Decision for dispute CAC-UDRP-103413

Case number	**CAC-UDRP-103413**
Time of filing	**2020-11-30 10:36:57**
Domain names	**essays-shark.net**

Case administrator

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

Complainant

Organization	**FrogProg Limited**

Respondent

Name	**Pavlo Kucheruk**

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 relies on the following trademarks:

- EssayShark, European registration No. 014969083, filed on 31 December 2015 and registered on 26 May 2016 for services in classes 41 and 42;

- EssayShark, US registration No. 5021885, filed on 31 December 2015 and registered on 16 August 2016, for services in class 41, claiming first use in commerce since 4 October 2011; and

- EssayShark, US registration No. 5021887, filed on 31 December 2015 and registered on 16 August 2016 for services in class 41, claiming first use in commerce since 4 October 2011.

The Complainant is also the owner of the domain name <essayshark.com> registered in October 2011.

Furthermore, the Complainant relies on the unregistered trademark EssayShark used since the year 2011 for services in classes 41 and 42.

FACTUAL BACKGROUND

The Complainant does not spend much words on its field of activity. It only states that despite the fact that the disputed domain name was registered earlier than the filing date of the Complainant's trademark, the Complainant has been using its EssayShark trademark since 2011.

The disputed domain name was registered on 18 August 2015.

PARTIES CONTENTIONS

According to the Complainant, the disputed domain name is confusingly similar to its trademark as it fully incorporates this trademark with some minor changes, such as the upper case letters at the beginning of the words "Essay" and "Shark" in the Complainant's trademark, and the addition of a letter "s" at the word "essays", and of an hyphen between the words "essays" and "shark" in the disputed domain name. These slight modifications are insufficient to create a different overall impression between the disputed domain name and the Complainant's trademark.

The Complainant further maintains that the Respondent lacks rights or legitimate interests in the disputed domain name as it is not linked to the Complainant nor conducts any business with it. In addition, the Respondent is not known by the disputed domain name, nor is using the disputed domain name in accordance with a bona fide offering of goods and services, or for a legitimate non-commercial or fair use. The Complainant also argues that the Respondent would not be able to make a legitimate use of the disputed domain name as the Complainant's trademark is exclusively associated with the Complainant.

According to the Complainant, the disputed domain name was registered and is being used in bad faith. The Respondent is a competitor of the Complainant. In 2018, that is when the Complainant's website was the most popular, the Respondent's website associated with the disputed domain name offered the same type of services than those of the Complainant and reproduced the same graphic element accompanying the Complainant's trademark. Therefore, the Respondent was trying to take an unfair economic advantage from the reputation of the Complainant's trademark by attempting to attract, for commercial gain, users to its website by creating a likelihood of confusion with the Complainant's trademark. Such unlawful intent of the Respondent is also confirmed by the fact that he has used the Complainant's trademark as a keyword to attract Internet users to its website.

The Respondent did not submit any Response.

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

1. Confusing similarity (paragraph 4(a)(ii) of the Policy)

In this procedure, the Complainant relies on trademarks filed after the creation date of the disputed domain name. The Complainant maintains that it also owns unregistered trademark rights since 2011, when it started using the trademark

EssayShark publicly. The Panel does not feel necessary to evaluate these unregistered rights at this stage, as in order to assess the first requirement under the Policy it is not necessary for the trademark rights to have accrued prior to the date of registration of a domain name. This circumstance may have an impact on the assessment of the second and third Policy requirements, but for the purposes of identity or confusingly similarity with a complainant's trademark, UDRP panels have constantly held that it is sufficient to establish that trademark rights are in existence at the time the complaint is filed.

As at the time of the filing of the Complainant the Complainant is the owner of several trademark registrations for "EssayShark", the Panel is satisfied that the Respondent has standing to file this dispute, and the Panel is entitled to evaluate whether the first requirement under the Policy has been met.

The Panel agrees with the Complainant that the disputed domain name is confusingly similar to the Complainant's trademark EssayShark. The slight variations between the disputed domain name and the Complainant's trademark are minimal and certainly insufficient to avoid a confusing similarity. The disputed domain name reproduces the trademark entirely, but for the addition of a letter "s" at the end of the word "essay", and of a hyphen dividing this word from the term "shark". These differences are so minimal that they will probably go unnoticed.

