

Decision for dispute CAC-UDRP-105062

Case number	CAC-UDRP-105062
Time of filing	2022-12-28 17:33:05
Domain names	cool-living-balaton.com

Case administrator

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

Organization	Cool Living Balaton KFT
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Complainant representative

Name	Dr. Jasper Prigge LL.M.
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Respondent

Name	Stephan Rest
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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 the Hungarian device trademark "COOL LIVING BALATON" no. 213809 registered since 24.09.2014. The Complainant also owns the trade name of Cool Living Balaton KFT, registered since 18.11.2013.

FACTUAL BACKGROUND

The Complainant, Cool Living Balaton KFT, was founded in 2013 and it is registered to be dealing with various services, such as car rental, accommodation, travel organization and property management.

The Complainant is the owner of trademark COOL LIVING BALATON as well as trade name including said trademark, registered shortly after the date of registration of the disputed domain name, which is 14.11.2013 and it was updated on 29.12.2022.

The disputed domain name is currently inactive.

PARTIES CONTENTIONS

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

THE DISPUTED DOMAIN NAME IS CONFUSINGLY SIMILAR

The Complainant states that the disputed domain name <cool-living-balaton.com> is identical to its trademark "COOL LIVING BALATON".

THE RESPONDENT HAS NO RIGHTS OR LEGITIMATE INTERESTS IN RESPECT OF THE DOMAIN NAME(S);

The Complainant asserts that the Respondent was the managing director of the company RComSys ICT AG that was commissioned by the Complainant's managing director, Mr. Dietrich Rieser, to register the disputed domain name <cool-living-balaton.com>. The Complainant states that contrary to their agreement, the Respondent registered the disputed domain name in his own name via the company Hosttech GmbH, and after registration, the disputed domain name was used by the Complainant, including the e-mail address info@cool-living-balaton.com. The Complainant was not aware that the disputed domain name was not registered in its name until recently, when subsequently commissioned Mr. Adrian Moser to host the domain and terminated the contract with RComSys ICT AG informed the Complainant on 27.10.2022 that the Respondent is the registered owner of the disputed domain name. In the meantime, RComSys ICT AG was dissolved. Although the Complainant had requested the transfer of the disputed domain name from the Respondent, there was no response. It is claimed that the Respondent acted contrary to his contractual duty.

The Complainant therefore contends that the Respondent has no legitimate interest in the use of the trademark and that the disputed domain name refers to a website that is "under construction" and it is an inactive website that is merely parked.

Accordingly, the Complainant states that the Respondent has no rights or legitimate interests on the disputed domain name <cool-living-balaton.com>.

THE DISPUTED DOMAIN NAME WAS REGISTERED AND IS USED IN BAD FAITH

The Complainant contends that the Respondent has registered and used the domain name <cool-living-balaton.com> with full knowledge of the Complainant's trademark, in addition to the breach of his contractual duties to register the disputed domain name in the name of the Complainant rather than himself. The Respondent does not use the disputed domain name, however also does not surrender it. The Complainant states that the Respondent blocks the registration by the Complainant without using the domain itself, which also constitutes bad faith.

Consequently, the Complainant concludes that the Respondent has registered and is using the disputed domain name <cool-living-balaton.com> in bad faith.

RESPONDENT:

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.

Paragraph 15 of the Rules provides that the Panel is to decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable.

In this context, the Panel also notes that the burden of proof is on the Complainant to make out its case and past UDRP panels have consistently said that a Complainant must show that all three elements of the Policy have been made out before any order can be made to transfer a domain name.

For the Complainant to succeed it must prove, within the meaning of paragraph 4(a) of the Policy, that:

1. the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
2. the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
3. the disputed domain name has been registered and is being used in bad faith.

The Panel will therefore deal with each of these requirements in turn.

