Decision for dispute CAC-UDRP-105201

Case number	CAC-UDRP-105201
Time of filing	2023-02-15 10:45:08
Domain names	urheiluveikkaus.com

Case administrator

Name	Olga Slanařová (Case admin)

Complainant

Organization	Veikkaus Oy

Complainant representative

Organization	Berggren Oy

Respondent

Organization	Raketech Group Limited

OTHER LEGAL PROCEEDINGS

The disputed domain name was the subject of the earlier domain name dispute CAC-UDRP-105075, with a decision dated January 26, 2023 (the "Prior Complaint"). The Panel is not aware of any other legal proceedings which are pending or decided and which relate to the disputed domain name.

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

PRELIMINARY ISSUE – ACCEPTANCE OF A REFILED CASE

The proceeding is a so-called "refiled" case because it concerns an identical domain name and parties to a previously decided case in which the prior panel denied the complaint on the merits. The Panel notes that because "the UDRP itself contains no appeal mechanism, there is no express right to refile a complaint"; and accordingly, "refiled complaints are exceptional." See, generally, WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("WIPO 3.0"), section 4.18.

The disputed domain name was the subject of the earlier domain name dispute CAC-UDRP-105075, with a decision dated January 26, 2023 (the "Prior Complaint"). The panel in the Prior Complaint ("Prior Panel") rejected that complaint, finding in relevant part that the Complainant's earliest application for a trademark including the term "veikkaus" was February 5, 2013. The Prior Panel

concluded that Complainant did not have trademark rights at the time the disputed domain name was registered in 2007. The Prior Panel held:

> "Under the third element of the Policy, the Complainant must prove that the Disputed Domain Name was registered and is being used in bad faith. The requirements are conjunctive; hence no bad faith is normally found where the trademark relied on by the complainant postdates the Disputed Domain Name.
>
> If the Complainant had no trademark at the registration of the Disputed Domain Name, it would be difficult to prove that the Respondent targeted the Complainant's trademark and business.
>
> From the Respondent's perspective, the Respondent hold a generic domain name with proper use for years and was caught by surprise of somebody who got a little distinctive trademark "betting", Finnish <VEIKKAUS>.
>
> The Complainant could not show bad faith of the Respondent when he registered the Disputed Domain Name in 2007."

The Complainant freely admits that this Complaint is a refiled complaint. The Complainant makes no contentions regarding why this refiled Complaint should be accepted other than asserting that (i) the conclusion in the Prior Complaint was incorrect, and (ii) Complainant had recently been successful in several UDRP cases "based on the same facts as in this dispute".

Complainant contends that the Prior Panel incorrectly made its decision by considering Complainant trademark applications dated after the registration date of the disputed domain name. Complainant argues in this Complaint that the relevant date on which it should be able to rely is the application date of one of its VEIKKAUS trademarks, namely September 27, 2005. Regardless of whether or not Complainant's contentions are relevant and/or persuasive, the primary and dispositive issue in this matter is whether this case, as a refiled complaint, can be considered on its merits.

It is well-established that the panel appointed in a refiled complaint must determine whether it should proceed to a decision on the merits. As stated by the three-member panel in Mindaugas Vaitkunas v. Henrik Piski CAC-UDRP-104563:

> "However, the procedure provides for the possibility of a new complaint between the same parties concerning the same domain name.
>
> In line with a practice observed in most common law jurisdictions with which the Panel is familiar, the discovery of new evidence which, with the exercise of due diligence, would not have been reasonably available at the time of the original hearing can, in some circumstances provide a ground for a new hearing/procedure/complaint."

It is not clear to the Panel whether the evidence presented in the instant Complaint is the same evidence presented to the panel in the Prior Complaint, the full record in that proceeding is not before this Panel for comparison.

In GBI Prosperities Pty Ltd., Dr Grow It All Sales Pty Ltd. v. Private Registration / Dave Lovegrove, Real Estate Educational Programmes, WIPO D2016-0879, that panel elaborated on the issue of whether refiled complaints should be accepted:

> "There is no provision in the Policy dealing expressly with this issue. Conscious of the potential for well-resourced complainants to harass potential respondents by repeated filings following an unsuccessful complaint, UDRP panels have exercised their powers under the Policy to reject further complaints over the same domain name against the same respondent in the interests of finality and certainty, bearing in mind that no decision under the Policy precludes a party from pursuing its grievance in an appropriate court."

