Decision for dispute CAC-UDRP-103052

Case number	**CAC-UDRP-103052**
Time of filing	**2020-05-11 12:51:02**
Domain names	**besix-groupe.com**

Case administrator

Name	**Šárka Glasslová (Case admin)**

Complainant

Organization	**Besix Group**

Complainant representative

Organization	**Ulys**

Respondent

Name	**Sophie Apinsa**

OTHER LEGAL PROCEEDINGS

There are no other legal proceedings, pending or decided, which relate to the disputed domain name. However, Complainant has supplied details of a police investigation of fraud related to this and other similar domain names.

IDENTIFICATION OF RIGHTS

The Complainant is the owner of several BESIX trademark registrations:

• Benelux trademark No. 0872629 – BESIX, registered on February 10, 2010 in classes 35, 36, 37, 40 and 42;

• International trademark No. 1039445 – BESIX (fig), registered on April 14, 2010 in classes 35, 36, 37, 40 and 42, extended to the EU, Azerbaijan, Belarus, Switzerland, Algeria, Egypt, Croatia, Kazakhstan, Morocco, Serbia, Russian Federation, Ukraine, Norway, Turkmenistan;

• Benelux trademark No. 0872955 – BESIX (fig), registered on February 10, 2010 in classes 35, 36, 37, 40 and 42.

FACTUAL BACKGROUND

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

Additional explanations regarding other proceedings:

Since it is clearly a malicious act intended to obtain goods free of charge from third parties, using the name, trademark and distinctive signs of Besix, a complaint was lodged with an examining magistrate (juge d'instruction) in Brussels (Besix headquarters).

This complaint aims essentially at the identification and arrest of the persons organizing this fraud. As in any country in the world, the investigation may take several months (or years).

This does not prevent Besix from acting on the basis of the UDRP in order to recover, in the meantime, the domain names and thus prevent the aggravation of its prejudice and that of the third parties from whom property is thus taken.

There is nothing to prevent this procedure: as long as the 3 conditions provided for in the Regulation are established (which is the case), a panel can issue a decision.

For the information of the Panel, Besix Group filed four ADR complaints before the CAC in relation with the same fraud using other domain names:

besix.group (decision 102573, 6th of December 2019);
besix-group.net (decision 102767, 12nd of December 2019);
besix-belgium.com (decision 102927, 13rd of April 2020);
besix-belgium.net (decision 102957, 14th of April 2020).

In every case, the CAC has granted the transfer of the domaine names.

Decisions of the CAC

Besix Group filed an ADR complaint before the Belgian center for arbitration (CEPANI) in relation with the domain name <besix-group.be> which was also used for the perpetration of the same fraud. A decision has been issued on October 25, 2019. The Panel has granted the transfer of the domain name.

Decision of the Cepani

All those cases are related to the same fraud by the same Respondent who repeatedly files new fraudulent domain names.

Such an investigation was never considered as a legal proceeding preventing a UDRP case. If such an investigation would prevent the filing of a UDRP complaint, it would mean that a Complainant would be banned from alerting the authorities (police, prosecutor, etc.) if he ever wants to file a UDRP complaint, which is fortunately not the case.

In these circumstances, we can confirm that there is no “legal proceedings initiated prior to or during” the administrative proceeding in respect of the domain-name dispute that is the subject of the complaint, according to Par.18 of the UDRP Rules.

THE FIRST CONDITION: THE DOMAIN NAMES ARE IDENTICAL OR CONFUSINGLY SIMILAR TO A TRADEMARK OR SERVICE MARK IN WHICH THE COMPLAINANT HAS RIGHTS

The Complainant owns the trademark registrations for “BESIX”

Within these trademarks, the verbal element “BESIX” is predominant and constitutes the essential element to be taken into account when analysing the first condition (see, in this regard, WIPO D2012-1147, D2013-1226, D2015-2078, D2017-0070).

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant’s trademark

and the disputed domain names.

This test typically involves a side-by-side comparison of the domain names and the textual components of the relevant trademark to assess whether the mark is recognizable within the disputed domain names.

In this context, panels have also found that the overall facts and circumstances of a case may support a finding of confusing similarity, particularly where it appears that the Respondent registered the domain names precisely because it believed that the domain names were confusingly similar to a mark held by the Complainant. This is obviously the case here, since the domain names were registered and used in order to cheat the recipient of the mails sent under those domain names.

BESIX, the Complainant's trademarks, is included entirely in the disputed domain name <besix-groupe.com>.

