

ADMINISTRATIVE PANEL DECISION

Vorwerk International AG v. FlokiNET Ltd WhoisProtection, FlokiNET Ltd
Case No. D2022-3162

1. The Parties

Complainant is Vorwerk International AG, Switzerland, represented by Moeller IP, Argentina.

Respondent is FlokiNET Ltd WhoisProtection, FlokiNET Ltd, Seychelles.

2. The Domain Name and Registrar

The disputed domain name <destockage-thermomix.com> (the “Domain Name”) is registered with Tucows Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on August 26, 2022. On August 26, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On August 26, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name, which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to Complainant on August 29, 2022 providing the registrant and contact information disclosed by the Registrar, and inviting Complainant to submit an amendment to the Complaint. Complainant filed an amended Complaint on August 29, 2022.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on September 7, 2022. In accordance with the Rules, paragraph 5, the due date for Response was September 27, 2022. Respondent did not submit any formal response. However, on September 19, 2022, Respondent responded to an email from DHL, copying the Center, stating, “Hello, we did not requested the shipment so we have no return airwaybill. Please contact the sender”. Accordingly, the Center sent Commencement of Panel Appointment Process email to the Parties on September 28, 2022.

The Center appointed John C. McElwaine as the sole panelist in this matter on October 10, 2022. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

Complainant is a manufacturer of household appliances. Complainant contends that it owns trademark registrations for the THERMOMIX trademark registered in multiple countries.

The Panel verified that Complainant owned valid and existing registrations for the THERMOMIX Mark in the United States of America (U.S. Trademark Reg. No. 4762314, registered in June 2015), International Trademark (Reg. No. 1188472, registered in September 2013) and Swiss Trademark (Reg. No. 647702, registered in August 2013).

Respondent registered the Domain Name on August 15, 2022. The Domain Name resolves to a website purporting to offer Thermomix appliances for sale at discounted prices.

5. Parties' Contentions

A. Complainant

By way of factual background, Complainant alleges that it is an international manufacturer of appliances that has been in business for more than 130 years. Complainant contends that its business has grown and that currently it employs around 590,000 people, including around 578,000 as independent sales partners and around 12,000 as employees. Thermomix is a business division of Complainant with direct selling operations in 70 countries.

With respect to its trademarks, Complainant asserts that it has registered the THERMOMIX trademark in a number of countries which are listed in Attachment A to the Complaint. Collectively, these alleged registered trademarks rights are referred to herein as the THERMOMIX Mark. In addition, Complainant attached to the Complaint a list of domain names it claims to have registered that contain the THERMOMIX Mark.

Complainant alleges that it recently uncovered that Respondent had registered the Domain Name and developed a website that makes extensive use of the THERMOMIX Mark and fully reproduces original images and videos taken from the official website of Complainant, without authorization. Complainant asserts that Respondent's website named "Thermomix Destockage" sells presumably counterfeit products at prices well below that of the original product.

With respect to the first element of the Policy, Complainant alleges that the Domain Name incorporates Complainant's THERMOMIX Mark entirely and merely adds the word "destockage", which Complainant asserts means "destocking" in French. Thus, Complainant contends that the Domain Name is confusingly similar to the THERMOMIX Mark.

With respect to the second element of the Policy, Complainant points out that Respondent has not received any permission to use the THERMOMIX Mark to sell THERMOMIX products or to use Complainant's copyrighted images and videos. Moreover, Complainant points out that Respondent is falsely claiming to be an official distributor of Complainant's products. Lastly, Complainant contends it is likely that Respondent is offering counterfeit goods. As a result, Complainant asserts that Respondent has no legitimate rights or interest in the Domain Name.

With respect to the third element of the Policy, Complainant alleges that bad faith registration and use of the Domain Name is evident because Respondent clearly knew of Complainant's THERMOMIX mark when it

created a website that features Complainant's mark, product images copied from Complainant's website and engages in sales of potentially counterfeit and unauthorized THERMOMIX-branded appliances by impersonating or misrepresenting itself as affiliated with Complainant.

B. Respondent

Respondent did not reply formally to Complainant's contentions. Respondent sent an informal communication as a reply to DHL, copying the Center, on September 19, 2022

6. Discussion and Findings

Even though Respondent has defaulted, paragraph 4 of the Policy requires that, in order to succeed in this UDRP proceeding, Complainant must still prove its assertions with evidence demonstrating:

- (i) the Domain Name is identical or confusingly similar to a trademark or service mark in which Complainant has rights;
- (ii) Respondent has no rights or legitimate interests in respect of the Domain Name; and
- (iii) the Domain Name has been registered and is being used in bad faith.

Because of Respondent's default, the Panel may accept as true the reasonable factual allegations stated within the Complaint and may draw appropriate inferences therefrom. See *St. Tropez Acquisition Co. Limited v. AnonymousSpeech LLC and Global House Inc.*, WIPO Case No. [D2009-1779](#); *Bjorn Kassoe Andersen v. Direction International*, WIPO Case No. [D2007-0605](#); see also paragraph 5(f) of the Rules ("If a Respondent does not submit a response, in the absence of exceptional circumstances, the Panel shall decide the dispute based upon the complaint"). Having considered the Complaint, the Policy, the Rules, the Supplemental Rules and applicable principles of law, the Panel's findings on each of the above cited elements are as follows.

