

**CANADIAN INTERNET REGISTRATION AUTHORITY
DOMAIN NAME DISPUTE RESOLUTION POLICY**

DECISION

Domain Name: keencanada.ca

Complainant: KEEN, Inc.; KEEN Canada Outdoor, ULC

Registrant: Daniel Joseph

Registrar: MyID.ca

Provider: British Columbia International Commercial Arbitration Centre

Sole Panelist: Eric Macramalla

A. THE PARTIES

1. The Complainant is KEEN, Inc. and KEEN Canada Outdoor, ULC (the “Complainant”).
2. The Registrant is Daniel Joseph (the “Registrant”).

B. DISPUTED DOMAIN NAME & REGISTRAR

3. The disputed domain name is keencanada.ca (the “Domain Name”) and the Registrar is MyID.ca.

C. PROCEDURAL HISTORY

4. This is a dispute resolution proceeding initiated pursuant to the *CIRA Domain Name Dispute Resolution Policy* (the “Policy”) and the *CIRA Policies, Rules, and Procedures - CIRA Domain Name Dispute Resolution Rules* (the “Rules”). By registration of the Domain Name with the Registrar, the Registrant agreed to the resolution of this dispute pursuant to the Policy and the Rules.
5. The Complainant filed its complaint (the “Complaint”) on February 27, 2015. The Date of Commencement of the proceeding was March 2, 2015,
6. The Registrant did not file a Response.
7. On April 1, 2015, the Panel was appointed. As prescribed by the Policy, the Panel has declared to the Provider that it can act impartially and independently in connection with this matter, and that there are no circumstances known to the Panel which would prevent it from so acting.

D. CANADIAN PRESENCE REQUIREMENTS: ELIGIBILITY OF THE COMPLAINANT

8. The Complainant is the owner of a Canadian trademark registration KEEN, Registration No. TMA580,122. The Panel is therefore satisfied that the Complainant is eligible to initiate these proceedings.

E. THE POSITIONS OF THE PARTIES

The Complainant's Position

9. The Complainant has manufactured and sold footwear, bags, and clothing under the trade name and trademark KEEN throughout the world starting in 2003 and in Canada since 2005. KEEN-branded products are available through (a) KEEN-owned websites, including www.KEENFootwear.com and www.KEENfootwear.com/en-ca, (b) more than 5,000 authorized online retailer websites, and (c) brick-and-mortar stores in more than 70 countries. In Canada, Complainant's products are sold at more than 639 retailers, including such well-known retailers as Mountain Equipment Co-Op, Atmosphere/Sport Chek, The Shoe Company, SAIL Outdoors, and Cabela's Canada.
10. The Complainant is the owner of the Canadian trademark registrations KEEN, Registration No. TMA580,122, KEEN, Registration No. 869419, KEEN Design, Registration No. TMA788,968, KEEN.WARM, Registration No. TMA869,121 and KEEN.CORK, Registration No. TMA797,450 (the "KEEEN Trademarks").
11. In the United States and elsewhere, Complainant began using the word mark KEEN and the logo on footwear in March 2003, and expanded use of the marks to bags, backpacks and totes in 2007, and to clothing in 2013. In Canada, Complainant began using the word mark KEEN and the logo on footwear in 2005, and expanded use of the marks to bags, backpacks and totes in 2007 and to clothing in 2013. Complainant has invested considerably in growing the KEEN brand in Canada and elsewhere. Annually Complainant spends approximately \$1.0 million (CAD) in Canada on marketing and advertising efforts.
12. On information and belief, Complainant's former employee registered the Disputed Domain Name prior to 2006. Due to a change in personnel, Complainant inadvertently failed to renew the Disputed Domain Name before it expired in early 2014. A signed Affidavit of Adam Kramer, Complainant's Systems Administrator, explaining Complainant's ownership of the Disputed Domain Name is provided for reference as Exhibit 4. Registrant registered the Disputed Domain Name on May 17, 2014 when it became available after Complainant's inadvertent failure to renew.
13. Moreover, the Disputed Domain Name was an important part of Complainant's marketing strategy in Canada at least as early as 2006. Complainant made a significant investment in promotional items, motor vehicle wraps and event tents, among other items, that included the Disputed Domain Name. Images of such marketing materials are provided for reference as Exhibit 5. Prior to Complainant's inadvertent failure to renew the Disputed Domain Name, if a consumer went to the Disputed Domain Name, the consumer was redirected to Complainant's Canadian online sales page, www.KEENfootwear.com/en-ca.
14. The Registrant is using the Disputed Domain Name to host reviews for Complainant's products. The Registrant uses links to redirect these consumers from the Disputed Domain Name to Amazon.com and Registrant receives a fee each time a redirected consumer purchases Complainant's products on

Amazon.com. Therefore, Registrant is leveraging Complainant's goodwill in its name and trademarks for Registrant's commercial gain.

15. The Domain Name is confusingly similar with the KEEN Trademarks. The Registrant does not have a legitimate interest in the Domain Name as it is not licensed, or otherwise authorized, to use the KEEN Trademarks. The Registrant registered the Domain Name in bad faith, namely to intentionally attempt to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement.
16. The Complainant is seeking the transfer of the Domain Name.

The Registrant's Position

17. The Registrant did not file a formal response.
18. Since the Registrant has not submitted a response to the Complaint, the Panel shall decide the Proceeding on the basis of the Complaint. Notwithstanding the absence of a response, the proceedings shall be decided on the merits of the case.

F. DISCUSSION & REASONS

19. In accordance with paragraph 4.1 of the Policy, to succeed in this proceeding, the Complainant must prove, on a balance of probabilities, that:
 - (a) the Registrant's Domain Name is Confusingly Similar to a Mark in which the Complainant had Rights prior to the date of registration of the domain name and continues to have such Rights; and
 - (b) the Registrant has registered the domain name in bad faith as described in paragraph 3.5 of the Policy;

and the Complainant must provide some evidence that:
 - (c) the Registrant has no legitimate interest in the Domain Name as described in paragraph 3.4 of the Policy.

