

BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

DECISION OF THE THIRD-PARTY DECIDER

Mega Group Holding (Pty) Limited / G. Meeuwes, Comfort Trade

Case no. 44448: megamaster.be

1. The parties

1.1. Complainant: Mega Group Holding (Pty) Limited, with registered office at Plot. No.8, Donderhoek, Pretoria, Gauteng, South Africa;

Represented by:

Adams & Adams, attorneys at law, residing at Lynnwood Bidge Office Park, 4 Daventry Street, Lynwood Manor, Pretoria, South Africa;

1.2. Respondent: Mr. G. Meeuwes, owner of the entity Comfort Trade, with registered office at Werkhost 71; 7944 AS Meppel, Netherlands.

2. Domain name

Domain name: "megamaster.be"

Registered on: 11 November 2013

hereafter referred to as "the Domain Name".

3. Background to the case

On 8 May 2018, the Complainant filed a complaint with CEPANI under 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 – NON-PROFIT ASSOCIATION

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CEPANI rules for domain name dispute resolution (hereafter referred to as "the Rules").

On 31 May 2018, 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 instruction and provided CEPANI with the declaration of independence in accordance with article 7 of the Rules.

Pursuant to article 7.2 of the Rules, CEPANI formally appointed the Third-Party Decider in an email dated 1 June 2018 and provided him with an electronic copy of the case file, consisting of the completed complaint form (hereafter referred to as "the Complaint").

On the same day, CEPANI informed the Complainant and the Respondent of the appointment of the Third-Party Decider and notified them that deliberations would be closed on 11 June 2018, with the final decision being due on 25 June 2018.

The Respondent did not file a response to the Complaint.

4. Factual information

The Complainant, Mega Group Holding (Pty) Limited, is a company that was established in 1997 and that manufactures and distributes built-in braais and fireplaces under the trademark MEGAMASTER in Europe and Africa.

The Complainant registered the MEGAMASTER trademark in numerous African countries, in the United States, in New Zealand, in the European Union and with the African Organisation for Intellectual Property (*Organisation Africaine de la Propriété Intellectuelle*).

The Complainant also registered the domain name <megamaster.com> in July 2003. The Complainant uses the website to which this domain names resolves to provide information on its business to the public and to sell its products to internet users.

According to the DNS Belgium WHOIS record, the Respondent, who is based in the Netherlands, has registered the Domain Name on 11 November 2013.

When entering the Domain name, the internet user is redirected to the Respondent's website <braai.nl> where different sort of braais are promoted.

5. Position of the parties

5.1 Position of the Complainant

The Complainant requests that the Domain Name be transferred to it since, according to the Complainant, the conditions provided for under b) 1. i - iii of the Policy are clearly met.

(A) the Respondent's Domain Name is identical or confusingly similar to a trademark, a trade name, 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.

The Complainant asserts that the Domain Name is identical to the Complainant's MEGAMASTER trademark.

The Complainant also contends that the country code top-level “.be” does not negate the identical character of the Domain Name to the MEGAMASTER trademark.

(B) the Respondent has no rights or legitimate interests in the Domain Name.

The Complainant contends that the Respondent has no rights or legitimate interests in the Domain Name given that (i) the Complainant has not authorised the Respondent to use the MEGAMASTER trademark and (ii) the Respondent is not commonly known by the domain name and does not trade under this name.

The Complainant adds that the Domain Name leads to the Respondent’s website which the Respondent uses to promote its business, which evidences that the Respondent has no legitimate interest in the Domain Name.

(C) the Domain Name has been registered or is being used in bad faith.

The Complainant alleges that the Respondent registered and uses the Domain Name in bad faith.

The Complainant contends that when the Respondent registered the Domain Name in 2013, the Complainant had already been distributing its products throughout Europe under the MEGAMASTER trademark. The Complainant alleges that, given that the Respondent is a direct competitor of the Complainant, it is highly unlikely that the Respondent was unaware of the Complainant’s MEGAMASTER trademark when registering the Domain Name.

The Complainant adds that the Respondent registered the domain name <braaimaster.be> on the same day that the Respondent registered the Domain Name. The Complainant explains that at the time of registration of the two domain names (the Domain Name and <braaimaster.be>), the European distributor of the Complainant’s goods was named “Braaimaster”.

The Complainant is of the opinion that this circumstance evidences the fact that the Respondent was aware of the Complainant’s business and MEGAMASTER trademark when registering the Domain Name.

The Complainant contends that the Domain Name is used in bad faith by the Respondent as the Respondent uses the Domain Name to redirect internet users to its website, <braai.nl> where it promotes its business and advertises goods that are similar to those of the Complainant.

The Complainant contends that therefore, the Domain Name was registered primarily for the purpose of disrupting the business of a competitor and to attract, for commercial gain, internet users to the Respondent’s website by creating confusion with the MEGAMASTER trademark as to the source, sponsorship, affiliation or endorsement of the Respondent’s website (see article 10 (b) (2) of the Policy).

Consequently, the Complainant requests the transfer of the Domain Name registration.

5.2 Position of the Respondent

The Respondent has failed to respond to the Complainant’s contentions.

6. Discussion and findings

Paragraph 16 of the Rules instructs the Third-Party Decider on the principles that the Third-Party Decider must use in determining the dispute: “*The Third-Party Decider shall decide on the Complaint in accordance with the Policy and these Rules.*”

In accordance with article 10 of the Policy, entitled “*Dispute resolution policy*”, the complainant has to assert and to prove, in compliance with the rules of procedure, that :

- (i) *the registrant's domain name is identical or confusingly similar to a trademark, a trade name, a registered name or a company 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 registrant has no rights or legitimate interests in the domain name; and*
- (iii) *the registrant's domain name has been registered or is being used in bad faith.*

It appears from this provision that three cumulative conditions must be met to order the transfer of the disputed Domain Name to the Complainant.

