

Decision for dispute CAC-UDRP-105570

Case number	CAC-UDRP-105570
Time of filing	2023-06-26 09:34:18
Domain names	migrosancapital.com

Case administrator

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

Complainant

Organization	Migros-Genossenschafts-Bund
--------------	------------------------------------

Complainant representative

Organization	SILKA AB
--------------	-----------------

Respondent

Name	John Robert
------	--------------------

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 holder of various trademarks including the following:

- MIGROS, Swiss word mark registration No. 2P-415060, registered on February 13, 1995 in classes 35, 36, 37, 38, 39, 40, 41 and 42;
- MIGROS, Unites States word mark registration No. 6026436, registered on April 7, 2020 in class 35;
- MIGROSBANK, Swiss word mark registration No. 2P-414500, registered on January 12, 1995 in class 36.

FACTUAL BACKGROUND

The Complainant, Migros-Genossenschafts-Bund, is the Swiss based umbrella organization of the regional Migros cooperatives. The Complainant includes (but is not limited to) retail companies, various trading and travel companies, several foundations as well as the Migros Bank.

The disputed domain name <migrosancapital.com> has been registered on April 11, 2023. According to the Complainant's evidence, the disputed domain name resolved to a login page referring to Migros Bank. The disputed domain name currently resolves to an error page.

PARTIES CONTENTIONS

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.

PRINCIPAL REASONS FOR THE DECISION

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

The onus is on the Complainant to make out its case and it is apparent, both from the terms of the Policy and the decisions of past UDRP panels, that the Complainant must show that all three elements set out in Paragraph 4 (a) of the Policy have been established before any order can be made to transfer a domain name. As the proceedings are administrative, the standard of proof is the balance of probabilities.

Thus, for the Complainant to succeed it must prove, within the meaning of Paragraph 4(a) of the Policy and on the balance of probabilities that:

1. The 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 domain name; and
3. The domain name has been registered and is being used in bad faith.

The Panel has therefore dealt with each of these requirements in turn.

1. Identity of confusing similarity

The Complainant must first establish that there is a trademark or service mark in which it has rights. Since the Complainant is the holder of registered MIGROS trademarks, which is used in connection with the Complainant's various activities including financial services, it is established that there are trademarks in which the Complainant has rights.

The disputed domain name <migrosancapital.com> incorporates the Complainant's MIGROS trademark in its entirety, merely adding the terms "an" and "capital". In the Panel's view, this addition does not prevent the Complainant's trademark from being recognizable within the disputed domain name (see section 1.8 of the WIPO Overview 3.0).

Additionally, it is well established that the Top Level Domains ("TLDs") such as ".com" may be disregarded when considering whether

the disputed domain name is identical or confusingly similar to the trademark in which the Complainant has rights (see section 1.11 WIPO Overview 3.0).

Therefore, the Panel finds that the disputed domain name is confusingly similar to the Complainant's MIGROS trademark. Accordingly, the Complainant has made out the first of the three elements that they must establish.

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 disputed domain name.

It is established case law that it is sufficient for the Complainant to make prima facie showing that the Respondent has no right or legitimate interest in the disputed domain name in order to shift the burden of proof to the Respondent (see section 2.1 WIPO Overview 3.0 and *Champion Innovations, Ltd. V. Udo Dussling (45FHH)*, WIPO case No. D2005-1094; *Croatia Airlines d.d. v. Modern Empire Internet Ltd.*, WIPO case No. D2003-0455; *Belupo d.d. v. WACHEM d.o.o.*, WIPO case No. 2004-0110).

The Panel notes that the Respondent has not been commonly known by the disputed domain name and that the Respondent has not acquired trademark or service mark rights. The Whois records relating to the disputed domain name indicate that the Respondent is known as "John Robert". The Respondent's use and registration of the disputed domain name was not authorized by the Complainant. There are no indications that a connection between the Complainant and the Respondent existed.

