Decision for dispute CAC-UDRP-100296

Case number	CAC-UDRP-100296
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Domain names	fragranecx.com

Case administrator

Name	Tereza Bartošková (Case admin)

Complainant

Organization	FragranceX.com, Inc.

Complainant representative

Organization	UDRPro, LLC

Respondent

Name	Denholm Borg

OTHER LEGAL PROCEEDINGS

The panel is not aware of any other legal proceedings which are pending or decided and which relate to the disputed domain name.

IDENTIFICATION OF RIGHTS

The Complainant is the owner of the United States Trademark Registration No. 3,365,121 for FRAGRANCEX.COM, registered on January 8, 2008.

FACTUAL BACKGROUND

FACTS ASSERTED BY THE COMPLAINANT AND NOT CONTESTED BY THE RESPONDENT:

COMPLAINANT'S RIGHTS

Complainant, FragranceX.com, Inc. ("FragranceX") is a global online retailer of perfumes, colognes, fragrances, skincare products, aftershave products, makeup and cosmetic products. Complainant's FRAGRANCEX.COM trademark and brand is extremely well known worldwide, as Complainant ships products to customers in over 240 countries.

Complainant has been globally recognized in the online fragrance industry since 2000, and currently has annual revenues of $40 million USD. Complainant's website, <fragrancex.com>, is accessed by over 600,000 unique visitors every month from

all parts of the world.

Since its inception in 2000, Complainant has expended large sums of money advertising its goods and services, and promoting its products and trademarks. For example, Complainant has developed a worldwide network of wholesalers in over 130 countries to sell its products. As a result of all of these activities, Complainant had developed considerable goodwill in its business and in its trademarks, all well before Respondent registered the Disputed Domain Name on March 12, 2008.

Complainant maintains an extensive Internet presence, including 53 websites incorporating Complainant's mark FRAGRANCEX.COM or variations thereof. For example, Complainant owns the following domains names that are used to market its various products: <fragrancex.com>; <fragrancex.net>; and <fragrancx.com>. Being an online retailer, the Internet is the primary marketing channel used by Complainant, and Complainant’s use of and value of the Internet as a marketing and sales channel will continue to increase in the future.

Complainant registered its domain name <fragrancex.com> on April 13, 2001, and has been continuously using this domain name to promote and sell its products.

Furthermore, Complainant owns United States Trademark Registration No. 3,365,121 for FRAGRANCEX.COM, registered on January 8, 2008. Complainant registered this mark before Respondent registered the Disputed Domain Name on March 12, 2008.

THE DISPUTED DOMAIN NAME IS CONFUSINGLY SIMILAR TO COMPLAINANT'S TRADEMARK

The Disputed Domain Name is a common misspelling of Complainant’s FRAGRANCEX.COM trademark. Respondent has simply switched the "e" and "c" letters in Complainant's trademark to form <fragranecx.com>. FRAGRANECX.COM and FRAGRANCEX.COM still have a similar visual impression, and the switching of two letters in the Disputed Domain Name does not differentiate it from Complainant's trademark. See GoCompare.com Limited v. Pluto Domain Services Private Limited, D2008-1693 (WIPO January 12, 2009). ("However, given the similar visual impression of 'gocompare' and 'gocomapre', the Panel finds that such alteration in the domain name's spelling (switching letters) is not sufficient to set aside the similarity between the domain name <gocomapre.com> and Complainant's trademark GOCOMPARE, and cannot therefore significantly differentiate it from the Complainant's trademark GOCOMPARE, which remains very close visually to the disputed domain name <gocomapre.com>."); see also Myspace, Inc. v. Kang, FA 672160 (Nat. Arb. Forum June 19, 2006) (finding that the <myspce.com> domain name was confusingly similar to a complainant’s MYSPACE mark because a slight difference in spelling did not avoid a finding of confusing similarity).

