

ADMINISTRATIVE PANEL DECISION

The Optimism Foundation v. Data Protected, Data Protected
Case No. DIO2022-0043

1. The Parties

The Complainant is The Optimism Foundation, United Kingdom, represented COBALT Legal, United States of America (“United States”).

The Respondent is Data Protected, Data Protected, United States.

2. The Domain Name and Registrar

The disputed domain name <optimism-explorer.io> is registered with Key-Systems GmbH (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on September 2, 2022. On September 2, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On September 8, 2022, and October 11, 2022, the Registrar transmitted by email to the Center its verification response:

- (a) confirming the disputed domain name is registered with it; and
- (b) disclosing registrant and contact information for the disputed domain name which differed from the named Respondent and contact information in the Complaint.

The Center sent an email communication to the Complainant on October 14, 2022, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on October 17, 2022.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the .IO Domain Name Dispute Resolution Policy (the “Policy”), the Rules for .IO Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for .IO 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 October 26, 2022. In accordance with the Rules, paragraph 5, the due date for Response was November 15, 2022. The Respondent did not submit any

response. Accordingly, the Center notified the Respondent's default on November 16, 2022.

The Center appointed Warwick A. Rothnie as the sole panelist in this matter on November 21, 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

The Complainant claims to be a global leader in facilitating fair access to the blockchain and to other financial transactions in the Internet, through the development of open-source software that is used in conjunction with the Ethereum blockchain.

Amongst other things, it provides a service under and by reference to the name OPTIMISM which provides secure access to digital currency.

The Complainant registered the domain name, <optimism.io> in May 2015. It first began using a website from that domain name to promote, offer and provide its services in 2019. The Complainant also promotes itself and its services on social media including through a Twitter account, @optimismFND, which has more than 260,000 followers. According to an article on the Currency.com website, it is one of Ethereum's main "Layer-2" platforms, having successfully released its token in May this year. Also earlier this year, the Complainant successfully completed a capital raising in the amount of USD 150 million.

In February 2021, the Complainant filed United States Trademark Application No. 90,549,900 in respect of a range of relevant services in International Class 42 for the mark OPTIMISM. So far as the Complaint indicates, that application has not resulted in a registration yet.

The disputed domain name was registered on June 18, 2022. Since in or about that date, it has resolved to a website which appears for all practical intents and purposes to be identical to the Complainant's website. After landing on the homepage when the Complaint was filed, a browser was immediately invited to enter his or her "seed phrase" for their cryptocurrency wallet into the website's interface. According to the Complaint, that information conferred absolute access to and control over all digital assets stored in that wallet and could be used to steal its contents.

At the time this decision is being prepared, the website at the disputed domain name appears to have been taken down.

5. Discussion and Findings

No response has been filed. The Complaint and Written Notice have been sent, however, to the Respondent at the electronic and physical coordinates confirmed as correct by the Registrar in accordance with paragraph 2(a) of the Rules. The courier attempting delivery of the Written Notice was unable to complete delivery as the address details are incomplete. The Domain Contact tool provided by at "www.domain-contact.org" confirmed delivery of the Center's email notifying the dispute and providing a link to the Complaint and Annexes to the "owner" of the disputed domain name. Bearing in mind the duty of the holder of a domain name to provide and keep up to date correct Whois details, therefore, the Panel finds that the Respondent has been given a fair opportunity to present his or her case.

When a respondent has defaulted, paragraph 14(a) of the Rules requires the Panel to proceed to a decision on the Complaint in the absence of exceptional circumstances. Accordingly, paragraph 15(a) of the Rules requires the Panel to decide the dispute on the basis of the statements and documents that have been submitted and any rules and principles of law deemed applicable.

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of the disputed domain name, the Complainant must demonstrate each of the following:

- (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 or is being used in bad faith.

A. Identical or Confusingly Similar

The first element that the Complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the Complainant's trademark rights.

There are two parts to this inquiry: the Complainant must demonstrate that it has rights in a trademark at the date the Complaint was filed and, if so, the disputed domain name must be shown to be identical or confusingly similar to the trademark.

The Complainant's pending trademark application does not qualify as trademark rights under the Policy. See e.g. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ([WIPO Overview 3.0](#)), section 1.1.4.¹ The Complainant may rely, however, on rights in an unregistered or common law trademark where it can show through evidence that the sign has become a distinctive identifier associated with the Complainant's services. See e.g. [WIPO Overview 3.0](#), section 1.3.

While the Complaint does not include much of the evidence traditionally associated with proving reputation, the Complaint does include evidence that the Complainant is one of Ethereum's major Layer-2 providers; Ethereum itself being a major cryptocurrency and blockchain enterprise, perhaps second only to Bitcoin in terms of recognition. In addition, the Complainant has over 260,000 followers on just one of its Twitter accounts and recently has undertaken a very successful capital raising of USD 150 million. Bearing in mind that the Complainant is an Internet-based business and started public-facing business only recently, therefore, the Panel considers the Complainant has successfully demonstrated that its name, OPTIMISM, has become distinctive of it in the cryptocurrency and blockchain "space".

The Panel also notes that the nature of the Respondent's website, discussed further below, is predicated on a belief that there are members of the public who will associate the Complainant's trademark with its cryptocurrency services and mistake the Respondent's website for the Complainant's.

The second stage of this inquiry simply requires a visual and aural comparison of the disputed domain name to the proven trademark. This test is narrower than and thus different to the question of "likelihood of confusion" under trademark law. Therefore, questions such as the scope of the trademark rights, the geographical location of the respective parties and other considerations that may be relevant to an assessment of infringement under trademark law are not relevant at this stage. Such matters, if relevant, may fall for consideration under the other elements of the Policy. See e.g. [WIPO Overview 3.0](#), section 1.7.