A. Identical or Confusingly Similar

Paragraph 4(a)(i) of the Policy requires Complainant show that the Domain Name is identical or confusingly similar to a trademark or service mark in which Complainant has rights. Ownership of a trademark registration is generally sufficient evidence that a complainant has the requisite rights in a mark for purposes of paragraph 4(a)(i) of the Policy. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 1.2. Here, Complainant alleged that it is the owner of multiple trademark registrations in a chart detailing registrations of the THERMOMIX Mark in multiple countries. No actual evidence of such registrations were provided; however, the Panel verified that Complainant owned valid and existing registrations for the THERMOMIX Mark, see section 4 above. [WIPO Overview 3.0](#) section 4.8 (a panel may undertake limited factual research into matters of public record, including "accessing trademark registration databases".) Thus, the evidence submitted by Complainant, as confirmed by the Panel, is sufficient to establish valid trademark rights and, accordingly, standing to bring this proceeding.

It is well-established, and the Panel agrees, that the addition of a descriptive word to a trademark in a domain name does not avoid a finding of confusing similarity. See [WIPO Overview 3.0](#), Section 1.8; *Mastercard International Incorporated v. Dolancer Outsourcing Inc.*, WIPO Case No. [D2012-0619](#); *Air France v. Kitchkulture*, WIPO Case No. [D2002-0158](#); *DHL Operations B.V. and DHL International GmbH v. Diversified Home Loans*, WIPO Case No. [D2010-0097](#). Here, the Domain Name contains Complainant's THERMOMIX Mark in its entirety, as a dominant element. The addition of the word "destockage-", which means "clearance", does not avoid a finding of confusing similarity as between the Domain Name and the THERMOMIX Mark (but arguably reinforces that the Domain Name is confusingly similar to the THERMOMIX Mark).

Accordingly, the Panel finds that the Domain Name is confusingly similar to Complainant's THERMOMIX Mark in which Complainant has valid trademark rights. Therefore, Complainant has satisfied paragraph 4(a)(i) of the Policy.

B. Rights or Legitimate Interests

Under the Policy, paragraph 4(a)(ii), Complainant has the burden of establishing that Respondent has no rights or legitimate interests in the Domain Name. Complainant need only make a *prima facie* showing on this element, at which point the burden of production shifts to Respondent to present evidence that it has rights or legitimate interests in the Domain Name. If Respondent has failed to do so, Complainant is deemed to have satisfied its burden under paragraph 4(a)(ii) of the Policy. See *Vicar Operating, Inc. v. Domains by Proxy, Inc. / Eklin Bot Systems, Inc.*, WIPO Case No. [D2010-1141](#); see also *Nicole Kidman v. John Zuccarini, d/b/a Cupcake Party*, WIPO Case No. [D2000-1415](#); *Inter-Continental Hotels Corporation v. Khaled Ali Soussi*, WIPO Case No. [D2000-0252](#).

In this matter, Complainant contends Respondent developed a website at the Domain Name using Complainant's trademarks and images of Complainant's products to sell counterfeit products. Section 2.13.2 of the [WIPO Overview 3.0](#) provides the following guidance concerning such allegations, even when the respondent is in default:

"Evidence that the goods are offered disproportionately below market value, that the goods are only sold under license or through a prescription (especially with pharmaceutical products), that the images of the goods *prima facie* suggest (e.g., where the relevant logo is distorted) that they are not genuine, that the respondent has misappropriated copyrighted images from the complainant's website, that the goods are extremely rare, that the goods have prompted consumer complaints, or that a respondent has improperly masked its identity to avoid being contactable, have each been found relevant [to proving a lack of legitimate interest based upon illegal activity]."

As evidence of unlawful behavior, Complainant submitted evidence and arguments that the website displayed at the Domain Name was purportedly offering at least one of Complainant's products at a discount of 75 per cent (EUR 1,399 for the genuine TM6 product versus EUR 349.99 sold by Respondent). In addition, by comparing Complainant's website with Respondent's website in Exhibit C, Complainant provided evidence that Respondent used substantially similar images from Complainant's website, as well as, falsely claimed that Respondent was "*one of the main distributors of THERMOMIX and VOWERK brand in France. This privilege relationship offers advantages to our customers.*" Complainant contends that it did not authorize registration of the Domain Name or development of Respondent's website which contains no other indicators of source and appeared to intend to convince visitors that it is Complainant's legitimate website when it is not. Respondent has been properly notified of the Complaint by the Center; however, Respondent failed to submit any response concerning these serious accusations. As such, Complainant has established a *prima facie* case that Respondent lacks legitimate rights or interests in the Domain Name.

Although Complainant has satisfied its burden, Respondent may establish a right or legitimate interest in the Domain Name by demonstrating in accordance with paragraph 4(c) of the Policy any of the following:

- "(i) 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; or
- (ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
- (iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue."

