



ASIAN DOMAIN NAME DISPUTE RESOLUTION CENTRE (HONG KONG OFFICE)

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Decision Submission

[English](#)
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Version	
Decision ID	DE-0900242
Case ID	HK-0900261
Disputed Domain Name	www.Pattayahotel.com
Case Administrator	Ricky Wong
Submitted By	Neil Brown
Participated Panelist	

Date of Decision 05-10-2009

Language Version : English

The Parties Information

Claimant	Bruno Pingel
Respondent	Joshua Gardiner

Procedural History

The Complaint was filed with the Hong Kong Office of the ADNDRC (Asian Domain Name Dispute Resolution Center) [the 'Center'] on August 21, 2009.

The Center transmitted by email to the Registrar a request for Registrar verification in connection with the disputed domain name on August 26, 2009, August 31, 2009 and September 2, 2009.

The Registrar transmitted by email to the Center its verification response confirming that the Respondent, described as joshua gardiner purplefarm@gmail.com, is listed as the registrant and providing the details for the administrative matter on September 3, 2009.

The Center transmitted by email to the Complainant on September 3, 2009 a request for correction of the Complaint form so that it described the Respondent as Joshua Gardiner in keeping with the information provided by the registrar to the Center.

The Complainant transmitted by email to the Center on 3 September 2009 its agreement to so correct the Complaint and subsequently transmitted by email to the Center on the same day the corrected Complaint.

On September 4, 2009, the Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy"), the Rules for Uniform Domain Name Dispute Resolution Policy ("the Rules") and the ADNDRC Supplemental Rules (the "Supplemental Rules"). The Panel finds that the description of the Respondent is in compliance with paragraph 3 (b) (v) of the Rules.

On September 4, 2009, the Center transmitted the "Complaint Transmittal Sheet" along with the Complaint and the Annexes thereto to the Respondent by email, and the Center also sent a copy of the Complaint and the said Annexes to the Respondent by courier, notifying the Respondent of the commencement of the proceedings as well as the due date, September 24, 2009, for the Respondent to submit his Response.

The Respondent did not submit his Response by September 24, 2009 or at all, but responded by email to the Center on September 21, 2009 and again on September 24, 2009. The Center notified the Respondent of his having missed the due date for the Response by email on September 25, 2009.

On September 25, 2009, the Center inquired of The Honourable Neil Anthony Brown QC if he was available to act as the sole Panelist for this proceeding and, if so, whether he was in a position to act independently and impartially between the parties. On September 25, 2009, The Honourable Neil Anthony Brown QC confirmed his availability to act as Panelist and that he was in a position to act independently and impartially between the parties.

On September 28, 2009 the Center informed the parties by notice that The Honourable Neil Anthony Brown QC had been appointed as the Panelist. The Panel finds that it has been established in accordance with the Policy and the Rules and is properly constituted.

On September 28, 2009, the Center sent all the documents and materials relating to the Complaint to the Panelist by email and by courier and the Panelist confirms that they were received by him on September 28, 2009 by email and that hard copies were delivered to him by courier on September 30, 2009.

Factual Background

For Claimant

The following facts are taken from the Complaint.

The disputed domain name was originally registered in the name of the Complainant.

The Complainant used the disputed domain name since November 11, 1998 for the purpose of promoting his real estate and hotel business in Thailand and in particular for advertising and taking bookings for luxury residences.

The disputed domain name has subsequently become registered in the name of the Respondent.

Other factual matters are in dispute and in so far as they are relevant they are referred to subsequently in this decision.

For Respondent

Other factual matters are in dispute and in so far as they are relevant they are referred to subsequently in this decision.

Parties' Contentions

Claimant

The Complainant alleges that the disputed domain name <pattayahotel.com> should no longer be registered with the Respondent but that it should be transferred to the Complainant.

Specifically, the Complainant seeks the following remedies:

“We hereby request to cancel such unauthorized domain name transfer made by Robert and/or related person including Mr. Joshua Gardiner and simultaneously transferring such domain name back to Mr. Bruno, including cease and desist from transferring such domain name to any third party.”

The Complainant makes the following submissions:

“We act on behalf of our client, Mr. Bruno Pingel (“Mr. Bruno”), the legitimate owner of domain name and trademark “pattayahotel.com” . Please see a copy of our Power of Attorney as attached. (Annex IV).

