

DECISION OF THE THIRD-PARTY DECIDER

SOCIETE NOUVELLE DEL ARTE SAS / Mr. Arafat OZTURK

Case no. 44409: del-arte.be

1. The parties

1.1. Complainant: **SOCIETE NOUVELLE DEL ARTE SAS**
with registered office at 35200 Rennes (France), 52
avenue du Canada.
listed in the French trade register under SIRET number
424 886 653 00015.

hereinafter referred to as "the Complainant"

Represented by:

AARPI Clairmont Avocats, Mrs. CABANNE-
DESGRANGES Sandra, Attorney at law,
with office at 75008 Paris (France), 9 rue Pierre le
Grand.

1.2. Licensee: **Mr. Arafat OZTURK**
residing at 44100 Malatya, Merkez (Turkey),
Dabakhane Mah. Ptt Sok

hereinafter referred to as "the Licensee"

2. Domain name

Domain name: "del-arte.be"
Registered on: April 27th 2016

hereafter referred to as "the Domain name "

3. Background to the case

- 3.1. On July 22th 2016 the Complainant filed a complaint with CEPANI according to the CEPANI Rules for Domain Name Dispute Resolution ("the Rules") and the Dispute Resolution Policy of DNS BE, incorporated in its Terms and Conditions for domain name registrations under the ".be" domain operated by DNS ("the Policy").

The Complainant requests that the Domain name shall be transferred to the Complainant.

The complaint was notified to the Licensee and the latter was invited to reply.

No response was submitted by the Licensee.

- 3.2. On September 5th 2016 and pursuant to Article 7.2 of the CEPANI Rules for Domain Name Dispute Resolution, CEPANI appointed the Third-party decider to settle the dispute involving the aforementioned Domain name.

CEPANI duly received the declaration of independence of the Third-party decider. By e-mail and registered letter dated September 5th 2016 CEPANI informed the Complainant and the Licensee of the appointment of the Third-Party Decider.

CEPANI stated in this e-mail that the deliberations should be concluded by September 12th 2016 and that the Third-party decider must inform the CEPANI Secretariat of his decision by September 26th 2016 at the latest.

- 3.3. On September 12th 2016 and according to Article 13 of the CEPANI Rules for Domain Name Dispute Resolution, the deliberations were closed;

The Licensee did not submit a response on the Complainant's arguments and motifs.

- 3.4. By Registered letter dated September 5th 2016 CEPANA transferred the entire file concerning the Complaint to the Third-party decider, including the complaint form and annexes, namely:

- Annex A : Whois for <del-arte.be> on the DNS website www.dns.be
- Annex B : Details about the Group LE DUFF's activities
- Annex C : Screen shots from Group LE DUFF website www.groupeleduff.com
- Annexes D : Details about the DEL ARTE's activities (D1-D9)
- Annexes E : Complainant's "DEL ARTE" trademarks (E1-E7)
- Annexes F : Complainant's "DEL ARTE" domain names (F1-F6)
- Annex G : Extracts of the website <https://www.google.com.br/> and <https://www.google.com.tr>
- Annex H : Screen shots of www.del-arte.be
- Annex I : Copy of the printout of the database searches (I1-I3)
- Annex J : Formal notice to the Respondent, 9/06/2016

- 3.5. On basis of the file, the Third-Party Decider conclude that CEPANI has adhered to the Rules in administering this case.

4. Factual information

- 4.1. Complainant is a French company which owns and manages the Italian-style restaurant chain "Del Arte". The company is one of the subsidiaries of the Group Leduff which is specialised in restaurants and bakeries worldwide, including Belgium and Turkey. Complainant is currently developing its activity both in France and abroad.

Complainant is the proprietor (of amongst others) of the following trademarks, registered for classes 29, 30 and 42:

- The international registration of the verbal trademark PIZZA DEL ARTE, filed on March 15th 1984 and registered under n° 483478 (Annex E1 of the Complainant);
- The European Union verbal trademark PIZZA DEL ARTE, filed on March 30th 1999 and registered under n° 1123256 (Annex E2 of the Complainant);
- The international registration of the verbal-figurative trademark



, filed on August 29th 2001 and registered under n° 767986 (Annex E3 of the Complainant).

