Decision for dispute CAC-UDRP-101539

Case number	**CAC-UDRP-101539**
Time of filing	**2017-05-19 13:55:19**
Domain names	**Franke-servisi.com**

Case administrator

Name	**Aneta Jelenová (Case admin)**

Complainant

Organization	**Franke Technology and Trademark Ltd**

Complainant representative

Organization	**BrandIT GmbH**

Respondent

Name	**hakan gUlsoy**

OTHER LEGAL PROCEEDINGS

It is stated within the Complaint and confirmed by the Panel that there existed a prior UDRP case numbered 101464 filed on 09.03.2017 which was rejected.

IDENTIFICATION OF RIGHTS

The Complainant in this administrative proceeding, Franke Technology and Trademark Ltd, has entered into Turkish market in 1999 and since then it has been operating actively in the kitchen appliances industry through its Turkish subsidiary Franke Mutfak ve Banyo Sistemleri San.ve Tic. A.Ş in Turkey.

The Complainant has registered the word and figurative trademark "FRANKE" in several classes in many jurisdictions, including in Turkey. The first "FRANKE" trademark in Turkey was registered in 1992 which is before many years from the registration of the Disputed domain name. The Complainant's "FRANKE" trademark is considered as a well-known trademark as proved by the annexes to the Complaint and as accepted within the prior UDRP decisions in relation to the "FRANKE" trademark.

The Complainant has registered domain names under generic Top-Level Domains ("gTLD") and country-code Top-Level Domains ("ccTLD") containing the trademark "FRANKE", e.g., <franke.com> , <franke.net> and <franke.com.tr>. The registration date of these domain names shows that these were held long before the registration of the Disputed domain name as the first domain name of the Complainant (i.e., <franke.com>, was created on March 18, 1996) according to the

WhoIs records.

FACTUAL BACKGROUND

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

i) RE-FILING OF COMPLAINT

This is a second Complaint involving the same domain name <franke-servisi.com> (hereinafter “Domain Name”) and the same Respondent as the UDRP case 101464 filed on 09.03.17 before this Center, which was rejected (“Previous Proceeding”).

The Complainant is aware of the grounds for the rehearing or reconsideration of a previously filed decision. The Complainant justifies this second Complaint based on the following grounds:

1. The Complainant attaches Annexes 9.1. and 9.2. to this new Complaint, the current look and feel of the Domain Name. With this new evidence, the Panel can verify the existence of two critically important elements for this second complaint which were not verified by the Panelist at the Previous Proceeding; i.e. the use of the Complainant´s logo at the Domain Name as well as the use of the words “Yetkili Servis Merkezi” which translates as “Authorized Service Center” without authorization issued to the Respondent by the Complainant.

2. The Complainant also includes new evidence as Annex 12 concerning Respondent´s Pattern of Conduct regarding the registration of two domain names; including SIEMENS well-known brand (e.g. www.siemensservisiantalya.net). These new registrations were made on 25.04.17.

As to ground number 1, the Complainant wishes to explain why this evidence is of critical importance to justify this new complaint. At the decision dated 03.05.17, the Panelist made the following findings:

“We note the website includes the following statements (extracted by the panel and translated by Google Translate on 1 May 2015):

“Tüm Franke ürünleriniz Servisimiz Garantisinde... Servisimiz İstanbul' un Her Semtine Franke ürünleriniz için Yerinde Servis Hizmeti, Kapıda Ödeme Seçeneği, Orjinal Parça ve 1 Yıl Parça Garantisi sunmaktadır. Detaylı bilgi için tıklayın.” Per Google translate: “All our Franke products are under our Service Guarantee ...On-site service for your Franke products, door-to-door payment, original parts and 1 year parts Guarantee. Click for detailed information” and “Franke Ankastre Ürünlerinize Bakım, Onarım ve Servis Hizmetini tüm İstanbul genelinde sunmaktayız.” Per Google Translates: “Franke Built-In Products We provide maintenance, repair and service throughout Istanbul.”And “Franke Davlumbaz, firin, ocak teknik servisi cagri merkezi [telephone no].” Per Google Translate: “Franke Hood, oven, oven technical service call center.” At the end of the site: “Tüm Franke ürünleriniz için Servis Çağrı = 444 0 569. Franke Beyaz Eşya - Franke Klima - Franke Şarap Dolabı Teknik Servisi © 2017. Sitemizde ve duyurularımızda ismi geçen logo ve marka ilgili firmanın tescilli markasıdır. Franke markasının özel teknik servisi olarak hizmet vermekteyiz.” Per Google Translate: “Call for all your Franke products = 444 0 569Franke White Goods - Franke Air Conditioner - Franke Wine Cabinet Technical Service © 2017 The logo and brand name on our website and in our announcements are the registered trademark of the relevant company. As a special technical service of the Franke brand We are serving.” That last sentence also on another attempt translates as “We serve as a special technical service of Franke brand."

