Decision for dispute CAC-UDRP-101126

Case number	CAC-UDRP-101126
Time of filing	2015-11-26 13:12:08
Domain names	HUSTLEREQUIPMENT.COM

Case administrator

Name	Lada Válková (Case admin)

Complainant

Organization	Hustler Equipment Ltd.

Complainant representative

Organization	Muscovitch Law P.C.

Respondent

Name	To Thi Thanh Tam

OTHER LEGAL PROCEEDINGS

No other proceedings have been notified to the Panel.

IDENTIFICATION OF RIGHTS

The Complainant has provided evidence of two trademarks taken out by the Complainant in New Zealand, the first (1975) a word mark for the name “Hustler” and a second (1997) a combined word and design mark including the same name. The marks relate to what remains the Complainant's business, which is the design, production and supply of agricultural equipment. The Complaint refers to a similar New Zealand trademark and an Australian and a Canadian one.

The Complainant also provided evidence of longstanding use of the name “Hustler Equipment”, first by Hustler Equipment Partnership prior to 2011 and then, following transfer of that business to Hustler Equipment Ltd, from 2011 onwards. Further evidence documents notoriety won internationally for the business. These items are adduced by the Complainant to substantiate its claim to recognition of an unregistered trademark, in particular in relation to the combination of the words “Hustler” and “Equipment”, as contained in the disputed domain name. This combination is indeed contained in the domain name hustlerequipment.co.nz that the Complainant has registered and for use of which it provides evidence.

No rights have been identified by the Respondent, who has not submitted a Response. The registrar's response to the CAC's Request for Registrar Verification confirmed that the Respondent has been the registrant since 7 August 2004. This information is, however, contested by the Complainant, which has adduced third-party evidence of at least one change in

registration that must have taken place in or after 2010.

FACTUAL BACKGROUND

This case involves a domain name, hustlerequipment.com, which was registered in the Respondent's favour, although initially under a concealed identity in WHOIS and in all probability to at least one prior registrant before the Respondent. The Complainant asserts its registered and unregistered trademark rights to contest the Respondent's registration and use of the name. Delivery of the proceedings papers by registered mail in Vietnam was unsuccessful and no response could be obtained by e-mail. With the domain name registrar's help, the Respondent's identity was ascertained and the Complaint was duly amended to contain his details. The Complainant requests transfer of the disputed domain name to itself on the basis of its rights and the Respondent's lack of legitimate interest and its registration and use of the disputed name in bad faith.

PARTIES CONTENTIONS

No administratively compliant Response has been filed.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the 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 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 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

(1) The question of the language of the proceedings was raised by the fact of registration of the disputed domain name in the Socialist Republic of Vietnam, whose sole official language is Vietnamese.

However, the registrar's response to the CAC's Request for Registrar Verification confirmed that the language of the registration agreement with the Respondent is in English. Furthermore, the Complainant showed in the evidence it submitted that the web site employing the disputed domain name is accessible in English. The CAC then produced evidence on 18 January 2016 to show that the registered letter containing the notification of the proceedings was returned unopened. It had also provided details showing that the email sent to the Respondent's address was not delivered. Notwithstanding the apparent failure to make contact with the Respondent, the Complainant's evidence showed a change in content on the site employing the disputed domain name after proceedings commenced which suggested that the Respondent understood that proceedings related to the disputed domain name were taking place.

The Panel therefore concluded that, particularly in light of the confirmed language of the registration agreement and of the possibility of advertent lack of response on the Respondent's part, the case could proceed in English. The Panel, however, considers that there must be no automaticity in reaching such a conclusion. The UDRP is plainly a linguistically plural regime and departure from the ordinary rules on the language of proceedings should normally be upheld.

(2) The Amended Complaint made reference to the “Registration Agreement”. Yet, from the documentation submitted by the Complainant, it appeared that this reference is to the registration agreement of the internet and telecommunications service provider dotVN, and not that of the registrar for the domain name in dispute. The home page of the registrar with which the disputed domain name is registered, maprilis.net, seems to direct internet users to dotVN about .vn inquiries, not for its own terms and conditions for registration. The Complainant was given the opportunity to provide the Panel with a copy of the

correct registration agreement, if it chose. It did not exercise this possibility. The Panel therefore proceeded on the basis of the UDRP itself, which ICANN procedures require always to be passed down to registrants.

Conclusion

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

PRINCIPAL REASONS FOR THE DECISION

1. The Parties and their relation to the substance connoted by the disputed domain name

The Complainant is a New Zealand corporation whose founder designed and built the first tractor-mounted forklift to manage awkward tasks on his property in 1960. The company today exports uniquely engineered farm equipment to fifteen countries around the world, with more than 370 Hustler Equipment accredited dealers and over 10,000 farming equipment units working in the field. The Complainant maintains websites in association with numerous domain names, such as www.hustlerequipment.co.nz and states that it has eight other “hustlerequipment” domain name registrations, eight of which are under country code TLDs.