6.1 The registrant's domain name is identical or confusingly similar to, *inter alia*, a trademark, a trade name, a company name in which the complainant has rights.

The Complainant is the owner of the MEGAMASTER trademark which it has registered in the European Union and in several jurisdictions across the world.

The Policy states that the domain name in question in any dispute must be “*identical or confusingly similar to, inter alia, a trademark, a trade name, a company name in which the complainant has rights*”.

The Domain Name incorporates the MEGAMASTER trademark in its entirety and does not differ from it.

Given that the country code top-level domain ‘.be’ must be disregarded for the purpose of assessing the identical character of a domain name (See, e.g., [case n°44030 – chopard.be](#), cited by the Complainant), the Domain name is identical to the MEGAMASTER trademark.

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

6.2 The registrant has no rights or legitimate interests in the domain name

Pursuant to Article 10 (b) (3) of the Policy, a respondent's rights or legitimate interest to the domain name can be proved by certain circumstances. Article 10 (b) (3) of the Policy gives a non-exhaustive list of such circumstances:

- prior to any notice of the dispute, the respondent 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
- the respondent (as an individual, business or other organization) has been commonly known by the domain name, even if he has acquired no trademark; or
- the respondent 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.

Under Article 10 (b) (3) lit 1 of the Policy, legitimate interest can be demonstrated where prior to any notice of an ADR procedure the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the *bona fide* offering of goods and services or has made demonstrable preparation to do so. In the case at hand, these requirements do not appear to be fulfilled.

Indeed, when entering the Domain Name, the internet user is redirected to the Respondent's website where the Respondent promotes goods which are similar to those sold by the Complainant. Such website cannot be considered as a proof of the *bona fide* offering of goods and services. Indeed, there is no factual element pointing to the conclusion that, in consideration of the circumstances, there was a necessity for the Respondent to use the MEGAMASTER trademark in relation with its offering of goods (See case. n° 44167 – present.be; case n° 44274 – natura.be).

Under Article 10 (b) (3) lit 2 of the Policy, legitimate interest can be demonstrated where the holder of a domain name being an undertaking, organization or natural person, has been commonly known by the domain name, even in the absence of a trade mark. This requirement does not seem to be fulfilled in the present case, nor does the Respondent, by failing to reply to the Complainant's contentions, allege that this would be the case.

Under Article 10 (b) (3) lit 3 of the Policy, legitimate interest can be demonstrated where the holder of a domain name is making a non-commercial or fair use of the domain name, without intent to misleadingly divert consumers for commercial gain. The requirement of non-commercial use does not seem to be fulfilled in the present case either as the Respondent uses the Domain Name in order to promote its own (competing) business.

Consequently none of the examples listed in Article 10 (b) (3) of the Policy are supported by the facts asserted by the Respondent and the Third-Party Decider is of the opinion that the Complainant has made an acceptable case that the Respondent has no rights or legitimate interests in the Domain Name (See, case. n° 44167, already cited).

For these reasons, the Third-Party Decider finds that the first condition of Article 10(b) (2) of the Policy is satisfied.

6.3 The Respondent's domain name has been registered or is being used in bad faith

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

(a) Registration in bad faith

On 11 November 2013, the Respondent registered two domain names: (i) the Domain Name and (ii) a domain name incorporating the name of the European distributor of the Complainant's product at that date.

For this reason and given the fact that the Respondent is active in the same sector as the Complainant, the Third-Party Decider is of the opinion that the Domain Name was registered in bad faith since it is highly unlikely that the Respondent could not have been unaware of the MEGAMASTER trademark and of the Complainant's rights in this trademark at the time of registering the Domain Name.

(b) Use in bad faith

Article 10 (b) (3) of the Policy gives a non-exhaustive list of circumstances that can evidence the use of a domain name in bad faith. One of these circumstances is the use of a domain name *"to attract, for commercial gain, Internet users to the registrant's web site or other on-line location, by creating confusion with the complainant's trademark, trade name, registered name or company name, geographical designation, name of origin, designation of source, personal name or name of a geographical entity as to the source, sponsorship, affiliation, or endorsement of the registrant's web site or location or of a product or service on his web site or location"*.

The Domain Name redirects to the Respondent's website on which the Respondent advertises products which are similar to those manufactured and sold by the Complainant.

It can reasonably be inferred from the above-mentioned circumstances that the Complainant's use of the Domain Name constitutes an intentional attempt to attract, for commercial gain, internet users to its website by creating a likelihood of confusion with the MEGAMASTER trademark as described under article 10 (b) (3) of the Policy (See e.g., case n° 44248 – whitecu.be).

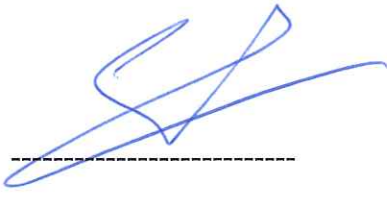
The Third-Party Decider therefore concludes that the third condition of Article 10 (b) (1) is fulfilled.

Hence, as the Third-Party Decider finds that the three conditions of Article 10 (b) (1) have been fulfilled, the Complaint is founded.

7. Decision

Consequently, in accordance with Article 10 (e) of the Policy, the Third-Party Decider orders that the Domain Name "**megamaster.be**" should be transferred to the Complainant.

Brussels, 25 June 2018.

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right. The signature is positioned above a short horizontal dashed line.

Geert Glas

The Third-Party Decider