In undertaking that comparison, it is permissible in the present circumstances to disregard the generic or country code Top- Level Domain ("gTLD" or "ccTLD") component as a functional aspect of the domain name system. [WIPO Overview 3.0](#), section 1.11.

Disregarding the ".io" ccTLD, the disputed domain name consists of the Complainant's trademark and the term "explorer" separated by a hyphen. As this requirement under the Policy is essentially a standing

¹ Noting the similarities between the Policy and the Uniform Domain Name Dispute Resolution Policy ("UDRP"), the Panel has referred to the [WIPO Overview 3.0](#), where appropriate (see also *Government Employees Insurance Company ("Geico") v. Privacy.cc / Bulent Tekmen*, [WIPO Case No. DIO2020-0003](#)).

requirement, the addition of this term and the hyphen does not preclude a finding of confusing similarity. See e.g. [WIPO Overview 3.0](#), section 1.8. Apart from anything else, the Complainant's trademark remains visually and aurally recognisable within the disputed domain name.

Accordingly, the Panel finds that the Complainant has established that the disputed domain name is confusingly similar to the Complainant's trademark and the requirement under the first limb of the Policy is satisfied.

B. Rights or Legitimate Interests

The second requirement the Complainant must prove is that the Respondent has no rights or legitimate interests in the disputed domain name.

Paragraph 4(c) of the Policy provides that the following circumstances can be situations in which the Respondent has rights or legitimate interests in a disputed domain name:

- (i) before any notice to [the Respondent] of the dispute, [the Respondent's] use of, or demonstrable preparations to use, the [disputed] domain name or a name corresponding to the [disputed] domain name in connection with a *bona fide* offering of goods or services; or
- (ii) [the Respondent] (as an individual, business, or other organization) has been commonly known by the [disputed] domain name, even if [the Respondent] has acquired no trademark or service mark rights; or
- (iii) [the Respondent] is making a legitimate noncommercial or fair use of the [disputed] domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

These are illustrative only and are not an exhaustive listing of the situations in which a respondent can show rights or legitimate interests in a domain name.

The onus of proving this requirement, like each element, falls on the Complainant. Panels have recognized the difficulties inherent in proving a negative, however, especially in circumstances where much of the relevant information is in, or likely to be in, the possession of the respondent. Accordingly, it is usually sufficient for a complainant to raise a *prima facie* case against the respondent under this head and an evidential burden will shift to the respondent to rebut that *prima facie* case. The ultimate burden of proof, however, remains with the Complainant. See e.g., [WIPO Overview 3.0](#), section 2.1.

The Respondent registered the disputed domain name after the Complainant began using its trademark including after the apparently successful launch of the Complainant's "token" in May this year.

The disputed domain name is not derived from the Respondent's name, at least as recorded in the Whois record. Nor is there any suggestion of some other name by which the Respondent is commonly known from which the disputed domain name could be derived.

The Complainant states that it has not authorised the Respondent to use the disputed domain name. Nor is the Respondent affiliated with it.

Bearing in mind that lack of licence or association, the Respondent was using the disputed domain name before the Complaint was filed to pass off the Respondent's website as and for the Complainant's website. That type of use alone is sufficient to disqualify the Respondent's use from being an offering of goods or services in good faith. The manner of use further appears to involve harvesting investors' "seed phrases" with the potential to steal the contents of those investors' digital wallets.

The way the Respondent was using the disputed domain name, therefore, is clearly disqualified from being use in good faith. See e.g. [WIPO Overview 3.0](#), section 2.13.

Further, that manner of use does not qualify as a legitimate noncommercial or fair use for the purposes of paragraph 4(c)(iii) of the Policy.

These matters, taken together, are sufficient to establish a *prima facie* case under the Policy that the Respondent has no rights or legitimate interests in the disputed domain name. The basis on which the Respondent has adopted the disputed domain name, therefore, calls for explanation or justification. The Respondent, however, has not sought to rebut that *prima facie* case or advance any claimed entitlement.

Accordingly, the Panel finds the Complainant has established the second requirement under the Policy also.

C. Registered or Used in Bad Faith

Under the third requirement of the Policy, the Complainant must establish that the disputed domain name has been both registered or used in bad faith by the Respondent.

Generally speaking, a finding that a domain name has been registered or is being used in bad faith requires an inference to be drawn that the respondent in question has registered or is using the disputed domain name to take advantage of its significance as a trademark owned by (usually) the complainant.

Bearing in mind the short time between the registration of the disputed domain name and the appearance of the Respondent's website so closely mimicking the Complainant's website, even down to the use of the Complainant's OPTIMISM trademark in very similar font and colours and positioning on the website, the Panel readily infers that the Respondent was well aware of the Complainant's trademark when the Respondent registered the disputed domain name.

Further, those circumstances also lead to a strong inference that the Respondent registered the disputed domain name for the purpose to which he or she has put it.

Having regard to the nature of the Respondent's website as already described, therefore, the Panel readily infers that the Respondent registered the disputed domain name in bad faith. In addition, the Respondent has used the disputed domain name in bad faith by implementing that purpose. The fact that the website at the disputed domain name appears to have been taken down does not prevent a finding of bad faith.

Accordingly, the Complainant has established all three requirements under the Policy.

6. Decision

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the disputed domain name, <optimism-explorer.io>, be transferred to the Complainant.

/Warwick A. Rothnie/

Warwick A. Rothnie

Sole Panelist

Date: December 5, 2022