Fundamentally, a respondent's use of a domain name will not be considered "fair" if it falsely suggests affiliation with the trademark owner. The correlation between a domain name and the complainant's mark is often central to this inquiry. Generally speaking, UDRP panels have found that domain names identical to a complainant's trademark carry a high risk of implied affiliation. Even where a domain name consists of a trademark plus an additional term, UDRP panels have largely held that such composition cannot constitute fair use if it effectively impersonates or suggests sponsorship or endorsement by the trademark owner (see section 2.5.1 WIPO Overview 3.0). The disputed domain name incorporates the Complainant's MIGROS trademark in its entirety and simply adds the term "an" and the descriptive word "capital". The Panel finds that the term "an" has no specific meaning and that the addition of this term does not avoid any confusion with the Complainant. As to the word "capital", the Panel finds that this term is often used in a business or financial context to refer to a company's assets and could therefore easily be considered as referring to the Complainant's capital or financial services. Therefore, the Panel finds that the disputed domain name carries a risk of implied affiliation with the Complainant and cannot constitute fair use in the circumstances of this case, as described below.

Moreover, according to the Complainant's evidence, the disputed domain name resolved to a login page requesting an Internet Banking ID and Password and directly referring to the Complainant's financial services subsidiary Migros Bank. The Complainant also has registered trademarks for MIGROSBANK. The Panel finds that this evidence indicates an intention to impersonate the Complainant, probably to obtain sensitive login information from Internet users. In the Panel's view, such use can never be considered as a legitimate noncommercial or fair use of the disputed domain name.

The Respondent had the opportunity to demonstrate its rights or legitimate interests but did not do so. In the absence of a Response from the Respondent, the prima facie case established by the Complainant has not been rebutted.

Therefore, the Panel finds that the Complainant has established that the Respondent has no rights or legitimate interests in the disputed domain name. In light of the above, the Complainant succeeds on the second element of the Policy.

3. Bad faith

Complainant must prove on the balance of probabilities that the disputed domain name was registered in bad faith and that it is being used in bad faith (See e.g. *Telstra Corporation Limited v. Nuclear Marshmallow*, WIPO Case No. D2000-0003; *Control Techniques Limited v. Lektronix Ltd*, WIPO Case No. D2006-1052).

According to the Panel, the awareness of a respondent of the complainant and/or the complainant's trademark rights at the time of registration can evidence bad faith (see *Red Bull GmbH v. Credit du Léman SA, Jean-Denis Deletraz*, WIPO Case No. D2011-2209; *Nintendo of America Inc v. Marco Beijen, Beijen Consulting, Pokemon Fan Clubs Org., and Pokemon Fans Unite*, WIPO Case No. D2001-1070). In the instant case, the Panel finds that the Respondent must have been aware of the Complainant and its rights in the MIGROS trademark at the moment it registered the disputed domain name:

- the disputed domain name incorporates the Complainant's distinctive MIGROS trademark in its entirety with the mere addition of a descriptive term and a short term which does not avoid any confusion with the Complainant's mark;
- some of the Complainant's trademarks were registered more than 25 years before the registration of the disputed domain name;
- the website linked to the disputed domain name directly referred to the Complainant's registered trademarks and financial services subsidiary Migros Bank.

In view of the nature of the disputed domain name and its use to resolve to a login page directly referring to a financial services subsidiary of the Complainant, the Panel finds that the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of the website or of a product or service on the website.

In the Panel's view, the fact that the disputed domain name now resolves to an error page has no impact on the Panel's assessment.

The suspension was most probably due to an action of the Respondent's hosting provider upon a request from the Complainant. In any event, the Panel does not see any good faith use to which the disputed domain name may be put by the Respondent in the circumstances of the present case.

By failing to respond to the Complaint, the Respondent did not take any initiative to contest the foregoing. Pursuant to paragraph 14 of the Rules, the Panel may draw the conclusions it considers appropriate.

Therefore, the Panel finds that, on the balance of probabilities, it is sufficiently shown that the disputed domain name was registered and is being used in bad faith.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

- 1. **migrosancapital.com** : Transferred

PANELLISTS

Name	Flip Petillion
------	----------------

DATE OF PANEL DECISION 2023-07-20

Publish the Decision