In the view of the panel, that the last sentence is a disclaimer of sorts”

“...
We also must consider the words “Yetkili Servis Merkezi” which the Complainant relies on. This does translate as “Authorized Service Center”. However the panel cannot see those words on the webpages submitted by the Complainant or on the wayback machine copy at the www.web.archive.org which has a copy of the website main landing page as at 20 April

2017. This was visited by the Panel on 2 May 2017."

" …
The webpages do not use the Complainant's logo. While Franke, the word, is in red font in two places, the international and other registered marks submitted by the Complainant, and viewed by the panel, are not in red but black and white. The Complainant on its own .com site uses a red surround but the word itself is in white letters. The word Franke is coloured in red on the website at the Disputed Domain Name but only barely so and not in the same way as the use on the Franke.com site and does not take the use over the line to logo use in the panel's view."

"…
The fact that there are similar sites, such as Bosch, also makes sense where the Respondent also services other similar branded goods and is consistent with OKI DATA principles and good --and not bad --faith."

Bad Faith
"

…
A finding of legitimate interests will often dictate the bad faith limb also. We note here that it is possible that the Respondent does not actually provide the services it holds out –but there is no satisfactory or reliable evidence on that issue and we are not prepared to assume or infer it. The wayback machine at the www.web.archive.org visited by the Panel on 2 May 2017 was the same as the evidence submitted."

"the Complainant must still prove its case and the three limbs required by the UDRP. The panel finds insufficient evidence of bad faith use as at the date of this decision."

From the Complainant´s perspective, the Respondent's current use of the Domain Name; i.e. the use of the Complainant´s logo and the words "Yetkili Servis Merkezi" (Authorized Service Center") goes against the OKI DATA principles and, therefore, it totally changes the Respondent's potential legitimate interest in the use of the Domain Name granted by the Panelist in the Previous Proceeding.

It is important to note that the Complainant has been successful in more than six UDRP proceedings under similar circumstances (the Respondents using the Complainant´s logo and in some cases using a disclaimer). In all six cases, the Panelists have not found legitimate interest on the Respondent´s side.

A good example is the WIPO case number D2016-1120, Franke Technology and Trademark Ltd vs. Domain Admin, Privacy Protection Service INC d/b/a PrivacyProtect.org / Murat Cayiroglu, Nesiline Bilisim Teknolojileri - Murat Cayiroglu regarding the domain name frankeservisleriniz.com, where the domain name was used under similar circumstances as the current Complaint (i.e. use of the Complainant´s logo and a disclaimer"). In that case, the Panel held:

"…
That being said, the Respondent is using the stylized version or the logo of the FRANKE trademark on the website. Moreover, the website includes a photo of an automobile with the use of the FRANKE logo. All of these circumstances give the impression that it is affiliated with the Complainant or it is authorized dealer of the Complainant.

On the other hand, the disclaimer at the footer of the webpage connected to the disputed domain which states that the "trademark is the property of the related company" and that the Respondent "provides private repair services", does not accurately disclose the relationship between the Respondent and the Complainant and on the contrary does suggest that there is a business relation and/or affiliation with the Complainant. In other words, while there is a disclaimer on the website under the disputed domain name, it is far from meeting the Oki Data standard of "accurately and prominently" disclosing the Respondent's relationship (or lack thereof) with the Complainant. WIPO Overview 2.0, paragraph 2.3.
For these reasons, the Panel concludes that the Respondent is not making use of the disputed domain name in connection with a bona fide offering of goods or services."

Complainant highlights that in WIPO case no. DCO2016-0021, Franke Technology and Trademark Ltd vs Abraham Joffe regarding the domain name frankeservis.co, the Panelist did not find legitimate interest on Respondent´s side although in that case Respondent was not using Franke´s logo and rather using the word mark FRANKE SERVIS. In that case, the Panel also did not find the disclaimer to satisfy the Oki Data standard. In short, the Panel found:

"…
In this case, it appears from the website, the Respondent has been operating its business to offer repair services exclusively for the Complainant's products under the disputed domain name for three years without any complaint.
That being said, although the Respondent is not using the stylized version or the logo of the FRANKE trademark, the use of the indication "FRANKE SERVIS" by the Respondent as a whole gives the impression that it is affiliated with the Complainant or it is authorized dealer of the Complainant.
The disclaimer in the footer of the webpage connected to the disputed domain states, in small text, that the "trademark is the property of the related company" and that the Respondent "provides private repair services".
While referring to the Complainant as a "related company" in the disclaimer in itself creates a false sense of association between the parties, in any event the text in the main body of the webpage creates an overall misimpression that it is officially associated with the Complainant. For example, the webpage states "all products of our firm are produced to increase your life standards. Therefore, it would be the best choice for you to prefer the expert personnel of Franke Service instead of other repairers in the market, when it is time for the repair and maintenance of these products." The reference to the "products of our firm" implies the Respondent is part of or officially connected with the Complainant.
In short, while there is a disclaimer on the website under the disputed domain name, it is far from meeting the Oki Data standard of "accurately and prominently" disclosing the Respondent's relationship (or lack thereof) with the Complainant. See WIPO Overview 2.0 paragraph 2.3.
For these reasons, the Panel concludes that the Respondent is not making use of the disputed domain name in connection with a bona fide offering of goods or services."

