Panel Decision for dispute CAC-ADREU-004141

Case number	**CAC-ADREU-004141**
Time of filing	**2007-01-10 13:55:13**
Domain names	**airfrancesucks.eu, airfrance-jp.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**Société Air France, Jean-Marc BARDY**

Respondent

Organization / Name	**Lexicon Media, Ltd.**

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

As far as the Panel is aware, there are no other legal proceedings that have been initiated or terminated in connection with, or relating to, the domain names <AIRFRANCESUCKS.EU> and <AIRFRANCE-JP.EU>, the subject of this Complaint.

FACTUAL BACKGROUND

The present case arises further to a complaint filed by the French Company, Air France, which is one of the world's major airline companies.

The Respondent, Lexicon Media, Ltd registered the domain names "airfrancesucks" and "airfrance-jp" on 7 April 2006, during the so-called "landrush period". EURid activated and registered the respective domain names for the Respondent in accordance with its rules.

Having become aware of the registrations, the Complainant lodged a complaint on 5 January 2007 (with the date of filing established as 10 January 2007 by The Czech Arbitration Court ("CAC")).

In accordance with paragraph A 2 (k) of the ADR rules, EURid transmitted the relevant information on the registrant of the contested domain names.

On 12 January 2007, The CAC sent to the Complainant a non-standard communication requesting to amend the incorrect "mutual jurisdiction". This modification was made the same day by choosing the Respondent's address.

On 19 January 2007, the CAC informed the Respondent of the Complaint, both by e-mail and registered letter. The letter was returned to the CAC by post with the mention "unknown recipient". This document was received on 2 February 2007.

On 22 March 2007, the CAC, having not received any response from the Respondent, issued a "Notification of Respondent's Default", which was not challenged within the set timeframe.

Therefore, the Panel was appointed and duly filed the "statement of acceptance and declaration of impartiality and independency".

A. COMPLAINANT

The Complainant requested to receive the transfer of the disputed domain names "airfrancesucks" and "airfrance-jp". This request is based on the fact that the Complainant (i) has used the trade name Air France since the origin of the Company, i.e., at least back to 1933 and is one of the world's major airline companies, (ii) owns the trademark registrations throughout the world, (iii) operates an international web portal at www.airfrance.com and is the rightful owner of several generic and country code top-level domain names

consisting of, or incorporating, the trademark AIR FRANCE, in particular AIRFRANCE-JP.COM, AIRFRANCE-JP.BIZ, AIRFRANCE-JP.INFO, being active domains since their registrations and redirecting users towards the Complainant's Japanese web portal.

The Complainant went on developing, based on the rules of Article B 1 (b) 10 (i) of the ADR rules, the reasons why the domain names should be transferred to the Complainant, in particular:

1/ "The Complainant is the registered owner of a large number of trademarks consisting of or including the wording "AIR FRANCE" in a great majority of countries in the world. Furthermore, the Complainant's trademark "AIR FRANCE" is well and widely known throughout the world and easily recognizable as such.

Several Courts of Justice and Administrative Panels from WIPO have already recognized the well-known character of the trademark "AIR FRANCE". As a consequence, it should be indisputably considered that the trademark "AIR FRANCE" owned by the Complainant is not only registered and used in commerce in great majority of countries in the world, but is well-known in the meaning of article 6 bis of the Paris Union Convention".

The Complainant claims that the domain names <AIRFRANCESUCKS.EU> and <AIRFRANCE-JP.EU> are confusingly similar to its trademark "AIR FRANCE". As the trademark "AIR FRANCE" is entirely reproduced in the disputed domain names, bearing in mind that previous decisions have also ruled, in line with ADR Rules, that the absence of space or stresses in litigated domain names added to a base using the trademark has to be ignored in assessing the question of identity or confusing similarity. The Complainant cited in particular ADR ".eu" cases No.03125 <BASLER-HAARKOSMETIK.EU> and <BASLERHAARKOSMETIK.EU>, No.00387 <GNC.EU>, No. 02035 <WAREMA.EU>, No. 00453 <WEB.EU> and No.02732 <HOTEL-ADLON.EU>.

