Decision for dispute CAC-UDRP-106311

Case number	CAC-UDRP-106311
Time of filing	2024-03-01 11:55:53
Domain names	toveax.com

Case administrator

Name	Olga Slanařová (Case admin)

Complainant

Organization	TOUAX SCA – SGTR – CITE – SGT – CMTE – TAF – SLM TOUAGE INVESTISSEMENTS REUNIES

Complainant representative

Organization	NAMESHIELD S.A.S.

Respondent

Name	roger bergman

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 its registered trademark:

Mark	Territory	Registration No.	Application Date	Registration Date	Classes
TOUAX (figurative)	WIPO Designations: EM, US, CH, MA	971690	29/02/2008	29/02/2008	6, 12, 19, 36,37, 39, 42, 43

Further, the Complainant operates its business using its domain name <toaux.com>, registered since January 24, 1998.

FACTUAL BACKGROUND

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

Key aspects of the Complainant's contentions are summarized below.

Complainant's Background

For 170 years, the Complainant's group has developed unique experience in leasing, sales and technical and financial management of sustainable transport equipment to become one of the European leaders.

Registration of the disputed domain name

According to the Complainant, the disputed domain name <toveax.com> was registered on February 19, 2024.

First UDRP Element - disputed domain name is Confusingly Similar to the Complainant's Trademark

The Complainant asserts that the disputed domain name is confusingly similar to its trademark TOUAX , as an obvious misspelling including the replacement of the letter ''U" with the letters "VE". This is characteristic of a typosquatting practice intended to create confusing similarity between the Complainant's trademark and the disputed domain name.

Furthermore, the Complainant contends that the addition of the gTLD ".COM" does not change the overall impression of the designation as being confusingly similar to the Complainant's trademark.

Second UDRP Element – The Respondent has no Rights or Legitimate Interests in the disputed domain name

The Complainant asserts that the Respondent is not known as the disputed domain name.

Further, the Respondent is not a licensee, authorized agent, or related in any way to the Complainant, nor is authorized in any way to use the Complainant's trademarks or to register or use the disputed domain name.

The Complainant also claims that the disputed domain name is a typo-squatted version of the trademark TOUAX, and that typo-squatting can evidence that a respondent lacks rights and legitimate interests in a domain name.

Lastly, the Complainant claims that the use of the disputed domain name to resolve to a parking page with commercial links should not be considered to be a bona fide offering of goods or services or legitimate non-commercial or fair use.

Third UDRP Element – The disputed domain name was Registered and is Being Used in Bad Faith

The Complainant asserts that the Respondent registered and uses the disputed domain name in bad faith because it used an email address associated with the disputed domain name to pass itself off as an employee of the Complainant to disrupt the Complainant's business or for financial gain Additionally, the Complainant asserts that the misspelling of its trademark in the disputed domain name is deliberate and, by design, confusingly similar thereto. Such instances of typo-squatting have been found by previous panels to be evidence of bad faith.

Lastly, the Complainant contends that the use of disputed domain name to resolve to a parking page with commercial links demonstrates an attempt to use the Complainant's trademark to attract Internet users to its own website for commercial gain, with such conduct being evidence of bad faith.

The above summarized facts and arguments asserted by the Complainant are not contested by the Respondent because no Response was filed.

PARTIES CONTENTIONS

The Complainant´s contentions are summarised above.

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

LANGUAGE OF PROCEEDING

According to Rule 11 in the Rules for Uniform Domain Name Dispute Resolution Policy, (the "Rules") "...the language of the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding."

According to the information on the case file, the Registrar confirmed that the Respondent is the current registrant of the disputed domain name, and that the language of the registration agreement is English.

As neither party has asked to deviate from the English language as per the registration agreements, the Panel finds that this proceeding may be properly conducted in English.

PRINCIPAL REASONS FOR THE DECISION

THREE ELEMENTS THE COMPLAINANT MUST ESTABLISH UNDER THE POLICY

According to Paragraph 4(a) of the Policy, the Complainant is required to prove each of the following three elements to obtain an order that a disputed domain name should be transferred or cancelled:

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

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

(iii) the disputed domain name has been registered and is being used in bad faith.

The Panel has examined the evidence available to it and has come to the following conclusions concerning the satisfaction of the three elements of paragraph 4(a) of the Policy in these proceedings:

(A) THE COMPLAINANT'S RIGHTS AND CONFUSING SIMILARITY OF THE DISPUTED DOMAIN NAME TO THE COMPLAINANT'S RIGHTS

Sufficient evidence has been submitted by the Complainant of its trademark rights in the term TOUAX in numerous classes and territories around the world. Such trademark rights were created and registered long prior to February 19, 2024, the creation date of the disputed domain name. A nationally or regionally registered trademark confers on its owner sufficient rights to satisfy the requirement of having trademark rights for the purposes of standing to file a UDRP case. Accordingly, the Panel finds that the Complainant possesses rights in its TOUAX trademark such that it has standing under the Policy.

