

DECISION OF THE THIRD-PARTY DECIDER

FERNOM FACILITY MANAGEMENT SPRL AND ATILLA BÁNYAI / RAY CHANG

Case no. 44477: fernom.be

1. The parties

1.1. Complainants:

- 1. Fernom Facility Management SPRL**, with registered office at B-3070 Kortenberg (Belgium), Oudstrijderslaan 42/0201 (hereinafter: "First Complainant"), and
- 2. Atilla Bányai**, also known as Fernom Home Management, with address B-1970 Wezembeek-Oppem (Belgium), Rue du Long Chêne 76 (hereinafter: "Second Complainant")

Represented by:

Mr. Bart Van Besien, attorney, with office at B-2800 Mechelen, Kannunik De Deckerstraat 20A,

- 1.2. Domain name holder:** Ray Chang, 17 jianye road, pudong xinqu 17, 201202, Shanghai, China (e-mail: love4026@gmail.com).

2. Domain name

Domain name: **fernom.be**
Registered on: 22 July 2019

hereafter referred to as "the domain name".

3. Procedure

On 2nd October 2019, Complainants filed a complaint with exhibits (42 in total) with the Belgian Centre for Arbitration and Mediation (CEPANI-CEPINA) concerning the domain name.

On the same date, CEPANI informed the Domain name holder of the pending proceedings.

The Domain name holder did not file a response to the complaint.

On 28 October 2019, the Complainants and the Domain name holder were notified that the undersigned had been appointed as Third-Party Decider to settle the dispute.

Pursuant to Article 13 of the CEPANI Rules for domain name dispute resolution the deliberations were closed on 4 November 2019.

On 11 November 2019 (hence after the lapse of the time period for the submission of a response), the Domain name holder sent two e-mails to the CEPANI Secretariat, stating as follows:

E-mail of 11 November, 07:08:

“The domain is belong to me, and domain is no problem. Whois info is correct.”

E-mail of 11 November, 07:22:

“the domain is deleted, and register it by me.

<https://www.icann.org/resources/pages/eddp-2017-01-18-zh>

anyone can register the domain when it deleted.

the domain is belong me.”

A further e-mail, in Chinese, was sent to the CEPANI Secretariat by the Domain name holder on 12 and 13 November 2019.

4. Factual background information

Having examined the complaint submitted by the Complainants, the Third-Party Decider finds that the following facts have been established.

Complainants are active in the business of renovation and house transformation works. They operate under the trade names “Fernom Home Management” (Second Complainant) and “Fernom Facility Management” (First Complainant). The trade name “Fernom Home Management” was first used by Second Complainant in 2008.

Second Complainant first registered the domain name on 1st June 2013 and the domain name was used, since at least 3 August 2014, for the exploitation of Second Complainant’s business under the trade name “Fernom Home Management”. Later, in 2017, Second Complainant founded a company called “Fernom Facility Management SPRL” (First Complainant) and the domain name was also used for this related company’s business. For ease of reference, the First Complainant and the Second Complainant will hereafter be referred to as the Complainants.

On 2nd May 2019, First Complainant was invited by its registrar GlobeHosting, Inc. to pay the renewal fee for the domain name which was set to expire on 10 June 2019. First Complainant made the renewal fee payment on 5 June

2019 but the payment was made to a wrong (read: old) bank account number of the registrar.

The communication that followed between the Complainants and their registrar is ambiguous with respect to which steps to be taken by the Complainants and by when in order to assure that their domain name was properly renewed. At a certain point, the Complainants even received an invoice payment confirmation from their registrar.

In the meanwhile, the domain name had been placed in quarantine until 21 July 2019. The quarantine ended and the domain name expired on 22 July 2019, on which date it was registered by the Domain name holder. The domain name currently appears to be used to promote products of a Malaysian company called 'Sinppa Industry' and which, judging by the information made available on the corresponding website www.fernom.be, engages in the industrial manufacture of aluminium.

5. Position of the parties

5.1. Position of the Complainants

Complainants request the Third-Party Decider to order the transfer of the domain name, stating that the conditions provided for in Article 10(b)(1) of the Terms and conditions for .be domain name registrations are met.

(i) *Domain name holder's domain name is confusingly similar to a company name and trade name in which Complainants have rights*

The trade name "Fernom Home Management" was registered by the Second Complainant in the Belgian Companies Register in 2008 and Second Complainant has been active under this name ever since. As of 2014 the Second Complainant also used the domain name fernom.be to operate its business.

On 31 July 2017 the First Complainant was registered in the Belgian Companies Register under the company name Fernom Facility Management SPRL.

Since "Fernom" is the most important and dominant element of the Complainants' company name and trade name, the domain name fernom.be is confusingly similar to such company name and trade name in which the Complainants have rights.