Moreover, the Complainant exposed that, the combination of the trademark "AIR FRANCE" with the wording "SUCKS" or the suffix "-JP" does not eliminate the risk of confusion with the Complainant's famous trademark "AIR FRANCE", which is the only distinctive element of the domain names in dispute.

The domain name <AIRFRANCE-JP.EU> combines the Complainant's famous trademark with the suffix "-JP" where "JP" is the international ISO code for Japan.

This combination could suggest that the domain name AIRFRANCE-JP.EU refers to the French airline company or its Japanese subsidiary and that "the simple addition of a generic or descriptive term to an otherwise distinctive or well-know trademark does not serve to distinguish the domain name from the complainant's trademark". In support, the Complainant cited several WIPO cases, in particular D2005-1337 AIRFRANCEFLIGHTS.COM and D2004-0993 AIRFRANCERESERVATIONS.COM

Furthermore, the risk of confusion with the trademark "AIR FRANCE" is all the more important that the Complainant is the registrant of the very similar domain names AIRFRANCE-JP.COM, AIRFRANCE-JP.BIZ and AIRFRANCE-JP.INFO which have pointed to AIR FRANCE's Japanese web portal since their registration.

With respect to the disputed domain name "airfrancesucks", the Complainant argued that "The domain name <AIRFRANCESUCKS.EU> combines the Complainant's famous trademark with the suffix "SUCKS": "SUCKS" is an English word used in slang to denigrate something or somebody, to indicate a disapprobation with, and (more generally) rude criticism. They then cited numerous cases rendered under the UDRP i.e. D2001-0463 <salvationarmysucks.com>, D2001-0213 <adtsucks.com>, D2001-0007 <accorsucks.com>; D2000-1472 <autotradersucks.com>; D2000-0996 <guiness-really-sucks.com>, D2000-0681 <standardcharteredsucks.com>, D2000-0662 <wal-martsucks.com>; D2000_0584 <dixonssucks.com; D2001-1121 <vivendiuniversalsucks.com> and D2005-0168 AIRFRANCESUCKS.COM.

The Complainant recognized that there is a split among UDRP decisions. Yet, The complainant mentioned that a "majority of the decisions have found confusing similarity" and "in a minority of decisions, and in some dissenting opinions, Panels have deemed a "-sucks" addition to a well-known trademark to be an obvious indication that the domain name is not affiliated with that trademark owner. This Panel, however, concurs with the notion that every case must be assessed on its own merits, and the Panel agrees with the remarks made by the Complainant, and which have also been stated in previous decisions under the UDRP, that not all international customers are familiar with the pejorative nature of the term "sucks", and that a large proportion of internet users therefore are likely to be confused by "-sucks" domain names" (WIPO Case No. D2003-00596).

The Complainant went on developing further arguments on how the slang word "sucks" is perceived by non-English speaking users of the Internet, as well as the fact that they do not share the view that adding such words would be considered as a pejorative exclamation, and therefore, dissociate it from the Complainant.

The Complainant specified that “it is not opposed to freedom of speech. To express its disagreement or opposition with something, someone or a company is one of the fundamental rights of human beings.

Registering domain names in the form of COMPANY NAME+PEJORATIVE TERM.COM to provide for example a forum for critical commentary is not uncommon, and is part of an internet phenomenon known as “cybergriping”, but denied that this was the case here where the domain name <AIRFRANCESUCKS.EU> is not used by the Respondent in any legitimate way.

The Complainant exposed then “that passive holding of the domain name does not appear to constitute any use for the purpose of criticism of the brand. Considering that, the Respondent’s argument which would consists of saying that <AIRFRANCESUCKS.EU> was registered in order to be run as a freedom expression website is not admissible”.

2. The domain names have been registered by their holder without rights or legitimate interests in respect of the domain names that are the subject of the Complaint

The Complainant argued that the Respondent should be considered as having no rights or legitimate interests in respect of the domain names AIRFRANCESUCKS.EU and AIRFRANCE-JP.EU for the following reasons:.

- The Respondent is not related in any way to the Complainant's business: He is not one of its agents and does not carry out any activity for it or has any business with it.

