

**ASIA DOMAIN NAME DISPUTE RESOLUTION CENTRE
(KUALA LUMPUR OFFICE)**

Administrative Panel Decision

Complainant: Fiskars Corporation
Respondent: The Unstoppable Sdn Bhd
Case Number: KLRCA/ADNDRC-144-2014
Disputed Domain Name: <unstoppable.com>
Panel Member: Gabriela Kennedy

1. Parties and Contested Domain Name

The Complainant is Fiskars Corporation of Finland, represented by Miranda & Samuel of Malaysia. The Respondent is The Unstoppable Sdn Bhd of Malaysia.

The disputed domain name <unstoppable.com> (the "Disputed Domain Name") is registered with GoDaddy.com LLC (the "Registrar").

2. Procedural History

The Complaint was filed with the Kuala Lumpur Regional Centre for Arbitration (the "Centre") on 20 December 2013. The Centre transmitted by email to the Registrar, a request for registrar verification in connection with the Disputed Domain Name. On 5 February 2014, the Registrar transmitted by email to the Centre its verification response confirming that the Respondent is listed as the registrant of the Disputed Domain Name.

The Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy" or "UDRP"), the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), and the ADNDRC Supplemental Rules to the Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, the Centre formally notified the Respondent of the Complaint, and the proceedings commenced on 6 February 2014. In accordance with paragraph 5 of the Rules, the due date for the Response was 26 February 2014. The Respondent did not submit any Response or request for any additional time to submit a Response.

The Centre appointed Gabriela Kennedy as the sole panelist in this matter on 28 February 2014. The Panel finds that it was properly constituted.

3. Factual Background

The Complainant is based in Finland and is a global supplier of branded consumer products for the home, garden and outdoors. The Complainant was founded in 1649 and is listed on the NASDAQ OMX Helsinki.

The Respondent is based in Malaysia. The Disputed Domain Name was registered on 6 November 1996 and currently resolves to a parking page.

4. Parties' Contentions

A. Complainant

The Complainant's contentions can be summarized as follows:

- (a) The Complainant owns several trade mark registrations for UNSTOPPABLE, including in the United States of America and Canada.
- (b) The Disputed Domain Name is identical to the Complainant's registered trade mark.
- (c) There is no evidence that the Respondent has been operating a business known as "unstopable" that offers bona fide goods or services.
- (d) There is no evidence that the Respondent has registered any trade mark that corresponds to the Disputed Domain Name.
- (e) The Complainant has not licensed or otherwise authorized the Respondent to use its UNSTOPPABLE trade mark.
- (f) The Disputed Domain Name does not resolve to an active website, and there is no genuine business or commercial activities operating under the Disputed Domain Name or website.
- (g) The registration and use of the Disputed Domain Name disrupts the business of the Complainant, as it confuses users into believing that the Complainant's products are no longer being commercialized, and deprives the Complainant from selling its products to prospective customers who are looking for the Complainant.
- (h) Alternatively, the Respondent is intentionally attempting to attract for commercial gain, Internet users to its website, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation or endorsement of the website.

B. Respondent

The Respondent did not reply to the Complainant's contentions.

The fact that the Respondent has not submitted a Response does not automatically result in a decision in favor of the Complainant. However, the failure of the Respondent to file a Response may result in the Panel drawing appropriate inferences from such default. The Panel may also accept all reasonable and supported allegations and inferences flowing from the Complaint as true (see *Entertainment Shopping AG v. Nischal Soni, Sonik Technologies*, WIPO Case No. D2009-1437 and *Charles Jourdan Holding AG v. AAIM*, WIPO Case No. D2000-0403).

6. Discussion and Findings

Under paragraph 4(a) of the Policy, the Complainant is required to prove each of the following three elements:

- (i) the Disputed Domain Name is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name; and

- (iii) the Disputed Domain Name has been registered and is being used by the Respondent in bad faith.

A. Identical or Confusingly Similar

The Panel accepts that the Complainant has rights in respect of the UNSTOPPABLE trade mark on the basis of its trade mark registrations in the United States of America and Canada.