The Amended Complaint and evidence supporting it show the Complainant has established a reputation for the name HUSTLER EQUIPMENT such that it is known by that name to the extent that it constitutes an unregistered trademark quite apart from the arguments that could be advanced based on its registered marks. The effect is to reinforce those arguments.

By contrast, the Respondent has apparently no connection whatsoever with the disputed domain name or the business it connotes. The evidence adduced shows he was formerly registered for the name under the denominator “Vietnam Domain Privacy Services” until the Registrar informed the CAC that the underlying registrant was Mr To Thi Thanh Tam and that he is the registrant of over a hundred domain names, three of which have been the subject of earlier domain name dispute resolution. In all three cases the disputed domain name was transferred and the Respondent entered a response in none of them. The Complainant alleges that the show a pattern of targeting medium sized company trademarks in a similar manner to the instant case.

In relation to the Respondent’s use of the disputed domain name, the Complainant alleged that the Respondent has been using a website associated with it for “pay per click” ads with the likelihood that the Respondent has been harnessing the reputation associated with the Complainant’s brand to deviate traffic and generate revenue for himself. Some evidence was adduced to show that advertisements switched from general advertisements to ones whose links specifically targeted the Complainant’s heavy equipment products. But not too much additional weight can be given to this evidence, given its rather general and ephemeral character.

2. Application of the UDRP criteria for mandatory resolution of disputes

2.1 An identical/confusingly similar domain name to a trademark or service mark in which the complainant has rights

Taking the combination of the registered and unregistered trademarks as discussed above, there can be no doubt that hustlerequipment.com is identical to that combination and so meets this criterion.

2.2 No legitimate interest on the part of the Respondent

The most important aspect here is the fact of registration of the domain name hustlerequipment.com by a third party since August 2004. This in itself cannot defeat a claim by a Complainant; there is no obligation for anyone to register a domain name in order to defend their rights. Indeed, the very purpose of the UDRP system is to protect those rights. However, the Panel must in these circumstances examine whether any legitimate interest may have accrued during a long period, which is here more than a decade, and, to fulfil its duties under the UDRP, it must do so irrespective of whether a Response has been submitted in order to fulfil the Panel's fundamental duty of even-handedness.

In the present case, there is no indication that such an interest has accrued, while the Respondent, in failing to enter a response, has offered no evidence that any of the reasons by way of illustration in the UDRP apply in his favour. To the contrary, all the evidence shows that the Respondent has sought to pursue an illegitimate interest, namely to profit from pay-per-click traffic that was attracted by the reputation associated with the Complainant's reputation in which the latter has rights that must be protected. The Panel takes due note that the Respondent has furthermore in the past been found to have engaged in typosquatting, a practice premised on the absence of legitimate interest by catching traffic destined for another's legitimate web site thanks only to users' mistakes.

2.3 Bad faith registration and use

Proof of bad faith domain name registration and use can often only be performed by inference from one or more circumstances rather than by direct evidence, with aid thus being given in the UDRP as to the type of circumstances that will suffice. Intentionally attempting to attract, for commercial gain, internet users to the registrant's web site by creating a likelihood of confusion of its content with the Complainant's mark is among them.

The presence of this circumstance is indicated in this case against the background introduced in Section 1, above, since, as the Complainant argues effectively: "Had the Respondent just registered HUSTLER.COM, or HUSTLER along with another descriptive word unrelated to the Complainant's business, there could have been a genuine question that there was perhaps a coincidence or lack of bad faith registration. However, the fact that the Respondent specifically used the word, 'equipment' leaves no reasonable doubt other than that the Respondent purposefully targeted the Complainant and its trademarks in the present case". Furthermore, given particularly the range of online advertising revenue models available, there can be no necessity in this case at least to show an intention specifically to offer competing goods or services to those of the Complainant on the site bearing the disputed domain name.

Other recognized indicators of bad faith can include concealment of identity, as was shown to have been the case until the present proceedings in respect of the disputed domain name. However, the latitude allowed for such concealment under the ICANN system means that the value of the resulting inference cannot be high when taken alone. This is thus a subsidiary element for determining bad faith, while strong and uncontroverted evidence indicating bad faith through creating confusion to divert traffic, as found in the preceding paragraph, suffices to establish a finding of bad faith on the Respondent's part in the present case.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **HUSTLEREQUIPMENT.COM**: Transferred

PANELLISTS

Name	**Kevin J. Madders**

DATE OF PANEL DECISION 2016-01-27

Publish the Decision