Decision for dispute CAC-UDRP-103170

Case number	CAC-UDRP-103170
Time of filing	2020-07-17 09:07:53
Domain names	Boursorama-Ag.com

Case administrator

Organization	Iveta Špiclová (Czech Arbitration Court) (Case admin)

Complainant

Organization	BOURSORAMA SA

Complainant representative

Organization	Nameshield (Laurent Becker)

Respondent

Name	Agathe Martin Sanchez

OTHER LEGAL PROCEEDINGS

The Panel became aware of another proceeding brought by the same Complainant against the same Respondent: CAC Case No. 103182 of 13 August 2020 (https://udrp.adr.eu). The Panel determined that Case 103182 had been conducted and decided in the English language with no discussion of the language of the proceeding.

The Panel took note that the Complainant invoked that proceeding's conduct in English as the reason also to conduct the present one in English.

See further "Procedural Factors" below.

IDENTIFICATION OF RIGHTS

The Complainant is the owner of EU trade mark 001758614, for the word "BOURSORAMA", registered on 26 November 2001 in relation to Nice Classification classes 9, 16, 35, 36, 38, 41 and 42. It is also the registrant of the domain name <boursorama.com>, registered on 1 March 1998.

The Respondent is the registrant of the disputed domain name <boursorama-ag.com>, registered on 9 July 2020.

FACTUAL BACKGROUND

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

The Complainant, Boursorama SA, is a French company that was founded in 1998 and acquired in 2002 by the online stock exchange broker Fimatex, which is part of the Société Générale financial services group. Boursorama entered the online banking services market in 2005. Today, it has over 2 million online banking customers, provides 300,000 stock exchange trading accounts and receives some 30 million visits online monthly.

The Respondent has obtained server hosting for the disputed domain name, as shown in evidence adduced by the Complainant. No home page is available, as explained on a default page automatically generated by the server and thus without the Respondent's intervention. But a subdirectory page loaded by the Respondent is accessible to internet users, which displays a login panel in French and bears the logo "Boursorama Banque".

The Respondent is not known by the disputed domain name and has no association with the Complainant of any kind or any authorization to use the Complainant's trade mark.

The Complainant stated that it had initiated another proceeding under similar circumstances to the present proceeding against the same Respondent and that the language employed in the other proceeding is English. See further in this regard "Other Legal Proceedings" above and "Procedural Factors" below.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS:

COMPLAINANT:

The disputed domain name <boursorama-ag.com> is confusingly similar to the Complainant's well-known trademark BOURSORAMA.

The lack of a legitimate interest on the Respondent's part is evidenced by the absence of anything resembling the brand BOURSORAMA appearing in her name, in particular at the point of registration ("WHOIS" information). This suffices to shift the burden of proof to the Respondent.

The Complainant relies on past proceedings it has successfully brought to show that the lack of legitimate interest furthermore extends to bad faith, notably the finding in CAC Case No. 101131, BOURSORAMA v. PD Host Inc – Ken Thomas that the Respondent there acted in bad faith in registering a name that incorporates its well-known brand, it being "totally irrealistic to believe that the Respondent did not know the Complainant's trademark" when registering the domain name.

Furthermore, the disputed domain name is being used for conducting a phishing scam, as evidenced by a login page purporting to be that of "Boursorama Banque" and which includes a link in case of forgotten login details. Numerous ADR proceedings have recognized that such a use is compelling evidence of bad faith use.

RESPONDENT:

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

RIGHTS

No finding made. See "Procedural Factors" and "Principal Reasons for the Decision" below.

NO RIGHTS OR LEGITIMATE INTERESTS

No finding made. See "Procedural Factors" and "Principal Reasons for the Decision" below.

BAD FAITH

No finding made. See "Procedural Factors" and "Principal Reasons for the Decision" below.

PROCEDURAL FACTORS

In light of a request recorded in the Case File by the Complainant to the CAC Case Administrator to change the language of the proceeding from French to English and of a contemporaneous and very similar proceeding involving the same Parties (see "Other Legal Proceedings" above), the Panel examined the issue of the language of the proceeding as a preliminary procedural matter by reference to the Case File and by means of investigations the Panel found it necessary to conduct under the general powers granted it by Paragraph 10 of the UDRP Rules.

The Panel then issued a Nonstandard Communication (NSC) entitled "Preliminary Findings and Procedural Order regarding the Language of the Proceeding". In this NSC, which was issued in English and French, the Panel:

- made the preliminary finding that the language of the proceeding should be French in application of Paragraph 11(a) of the UDRP Rules;

- noted, however, that the Complainant had invoked the fact that CAC Case 103182 had been conducted and decided in English as the reason to proceed in English also in this case;

- concluded therefore that new submissions on the issue of the language of the proceedings should be permitted before the Panel confirmed its preliminary finding;

- issued a procedural order inviting the Parties to make any such submissions by NSC in both English and French within a period of 14 days.