(ii) *Domain name holder has no right or legitimate interest in the domain name*

The Domain name holder has its domicile in China and uses the fernom.be domain for a Malaysian company called Sinppa. The name Fernom is not mentioned anywhere on the website and the Sinppa company does not appear to have any link with Belgium. Also, there is no evidence or indication that, prior to any notice of the dispute, the Domain name holder used the domain name in connection with a *bona fide* offering of goods or services or made demonstrable preparations for such use.

From these circumstances, the Complainants conclude that the Domain name holder has no rights or legitimate interests in the domain name.

(iii) *Domain name holder's domain name has been registered or is being used in bad faith*

Complainants argue that the domain name was registered and is being used in bad faith by the current Domain name holder. The situations of bad faith listed in Article 10(b)(2) of the Terms and conditions for .be domain name registrations being non-exhaustive, account can also be taken of other relevant circumstances. Complainants distinguish the following relevant circumstances, derived from a *mutatis mutandis* application of principles set out in the WIPO Overview of WIPO Panel Views on Selected UDRP Questions of 2017:

- The chosen top-level domain .be does not correspond to the Domain name holder's activities or business, which has no demonstrable link with Belgium, whereas this is the case with the business of the Complainants.
- The absence of a credible explanation for the Domain name holder's choice of the domain name, also taking into account that "Fernom" is not a commonly used term.
- The clear absence of rights or legitimate interests of the Domain name holder in the domain name.
- The suspicious timing and circumstances of the registration of the domain name, namely the very first day that the domain name came out of quarantine on 22 July 2019 following the accidental non-renewal due to the fault or miscommunication of the Complainants' registrar. In this respect, the Complainants refers to a number of decisions of the WIPO arbitration panels in which a complainant's failure to renew his domain name was accepted as a factor pointing towards bad faith.
- The fact that the Domain name holder is not using the name "Fernom" on its website, has never been known under this name and has no connection with Belgium.
- The Domain name holder is engaged in a pattern of conduct of registering domain names in which he does not appear to have rights. The Domain name holder has registered several .be domain names all of which redirect to the website of the same company 'Sinppa Industry'. Several of these domain names were previously used by Belgian companies, individuals or other entities that do have rights and legitimate interests on the names used as a domain name. There are also several other domain names in the .be domain and with other ccTLD's that also similarly redirect to the website of 'Sinppa Industry' and that are equally unrelated to the name used in the domain name and to the territory associated with the country code. Whereas some of these domain names are registered by another Chinese registrant, it is well possible that they ultimately

also belong to Mr Ray Chang, operating under another name and e-mail address.

- The Complainants also argue that the Domain name holder's registration of the domain name prevents them from using the domain name and therefore severely interrupts their ability to exploit their business.
- Despite the Domain name holder's multiple registrations for .be domain names, it is reasonable to expect from him a good faith effort to ensure that he is not infringing upon the rights of others, which he could easily have done by, for example, checking the online available registers of the Belgian Crossroads Bank for Enterprises.
- The fact that the Domain name holder did not respond to the complaint or to any earlier communications sent by the Complainants is also indicative of its bad faith.

5.2. Position of the Domain name holder

The Domain name holder did not file any response with CEPANI as provided for by Article 6 of the CEPANI Rules for domain name dispute resolution. The e-mails sent by Domain name holder on 11 and 12 November 2019 do not constitute a valid and timely response and are therefore not considered by the Third-Party Decider.

6. Discussion and findings

Pursuant to Article 16.1 of the CEPANI Rules for domain name dispute resolution, the Third-Party Decider shall rule on domain name disputes following the parties' views and in accordance with the dispute resolution policy of DNS.be, the registration agreement and following the provisions of the CEPANI Rules for domain name dispute resolution.

Pursuant to Article 10(b)(1) of the Terms and conditions for .be domain name registrations, the Complainant must prove that:

- the Domain name holder'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 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. The domain name is confusingly similar to a trade name and company name of the Complainants

In order to meet the first condition of Article 10(b)(1) of the Terms and conditions for .be domain name registrations, the domain name must be either identical or confusingly similar to a sign owned by the Complainants.

It is sufficient that the domain name is identical or confusingly similar to one of Complainants' rights or interests mentioned in this Article.

In the case at hand, the word element "Fernom" is the most important and dominant element of the First Complainant's trade name and company name "Fernom Facility Management" and of the Second Complainant's trade name "Fernom Home Management". The domain name "fernom.be" is therefore confusingly similar to the Complainants' company name and trade names. As pointed out by the Complainants, the risk of confusion is enhanced by the fact that the domain name redirects to a website of a Malaysian company called 'Sinppa Industry' which appears to engage in the manufacture of aluminium for use, amongst others, in the construction sector which is the very same sector in which the Complainants are active.

The domain name fernom.be must therefore be held to be confusingly similar to the company name and trade names in which the Complainants have rights.

As a consequence, the first condition of Article 10(b)(1) is fulfilled.

6.2. The Domain name holder has no right or legitimate interests in the domain name

In order to meet the second condition of Article 10(b)(1) of the Terms and conditions for .be domain name registrations, Complainants must prove that the Domain name holder has no right to or legitimate interest in the domain name.

