

DISPUTE RESOLUTION SERVICE

D00009620

Decision of Independent Expert

Zulily, Inc.

and

Mr Dan Goldstein

1. The Parties:

Lead Complainant: Zulily, Inc.
300 Occidental, Suite 300
Seattle
Washington
98104
United States

Respondent: Mr Dan Goldstein
200 e 62ns st
ny
NY
10 021
United States

2. The Domain Name(s):

zulily.co.uk

3. Procedural History:

23 February 2011 19:40 Dispute received
24 February 2011 14:24 Complaint validated
24 February 2011 14:26 Notification of complaint sent to parties
18 March 2011 10:44 No Response Received
18 March 2011 10:44 Notification of no response sent to parties
24 March 2011 13:17 Expert decision payment received

4. Factual Background

- 4.1 The Complainant is a company based in Seattle, Washington, United States. Following investment of \$4.6 million by a venture capital firm in late 2009, the Complainant announced in December 2009 that it was launching a new business, in the first quarter of 2010 selling discounted children's clothing brands through an on-line store at www.zulily.com. The website operates as an outlet for excess inventory for brand owners, and features regular short duration sales (with events lasting up to 72 hours).
- 4.2 The Complainant has registered the trade mark as ZULILY in respect of on-line retail store services, and clothing, inter alia in the United States (with the first use in commerce of 27 January 2010), Canada, and the European Union.
- 4.3 The Complainant registered the domain name zulily.com on 10 December 2009.
- 4.4 The Complainant says that it has spent considerable time and resources building up its company, and strengthening its trade marks and domain names, pointing to a Google search for the ZULILY mark which generates 937,000 results, and 18,900,000 in Yahoo!
- 4.5 The Respondent registered the Domain Name on 19 December 2009. Nothing appears to be known about the Respondent, except an address of sorts in New York. The Respondent is also the registrant for the domain names zulili.com and zulily.net, both of which were registered in late December 2009.
- 4.6 The Complainant has attempted to contact the Respondent, by email through the domain names zulily.net and zulili.com on 10 January 2011, with a "cease and desist" request. There has been no response received to those emails, or to subsequent reminders on the Complainant's behalf.
- 4.7 Currently, the Domain Name does not seem to be used for any active website, with a "website cannot be found" message appearing.

5. Parties' Contentions

Complainant's submissions

Rights

- 5.1 The Complainant relies upon its trade mark registrations in the United States and elsewhere, as well as extensive use, and goodwill shown through its rankings in Google and Yahoo! searches. The Complainant says that the Domain Name is confusingly similar to its mark and website, with the only difference between the two being the addition of the ccTLD denominator .co.uk.

Abusive registration

- 5.2 The Complainant says that the Respondent has no rights or legitimate interests in respect of the Domain Name because he has not been commonly known by the Domain Name, is not sponsored by or legitimately affiliated with the Complainant in any way, has not been given permission to use the

ZULILY mark in a domain name, and has taken no steps to register or otherwise legitimately protect his use of the ZULILY mark.

- 5.3 The Complainant points out that the Respondent registered the Domain Name on 19 December 2009, after the Complainant's registration of its zulily.com domain name, and after press reports had appeared about the proposed launch of the Complainant's business in early 2010.
- 5.4 The Complainant further says that the Domain Name should be considered as having been registered abusively for the following reasons:-
- (a) The Respondent has ignored its attempts to resolve the dispute outside the administrative proceeding;
 - (b) The Domain Name currently resolves to an inactive webpage which has great potential for confusion and, thus, serious disruption to the Complainant's business. If the Complainant's customers access an inactive site, there might be a potential loss of customers;
 - (c) The Respondent cannot establish any situation demonstrating that the Domain Name is not an Abusive Registration, under the DRS Policy, paragraph 4.a. The Respondent is not commonly known as "ZULILY"; there is no active website involved; the Respondent cannot make legitimate non-commercial or fair use of the Domain Name because of the "fame" of the Complainant's Marks; nor can the Respondent make a genuine offering of goods or services under the Domain Name; and the Domain Name is not generic or descriptive;
 - (d) The Respondent holds registrations of other domain names that appear to be "straightforward examples of typo squatting" which serve as "further evidence of bad faith intent";
 - (e) Because the website reachable by the Domain Name does not display correctly, this is further evidence of bad faith intent, because it removes any doubt as to whether the true intention of the Respondent was improperly to capitalise on the Complainant's mark;

The Complainant seeks transfer of the Domain Name to itself.