PRINCIPAL REASONS FOR THE DECISION

1. Procedural findings

Paragraph 11 of the UDRP Rules directs the Parties and the Dispute Resolution Provider to abide by the language of the registration agreement for the disputed domain name when determining the language in which a proceeding should take place.

Compliance with Paragraph 11 of the Rules thereby constitutes a condition precedent for due submission of a Complaint under the UDRP procedure. Hence, if a Dispute Resolution Provider can only offer its facilities in a language other than the one to apply on the basis of Paragraph 11, it should advise the Complainant and make a fee refund.

Correspondingly, non-compliance with Paragraph 11 makes the Complaint inadmissible and thus the Panel cannot decide on its merits.

This said, Paragraph 11 does allow some latitude.

On the one side, the Parties may agree on another language or the registration agreement's terms themselves may already provide for this.

Neither of these circumstances applies in the present proceeding. In particular, the registrar, Google, unequivocally stated in its response to the CAC Case Administrator's Request for Verification that the language of the registration agreement (which Google provided by hyperlink) is not English but French. The Panel furthermore observes that, whereas the terms of the registration agreement require legal notices to Google to be sent in English and make the agreement's law that of the US state of California (excluding Californian rules for conflict of laws), these terms do not relate to third-party dispute resolution. Instead, the agreement in that regard makes reference to Google's registrar accreditation agreement with ICANN and to ICANN's policies and rules, which include the UDRP and its Rules. In short, the agreement's authoritative language for

this proceeding's purposes is the one it is written in, French.

On the other side, Paragraph 11 grants the Panel discretion to determine upon another language than that of the registration agreement "having regard to the circumstances" in the proceeding at hand.

A circumstance which the Panel needed to consider is the fact of a similar proceeding, CAC Case 103182, as explained under "Other Legal Proceedings" and "Procedural Factors" above. Yet the proper language of the proceeding was apparently not raised during that case and certainly not in the Decision. Thus, that case in itself offers no insight to which the present Panel can have regard.

Nor can the Panel consider that a mere wish on behalf of a Complainant -- to change the language to one it prefers -- suffices to qualify as a circumstance to which the Panel should have regard. This would rob Paragraph 11's clear terms of practical meaning and instead bestow on one Party to a proceeding a privilege that would fly in the face of due process.

It must be underlined here that the UDRP Rules in Paragraph 11 serve to recognize the legitimate expectation of any Respondent to read and be able to respond to allegations in the language that the Respondent understands, as signified by signature of a registration agreement. This corresponds to the reality that the Top Level Domain names to which the UDRP applies form a global facility for the benefit of domain name registrants whatever their country or language.

Further circumstances in this case that might have justified the Panel's exercise of the discretion allowed by Paragraph 11 could, though, have been evident to the Complainant. If so, it is necessary for the Complainant to provide sufficient evidence to provide a valid reason for such exercise, bearing in mind that the issue of language is a condition precedent that must be satisfied. Thus, the Complainant can bring pertinent matters to the fore, but cannot count on the Panel to sift through the Complaint in order to seek justification for a Complainant's procedural preference as to language. Again, that would contradict due process, and thereby violate the Panel's own duties of impartiality under the Rules.

In the present proceeding, the Panel observes that the Complainant and the Respondent were, by virtue of the Preliminary Findings and Procedural Order which the Panel issued, granted ample opportunity to offer evidence and reasons in respect of its preliminary findings, summarized above under "Procedural Factors". But neither Party took advantage of this opportunity.

The Panel, in light of the above, therefore confirms its preliminary finding and rules that the Complaint is not admissible.

2. Substantive findings

The Complaint not being admissible, the Panel declines to comment on its substance.

3. Re-filing

Not having been able to reach the point of making findings on the substance of the Complaint, the Panel rules that the Complaint may be re-filed, but that the Complainant must, in any refiling submitted in the English language, show sufficient evidence and reason(s) to overcome the procedural objections to its admissibility stated under point 1 above.

4. Fees of the Proceeding

The Panel takes note that the Case Administrator duly advised the Complainant of the consequences of not filing a Complaint in the language directed under the Rules and that the Complainant nevertheless chose to pursue its Complaint in English. The proceeding thereby continued to Decision with the character of a language proceeding. The Complainant's obligations as to the proceeding's fees similarly continued and these are hence not refundable.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Rejected

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

1. **BOURSORAMA-AG.COM**: Remaining with the Respondent

PANELLISTS

Name	**Kevin J. Madders**

DATE OF PANEL DECISION 2020-08-31

Publish the Decision