It is well-established that when making an enquiry as to whether or not a trade mark is identical or confusingly similar to a domain name, the generic top-level domain extension, in this case “.com”, may be disregarded (see *Rohde & Schwarz GmbH & Co. KG v. Pertshire Marketing, Ltd*, WIPO Case No. D2006-0762).

The Panel accordingly finds that the Disputed Domain Name is identical to the Complainant's UNSTOPPABLE mark in which the Complainant has rights, and that paragraph 4(a)(i) of the Policy is satisfied.

B. Rights or Legitimate Interests

Pursuant to paragraph 4(c) of the Policy, a respondent may establish rights or legitimate interests in a domain name by demonstrating any of the following:

- (i) before any notice to it of the dispute, the Respondent's use of, or demonstrable preparations to use the Disputed Domain Name or a name corresponding to the Disputed Domain Name was in connection with a *bona fide* offering of goods or services; or
- (ii) the Respondent has been commonly known by the Disputed Domain Name, even if it has acquired no trade mark or service mark rights; or
- (iii) the Respondent is making a legitimate non-commercial or fair use of the Disputed Domain Name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue.

The Complainant is required to establish a *prima facie* case in respect of the lack of rights or legitimate interests of the Respondent in the Disputed Domain Name. The Respondent then bears the burden of proving otherwise, failing which, paragraph 4(a)(ii) of the Policy shall be deemed to have been satisfied (see Paragraph 2.1 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition, *Croatia Airlines d.d. v. Modern Empire Internet Ltd.*, WIPO Case No. D2003-0455 and *Accor v. Eren Atesmen*, WIPO Case No. D2009-0701).

Since no Response has been submitted by the Respondent, the Panel will assess whether or not the Respondent has any rights in the Disputed Domain Name (or lack thereof) based on the inferences that can be reasonably drawn from the Complainant's evidence and the website to which the Disputed Domain Name resolves.

The Panel accepts that the Respondent is not a licensee of the Complainant, nor has the Complainant otherwise authorised or consented to the use of the Complainant's UNSTOPPABLE mark. The Panel notes that the Respondent's name (The Unstoppable Sdn Bhd) contains the word "unstoppable", which may explain why it registered the Disputed Domain Name in the first place. However, the Panel accepts that regardless of the Respondent's name, the Respondent has provided no evidence to demonstrate that it has become commonly known by, or produced any evidence of any registration of the UNSTOPPABLE trade mark anywhere in the world. Overall, the Panel is of the view that a *prima facie*

case is established and it is for the Respondent to prove it has rights or legitimate interests to the Disputed Domain Name.

Based on the evidence provided by the Complainant in the Complaint, the Disputed Domain Name used to resolve to a page that simply stated ".....BUAT SAMPAL JADI". As at the date of this decision, the Panel found that the Disputed Domain Name resolves to a parking page that provides sponsored links. The Panel therefore finds that the Respondent has not been using the Disputed Domain Name in connection with a *bona fide* offering of goods or services, or making legitimate non-commercial or fair use of the Disputed Domain Name without intent for commercial gain.

Consequently, the Panel finds that the Complainant has satisfied paragraph 4(a)(ii) of the Policy in respect of the Disputed Domain Name.

C. Registered and Used in Bad Faith

The Complainant has provided limited arguments and essentially no evidence of bad faith registration and use of the Disputed Domain Name by the Respondent, except to state that: (a) the website that the Disputed Domain Name resolves to simply states the words ".....BUAT SAMPAL JADI" (i.e. "do until you make it"); (b) the website shows no indication of any commercial activities engaged in by the Respondent; and (c) that the Complainant has established goodwill and reputation in the UNSTOPPABLE mark due to its global online presence and strong advertising.