The Respondent's submissions

- 5.5 The Respondent has not replied.

6. Discussions and Findings

- 6.1 In order to succeed in these proceedings, paragraph 2.b of the Policy requires the Complainant to prove on the balance of probabilities that both elements of the test set out in paragraph 2.a are present, namely that :
- i. the Complainant has Rights in respect of names or marks which are identical or similar to the Domain Name; and
 - ii. the Domain Name, in the hands of the Respondent, is an Abusive Registration.

Complainant's Rights

- 6.2 Although the Complainant has not provided evidence as to its current turnover, the Complainant's registered trade mark rights, and the evidence of

its trading reputation sufficiently demonstrate that it has Rights in respect of ZULILY. This is identical to the Domain Name (ignoring the cc TLD). The Expert therefore finds that the Complainant has Rights in respect of the name or mark ZULILY which is identical to the Domain Name.

Abusive registration

- 6.3 The Complainant has to show that the Domain Name is an Abusive Registration. Paragraph 1 of the Policy defines “Abusive Registration” as a Domain Name which either:-
- i. Was registered or otherwise acquired in a manner which, at the time the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant’s Rights; or
 - ii. Has been used in a manner, which has taken unfair advantage of or has been unfairly detrimental to the Complainant’s Rights.
- 6.4 A non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration is set out in paragraph 3.a of the Policy. The Complaint does not specifically cite or address any particular subparagraphs of paragraph 3.a. On the other hand, the Complainant has set out why the Respondent cannot show that the Domain Name is not an abusive registration under paragraph 4.a of the Policy. In addition, the Complainant has asserted “bad faith”, although this is not itself a relevant factor under the DRS Policy.
- 6.5 Some of the Complainant’s allegations of conduct amounting to abusive registration are difficult to accept on their own. Those include failure to respond to the Complainant’s “cease and desist” correspondence, and also the level of confusion being caused by the Domain Name being linked to what might be perceived as an inactive site, neither of which the Expert finds persuasive. The Complaint’s lack of reliance upon the wording of the Policy itself does not strengthen the Complainant’s case.
- 6.6 However, it does seem to the Expert that the timing of the Respondent’s registration of the Domain Name very shortly after the announcement of the Complainant’s intentions to commence business under the ZULILY name cannot have been coincidental, and the registration must have been intended to take unfair advantage of or to be unfairly detrimental to the Complainant’s Rights. The fact that the Respondent has also registered the zulily.net and zulili.com domain names around the same time adds credence to that conclusion. The Respondent has not replied to these proceedings, nor to the “cease and desist” correspondence, and therefore has not advanced any legitimate reason to have registered the Domain Name at the time he did.
- 6.7 As such, it seems reasonable to conclude that the Respondent has registered the Domain Name, either for the purposes of selling the Domain Name to the Complainant or to a competitor, or as a blocking registration, or for the purposes of unfairly disrupting the business of the Complainant under paragraph 3.a.i of the Policy. The Respondent has also, on balance, engaged in a pattern of registrations of registering domain names which correspond to the Complainant’s trade mark, in which he has no apparent rights (zulily.co.uk, zulily.net and zulili.com), and the Domain Name is part of that pattern (under paragraph 3.a.iii of the Policy).

6.8 Therefore, the Expert finds that the registration of the Domain Name in the hands of the Respondent is an Abusive Registration within the terms of the Policy.

7. Decision

7.1 The Expert finds that the Complainant has rights in the name ZULILY which is identical to the Domain Name.

7.2 The Expert further finds that the Complainant has shown that the Domain Name in the hands of the Respondent, is an abusive Registration and therefore directs that the Domain Name should be transferred to the Complainant.

Signed Bob Elliott

Dated 30 March 2011