- The Respondent is not currently, and has never been, known under the wording AIR FRANCE nor under the combination of this trademark with the suffix “SUCKS” nor “-JP”.

- No license or authorization has been granted to the Respondent, neither to make any use of, nor to apply for the registration of the domain names AIRFRANCESUCKS.EU and AIRFRANCE-JP.EU, from the Complainant.

- Domains AIRFRANCESUCKS.EU and AIRFRANCE-JP.EU have been registered by the Respondent to take advantage of the Complainant’s well-known trademark and disrupt the Complainant’s on-line presence under the Tld .EU. More particularly, regarding the domain name AIRFRANCESUCKS.EU, such passive holding of the litigated domain names does not constitute any use for the purpose of criticism of the brand nor to protest in any way with the business practices of the Complainant.

Again the Complainant cited several UDRP decisions where in similar circumstances, Panels decided that the Respondent had neither rights nor legitimate interests in issuing domain names (see WIPO Cases D2000-0055 Guerlain SA / Peikang, D2005-0168 <AIRFRANCESUCKS.COM>)

As a matter of fact, the Respondent has not engaged in any action that shows he has any right or legitimate interests in the disputed domain names.

The Complainant concluded that the Respondent should not be considered as having rights or legitimate interests in respect of the domain names <AIRFRANCESUCKS.EU> and <AIRFRANCE-JP.EU>.

3. The domain names should be considered as having been registered or used in bad faith.

a) BAD FAITH REGISTRATION

It appears to the Complainant “difficult to imagine that the Respondent could have ignored the well-known trademark "AIR FRANCE” at the time he applied for registration of the confusingly similar domain names AIRFRANCESUCKS.EU and AIRFRANCE-JP.EU.”

The Complainant has previously demonstrated the strong reputation and the widely known character of its mark “AIR FRANCE” throughout the world for a long time.

In similar cases, WIPO panels already decided that the notoriety of a complainant's trademark “creates a prima facie presumption that the respondent registered the domain name for the purpose of selling it to Complainant or one of its competitors, or that it was intended to be used in some way to attract for commercial gain users to the website by creating a likelihood of confusion with Complainant's mark" (see for example WIPO Case n° D2001-0020 regarding <guinessbeer.com>).

Moreover, the fact that the disputed domain names combines the Complainant's famous trademark AIR FRANCE with the suffix "SUCKS" in the domain name <AIRFRANCESUCKS.EU> and with the suffix "-JP" in the domain name <AIRFRANCE-JP.EU>, ascertains the Respondent bad faith registration.

On the one hand, what is qualified in the domain name <AIRFRANCESUCKS.EU> is the term "AIR FRANCE" which is the Complainant's trademark. The word "SUCKS" has only one interest in focusing the attention on AIR FRANCE's trademark.

On the other hand, the domain name AIRFRANCE-JP.EU is very closely similar to other domain names registered by the Complainant: AIRFRANCE-JP.COM, AIRFRANCE-JP.BIZ, AIRFRANCE-JP.INFO.

In registering the domain names, there is no doubt that the Respondent wanted to refer to the Complainant.

The Respondent has registered these domain names precisely because he knew the well-known character of the trademark "AIR FRANCE" for the only purpose of disrupting the Complainant's business on the internet.

This combination of facts shows the bad faith registration of the domain names <AIRFRANCESUCKS.EU> and <AIRFRANCE-JP.EU> by the Respondent.

b) BAD FAITH USE

According to the Complainant, "Société AIR FRANCE contends that the Respondent's passive holding of the domain names AIRFRANCESUCKS.EU and AIRFRANCE-JP.EU constitutes bad faith use.

The Respondent is obviously not making any legitimate or fair use of the disputed domain names. He only registered the disputed domain names to disrupt the Complainant's business and brand image on the Internet."

In such circumstances, an ADR Panel has decided in similar cases that the Respondent has used the domain name in bad faith, see ADR .eu Case no. 02325 <GLENDIMPLEX.EU>

The Complainant concluded that the Respondent, for all these reasons, has engaged in bad faith registration and use of the domain names <AIRFRANCESUCKS.EU> and <AIRFRANCE-JP.EU>.