Mr. Bruno registered the said domain name and trademark with Network Solutions, Inc. (“NSI”), on November 11, 1998, as specified all details in copies of WHOIS database (Annex V).

Since 1998, upon becoming the legitimate owner of “Pattayahotel.com” , Mr. Bruno, continuously, has used the said domain name and trademark for promoting his real estate and hotel businesses in Thailand, especially in Pattaya, Chonburi Province until the said tradename and website – “pattayahotel.com” is very popular and well-known in Thailand and world wide. The said domain name and trademark has been used with luxury residence together with tradename “View-Talay Villa Residence and its device” , located at Jomtien beach, Thailand.

To register such domain name and trademark, in 1998, Mr. Bruno hired a Thai ISP, Loxinfo Co., Ltd. (current name “CS Loxinfo PLC”) to register such domain name and trademark on behalf of him with NSI (Annex VI). Therefore, Mr. Bruno is the sole legitimate owner of such domain name and trademark as

Registrant, Administrative Contact and Billing Contact.

Subsequently, Mr. Bruno knew Mr. Robert Hamilton (“Robert”), as an IT consultant but never assigned him to handle IT matter on behalf of Mr. Bruno or contacting with NSI.

On December 2008, it has been brought to Mr. Bruno’ s attention that the said domain name are changed and sold by Robert to the third party without his consent (as of now, the current domain name holder is “Moniker”) by falsifying

its e-mail address “datamatch@writeme.com” to change hosting company and Accredited Domain Name Registrar from “NSI to Moniker”, respectively. (Annex VII). After modifying the said contents, he deliberately changed Registrant Name, Administrative Contact, Technical Contact or Expiration date for his own benefit without Mr. Bruno’s consent and/or instruction. Subsequently, the domain name and trademark has been illegally sold to Mr. Kim Ho Chun and Mr. Joshua Gardiner, respectively. Enclosed herewith please find e-mail correspondences between Mrs. Burke (NSI’s Staff) and us and related documents with respect to such domain name transfer of NSI. (Annex VIII and IX) On February 17, 2009 Mr. Francis Wittenberger, Mr. Bruno’s staff, has contacted to Mr. Kim Ho Chun for claiming domain name and trademark back to Mr. Bruno. However, he refused to transfer it back to Mr. Bruno. He has offered to sell the domain name and trademark at the same amount as he bought from Robert, at the amount of \$ 12,200 USD. Attached hereto are the copies of e-mail correspondences between Mr. Francis and Mr. Kim Ho Chun. (Annex X) In addition, Pattayahotel.com was for sale on website “www.moniker.com”. Enclosed herewith is the latest e-mail correspondence between Moniker and our staff, indicating that the current owner acquired the aforesaid domain name and trademark for the purpose of selling to third party, even though he has already known that Mr. Bruno is the sole legitimate owner of the domain name and trademark. (Annex XI)

In light of the foregoing, such domain name and trademark has been registered and used in bad faith in accordance with Clauses 4a (ii) and (iii), and 4b(i) of Uniform Domain Name Dispute Resolution Policy (“UDRP”) of ICANN as specified here below, since Robert is not entitled to modify, transfer or register the aforesaid domain name and trademark to Moniker, Mr. Kim Ho Chun and finally Mr. Joshua Gardiner. Therefore, Mr. Joshua Gardiner, a current owner of domain name “Pattayahotel.com” has no rights or legitimate rights in respect of the said domain name.

Clause 4(a) (iii) and 4(b) of UDRP, having detail as follows:

“4. Mandatory Administrative Proceeding.

This Paragraph sets forth the type of disputes for which you are required to submit to a mandatory administrative proceeding. These proceedings will be conducted before one of the administrative-dispute-resolution service providers listed at www.icann.org/udrp/approved-providers.htm (each, a "Provider").

a. Applicable Disputes. You are required to submit to a mandatory administrative proceeding in the event that a third party (a "Complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) you have no rights or legitimate interests in respect of the domain name; and

(iii) your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present

b. Evidence of Registration and Use in Bad Faith. For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or

(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.”

In light of above, we hereby submit this domain name dispute to Hong Kong Office of Asian Domain Name Dispute Resolution Centre (“ADNDRC”) pursuant to UDRP for the purpose of canceling such unauthorized domain name transfer made by Robert and/or related persons and simultaneously transferring such domain name back to Mr. Bruno, including cease and desist from transferring such domain name to any third party without our consent.”

