CEPANI

THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

DECISION OF THE THIRD-PARTY DECIDER

Braaimaster / Comfort Trade

Case no. 44452/ braaimaster.be

1. The Parties

1.1. Complainant: Geertruida Margaretha SOMBROEK, operating under the name Braaimaster, Herenweg 47-S, 1861PB, Bergen, the Netherlands (the Complainant)

Not represented

1.2. Domain name holder: VOF COMFORT TRADE, Werkhorst 71, 7944AS Meppel, the Netherlands (the Respondent)

Not represented

2. Domain name

Domain name: **braaimaster.be**

Registered on: 11 November 2013

Hereafter referred to as "the Domain Name".

3. Procedure

On 9 July 2018, the Complainant filed a complaint with CEPANI under article 10 of the general terms and conditions of the domain name registration within the ".be" domain governed by DNS BE and in accordance with the CEPANI rules for domain name dispute resolution.

The Respondent filed a Response form on 2 August 2018.

On 2 August 2018 CEPANI informed Mr. Jan Surmont that it has the intention of proposing him as Third-party Decider. On 3 August 2018 Mr. Jan Surmont accepted the appointment as Third-party Decider and provided CEPANI with the declaration of independence.

On 3 August 2018 CEPANI appointed the Third-party Decider and provided him with an electronic copy of the case file.

In an email of 3 August 2018 CEPANI communicated to the Parties that the deliberations shall be closed on 13 August 2018 and that the Third-party Decider must inform the Secretariat of his decision on 27 August 2018 at the latest.

On 6 August 2018, the Complainant asked for retort in accordance with Article 13 of the CEPANI domain name Rules.

On the same day, the Third-party Decider fixed the following procedural calendar:

- the Complainant must submit his response and further documents by 13 August 2018;
- The Respondent must submit his reply and submit further documents by 20 August 2018.

The closing of the deliberations was fixed at 20 August 2018 and the date for forwarding the decision to the CEPANI Secretariat at 3 September 2018 at the latest.

By email of 28 August 2018, the Third-party Decider informed the CEPANI Secretariat that the decision will be postponed until 10 September 2018.

Finally, the decision was postponed until 14 September 2018.

4. Factual Background information

The company "Braaimaster" was established on 1 July 2013 by Mr. Kuin Johannes and acquired on 1 October 2015 by the Complainant, his partner.

The Complainant designs and produces high-quality steel outdoor kitchens inspired on the way of outdoor cooking, as has been done for generations in South Africa. These are called "braais" and are marketed under the "Braaimaster" brand. Complainant is, amongst others, active on the Belgian and Dutch market.

In the past, the Complainant apparently also imported South African braais from the brand "Megamaster".

The Complainant registered the domain name "braaimaster.nl" on 2 May 2013. The website www.braaimaster.nl contains amongst others an online shop where aforementioned braais can be bought.

On 2 March 2016, the European word trademark "braaimaster" was registered, on the name of Johannes Adrianus Kuin.

The Respondent claims to sell South African braais since 2002. Through her website www.braai.nl, various braais are advertised.

The Respondent registered The Domain Name on 11 November 2013. This Domain Name leads to the website of the Respondent www.braai.nl.

On the same date, the Respondent registered the domain name "megamaster.be". On 25 June 2018 it was decided that this domain name had to be transferred to Mega Group Holding (Pty) Limited (CEPANI case n° 44448).

5. Position of the parties

5.1. Position of the Complainant

5.1.1. the Respondent's Domain Name is identical or confusingly similar to a trademark, a trade name, a social name of corporation name, a geographical designation, a name of origin, a designation of source, a personal name or name of a geographical entity in which the Complainant has rights

The Complainant claims that the Domain Name is identical to the corporation name "Braaimaster", the trade name "Braaimaster" and the "Braaimaster", both visually, orally as conceptually.

According to the Complainant, the fact that the trademark was only filed in 2016, does not change the fact that the trade name "Braaimaster", allegedly, has already been used since May 2013.

The Complainant claims that "braaimaster" is not a general term in Belgium, although this could be the case locally in South Africa.

5.1.2. the Respondent has no rights or legitimate interests in the Domain Name

The Complainant claims that the Respondent is not generally known under the Domain Name, is active under the name "Comfort Trade" and distributes the brand "Home Fires". Both parties sell braais and are active in the same Belgian and Dutch market.

The Complainant claims that the Respondent only uses the Domain Name to redirect customers to its own website (www.braai.nl) and to prevent her to connect with her customers.