The Third-Party Decider is of the opinion that Complainants have made it plausible that the Domain name holder has no rights or legitimate interests in the domain name.

None of the (non-exhaustively) listed circumstances in Article 10(b)(3) of the Terms and conditions for .be domain name registrations appears to be present in the case at hand.

First, there are no indications that the Domain name holder has 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. On the contrary, when typing in the domain name fernom.be, Internet users arrive at the webpage of a Malaysian company called 'Sinppa Industry'. It is unclear if this company actually exists.

Second, there are also no indications that the Domain name holder is making a legitimate and non-commercial or fair use of the domain name.

Third, no evidence is available showing that the Domain name holder would have been commonly known by the domain name. On the contrary, the company name used by the Domain name holder is "Sinppa Industry". The Domain name holder does not seem to own any trademarks in relation to "Fernom" and the term "Fernom" is nowhere to be found on the website.

In general, there does not appear to be any potentially legitimate connection between the Domain name holder and the domain name. There is no logic to the registration, by a Chinese registrant, of a .be domain name and the subsequent use thereof for a differently named company based in Malaysia that does not seem to have any link with Belgium or with the name "Fernom".

Finally, the Domain name holder did not file any reply to the complaint. The e-mails sent by the Domain name holder after the closing of the debates cannot be taken into account and in any event do not contain any substantive reaction that could demonstrate the existence of any rights or legitimate interests of the Domain name holder in the domain name.

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

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

In order to meet the third and last condition of Article 10(b)(1) of the Terms and conditions for .be domain name registrations, Complainants must demonstrate that the Domain name holder registered or used the domain name in bad faith. Article 10(b)(2) provides a non-exhaustive list of circumstances which prove that a domain name is used or registered in bad faith.

In this context, it is appropriate to point out that the current proceedings are not an automatic remedy to a complainant's failure to renew its domain name registration, regardless of whether such failure is attributable to the complainant's own negligence or to a fault by its registrar¹. This is because the registration of an erroneously lapsed domain name by a new holder does not in itself constitute a proof of bad faith by that new holder. A new holder cannot automatically be supposed to know that, for example, something went wrong in the communication between the previous domain name holder and its registrar as a consequence of which a desired renewal was eventually not effectuated.

However, the previous domain name holder's failure to timely renew its domain name registration can be taken into account as a relevant circumstance in the assessment of the new domain name holder's good or bad faith. Although not decisive on its own, it can add up to other circumstances that are indicative of bad faith.

In the case at hand, balancing the interests of all parties, the Third-Party Decider finds that such other circumstances are present.

More specifically, in the absence of any explanation by the Domain name holder of how and why he acquired the domain name, it can be reasonably assumed that the Domain name holder has acquired the domain name through a mechanism that allows him to take advantage of administrative errors due to which domain names, having been in use for a long time, were not timely renewed. Indeed, from the examples of other domain names owned by the same Domain name holder, as referred to in the Complainants' exhibits, it can be inferred that the Domain name holder engages in a pattern of conduct consisting of registering long-used domain names that were (whether or not unintentionally or mistakenly) not (timely) renewed by their previous owners, who often also own the corresponding trademarks, trade names or company names. In these other cases referred to by the Complainants, the domain names are also used by the Domain name holder to redirect to a webpage of the very same Malaysian company 'Sinppa Industry', which – as discussed above – does not appear

¹ Cfr. WIPO Arbitration and Mediation Center, administrative panel decision of 16 May 2019, *Titoni AG v. Synergy Technologies, LLC, Domain Administrator*, Case No. D2019-0395.

to have any link with Belgium and which does not mention the trade name/company name/trademark corresponding to the domain name anywhere on the website.

Taking into account that the Domain name holder has registered multiple .be domain names, which points in the direction of an organized and calculated pattern of conduct, it is reasonable to expect from such a registrant at least some effort of verifying that he is not infringing a third party's rights.

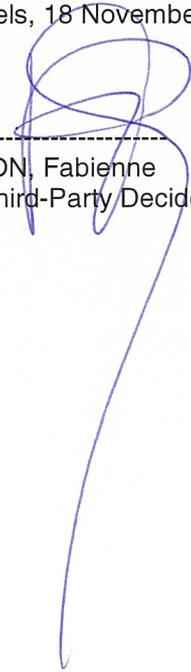
"Fernom" is a fanciful word without any common meaning and there is no credible explanation for the Domain name holder's choice of this domain name, let alone in the .be domain. In fact, the Domain name holder failed to file a substantive reply to the complaint.

Taking into account the combination of all these circumstances, the Third-Party Decider is of the opinion that the bad faith of the Domain name holder has been sufficiently established. Therefore, 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 "fernom.be" domain name is to be transferred to the First Complainant.

Brussels, 18 November 2019



BRISON, Fabienne
The Third-Party Decider