Supplemental Submissions

On October 1, 2009 the Complainant’s representative sent the following email to the Center:

“Dear Mr. Wong,

Reference is made to our complaint regarding domain name arbitration “pattayahotel.com”.

In the light of default of filing the response to our complaint by Mr. Joshua Gardiner, this implies that Mr. Joshua Gardiner has no evidence to prove that he is a legitimate owner over our trademark and domain name

“pattayahotel.com”, obtaining “secondary meaning” under Thai Trademark Act and International Trademark law since our client has consistently used this trademark and domain name since 1998. In addition, in accordance with his e-mail dated September 21, 2009, sent to ADNDRC, he admitted that he bought this domain name and/or this trademark from third party and have no evidence to prove his exploitation over such domain name and/or trademark like the Complainant, Mr. Bruno.

Based on the UDRP Policy, the Complainant has already proved the following (Case No D2003-0023-Computer Associates v. Tvtaxi.com, Inc)

(1) the domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has right;

Pls see the attached (Comparison of the Complainant's former website and Mr. Gardiner's website, including domain name exploitation of the Complainant). This definitely causes confusion to the public.

(2) the Respondent has no right or legitimate interest in the respect domain name; and

As clarified in the above, Mr. Gardiner bought this domain name from the third party and has intention to sell to third party. According to the latest whois record, this shows that Mr. Gardiner has domain name around "25 other domain name for sale". The use of his free g-mail and PO Box address, as a contacting address, not formal address like the Complainant. This also still shows his intention to conceal all his information to be used for preventing any potential legal action(s) from the Complainant and /or interested party.

(3) the domain name was registered and being used in bad faith.

He bought this domain name from "Moniker" as an agent for selling domain name and he has "constructive knowledge" to know that this disputed domain name was stolen by the Complainant since he has to check domain name record from "Whois database" before buying. Our client consistently renewed the domain name but Mr. Robert Hamilton, who is not our employee, falsified the e-mail and instructed NSI computer to change the domain name Registrar from NSI to Moniker and hosting company, respectively. Subsequently, he also changed the renewal instruction and finally transferred domain name to third party for sale. Pls see the details in NSI log files and our correspondence with NSI's officer.

Trusting the above can support our ground for canceling this domain name and fulfill the criteria of UDRP.

Best regards,

Paiboon"

Attached to that email were three documents, as follows:

(a) A print out from the website of www.pattayahotel.com as it was when the disputed domain name was allegedly registered in the name of the Complainant and entitled "Our client website".

(b) A print out of the website at www.pattayahotel.com made on October 1, 2009 and entitled "Joshua website".

(c) A print out from the website of www.domaintools.com relating to <pattayahotel.com> made on October 1, 2009.

The question arises whether the Panel should accept the Supplemental Submission and take it into account in its decision.

A panel has a discretion whether to accept or reject a supplemental submission. In all the circumstances, the Panel has decided to accept the supplemental submission and has taken it into account in its decision. The principal reason why it has done so is that the Panel is concerned that the parties should understand that the Panel has taken into account all of the material that the parties have submitted in support of their respective cases.

Respondent

The Respondent did not file a formal Response to the Complaint.

However, as has been set out above under Procedural History the Respondent sent emails concerning the proceeding to the Center on September 21 and 24, 2009 and from the contents of those emails the attitude of the Respondent to the proceedings is reasonably clear.

But so that there is no doubt but that the Panel has given consideration to the submissions of the parties, the Panel will set out the contents of the Respondent's emails in full.

The Respondent's email of September 21, 2009 provided as follows:

"Hello

I have just got back from holiday and seen your email.

I really do not understand what you have sent.

The domain was purchased through namejet.com

Since owning the domain we have created a information site about pattaya =nd have had a great response from viewers.

I do not see where this complaint has any substance, the previous owner forgot to reregister the domain and has shown no evidence.

Anyone can file a police report in thailand, that does not mean they =ave a case.

I know this as i used to live in thailand.

Please give me instructions to disputed this.

Thankyou" .

The Respondent's email of September 24, 2009 provided as follows:

"I still do not understand exactly what do you need from me?

It is =bvious that this domain was purchased at namecheap and not stolen, =lease look at the domain history.

Thankyou" .

