

DISPUTE RESOLUTION SERVICE**D00021522****Decision of Independent Expert**

Younique, LLC

and

Caroline Djuissi

1. The Parties:

Complainant: Younique, LLC

Younique, LLC

3400 Mayflower Avenue

Lehi

Utah

84043

United States

Respondent: Caroline Djuissi

17 Tideswell Road

Sheffield

South Yorkshire

S5 6QR

United Kingdom

2. The Domain Name(s):

yuniqueproducts.co.uk

3. Procedural History:

I confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of such a nature as to call in to question my independence in the eyes of one or both of the parties.

21 June 2019 04:52 Dispute received

26 June 2019 15:14 Complaint validated

26 June 2019 15:42 Notification of complaint sent to parties

15 July 2019 02:30 Response reminder sent

17 July 2019 17:33 Response received

17 July 2019 17:33 Notification of response sent to parties

22 July 2019 02:30 Reply reminder sent

23 July 2019 13:37 Reply received

23 July 2019 13:38 Notification of reply sent to parties

23 July 2019 13:43 Mediator appointed

30 July 2019 10:01 Mediation started

10 September 2019 13:04 Mediation failed

10 September 2019 13:04 Close of mediation documents sent

11 September 2019 14:24 Expert decision payment received

4. Factual Background

A summary of the more pertinent facts of this dispute as asserted by the parties is as follows:

The Complainant's business was founded in September 2012 and is based in Utah, United States of America, trading as YOUNIQUE. It develops, markets and sells cosmetic products almost exclusively through social media and a virtual home party business model, via its "Younique Presenters". It estimates that it has generated revenue of \$400m in 2018 and during that year had over one million registered Younique Presenters working across 13 markets with over two and a half million virtual parties hosted. (N.B I have found the figure of \$400m difficult to reconcile with the Complainant's financial information that has been annexed to the Complaint which shows turnover in 2017 of \$7.2m and in 2016 of \$3.9m.)

The Complainant is the registrant of youniqueproducts.com and is also the proprietor of various trade mark registrations, including International Registration No 1191504 for the figurative mark "YOUNIQUE PRODUCTS" and device which has effect within the European Union from 20 December 2013.

The Complainant maintains a strong internet and retail presence through its website (located via youniqueproducts.com) as well as through social media platforms which have substantial visitors/followers around the globe, including from the United Kingdom.

The Respondent qualified in anatomy and physiology and other healing modalities in 2013 and has run a bricks and mortar business in that field since then. Prior to the Respondent purchasing the Domain Name, she looked up the use of the name 'Younique', and found it to be generic and widely used in the holistic world. She felt that it would be suitable for the personal and sometimes bespoke services and goods that she provides as a holistic wellness practitioner because such services are 'younique/unique'.

The Domain Name was registered in the name of the Respondent on 28 January 2014.

On 1 October 2014 the Complainant announced that it was opening its UK business. On the same day the Respondent became a Younique Presenter. The Complainant's records indicate that the Respondent consented to its terms and conditions on the same day. Whilst the records refer to a person with a different surname, I do not understand the Respondent to dispute that

the records do in fact refer to her. Those terms and conditions provide that a presenter cannot use or register the word Younique or any of the Younique trade marks as a domain name.

On 24 October 2014 the Respondent received an email from the Complainant suspending her account as a Younique Presenter on the grounds that she had registered the Domain Name in breach of its terms and conditions. On 28 October 2014 the Complainant made the Respondent an offer to buy the Domain Name at the cost price that she had paid for it. A further offer was made in March 2019 of \$600.

In or around the end of March or the beginning of April 2019, the Complainant made a further offer to buy the Domain Name via GoDaddy as a broker in the amount of \$3,000. In response the Respondent counter offered the amount of \$1m. The broker indicated to the Complainant that he thought the Respondent was aware of the Complainant's business and that this was driving the price demanded.

On 15 April 2019, the Complainant sent the Respondent a cease and desist letter by which it complained about the use of the Domain Name and demanded that it be transferred to it.