It is considered that "where a domain name incorporates the entirety of a trademark, or where at least a dominant feature of the relevant mark is recognizable in the domain name, the domain name will normally be considered confusingly similar to that mark for purposes of UDRP standing" (the same applies to WIPO Cases No. D2003-0251, D2004-0206, D2004-0962, D2005-0649, D2017-0138, D2017-0156, D2017-0209).

This circumstance alone provides justification for holding that the first condition is satisfied.

Furthermore, BESIX Group, a trade name as well as the company name, is very similar to the disputed domain name.

In this respect, the addition of the suffix ".com", ".net" or ".group" is deemed irrelevant for determining the similarity between the domain name and the trademark of the Complainant. The same reasoning applies to the addition of a hyphen or the letter "e" which, in many languages, such as French, one the language of Besix origin country, is not even pronounced.

It should also be added that the confusion is all the more evident since the disputed domain name is used precisely in order to falsely give the impression that the emails sent under that domain are originating from the Complainant.

There is therefore even greater confusion since the confusion not only is a consequence of the domain name use, but the intended consequence of the domain name use.

The Complainant's distinctive marks pre-date the registration of the disputed domain name. While the registration of the disputed domain name dates from 27th of March 2020, the Complainant's trademarks have been registered since 10 February 2010 and 14 April 2010, and the oldest domain names of the Complainant date back to:

- besix.com : 17 January 1997;
- besix.net : 18 June 2001;
- besix.be : 26 March 2003;
- besix.fr : 27 May 2003;
- besixgroup.com : 18 August 2004;
- besixgroup.be : 21 September 2007.

THE SECOND CONDITION: THE RESPONDENT HAS NO RIGHTS OR LEGITIMATE INTERESTS IN RESPECT OF THE DOMAIN NAMES

The right (or legitimate interest) must be understood as the specific and personal right (or legitimate interest) to hold the domain name in order to make use of them or to legitimately prevent their use by third parties.

While the overall burden of proof in UDRP proceedings is on the Complainant, panels have recognized that proving a Respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of "proving a negative", requiring information that is often primarily within the knowledge or control of the Respondent. As such, where a Complainant makes out a prima facie case that the Respondent lacks rights or legitimate interests, the burden of production

on this element shifts to the Respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name. If the Respondent fails to come forward with such relevant evidence, the Complainant is deemed to have satisfied the second element.

The following circumstances should be indicative that the second condition of article 4, a, (ii) of the UDRP is met :

- The domain name holder has no legal relation nor business relationship with the Complainant;
- The Complainant ignores the exact identity of the domain name holder, which can be proven by a complaint filed with the police against “unknown (X)” and the impossibility to deduce a real identity from information transmitted by the registrars (none of them answered positively to our RDDS queries, when we asked for information about the Respondent);
- The domain name holder used an e-mail address similar to those of the Complainant;
- The domain name holder usurped the identity of Complainant’s employees;
- The use of a company number different from the one of the Complainant but close enough as not to draw attention;
- When the Complainant filed complaints against the domain names <besix-belgium.net>, <besix-belgium.com>, <besix.group> and <besix-group.net> before the Czech Arbitration Court, the domain name holder did not answer, and did not provide any proof of rights or legitimate interests in the domain name.
- When the Complainant filed a complaint against the domain name <besix-group.be> before the CEPANI, the Belgian Centre for Arbitration and Mediation, the third-party decider competent for .be domain name (see https://www.iana.org/ and https://www.dnsbelgium.be/) the domain name holder did not answer, and did not provide any proof of rights or legitimate interests in the domain name.

The fact that the domain name <besix-groupe.com> holder is the same as the person who held <besix-belgium.com>, <besix-belgium.net>, <besix.group>, <besix-group.net>, and <besix-group.com> is made clear by the fact that the domain name <besix-belgium.com> was registered the very day (11 February 2020) the Sender Policy Framework (SPF) record for the domain names <besix.group> and <besix-group.net> were changed after Besix Group won the cases related to these domain names before the CAC (cases 102573 and 102767).

When the domain names <besix-belgium.com> and <besix-belgium.ne>t have were about to be transferred to the Complainant, a new domain name has been acquired: <besix-groupe.com>.

Moreover, the texts of the fraudulent e-mails are always the same, irrespective of the fraudulent domain name used, and the (fake) names (Michael Hannart or Laurent Peters) and e-mail addresses used to register the domain names are always the same.