5.1.3. the Domain Name has been registered or is being used in bad faith

The Complainant claims that the Respondent has registered the Domain Name in bad faith and that the Domain Name is used in bad faith for the following reasons:

- the Respondent is aware of her activities and there are only two distributers of braais in Belgium; the Domain Name is allegedly only registered to disrupt or block the activities of the Complainant;
- both parties advertise in the same journal "Fire & Food";
- in the first years, the Domain Name was not used and in 2017 the Domain Name was only used to redirect customers to the website www.braai.nl; in doing so, customers are misled;
- the Respondent registered at the same time the Domain Name and the domain name "megamaster.be" on the moment that the Complainant imported South-African braais of the brand "Megamaster"; this would prove that the Respondent was aware of the activities of the Complainant and Megamaster; the Complainant refers to the decision that the domain name "Megamaster" had to be transferred by the Respondent (CEPANI case n° 44448);

- both parties negotiated in November 2013 with a Belgian retailer Noki; during these negotiations, the Respondent repeatedly mentioned the name of the Complainant, which demonstrates that the Respondent was aware of the activities of the Complainant; the fact that the Respondent has registered the Domain Name a few hours later, proves that he knew the Complainant and that the registration was done in bad faith.

5.2. Position of the Respondent

The point of view of the Respondent can be summarised as follows.

The complaint was filed five years after the registration of the Domain Name and previously, the Respondent had never received a remark relating to the Domain Name.

The Respondent states that there was no trademark protection at the moment of the establishment of the company of the Complainant and that, before the establishment of the Complainant, she already was active in the sale of braais during more than 10 years. The brand was only registered three years after the registration of the domain name when the Complainant had just started with the sale of her own braais and the holder of the trademark is Mr. Kuin Johannes.

The Domain Name was registered to attract potential customers in Belgium who search for "Braaimaster".

According to the Respondent, braaimaster is a commonly used term in South Africa (someone who operates a braai is a braaimaster) and is directly linked to her activities, namely the sale of braais and workshops relating to braais and a newcomer in the market cannot claim a general term and existing domain.

At the moment that the Domain Name was registered, the Complainant was not yet known by the public, nor by the Respondent.

The Domain Name was linked to the website www.kokenophout.nl from the outset and later to www.braai.nl..

The domain name "megamaster" was allegedly registered because the Respondent considered to import devices of the brand "megamaster". The relevant decision relating to the domain name "Megamaster.be" (CEPANI case 44448) concerns another case and in that case, the Respondent did not object to the transferral of the domain name.

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 with due regard for the Policy and the CEPANI rules for domain name dispute resolution.

In accordance with Article 10b (1) of the Terms and conditions of domain name registrations under the ".be" domain operated by DNS BE, the Complainant has to assert and to prove that:

- *"The Respondent is identical or confusingly similar to a trademark, a tradename, 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 the Complainant has rights; and*
- *The Respondent has no rights or legitimate interests in the domain name; and*
- *The Respondent's domain name has been registered or is being used in bad faith."*

6.1. The Domain Name is identical or confusingly similar to *inter alia, a* trademark, a corporation name or a trade name in which the Complainant has rights

6.1.1. The Complainant is not the holder of the European word trademark "braaimaster" on which she relies, nor is there any evidence of the fact that the Complainant was a licence holder and even less of the fact that such a licence was registered.

The Complainant does not prove that she could assert any rights with regard to said trademark (cfr. CEPANI case n° 4018).

6.1.2. Furthermore, the Complainant relies upon the trade name "braaimaster".

It has to be derived from the documents of the case that the Complainant has to be considered as the holder of the trade name "braaimaster".

The Domain Name is identical to the trade naam "braaimaster". The only difference is the extension of which, in accordance with established case law of CEPANI, abstraction is made when comparing the invoked sign and the Domain Name (see amongst others CEPANI case n° 44030, CEPANI case n° 44455).

When the Domain Name and the trademark are equal, the first condition is met (cfr. CEPANI case n° 44423).

The first condition is therefore met.

6.2. The Respondent has no right or legitimate interests in the Domain Name

Pursuant to Article 10 (b) (3) of the Policy, a respondent's rights or legitimate interest to the domain name can be proven by certain circumstances. Article 10 (b) (3) of the Policy gives a non-exhaustive list of such circumstances:

(i) prior to any notice of the dispute, the respondent 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; or

(ii) the respondent (as an individual, business or other organization) has been commonly known by the domain name, even if he had acquired no trademark; or

(iii) the respondent is making a legitimate and non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark, trade name, social name or corporation name, geographical designation, name or origin, designation of source, personal name of the geographical entity at issue.