Supplemental Submissions

In reply to the Complainant's Supplemental Submission, the Respondent submitted the following email to the Center

on 3 October 2009. As the Panel accepted the Complainant's Supplemental Submission, the Respondent is clearly entitled to reply to it and for that reason the Panel has decided to accept the Respondent's reply and take it into account in its decision. The email provides as follows:

“ Several of these points are wrong

- 1.) Pattaya Hotel is not a trademarked term, this is a generic keyword and is not trademarked.
- 2) That is correct i would have 20 other domains but all are for legitamet uses, i do not buy domains for resale.
- 3) The domain was not stolen at all, the previous owner forgot to register the domain so it was sent to an auction, this is the common process of domains.

And about my website, i have only had a few months of work on it and already had a great response. i am not selling any service, i am writting informative articles about Pattaya to help them with travel information of this region in thailand.

You can see my actual site on www.pattayahotel.com

I have many categories helping the traveller with information on Pattaya and i am starting to also write artices for bangkok now.

Many of my articles have been featured on other websites as top articles.

The previous owner contact me to purchase the domain which i refused to accept as i have plans for the site and i am not looking for financial benefit.

Thankyou

Joshua Gardiner”

Findings

Paragraph 15 of the Rules provides that the Panel is to decide the complaint on the basis of the statements and documents submitted and in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable.

The onus remains on the Complainant to make out its case and past UDRP panels have said many times that a Complainant must show that all three elements of the Policy have been made out before any order can be made to transfer a domain name.

The Panel therefore turns to discuss the various issues that arise for decision on the facts as they are known.

For the Complainant to succeed it must prove, within the meaning of paragraph 4(a) of the Policy, that:

- A. The domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- B. The Respondent has no rights or legitimate interests in respect of the domain name; and
- C. The domain name has been registered and are being used in bad faith.

It is to be noted that paragraph 4 of the Policy provides that the Complainant must prove that each of the three elements is present. In other words the Complainant must prove by evidence that each of the above elements is present. The Panel will therefore deal with each of these requirements in turn and examine what evidence is adduced in support of them.

Identical / Confusingly Similar

It is apparent from the wording of paragraph 4(a) of the Policy that the first thing that the Complainant must prove in this case, as in all others, is that he has “a trademark or service mark in which the Complainant has rights.”

The Complaint asserts that the Complainant has a trademark in the expression “pattayahotel.com”. However, no submission is made apart from this assertion, to show how or why there is a trademark in that expression or that any such trademark is owned by the Complainant.

More importantly, there is no evidence at all to show that there is any such trademark or that any such trademark is owned by the Complainant.

It has been said many times in UDRP decisions that this evidence is necessary and the fact that there is no such evidence advanced is a major defect in the Complainant's case.

The Complaint seems to assume that, because in the past the Complainant has used the domain name to promote his real estate and hotel businesses in Thailand, it must follow that he has a trademark over the expression. That is not so and there are many decisions to show that the fact that a party has used a domain name does not mean that it creates any trademark rights. Clearly, this could not be so as, among other reasons, it would be contrary to the trademark rights of a party who had a registered or unregistered trademark in the same expression.

In any event, the plain fact is that there is no evidence of a trademark or service mark in the expression.

One way (and the most usual way) in which a complainant may show a trademark is to prove that it is a registered trademark and to annex a certificate of registration. This has not been done in the present case and there is therefore no evidence that the Complainant has a registered trademark.

It is true that the Complainant has asserted in the Complaint that he “...registered the said domain name and trademark

with Network Solutions, Inc. (“NSI”), ON November 11, 1998, as specified all details in copies of WHOIS database (Annex V.” (emphasis added).

Not surprisingly, the WHOIS record does not show that a trademark was registered by that means and the notion that a trademark could be registered with a domain name registrar is misconceived. This is not evidence of the registration of a trademark and no other evidence of there being a registered trademark has been produced.

But it is well established that a complainant need not go as far as to prove a registered trademark, as it is sufficient if a complainant can prove an unregistered or common law trademark. The question then arises as to how such an unregistered or common law trademark is to be proved and, again, there are many decisions where it has been shown just what evidence is needed to show an unregistered or common law trademark.

