



BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

DECISION OF THE THIRD-PARTY DECIDER

Mr. MARC GEENS/NVA ONLINE ADVERTISING
Dispute N° 44207: geens.be

1. The parties

- 1.1. Complainant: Mr. Marc GEENS
Residing at 8800 ROESELAERE (Belgium), Processiestraat 23

Not represented

- 1.2. Domain Name Holder:

NVA ONLINE ADVERTISING
Having its registered office at 5401 CG UDEN (The
Netherlands), Wilhelminastraat 231

Represented by:

Mr. Bart Demyttenaere, Partner at DNex.be, Zeelaan 203 Box
GV02, 8670 KOKSIJDE

2. Domain name

Domain name: geens.be
Registered: July 26th, 2010

hereafter referred to as "the Domain Name".

3. Background to the case

On July 30th 2010, the Complainant filed a complaint with CEPANI according to the CEPANI rules for domain name dispute resolution and the dispute resolution policy of DNS, incorporated in the General Conditions, concerning the Domain Name. The Complainant requests that the Domain Name shall be transferred to the Complainant.

On August 16th, 2010 the Domain Name Holder submitted a response.

On August 23th, 2010 CEPANI appointed the undersigned as third-party decider. The undersigned has filed his statement of independence with the Secretariat of CEPANI. CEPANI informed the Complainant and the Domain Name Holder on August 23th, 2010 that the undersigned was appointed as third-party decider.

On August 29th, 2010, the Complainant asked for an extension of the deadline in order to submit retort.

On August 31st, 2010, the third-party decider made the following decision:

- The deadline for the retort of the Complainant is September 7th, 2010;
- The deadline for the reply of the Domain Name Holder is September 14th, 2010;
- The deliberations shall be closed by September 14th (by midnight).

On September 10th, 2010 the Complainant asked for a new extension of the deadline for his retort, stating that he misinterpreted the email of CEPANI and believed that the deadline for his retort was September 28th, 2010.

On September 11th, 2010, the Domain Name Holder demanded that the debates would be closed as of September 11th, 2010.

On September 16th, 2010, the the third-party decider ruled as follows:

- The deadline for the retort of the Complainant is September 7th, 2010;
- The deadline for the reply of the Domain Name Holder is September 14th, 2010;
- The deliberations shall be closed by September 14th (by midnight).

On September 20th 2010, the Complainant submitted retort.

On September 27th 2010, the Domain Name Holder submitted his reply.

The deliberations were closed on September 27th 2010.

4. Factual information

The Complainant conducts a business and is active in the field of kitchen renovation. He operates a website www.keukenrenoveerder.be.

The Domain Name Holder conducts a business consisting in website design, webshop creation and maintenance, hosting, domain name registration services, IT consultancy and hardware services.

The Domain Name Holder registered the Domain Name on July, 26th 2010.

The website www.geens.be contains a number of sponsored links to websites of third parties. Some of those websites relate to real estates business.

On July, 28th 2010, Mr. Thomas Geens contacted the Domain Name Holder and asked for a transfer of the Domain Name.

On the same day, the Domain Name Holder asked Mr. Thomas Geens to make a proposition.

Mr. Thomas Geens made a proposition of 100 EUR.

On July, 29th 2010, the Domain Name Holder responded that he was willing to sell the Domain Name for an amount of 550 EUR.

5. Position of the parties

5.1. Position of the Complainant

5.1.1.

The Complainant states that his last name is "Geens" and refers to the decision in case no. 4020.

Furthermore he states that his firm is doing business under the name "Geens Marc" and this name would change in the near future to "Geens" as both of his sons are joining his firm.

According to the Complainant, www.geens.be causes confusion with "MARC GEENS" taking into account that the family name is the dominant element of a certain trade name.

5.1.2.

The Complainant argues that the Domain Name Holder has no rights or legitimate interests in the Domain Name. According to the Complainant, this would appear from the following elements:

- The Domain Name Holder is not known under the name "Geens";
- The Domain Name Holder tries to sell the Domain Name for valuable consideration in excess of the costs directly related to the Domain Name;

- The intention to set up a trade offering email accounts to persons with the name "Geens" is not sufficiently proven and such a trade is not an activity in line with the Domain Name Holder's activities.