This case is similar as the Previous Proceeding where the FRANKE word mark was used at the website and the disclaimer was not in line with the OKI DATA standard. However, in the Previous Proceeding, the Panelist determined that the Respondent had a legitimate interest in the domain. The Complainant respectfully disagrees with the the Panelist's finding, in light of numerous previous decisions. Further, the Complainant notes that the wording identified by the Panelist as being "a disclaimer of sorts", ie "We serve as a special technical service of Franke Brand" does not change the first and pervading impression that the website is part of or officially connected with the Complainant.

The current look and feel of the Domain Name just confirms that the Respondent does not meet all the Oki Data criteria.

Finally, the recent registrations <siemensservisiantalya.xyz< and <siemensservisiantalya.net> where the Respondent uses the well-known brand SIEMENS and logo to provide services without authorisation as it described at the disclaimer, confirms a pattern of conduct on the Respondent's side and, therefore, bad faith involved in these registrations as well.

Based on the facts described above, the Complainant respectfully asks this Panel to review the case again.

ii) LANGUAGE OF PROCEEDINGS REQUEST:

In accordance with the applicable Registrar, the language of the Registration Agreement of the Domain Name <franke-servisi.com> is Turkish. Therefore, the Complainant hereby files a language of proceeding request that the language of the proceeding should be English based on the following facts:

The Respondent has not replied to the cease and desist letter ("C&D letter"), nor responded that they did not understand the content of the letter. This conduct has a relevancy when deciding on the language of the proceeding, as it was stated on WIPO Case no. D2015-0298 where the "The Respondent did not reply to the Complainant's request, therefore it did not express in any way that it cannot answer the allegations since it does not understand English."

The Domain Name includes the Complainant's mark FRANKE. The Complainant is a Swiss company whose business language is English and considering that the Respondent is in the service business, it is unlikely that the Respondent is not at least familiar with the English language. In addition, the Respondent has chosen to register the Domain Name under the Top Level domain name ".com" which is the commercial TLD, and is applicable to a broader audience than merely Turkey. A more suitable TLD if only addressing the Turkish market would be the .com.tr extension. The proceeding will likely be put through unnecessary trouble and delay if Turkish were made the language of the proceeding and there would be no discernible benefit to the parties or the proceeding, in the circumstances, that may be gained by maintaining the default language. In WIPO decisions D2015-1508 and D2015-0614 the Panel decided to accept the Complaint to be filed in English despite the fact that the Registrar had informed the Center that the language of the Registration Agreement was Turkish.

It is important to mention that the Respondent did not reply to the Previous Proceeding where the language of proceeding was English.

iii) ABOUT COMPLAINANT AND THE BRAND FRANKE

The Complainant is the proprietor of the FRANKE trademarks. Franke entered the Turkish market as early as in 1999 and Turkey has become an important market.

The Complainant has presence in Turkey through its wholly owned subsidiaries Franke Mutfak ve Banyo and Sistemleri Sanayi ve Ticaret A.S.

In 1911 Hermann Franke established a sheet-metal business in Rorschach, Switzerland. Today the Franke Group (included in the Artemis Group) has 70 subsidiaries with around 9'000 employees in 37 countries, generating consolidated sales of CHF 2.1 billion.

The Franke Group consists of four businesses:

• Franke Kitchen Systems – integrated systems for food preparation and cooking, including sinks, taps, worktops, hoods and cooking appliances

• Franke Foodservice Systems – kitchen equipment, supplies and a broad range of services for leading restaurant chains
• Franke Water Systems – integrated systems for private bathrooms and semi-/public washrooms, including taps, showers, sinks, accessories, water management systems

• Franke Coffee Systems – a comprehensive range of coffee machines for out of home coffee preparation, including superautomatics, traditionals and brewers

The Complainant is the owner of the well-known registered trademark FRANKE as a word and figure mark in several classes in numerous countries all over the world including Turkey where the Respondent resides. The Complainants official sales and service locator and website in Turkey are:

• www.franke.com.tr
• www.franke.com
• http://www.franke.com/countries/tr/tr/home.html

Overview of trademark registrations:

IR = International Registration (NB: Turkey falls within the Madrid Protocol)

Trademark

Reg. No
Class:
Date of Registration

FRANKE
IR 975860
6; 11; 20; 21; 37
June 14, 2007 (ink. Turkey)

FRANKE (device)
IR 872557
6; 11; 21;
February 28, 2005 (ink. Turkey)

FRANKE (device)
IR 387826
6,7,8,9,10,11,12,19, 20 & 21
February 28, 2005 (ink. Turkey)

FRANKE Turkish national no. 135579
6-7,9,11,19, 20-21
September 23, 1992

FRANKE (device) Turkish national no. 2008 60692
6,11, 20, 21, 37
September 09, 2009

The Complainant owns the Turkish national trademarks via its subsidiary, Franke Water Systems AG.

