Decision for dispute CAC-UDRP-100300

Case number	CAC-UDRP-100300
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Domain names	fragrancxe.com

Case administrator

Name	Tereza Bartošková (Case admin)

Complainant

Organization	FragranceX.com, Inc.

Complainant representative

Organization	UDRPro, LLC

Respondent

Name	Denesh Kumar

OTHER LEGAL PROCEEDINGS

The Panel is not aware of any other legal proceedings pending or decided between the same parties and related to the disputed Domain Name.

IDENTIFICATION OF RIGHTS

The Complainant has proved to be the owner of the American FRAGRANCEX.COM trademark N° 3,365,121.

The Complainant registered its domain name <fragrancex.com> on April 13, 2001 and he claims to be the registrant of numerous domain names composed with “Fragrancex”.

FACTUAL BACKGROUND

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

Complainant, FragranceX.com, Inc. ("FragranceX") is a global online retailer of perfumes, colognes, fragrances, skincare products, aftershave products, makeup and cosmetic products. See Annex 1. Complainant's FRAGRANCEX.COM trademark and brand is extremely well known worldwide, as Complainant ships products to customers in over 240 countries.

Complainant has been globally recognized in the online fragrance industry since 2000, and currently has annual revenues of $40 million USD. Complainant's website, <fragrancex.com>, is accessed by over 600,000 unique visitors every month from all parts of the world. See Annex 2.

Since its inception in 2000, Complainant has expended large sums of money advertising its goods and services, and promoting its products and trademarks. For example, Complainant has developed a worldwide network of wholesalers in over 130 countries to sell its products. As a result of all of these activities, Complainant had developed considerable goodwill in its business and in its trademarks, all well before Respondent registered the Disputed Domain Name on March 12, 2008.

Complainant maintains an extensive Internet presence, including 53 websites incorporating Complainant's mark FRAGRANCEX.COM or variations thereof. See Annex 3. For example, Complainant owns the following domains names that are used to market its various products: <fragrancex.com>; <fragrancex.net>; and <fragrancx.com>. Being an online retailer, the Internet is the primary marketing channel used by Complainant, and Complainant’s use of and value of the Internet as a marketing and sales channel will continue to increase in the future.

Complainant registered its domain name <fragrancex.com> on April 13, 2001, and has been continuously using this domain name to promote and sell its products. See Annex 4. Attached as Annex 5 is an Internet Archive screenshot of <fragrancex.com> as early as November 2001.

Furthermore, Complainant owns United States Trademark Registration No. 3,365,121 for FRAGRANCEX.COM, registered on January 8, 2008. See Annex 6. Complainant registered this mark before Respondent registered the Disputed Domain Name on March 12, 2008. See Annex 7.

THE DISPUTED DOMAIN NAME IS CONFUSINGLY SIMILAR TO COMPLAINANT'S TRADEMARK

The Disputed Domain Name is a common misspelling of Complainant’s FRAGRANCEX.COM trademark. Respondent has simply switched the "e" and "x" letters in Complainant's trademark to form <fragrancxe.com>. FRAGRANCXE.COM and FRAGRANCEX.COM still have a similar visual impression, and the switching of two letters in the Disputed Domain Name does not differentiate it from Complainant's trademark. See GoCompare.com Limited v. Pluto Domain Services Private Limited, D2008-1693 (WIPO January 12, 2009). ("However, given the similar visual impression of 'gocompare' and 'gocomapre', the Panel finds that such alteration in the domain name's spelling (switching letters) is not sufficient to set aside the similarity between the domain name <gocomapre.com> and Complainant's trademark GOCOMPARE, and cannot therefore significantly differentiate it from the Complainant's trademark GOCOMPARE, which remains very close visually to the disputed domain name <gocomapre.com>."); see also Myspace, Inc. v. Kang, FA 672160 (Nat. Arb. Forum June 19, 2006) (finding that the <myspce.com> domain name was confusingly similar to a complainant’s MYSPACE mark because a slight difference in spelling did not avoid a finding of confusing similarity).

RESPONDENT DOES NOT HAVE ANY RIGHTS OR LEGITIMATE INTEREST IN THE DISPUTED DOMAIN NAME

Respondent is using the Disputed Domain Name to divert Internet traffic to Complainant’s official website. The Disputed Domain Name resolves to a version of Complainant’s website where Respondent receives an affiliate commission. See Annex 8. The Disputed Domain Name is redirected via the following route to hide the fact that the traffic is coming from Respondent's website at <www.fragrancxe.com>:

Starting Address: http://www.fragrancxe.com
Redirect: http://newmdi.com/last_redir.php?id=http%3A%2F%2Fwww.kqzyfj.com%2F56102uoxuowBDHFGHJHBLEKJKGK
Landing Address: http://www.fragrancex.com/index.html?source=cjx

The portion of the Landing Address URL beginning after “?source=” represents Respondent’s unique affiliate number. When an Internet user inadvertently and mistakenly types the Disputed Domain Name into their browser, they are diverted to Complainant’s affiliate online store. Respondent receives a commission from any purchases and/or visits made from the

Disputed Domain Name.