5.1.3.

Finally the Complainant argues that the Domain Name was registered or is being used in bad faith and this would be proven by the following circumstances:

- The Domain Name Holder has registered one or more personal names, without a demonstrable link between the Domain Name Holder and the registered domain name;
- The Domain Name was registered mainly to sell, hire or otherwise transfer it to the Complainant (or a different "Geens") and for a price that exceeds the costs involved with the acquisition of the domain name; this should be considered as cyber squatting.

5.2. Position of the Domain Name Holder

5.2.1.

The Domain Name Holder argues that there is no definition for "personal name". He refers to the decision in case no. 4015 and states that since thousands of Belgians have the surname "GEENS", the Complainant cannot be identified as being an individual person without adding his first name "MARC". As a consequence, the Domain Name cannot be considered identical to the personal name of the Complainant.

Furthermore he states that the following facts suggest that there is no risk of confusing similarity:

- Visually as well as auditory, there is a distinctive difference between "Marc Geens" and "Geens";
- No references were found to the goods, services, operations or corporation's of Complainant under the name "Marc Geens";
- Complainant does not prove that his goods or services are well known under the name "Marc Geens"
- The domain name "marcgeens.be" or "geensmarc.be" was available for registration at least until August, 6th 2010;
- There are more dan 1.600 results for the word "Geens" in the database of Belgian corporations;
- There were more than 4.000 people in Belgium with last name "Geens" in 1998;
- There is no reference of the Domain Name in the first 100 search results of the search engine Google.be;
- The Complainant is offering services and goods under the trade name "(DE) KEUKEN RENOVEERDER" and reference to the complainant can be found using the keyword "(DE) KEUKEN RENOVEERDER" ;

- On de website of KEUKENRENOVEERDER.BE not a single reference was found to Complainant;
- The Domain Name Holder will start a vanity email-service on the Domain Name;
- The Domain Name is meanwhile parked with SEDO.COM but does not offer any competitive, confusing or misleading ads on the landingpage.

The Domain Name Holder argues that there is no proof that the name "M Geens Marc Emiel" is used by the Complainant as a trade name and that the Complainant apparently is using the name "De Keuken Renoveerder" as his trade name. As a consequence, there would be no identity between a trade name and the Domain Name. According to the Domain Name Holder, Complainant has no rights in the future corporation name "Geens".

Furthermore, the Domain Name Holder states that even if a corporation or trade name would be withheld, these names can in no way be confusingly similar to the Domain Name.

5.2.2.

The Domain Name Holder refers to the fact that he used the Domain Name in connection with a bona fide offering of goods or services or made demonstrable preparations for such use.

According to the Domain Name Holder, he wants to use the Domain Name to offer customized e-mail addresses to people having as last name "GEENS". He points out that considering the very short time between registering the Domain Name and the complaint filed, it seems very reasonable to accept that he does not have a very detailed scheme of how the future GEENS.BE-project will look like.

The Domain Name Holder claims to have used the Domain Name in a fair way as no ads are displayed which are related to Complainant's business and he did not try to divert consumers or intended to tarnish any rights claimed by Complainant.

The Domain Name Holder argues that he should get the benefit of the doubt.

5.2.3.

The Domain Name Holder denies that the Domain Name has been registered or is being used in bad faith.

The Domain Name Holder indicates to have never approached anyone to sell the Domain Name and he only named a price after someone related to Complainant insisted.

Additionally, he asserts that the Complainant is offering his goods and services under the Domain Name KEUKENRENOVEERDER.BE while the domain names MARCGEENS.BE and/or GEENSMARC.BE are still available.

He also refers to the fact that the ads showed are not related to the business of Complainant, the Domain Name Holder was never before subject of any legal procedure concerning domain names and that he wants to use the Domain Name for the development of a customized e-mail-service.

The Domain Name Holder points out that he and the Complainant cannot be considered as competitors since the Complainant creates kitchens and the Domain Name Holder creates websites.