RESPONDENT DOES NOT HAVE ANY RIGHTS OR LEGITIMATE INTEREST IN THE DISPUTED DOMAIN NAME

The Disputed Domain Name resolves to an inactive website. The disputed domain name resolves to a website that is blank except for the message “Internal Server Error". Respondent’s failure to make an active use of the disputed domain name does not constitute a bona fide offering of goods and services under Policy ¶ 4(c)(i) or a legitimate noncommercial or fair use pursuant to Policy ¶ 4(c)(iii). See Thermo Electron Corp. v. Xu, FA 713851 (Nat. Arb. Forum July 12, 2006) (finding that the respondent’s non-use of the disputed domain names demonstrates that the respondent is not using the disputed domain names for a bona fide offering of goods or services under Policy ¶ 4(c)(i) or a legitimate noncommercial or fair use pursuant to Policy ¶ 4(c)(iii)); see also Melbourne IT Ltd. v. Stafford, D2000-1167 (WIPO Oct. 16, 2000) (finding no rights or legitimate interests in the domain name where there is no proof that the respondent made preparations to use the domain name or one like it in connection with a bona fide offering of goods and services before notice of the domain name dispute, the domain name did not resolve to a website, and the respondent is not commonly known by the domain name).

Additionally, there is no evidence in the record to suggest that Respondent is commonly known by the disputed domain name pursuant to Policy ¶ 4(c)(ii). Respondent is only known as “Denholm Borg", as shown in the WHOIS information provided by Registrant. See Broadcom Corp. v. Intellifone Corp., FA 96356 (Nat. Arb. Forum Feb. 5, 2001) (finding no rights or legitimate interests where Respondent is not commonly known by the disputed domain name or using the domain name

in connection with a legitimate or fair use); see also Hartford Fire Ins. Co. v. Webdeal.com, Inc., FA 95162 (Nat. Arb. Forum Aug. 29, 2000) (finding that Respondent has no rights or legitimate interests in domain names because it is not commonly known by Complainant's marks and Respondent has not used the domain names in connection with a bona fide offering of goods and services or for a legitimate noncommercial or fair use).

Furthermore, Respondent is using the typographical error described above in the confusingly similar Disputed Domain Name, thereby capitalizing on a common misspelling of Complainant's mark. This action amount to typo-squatting by the Respondent, which by itself is evidence that Respondent lacks rights and legitimate interests in the Disputed Domain Name under Policy ¶ 4(a)(ii). See IndyMac Bank F.S.B. v. Ebeyer, FA 175292 (Nat. Arb. Forum Sept. 19, 2003) (finding that the respondent lacked rights and legitimate interests in the disputed domain names because it "engaged in the practice of typosquatting by taking advantage of Internet users who attempt to access Complainant's <indymac.com> website but mistakenly misspell Complainant's mark by typing the letter 'x' instead of the letter 'c'"); see also LTD Commodities LLC v. Party Night, Inc., FA 165155 (Nat. Arb. Forum Aug. 14, 2003) (finding that the <ltdcommadities.com>, <ltdcommmodities.com>, and <ltdcommodaties.com> domain names were intentional misspellings of Complainant's LTD COMMODITIES mark and this "'typosquatting' is evidence that Respondent lacks rights or legitimate interests in the disputed domain names").

THE DISPUTED DOMAIN NAME HAS BEEN REGISTERED AND IS BEING USED IN BAD FAITH

As previously discussed, Respondent has failed to make active use of the Disputed Domain Name, which constitutes bad faith registration and use under Policy ¶ 4(a)(iii). See DCI S.A. v. Link Commercial Corp., D2000-1232 (WIPO Dec. 7, 2000) (concluding that the respondent's failure to make an active use of the domain name satisfies the requirement of ¶ 4(a)(iii) of the Policy); see also Clerical Med. Inv. Group Ltd. v. Clericalmedical.com, D2000-1228 (WIPO Nov. 28, 2000) (finding that merely holding an infringing domain name without active use can constitute use in bad faith).