If the instant Complaint does not include fresh new material, then Complainant would be asking this Panel to overturn the initial finding, without having presented any legally relevant developments or new material evidence. According to the long held and well-established view of panels, a panel cannot do that. Only in exceptional circumstances where new evidence has come to light, or some other exceptional situation applies, can a panel exert discretion to re-hear a complaint on the merits and potentially reverse an earlier decision.

Such a situation where a refiled complaint was accepted occurred in Alpine Entertainment Group, Inc. v. Walter Alvarez, WIPO D2007-1082. In that case, the panel found that a trademark which had been registered since the time of the initial complaint could be considered "new evidence" sufficient to warrant hearing of the refiled complaint:

> "The new evidence is the evidence that the United States trademark REALSPANKINGS has now registered. Given that the prior case failed on the first element, the new evidence of trademark registration is likely to have an important influence on the result of the case, although it may not be decisive. The registration of the REALSPANKINGS trademark is not challenged by the Respondent. This new evidence was not in existence at the time of the earlier decision and was therefore unable to be considered by the prior panel in relation to its original finding under the threshold first element of the Policy. The Panel therefore finds that the refiled Complaint should be heard by the present Panel."

Unlike in Alpine Entertainment Group, the Complaint in these proceedings does not purport to present newly discovered evidence regarding Complainant's trademarks, not in existence at the time of the Prior Complaint.

In Free Bridge Auto Sales Inc. v. Larry Ross, FA1272427, the three-member panel stated:

> "Typically, complaints may not be resubmitted for relief subsequent to their denial due to res judicata principles unless the complainant meets its high burden of demonstrating the need for such additional review. See, e.g., Creo Prods. Inc. v. Website

> in Dev., D2000-1490 (WIPO Jan. 19, 2001) (finding that the burden of establishing that a second complaint should be entertained is "high"). Several criteria have been set forth for determining whether a complaint may be refiled. See Grove Broad. Co. Ltd. v. Telesystems Commc'ns Ltd., D2000-0703 (WIPO Nov. 10, 2000) (noting, and subsequently applying to the UDRP, the four common-law grounds for the rehearing or reconsideration of a previously filed decision as (1) serious misconduct on the part of a judge, juror, witness or lawyer; (2) perjured evidence having been offered to the court; (3) the discovery of credible and material evidence which could not have been reasonably foreseen or known at trial; or (4) a breach of natural justice)."

As elaborated in further detail below, prima facie none of the four grounds mentioned above in Free Bridge Auto Sales Inc are apparent in this Complaint.

Unlike in this current proceeding, in Franke Technology and Trademark Ltd v. hakan gUlsoy (sic) CAC-UDRP-101539 the Complainant submitted fresh material evidence not available at the time of filing the original complaint such that the Panel deemed the matter warranted consideration on the merits:

> "It further seems accepted that the presentation of fresh material evidence, not reasonably available at the time of filing the original Complaint, is justification for considering a fresh complaint between the same parties in respect of the same domain name. In the initial Panel decision, the Panel concluded that the Complainant did not manage to prove that the Complainant does not provide the criteria of OKI DATA and also finds insufficient evidence of bad faith. This time, the Complainant submits the current look and feel of the Disputed domain name bearing the exact same logo of the Complainant's "FRANKE" logo and also uses of the Respondent on third parties' registered and well-known trademarks as to create pattern of conduct. The Panel therefore proceeds to consider the Complaint on its merits."

The most recently-published consensus view of panels (i.e. WIPO 3.0) is that refiled complaints may only be accepted in highly limited circumstances such as:

> "(i) when the complainant establishes that legally relevant developments have occurred since the original UDRP decision, (ii) a breach of natural justice or of due process has objectively occurred, (iii) where serious misconduct in the original case (such as perjured evidence) that influenced the outcome is subsequently identified, (iv) where new material evidence that was reasonably unavailable to the complainant during the original case is presented, or (v) where the case has previously been decided (including termination orders) expressly on a "without prejudice" basis."

(see paragraph 4.18 WIPO 3.0).