In accordance with Paragraph B(11) of the ADR Rules, for the reasons described above, the Complainant requests the Panel appointed in this administrative proceeding issue a decision that the disputed domain names be transferred to the Complainant.

The Complainant satisfies the general eligibility criteria for registration set out in Paragraph 4(2)(b) of Regulation (EC) No. 733/2002; Société AIR FRANCE is a limited company registered under the laws of France no. 420 495 178 and having its headquarters located 45, rue de Paris, 95747 Roissy CDG Cedex, in France.

B. RESPONDENT

The Respondent did not submit any response or challenge the notification of default.

DISCUSSION AND FINDINGS

Before deciding on the merits of the Complaint, the Panel would point out that Paragraph B. 3 (f) of the ADR Rules states that "if a Respondent does not submit a Response or submits solely an administratively deficient Response, the Provider shall notify the Parties of Respondent's default. The Provider shall send to the Panel for its information and to the Complainant the administratively deficient Response submitted by the Respondent." Moreover, Paragraph 10 (a) of the ADR Rules states that "in case of default of one of the Parties, the Panel may consider this failure to comply as grounds to accept the claims of the other Party". The fact that the Respondent did not challenge the Complaint will be taken into account.

First and foremost, the Panel, after examining the documents and arguments, concludes that neither the trademark rights of the Complainant nor the repute of trademark AIR FRANCE in its field of activity are questionable.

Secondly, the Panel, in the absence of response from the Respondent, has to determine whether or not the Complainant has proven that the registered domain names are identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of member state, and the domain name has been registered by the Respondent without rights or legitimate interest in the

name or used in bad faith. The Panel will examine each point:

1/ Identical or Confusingly Similar:

The Panel is of the opinion that it is not bound by previous decisions in ADR or UDRP cases for the principal reason that the cases are very often, if not always, based on very specific facts; one case may differ to another solely on factual arguments more than the comparison of the domain names.

However, the Panel, for the sake of equity and all fairness, considers that it has to review the ADR/UDRP "Case law".

In light of this, the Panel considers that the domain names are indisputably similar to the denomination "AIR FRANCE", the rights to which are owned by the Complainant. Yet, the Panel must also determine whether or not adding of the element "sucks" or "jp" is sufficient to distinguish the domain names from the prior right.

- <airfrance-jp.eu>: adding the nondistinctive element JP, as correctly stated by the Complainant the ISO Code for Japan, would be considered undoubtedly as such, and this would be known by any consumer. Moreover, the risk of confusion is increased by the fact the Complainant is already operating domain names with an identical structure, i.e., company_name_JP under other Top Level Domain ("TLD").

- <airfrancesucks.eu>: The Complainant strives to demonstrate that the term "sucks" is slang used to denigrate something or somebody, to indicate a disapprobation with, and (more generally) rude criticism—that it is a pejorative word causing a nuisance to its repute.

Moreover, the Complainant contested, prima facie, any possible reply based on the freedom of speech.

The Oxford's Advanced Learner's Dictionary (6th edition – 2000) defines the term "sucks" as "the slang used to say that something is bad". This definition shows, in the opinion of the Panel, that simply adding pejorative word to the Complainant's company name, by no means otherwise, would not be sufficient to put aside a risk of confusion.

The Panel, however, concurs with the notion that every case must be assessed on its own merits, and the Panel agrees with the remarks made by the Complainant. The panel concludes that if the contested domain names are not identical, they are at least no doubt confusingly similar.

2/ Rights or Legitimate Interests:

The Complainant alleges that the Respondent has no rights or legitimate interests in the contested domain names.

As far as the right or legitimate interest are concerned, it must be stressed that, in most cases, it is sometimes very harsh for a Complainant to demonstrate with absolute certainty the absence of a right or legitimate interest of a Respondent.

The Panels usually expects the Complainant to make a reasonable demonstration rather than bring absolute evidence. This demonstration rests on the various facts and legal elements of each case.