At the point at which this Complaint was brought, the Domain Name resolved to a website at ww.carmiacaroline.com at which the Respondent primarily promotes and sells health supplements under the sign AYIZAN.

5. Parties' Contentions

a. The Complaint

The Complainant asserts that the Domain Name is identical or similar to a name or mark in which it has exclusive or substantially exclusive rights. In that regard it says that the Domain Name is identical to its trade mark and it relies upon its trade mark registrations and the substantial goodwill it has developed as a result of its use of that mark to establish that it has Rights.

It identifies the following factors as set out in the Policy in support of its contention that the Domain Name is an Abusive Registration:

5.1.1.2 - as a blocking registration

5.1.1.3 – for the purposes of unfairly disrupting the Complainant’s business

5.1.2 – using it in a manner which has confused or will confuse people into believing that the Domain Name is connected with the Complainant

5.1.6 – the Domain Name is an exact match for the mark in which the Complainant has Rights, the mark has a reputation and the Respondent has no reasonable justification for having registered the Domain Name.

In support of those factors the Complainant’s contentions include the following:

- The Respondent is not commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name and there is no legitimate connection with the Complainant.
- Agreeing to the Complainant’s terms and conditions as a Younique Presenter, shows that the Respondent had sufficient knowledge of the Complainant’s trade mark.
- The fact that the content of the website to which the Domain Name is pointed is unrelated to the Complainant, is of no consequence as the Domain Name itself is confusing.
- The promotion of a wellness and herbal store at the website to which the Domain Name is pointed is not a *bona fide* offering of goods or services or a legitimate non-commercial or fair use.
- The Respondent registered the Domain Name significantly after the Complainant applied to register its trade mark and after its first use.
- The notoriety of the Complainant’s business and the identical nature of the Domain Name to the Complainant’s mark are indicative of an improper motive when it was registered.
- Internet searches for “yuniqueproducts” returns multiple links to the Complainant and therefore the Respondent did know or should have known of the Complainant.
- The failure by the Respondent to respond to the Complainant’s cease and desist letter is indicative of bad faith.

b. The Response

The Respondent contentions in support of her position that the Domain Name is not an Abusive Registration include the following:

- When she looked up the name “Younique” at the time she acquired the Domain Name she found it to be generic and widely used in the holistic world.
- Many businesses use the term “Younique”.
- From October 2014 until now she has not received any offers to purchase or made offers herself to sell the Domain Name (which I take to mean other than in respect of the Complainant).
- The Domain Name is used for a business that is unrelated to the Respondent and she has refrained from using the word “Younique” on her website because of the dispute with the Complainant.
- Attempts by the Complainant to purchase the Domain name are indicative of the Complainant’s knowledge that the registration is not Abusive.
- The Respondent’s refusal to sell the Domain Name to the Complainant is indicative only of the Respondent’s intent to retain it and/or the failure of the Complainant to make a reasonable offer.
- The Respondent became a Younique Presenter because of the serendipity and coincidence of her having a domain name similar to their brand, which was many months after she registered the Domain Name.
- The Complainant has not taken any action against the Respondent in the last five years which is indicative of there being no adverse effect on its business.
- The Complainant has not evidenced any confusion arising in the last five years as a result of the Respondent’s registration or use of the Domain Name.

c. The Reply

The Complainant assertions in response to the above contentions include the following:

- That the evidence will show that the Complainant made several announcements about its presence in the United Kingdom and it also refers to website traffic in 2018.
- Contrary to the Respondent’s claim that it had not received an offer or made an offer to sell the Domain Name, she had done so via the GoDaddy broker and therefore has no intention to retain the Domain Name for long-term use.

- The Domain Name is directed to a website that promotes a wellness and herbal store which is contrary to the products and services of the Complainant. The website was instigated after the Complainant's cease and desist letter.
- The Respondent should be considered to have known of the Complainant's trade marks because of their notoriety but also because the Complainant registered its International trade mark on 20 December 2013, only a short time before the Domain Name was registered and because of the publicity generated and received by the Complainant.