6.2.1

Legitimate interest can be demonstrated where prior to any notice of the dispute, the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the *bona fide* offering of goods and services or has made demonstrable preparation to do so.

However, this does not appear to be the case here.

When entering the Domain Name, the internet user is redirected to the website of the Respondent where he promotes goods which are similar to those sold by the Complainant. Such website cannot be considered as a proof of *bona fide* offering of goods and services. There is no factual element supporting the conclusion that there was a necessity for the Respondent to use the tradename "Braaimaster" in relation with its offering of goods (CEPANI case n°44167).

Although the Respondent already registered the domain name "braai.nl" in 2004 and subsequently used the website www.braai.nl to promote braai machines, the Third-party Decider is of the opinion that the name "braai" cannot be considered as sufficiently corresponding to the Domain Name.

6.2.2.

It cannot be derived from the documents of the case that The Respondent is known under the name Braaimaster, nor that he trades under this name.

Furthermore, the Respondent does not produce or deliver products of the brand Braaimaster. The Domain Name is only used as a pass-through to another domain name leading to its own website.

The Respondent is active under the name "Comfort Trade" and sells products of the brand "Home Fires".

The mere fact that persons on Facebook of Instagram post messages with mention #Braaimaster, in no way proves that the Respondent is known under this name.

6.2.3.

The requirement of non-commercial use of the Domain Name is not fulfilled in the present case, since the Respondent uses the Domain Name to lead potential customers to this website www.braai.nl.

The Respondent points to the fact that "braaimaster" is a commonly used term and that this would grant him the right to use this term in relation to the selling of his products. The Respondent refers in particular to a television show from 2012 called "The Ultimate Braaimaster".

Even if it would be the case that the term "braaimaster" is well-known in South-Africa – which in the opinion of the Third-party Decider is not adequately demonstrated by the Respondent – it remains that a term can be commonly used in a specific country, but not automatically in all countries. It does not appear from the documents of the case that the term "braaimaster" is commonly used in the Benelux and in particular in Belgium, which is the relevant territory for .be domain names (cfr. CEPANI case n° 44274).

The mere use of the name "braaimaster" to link to the own website of the Respondent points, in the opinion of the Third-party Decider, to the intention to make potential customers believe that the Respondent is in one way or another connected to "Braaimaster".

6.2.4.

The facts and documents presented by the Respondent are of no nature to conclude that one of the examples listed in article 10 (b) (3) of the Policy is applicable in the present case and the Complainant sufficiently proves that the Respondent has no rights or legitimate interests in the Domain Name.

The second condition is therefore met.

6.3. The Respondent's Domain Name has been registered or is being used in bad faith

The Complainant must prove that the Respondent registered or used the Domain Name in bad faith.

6.3.1.

The documents submitted by the Complainant show that the Respondent was aware of the existence of the Complainant, its activities consisting of selling similar products and the "Braaimaster" trade name used by her.

In an email of 11 November 2013 to the firm Noki, with whom the Respondent hoped to cooperate with, the Respondent writes that she understood that Noki was negotiating with "Braaimaster" in the meantime. Several hours later, the Respondent registered the Domain Name.

The registration in bad faith is strengthened by the fact that the Respondent registered the domain name "Megamaster.be" on the same day, which was later ordered to be transferred by the Respondent because of registration and use of the domain name in bad faith.

6.3.2.

According to article 10, b) 2, 2° of the Terms and conditions, evidence of the use in bad faith can be provided if: "*the domain name is registered in order to prevent the complainant, who is the holder of a mark, trade name, company name or commercial name, geographical indication, designation of origin, source of origin, personal name or name of a geographical entity, to use them and if the domain name holder does this regularly*;"

The Domain Name is linked to the website of the Respondent, www.braai.nl on which he promotes products which are similar to those of the Complainant.

It these circumstances, it may be assumed that the use of the Domain Name by the Respondent constitutes an intentional attempt to attract, for commercial gain, internet users to its website by creating a likelihood of confusion with the tradename "Braaimaster".

Moreover, a recurring pattern can be recognized in the approach of the Respondent. In this respect reference is made to the simultaneous use of the domain name "Megamaster" to attract potential clients to his website www.braai.nl.

Therefore, the third condition is also met.

7. Decision

As the three conditions of Article 10 (b) (1) have been fulfilled, the Complaint is founded.

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 " **braaimaster.be**" domain name is to be transferred to the Complainant.

Turnhout, 14 September 2018

Jan, SURMONT
The Third-party Decider