The most recent decision of which the Panel is aware where this issue has been dealt with is AOL LLC v. Joe DiMarc, National Arbitration Forum Case, No. 1275978 (Sept.9, 2009) where the panellist’ s observation were directly applicable to the facts of the present case. The panelist in that case said:

“A party claiming trademark rights in a generic or descriptive mark must show that such mark has acquired secondary meaning through use. “Secondary meaning” is acquired when “in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself.” Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163 (U.S. 1995) In its papers, Complainant presents only “bare bones” assertions to show that the public identifies the AUTOBLOG mark with the source of Complainant’ s services rather than as merely a phrase describing those services. Therefore, as discussed below, the record does not support a finding that Complainant has rights in AUTOBLOG pursuant to Policy 4(a) (i) and accordingly relief must be denied.”

In the present case, as the Complainant does not have a registered trademark, it is driven to claim unregistered trademark rights in the generic or descriptive mark PATTAYA HOTEL. That is a generic or descriptive expression because it is meant to apply to hotels in Pattaya in general and to describe them, as the Complainant is not claiming that the expression refers to a specific hotel named Pattaya. Indeed, the Complainant’ s own material says that the domain name has been used to invoke “real estate and hotel businesses in Thaliand, especially in Pattaya, Chonburi Province... (and) luxury residence together with tradename “ View - Talay Villa Residence and its device” , located at Jomtien beach, Thailand.” The expression is therefore being used in a generic or descriptive sense.

That being so, it is necessary to show that the expression has acquired a secondary meaning such that it specifically refers to the source of a product and links it with the Complainant himself, as it is he who is asserting that it is a trademark identifying his goods or services.

There is simply no evidence put forward to establish this.

The decision in AOL LLC v. Joe DiMarc (supra) and many other cases show what evidence is required. The panel in AOL LLC v. Joe DiMarc (supra) put it in this way:

“In determining whether or not a mark has acquired secondary meaning, tribunals consider several factors. Direct evidence of secondary meaning includes: (a) direct consumer testimony; and (b) consumer surveys. Circumstantial evidence of secondary meaning includes: (c) exclusivity, length, and manner of use; (d) amount and manner of advertising; (e) amount of sales and number of customers; (f) established place in the market; and (g) proof of intentional copying..

Similarly put:

The factors considered ... [in] determining whether a mark has acquired secondary meaning include: "(1) whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer, (2) the degree and manner of advertising under the claimed trademark, (3) the length and manner of use of the claimed trademark, (4) whether use of the claimed trademark has been exclusive," ...

UDRP panels have likewise urged that particular evidence rather than mere conclusory allegations is required to show that an otherwise generic or descriptive mark has acquired distinctiveness and is a trademark for the purposes of Policy 4 (a) (i). See Occidental Hoteles Mgmt., S.A., & Corictal II, S.A. v. Hargrave Arts, LLC, FA 959645 (Nat. Arb. Forum May 21, 2007) (finding that the complainant did not submit sufficient evidence showing that its OCCIDENTAL mark had acquired the necessary secondary meaning for it to establish common law rights pursuant to UDRP ¶ 4(a)(i); see also Telecom Italia S.p.A. v. NetGears LLC, FA 944807 (Nat. Arb. Forum May 16, 2007) (finding that when a disputed domain name, such as <187.com>, is made up entirely of generic or common terms, “good evidence will be needed to show a significant secondary meaning and, above all, one associated with Complainant.”).”

The evidence required is clear enough but it is lacking in the present case. No evidence has been put forward to establish any of these elements and the Panel must conclude that there is no evidence showing that the expression PATTAYA HOTEL has taken on a secondary meaning to identify particular goods or services or that it is associated by anyone at all with the Complainant.

The evidence that is in fact adduced by the Complainant and annexed to the Complaint as Annex III is designed to show what is referred to as the “exploitation” of the domain name. The Panel has already explained that even if that assertion were proved, it does not prove that the expression has been used as a trademark, has been regarded by anyone as a trademark or that anyone associates it with the Complainant.

But the additional problem with Annex III is that it consists of 30 pages of print outs from websites, 28 of which do not relate to <pattayahotel.com> at all, but to entirely different domain names, namely <villahotels-ghe-thailand.com> and <pattayanitelife.com>. They are therefore of no value for the purpose of showing that the Complainant had acquired an unregistered or common law trademark in the expression <pattayahotel.com>.