6. Discussions and Findings

a. General

To succeed in this Complaint, the Complainant must, in accordance with Paragraph 2 of the Policy, prove to the Expert on the balance of probabilities that:

- (i) it has Rights (as defined in paragraph 1 of the Policy) in respect of a name or mark identical or similar to the Domain Name; and
- (ii) the Domain Name in the hands of the Respondent is an Abusive Registration (as defined in paragraph 1 of the Policy).

b. Complainant's Rights

The DRS Policy defines Rights as follows: "Rights means rights enforceable by the Complainant whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning".

The Complainant relies upon its registered trade marks and the use of its YOUNIQUE PRODUCTS trade mark, which in my view are sufficient to meet the definition identified above. For the purpose of analysing whether the Domain Name is identical or similar to the name or mark in which Rights are claimed, one should ignore the .co.uk suffix. In my opinion, the Complainant has established that it has Rights in a mark identical to the disputed Domain Name.

c. Abusive Registration

I now go on to consider the extent to which the Domain Name is an Abusive Registration.

The Complainant asserts that the Domain Name is an Abusive Registration for the reasons identified above. I would comment that on several occasions the Complaint refers to decisions that have been made under the Uniform Dispute Resolution Policy ("UDRP"). Whilst not wholly irrelevant, the policy that those decisions are made pursuant to is not the same as the policy that is applicable to this dispute and I consider that prior decisions that have been made by Nominet Experts are far more persuasive than those made under the UDRP.

The Policy defines an Abusive Registration as –

"a Domain Name which either:

- i. was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; or*
- ii. is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights"*

A fundamental issue that must be determined is whether the Respondent had knowledge of the Complainant's Rights and intended to take unfair advantage of or cause unfair detriment to them. In appeal case DRS 04331 *Verbatim*, the Appeal Panel said the following (N.B the Policy at that time set out the above grounds at Paragraph 3 of the Policy):

"8.13 In this Panel's view the following should be the approach to the issues of knowledge and intent in relation to the factors listed under paragraph 3 of the Policy:

- (1) First, some knowledge of the Complainant and/or its brand/rights is a pre-requisite for a successful complaint under all heads of the DRS Policy other*

than paragraph 3(a) (iv) (giving false contact details). The DNS is a first-come-first-served system. The Panel cannot at present conceive of any circumstances under which a domain name registrant, wholly unaware of the Complainant and its Rights, can be said to be taking unfair advantage of or causing unfair detriment to the Complainant's Rights.

- (2) Secondly, 'knowledge' and 'intention' are pre-requisites for a successful complaint under all heads of paragraph 3(a)(1) of the Policy. The wording of that paragraph expressly calls for the relevant intent, which cannot exist without the relevant knowledge.*
- (3) Thirdly, 'intention' is not a necessary ingredient for a complaint under paragraph 3(a)(ii) of the DRS Policy. The test is more objective than that. However, some knowledge of the Complainant or its name/brand is a pre-requisite.*
- (4) Fourthly, while some knowledge of the Complainant or its name/brand is a pre-requisite for a successful complaint under the DRS Policy (save for a complaint under paragraph 3(a)(iv)), knowledge is not of itself conclusive in favour of the Complainant. The Expert/Appeal Panel will still need to be satisfied that the registration/use takes unfair advantage of or is causing unfair detriment to the Complainant's Rights.*
- (5) Fifthly, when a Respondent denies all knowledge of the Complainant and/or its Rights at the relevant time, that denial is not necessarily the end of the matter. The credibility of that denial will be scrutinised carefully in order to discern whether, on the balance of probabilities, the relevant degree of knowledge or awareness was present. ”*

While subsequent decisions have somewhat diluted the above in respect of automated systems that bid on domain names, the principle largely remains and I see no reason why it would not be applicable in the current dispute.