CONFUSINGLY SIMILAR - PARAGRAPH 3.3

20. In order to satisfy this branch of the test, the Complainant must demonstrate (i) that it has rights in a mark, (ii) that the rights in its mark predate the registration date of the Domain Name, and (iii) that the Domain Name is confusingly similar with the disputed domain name.

Rights in the Marks & Rights that Predate the Domain Name Registration Dates

21. Where the Complainant relies upon a trademark registered prior to the domain name registration date, the Policy does not require or permit a Panel to go behind the registration to determine whether the mark is valid or invalid based upon lack

of distinctiveness or non-use. In cases where a trademark registration matured to registration after the domain name registration date, or the Complainant is relying on common law rights, it must establish rights that predate the domain name registration.

22. The Complainant has established prior trademark rights by virtue of its Canadian trademark registrations that predate the domain name registration date of May 7, 2014.

Confusingly Similar

23. As per paragraph 3.3 of the Policy, a domain name will be found to be confusingly similar with a mark if the domain name so nearly resembles the mark in appearance, sound or in the ideas suggested by the mark so as to be likely to be mistaken for the mark.
24. Pursuant to paragraph 1.2 of the Policy, a domain name is defined as the second level domain (the portion that immediately precedes the dot-ca suffix).
25. The test to be applied when considering “confusingly similar” is one of first impression and imperfect recollection. The Complainant must prove, on a balance of probabilities, that a person, as a matter of first impression, knowing the Complainant’s corresponding marks only, and having an imperfect recollection of the marks, would likely confuse the Domain Name for the Complainant’s marks based upon the appearance, sound or the ideas suggested by the mark.
26. It should be noted that the test for confusion under the Policy is not the same test for confusion set out under the Canadian *Trademarks Act*. Under the Section 6(5) of the *Trademark Act*, when assessing the likelihood of confusion between marks, the factors to consider are as follows: (a) the inherent distinctiveness of the marks and the extent to which they have become known; (b) the length of time the marks have been in use; (c) the nature of the wares, services, or businesses; (d) the nature of the trade; (e) the degree of resemblance between the marks in appearance or sound or in the ideas suggested by them; and (f) the surrounding circumstances.
27. In contrast, the Policy provides that confusion is established if a domain name so nearly resembles a mark in appearance, sound or in the ideas suggested. This is similar to the test set out under Section 6(5)(e) of the *Trademarks Act*. However, the remaining factors as set out under the *Trademarks Act* do not apply to the assessment of confusion under the Policy. The Policy’s summary proceedings are ill-suited for the in-depth and traditional confusion analysis contemplated by the *Trademarks Act*.
28. The Domain Name incorporates the entirety of the KEEN trademark. Further, the element “canada” suggests that the Domain Name resolves to the Complainant’s Canadian website. While “keen” by itself is a dictionary term, “keen” together with “canada” is more likely to invoke a company name.

29. Under the circumstances, the Panel concludes that the Domain Name is confusingly similar with the Complainant's KEEN Trademarks given that the Domain Name so nearly resembles the KEEN Trademarks in appearance, sound and in the ideas suggested so as to be likely to be mistaken for the mark.

Conclusion - Confusion

30. The Panel finds that the Domain Name is confusingly similar with the KEEN Trademarks in which the Complainant had rights prior to the registration date of the Domain Name, and continues to have such rights.

BAD FAITH REGISTRATION

31. The Complainant has alleged that the Domain Name was registered in bad faith pursuant to paragraph 3.5(d) of the Policy, namely that the Registrant registered the Domain Name to intentionally attempt to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's marks as to the source, sponsorship, affiliation, or endorsement.
32. Given that it is comprised the KEEN trademark together with the word "canada", the Domain Name suggests that it resolves to the Complainant's Canadian website. Under the circumstances, the Panel is of the view that the Domain Name is likely to confuse potential consumers into believing that the Registrant is somehow affiliated with, or endorsed by, the Complainant. Further, the Registrant is using the Domain Name to generate referral fees by resolving the Domain Name to a website featuring the Complainant's products and thereafter taking the end user to Amazon. In this case, the Panel concludes that bad faith does indeed exist as per paragraph 3.5(d).
33. In light of the foregoing, the Panel finds that the Complainant has established bad faith as per paragraph 3.5(d).

LEGITIMATE INTEREST

34. The final element to determine is whether the Registrant has a legitimate interest in the Domain Name.
35. As per paragraph 4.1 of the Policy, the Complainant must provide "some evidence that the Registrant has no legitimate interest in the domain name as described in paragraph 3.6".
36. Once this onus has been discharged by the Complainant, the Registrant may still succeed if it can show, on a balance of probabilities, that it has a legitimate interest in the Domain Name pursuant to paragraph 3.4.
37. The Panel finds that the Complainant has provided sufficient evidence that the Registrant does not have a legitimate interest in the Domain Name. The Complainant did not authorize the registration and the website is likely to mislead the public into believing that the Registrant is affiliated with, or endorsed by, the Complainant.

38. The Registrant did not file a Response.
39. The Panel finds that the Registrant does not have a legitimate interest in the Domain Name.

DECISION & ORDER

40. For the reasons set out herein, the Panel decides this dispute in favour of the Complainant.
41. Pursuant to paragraph 4.3 of the Policy, the Panel orders the domain name keencanada.ca transferred to the Complainant.

Dated at Ottawa, Ontario, Canada, this 23rd day of April, 2015.



Eric Macramalla
Sole Panelist