The response is then the occasion for the Respondent to challenge and contradict the reasonable demonstration of the Complainant and to draw the Panel's attention on other facts and legal elements to support its view.

In this case, the least that can be said is that the complaint is quite persuasive.

It underlines facts and legal elements that are indeed good signs that the domain name "has been registered by its holder without rights or legitimate interest in the name" (art. 21 of EC regulation 874/2004), as per the factual and legal elements depicted in the section "Parties' contentions".

The respondent had a chance to reply; it chose not to. Such an attitude may be construed as an absence of rights or legitimate interest by the Panel.

3/ Registered and used in Bad Faith:

Although this criterion is an alternative, and not something cumulative to the legitimate rights or interests, it would be examined for the

sake of completeness.

Bad faith registration:

This point cannot be denied considering the well-known aspect of the Complainant's trademark, which as it has already been decided “creates a prima facie presumption that the respondent registered the domain name for the purpose of selling it to Complainant or one of its competitors, or that it was intended to be used in some way to attract for commercial gain users to the website by creating a likelihood of confusion with Complainant's mark".

Bad faith use:

This point seems to be more delicate to determine, as the domain names are not exploited. How can “use in bad faith” be determined? Should “passive holding” be taken into consideration, as such, and would it be sufficient to prove “use in bad faith”?

The Panel is of the opinion that use in bad faith has to be appreciated essentially in view of factual elements such as the length or absence of use, the presence of static web pages, i.e. “under construction”, or again “parking web pages”.

However, among all these possible ways to put a domain name in “stand-by” for real and effective exploitation, some have to be construed carefully. Indeed, the sole idea of the period of time when the domain name is not really in use and being an effective form of exploitation cannot always be, in itself, sufficient. Indeed, to secure a project, one would reserve a domain name with one or several extensions or combinations as early as possible. Then, one would need to finalize his/her web page design.

Would a “passive holding” necessarily constitute “use in bad faith”?

The Panel would like to mention that the principle of specialty of trademark rights may constitute an obstacle to an administrative complaint, in presence of an identical or confusingly similar domain name. Therefore, a “passive holding” in such a case would deny the rights of the holder of a domain name for different goods or services than those claimed by the Complainant and lead the Panel to an unfair decision.

Thus, “passive holding” may, according to the facts of each and every case, be considered as a use in bad faith, but it cannot be systematic to demonstrate it as such.

In the present case, the Panel is confronted with a trademark with a strong repute and confusingly similar domain names to the Complainant’s rights. Again, there is no proof whatsoever that the use of the term “sucks” was intended to criticize the Complainant’s company – where in certain extremely specific circumstances, freedom of speech could have been raised as a defense- but, rather, simply to disrupt the Complainant’s business.

In conclusion, the Panel decides that the domain names shall be transferred to the Complainant.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 of the ADR Rules and B11 (b) of the ADR Rules,

the Panel orders that the domain names <AIRFRANCESUCKS> and <AIRFRANCE-JP> be transferred to the Complainant

This decision shall be implemented by the Registry within thirty (30) days after the notification of the decision to the Parties, unless the Respondent initiates court proceedings in a Mutual Jurisdiction.

PANELISTS

Name	David-Irving Tayer

DATE OF PANEL DECISION 2007-04-28

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant requested to receive the transfer of the disputed domain names <AIRFRANCESUCKS.EU> and <AIRFRANCE-JP.EU> based on the existence of prior rights on the terms AIR FRANCE and the worldwide repute of this trademark, as well as its company

name. The Complainant further argued that (i) the domain name was confusingly similar to its trademark rights, (ii) the domain name was registered with no rights or legitimate interests, and (ii) the domain name has been used in bad faith.

First, the Panel dealt with the question arising from the default of the Respondent to reply and concluded that this default can be taken into consideration in assessing the case.

The Panel then examined whether or not the Complainant has proven that the registered domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State, and whether or not the domain name has been registered by the Respondent without rights or legitimate interest in the name or has used it in bad faith.

The Panel considered that all three conditions were met and decided to transfer the domain names <AIRFRANCESUCKS.EU> and <AIRFRANCE-JP.EU> to the Complainant.