The Panel finds that Respondent has failed to show rights or legitimate interests under any of the three conditions.

As an initial matter, there is no evidence that Respondent is commonly known by the Domain Name, as the Whois information lists Respondent as “FlokiNET”. Respondent cannot rely upon paragraph 4(c)(ii) of the Policy.

Also, the Panel finds that Respondent’s use is not legitimate use of the Domain Name. Respondent was using the Domain Name to resolve to a website allegedly engaged in unlawfully selling of unauthorized or counterfeit goods. [WIPO Overview 3.0](#), section 2.13.1 (“Panels have categorically held that the use of a domain name for illegal activity (e.g., the sale of counterfeit goods or illegal pharmaceuticals, phishing, distributing malware, unauthorized account access/hacking, impersonation/passing off, or other types of fraud) can never confer rights or legitimate interests on a respondent.”). In addition, the use of the Domain Name to divert Internet traffic to an infringing or misleading webpage is not a *bona fide* offering of goods or services. See *Chicago Mercantile Exchange Inc., CME Group Inc. v. Registration Private, Domains By Proxy, LLC, DomainsByProxy.com / Nikolay Korobeynikov*, WIPO Case No. [D2016-0654](#) (finding no legitimate interest in a website resolving from the disputed domain name, which mirrored, and purported to be, the website of “CME Group” and which provided information relating to the trading of futures and options).

Lastly, Respondent’s use of the Domain Name is not noncommercial or fair use under paragraph 4(c)(iii) of the Policy, given that Respondent is allegedly selling counterfeit or competing products from an infringing online retail website. Such activity does not amount to a fan site, criticism, or other activity that may be considered noncommercial or fair use. See, e.g., *Sermo, Inc. v. CatalystMD, LLC*, WIPO Case No. [D2008-0647](#).

Accordingly, for the reasons detailed above, Complainant has established a *prima facie* case that Respondent lacks rights or legitimate interests in the Domain Name. Respondent had the opportunity to put forth evidence of its rights or legitimate interests yet provided no substantive response as to why its conduct amounts to a right or legitimate interest in the Domain Name under the Policy. In the absence of such a response and combined with the factors as detailed above, the Panel finds that Respondent has no rights or legitimate interests in respect of the Domain Name under paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

According to paragraph 4(a)(iii) of the Policy, Complainant must show that Respondent registered and is using the Domain Name in bad faith. A non-exhaustive list of factors constituting bad faith registration and use is set out in paragraph 4(b) of the Policy.

As detailed above, Respondent registered the Domain Name which is confusingly similar to the THERMOMIX Mark. There is no explanation for Respondent to have chosen to register the Domain Name other than to intentionally trade off the goodwill and reputation of Complainant’s trademark or otherwise create a false association with Complainant. With no response from Respondent, this claim is undisputed.

As discussed herein, Respondent registered the Domain Name and linked it to a website using Complainant’s THERMOMIX Mark, including images and product names of Complainant to allegedly sell counterfeit appliances at steep discounts. This amounts to bad faith use of the Domain Name by Respondent. See *Identigene, Inc. v. Genetest Labs*, WIPO Case No. [D2000-1100](#) (finding bad faith where the respondent’s use of the domain name at issue to resolve to a website where similar services are offered to Internet users is likely to confuse the user into believing that the complainant is the source of or is sponsoring the services offered at the site); *MathForum.com, LLC v. Weiguang Huang*, WIPO Case No. [D2000-0743](#) (finding bad faith under paragraph 4(b)(iv) of the Policy where the respondent registered a domain name confusingly similar to the complainant’s mark and the domain name was used to host a commercial website that offered similar services offered by the complainant under its mark). Furthermore, the Panel finds that Respondent’s uncontroverted use of the Domain Name in connection with the sale of

allegedly counterfeit products is evidence of bad faith. See [WIPO Overview 3.0](#), section 3.1.4 (“given that the use of a domain name for per se illegitimate activity such as the sale of counterfeit goods or phishing can never confer rights or legitimate interests on a respondent, such behavior is manifestly considered evidence of bad faith.”); see also *Wellquest International, Inc. v. Nicholas Clark*, WIPO Case No. [D2005-0552](#) (“Respondent’s sale of counterfeit goods on a website accessible through the domain name is paradigmatic bad faith”).

As detailed above, the Panel finds on the record before it that Respondent’s intention in registering the Domain Name was to attract, for commercial gain, Internet users to Respondent’s website by creating a likelihood of confusion with the THERMOMIX Mark as to the source, sponsorship, affiliation, or endorsement of its website or location or of a product or service on its website or location. Thus, the Panel holds that Complainant has met its burden of providing sufficient evidence that Respondent registered and is using the Domain Name in bad faith under paragraph 4(b)(iv) of the Policy.

For these reasons, the Panel holds that Complainant has met its burden of showing that Respondent registered and is using the Domain Name in bad faith under paragraph 4(a)(iii) of the Policy.

7. Decision

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Domain Name, <destockage-thermomix.com> be transferred to Complainant.

/John C McElwaine/

John C McElwaine

Sole Panelist

Date: October 24, 2022