The evidence that has been submitted by both parties in that regard is less than satisfactory. The Complainant asserts that the Respondent must have known of its business and its brand when the Domain Name was registered in January 2014 because (a) of the notoriety of its business, and (b) its International trade mark filing was registered only a few weeks earlier. However, the evidence that has been submitted within this procedure regarding the former all post-dates the registration of the Domain Name. I have no evidence as to the notoriety of the Complainant's business at or before January 2014 or why such notoriety would have come to the attention of the Respondent at that time. With regard to the registered trade mark, I note from the EUIPO records that in fact it only published the application in February 2014 and therefore I am equally unpersuaded in the absence of any evidence to the

contrary that the application or registration of the trade mark would have been known to the Respondent at the time she registered the Domain Name. On the Respondent's part, she does not expressly deny knowledge of the Complainant's business in January 2014 (although I do take it as implicit from the Response generally that such is the case), but she does explain her reasons for selecting the Domain Name which are unconnected to the Complainant. It is also a fact that she clearly became aware of the Complainant's business at some point because she applied to be a Younique Presenter and I note that she has not explained how or when she became so aware.

On the evidence that I have been provided with, taking into consideration the mark itself and the level of distinctiveness that it has, which I consider not to be particularly high and such that it is possible that a person would conceive of using it without reference to the Complainant, and in the context of the standard that the Complainant is required to meet, namely to prove its case on the balance of probabilities, I am not persuaded that the Respondent had knowledge of the Complainant or its Rights at the time that she registered the Domain Name and therefore conclude the Domain Name was not an Abusive Registration at the time that it was registered.

However that is not the end of the matter, because the Policy provides that a registration may be an Abusive Registration as a result of the use that is made of it. It is clear that at least as early as 1 October 2014 when the Respondent became a Younique Presenter that she was aware of the Complainant's business and she was also aware as a result of the terms and conditions that she signed up to and the subsequent suspension of her account, that they objected to her registration and use of the Domain Name. At that point the requirement in *Verbatim* is met and the Respondent clearly had knowledge. The question that then arises is whether the legitimate registration became illegitimate because of the use made of it.

The only use that the Complainant has evidenced is the redirection of the Domain Name to a website from which the Complainant offers health supplements under the brand AYIZAN. It does not seem to me that such use is likely to cause any confusion with the Complainant's business and in that respect I note that the Complainant has not evidenced any confusion, notwithstanding the registration of the Domain Name taking place over five years ago. In coming to that conclusion I am also mindful of the Complainant's argument that the Domain Name itself rather than the content of the website to which it is directed will cause confusion, but it seems to me that if the registration was legitimate, then one should be very reluctant to conclude that it has become an Abusive Registration absent some other action on the part of the Respondent. In reaching that view I am also conscious that the Complainant is not by any means the exclusive user of the 'Younique' mark.

The Complainant also relies upon the Respondents counteroffer of \$1million to sell the Domain Name as being indicative of the Respondent's bad faith. However, all communications regarding the purchase/sale were instigated by the Complainant including via the GoDaddy broker which the Respondent appears to have known was instigated by the Complainant. In circumstances where the registration and use of a domain name is legitimate, it does not make that registration illegitimate because the registrant is prepared to entertain the possibility of selling it to another party, even where the amount demanded is very high. Such conduct is merely the respondent exercising its lawful right to sell its "asset".

I am not therefore persuaded that the use that has been made of the Domain Name since it was registered by the Respondent is such that it has become an Abusive Registration.

7. Decision

In light of the above conclusions I therefore find that the Complaint does have Rights in respect of a name or mark which is identical to the Domain Name youniqueproducts.co.uk, but that it is not an Abusive Registration. The Complainant's request that the Domain Name be transferred to it is therefore denied.

I would stress that the DRS procedure is largely a paper exercise by which it is difficult to test the veracity of the parties' evidence. In that respect it is to the benefit of a Complainant to provide the expert with clear evidence that supports its case. Where the evidence falls short and a Respondent denies the generalised allegations that have been made by a Complainant, it is very difficult absent circumstances that would make a denial improbable, for example where the Complainant has a famous mark and the Respondent denies knowledge, for an Expert to conclude that it is more probable than not that the Domain name is an Abusive Registration. In a forum where the evidence submitted is more extensive and it allows for the parties evidence to be tested for its truthfulness, a different result might be achieved.

Signed ...Simon Chapman.....

Dated04 Oct 2019.....