Complainant is the proprietor of the following trademarks, registered for classes 29, 30 and 43:

- The international registration of the verbal-figurative



trademark, filed on April 25th 2007 and registered under n° 929985 (Annex E5 of the Complainant);

- The international registration of the verbal-figurative trademark



, filed on February 8th 2011 and registered under n° 1070709 (Annex E6 of the Complainant);

- The international registration of the verbal-figurative



trademark *Toutes mes envies d'Italie*, filed on February 8th 2011 and registered under n° 1070708 (Annex E7 of the Complainant).

Finally Complainant is the proprietor of the following trademark, registered for class 38:

- The European Union verbal trademark PIZZA DEL ARTE, filed on January 9th 2003 and registered under n° 3001088 (Annex E4 of the Complainant).

Complainant is also the owner (of amongst others) of following domain names:

- "delarte.fr", domain name registered on October 27th 2003 (Annex F1 of the Complainant);
- "del-arte.fr", domain name registered on December 19th 2003 (Annex F2 of the Complainant);
- "del-arte.net", domain name registered on June 7th 2010 (Annex F3 of the Complainant);
- "del-arte.eu", domain name registered on June 7th 2010 (Annex F4 of the Complainant);
- "pizzapastadelarte.com", domain name registered on November 22nd 2012 (Annex F5 of the Complainant);
- "delarte.pizza.txt", domain name registered on December 31st 2015 (Annex F6 of the Complainant).

4.2. The Licensee is a natural person with an address in Turkey.

He registered the domain name "del-arte.be" on April 27th 2016.

5. Position of the parties

5.1. Position of the Complainant

5.1.1. The language

The Complaint has been submitted in English since the Whois database indicates English as language (art. 12.1. of the Rules and 10 (a) of the Policy).

5.1.2. In general

The Complainant states that the registration and the use of the Domain name is illicit. Complainant's argumentation is based mainly on the infringement of the trademarks and on the registration and use of the Domain name in bad faith.

Complainant requests the Third-party decider to order the transfer of the Domain name considering the conflict and alleged misuse of the company and trading name of the Complainant. The Complainant therefore applies to Article 10 of the Policy.

5.1.3. Arguments on the merits

The Complainant argues in its request that the conditions of Art. 10 (b)1 of the Policy are met since:

- (i) the Domain name is identical and/or confusingly similar to the trademarks registered in the name of the Complainant and to its company name;
- (ii) the Licensee has no rights or legitimate interests in the Domain name;
- (iii) the Licensee's Domain name has been registered or is being used in bad faith.

5.1.4. The costs of the proceedings

As the Licensee has not voluntarily proceeded with the execution of the relief sought (i.e. the transfer of the Domain name) within seven calendar days, as offered by the Complainant, the Licensee will be required to pay the costs of the proceedings to DNS Belgium in case the Third-party decider will decide that the Domain name has to be transferred. In this case DNS Belgium shall repay the total of the costs paid by Complainant in order to start the dispute resolution and reclaim the thus repaid costs from the Licensee (art. 3.2.9. of the Rules and 10 (k) of the Policy).

5.2. Position of the Licensee

The Licensee did not submit a Response within twenty-one calendar days of the date of commencement of the proceeding (Art. 6.1. of the Rules).

As a consequence, the dispute shall only be decided on the basis of the Complaint (Art. 6.4. of the Rules).

6. Discussion and findings

6.1. Language of the procedure

Art. 12.1. of the Rules stipulates that *"unless otherwise agreed by the Parties, the language of the proceeding for the Domain name in dispute shall be the language mentioned in the WHOIS database on the DNS website www.dns.be. The Third-Party Decider may select a different language in exceptional cases."* (see also art. 10 (a) of the Policy)

The Third-Party Decider confirms that English has to be the language of the proceeding as the WHOIS database mentions English as language with regard to the registrant and to the onsite contact (Annex A of Complainant).

Since the Licensee did not send a response nor after the formal notice of Complainant of June 9th 2016 (Annex J of Complainant) nor during this proceeding, the Third-party decider has no reason to select a different language.

Most of the annexes of Complainant have been submitted in English. A (summarized) translation to English is provided with the documents in French. Therefore all annexes of Complainant are allowed in the debates (art. 12.2. of the Rules).

6.2. On the merits

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.