UDRP panels have held that where the disputed domain name is a common, obvious, or intentional misspelling of a trademark it may be considered to be confusingly similar. In the present case, the disputed domain name consists of the TOUAX trademark reproduced almost in its entirety with a replacement of the vowel "U" with the similar-looking "VE"-. The Panel finds the disputed domain name to be confusingly similar to the Complainant's trademark TOUAX under a side by-side analysis because TOUAX is visually similar to TOVEAX, particularly when looked at quickly, and includes changes from the Complainant's mark that follow classic typo-squatting strategies. These changes are the replacement of an "U" with an "VE". Importantly, the first two letters "TO" and the last two letters "AX" within the Complainant's TOUAX trademark are retained in the same positions within the disputed domain name. A casual observer would likely focus on the start and end of the mark, and thus could overlook the replacement of the middle letter.

The TLD may usually be ignored for the purpose of determination of identity or confusing similarity between a domain name and the Complainant's trademark as it is technical requirement of registration (see paragraph 1.11.1 WIPO Overview 3.0).

Accordingly, the Panel concludes that the Complainant has satisfied the requirement under paragraph 4(a)(i) of the Policy and the disputed domain name is confusingly similar to the Complainant's mark.

(B) THE RESPONDENT'S LACK OF RIGHTS OR LEGITIMATE INTERESTS IN THE DISPUTED DOMAIN NAME

The second element of the Policy requires that the Complainant establishes that the Respondent has no rights or legitimate interests in the disputed domain name. The generally adopted approach, when considering the second element, is that if a complainant makes out a prima facie case, the burden of proof shifts to the respondent to rebut it; see, for example, WIPO Overview 3.0, section 2.1 ("While the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of 'proving a negative', requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a prima facie case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element."). However, the burden of proof still remains with the complainant to make out its prima facie case on a balance of probabilities. Moreover, the wording of paragraph 4(a)(ii) of the Policy requires a complainant to establish that the respondent has no rights or legitimate interests in the domain name in issue. Simply establishing that the complainant also has rights in the domain name in issue is insufficient.

Paragraph 4(a)(ii) of the Policy contemplates an examination of the available facts to determine whether a respondent has rights or legitimate interest in the domain name. Paragraph 4(c) sets out a list of circumstances through which a respondent may demonstrate that it does have such rights or interests.

The first circumstance, under Paragraph 4(c)(i), is where "before any notice to you 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". Here, according to screenshot evidence submitted by the Complainant, the disputed domain name resolves to a pay-per-click ("PPC") page with commercial links. Prior panels have in certain cases recognized the legitimacy in use for PPC pages where the domain name consists of a dictionary word or phases and the PPC links relate to such words or phrase, however no such circumstances apply in this instant case. The Panel is not aware of any meaning for the term "TOVEAX" as included in the disputed domain name and further, according to the screenshot submitted by the Complainant, the PPC links bear no relation thereto. Rather, the PPC links are the French terms "Recontres 60 Ans et Plus" (Google translation "Dating 60 years and older"), "Art et Fenetre" (Google translation "Art and Window"), and "Mademoiselle Culotte" (Google translation "Miss panties"). Because the disputed domain name does not include a dictionary term, and there is no ascertainable connection between the PPC links and the disputed domain name, therefore no bona fide offering of goods or services is established. Accordingly, the Panel finds no evidence of a bona fide offering or goods or services or demonstrable preparations to use per Policy 4(c)(i) and the Respondent does not have rights or legitimate interests with respect of the domain name thereunder.

The second circumstance, under Paragraph 4(c)(ii), concerns cases where the respondent is commonly known by the domain name. Here, according to the registrar verification, the Respondent name is "roger bergman", and has no similarity or connection to the disputed domain name. There is no evidence that the Respondent is commonly known by the disputed domain name. As such, this second circumstance of legitimate rights or interests under the Policy is not applicable to the Respondent.

Regarding the third circumstance, under Paragraph 4(c)(iii) of the Policy, there is no evidence that the Respondent is making a legitimate non-commercial or fair use of the disputed domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the Complainant's TOUAX trademark. According to the evidence in the record showing the disputed domain name resolves to a PPC page with unrelated commercial links, none of the accepted categories of fair use - such as news reporting, commentary, political speech, education etc – are found to apply and the Panel concludes there is no legitimate non-commercial or fair use on the part of the Respondent.