These trademark registrations predate the registration of the Domain Name. Due to extensive use, advertising and revenue associated with its trademarks worldwide, the Complainant enjoys a high degree of renown around the world, including in Turkey.

The trademark FRANKE has been already considered by previous WIPO cases as a well-known trademark and it is unlikely that the Respondent didn't know about its existence. E.g. WIPO case number D2016-0686 Franke Technology and Trademark Ltd vs NicProxy Customer Whois Privacy Protection Service where the Panel stated:

"First, the Panel believes that the Respondent must have been well aware of the Complainant's trademarks when it registered the disputed domain name on September 24, 2013. At the date of registration of the disputed domain name, the Complainant's FRANKE trademark was already well-known worldwide, including in Turkey, for many years".

The Complainant has registered a number of domain names under generic Top-Level Domains ("gTLD") and country-code Top-Level Domains ("ccTLD") containing the term "franke", for example, <franke.com> (created on March 18, 1996), <franke.com.tr> (created on April 27, 2000), and <franke.net> (created on October 1, 1997). Complainant uses these domain names to connect to a website to inform potential customers about its FRANKE mark, products and services (e.g. See ANNEXES 7.1., 7.2. & 7.3.).

LEGAL GROUNDS:

i) THE DOMAIN NAME IS CONFUSINGLY SIMILAR

The Domain Name registered November 26, 2016, directly and entirely incorporates the Complainant's well-known,

registered trademark FRANKE. The addition of ".com" does not add any distinctiveness to the Domain Name. The Domain Name incorporates the FRANKE trademark coupled with the Turkish word "servisi", a term closely connected to Franke´s business. This exaggerates the impression that the Respondent is somehow affiliated with the Complainant, and the Respondent is doing business in Turkey using the Complainant's trademark. E.g. WIPO Overview on Selected UDRP Questions, Second Edition WIPO Overview 2.0, paragraph 1.2., as well as the International Business Machines Corporation v. Sledge, Inc. / Frank Sledge WIPO Case No. D2014-0581 where the Panel stated the following "In addition, it is generally accepted that the addition of the top-level suffix in the domain name (e.g., ".com") is to be disregarded under the confusing similarity test". This reasoning should apply and the Domain Name should be considered as confusingly similar to the registered trademark FRANKE.

ii) THE RESPONDENT HAS NO RIGHTS OR LEGITIMATE INTEREST IN RESPECT OF THE DOMAIN NAME

The Complainant has not found that the Respondent is commonly known by the Domain Name. The WHOIS information "hakan gUlsoy" is the only evidence in the WHOIS record, which relates the Respondent to the Domain Name. When entering the terms "FRANKE" and "Turkey" on Google engine search, all returned results point to Complainant and its business activity. The Respondent could have easily performed a similar search before registering the Domain Name and would have discovered that the trademarks are owned by the Complainant and that the Complainant has been using its trademarks in Turkey.

There is no evidence that the Respondent has a history of using, or preparing to use, the Domain Name in connection with a bona fide offering of goods and services. The Complainant has become a distinctively identified with the term "FRANKE" and that the intention of the Domain Name is to take advantage of an association with the Complainant's business.

THE WEBSITE

The Respondent is using the Domain Name to attract internet users to its website where the Respondent states prominently "Yetkili Servis Merkezi" (by Google Translator: "Authorized Service Center"). A common misunderstanding with authorized or non-authorized repair centers is that they also believe that they can freely register domain names incorporating the trademark name of the products they are offering services on. In this case, the Respondent is not an authorized service center. The Respondent's layout including the FRANKE logotype in red prominently on the top left and also multiple times in the website text strongly suggests that a connection with the Complainant. Moreover, use of the word FRANKE in the Domain Name supports the impression that there is an official or authorized link with the Complainant for the purposes of repairs and services.

In the light of Oki Data Americas, Inc. v. ASD, Inc. WIPO Case No. D2001–0903, the use of a trademark as a domain name by an authorized or non-authorized third party is only to be regarded as a bona fide offering of goods or services within the meaning of paragraph 4(c) of the Policy if the following conditions are satisfied:

• the respondent must actually be offering the goods or services at issue;
• the respondent must use the site to sell only the trademarked goods; otherwise, it could be using the trademark to bait Internet users and then switch them to other goods;
• the site must accurately disclose the registrant's relationship with the trademark owner; it may not, for example, falsely suggest that it is the trademark owner, or that the website is the official site, if, in fact, it is only one of many sales agents;
• the respondent must not try to corner the market in all domain names, thus depriving the trademark owner of reflecting its own mark in a domain name.

