

(Kuala Lumpur Office)

ADMINISTRATIVE PANEL DECISION

Case No.	KLRCA/ADNDRC-407-2016
Complainant:	Genting Berhad
Respondent:	Asad Chaudhry
Disputed Domain Name(s):	<awanahotels.com>

The Parties and Contested Domain Name

1. The Complainant is Genting Berhad of 24th Floor, Wisma Genting, Jalan Sultan Ismail, 50250 Kuala Lumpur, Malaysia.
2. The Respondent is Asad Chaudhry, of Awana Operating Company, 16931 Old Stage Road, Dumfries, Virginia, 22025, USA.
3. The domain name at issue is <awanahotels.com>, registered by the Respondent with GoDaddy.com LLC, of 14455 N Hayden Rd #219, Scottsdale, AZ 85260, USA.

Procedural History

4. The Complainant filed this complaint with the Asian Domain Name Dispute Resolution Centre (ADNDRC) (Hong Kong Office) on 30 August 2016.
5. A copy of the Complaint was forwarded to the Respondent on 30 August 2016. Concurrently, a copy was also sent to the Registrar of the disputed domain name.
6. The ADNDRC did not receive any response from the Respondent within 20 calendar days as required under paragraph 5 of the Rules for Domain Name Dispute Resolution Policy (the "Rules"). Accordingly, the ADNDRC informed the parties that no response had been received and that it would shortly appoint a single panelist.
7. On 26 September 2016, the ADNDRC appointed David Allison as the sole Panelist in this matter. The Panelist accepted the appointment and has submitted a statement to the ADNDRC that he is able to act independently and impartially between the parties.
8. On 10 October 2016, the Panel exercised its discretion under Article 12 of the Rules to request the Complainant to file a supplemental statement and evidence in relation to paragraph 4(a)(iii) of the Policy (ie bad faith).
9. On 13 October 2013, the Complainant filed a short supplemental statement and supporting evidence. The respondent was provided an opportunity to respond but failed to provide any response.

Factual background

The Complainant's Background

10. The Complainant, Genting Malaysia Berhard and Genting International Management Limited are part of the Genting Group of Companies ("**Genting Group**").

11. The Complainant is the part of the Genting Group and is the registered proprietor of the registered trade mark "AWANA" in various classes in Malaysia, Indonesia and Singapore.

12. The Complainant and the Genting Group are well known in the leisure, hospitality and casino industries, particularly in Malaysia.

13. The Complainant has operated a hotel in Malaysia under the AWANA name for over 30 years. The AWANA hotel is featured on several hotel booking websites and the AWANA trade mark has been used extensively by complainant in Malaysia for an extended period of time.

14. Since as early as 2005, the Complaint has filed for an extensive collection of trade marks over the term "AWANA" in Malaysia, Indonesia and Singapore. Relevantly, the marks registered by the Complainant in both Malaysia, Indonesia and Singapore are as follows:

Marks registered in Malaysia

	Mark	Reg. No.	Class	Reg. Date
	AWANA	05011537	41	06-05-2008
	AWANA	0511535	43	12-05-2008
	AWANA	09012430	41	08-02-2011
	AWANA	09012428	43	21-02-2011

Marks registered in Indonesia & Singapore

	Mark	Reg. No.	Country	Class	Reg. Date
	AWANA	IDM000307841	Indonesia	41	25-05-2011
	AWANA	IDM000346068	Indonesia	43	24-01-2012
	AWANA	T05/12235D	Singapore	41	15-07-2005
	AWANA	T05/12236B	Singapore	43	15-07-2005

15. The evidence submitted by the Complainant suggests that the Complainant has become very successful and its name, AWANA, has become well recognized by consumers, particularly in Malaysia and South East Asia, in relation to hotels and resorts.

The Respondent's Background

16. As the Respondent did not file any response to the Complaint, little is known about the background of the Respondent. However, according to the WHOIS search report of the disputed domain name, the Respondent appears to be an individual based in the United States.

Parties' Contentions

Complainant

17. The Complainant's contentions may be summarized as follows:

- i. The disputed domain name is identical or confusingly similar to the trade name and trade marks of the Complainant.
- ii. The Respondent has no rights to the name "AWANA".
- iii. Given the fact that "AWANA" has been used by the Complainant for over 30 years and has acquired a significant reputation in the name, it is unlikely that the Respondent was not aware of the Complainant's rights.