Lastly, the Complaint confirms that the Respondent is not licensed, nor has any relationship with or authority to represent the Complainant in any way.

Accordingly, the Complainant has sufficiently made out its prima-facie case on the second element of the Policy. Thus, the burden of proof is shifted to the Respondent to rebut the Complainant's case. Here, because the Respondent has not participated in these proceedings, there is no such rebuttal to consider, and the Complainant prevails.

The Panel therefore concludes that neither the Respondent nor the evidence establishes that the Respondent has any right or legitimate interest to the disputed domain name. The Complainant has therefore also satisfied the requirement under paragraph 4(a)(ii) of the Policy.

(C) BAD FAITH REGISTRATION AND USE OF THE DISPUTED DOMAIN NAME

The third element requires the Complainant to show that the disputed domain name has been registered and used in bad faith under paragraph 4(a)(iii) of the Policy. See, e.g. Hallmark Licensing, LLC v. EWebMall, Inc., WIPO Case No. D2015-2202 ("The standard of proof under the Policy is often expressed as the "balance of the probabilities" or "preponderance of the evidence" standard. Under this standard, an asserting party needs to establish that it is more likely than not that the claimed fact is true.").

Further, Paragraph 4(b) of the Policy sets out a non-exhaustive list of four circumstances, any one of which may be evidence of the registration and use of a domain name in bad faith. 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.

The Panel finds that the Complainant has shown that the Respondent registered and used the disputed domain name in bad faith under paragraph 4(a)(iii) of the Policy for the reasons as set out below.

The Complainant's TOUAX trademark has been held by a prior panel to be distinctive, see TOUAX SCA – SGTR – CITE – SGT – CMTE – TAF – SLM TOUAGE INVESTISSEMENTS REUNIES v. Frankie L Neal, CAC-UDRP-103805 ("The Complainant's distinctive trade mark pre-dates the registration of the disputed domain name.") . Further, the Complainant's TOUAX trademark enjoys a considerable reputation in its industry as indicated by the substantial size and reach of the Complainant's business, which in 2023 had around 1.3 Billion Euro in assets under management and a position as one of the European leaders in operational leasing in sustainable transport.

Because of the well-established status of the Complainant, and the actual use to which the disputed domain name was put in connection with a scheme to pass off an email as originating from one of the Complainant's employees, it is more probable than not that the Respondent either knew, or should have known, that the disputed domain name would be confusingly similar to the Complainant's trademarks and thus they registered the disputed domain name with the Complainant in mind. This is even more compelling when one considers the nature of the disputed domain name. Not only is the disputed domain name confusingly similar to the mark in which the Complainant has rights, that is, TOUAX, but also it differs in elements which are clearly intended to make the disputed domain name closely resemble the Complainant's trademark TOUAX. As mentioned above, the <toveax.com> domain name utilizes typical typo-squatting tactics in which the disputed domain name retains close visual similarities to the Complainant's distinctive trademark.

Due to the use of classic typo-squatting tactics applied to the Complainant's trademark, it is apparent the Responded had the Complainant and its TOUAX trademark in mind at the time the disputed domain name was registered. In these circumstances, the Panel concludes that the Respondent was targeting the Complainant and is seeking to take unfair advantage of or otherwise abuse the Complainant's trademark.

The record indicates that the disputed domain name was utilized to create an email address which was used to send an email misleadingly passing itself off as a communication from the Complainant ("the Email"). The Email included a request for payment of an "outstanding balance", and purported to be sent from an employee of the Complainant with the title "Accounts Receivable Specialist". The Complainant's TOUAX trademark, legitimate website URL and one of its business addresses were included within the Email signature to enhance the appearance of authenticity. The use of the disputed domain name for the Email - with the purpose to mislead the recipient(s) as to its source - indicates an attempted phishing scheme and is an additional circumstance of the Respondent's bad faith. Because the use of the disputed domain name for per se illegitimate activity such as phishing can never confer rights or legitimate interests on the Respondent, such behavior is manifestly considered evidence of bad faith.

As a final point, the Panel may draw a negative inference from the Respondent's silence throughout these proceedings.

In light of the above analysis, the Panel concludes that the Complainant has made out its case that the disputed domain name was registered and are being used in bad faith, and thus has satisfied the requirements 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. **toveax.com**: Transferred

PANELLISTS

Name	**Claire Kowarsky**

DATE OF PANEL DECISION 2024-03-25