As mentioned previously, the Respondent fails at least three elements of these tests, namely:

• First, the Respondent does not publish a proper disclaimer on the challenged page that meets the OKI DATA standard of "accurately and prominently" disclosing the Respondent's relationship (or lack thereof) with the Complainant. On the website connected to Disputed Domain Name the Respondent added a small text at the bottom stating "Tüm Franke ürünleriniz için Servis Çağrı = 444 0 569Franke Beyaz Eşya - Franke Klima - Franke Şarap Dolabı Teknik Servisi © 2017Sitemizde ve

duyurularımızda ismi geçen logo ve marka ilgili firmanın tescilli markasıdır. Franke markasının özel teknik servisi olarak hizmet vermekteyiz" which can be translated in English "Service Call for all your Franke products = 444 0 569 Franke White Goods - Franke Air Conditioner - Franke Wine Cabinet Technical Service © 2017 The logo and the name of our company are registered trademarks of the relevant company. We serve as special technical service of Franke brand." As noted previously, this is not a valid disclaimer that describes the lack of relationship with the Complainant. Rather, it proves that the Respondent had prior knowledge of the Complainant's trademark and tried to take advantage of an association with the business of Complainant. In fact, when an Internet user visits the Disputed Domain Name, the first thing that the user sees is the prominent FRANKE logo and the sentence ""Yetkili Servis Merkezi" (in English by Google Translator: "Authorized Service Center"). With this, the user believes that the Respondent is authorized by the Complainant to offer repair services, which is not true.
• Secondly, the Respondent is depriving the Complainant of reflecting its own mark in the Domain Name.
• Thirdly, the Respondent presents themselves as the trademark owner by using the Complainant`s official FRANKE´s logo and word mark several times in the text of the website connected to the Domain Name.

The Respondent's use of the Domain Name creates an overall impression that they are the Complainant and/or that they have received Complainant´s authorization to provide services. The Respondent does meet the Oki Data criteria at least on three elements. It is undeniable that the the Respondent was aware of the Complainant's marks prior to acquiring the Domain Name and the establishment of the Respondent's website. The Respondent has made no claims to having any relevant prior rights of its own, nor to being commonly known by the Domain Name. Clearly, the Respondent is not known by the Domain Name, nor does the Respondent claim to have made legitimate, non-commercial use of the Domain Name. The Respondent has been granted several opportunities to argue that it has rights in the Domain Name but has failed to do so. This behavior coupled with the use of the Domain Name cannot be considered as legitimate use of the Domain Name.

iii) THE DOMAIN NAME WAS REGISTERED AND IS BEING USED IN BAD FAITH

THE DOMAIN NAMES WAS REGISTERED IN BAD FAITH

The Complainant's trademarks predate the registration of the Domain Name and the Respondent has never been authorized by the Complainant to register the Domain Name. In light of the website content, it is clear that the Respondent was aware of the Complainant's trade mark at the time of registration and, therefore, the Domain Name was registered in bad faith.

THE DOMAIN NAME IS BEING USED IN BAD FAITH

The Complainant tried to contact the Respondent on January 31, 2017 through a C&D letter. Reminders were sent on February 10, 2017 and February 16, 2017. The letter was sent to the email address listed in the whois record and to the email address listed on the website associated with the Domain Name. In the cease and desist letter, the Complainant advised the Respondent that the unauthorized use of its trademarks within the Domain Name violated their trademark rights and the Complainant requested a voluntary transfer of the Domain Name. However, no reply was received. The Respondent has simply disregarded such communications. In earlier cases the failure of a respondent to respond to a C&D letter, or a similar attempt at contact, has been considered relevant in a finding of bad faith, e.g., News Group Newspapers Limited and News Network Limited v. Momm Amed Ia, WIPO Case No. D2000-1623; Nike, Inc. v. Azumano Travel, WIPO Case No. D2000-1598; and America Online, Inc. v. Antonio R. Diaz, WIPO Case No. D2000-1460.

THE WEBSITE

In the WIPO case no. D2014-1010 M. & B. Marchi e Brevetti Srl - Limited Liability Company v. A Gurbulak As / Webbilisimhizmetleri / Domain Admin, Privacy Protection Service INC d/b/a PrivacyProtect.org / Zafer Gurbulak concerning among others the domain names <ankaraaristonservisi.net>, <ankaraaristonservisleri.com>, <ankaraaristonservisleri.net> where similar circumstances to the current case were established, the Panel noted that:

"The Respondent's active websites associated with the disputed domain names appear to offer repair services for Ariston

branded products. Therefore, the Respondent was aware of the Complainant's trademark ARISTON at the time the disputed domain names were registered."

"The fact that the Respondent's active website uses the Complainant's trademark ARISTON multiple times in bold letters and states that the Respondent provides original spare parts with "ARISTON Service Assurance" suggests that the respondent is affiliated with the Complainant when it is actually not the case. The Panel has noted the presence of a small disclaimer on the active website but finds it insufficient in the circumstances, especially given that it is very general and does not make specific reference to the Complainant. In the circumstances, and as indicated before, the Panel considers that the use made of the active websites associated with the disputed domain names does not qualify as a bona fide offering of goods or services under the Policy."