Pursuant to Article 10 (b) 1 of the Terms and conditions of domain name registrations under the ".be" domain operated by DNS BE, the Complainant must provide evidence of the following:

- *" the licensee's domain name 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 licensee has no rights or legitimate interests in the domain name; and*
- *the licensee's domain name has been registered or is being used in bad faith."*

6.2.1. Identical or confusingly similar to

According to the Cepina case-law, country code top-level domains (ccTLs), such as the suffix "be", are not relevant for establishing the identity or the similarity between a domain name and a trademark (see amongst other cases, nr. 44003 *Pernod Ricard / Worldsites Internet Networks*, April 11th 2001 and nr. 44059 *Province du Brabant wallon / Marie-Claire Suigne*, April 28th 2005).

The addition of a hyphen between words is also irrelevant in this respect (see amongst other cases, nr. 44054 *The European Omnibus Survey / Magyar Gallup Intezet*, January 25th 2005 and nr. 44387 *Eiffage Benelux / Hugues Patrick*, September 22nd 2015).

In the present case the Third-party decider considers that the evidence provided by the Complainant sufficiently demonstrates the Complainant to be the owner of several trademarks referring to the activities of the DEL ARTE restaurant chain. DEL ARTE is always a part of the verbal and verbal-figurative trademarks. All the trademarks are prior to the registration of the domain name "del-arte.be". Complainant also sufficiently demonstrates to be the owner of the company name DEL ARTE.

The Third-party decider is of the opinion that the domain name "del-arte.be" is confusingly similar to (i) the Complainant's prior trademarks referring to the activities of the DEL ARTE restaurant chain and (ii) the company name DEL ARTE.

The Third-party decider therefore concludes that the first condition is met.

6.2.2. Rights and legitimate interests

- A) According to Article 10 (b) 1 of the Policy the Complainant has to prove that the Licensee has no rights or legitimate interests to the Domain name.

Considering the difficulty of proving such a negative fact ("*negativa non sunt probanda*"), this burden of proof is considered to be satisfied when, taking into account all the facts of the case, the Complainant could credibly state that he is unaware of any reason or circumstance which could be indicative of such a right or legitimate interest (see amongst other cases nr. 44039 *Consitex S.A. / Piero Gerolanda*, November 21st 2003; nr. 44030 *S.A. Le Petit-Fils de L.U. Chopard & Cie / Joël GLECKER (OROLOGIO NV)*, February 17th 2003 and nr. 44013 *Guinness UDV North America Inc. / Olivier Noël*, February 7th 2002).

Art. 10 (b) 3 of the Policy however provides that the Licensee can prove that he has a right or a legitimate interest to the Domain name due to the following circumstances:

- "*prior to any notice of the dispute, he used the domain 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;*

- *he has been commonly known by the domain name, even if he has acquired no trademark;*
- *he 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 of origin, designation of source, personal name or name of the geographical entity at issue."*

B) In this case the Complainant sufficiently indicates why it believes that the Licensee has no rights or legitimate interests to the Domain name, *i.e.* considering the following facts:

- the Licensee is not known under the name DEL ARTE;
- the Licensee is not related to the business of Complainant and doesn't carry out any activity for or has any business with Complainant;
- the Licensee has not been licensed, contracted or permitted by the Complainant to register any domain name containing the DEL ARTE trademarks;

The Third-party decider also considers that the Licensee did not submit a Response in order to demonstrate his rights or legitimate interests to the Domain name. The website linked with "del-arte.be" is a parking page and therefore not used to offer *bona fide* goods or services.

According to the Third-party decider, therefore, the second condition is also met.

6.2.3. Registration in bad faith

A) The evidence of a registration or use in bad faith of a domain name can be provided by the circumstances mentioned in the non-exhaustive list under art. 10 (b) 2 of the Policy, *i.e.*:

- *"circumstances indicating that the domain name was registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name to the complainant or a competitor of the complainant;*
- *the domain name was registered in order to prevent the owner of the trademark from reflecting this name in a corresponding domain name;*
- *the domain name was registered primarily for the purpose of disrupting the business of a competitor;*
- *the domain name was intentionally used to attract, for commercial gain, internet-users to the licensee's website or other on-line location, by creating a likelihood of confusion with the complainant 's trademark;*

- *the licensee registered one or more personal names without the existence of a demonstrable link between the licensee and the registered domain names."*