In the present case, all these circumstances are present. There is no relation between the domain name holder and the Complainant ; it is impossible to know the identity of the domain name holder who hides behind an anonymous registration (even the police had to work hard on this) and therefore impossible to contact him/her; the e-mail addresses used are:

- communication@besix-groupe.com;
- order@besix-belgium.net;
- sales@besix-belgium.net;
- procurement@besix-belgium.net;
- pascal.b@besix-belgium.com;
- procurement@besix-belgium.com;
- sales@besix-group.com;
- sales@besix-group.net;
- larosse@besix-group.net;
- contact@besix-group.net;
- info@besix-group.net;
- info@besix.group;
- order@besix.group;
- contact@besix.group;

- finance@besix.group;
- sales@besix.group;
- larosse@besix.group;

which are very similar to existing addresses used by the Complainant or its team; the domain name holder usurps the identities of 1) the BESIX Group, 2) Pascal Beeckmans, an employee of BESIX Group, and 3) Peter Larosse, an employee of a Besix subsidiary and former employee of BESIX Group. The domain name holder appears in the scam as a present employee of the BESIX Group and valid representative of the company ; the company number used is the one of Besix Group, which can be argued is worse than using a similar one; and it is probable he will not respond to any CAC's queries.

Moreover, the lack of a right or legitimate interest arises from the following elements inter alia

- The domain name holder does not hold, whether in the European Union, or elsewhere, any known trademark that corresponds, to a greater or lesser extent, to the disputed domain name;
- The Respondent is not known as a company or other organisation under the name besix group or besix;
- The Complainant has never granted a licence to the domain name holder to use its trademark.

Even in case the Respondent would claim interest or right in the domain name, it would fail proving that this (alleged) interest or right is legitimate.

This will be addressed under the 3rd condition but it should be stressed from the outset that, at the stage of analysing the right or the legitimate interest, it is impossible to consider as legitimate a case of identity theft and attempted fraud.
Case law precedent acknowledges that the 2nd and 3rd conditions may be linked to each other when the project pursued by the domain names holder appears to be unlawful as in this case (see inter alia WIPO D2013-0528, D2014-1433, D2015-1221, D2015-2062, D2016-1814, D2012-2123).

Also, as is evident in the Report of the First WIPO Internet Domain Name Process (UDRP rules and decisions are an important source of inspiration for .be ADR), fairness is a lynchpin of a credible dispute resolution system. It is contrary to fairness to register domain names, leave them unused in terms of website and use them to create mail addresses in order to scam and try to get a fraudulent advantage using the Complaint trademarks, name, logo and colours. Indeed, beyond looking at the domain names and the nature of their content, panels assess whether the overall facts and circumstances of the case support a claimed fair use.

Eventually, it should be stressed that Panels have categorically held that the use of domain names for illegal activity (e.g. phishing, unauthorized account access/hacking, impersonation/passing off, or other types of fraud) can never confer rights or legitimate interests on a Respondent (see Prada S.A. v. Domains For Life, WIPO Case No. D2004-1019 ; Advance Magazine Publishers Inc. v. Arena International Inc., WIPO Case No. D2011-0203 ; Pierre Fabre Dermo-Cosmetique v. Simon Chen/personal/jinpingguo, WIPO Case No. D2011-0769 ; Advance Magazine Publishers Inc., Les Publications Conde Nast S.A. v. Chunhai Zhang, WIPO Case No. D2012-0136).

In this respect, Complainant doesn't have to prove that Respondent has been convicted of illegal activity by a Court (otherwise ADR would be too slow, ineffective and useless). Panels have found that circumstantial evidence can support a Complainant's otherwise credible claim of illegal Respondent activity. In this case, the existence of more than 200 identified victims (!), the deep enquiry by the police (still ongoing), and the nature of the fraud (a pure scam-scheme where hidden persons are trying to cheat the recipient of the emails and lead then to believe that the order is placed by the Complainant), are enough to demonstrate a blatant illegal activity.

THE THIRD CONDITION: REGISTRATION OR USE IN BAD FAITH

The notion of bad faith may be deduced from a set of circumstances on the basis of which one can only conclude that the domain name holder was aware, or should have been aware, that by registering or using the domain name, it was perpetrating misconduct, violating a law or infringing rights.

Not only is it for sure that Respondent was aware of the existence of Complainant when registering the domain name (the Complainant is the largest Belgian constructor and among the top 69 in the world), but the domain name has been carefully chosen in order to be as close as possible to the Complainant's websites, in order to exchange emails from a domain that appears as original as possible. Bad faith is blatant.