The Domain Name Holder also argues that a likelihood of confusion with Complainant's claimed rights is difficult to establish since normal internet users would notice that the website GEENS.BE is not the Complainant's website, as no single ad or link is related to Complainant's business.

Finally, the Domain Name Holder claims that the Domain Name does not correspond with the personal name of Complainant which is "MARC GEENS" or "GEENS MARC" and he did not register a personal name. According to the Domain Name Holder, there would be a demonstrable link between the domain name and the Domain Name Holder.

6. Discussion and findings

Pursuant to Article 15.1 of the *CEPANI rules for domain name dispute resolution*, the Third-party decider shall rule on domain name disputes with due regard for the Policy and the CEPANI rules for domain name dispute resolution.

Pursuant to Article 10b(1) of the Terms and conditions of domain name registrations under the ".be" domain operated by DNS BE, the Complainant must provide evidence of the following:

- *" the licensee's domain name is identical or confusingly similar to a trademark, a tradename, a social name or corporation name, a geographical designation, a name of origin, a designation of source, a personal name or name of a geographical entity in which the Complainant has rights; and*
- *the licensee has no rights or legitimate interests in the domain name; and*
- *the licensee's domain name has been registered or is being used in bad faith."*

6.1. Is identical or confusingly similar to

6.1.1.

First of all, the Complainant relies on his last name "Geens".

In the DNS.be Terms & conditions the term "*personal name*" is not further specified.

Rather than using common spoken language in adopting the meaning of the word "personal name", this term must be interpreted from a legal point of view.

The reference to the definition of the dictionary "Van Dale" is therefore quite irrelevant. In the "Van Dale" dictionary the concept "personal name" is moreover defined as "proper name of a person". The concept "proper name" is then explained as "*A name that represents unique entities, in particular of a person, also of geographical variables that distinguishes others of the same kind, as opposed to a generic name*". From this definition it cannot be derived that a personal name necessarily means the combination of the first name and last name of a particular person.

The term "personal name" in article 10 b) 1 i of the DNS.be Terms & Conditions refers to a particular right that can be claimed (like a trademark, trade name, corporation name,...).

In a judgment of 25 May 1962 the Belgian Court de Cassation has decided that the right on a family name is a right "sui generis" that allows the rightholder to take action against someone who appropriates this name without being the rightholder.

In Belgian case law and doctrine the right to a name is considered a personality right. Someone who's last name is abused has an interest in ending the risk of confusion between him and the defendant or in the risk that the defendant would be considered as a member of his family (Pintens, W, Naam, E. Story – Scientia, Leuven, P. 106).

It is already decided that reserving or booking a domain name that corresponds to the last name of a person can be contrary to the right on a last name of the particular person. (Rb. Luik, 16 januari 2002; Rb. Luik, 20 september 2002 mentioned in MAEYAERT, P., *De bescherming van de handelsnaam en de vennootschapsnaam in België*, Larcier, 2006, p. 54).

In case no. 4020 it was also held that a last name must be considered as a "personal name" in accordance with article 10 b) 1 i of the DNS.be Terms & Conditions.

This is in line with Article 4 of the Act of 26 June 2003 regarding the abusive registration of domain names that stipulates that an action can be grounded on a person's last name ("geslachtsnaam").

Therefore, Complainant can invoke his last name "Geens".

The Domain Name is identical to his personal name "Geens".

According to the CEPANI case-law, the suffix ".be" has no relevance in order to establish the identity or similarity.

6.1.2.

Complainant also points out that his trade name is "Geens Marc".

However, Complainant does not prove that he uses the name "Geens Marc" as his trade name, in other words, the name under which his corporation is known by the public. The communication with the administration of 24 April 2002 which mentions that the VAT-taxpayer is registered under the name "M Geens Marc" and the two

invoices with as date 10 and 11 July 2010 (which were brought forward for the first time at retort) upon which the name Geens Marc is mentioned together with the address, do not show that the name "Geens Marc" is used by the Complainant as his trade name.

Based upon the provided documents it could be established that the Complainant is more likely known under the name "De Keuken Renoveerder". In addition, on the invoices of 10 and 11 July the name "Zaagenafplakwerk" is mentioned.

