



BELGIAN CENTER FOR ARBITRATION AND MEDIATION

FINAL DECISION OF THE THIRD-PARTY DECIDER

Nekka vzw / Easy Domain Connect Ltd.

Dispute N° 44151 : nekkanacht.be

1. Parties

1.1. Complainant:

Nekka vzw

~~2140 Antwerp, Collegelaan 106~~

registered at the company register under the number 453.708.095

Represented by:

Mr. David Lloyd
iFORi bvba
9040 Ghent, Victor Braeckmanlaan 107

1.2. Domain name holder:

Easy Domain Connect Ltd.
Carpenter Court, 1 Maple Road, SK7 2DH Stockport, Cheshire
United Kingdom

2. Domain Name

Domain Name: "nekkanacht.be"
registered the: 25 March 2007

Hereafter stated as « domain name »

3. History of the procedure

On 19 November 2008, the Complainant filed a complaint with the Belgian centre for mediation and arbitration regarding the domain name.

No Response was submitted in due time.

On 19 December 2008, the third-party decider was appointed to rule on the Complaint. The Complainant and the Domain name holder were informed of the third-party decider's appointment on the same day.

CEPANI – ASSOCIATION SANS BUT LUCRATIF

rue des Sols 8 – 1000 Bruxelles • Téléphone: +32-2-515.08.35 • Fax: +32-2-515.08.75

E-mail: info@cepina-cepiani.be • Site: <http://www.cepiani.be>

FORTIS BANQUE: 210-0076085-89 • KBC: 430-0169391-20 • ING: 310-0720414-81

On 5 January 2009, the third-party decider issued an interim decision requesting the Complainant to submit a power of attorney in favour of its counsel in the framework of the present procedure. A power of attorney was submitted on 7 January 2009.

The third-party decider was informed of an e-mail sent by the Domain name holder on 8 January 2009, stating that it was willing to surrender the domain name. The third-party decider suspended the procedure until 13 January 2009 so as to allow the parties to agree on the terms of a settlement. No settlement was agreed on and the procedure was continued.

4. Facts

The Complainant is a not-for-profit organization which organizes various events, including "Nekka Nacht". "Nekka Nacht" is an annual music festival staging Dutch singers.

The Complainant is the holder of the Benelux word mark "nekka" with registration number 728902. This trade mark was applied for on 8 July 2002 and has been registered for goods in class 9 and services in classes 28 and 41.

No information is available on the Domain name holder.

On 7 November 2008, the Complainant served notice to the Domain name holder in order to have the domain name transferred. No reply was given.

Until at least 19 November 2008, the domain name was used as a parking page. At this point in time, the domain name is however no longer used for such a page or any other website.

5. Position of the parties

5.1. Position of the Complainant

The Complaint states the following with regard to the conditions provided for in article 10 of the Terms and Conditions of DNS Belgium:

- the domain name is identical to the trade name "nekka nacht" and confusingly similar to its Benelux word mark as "nekka" is the distinctive element in the domain name;
- the Domain name holder has no right or legitimate interest;
- the Domain name holder is a known cybersquatter and only registered the domain name for the purpose of selling it to the Complainant;
- the trade name "Nekka Nacht" and the trade mark "nekka" are so famous in Belgium that they had to be known by the Domain name holder.

5.2. Position of the Domain name holder

The Domain name holder did not submit a response within the term provided for in section 5.1 of the Cepani Rules for domain name dispute resolution.

6. Discussion and conclusions

According to Article 15.1 of Cepani Rules for domain name dispute resolution, the Third-Party Decider shall decide on the Complaint in accordance with the DNS.BE Policy and these Rules.

According to Article 10,b,1 of the terms and conditions of Domain name Registration under the « .BE » for domain operated by DNS.BE., the complainant has to prove

- the Domain name holder'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 Domain name holder has no rights or legitimate interests in the domain name; and
- the Domain name holder's domain name has been registered or is being used in bad faith.

