Decision for dispute CAC-UDRP-103591

Case number	**CAC-UDRP-103591**
Time of filing	**2021-02-22 09:08:07**
Domain names	**flowbird.app**

Case administrator

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

Complainant

Organization	**FLOWBIRD SAS (PARKEON)**

Complainant representative

Organization	**Nameshield (Enora Millocheau)**

Respondent

Name	**Christoffer Blixoe**

OTHER LEGAL PROCEEDINGS

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

IDENTIFICATION OF RIGHTS

The Complainant is the owner of several trademarks including the term “FLOWBIRD”:

- French trademark FLOWBIRD® n°4425718 registered since February 5, 2018;

- French trademark FLOWBIRD® n° 4449643 registered since April 27, 2018;

- International trademark FLOWBIRD® n° 1454019 registered since July 13, 2018.

Complainant offers a variety of services under Classes 9, 35, 36, 37, 38, 39, and 42.

FACTUAL BACKGROUND

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

Complainant, FLOWBIRD SAS (PARKEON) is a French-headquartered company specializing in payment and ticketing

systems, notably for car parks and public transport systems. It asserts that it has a global presence. The Complainant states that “Flowbird supports decision-makers in organizing, encouraging and managing mobility within cities, helping address the ever changing quality of life, environmental and economic challenges. . . . Every week around the world, thanks to our solutions, mobile applications and online services, we contribute to improving the environment by reducing air pollution, optimising traffic, simplifying payments and in doing so, making cities more secure and economically sustainable.”

The disputed domain name <flowbird.app> was registered on May 18, 2018 and does not resolve to an active website.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

PARTIES' CONTENTIONS:

COMPLAINANT:
The Complainant submits that <flowbird.app> is identical to its trademark FLOWBIRD in that it contains in whole the combined words “flow” and “bird.”

According to the Complainant, the Respondent has no rights or legitimate interests in respect of the disputed domain name, because it has not been authorized by the Complainant to use the FLOWBIRD trademark, and the disputed domain name does not correspond to the name of the Respondent. The Complainant adds that the Respondent does not carry out a fair or non-commercial use of the disputed domain name as it currently does not resolve to an active website.

The Complainant contends further that the disputed domain name was registered and is being used in bad faith. According to the Complainant, the FLOWBIRD trademark is distinctive and well-known around the world, and that it is evident that the Respondent registered the disputed domain name with knowledge of Complainant’s trademark. The disputed domain name is not used for any bona fide purpose and was registered and is being used in bad faith.

RESPONDENT:

The Respondent did not reply to the Complainant's contentions and did not submit any arguments or evidence in its defence. In such event, UDRP Rule 14 provides (a) that the “Panel shall proceed to a decision on the complaint” and (b) that “the Panel shall draw such inferences therefrom as it considers appropriate.” In view of Respondent's failure to submit a response, the Panel shall decide this administrative proceeding on the basis of Complainant's undisputed representations pursuant to paragraphs 5(f), 14(a) and 15(a) of the Rules and draw such inferences it considers appropriate pursuant to paragraph 14(b) of the Rules. The Panel is entitled to accept all reasonable allegations set forth in a complaint; however, the Panel may deny relief where a complaint contains mere conclusory or unsubstantiated arguments. See WIPO Jurisprudential Overview 3.0 at Para. 4.3.

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

Pursuant to the Policy, paragraph 4(a), a complainant must prove each of the following to justify the transfer of a domain name:

(i) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;

(ii) the respondent has no rights or legitimate interests in respect of the domain name; and

(iii) the respondent has registered and is using the domain name in bad faith.

In this case, the Czech Arbitration Court has employed the required measures to achieve actual notice of the Complaint to the Respondent, and the Respondent was given a fair opportunity to present its case and defend its registration of the subject domain name <flowbird.app>.

By the Rules, paragraph 5(c)(i), it is expected of a respondent to: "[r]espond specifically to the statements and allegations contained in the complaint and include any and all bases for the Respondent (domain name holder) to retain registration and use of the disputed domain name …"

Notwithstanding Respondent's default Complainant is not relieved from the burden of establishing its claim. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, 3.0, § 4.3: "Noting the burden of proof on the complainant, a respondent's default (i.e., failure to submit a formal response) would not by itself mean that the complainant is deemed to have prevailed; a respondent's default is not necessarily an admission that the complainant's claims are true." However, if a complainant's adduced evidence supports any element of the Policy, a respondent has an opportunity to contest the lawful registration of the disputed domain name.