Respondent

18. The Respondent has filed no response to the Complainant's complaint.

Discussion & Findings

Default decisions

19. The ICANN Uniform Domain Name Dispute Resolution Policy ("UDRP") provides, at paragraph 4(a), that each of three following three elements must be satisfied 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.

20. Whilst the Respondent has not filed a response to this Complaint, this fact has not resulted in an automatic finding against the Respondent. Despite the Respondent's default, the Panel must still satisfy itself that the Complainant has established each of the three elements required by paragraph 4(a) of the UDRP. Accordingly, the Panel has considered whether each of the three requirements under paragraph 4(a) of the UDRP has been met. The Panel's findings are as follows:

Findings

A) Identical / Confusingly Similar

21. The disputed domain name consists of the elements "awanahotels" and ".com". It is a well-accepted principle that TLD suffixes such as ".com", ".net", etc are ignored for the purposes of comparison and thus the Panel has not considered this suffix when comparing the disputed domain name to the Complainant's prior rights.

22. The Complainant has adduced sufficient evidence to demonstrate that it has a collection of trade marks over the mark "AWANA", in Malaysia, Indonesia and Singapore. The earliest of these marks have a registration date back to 2005. Relevantly (and significantly for this complaint), each of the marks are registered in relation to services relating to hotels, hospitality and related services

23. The Complainant has also adduced evidence showing its marks are known among the public, particularly in Malaysia, Singapore and Indonesia. The Complainant adduced some limited evidence that the marks are known outside of South East Asia – for example, in China.

24. On the basis of the evidence adduced, the Panel finds that the Complainant has rights over the trademark "AWANA", at least in relation to hotel and hospitality related services.

25. In comparing the disputed domain name with the Complainant's prior rights, whilst they are not identical, the Panel holds that the disputed domain name is confusingly similar to the Complainant's prior trademark rights.

26. In making this assessment, the Panel considered the visual, aural and conceptual similarities between the Complainant's prior trademark rights and the disputed domain name. The Panel also evaluated these criteria from the perspective of the average consumer.

27. In the Panel's view, the "AWANA" element of the disputed domain name is likely to be regarded by consumers as the dominant element. It is identical to the prior trademarks registered by the Complainant and it is placed at the beginning of the disputed domain name – where it is most prominent.

28. The Panel also finds that the "___HOTEL" element of the disputed domain name is highly relevant since the Complainant has a reputation in relation to the hotel and hospitality industries. Accordingly, it is the Panel's view that the combination of the "AWANA" and "HOTEL" elements taken together in the disputed domain name increase the likelihood of consumer confusion.

29. For the reasons noted above, the Panel finds that the disputed domain name is confusingly similar to the Complainant's prior trademarks and therefore, element 1 of UDRP paragraph 4(a) has been satisfied.

B) Rights and Legitimate Interests

30. Based on the evidence placed before the Panel, the Panel has found that the Respondent has no rights or legitimate interests in the disputed domain name.

31. This finding is based on the following:

- i. There has been no evidence submitted by the Respondent to show the reasons or justification for the choice of a domain name in which the element "AWANA" constitutes the dominant part of the domain name.
- ii. No website is linked to the disputed domain name and there is no content whatsoever at the disputed domain name. Therefore, there is no *prima facie* evidence of the use that the Respondent is making or intends to make of the disputed domain name nor any evidence whatsoever to show what legitimate interest the Respondent may have in the disputed domain name.
- iii. In contrast, the Complainant has adduced sufficient credible evidence to substantiate its claim that it has a reputation throughout South East Asia and has built up sufficient rights and interest in the mark and name "AWANA".

32. While the Panel notes that the overall burden of proving this element rests with the Complainant, it also recognizes the well-established principle that once the Complainant has established a *prima facie* case that the Respondent lacks sufficient legitimate rights and interests, the burden then shifts to the Respondent.

33. In this case, the Panel finds that the Complainant has adduced a sufficient *prima facie* case whereas the Respondent has failed to adduce any evidence whatsoever.

