



BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

DECISION OF THE THIRD-PARTY DECIDER

Michel Vanderfeesten / PrestaWinkel

Case no. 44288: babygadgets.be

1. The parties

- 1.1. Complainant: Michel Vanderfeesten,
residing at 3990 Peer, Bomerstraat 6/10, Belgium;
- 1.2. Licensee: PrestaWinkel, with office at 1000 Brussel, Nationalestraat 1,
Belgium;
- Represented by Mr. Oscar Janssens, CEO of Houston GCV.

2. Domain name

Domain name: **"babygadgets.be"**
Registered on: 9 January 2011

hereafter referred to as "the Domain Name".

3. Background to the case

On 5 November 2012, the Complainant filed a complaint with CEPANI on the basis of article 10 of the general terms and conditions of the domain name registration within the ".be" domain governed by DNS BE (hereafter referred to as "the Policy") and in accordance with the CEPANI rules for domain name dispute resolution (hereafter referred to as "the Rules").

On 17 December 2012, CEPANI appointed Mr. Geert Glas, to act as third party decider pursuant to the Rules (hereafter referred to as "Third Party Decider"). The Third Party Decider accepted this invitation and provided CEPANI with the declaration of independence required by article 7 of the Rules.

Pursuant to article 6.2 of the Rules, CEPANI formally appointed the Third Party

CEPANI – NON-PROFIT ASSOCIATION

Stuiversstraat 8, B-1000 Brussels ● Telephone: +32 2 515 08 35 ● Fax: +32 2 515 08 75
E-mail: cepina@vbo-feb.be ● Website: <http://www.cepani.be>
FORTIS BANK: 210-0076085-89 ● KBC: 430-0169391-20 ● BBL: 310-0720414-81

Decider by email of 19 December 2012 and provided him with an electronic copy of the case file, consisting of the completed complaint form and annexes attached thereto (hereafter referred to as "the Complaint").

On the same day, CEPANI informed the Complainant and the Licensee of the appointment of the Third Party Decider and notified that the deliberations would be closed on 4 January 2013, with the final decision being due on 18 January 2013.

The Licensee did not file any response to the Complaint.

4. Factual information

The Complainant runs an online store, "Babygadgets".

On 7 January 2011, the Complainant called on Licensee's service to help create and host his online baby store "babygadgets" via the Licensee's website www.prestawinkel.be. In a promotional email, the Licensee explicitly promised to not only deliver the online store's software but also to provide clients with all related technical aspects such as their own email addresses, their own domain name as well as domain name hosting services.

The online store created via the Licensee's website consistently uses the word "babygadgets" as its name. The store is accessible by way of the Domain Name.

On 8 January 2012, the Complainant renewed its contract with Licensee for a period of three years, but was shortly thereafter confronted with some hosting quality problems resulting in the website www.babygadgets.be being inaccessible for several days.

When the Complainant wanted to transfer the Domain Name to a different agent, he discovered that the Domain Name was registered in the Licensee's name and not in its own. Any attempt to contact the Licensee in this respect has failed.

In the meantime, the website www.prestawinkel.be has been offline for several months. Attempts by Complainant to contact Licensee have been difficult as both the address (Nationalestraat 1, 1000 Brussel) and the telephone number (0488 03 41 973) of Licensee did not seem to exist.

5. Position of the parties

5.1. Position of the Complainant

The Complainant requests that the Domain Name be transferred to it on the basis that

- the Licensee does not have a legitimate interest in the Domain Name;
- the Domain Name of the Licensee is registered in bad faith or has been used in bad faith; and

- the Licensee has one or more personal names registered with no demonstrable link between Licensee and the Domain Name.

Complainant furthermore points to the fact that he has not received any response of the Licensee as regards to the case at hand.

5.2. Position of the Domain name holder

The Licensee did not file any response during the present arbitration proceedings.

6. Discussion and findings

Pursuant to Article 15.1 of the Rules, the Third Party Decider shall rule on domain name disputes with due regard for the Policy and the Rules.

Pursuant to Article 10b(1) of the Policy, the Complainant must assert and prove that:

- i. *" 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*
- ii. *the licensee has no rights or legitimate interests in the domain name; and*
- iii. *the licensee's domain name has been registered or is being used in bad faith."*

As the Licensee did not file any response in the course of the present arbitration proceedings, the Third Party Decider will decide the matter on the basis of the Complaint in accordance with article 5.4 of the Rules.