Identical or confusingly similar, §4(a)(i)

A side-by-side comparison of the domain name and the FLOWBIRD trademark indicates that <flowbird.app> is identical to the mark. At the threshold it is necessary only to consider "whether a domain name is similar enough in light of the purpose of the Policy to justify moving on to the other elements of a claim for cancellation or transfer of a domain name," The Panel in Nicole Kidman v. John Zuccarini, d/b/a Cupcake Party, D2000-1415 (WIPO January 23, 2001) notes that "numerous prior panels have held [the purposes of the Policy are satisfied] when a domain name wholly incorporates a complainant's registered mark." Similarly, Magnum Piering, Inc. v The Mudjackers and Garwood S. Wilson, Sr., D2000-1525 (WIPO January 21, 2001). Panelists generally disregard the top-level suffixes as functional necessities, thus the top-level extension is irrelevant in determining the issue under the first requirement of the Policy.

Having demonstrated that <flowbird.app> is identical Complainant's FLOWBIRD trademark the Panel finds Complainant has satisfied Para. 4(a)(i) of the Policy.

B. Rights and legitimate interests, Para. 4(a)(ii)

Under paragraph 4(a)(ii) of the Policy, a complainant has the burden of establishing that a respondent lacks rights or legitimate interests in respect of the disputed domain name, but this burden is light. It is sufficient in the first instance for Complainant to allege a prima facie case, and if the evidence presented is conclusive or yields an inference that Respondent lacks rights or legitimate interests, the burden shifts to Respondent to rebut the allegations.

This concept of shifting burdens is clearly explained in Croatia Airlines d.d. v. Modern Empire Internet Ltd., D2003-0455 (WIPO August 21, 2003) in which the Panel held that "[s]ince it is difficult to prove a negative ... especially where the Respondent, rather than complainant, would be best placed to have specific knowledge of such rights or interests–and since Paragraph 4(c) describes how a Respondent can demonstrate rights and legitimate interests, a Complainant's burden of proof on this element is light."

Once the complainant makes such a prima facie showing, "the burden of production shifts to the respondent, though the burden of proof always remains on the complainant. If the respondent fails to come forward with evidence showing rights or legitimate interests, the complainant will have sustained its burden under the second element of the UDRP," Malayan Banking Berhad v. Beauty, Success & Truth International, D2008-1393 (December 8, 2008). Finally, "in the absence of direct evidence, complainant and the panel must resort to reasonable inferences from whatever evidence is in the record," Euromarket Designs, Inc. v. Domain For Sale VMI, D2000-1195 (WIPO October 26, 2000).

In this case, Complainant contends that Respondent has no rights or legitimate interests in the disputed domain name, because the Respondent has no permission to use the FLOWBIRD trademark. The evidence in the record is conclusive that Respondent Christopher Blixoe is not commonly known under the disputed domain name. See Skechers U.S.A., Inc. and Skechers U.S.A., Inc. II v. Chad Moston / Elite Media Group, FA1804001781783 (Forum May 11, 2018) ("Here, the WHOIS information of record identifies Respondent as "Chad Moston / Elite Media Group." The Panel therefore finds under Policy 4(c)(ii) that Respondent is not commonly known by the disputed domain name under Policy 4(c)(ii)"); Amazon Technologies, Inc. v. Suzen Khan / Nancy Jain / Andrew Stanzy, FA 1741129 (FORUM August 16, 2017) (finding that respondent had no rights or legitimate interests in the disputed domain names when the identifying information provided by WHOIS was unrelated to the domain names or respondent's use of the same).

The Complainant also points out that the disputed domain name is passively held. While passive holding is not conclusive that Respondent lacks rights or legitimate interests, the unusual combination of words forming the domain name and the global presence of the Complainant in this dispute points to the conclusion that Respondent registered the domain name despite its knowledge of Complainant and can have neither rights or legitimate interest in the registration.

This conclusion is supported by the principle formulated in Telstra Corporation Limited v. Nuclear Marshmallows, D2000-0003 (WIPO February 18, 2000) that where "it is not possible to conceive of any plausible actual or contemplated active use of the Domain Name by respondent that would not be illegitimate" there can be no legal basis for finding either a right or a legitimate interest. See also Deutsche Telekom AG v. Britt Cordon, D2004-0487 (WIPO September 13, 2004) (holding that "once a complainant establishes a prima facie case that none of the three circumstances establishing legitimate interests or rights applies, the burden of production on this factor shifts to the Respondent. If the respondent cannot do so, a complainant is deemed to have satisfied paragraph 4(a)(ii) of the UDRP). Similarly in Malayan Banking Berhad, supra. (holding that "[i]f the respondent fails to come forward with evidence showing rights or legitimate interests, the complainant will have sustained its burden under the second element of the UDRP.").