The same circumstances apply in this case. The Respondent has never been granted permission to register the Domain Name. The Respondent takes advantage of the FRANKE trademark by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's products, services, website or location.

The Complainant submits that the Respondent intentionally chose the Domain Name based on registered and well-known trademark in order to generate more traffic to its own business. The Domain Name is currently connected to a service center website, consequently, theRespondent is using the Domain Name to intentionally attempt to attract, for commercial gain, internet users to the website, by creating a likelihood of confusion with the Complainant's trademarks as to the source, sponsorship, affiliation or endorsement of its website. This conduct has been considered as bad faith under the Policy, and other WIPO decisions have also arrived to the same conclusion, for example Philip Morris Incorporated v. Alex Tsypkin, WIPO Case No. D2002-0946, where the Panel stated:

"It follows from what has been said about legitimacy that the Panel is satisfied that Respondent is using the disputed domain name intentionally to attempt to attract, for commercial gain, Internauts to his web site by creating a likelihood of confusion with Complainant's mark as to the source, sponsorship, affiliation or endorsement of his web site. Pursuant to Policy paragraph 4(b)(iv), this constitutes evidence of both bad faith registration and bad faith use, for the purposes of paragraph 4(a)(iii).

Similarly, in the WIPO case no D2014-0487 Aktiebolaget Electrolux v. electroluxmedellin.com, Domain Discreet Privacy Service / Luis Rincon where analogous circumstances were at hand the Panel stated:

"The continuing use of the disputed domain name is clearly confusing to online users who will be attracted by the inclusion of the word ELECTROLX in the disputed domain name, and who will therefore believe that they are accessing a website that is in some way associated with or authorized by the Complainant. This is not the case, and the consumer confusion is further strengthened by the fact that there are services for Electrolux products advertised on the Respondent's website without any disclaimer of association with the Respondent."

PATTERN OF CONDUCT

A pattern of conduct can involve multiple UDRP cases with similar fact situations or a single case where the respondent has registered multiple domain names, which are similar to trademarks. Here, it has to be highlighted that the Respondent using its official email address <dj_fener154@hotmail.com>, as indicated in WHOIS Lookup record, has registered 39 domain names including well-known brands such as BOSCH and SIEMENS with the domain names. Such pattern of abusive registrations does not constitute bona fide use of the Domain Name and it is clear that the Respondent is not in compliance with the Oki-Data rules and therefore, the Respondent is capitalizing on well-known trademarks.

The Respondent takes advantage of the FRANKE trademark by intentionally attempting to attract visitors to the Respondent's website by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation.

The Complainant submits the Respondent intentionally chose the Domain Name based on a registered and well-known trademark in order to only use it for non-legitimate purposes. The conduct of the Respondent in registering domains incorporating well-known trademarks demonstrates systematic bad faith behavior.

To summarize, FRANKE is a well-known trademark in the kitchen appliances industry including Turkey where the Respondent is located and where the website associated with the Domain Name is operating as “Authorized Franke Service”. The Respondent was almost certainly aware of the rights the Complainant has in the trademark and the value of said trademark, at the point of the registration. Inference of bad faith registration and use of the Domain Name is also inferred by the fact that the Respondent never replied to Complainant’s C&D letter. It is reasonable to assume that if the Respondent did have legitimate purposes in registering and using the Domain Name it would have responded. In addition, the Respondent does not meet the Oki Data principles on at least three elements: lack of a distinctive disclaimer; the Respondent can be regarded to corner the market preventing the Complainant from operating the Domain Name; and they represent themselves as the trademark owner by displaying the Complainant’s logo on the website. Finally, the Respondent shows a pattern of abusive conduct by owning several domain names related to third party brands. Consequently, the Respondent should be considered to have registered and to be using the Domain Name in bad faith.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the Disputed 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 Disputed 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 Disputed 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.

A. Refiling of Complaint

It is stated within the Complaint and confirmed by the Panel that there existed a prior UDRP case numbered 101464 filed on 09.03.2017 which was rejected. It now appears generally accepted in WIPO decisions that the principles relating to permitting the refilling of complaints have been established by the decisions in WIPO Case Nos. D2000-0703 and D2000-1490. A helpful summary of relevant later decisions is to be found in Koninklijke Philips Electronics N.V. v Relson Ltd, WIPO case no. DWS2002-0001 at pp 5-6.

It further seems accepted that the presentation of fresh material evidence, not reasonably available at the time of filing the original Complaint, is justification for considering a fresh complaint between the same parties in respect of the same domain name. In the initial Panel decision, the Panel concluded that the Complainant did not manage to prove that the Complainant does not provide the criteria of OKI DATA and also finds insufficient evidence of bad faith. This time, the Complainant submits the current look and feel of the Disputed domain name bearing the exact same logo of the Complainant's "FRANKE" logo and also uses of the Respondent on third parties' registered and well-known trademarks as to create pattern of conduct. The Panel therefore proceeds to consider the Complaint on its merits.