6.1. Identical or confusingly similar to another right

In order to meet the first condition of Article 10(b)(1) of the Policy, the Domain Name must be either identical or similar to one of the rights or interests listed therein.

According to Belgian law, a trade name is the name which a commercial entity uses to engage in business affairs and to distinguish itself from other commercial entities. The right to use a trade name is accorded to whoever has the first visible, public and continuous use of said name (see *inter alia* D. Kaesmacher, *Les droits intellectuels*, Larcier, 2007, p.207, nr. 95).

In the case at hand, Complainant clearly shows that it uses the name "Babygadgets" to refer to its commercial entity which sells baby items online.



Hence, the Third Party Decider is of the opinion that Babygadgets is used as Complainant's trade name.

Undoubtedly, the Complainant's trade name is identical to the Domain Name.

For these reasons, the Third Party Decider finds that the first condition of Article 10(b)(1) of the Policy is satisfied.

6.2. Rights and legitimate interests

In order to meet the second condition of Article 10(b)(1) of the Policy, Complainant must prove or at least make it plausible that the Licensee has no rights or legitimate interests in respect of the Domain Name.

None of the listed circumstances in Article 10(b)(3) of the Policy appears to be present in the case at hand.

First, there are no indications that the Licensee has used the Domain Name or a name corresponding to the Domain Name in connection with a *bona fide* offering of goods and services. On the contrary, the Licensee is merely hosting the Domain Name. All goods and services are offered by the Complainant.

Second, there are no indications that the Licensee is making a legitimate and non-commercial or fair use of the Domain Name.

Third, no evidence is available showing that the Licensee would have been commonly known by the domain name.

Finally, the Licensee did not file any reply to the Complaint. The Licensee hence fails to demonstrate that these circumstances, or other circumstances that would

demonstrate the existence of any rights or legitimate interests of Licensee in the Domain Name, would be present in the case at hand.

The Third Party Decider therefore concludes that Licensee has no rights or legitimate interests in the Domain Name and that the second condition of Article 10(b)(1) of the Policy is also fulfilled.

6.3. Registration in bad faith

In order to meet the third condition of Article 10(b)(1) of the Policy, the Complainant must prove that the Licensee registered or used the Domain Name in bad faith.

Bad faith can be presumed to exist if the facts or circumstances exclude any reasonable doubt. The latter standard is to be interpreted objectively, i.e. 'knows or should have known' (see *inter alia* CEPANI case n° 4030, *S.A. Le Petit Fils de L.U. Chopard & Cie v. Monsieur Joël GLEGER*; case n° 4013, *Guinness UDV North America Inc. v. Mr. Olivier Noël*; and case n° 4007, *Vzw Wit-Gele Kruis van Vlaanderen v. Bvba Verpleging aan Huis – Webservice*).

This evidence can be delivered by any means (CEPANI case n° 4025, *Allianz Aktiengesellschaft v. Constantin European Internet club ASBL*; and case n° 44202, *Ryanair Ltd. v. Lili Karizama*).

The Third Party Decider is of the opinion that the fact that the Licensee registered the Domain Name in the Licensee's name, while promising clients including Complainant to provide them with their **own** domain name (i.e. a domain name registered in the client's name), is in itself sufficient to prove registration in bad faith.

Moreover, prior decisions have found that using false contact information in registering the domain name to conceal one's identity, may well be an additional indication of the Licensee's bad faith (WIPO Case No. D2006-1107, *Ebay Inc. v. Wangming*). In the case at hand, both the address and telephone number provided by the Licensee are nonexistent.

Hence, the Third Party Decider is of the opinion that the third condition of Article 10(b)(1) is also met.

7. Decision

Consequently, pursuant to Article 10(e) of the *Terms and conditions of domain name registrations under the ".be" domain operated by DNS BE*, the Third Party Decider hereby rules that the domain name registration for the "**babygadgets.be**" domain name is to be transferred to the Complainant.

Brussels, 18 January 2013

A handwritten signature in blue ink, consisting of a long horizontal stroke with a loop and a vertical stroke crossing it.

Geert Glas
The Third Party Decider