There is nothing in the record contradictory to Complainant's contentions. Accordingly, the Panel finds that Complainant has satisfied its prima facie burden.

Once the burden shifts, Respondent has the opportunity of demonstrating its right or legitimate interest by showing the existence of any of the following nonexclusive circumstances:

(i) before any notice to you [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 [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 [respondent] are making a legitimate noncommercial 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.

If a respondent proves any of these circumstances or indeed anything else that shows it has a right or legitimate interest in the domain name, the complainant will have failed to discharge its onus and the complaint will fail. Where respondent fails to respond, the panel must assess the record before it. Here, the choice of words is identical to the trademark. While the separate words are common in the English language they are, as the Panel has noted, uncommon when joined. FLOWBIRD is inherently distinctive in which the joined words are unmistakably one of a kind.

Therefore, Respondent's rebuttal burden would, had it appeared, have been greater to demonstrate its right or legitimate interest. Here, though, since no proof has been adduced otherwise to rebut Complainant's proof, it is evident that Respondent lacks any right or legitimate interest as measured by the three circumstances of paragraph 4(c).

Accordingly, the Panel finds that the Respondent does not have rights or legitimate interests in the disputed domain name.

C. Registered and Used in Bad Faith, §4(a)(iii)

Having determined that Respondent lacks rights or legitimate interests, the Complainant must then prove on the balance of probabilities both that the disputed domain name was registered in bad faith and that it is being used in bad faith. The consensus expressed in WIPO Overview 3.0, section 3.1.4. is that "the mere registration of a domain name that is identical or confusingly similar . . . to a famous or widely-known trademark by an unaffiliated entity can by itself create a presumption of bad faith."

While it is true as already noted that the separate words, "flow" and "bird" are common words, understandable in different languages they are not commonly found together. Absent a cogent explanation from Respondent as to its choice of domain name, this supports the conclusion that it registered <flowbird.app> with knowledge of Complainant and its mark with the intention of taking advantage of it. The Panel finds that the present case is one in which the presumption of bad faith is satisfied. The presumption is further strengthened by the strong inference of actual knowledge of Complainant's and the FLOWBIRD trademark.

Paragraph 4(b) of the Policy sets out four nonexclusive circumstances, any one of which is evidence of the registration and use of a domain name in bad faith, although other circumstances may also be relied on, as the four circumstances are not exclusive. The four specified circumstances are:

(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 on-line 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 site or location.

Of the four circumstances, the fourth most readily applies as it clearly reaches out to Internet users seeking to purchase Complainant's products. The domain name in this case is passively held, but for no conceivably lawful use. Telstra, supra.

While it is not the deciding factor, passive holding is cumulative with other factors to support complainant's contention that respondent lacks rights or legitimate interests in the accused domain name, and depending on the circumstances could also support abusive registration. See National Football League v. Thomas Trainer, D2006-1440 (WIPO December 29, 2006) (<nflnetwork.com>) (holding that "when a registrant, such as respondent here, obtains a domain name that is [identical and] to a famous mark, with no apparent rights or legitimate interests in the name, and then fails to respond to infringement claims and a UDRP Complaint, an inference of bad faith is warranted." Where the facts demonstrate an intent to capitalize on an owner mark, the registration is prima facie abusive. Royal Bank of Canada - Banque Royale Du Canada v. Registration Private, Domains By Proxy, LLC / Randy Cass, D2019-2803 (WIPO February 23, 2020) (<investease.com>. "It is clear that where the facts of the case establish that the respondent's intent in registering or acquiring a domain name was to unfairly capitalize on the complainant's nascent . . . trademark, panels have been prepared to find the respondent acted in bad faith.). See WIPO Overview 3.0, section 3.8.2.

In this case, the FLOWBIRD trademark has a long history of use in commerce before its trademark registrations predating the registration of the domain name, and in its global niche it cannot be considered otherwise than as a famous mark. As the evidence demonstrates bad faith use, so the priority of the trademark establishes bad faith registration. The Panel finds that the Complainant has shown that the Respondent registered and is using the disputed domain name in bad faith both in general and in particular because the Respondent's conduct puts the case squarely within paragraph 4(b)(iv) as well as within the larger notion of abusive conduct.

The Panel finds that Complainant has adduced more than sufficient evidence to prove Respondent's bad faith based on the foregoing considerations.

Accordingly, the Respondent has registered and used the disputed domain name in bad faith and that its conduct firmly supports the conclusion the registration of <flowbird.app> was an abusive act. Thus, Complainant has also satisfied 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. **FLOWBIRD.APP**: Transferred

PANELLISTS

Name	**Gerald M. Levine, Ph.D, Esq.**

DATE OF PANEL DECISION 2021-03-18

Publish the Decision