



BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

DECISION OF THE THIRD-PARTY DECIDER

Gallup Inc. – Gallup GmbH / European Omnibus Survey S.C.R.L.

Case no. 44052: gallup.be

1. The parties

1.1. Complainant: Gallup Inc., US company established under Delaware law, with offices at 1001 Gallup Drive, Omaha, Nebraska 68102, United States of America,

and,

Gallup GmbH., company established under German law, with offices at 14467 Potsdam, Berliner Strasse 62, Germany,

Hereafter jointly referred to as the "Complainant",

Both represented by:

Mr. Paul Maeyaert, Mr. Philippe Carreau and Mr. Michel Draps, attorneys, with office at 1080 Brussels (Belgium), Avenue du Port 16.

1.2. Licensee: The European Omnibus Survey s.c.r.l., with registered office at 1300 Wavre (Belgium), Place Henri Berger 12/1, company number 0428913808,

Represented by:

Mr Flip Petillion, attorney, with office at 1170 Brussels (Belgium), Chaussée de la Hulpe 187.

2. Domain name

Domain name: "gallup.be"
Registered on: 31 January 2001

hereafter referred to as the "Domain Name".

3. Background to the case

On 8 November 2004, the Complainant filed its complaint with CEPANI.

On 30 November 2004, the Respondent filed its response with CEPANI.

On 12 December 2004, the Third-Party Decider was appointed to settle the dispute.

On 7 December 2004, the Complainant filed a request to reply to Licensee's Response.

On 9 December 2004, the Third-Party Decider granted this request. On 17 December 2004, the Third-Party Decider allowed the Complainant to file a reply no later than 10 January and allowed the Licensee to file a last reply no later than 31 January.

The Complainant's reply was dated 7 January 2005; the Licensee's last reply was dated 28 January 2005.

Notwithstanding the Third-Party Decider's decision of 17 December 2004, the Complainant filed a response to the Licensee's reply of 28 January 2005 on 1 February 2005, followed by an ultimate response by the Licensee on 11 February 2005. Because the Third-Party Decider had not allowed the Complainant to file a last response, his response of 1 February 2005 and the ultimate reply of the Licensee of 11 February 2005 have been disregarded by the Third-Party Decider.

4. Factual information

(a) The Complainant

The Complaint was filed by two parties: the U.S. company Gallup Inc. and the German company Gallup GmbH. Both complainants (hereafter jointly referred to as the "Complainant") are part of a group of related companies that specialise in opinion polling and market studies. The founder of one or more of the companies of what can be called the Gallup Group is Dr. George H. Gallup, who developed particular opinion polling methods in the 1930s.

The Complainant has the following trademark rights on which its Complaint is based:

- The trademark GALLUP, registered in the Benelux under nr. 540.744, application date 11 October 1993, for class 35 services (in the name of Gallup Inc.),
- The trademark GALLUP, registered in the Benelux under nr. 35.278, application date 28 May 1971, for class 16 products (in the name of Gallup GmbH),
- The trademark GALLUP, registered in the Benelux under nr. 476.112, application date 20 March 1990, for class 35 services (in the name of Gallup GmbH).

The Complainant asserts that the commercial name GALLUP, which is identical to the trademarks on which the Complaint is based, has been used since 1935, first in the United States and later worldwide, including in the Benelux, in the sector of opinion polls.

The GALLUP trademark is a well known trademark, according to the Complainant, given its intensive use amongst others in the media, and has been registered by companies of the Gallup Group in more than 90 countries.

The Complainant and affiliated companies also own various domain names incorporating the word GALLUP, including "gallup.com", "gallup.info", "galluponline.com" and "gallup-poll.com" (registered by Gallup Inc.) and "Gallup.de" (registered by Gallup GmbH).

(b) The Licensee

The Licensee is the Belgian company European Omnibus Survey S.C.R.L., which registered the Domain Name under its trade name EOS Gallup Europe according to the DNS Belgium Who Is database. The Licensee is also active in the business of conducting public opinion polls and market research.

The Licensee has, amongst other rights, the following rights that are relevant to these proceedings:

1. Trademark rights:

- The trademark GALLUP EUROPE (figurative), registered in the Benelux under nr. 727.700, application date 28 January 2003, for class 35 and 42 services;
- The trademark EOS GALLUP EUROPE (figurative), registered in the Benelux under nr. 486.716, application date 5 September 1990, for class 35 services;
- The trademark EOS GALLUP EUROPE (figurative), registered as an international trademark under nr. 568.130, application date 20 February 1991, for class 35 services.

The Licensee applied for several Community Trademarks, such as the figurative mark GALLUP EUROPE nr. 32131196 filed on 4 June 2003 for class 35 and 42 services and the figurative mark EOS GALLUP EUROPE nr. 3027257 filed on 28 January 2003 for the class 35 and 42 services, but due to the opposition of third parties the Licensee's Community Trademarks have not yet been registered.