B. Language of the decision:

The Disputed domain name's Registration Agreement is in Turkish and pursuant to the Rules, paragraph 11, unless otherwise agreed by the parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement. However, the Complainant submitted arguments along with the Complaint as to why the proceeding should proceed in English. The purpose of paragraph 11 of the Rules is to ensure fairness in the selection of language by giving full consideration to the parties' level of comfort with each language, the expenses to be incurred and the possibility of delay in the proceeding in the event translations are required and other relevant factors.

The Respondent did not reply to the Complainant's request, therefore it did not express in any way that it cannot answer the allegations since it does not understand English.The Complainant has submitted its Complaint in English and supporting evidence in both in English and Turkish. Moreover, the Complainant is not a Turkish entity. Therefore, if the Complainant were required to submit all documents in Turkish, the administrative proceeding would be unduly delayed and the Complainant would have to incur substantial expenses for translation. The Respondent has not objected to the Complainant's language request and has not come forward to express any interest in this proceeding. Therefore, in consideration of the above circumstances and in the interest of fairness to both Parties, the Panel hereby decides, under paragraph 11(a) of the Rules, that English shall be the language of administrative proceeding in this case.At this point, the Panel refers to Groupe Industriel Marcel Dassault, Dassault Aviation v. Mr. Minwoo Park, WIPO Case No. D2003-0989; Deutsche Messe AG v. Kim Hyungho, WIPO Case No. D2003-0679; and Zappos.com, Inc. v. Zufu aka Huahaotrade, WIPO Case No. D2008-1191. The Panel finds that in the circumstances of this case, paragraph 11 of the Rules is best served by allowing this proceeding to be conducted in English.

PRINCIPAL REASONS FOR THE DECISION

Paragraph 15 of the Rules provides that the Panel is to decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable.

In that regard, the Panel also notes that the burden of proof is on the Complainant to make out its case and past UDRP panels have consistently said that a Complainant must show that all three elements of the Policy have been made out before any order can be made to transfer a domain name.

For the Complainant to succeed it must prove, within the meaning of paragraph 4(a) of the Policy, that:

A. The domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and

B. The Respondent has no rights or legitimate interests in respect of the domain name; and

C. The domain name has been registered and is being used in bad faith.

The Panel will therefore deal with each of these requirements in turn.

A. Identical or Confusingly Similar

The Policy simply requires the Complainant to demonstrate that the Disputed domain name is identical or confusingly similar to a trademark in which the Complainant has rights. The Panel is satisfied that the Complainant is the owner of registrations of the trademarks "FRANKE" in Turkey.

The Panel further finds that the Disputed domain name is confusingly similar to the Complainant's "FRANKE" trademark. The Disputed domain name incorporates the Complainant's FRANKE trademark in its entirety with the additional element "servisi". The Panel concludes that the addition of the element "servisi", meaning "service" in Turkish does not eliminate the confusing similarity between the Complainant's trademark "FRANKE" and the Disputed domain name. In similar UDRP cases

(see, e.g., Sanofi-Aventis v. Gideon Kimbrell, WIPO Case No. D2010-1559; Turkcell Iletisim Hizmetleri A.S. v. Vural Kavak, WIPO Case No. D2010-0010; Greenbrier IA, Inc. v. Moniker Privacy Services/Jim Lyons, WIPO Case No. D2010-0017 and Zodiac Marine & Pool, Avon Inflatables Ltd and Zodiac of North America Inc. v. Mr. Tim Green, WIPO Case No. D2010-0024), the respective UDRP panels found that adding descriptive words does not remove the likelihood of confusion between a trademark and a domain name incorporating said trademark.

Moreover, the Panel finds that the addition of the "com" suffix is irrelevant when determining whether the Disputed domain name is confusingly similar to the Complainant's trademark.

The Panel is of the opinion that the internet users will fall into false impression that the Disputed domain name is an official domain name of the Complainant. The Panel recognizes the Complainant's rights and concludes that the Disputed domain name is confusingly similar with the Complainant's trademarks. Therefore, the Panel concludes that the requirements of paragraph 4(a)(i) of the Policy is provided.

B. Rights or Legitimate Interests

Under paragraph 4(a)(ii) of the Policy, the Complainant has the burden of establishing that the Respondent has no rights or legitimate interests in respect of the Disputed domain name.

It is open to a Respondent to establish its rights or legitimate interests in a domain name, among other circumstances, by showing any of the following elements:

(i) before any notice to you [the Respondent] of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
(ii) you [the Respondent] (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
(iii) you [the Respondent] are making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

Thus, if the Respondent proves any of these elements or indeed anything else that shows that it has a right or legitimate interest in the Disputed domain name, the Complainant will have failed to discharge its burden of proof and the Complaint will fail. The burden is on the Complainant to demonstrate a prima facie case that the Respondent does not have rights or legitimate interests in the Disputed domain names. Once the Complainant has made out a prima facie case, then the Respondent may, inter alia, by showing one of the above circumstances, demonstrate rights or legitimate interests in the Disputed domain name.