Respondent's diversion of Internet users to Complainant's website through a confusingly similar domain name is not a bona fide offering of goods or services pursuant to Policy ¶ 4(c)(i) or a legitimate noncommercial or fair use pursuant to Policy ¶ 4(c)(iii). See Deluxe Corp. v. Dallas Internet, FA 105216 (Nat. Arb. Forum Apr. 10, 2002) (finding the respondent had no rights or legitimate interests pursuant to Policy ¶ 4(a)(ii) where it used the domain name <deluxeform.com> to redirect users to the complainant's <deluxeforms.com> domain name and to receive a commission from the complainant through its affiliate program); see also Sports Auth. Mich., Inc. v. Jablome, FA 124861 (Nat. Arb. Forum Nov. 4, 2002) (by signing up for the complainant's affiliate program upon registering the domain name, which was a misspelling of the complainant's mark, the respondent intended to use the domain name to generate profit at the complainant's expense, thereby evidencing a lack of rights and legitimate interests in the domain name under Policy ¶ 4(c)(i) and (iii)).

Additionally, there is no evidence in the record to suggest that Respondent is commonly known by the disputed domain name pursuant to Policy ¶ 4(c)(ii). Respondent is only known as "Denesh Kumar", as shown in the WHOIS information provided by Registrant. See Annex 7; see also Broadcom Corp. v. Intellifone Corp., FA 96356 (Nat. Arb. Forum Feb. 5, 2001) (finding no rights or legitimate interests where Respondent is not commonly known by the disputed domain name or using the domain name in connection with a legitimate or fair use); see also Hartford Fire Ins. Co. v. Webdeal.com, Inc., FA 95162 (Nat. Arb. Forum Aug. 29, 2000) (finding that Respondent has no rights or legitimate interests in domain names because it is not commonly known by Complainant's marks and Respondent has not used the domain names in connection with a bona fide offering of goods and services or for a legitimate noncommercial or fair use).

Furthermore, Respondent is using the typographical error described above in the confusingly similar Disputed Domain Name, thereby capitalizing on a common misspelling of Complainant's mark. This action amount to typo-squatting by the Respondent, which by itself is evidence that Respondent lacks rights and legitimate interests in the disputed domain names under Policy ¶ 4(a)(ii). See IndyMac Bank F.S.B. v. Ebeyer, FA 175292 (Nat. Arb. Forum Sept. 19, 2003) (finding that the respondent lacked rights and legitimate interests in the disputed domain names because it "engaged in the practice of typosquatting by taking advantage of Internet users who attempt to access Complainant's <indymac.com> website but mistakenly misspell Complainant's mark by typing the letter 'x' instead of the letter 'c'"); see also LTD Commodities LLC v. Party Night, Inc., FA 165155 (Nat. Arb. Forum Aug. 14, 2003) (finding that the <ltdcommadities.com>, <ltdcommmodities.com>, and <ltdcommodaties.com> domain names were intentional misspellings of Complainant's LTD COMMODITIES mark and this "'typosquatting' is evidence that Respondent lacks rights or legitimate interests in the disputed domain names").

THE DISPUTED DOMAIN NAME HAS BEEN REGISTERED AND IS BEING USED IN BAD FAITH

Respondent is using a common misspelling of Complainant's FRAGRANCEX.COM mark in order to attract Complainant's customers for Respondent's own commercial gain, as Respondent receives affiliate fees from Complainant when the Internet users reach Complainant's site through Respondent's typosquatted domain name instead of arriving at Complainant's site directly. Respondent is luring internet users through, rather than to, its website, in bad faith to trigger a commission for itself. See The Sportsman's Guide, Inc. v. JoyRide, D2003-0153 (WIPO May 19, 2003) ("The registration and use of domain names which the Respondent had reason to know were confusingly similar to the Complainant's trademark, in order to divert the Complainant's would-be customers down a route that would trigger a commission for the Respondent, was manifestly below the standards of acceptable commercial behaviour. Such use was in bad faith, notwithstanding the fact that the re-routed visitors probably never knew that they had not reached the Complainant's site directly."); see also Deluxe Corp. v. Dallas Internet, FA 105216 (Nat. Arb. Forum Apr. 10, 2002) (finding the respondent registered and used the <deluxeform.com> domain name in bad faith pursuant to Policy ¶ 4(b)(iv) by redirecting its users to the complainant's <deluxeforms.com> domain name, thus receiving a commission from the complainant through its affiliate program).

In addition, Respondent registered the <fragrancxe.com> domain name with at least constructive knowledge of Complainant's rights in the FRAGRANCEX.COM mark by virtue of Complainant's prior registration of that mark with the USPTO. Registration of a confusingly similar domain name despite such constructive knowledge is evidence of bad faith registration and use of the domain name pursuant to Policy ¶ 4(a)(iii). See Orange Glo Int'l v. Blume, FA 118313 (Nat. Arb.