Bad faith can also be presumed when other elements of facts or circumstances exclude any reasonable doubt in this respect. Indeed, Article 10 (b) 2 of the Policy sets out, without limitation, certain circumstances which, if found, are deemed to be evidence of use and registration in bad faith. The circumstances enlisted are not exclusive but merely intended to assist the parties in establishing the strengths or weaknesses of their position (WIPO Case nr. D2000-1228 *Clerical Medical Investment Group Limited / Clericalmedical.com (Clerical & Medical Services Agency)*, November 28th 2000; CEPANI case nr. 44010 *Red Bull GmbH / Kees Rasenberg*, October 25th 2001, CEPANI Case nr. 44002 *Vlaamse Radio en Televisieomroep / Securax BVBA*, March 5th 2001). Bad Faith is an element in fact and may therefore be evidenced by all means, including presumptions and circumstances that indicate with reasonable degree of certainty, the existence of bad faith. The assertion of bad faith is not disputed by the Licensee since he did not submit any Response.

B) In the case at hand, the Complainant arguments that following circumstances demonstrate that the Domain name has been registered or used in bad faith:

- the notoriety of the Complainant's trademarks is such that it will be more unlikely that the Licensee registered the Domain name in good faith;
- the Domain name is on sale at a very high price which confirms that the Domain name has been registered for the sole use of selling it to the Complainant or a competitor of the Complainant;
- the website www.del-arte.be is "parking page" with sponsored links creating confusion with the Complainant's trademarks; the Licensee is earning pay-per-click revenue from the advertising links on this "parking page" for commercial gain that disrupts the business of Complainant;
- the Complainant believes that the Licensee has registered on the same day the domain names "del-arte.be", "del-arte.it" and "del-arte.es" which demonstrates the bad faith of the Licensee.

The mere fact that the Licensee had knowledge or should have knowledge of the existence of a trademark or a company name before the registration of the domain name does not necessarily implicate that the registration has been done in bad faith (case nr. 44010 *Red Bull GmbH / Kees Rasenberg*, October 25th 2001). Del(l) arte is after all a kind of "common expression" widely known and used.

The Third-party decider also considers that the fact that the three domain names "del-arte.be", "del-arte.es" and "del-arte.it" are hosted on the same webserver in Hong Kong, that they have been registered on the same day and that they refer to "parking pages" with the same links, does not actually proof that the three registrars refer to the same person, i.e. the Licensee. Nevertheless they may be strong indications that the domain name "del-arte.be" might have been registered in bad faith. In this respect it also relevant

to mention that the Complainant did not receive any response on the formal notice sent on June 9th 2016 to the provided e-mail addresses of the registrars of "del-arte.be" (the Licensee) and "del-arte.es".

However the Third-party decider is of the opinion that the Complainant does provide sufficient evidence demonstrating that the registration of the Domain name was made in bad faith as the presence of one of the circumstances cited under Art. 10 (b) 2 of the Policy is sufficient to demonstrate that the Domain name is registered or used in bad faith.

The Complainant points out that the Domain name is for sale at the price of 3.600,- euros – an amount that exceeds the costs directly related to the acquisition of the Domain name – as shown on the "parking page". This is already sufficient to demonstrate the in bad faith registration or use of a domain name according to the Cepina case-law (amongst others, case nr. 44025 *Allianz Aktiengesellschaft / Constantin European Internet Club ASBL*, January 2nd 2003; case nr. 44285 *Crohn en Colitis Ulcerosa Vereniging vzw / Roger Overdevest*, December 19th 2012; nr. 44279 *Transfer BVBA / Marcus Jank*, October 10th 2012).

As demonstrated by the Complainant, the website www.del-arte.be is only a "parking page", proposing commercial links. This fact clearly establishes that the Licensee registered and/or uses the domain name "del-arte.be" intentionally to attract, for commercial gain, internet-users to the Licensee's website www.del-arte.be or to other online locations, by creating a likelihood of confusion with the complainant's trademark (see forth circumstance cited under Art. 10 (b) 2 of the Policy).

As a result the Third-party decider concludes that the third condition is also met.

7. Decision

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 "del-arte.be" domain name is to be transferred to the complainant.

Antwerpen, September 21st 2016

Francis de Clippele
The Third-party decider
(signature)

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