In any event, the whole basis of the Complainant’ s case in this regard is that he was previously the registrant of the disputed domain name <pattayahotel.com>. In support of this, the Complainant produces Annex V, which is a copy of

the WHOIS database relating to that domain name for the time when the domain name was registered with Network Solutions, INC. That document does not show that the Complainant was the registrant of the domain name, but rather that it was registered in the name of Bruno Pringer. It is true that this may be a mistake and indeed the name “PINGEL” has been written in handwriting on the certificate, as has the word “ME” . But there is no explanation of how any of this came about or why the mistake, if that is what it is, is perpetuated throughout the documentation. The evidence is therefore not evidence that the domain name was registered in the name of the Complainant.

Moreover, as was said in AOL LLC v. Joe DiMarc (supra):

“The burden required to prove that a complainant has trademark rights in a domain name under Policy 4(a) (i) is not trivial since in effect such rights predicate a complainant’ s ability to bring an action under the UDRP. Choosing a descriptive mark and choosing not to seek registration of such mark increases Complainant’ s burden to demonstrate that its descriptive mark had acquired protectable trademark rights.” (emphasis added).

In other words, this is not a mere formality, but the omission of an essential matter of evidence and its absence means that the Complainant cannot succeed in these proceedings.

Apart from anything else, to allow the Complainant to proceed on such inadequate evidence would be a substantial injustice to the Respondent.

The Complainant’ s Supplemental Submission

What is particularly disturbing about the Complainant’ s failure to produce any evidence that it has a trademark, registered or unregistered, in the name PATTAYA HOTEL, is the fact that he has filed a Supplemental Submission which the Panel has accepted and which provided, as it were, a second opportunity for the Complainant to complete his evidence and put to the Panel all that he wanted to say in support of the case. He has certainly been given an opportunity to do that.

In his supplemental submission, he relied on the decision in Computer Associates International, Inc. v. TvTaxi.com, Inc., WIPO Case No. D2003-0023. The fact that the Complainant has cited this decision shows that his advisers or he must be familiar with the requirements of what has to be proved in UDRP proceedings and the decision he cites actually refers to those matters. The case cited is one where the Complainant did not have a registered trademark and accordingly had to prove a common law trademark. In that case, the Complainant went about its task and adduced evidence to prove its common law trademark. The panel put it in this way:

“However, the Complainant has shown that it has used the mark Ezantivirus to market its computer antivirus software since mid-2001.”

The next sentence of the decision makes the task for the Complainant even plainer. The panel said:

“Relying on this proof, the Complainant is claiming common law use rights in the mark Ezantivirus.” (emphasis added).

In other words, the complainant in Computer Associates International, Inc. v. TvTaxi.com, Inc (supra) adduced evidence showing that it had used the expression that was claimed as a trademark in its marketing. The Complainant in the present case has not claimed a trademark in any expression other than the domain name itself, has adduced nothing to show that that expression has acquired a secondary meaning beyond the generic and descriptive meaning that the words naturally have and, above all, has shown nothing to indicate that the expression is understood as the source of the goods or services of the Complainant himself.

The Complainant has therefore failed to prove the first of the three elements that he must establish.

Rights and Legitimate Interests

N/A

Bad Faith

As the Complainant has failed on the first of the three elements, he is unable to prove all three elements and the Complaint therefore fails.

Accordingly, it is unnecessary for the Panel to say anything about the Complainant’ s case on the other two elements, including his Supplemental Submission and the Annexures to it.

There is an additional reason why the Panel deems it unwise to say to anything further. That is because it is apparent from the Respondent’ s two emails to the Center and other documentation in the file, including the material annexed to the Complainant’ s Supplemental Submission, that there are substantial matters of dispute between the parties that cannot be resolved in UDRP proceedings, which are essentially summary in nature. There are conflicts in the evidence, police charges on foot and a major issue of how the Complainant ceased to be the registrant of the domain name and the Respondent came to be the registrant. Those issues can only be resolved in court proceedings with investigative powers that are not available to a UDRP panel. As this matter therefore may go further, it is inappropriate for the Panel to make

any further comments on issues that may be tested in those other proceedings.

Status

www.Pattayahotel.com Complaint Rejected

Decision

For all the foregoing reasons, in accordance with paragraphs 4 of the Policy and 15 of the Rules, the Panel orders that the Complaint be dismissed.

The Honourable Neil Anthony Brown QC
Sole Panelist
Date: October 2, 2009