6.1. Is identical or confusingly similar to

The Complainant uses the name "Nekka Nacht" to identify part of its business. Therefore, the third-party decider is satisfied that the name "Nekka Nacht" is to be considered a trade name.

It is the third-party decider's opinion that the domain name is identical to the trade name "nekka nacht". The 2 differences between this trade name and the domain name, i.e. a space between the two words and the lack of the ".be" suffix, are to be disregarded.

Indeed, for technical reasons, no space can be included in the second domain. A space between words in a trade name, or any other right, is therefore irrelevant when assessing identity. (nr. 4067 – rembostyling.be)

Moreover, it is a well-accepted rule that the ".be" suffix should not be taken into account when assessing whether a domain name is identical or confusingly similar to a complainant's right. (nr. 44113 – aixam.be; nr. 44003 – pernod.be)

As the first condition is already met regarding the sole trade name, there is no need to examine whether the domain name is confusingly similar to the Complainant's Benelux word mark.

6.2. Right and legitimate interest

A complainant bears the initial burden to prove that a domain name holder does not have a legitimate interest in the disputed domain name. One should however not require a complainant to prove a negative fact. It is therefore generally accepted that the burden will shift once a complainant provides *prima facie* proof or indications that the domain name holder has no rights or legitimate interest. (nr. 44085 – casas.be; nr. 44067 – rembostyling.be; nr. 44019 – verfaillie.be)

The third-party decider finds that such an indication is at hand. Indeed, registering a domain name which is identical to a complainant's earlier right, as is the case in the matter at hand, is an indication that the domain name holder has no right or legitimate interest. (nr. 4088 – carte-bleue.be)

The Domain name holder chose not to file a response and therefore failed to prove that it has a right or legitimate interest.

Moreover, after the deadline to file a response had expired, the Domain name holder offered to surrender the domain name. The third-party decider considers such an offer to be a further indication that the Domain name holder has no legitimate interest in the domain name.

The second condition is also met.

6.3. Registered in bad faith

The Complainant alleges that the Domain name holder registered the domain name with the sole intent of selling it to its rightful owner. To that regard, the Complainant refers to another CEPINA case in which the Domain name holder was involved, nr. 44138 - sodexo.be. In that case, the Domain name holder had accepted to sell the domain name at hand for a price in excess of out-of-pocket costs directly related to the domain name.

The third-party decider has not been provided with any other evidence that the situation at hand in case nr. 44138 - sodexo.be was not an isolated one.

The third-party decider therefore cannot accept that the domain name holder necessarily registered *all* of its domain names with the intent of selling them for a price in excess of out-of-pocket costs. The third-party decider believes it is a bridge too far to infer bad faith behavior of a party from previous behavior in other cases. In view of the third-party decider, the facts in a domain name arbitration should be considered on their own merits and anew for each single case referred to a third-party decider.

The legal argument invoked by the Complainant is, in other words, unfounded.

This, however, does not mean that the domain name holder did not register the domain name in bad faith.

Indeed, the third-party decider in case nr. 4068 - vueling.be ruled that bad faith can be inferred when a trade mark or trade name is so arbitrarily chosen that it is extremely unlikely that a third party would have selected this word as its domain name.


The third-party decider considers this to be the case with the trade name "nekka nacht". Indeed, this trade name is not of a generic nature. Moreover, a Google search for "nekka nacht" only lists results related to the event organized by the Complainant. The third-party therefore can but conclude that the trade name "nekka nacht" is only used for the event organized by the Complainant. It must therefore have been arbitrarily chosen by the domain name holder - in any event, the domain name holder has not furnished any evidence to rebut the presumption that the domain name nekkanacht.be *has* been arbitrarily chosen.

The third condition is therefore also met.

7. Decision

The third-party decider orders, according to Article 10, e of the terms and conditions of domain name registration under the « .BE » domain operated by DNS.BE, the transfer to the complainant of the registration of the domain name « nekkanacht.be ».

Brussels, 13 January 2009.



The third-party decider
Christoph De Preter