2. Trade name rights: the Licensee asserts that it has been using the trade names GALLUP EUROPE and EOS GALLUP EUROPE since 1991.

The Licensee also owns various domain names incorporating the "Gallup" word, including "gallupeurope.be", "gallupeurope.com", "eosgallupeurope.be" and "eosgallupeurope.com". The Licensee uses these domain names to promote its services on a website.

5. Position of the parties

5.1. Position of the Complainant

- (i) The Licensee's Domain Name is identical to the Complainant's trademarks

The Complainant claims that the Domain Name is identical to the GALLUP trademarks. The suffix ".be" should not be taken into consideration in deciding whether the domain name is identical to the trademark (cf. Cepina cases nos. 4021 ("napster.be"), 4025 ("allianz.be") and 44030 ("chopard.be")).

- (ii) The Licensee has no rights or legitimate interests in the Domain Name

The Complainant asserts that the Licensee does not have any rights or legitimate interests in the disputed Domain Name. To support this conclusion the Complainant developed the following arguments:

- The Licensee does not own any trademark merely consisting of the word GALLUP;
- The Licensee has never received any authorisation from the Complainant to use the GALLUP trademarks;
- The Licensee has never conducted its business under the trade name GALLUP, but has used other names such as “The European Omnibus Survey”, “EOS” or “EOS Gallup Europe”. Such use is illustrated by the Licensee’s registration of the domain names “eosgallupeurope.be” and “eosgallupeurope.com” and of the Benelux trademark EOS GALLUP EUROPE. The Complainant disputes that the Licensee used the name “Gallup Europe” as such, i.e. not preceded by “EOS”;

The Licensee contradicts itself when it claims on the one hand that the word GALLUP is generic, while on the other hand it has registered the trademark GALLUP EUROPE, which consists of the allegedly generic word GALLUP and the merely descriptive word EUROPE;

- Finally, the Licensee has never made reference to the Domain Name in public documents or in any publicity, and always referred to its other domain name “eosgallupeurope.com”. This “hidden use” of the Domain Name confirms that the Licensee is aware of the “illegal character of the Domain Name”.

- (iii) The Domain Name has been registered or is being used in bad faith

The Complainant puts forward several arguments to show that the Licensee registered or used the Domain Name in bad faith.

- The Domain Name was registered primarily for the purpose of disrupting the business of a competitor. The Licensee knew the GALLUP trademark of its competitor (the Complainant), but nevertheless registered the Domain Name, which merely consists of the trademark. By doing so, the Licensee, who is not known as “GALLUP”, deliberately sought to confuse the public, to create the impression that it belonged to the Gallup Group and to lure the Complainants’ (potential) public to its own website.
- The Domain Name was registered in order to prevent the Complainant from using the GALLUP trademark in the corresponding domain name.
- The Licensee also prevented the Complainant from benefiting from the advertising and economic functions of the trademark.

5.2. Position of the Licensee

- (i) The identity or confusing similarity between the Domain Name and the trademarks

The Licensee does not dispute that the Domain Name is identical to the GALLUP trademarks to which the Complainant owns valid rights.

(ii) The Licensee has rights or legitimate interests in the disputed Domain Name

The Licensee asserts that it does have rights, or at least legitimate interests, in the disputed Domain Name as:

- The word Gallup is a generic term meaning “opinion poll” and can therefore be used by anyone. Several dictionaries list the word Gallup and several companies not related to the Complainant have trade names, domain names, etc. incorporating the word Gallup;
- The Licensee registered the Domain Name four years ago and the Complainant did not question this registration for almost four years;
- The Licensee owns several Benelux and international trademarks and several domain names incorporating the word “Gallup”, as well as the trade name “Gallup Europe”.
- The use of the Domain Name is not a hidden use, because the Licensee operates a website under the Domain Name, even if this website is very similar to other websites that the Licensee operates under other domain names. As a result, the Licensee is making legitimate and fair use of the Domain Name.

(iii) The disputed Domain Name has not been registered or used in bad faith

In general, the Licensee points out that it has been active in the polling business (which it calls the “gallup market”) since 1974 and did thus not register the Domain Name in bad faith.

The Licensee further asserts that:

- the Domain Name was not registered for the purpose of selling, renting or otherwise transferring it to a third party.
- the Domain Name was not registered in order to prevent the Complainant from reflecting this name in a corresponding domain name, because the Complainant had registered several of its domain names before 31 January 2001, when the Licensee registered the Domain Name. The Complainant could have registered the Domain Name before 31 January 2003 if it was interested.
- the Complainant registered several domain names incorporating the words “Gallup” and does not really need to register the Domain Name.
- the Licensee never sought to confuse the public or create the impression that it belonged to the Gallup Group.

Finally, the Licensee asks the Third-Party Decider to make a finding of reverse domain name hijacking by the Complainant.