Complainant refers fruitlessly to the fact that he will use the trade name "Geens" in the near future (see CEPANI case no. 4119). Fact is that such use cannot be established before the domain name was registered.

Neither identity nor confusingly similarity can therefore be established between the supposedly used trade name invoked by the Complainant and the Domain Name.

6.1.3.

The third-party decider concludes that the Domain Name is identical to the personal name of the Complainant.

Therefore the first condition is met.

6.2. *Right and legitimate interest*

In the CEPANI case law was repeatedly decided that the burden of proof can be satisfied when the Complainant can credibly state that, when taking into account all the facts of the case, that he is unaware of any reason or circumstance which could be indicative of such a right or legitimate interest (Third Party Case No. 4116).

Article 10,b,3 of the DNS BE Terms and Conditions stipulates that if a Complaint is filed, the Licensee can demonstrate his rights or legitimate interests to the Domain Name by the following circumstances:

1. prior to any notice of the dispute, the Licensee used the Domain Name or a name corresponding to the Domain Name in connection with a bona fide offering of goods or services or made demonstrable preparations for such use; or
2. the Licensee (as an individual, business, or other organization) has been commonly known by the Domain Name, even if he has acquired no trademark; or
3. the Licensee is making a legitimate and non-commercial or fair use of the Domain Name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark, trade name, social name or corporation name, geographical, designation, name of origin, designation of source, personal name or name of the geographical entity at issue.

There is no indication that the Domain Name Holder is known under the Domain Name and/or that he can claim hereupon any specific rights. The Domain Name Holder does not even claim any rights.

There is neither evidence that the Complainant has given permission to use the Domain Name.

The Domain Name holder argues that he is planning to use the Domain Name to offer bespoke e-mail addresses to persons with the name "Geens" as last name (the so called project "geens.be"). He states there was insufficient time between the date of registration of the Domain Name and the Complaint to work out a detailed plan to develop the website and that he is using in the meantime the domain name parking service of SEDO.COM.

It is clear that the Domain Name was not used for the project "geens.be" before the Complaint was submitted and communicated to the Domain Name Holder.

The Domain Name Holder does not prove sufficiently that he has made preparations for such use. The description of the project "geens.be" brought forward in attachment 10 is very brief and it does not show a date. The document may well date after the Domain Name Holder was notified of the Complaint. In addition, the Domain Name Holder does not provide any information why he specifically wants the name "geens" for his project.

By his Reply of 27 September 2010, which is more than one month after the Complaint, the Domain Name holder has not provided the least amount of evidence of further execution of his so called project.

If the Domain Name Holder really had serious plans for his so called project (that apparently only is connected to the name "geens") it is very strange that he was prepared to sell the Domain Name already 2 days after the registration for an amount of 550 EUR when someone made an offer.

The use of the Domain Name for a website with sponsored links of which the Domain Name Holder will no doubt generate income and does not constitute a non-commercial use.

The third-party decider concludes that the Domain Name Holder has no rights and legitimate interests in the Domain Name.

Therefore the second condition is met.

6.3. Registered or being used in bad faith

According to Article 10 b 2 DNS.BE Terms and Conditions, bad faith can be established if the Domain Name Holder registers one or more personal names without the existence of a demonstrable link between the Licensee and the registered domain names.

Previously it was established that "geens" must be considered as a "personal name". Contrary to what the Domain Name Holder claims he has registered a personal name.

The Domain Name Holder does not prove that there is a demonstrable link between him and the Domain Name. There is no evidence that the Domain Name Holder is known under this name or that he can claim any rights with respect hereto.

Considering the link must be interpreted accordingly, the reference made by the Domain Name Holder to the alleged planned project "geens.be" is not relevant.

The third party decider concludes that the Domain Name was registered in bad faith.

Therefore the third condition is met.

7. Decision

The third party decider rules that the Domain Name shall be transferred to the Complainant.

Turnhout, October 11, 2010

The third-party decider

Jan SURMONT

A handwritten signature in black ink, consisting of a large loop on the left and a long horizontal stroke extending to the right.