Before Dr. Bernardo M. Cremades, Single Panellist

PROCEDURAL HISTORY

The Complaint was filed with CPR and, after review for administrative compliance, served on the Respondent on May 8, 2003. The Respondent did not file a Response on or before May 28, 2003. I was appointed Arbitrator pursuant to the Uniform Domain Name Dispute Resolution Policy (“UDRP”) and Rules promulgated by the Internet Corporation for Domain Names and Numbers (ICANN). Upon the written submitted record including

- Domain Name Dispute Complaint, submitted by the Complainant, with two attachments:
  - (i) Cease and Desist Letter from the counsel of the Complainant to the Respondent, dated February 24, 2003; and
  - (ii) Domain Name Dispute Complaint Form.

- Commencement of Proceedings Letter, from CPR to both Complainant and Respondent, dated May 8, 2003;

- Non Response Letter, from CPR to the Respondent, dated May 29, 2003; and

- Whois information provided by the Registrar on May 30, 2003,
I find as follows:

FINDINGS

Respondent’s registered domain name, stickopotamus.com, was registered with NameScout.com on January 10, 2003. In registering the name, Respondent agreed to submit to this forum to resolve any dispute concerning the domain name, pursuant to the UDRP.

The UDRP provides, at Paragraph 4(a), that each of three findings must be made in order for a Complainant to prevail:

i. Respondent’s domain name is identical or confusingly similar to a trademark or service mark in which complainant has rights; and

ii. Respondent has no rights or legitimate interests in respect of the domain name; and

iii. Respondent’s domain name has been registered and is being used in bad faith.

IDENTITY/CONFUSING SIMILARITY: Complainant alleges that stickopotamus.com is identical or confusingly similar to Complainant’s U.S. registered trademarks 2410902 and 2086267, which applies to “stickers with pre-punched holes to be used with ring binders, and stickers books, binders of stickers and stickers pouches”.

The UDRP requires that the Complainant proves all three elements contained at Paragraph 4(a). Although Paragraph 4(a) requires the Claimant to “assert” the three requirements there contained, the final sentence of Paragraph 4(a) states that “the complainant must prove that each of these three elements are present”. Therefore, the UDRP imposes the burden of proof on the Complainant.

The principle that the complainant has the burden of proving its statements is not strange to any legal system. It can be affirmed that it is a general legal principle both in common law and civil law systems. Otherwise, any defendant would be exposed to vexatious litigation and obliged to produce evidence to respond to allegations made by the plaintiff without any basis. This situation would be even more contrary to widely recognized principles of due process in cases where the defendant would have to prove negative facts in order to rebate the allegations of the plaintiff.

These arguments are fully applicable to the proceedings under the UDRP. The Complainant must prove, on the balance of probabilities, the three requirements of Paragraph 4(a). Otherwise, the Respondent’s right to due process would be infringed.

In the instant case, the Complainant has asserted that it is the legitimate owner of U.S. registered trademarks 2410902 and 2086267. However, the Complainant has offered any proof at all of this contention. The Complainant has not filed any documents supporting its allegations and claims, besides the cease and desist letter that it addressed to the Respondent on February 24, 2003.

Therefore, the conclusion is that the Complainant has not proved that it is the legitimate owner of U.S. registered trademarks 2410902 and 2086267.
Further, this absence of evidence prevents a finding on the similarity of the domain name with the alleged trademarks. The Complainant has not shown what is the content of its alleged trademarks. Therefore, it is impossible to find whether the trademarks contain the word “stickopotamus” alone, or together with other words; or whether the alleged trademarks are subject to any disclaimer.

It may be inferred from Paragraphs 5(e) and 14 of the Rules for UDRP that the Respondent's default does not lead to an automatic ruling for the Complainant. These paragraphs only provide that the Panelist may be entitled to draw reasonable inferences from the Respondent's lack of response. However, the Respondent’s default cannot simply be construed as an admission of the allegations contained in the Complaint. “The Respondent might conceivably have taken the view that the Complainant had failed to make a case meriting a response”. (WIPO Case No. D2000-1547, Link Clicks Inc. d/b/a Ad Here and TOTALLYFREESTUFF.COM v. John Zuccarini d/b/a Cupcake Patrol).

Further, the Complainant has not filed any evidence showing that it was the rightful owner of the domain name prior to January 10, 2003 (as it asserts), which is relevant to the inferences that might be drawn from the Respondent's lack of response.

Therefore, the Complainant has failed to meet the requirement contained at Paragraph 4(a)(i) of the UDRP.

I therefore conclude that it is impossible to make the finding that the registered domain name is identical or confusingly similar to Complainant’s protected mark.

As a consequence, it is not necessary to go further in the analysis of the remaining requirements of Paragraph 4(a) of the UDRP.

However, it must be pointed out that, since this decision is based on the lack of evidence, and the decisions issued on proceedings under the UDRP do not produce the effect of res judicata, nothing prevents the Complainant from resubmitting its claim in a new case, supported by proper evidence.

CONCLUSION

In light of the absence of a finding that the registered domain name is identical or confusingly similar to Complainant’s protected mark, I find in favor of the Respondent.

REMEDY

Complainant’s request to transfer or cancel the domain name stickopotamus.com is hereby DENIED.

Dr. Bernardo M. Cremades
Single Panellist
June 12, 2003