Forum Oct. 4, 2002) ("Complainant's OXICLEAN mark is listed on the Principal Register of the USPTO, a status that confers constructive notice on those seeking to register or use the mark or any confusingly similar variation thereof. Respondent's registration of a domain name, despite knowledge of Complainant's preexisting rights, indicates bad faith registration pursuant to Policy ¶ 4(a)(iii).")

As noted earlier, Respondent has engaged in typo-squatting through its registration and use of the Disputed Domain Name. This practice has been found by previous panels to constitute evidence of bad faith registration and use under Policy ¶ 4(a)(iii). See Nextel Commc'ns Inc. v. Geer, FA 477183 (Nat. Arb. Forum July 15, 2005) (finding that a respondent's registration and use of the <nextell.com> domain name was in bad faith because the domain name epitomized typo-squatting in its purest form); see also Microsoft Corp. v. Domain Registration Philippines, FA 877979 (Nat. Arb. Forum Feb. 20, 2007) (finding bad faith registration and use of the <microssoft.com> domain name as it merely misspelled a complainant's MICROSOFT mark).

Furthermore, Respondent is a pattern cyber-squatter with a history of registering domain names that infringe upon the trademark rights of others, as a result of which Respondent has been ordered by panels to transfer disputed domain names to various complainants. See FragranceX.com, Inc. v. Argosweb Corp a/k/a Oleg Techino in this name and under various aliases...Denesh Kumar..., D2010-1237 (WIPO September 17, 2010); Foster and Smith, Inc. v. Denesh Kumar, FA 1345128 (Nat. Arb. Forum, October 20, 2010).

Thus, Respondent's pattern of bad faith registration and use of domain names is evidence of bad faith registration and use in the instant case pursuant to Policy ¶ 4(b)(ii). See Westcoast Contempo Fashions Ltd. v. Manila Indus., Inc., FA 814312 (Nat. Arb. Forum Nov. 29, 2006) (finding bad faith registration and use pursuant to Policy ¶ 4(b)(ii) where a respondent had been subject to numerous UDRP proceedings in which panels ordered the transfer of disputed domain names containing the trademarks of various complainants); see also Sony Kabushiki Kaisha v. Anderson, FA 198809 (Nat. Arb. Forum Nov. 20, 2003) (finding a pattern of registering domain names in bad faith pursuant to Policy ¶ 4(b)(ii) where a respondent previously registered domain names incorporating well-known trademarks).

On July 7, 2011, Complainant's representative sent Registrant a cease and desist letter to admin@kumarnet.net, the email address provided by Respondent in its WHOIS record, requesting transfer of the Disputed Domain Name. See Annex 9. The email bounced back, indicating that Respondent provided a false email address during registration of the Disputed Domain Name. See Annex 10; see also Allianz Global Investors of America, L.P. and Pacific Investment Management Company (PIMCO) v. Bingo-Bongo, D2011-0795 (WIPO July 12, 2011) (" Complainants indicate that emails sent to Respondent's designated email address bounce. In this Panel's view, such fraudulent conduct is clear evidence of bad faith registration and use.")

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the 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 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 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. Rights (paragraph 4(a)(i)of the Policy)

The Complainant, FragranceX.com, Inc. is a global online retailer of perfumes, colognes, fragrances, skincare products, aftershave products, makeup and cosmetic products. It is justified that the Complainant owns the American trademark FRAGRANCEX.COM.

The Domain Name at issue has been registered by the Complainant on March 12, 2008, after the American trademark has been filed and registered. It is misspelling the Complainant's trademark.

The Panel finds that the Domain Name is confusingly similar to the trademark in which the complainant has rights, within the meaning of paragraph 4(a)(i)of the Policy.

2. Absence of right or legitimate interest on the Domain Name (paragraph 4(a)(ii)of the Policy).

The Domain Name <fragrancxe.com> resolves to the Complainant's website, at its address http;//www.fragrancex.com.

The Complainant declares that the Respondent is an affiliate and that he receives affiliate fees when an Internet user reaches its website through the disputed Domain Name <frangrancxe.com>.

Considering the facts such as described by the Respondent and which have not been contested, the Panel finds that the Respondent is not commonly known under the domain name and has no right or legitimate interest on the Domain Name (paragraph 4(a)(ii)of the Policy).

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

The Complainant explains that he has been globally recognized in the online fragrance industry since 2000, and currently has annual revenues of $40 million USD. Complainant's website, www.fragrancex.com is accessed by over 600,000 unique visitors every month from all parts of the world.

It is asserted that the redirection is organized to be hidden to the Internet user. This redirection proves that the Respondent was fully aware of the Complainant's rights.

Considering the facts such as described by the Respondent and which have not been contested, the Panel finds that the Complainant has proved that the Respondent registered the Domain Name to attempt to take advantage of the Complainant's goodwill. It is an evidence of bad faith registration.

Using the typosquatting Domain Name to intentionally attract Internet users to the Complainant's website in order to receive affiliate fees is evidence of bad faith use.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **FRAGRANCXE.COM**: Transferred

PANELLISTS

Name	Marie Emmanuelle Haas

DATE OF PANEL DECISION 2011-09-14

Publish the Decision