In addition, Respondent registered the <fragranecx.com> domain name with at least constructive knowledge of Complainant's rights in the FRAGRANCEX.COM mark by virtue of Complainant's prior registration of that mark with the USPTO. Registration of a confusingly similar domain name despite such constructive knowledge is evidence of bad faith registration and use of the domain name pursuant to Policy ¶ 4(a)(iii). See Orange Glo Int'l v. Blume, FA 118313 (Nat. Arb. Forum Oct. 4, 2002) ("Complainant's OXICLEAN mark is listed on the Principal Register of the USPTO, a status that confers constructive notice on those seeking to register or use the mark or any confusingly similar variation thereof. Respondent's registration of a domain name, despite knowledge of Complainant's preexisting rights, indicates bad faith registration pursuant to Policy ¶ 4(a)(iii).")

As noted earlier, Respondent has engaged in typo-squatting through its registration and use of the Disputed Domain Name. This practice has been found by previous panels to constitute evidence of bad faith registration and use under Policy ¶ 4(a)(iii). See Nextel Commc'ns Inc. v. Geer, FA 477183 (Nat. Arb. Forum July 15, 2005) (finding that a respondent's registration and use of the <nextell.com> domain name was in bad faith because the domain name epitomized typo-squatting in its purest form); see also Microsoft Corp. v. Domain Registration Philippines, FA 877979 (Nat. Arb. Forum Feb. 20, 2007) (finding bad faith registration and use of the <microssoft.com> domain name as it merely misspelled a complainant's MICROSOFT mark).

Respondent is a pattern cyber-squatter with a history of registering domain names that infringe upon the trademark rights of others, as a result of which Respondent has been ordered by panels to transfer disputed domain names to various complainants. See FragranceX.com, Inc. v. Argosweb Corp a/k/a Oleg Techino in this name and under various aliases...Denholm Borg..., D2010-1237 (WIPO September 17, 2010); LD Products, Inc. v. Denholm Borg, FA 1333640 (Nat. Arb. Forum, August 9, 2010).

Thus, Respondent's pattern of bad faith registration and use of domain names is evidence of bad faith registration and use in the instant case pursuant to Policy ¶ 4(b)(ii). See Westcoast Contempo Fashions Ltd. v. Manila Indus., Inc., FA 814312 (Nat. Arb. Forum Nov. 29, 2006) (finding bad faith registration and use pursuant to Policy ¶ 4(b)(ii) where a respondent had been subject to numerous UDRP proceedings in which panels ordered the transfer of disputed domain names containing the

trademarks of various complainants); see also Sony Kabushiki Kaisha v. Anderson, FA 198809 (Nat. Arb. Forum Nov. 20, 2003) (finding a pattern of registering domain names in bad faith pursuant to Policy ¶ 4(b)(ii) where a respondent previously registered domain names incorporating well-known trademarks).

Furthermore, on July 7, 2011, Complainant's representative sent Registrant a cease and desist letter requesting transfer of the Disputed Domain Name. Respondent did not respond to Complainant's letter, and failed to comply with Complainant's demands.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS:

COMPLAINANT: The Complainant on its brief upholds that:

The domain name held by the Respondent ("fragranecxe.com") is confusingly very similar to the registered mark and domain name that belongs to the Complainant ("frangrancex.com") since the only difference is the order of the letters "e" and "c", in an inverted order, but that from the standpoint of a visual impression both may seem practically identical.

The Respondent does not have any right or legitimate interest in the domain name in dispute because the truth is this domain name conducts to a web page showing the message "Internal Service Error", which is a clear indication that he is not using that domain name in any business form to defend the good faith when offering a number of products or services, neither in a non business form. Besides, the Respondent is not known by the domain name in dispute.

The domain name has been registered and used in bad faith, which may be gathered from the lack of actual use as well as from the application which was filed being aware of the existing rights in favor of the Complainant in relation with the "fragrancex.com" trademark. To this besides we have to add that the Respondent is a cyber-squatter sponsor with a background of having registered domain names that violate protected trademarks rights that belong to others. He is currently involved in several proceedings as Complainant and has acted using several different names.