6. Discussion and findings

Pursuant to Article 15.1 of the CEPANI rules for domain name dispute resolution ('the Rules'), the Third-Party Decider shall rule on domain name disputes with due regard for the Policy (as defined hereunder) and the CEPANI rules for domain name dispute resolution.

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

- " the Licensee's domain name is identical or confusingly similar to a trademark, a trade name, 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."

6.1. Identity or confusing similarity of the Domain Name and Complainant's trademarks

The Licensee does not dispute that the Domain Name is identical to the trademarks of the Complainant.

The Third-Party Decider therefore accepts that the first requirement is met.

6.2. Rights and legitimate interests

The Third-Party Decider holds that the Licensee does have rights or legitimate interests on the sign "Gallup" for the following reasons.

The Licensee contends, and the Complainant does not dispute, that it is doing business under the name EOS GALLUP EUROPE. This is illustrated by several trademarks and several domain names registered by the Licensee. These trademarks and domain names are currently not being disputed by the Complainant. The Complainant accepts the use of EOS GALLUP EUROPE by the Licensee, and abandoned on these grounds legal proceedings initiated before the Commercial Court of Nivelles in 1995.

Of course, simply because the Complainant accepts the use of EOS GALLUP EUROPE, the Licensee is not entitled to use the word GALLUP as such, i.e. with the prefix EOS or without the suffix EUROPE. The Complainant therefore initiated legal proceedings before the President of the Commercial Court of Nivelles in 2003, seeking injunctive relief regarding the use of the sign GALLUP EUROPE if not preceded by the sign EOS. On 26 May 2004, the President of the Commercial Court of Nivelles dismissed the claim of the Complainant. The Complainant lodged an appeal and the case is currently pending before the Brussels Court of Appeal.

The Third-Party Decider accepts that the Licensee currently has at least some rights to use the sign GALLUP. The right to use the word "Gallup" as part of the name EOS GALLUP EUROPE is not disputed. The right to use the word "Gallup" as part of the name GALLUP EUROPE is disputed, but the case is pending before the Court of Appeals. The Complainant did not convince the President of the Commercial Court of Nivelles who dismissed the claim. As long as the Court of Appeal has not taken a decision, the Licensee is allowed by a decision of the court of law to use the sign GALLUP EUROPE.

In the Cepina case no. 44054 between the Licensee acting as the Complainant and Magyar Gallup Intezt, which is part of the Gallup Group just as the Complainant, the Third-Party Decider stressed that within the limited framework of the Rules and the Policy it is not the task of the Third-Party Decider to determine whether the Licensee has more or better rights or legitimate interests than the Complainant but whether the Licensee has any rights or legitimate interests. As the parties are involved in a complex legal battle regarding the use of the word “Gallup”, it will be eventually for the courts to decide the extent to which either party may use that word.

It is clear that in this case, the parties have exceeded the limited framework of the Rules and the Policy. The parties have both filed almost 30 pages of arguments in the complaint and in the reply, complemented by additional arguments in the respective additional replies and by two full binders each of supporting evidence. This indicates that the scope of the rights of the respective parties is heavily disputed and that as a result, the Third Party Decider cannot conclude that the Licensee does not have any right or legitimate interest to use the word “Gallup” in the Domain Name. The Licensee has shown that many parties that are not related to the Complainant use the word “Gallup” in relation to opinion polling, that the word appears as “Gallup poll” in some dictionaries describing an “opinion poll”, and that the Swiss organisation Gallup International Research Institutes, which is a separate legal entity distinct from the Complainant, adopted rules to allow third parties to use the word “Gallup” in relation to opinion polling.

The Third-Party Decider endorses the reasoning of the Third-Party Decider in the Cepina case no. 44054 referred to above: *“The “as is” situation of today is however that both parties still have some rights or legitimate interests in the “Gallup” name. Even if the rights or legitimate interest of the Complainant would outweigh those of the Licensee, this still implies that, today, the Licensee does have some rights or legitimate interests in the disputed domain name.”*

In view of the above, the Third-Party Decider holds that the Licensee has rights and legitimate interests in the disputed Domain Name.

6.3. Bad faith registration or use

As the requirements of article 10, b, 1 of the Policy are cumulative, the finding regarding the legitimate right or interest renders any discussion of bad faith on the part of the Licensee obsolete.

6.4. Reverse domain name hijacking

The Licensee asked the Third-Party Decider to make a finding of reverse domain name hijacking by the Complainant. Given the heavily disputed nature of the rights of the respective parties, the Third-Party Decider does not find that the Complaint was filed to hijack the Domain Name.

7. Decision

The Third-Party Decider finds that the Domain Name is identical to the Complainant's trademarks.

The Third Party Decider finds that the Licensee has rights or legitimate interests in the disputed Domain Name and can therefore not grant the request to transfer the Domain Name to the Complainant.

The Third-Party Decider does not find that the Complaint was filed to hijack the Domain Name.

Brussels, 15 February 2005.

Tom HEREMANS
The Third-Party Decider