Thus, the Panel is satisfied that the first requirement under the Policy has been met.

2. The Respondent's rights or legitimate interests in the disputed domain name (paragraph 4(a)(ii) of the Policy)

UDRP panels have unanimously held that in order to prove the second requirement under the Policy, it is sufficient for the complainant to make out a prima facie case that the respondent lack rights or legitimate interests in the disputed domain name. Once a prima facie case is made, the burden of proof shifts to the respondent to show that it owns rights or legitimate interests in the disputed domain name. This is so because proving a negative, requiring information that is often primarily within the knowledge of control of the respondent is very cumbersome, if not impossible (see in this respect, also paragraph 2.1. of the "WIPO Jurisprudential Overview 3.0").

However, in order to duly perform its task, a Panel cannot simply conclude that a Respondent lacks rights or legitimate interests in a disputed domain name, when the Complainant has made out a prima facie case and the Respondent has failed to respond.

To be impartial and independent and to ensure that the parties are treated with equality as requested by the Rules, a Panel must take into consideration all the facts and circumstances of the case. This is in line with paragraph 2.1. of the “WIPO Jurisprudential Overview 3.0”, which states that “[t]he panel may draw inferences from the absence of a response as it considers appropriate, but will weigh all available evidence irrespective of whether a response is filed”.

Thus, in the case at issue, the Panel should evaluate whether the fact that the disputed domain name predates the application of the Complainant’s trademarks may provide the Respondent with rights or legitimate interests in the disputed domain name.

The Panel does not find that this is the case for a number of reasons. First, the Respondent registered the disputed domain name only a few months before the filing date of the Complainant’s trademarks and the Complainant proved that its “EssayShark” trademark was in use since long before the registration of the disputed domain name; thus, the Complainant appears to have accrued trademark rights before the registration of the disputed domain name. Furthermore, the disputed domain name gives access to a website promoting services identical to those performed by the Complainant under its “EssayShark” trademark (paper writing services). However, what strikes the Panel the most, is that although according to the relevant WhoIs, the disputed domain name is in the name of an individual with address in Panama City, the website connected to the disputed domain name is owned and operated by a company based in Nicosia, Cyprus, that is the same town of the Complainant. In fact, at the bottom of the home page of the Respondent’s website, one may read as follows: “The website is owned and operated by Writology Ltd., 1-3- Boumpoulinas, Office 42 Boubolulina Building, Nicosia, 2407 Cyprus”.

For all these reasons and in the absence of a Response that could support a different view, the Panel is not prepared to conclude that the Respondent owns rights or legitimate interests in the disputed domain name simply because it was registered a few months before the filing date of the Complainant's trademark applications.

Hence, the Panel is satisfied that the Complainant has made a prima facie case that the Respondent lacks rights or legitimate interests in the disputed domain name, which the Respondent has failed to rebut.

Thus, the second requirement under the Policy is met.

3. Bad Faith (paragraph 4(a)(iii) of the Policy)

As far as registration and use in bad faith are concerned, paragraph 3.8.2. of the "WIPO Jurisprudential Overview 3.0" states that "in certain limited circumstances where the facts of the case establish that the respondent's intent in registering the domain name was to unfairly capitalize on the complainant's nascent (typically as yet unregistered) trademark rights, panels have been prepared to find that the respondent has acted in bad faith".

In the instant case, there are too many coincidences for the Panel to conclude that the disputed domain name was registered by chance. It is hardly credible that when the Respondent registered the disputed domain name, he was not aware of the Complainant and of its activities. Considering that the disputed domain name is used to access a website that offers competing services, it is hardly credible that the Respondent did not want to take an unfair economic advantage from the Complainant's trademark and activities when it registered the disputed domain name. Rather, it is much more credible that the Respondent registered and used the disputed domain specifically to attempt to attract, for commercial gain, Internet users to his 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.

Thus, the Panel is satisfied that also the third and last condition under the Policy has been met.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **ESSAYS-SHARK.NET**: Transferred

PANELLISTS

Name	**Angelica Lodigiani**

DATE OF PANEL DECISION 2021-01-19

Publish the Decision