In fact, the Complainant has only provided evidence of two trade mark registrations for UNSTOPPABLE, which were registered in 2012 and 2013, which is well after the Disputed Domain Name was registered (i.e. in 1996). As stated in *PlasmaNet, Inc. v. John Zuccarini*, WIPO Case No. D2002-11001, "*There is already a substantial body of UDRP decisions concluding that, in the absence of special circumstances as discussed below, a trademark that did not exist at the time the disputed domain name was registered cannot serve as the basis for a claim under ICANN's dispute resolution system... it is clear that both bad faith use and bad faith registration are required*".

No evidence has been provided, and no assertions have been made by the Complainant that it had any rights or prior trade mark registrations for UNSTOPPABLE before the Disputed Domain Name was registered in 1996 and/or that the Respondent was not the first registrant of the Disputed Domain Name in 1996 (e.g. that the Disputed Domain Name was transferred to the Respondent after the Complainant registered and began using its UNSTOPPABLE marks). The Panel therefore finds that the Disputed Domain Name could not have been registered in bad faith since the Complainant's trade mark rights in UNSTOPPABLE did not exist until sixteen years after the Disputed Domain Name was registered.

Whilst in some cases, bad faith can still be found even if the domain name has been registered before the complainant had any trade mark rights, this will only apply in special circumstances, e.g. where the respondent is clearly aware of the complainant and it has clearly used the domain name in bad faith. In this case, the Disputed Domain Name currently resolves to a parking page, and there is no clear evidence that the Respondent was aware of the Complainant or its intent to use the UNSTOPPABLE mark before it registered the Disputed Domain Name, or that the Respondent is using (or has ever used) the Disputed Domain Name to disrupt the Complainant's business; to deprive the Complainant from selling its products to prospective customers; or to intentionally attract, for commercial gain, users to its website, by creating a likelihood of confusion with the Complainant's mark. The situation may have been different if, for example, the Respondent had been using the Disputed Domain Name to directly compete with the Complainant or to sell counterfeit goods of the Complainant.

Either way, even if the Complainant did have rights in the UNSTOPPABLE mark prior to the registration of the Disputed Domain Name by the Respondent, the Panel is of the opinion that, notwithstanding the Complainant's trade mark registrations for UNSTOPPABLE in the United States of America and Canada, the word "unstopable" is a generic word. Therefore, any use of the word "unstopable" in the Disputed Domain Name or the Respondent's company name does not in itself act

as evidence that the Respondent must have been aware of the Complainant and its trade mark rights when it registered the Disputed Domain Name, and therefore did so in bad faith. The situation may have been different if the mark in question was a unique or made up word having no ordinary meaning outside of the Complainant's trade mark, or if the Complainant could show that its UNSTOPPABLE trade mark was well-known in Malaysia or the Respondent is involved in the same industry as the Complainant – however, this is not the case here.

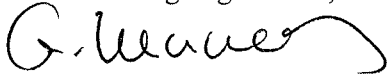
In addition, even if the Complainant did have rights in the UNSTOPPABLE mark prior to the registration of the Disputed Domain Name by the Respondent, since the word "unstoppable" is a generic word, the Panel finds that the Complainant in this case would have had to clearly establish that its UNSTOPPABLE mark is well-known in Malaysia where the Respondent is based and was well-known at the time the Respondent registered the Disputed Domain Name or, at the very least, in other parts of Asia, so that the Complainant can reasonably show that the Respondent registered and used the Disputed Domain Name in bad faith (e.g. to take advantage of the Complainant's reputation in the mark). However, the Complainant provided no evidence that its UNSTOPPABLE trade mark has been registered or is being used in bad faith or that it is well-known in Malaysia, where the Respondent is based, or anywhere else in Asia.

The Complainant has therefore provided no clear evidence that the Respondent must have been aware of the Complainant's rights in the UNSTOPPABLE mark when it registered the Disputed Domain Name (particularly as the Complainant appears to have only registered and begun using the mark after the Disputed Domain Name was registered), and that it is using the Disputed Domain Name in bad faith.

In light of the above, the Panel finds that the Complainant has failed to satisfy paragraph 4(a)(iii) of the Policy.

7. Decision

For the foregoing reasons, the Complaint is denied.



Gabriela Kennedy
Sole Panelist

Date: 7 March 2014