)(iii))].

The Panel finds it hard to believe that the Respondent would have chosen and registered the disputed domain name in good faith, without having been aware of the Complainant.

As it ensues from the evidence provided by the Complainant, the Complainant's managing director was contacted via email, referring the Managing Director to the website sedo.com where the disputed domain name was offered for sale. These circumstances indicating that the Respondent has registered the disputed domain name primarily for the purpose of selling, renting, or otherwise transferring the disputed domain name to the Complainant who is the owner of the trademark;

For the reasons mentioned above the Panel finds, that the disputed domain name has been registered and is being used in bad faith under paragraph 4(a)(iii) of the Policy.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **SIMBASLEEP.ORG**: Transferred

PANELLISTS

Name	**Prof. Dr. Lambert Grosskopf, LL.M.Eur.**

DATE OF PANEL DECISION 2018-06-02

Publish the Decision