RESPONDENT:The Respondent never accessed the online platform although there is confirmation that he became aware of the Complaint after its remittance to his electronic mail address (denholm@borgaster.net). A confirmation that the brief was properly served is attached to the records of the case, which means that the due date for the submitting the reply was the 28th of August 2011.

Since no reply was filed by the Respondent, on the 30th of August 2011 the Czech Arbitration Court declared him in default, in accordance with the EU Dispute Resolution Rules (the ADR rules) and the Supplemental Rules of the Czech Arbitration Court (the ADR Supplemental Rules), and advised him accordingly.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the Domain Name is identical or confusingly similar to a trademark or service mark in which the complainant has rights (within the meaning of paragraph 4(a)(i)of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the Domain Name (within the meaning of paragraph 4(a)(ii)of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the Domain Name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii)of the Policy).

PROCEDURAL FACTORS

The Panel is satisfied that all procedural requirements under UDRP were met and there is no other reason why it would be

inappropriate to provide a decision.

PRINCIPAL REASONS FOR THE DECISION

Now, with reference to the grounds of the present resolution, and in agreement with the provisions of Paragraph 4 (a) of the Policy, there are three elements the Complainant must prove in order to have the domain name registered by the Respondent assigned in his favor. These elements are:

(i) The domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights,
(ii) The Respondent has no right or legitimate interests in respect of the domain name, and,
(iii) The domain name has been registered and is being used in bad faith.

Now, if we take into account the brief filed by the Complainant as well as the documents attached thereof, it is clear that the disputed domain name ("fragranecx.com") is identical or confusingly similar to the Complainant's United States Trade Mark "FRAGRANCEX.COM" and also to its company name "FragranceX.com, Inc and its prior domain name ("fragrancex.com").

Regarding the need to prove that the disputed domain name is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights, the truth is that the Complainant has demonstrated that: (i) it is the holder of the United States Trade Mark "FRAGRANCEX.COM" since January 8th 2008 with number 3.365.121.;
(ii) it is the holder of the United States Society named "Frangrancex.com, Inc", at least since its incorporation in year 2000;)
(iii) it is the holder, it has duly registered and has been using the "fragrancex.com" domain name since April 13th 2001.
Taking into account that the disputed domain name registered by the Respondent is "frangranecx.com", the Panel understands that the Complainant has demonstrated that such name is not only confusingly similar to its trade mark "FRAGRANCEX.COM", but practically identical.

On the other side and as far as the second requirement is concerned, this is to demonstrate that the Respondent does not have any right or legitimate interest with respect to the domain name in question, this Panel has proceeded:

a) to introduce in several searches of Internet the expression fragrance having realized that on every occasion the first result obtained invites us to visit the web page of the Complainant,

(b) to repeat the same operation using the expression fragranecx in which case the first result obtained again is the web page of the Complainant, and after repeating the action but this time adding ".com", the result continues being the same, this is, the searcher considers it an error and automatically redirects us to the page of the Complainant.

(c) furthermore, we equally have confirmed that if we directly type www.fragranecx.com on the searcher of the net no result is obtained, at least as of the 31st of August 2011.

The above means that behind the domain name in dispute in fact there are no actual grounds whatsoever of business or any other nature associated with the Respondent, which allows us to assert that said Respondent has no rights or legitimate interest in respect of the domain name, and that the disputed domain name has been registered and is being used in bad faith by the part of the Respondent.

Furthermore and besides all of the above, this Panel equally must point out that the Respondent is an individual that has a history in the registration of domain names that violate the rights that belong to others which has given rise to several law suits and/or arbitration proceedings similar to this one, which is something that without any doubt must be seriously taken into account.

Based on the above the Panel believes that the Complainant has demonstrated that each and every one of the requirements demanded for an application of the provisions of Paragraph 4 (a) are met and consequently considers that the Complaint must be admitted and the disputed domain name transferred to the Complainant.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

1. **FRAGRANECX.COM**: Transferred

PANELLISTS

Name	**Enrique Batalla**

DATE OF PANEL DECISION 2011-09-12

Publish the Decision