The Panel has considered each of these above listed circumstances in turn, and finds that none are applicable to these proceedings:

a) First, regarding (i) the Complaint does not mention any legally relevant developments that have occurred in the recent period since the Prior Complaint was decided, in January 2023. The Complaint mentions reform of the betting and gambling system in 2017, and refers to a trademark filed in 2005 and registered in 2010, but neither of these developments – even if legally relevant – occurred since the decision in the Prior Complaint. Therefore, circumstance (i) is not applicable to this Complaint;

b) Second, regarding (ii) the Complainant has not asserted, nor is there any evidence on the record before this Panel, that the Prior Complaint involved a breach of natural justice or of due process. Accordingly, this second circumstance is found to be inapplicable;

c) Third, regarding (iii) the Prior Complaint was uncontested, and as such in making its determination, the Prior Panel considered only evidence filed by Complainant. Complainant did not, and surely would not, assert that its own evidence involved serious misconduct. As such, this third circumstance is found not to apply here;

d) Fourth, regarding (iv) there is no indication that any of the evidence submitted by Complainant with this Complaint was not available to Complainant during the Prior Complaint. Rather, website and trademark database extracts provided by Complainant in the Annexes of this Complaint are all dated or time stamped prior to the time of filing the Prior Complaint on December 22, 2022. As mentioned previously the full record in that proceeding is not before this Panel for comparison, however there is no claim by Complainant nor indication based on examination of the evidence, that any aspects thereof were not reasonably available to Complainant during the Prior complaint and as such, Panel concludes that this circumstance is not applicable; and

e) Fifth, regarding (v) the Prior Panel did not expressly decide the Prior Complaint on a "without prejudice" basis. The Prior Panel mentioned that the Complainant may have other legal remedies available to it beyond the scope of the UDRP, relevantly concluding:

"Beneath the conclusion that the third element within the meaning of paragraph 4(a)(iii) of the Policy is not fulfilled does it not mean that the acting of the Respondent is free without limits and not bound to other law principles. Distortion of competition and violating consumer rights is possible but not under the jurisdiction of UDRP."

Although the above listed circumstances are non-exhaustive, the Complainant failed to indicate that any of these circumstances or any other circumstances differing from the situation of the Prior Complaint are applicable. Moreover, the Panel finds that this Complaint does not give the impression that any of the circumstances mentioned above, nor any other exceptional circumstances, should apply.

As mentioned in the Complaint, the Complainant additionally seeks to justify its request for acceptance of a refiled complaint based on decisions in its favor in three recent UDRP cases, namely (i) Veikkaus Oy v. laurent north CAC-UDRP-105086, and (ii) Veikkaus Oy v. RankTastic Media OU CAC-UDRP-105107. Panel was not able to find a case reference for the third UDRP case referred to in the

Complaint, namely (iii) veikkausveikkaus24.com. Regarding reliance on past UDRP decisions dealing with similar factual matters, paragraph 4.1 of WIPO 3.0 provides:

“While the UDRP does not operate on a strict doctrine of binding precedent, it is considered important for the overall credibility of the UDRP system that parties can reasonably anticipate the result of their case. Often noting the existence of similar facts and circumstances or identifying distinguishing factors, panels strive for consistency with prior decisions. In so doing, panels seek to ensure that the UDRP operates in a fair and predictable manner for all stakeholders while also retaining sufficient flexibility to address evolving Internet and domain name practices.“

The Complainant claims that the cases mentioned concern “the same facts as in this dispute“. The Panel disagrees that the cited cases concern the same facts. Neither of the two cited cases - for which case references could be found - concern domain names registered in 2007 as was the disputed domain name. Rather in CAC-UDRP-105086 the subject domain name was registered on March 9, 2021 and in CAC-UDRP-105107 the subject domain name was registered on January 27, 2018. In any event, the cited cases do not involve or concern the issue regarding acceptability of refiled cases, which is central and dispositive to this current proceeding.

In conclusion, for the reasons explained above, the Panel finds no exceptional circumstances occur to justify reconsideration of the Prior Complaint and as such cannot accept the Complaint in this refiled case. The Panel will therefore not discuss the merits of this Complaint.

As a final point, the Panel emphasizes that its decision is limited to the criteria under the Policy and the widely-accepted practices of panels regarding the application thereof. The Panel makes no findings concerning the parties’ rights under applicable national law which may, in any event, be better suited for determination by a court of relevant jurisdiction. As cited above in GBI Prosperities Pty Ltd., Dr Grow It All Sales Pty Ltd. "no decision under the Policy precludes a party from pursuing its grievance in an appropriate court".

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Rejected

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

1. **urheiluveikkaus.com**: Remaining with the Respondent

PANELLISTS

Name	**Claire Kowarsky**

DATE OF PANEL DECISION 2023-03-26

Publish the Decision