34. Accordingly, the Panel finds that the Complainant has established the second element of UDRP paragraph 4(a).

C) Bad Faith

35. This element is the most problematic element of these proceedings. Besides bald claims that the "*Respondent is clearly tainted with mala fide intention, knowing very well...that the Complainant owns the mark "AWANA"*" the Complainant has offered no evidence to support this allegation. Even when invited to provide a supplemental statement and evidence, the Complainant failed to provide any such evidence to establish bad faith on the part of the Respondent but merely resorted to further arguments and reliance on previous WIPO Administrative Panel Decisions (in particular Case No. D2000-0003 *Telstra Corporation Limited v Nuclear Marshmallows*).

36. To establish bad faith, the Complainant may refer to the circumstances outlined in paragraph 4(b) of the UDRP. However, none of those circumstances apply in this case. Nevertheless, the circumstances outlined in paragraph 4(b) are not exhaustive and the Panel may take into account other circumstances which demonstrate bad faith.

37. One circumstance that *may* be taken into account is where the Respondent has not made any active use of the disputed domain name. It must be stressed that failure to make active use of a domain name alone is not sufficient to make a finding of bad faith but may constitute an indicia of bad faith when considered in conjunction with all other factors.

38. In this case, the disputed domain name was only registered in June 2016 – a mere 3 months prior to filing this complaint. In the circumstances, the Panel finds that the failure of the Respondent to make active use of the disputed domain name is not sufficient to support an allegation of bad faith.

39. Likewise, knowledge on the part of the Respondent of the Complainant's prior rights may in some circumstances be an indicia of bad faith. Again, much depends on the circumstances. In this case, the Complainant purported to send a 'cease and desist' letter to the Respondent on 29 July 2016 alerting the Respondent of the Complainant's prior rights and demanding that the Respondent immediately cease its alleged infringing activities and immediately surrender the disputed domain name to the Complainant. The Complainant refers to this cease and desist letter in its complaint and notes that the Respondent "*refused and/ or neglected to accede to the Complainant's demand letter*".

40. While such a letter and a failure to respond would ordinarily be given some weight, the Panel notes that the letter was not addressed to either the Registrant or Admin contact as noted in the attached Whois search (ie casad@hotmail.com). Rather, the letter was addressed to "DomainsbyProxy.com" and awanahotels.com@domainsbyproxy.com neither of which are noted on the current Whois search for the disputed domain name. In the circumstances, the purported issuing of the demand letter cannot assist the Complainant in establishing bad faith.

41. Furthermore, the concept of knowledge or constructive knowledge will generally only apply where the Complainant's mark is "well-known". In this case, the Complainant has established that its "AWANA" marks have acquired a certain reputation in relation to hospitality and hotels, particularly in South East Asia. The Panel doubts however, based on the evidence before it, whether the reputation of the mark has risen to the level of 'well-known status'. The evidence submitted does not support such a finding. Indeed, a brief search of the USPTO trademark search records shows that there are many "AWANA" type marks registered to third parties existing on the Register, including in Class 41 and such a finding goes against a conclusion that the Complainant's mark is so well known that the Respondent must have had knowledge of the Complainant's marks and therefore the registration of the disputed domain name must have been made in bad faith.

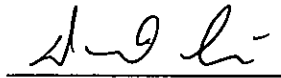
42. On the one hand, the Complainant has produced evidence in its supplemental submissions showing that a simple Google search for "*awana hotels*" immediately returns hits on the first page that all refer to the Complainant. Further, the Respondent has chosen the domain name "awanahotels.com" rather than some other permutation of "AWANA + XYZ". Accordingly, the Panel finds it difficult to believe that the Respondent would have selected this domain name and would have been completely unaware of the existence, and indeed reputation, of the Complainant. This supports a finding of bad faith on the part of the Respondent.

43. As noted above, establishment of this element of the UDRP has been a finely balanced matter. Nevertheless, considering all of the matters raised above, the evidence submitted by the Complainant, and the complete failure of the Respondent to make any submissions whatsoever, the Panel finds that the third element of UDRP paragraph 4(a) has

been made out and that the Respondent has registered the disputed domain name in bad faith.

Decision

44. For the reasons outlined above, the Panel finds that the Complainant has satisfied all three elements of UDRP paragraph 4(a). Accordingly, the Panel orders that the disputed domain name, <awanahotels.com>, be transferred to the Complainant



David Andrew Allison
Sole Panelist

Dated: 26 October 2016