It is considered that the apparent intention of disrupting the business of the Complainant, through contacting its co-contractors under the identity of the Complainant, but using a different e-mail address to place fraudulent orders, should be interpreted as an attempt, by the domain names holder, to knowingly create a risk of confusion between him and the Complainant. Such a conclusion is confirmed by the use of the trademark and the company name of the Complainant.

These circumstances, coupled with the use of the domain name without the Complainant's consent and the lack of information provided to the registrar at the moment of registration, the use of e-mail addresses similar to those of the Complainant and of the same company number similar to the one of the Complainant (logically, the use of an identical number should be deemed more serious), tends to confirm the domain name holder's bad faith.

Moreover, immediately after <besix.group> and <besix-group.net> have been transferred to the Complainant, two new domain names have been acquired: <besix-belgium.com> and <besix-belgium.net>.

When the domain names <besix-belgium.com> and <besix-belgium.net> were about to be transferred to the Complainant, a new domain name has been acquired: <besix-groupe.com>.

In this case, arguments raised regarding the second condition may also be assessed as far as the third condition is concerned : such common assessment is recommended for example where clear indicia of bad faith suggest there cannot be any Respondent rights or legitimate interests (and vice-versa). In such cases, panels have found that the facts and circumstances of the case would benefit from a joint discussion of the policy elements.

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.

PRINCIPAL REASONS FOR THE DECISION

I. RIGHTS

The disputed domain name is confusingly similar to the Complainant's registered trademarks since it reproduces the Complainant's mark 'BESIX', merely adding the generic expression "GROUPE" at the end, with a hyphen between the two words.

II. NO RIGHTS OR LEGITIMATE INTERESTS

The Respondent has not submitted any response. Therefore, it has submitted no information on possible rights or legitimate interests it might hold. On its part, the Complainant has submitted information and arguments which allow it to be reasonably assumed that the Respondent has no rights or legitimate interest in the domain name in dispute.

As the WIPO Arbitration and Mediation Center pointed out in UDRP case No. D20020856:

"As mentioned [in the decision], the Respondent has not filed a Response and is therefore in default. In those circumstances when the Respondent has no obvious connection with the disputed Domain Names, the prima facie showing by the Complainant that the Respondent has no right or legitimate interest is sufficient to shift the burden of proof to the Respondent to demonstrate that such a right or legitimate interest exists." WIPO Case No. D20020273 <sachsenanhalt>; WIPO Case No. D20020521 <volvovehicles.com>.

Furthermore, the disputed domain name does not host any active website, but apparently is used for fraudulent emails.

Accordingly, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name.

III. BAD FAITH

The Respondent has, as a result of his default, not invoked any circumstances which could invalidate the Complainant´s allegations and evidence with regard to the Respondent´s registration and use of the disputed domain name in bad faith.

The Complainant has supplied evidence of apparently fraudulent use of the disputed domain name by the Respondent. This consists of the generation of e-mails to third parties purporting to emanate from the Complainant, but in fact generated by the Respondent in order to seek payments to which the Respondent is not entitled.

It is demonstrated that the disputed domain name is being used in such a way as to impersonate the Complainant's in fraudulent emails. This impersonation is aided by the very meaning of the added word GROUPE. It is therefore clear that the Respondent registered the domain name for this purpose.

Paragraph 4(b) (iiii) of the Policy provides that the following circumstances are deemed to be evidence that the Respondent has registered and is using the disputed domain name in bad faith:

(iv) by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to its 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 its website or location or of a product or service on its website or location.

As mentioned in Andrey Ternovskiy dba Chatroulette v. Alexander Ochki, WIPO Case No. D2017-0334:

"It is clear in the Panel's view that in the mind of an Internet user, the disputed domain names could be directly associated with the Complainant's trademark, which is likely to be confusing to the public as suggesting either an operation of the Complainant or one associated with or endorsed by it (see AT&T Corp. v. Amjad Kausar, WIPO Case No. D2003-0327)."

It has, therefore, been satisfactorily demonstrated to the Panel that the disputed domain name has been registered and used in bad faith.

For the reasons stated above, it is the decision of this Panel that the Complainant has satisfied all three elements of

paragraph 4(a) of the Policy.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **BESIX-GROUPE.COM**: Transferred

PANELLISTS

Name	**José Ignacio San Martín**

DATE OF PANEL DECISION 2020-06-11

Publish the Decision