The Panel is of the opinion that, without express authority of the relevant trademark holder, to be an authorized technical service of that trademark holder's products would not create any right to use a domain name that is identical, or otherwise wholly incorporates the relevant trademarks. In the absence of a response, the Panel accepts the Complainant's allegations as true that the Respondent is not an authorized business partner and therefore has no authorization to use the "FRANKE" trademark in the Disputed domain name.

The Panel also accepts that the Respondent is not commonly known by the Disputed domain name, the Respondent has acquired no trademark or service mark rights, and the Respondent is not an authorized dealer or representative of the Complainant.

Moreover, as the Complainant points out, the Respondent would not meet the criteria laid down in Oki Data Americas, Inc. v. ASD, Inc., WIPO Case No. D2001-0903, and therefore shall not be considered as acting with goodwill. This is based on the fact that the web site does not accurately disclose the Respondent's relationship with the trademark owner as there is no clear explanation or disclaimer and the trademark of the Complainant is used on the top left corner of each page.

In light of the evidence provided by the Complainant, notably that the Complainant has not granted the Respondent any right

or license to use the FRANKE trademarks, the Panel finds that the Complainant has established a prima facie case that the Respondent does not have rights or legitimate interests in the Disputed domain names for the purposes of the Policy.

Hence, as the Complainant has made out its prima facie case, and as the Respondent has not demonstrated any rights or legitimate interests as illustrated under paragraph 4(c) of the Policy, nor has the Panel found any other basis for finding any rights or legitimate interests of the Respondent in the Disputed domain name, the Panel concludes that the Complainant has satisfied the requirements of paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

The Panel notes that the Complainant must prove both that the Disputed domain name was registered in bad faith and that it is being used in bad faith.

Paragraph 4(b) of the Policy provides a non-exhaustive list of circumstances that, if found by a panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) circumstances indicating that the respondent has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the domain name; or

(ii) the respondent has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct; or

(iii) the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to the respondent's website or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's website or location or of a product or service on the respondent's website or location.

By consideration of the foregoing, the Panel is of the opinion that due to the earlier rights of the Complainant in the trademark FRANKE, the Respondent, also being located in Turkey, was aware of the Complainant and its FRANKE trademark at the time of the registration of the Disputed domain name. See, e.g., Ebay Inc. v. Wangming, WIPO Case No. D2006-1107; General Electric Company v. CPIC NET and Hussain Syed, WIPO Case No. D2001-0087; Parfums Christian Dior v. Javier Garcia Quintas and Christiandior.net, WIPO Case No. D2000-0226. The Panel believes that the awareness of the Complainant's trademark at the time of the registration of the Disputed domain name is to be considered an inference of registration in bad faith.

Further, the fact that the Respondent's website uses the Complainant's trademark "FRANKE" in connection with an offering of services related to the Complainant's goods suggests that by using the Disputed domain name the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website, by creating a likelihood of confusion with the Complainant's trademark as to the source, sponsorship, affiliation, or endorsement of the Respondent's website.

Considering that the Complainant is conducting business on kitchen appliances industry and repair and maintenance services of the same are part of the Complainant's business, the addition of the subject terms to the Disputed domain name is descriptive of the Complainant's services under the trademarks rather than being distinctive. See Swarovski Aktiengesellschaft v. Frank Jackie, WIPO Case No. D2013-0742. Therefore, the nature of the generic terms used would tend to reinforce consumers' conclusion that the website to which the Disputed domain name resolves is somehow legitimately included in the supply and service system established by the Complainant under its "FRANKE" trademarks, or otherwise strengthens the risk of association with the Complainant's mark.

Moreover, the Complainant points to a pattern of conduct by Respondent wherein Respondent registered 39 domain names including well-known brands such as "BOSCH" and "SIEMENS". A pattern of conduct expressly forbidden by paragraph 4(b)(ii) of the Policy. It is found that the Respondent has pattern of conduct that includes regularly registering as domain names trademark holders' trademarks. This pattern of conduct clearly demonstrates bad faith on the part of the Respondent.

Furthermore, by not submitting any response, the Respondent has failed to invoke any circumstances that could demonstrate that it did not register and use the Disputed domain name in bad faith.

Therefore, in light of the above-mentioned circumstances in the present case, the Panel finds that the Disputed domain name has been registered and is being used in bad faith and that the Complainant has established the third element under paragraph 4(a)(iii) of the Policy.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **FRANKE-SERVISI.COM**: Transferred

PANELLISTS

Name	**Mrs Selma Ünlü**

DATE OF PANEL DECISION 2017-06-30

Publish the Decision