1. IDENTICAL OR CONFUSINGLY SIMILAR

The Policy simply requires the Complainant to demonstrate that the disputed domain name is identical or confusingly similar to a trademark in which the Complainant has rights. The Panel is satisfied that the Complainant is the owner of registration of "COOL LIVING BALATON" trademark. Although the date of the registration of the trademark is later than the date of the registration of the disputed domain name, as also stated under the WIPO Jurisprudential Overview 3.0 section 1.1.3., the Panel considers that the UDRP makes no specific reference to the registration date of the trademark and it is enough that the rights are in existence at the time the complaint is filed, as well as that a domain name being registered before the registration of trademark rights does not by itself preclude a complainant's standing to file a UDRP case, nor a panel's finding of identity or confusing similarity under the first element. It is also stated that in case a domain name has been registered before the trademark, only in exceptional cases would a complainant be able to prove a respondent's bad faith. However, the Panel considers that in this case there are exceptional circumstances that the Respondent was given a duty to register the disputed domain name in the name of the Complainant, which was apparently preparing for going into business with the COOL LIVING BALATON name, but he failed to do so. Since the Respondent filed no response to justify his action, the Panel considers that the said difference in dates does not affect the outcome of this decision.

The Panel finds that the disputed domain name is identical to the Complainant's "COOL LIVING BALATON" trademark. Moreover, the addition of the gTLD ".com" is not enough to abolish the identity.

The Panel recognizes the Complainant's rights and concludes that the disputed domain name is identical to the Complainant's trademark. Therefore, the Panel concludes that the requirements of paragraph 4(a)(i) of the Policy is provided.

2. NO RIGHTS OR LEGITIMATE INTERESTS

Under paragraph 4(a)(ii) of the Policy, the complainant has the burden of establishing that the respondent has no rights or legitimate interests in respect of the domain name.

It is open to a respondent to establish its rights or legitimate interests in a domain name, among other circumstances, by showing any of the following elements:

- (i) before any notice to the respondent of the dispute, the use or making 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) the respondent of the dispute (as an individual, business, or other organization) has been commonly known by the domain name, even if it has acquired no trademark or service mark rights; or
- (iii) the respondent of the dispute is making a legitimate non-commercial or fair use of the domain name, without an intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

Thus, if the respondent proves any of these elements or indeed anything else that shows that it has a right or legitimate interest in the disputed domain name, the complainant will have failed to discharge its burden of proof and the complaint will fail. The burden is on the complainant to demonstrate a prima facie case that the respondent does not have rights or legitimate interests in the disputed domain name. Once the complainant has made out a prima facie case, then the respondent may, inter alia, by showing one of the above circumstances, demonstrate rights or legitimate interests in the disputed domain name.

It is understood from the explanations of the Complainant that the Respondent and the Complainant had a contractual relationship and an agreement on the registration of the disputed domain name in the name of the Complainant, not the Respondent. Also, there seems to be no agreement on the use of the trademark by the Respondent in any way. In the absence of a response, the Panel considers that the Respondent has no authorization to use the Complainant's trademarks in the disputed domain name.

Hence, as the Complainant has made out its prima facie case, and as the Respondent has not demonstrated any rights or legitimate interests as illustrated under paragraph 4(c) of the Policy, nor has the Panel found any other basis for finding any rights or legitimate

interests of the Respondent in the disputed domain name, the Panel concludes that the Complainant has satisfied the requirements of paragraph 4(a)(ii) of the Policy.

3. BAD FAITH

The Panel concludes that the Complainant's "COOL LOVONG BALATON" trademark is of distinctive character. Therefore, the Panel is of the opinion that due to the rights of the Complainant in the "COOL LOVONG BALATON" trademark, and the fact that there was an agreement to obtain the disputed domain name for the Complainant but the Respondent failed to do so and instead registered it in his name, the Respondent was not only aware of the Complainant and its trademarks at the time of registration of the disputed domain name, but also was bound by their agreement. The Panel believes that the awareness of the Complainant's trademark at the time of the registration of the disputed domain name and the breach of their agreement with regards to registering the disputed domain name in the name of the Complainant are to be considered an inference of bad faith registration.

Moreover, the link <cool-living-balaton.com> is currently inactive. Regarding inactive domain names, section 3.3 of the WIPO Overview 3.0 provides the following: "From the inception of the UDRP, panelists have found that the non-use of a domain name (including a blank or 'coming soon' page) would not prevent a finding of bad faith under the doctrine of passive holding."

Therefore, in light of the above-mentioned circumstances in the present case, the Panel finds that the disputed domain name has been registered and is being used in bad faith and that the Complainant has established the third element under paragraph 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. **cool-living-balaton.com**: Transferred

PANELLISTS

Name	Mrs Selma Ünlü
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DATE OF PANEL DECISION **2023-02-02**

Publish the Decision
