

ADMINISTRATIVE PANEL DECISION

Educational Testing Service v. Ndip Junior Arrey Johnson, Johnson Empire and Jamie Chaviers
Case No. D2022-0495

1. The Parties

The Complainant is Educational Testing Service, United States of America (“United States”), represented by Jones Day, United States.

The Respondents are Ndip Junior Arrey Johnson, Johnson Empire, Cameroon, and Jamie Chaviers, United States.

2. The Domain Names and Registrars

The disputed domain name <ets-portal.org> is registered with PDR Ltd. d/b/a PublicDomainRegistry.com (the “First Registrar”).

The disputed domain name <ets-portals-toeic.org> is registered with NameWeb BVBA (the “Second Registrar”).

3. Procedural History

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the “Center”) on February 12, 2022. On February 14, 2022, the Center transmitted by email to the Registrars a request for registrar verification in connection with the disputed domain names. On February 16, 2022, the First Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name <ets-portal.org> which differed from the named Respondent and contact information in the Complaint. On February 15, 2022, the Second Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name <ets-portals-toeic.org> which differed from the named Respondent and contact information in the Complaint.

On February 15, 2022, the Center sent an email communication to the Complainant, informing it that the Language of Registration of the disputed domain name <ets-portals-toeic.org> was French, and the disputed domain name <ets-portal.org> was English, inviting the parties to respond with their preferred language. On

February 15, 2022, the Complainant sent an email to the Center, with arguments that the procedure should be in English. The Respondent did not reply.

The Center sent an email communication to the Complainant on February 28, 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 amendment to the Complaint on March 5, 2022.

The Center verified that the Complaint together with the amendment to the 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 in English and French, and the proceedings commenced on March 18, 2022. In accordance with the Rules, paragraph 5, the due date for Response was April 7, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on April 8, 2022.

The Center appointed Benjamin Fontaine as the sole panelist in this matter on April 25, 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. Preliminary procedural issues

Two preliminary issues require determination by the Panel upon request of the Complainant, in this case: first a request of consolidation, second a request of adoption of a language distinct from that of the registration agreement of one of the disputed domain names.

A. Consolidation

Both disputed domain names are registered by different Respondents, with addresses in different continents. They were registered in 2021, but months apart. Still, the Complainant submits that the Complaint should be consolidated, on account of the fact that the disputed domain names are subject to a common control and are configured in a similar way. The Complainant relies on the extracts of the respective webpages, which layout and overall content are nearly identical: “The similarities between the websites at the Disputed Domain Names included identical home pages, product listings, and sign-in portals for test takers.” The Complainant also notes that the disputed domain names start with “ets-portal” and are registered under the same Top-Level Domain.

Regarding consolidation scenarios, section 4.11.2 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”) states that “where a complaint is filed against multiple respondents, panels look at whether (i) the domain names or corresponding websites are subject to common control, and (ii) the consolidation would be fair and equitable to all parties. Procedural efficiency would also underpin panel consideration of such a consolidation scenario.

Panels have considered a range of factors, typically present in some combination, as useful to determining whether such consolidation is appropriate, such as similarities in or relevant aspects of (i) the registrants’ identity(ies) including pseudonyms, (ii) the registrants’ contact information including email address(es), postal address(es), or phone number(s), including any pattern of irregularities, (iii) relevant IP addresses, name servers, or webhost(s), (iv) the content or layout of websites corresponding to the disputed domain names, (v) the nature of the marks at issue (e.g., where a registrant targets a specific sector), (vi) any naming patterns in the disputed domain names (e.g., <mark-country> or <mark-goods>), (vii) the relevant language/scripts of the disputed domain names particularly where they are the same as the mark(s) at issue, (viii) any changes by the respondent relating to any of the above items following communications regarding

the disputed domain name(s), (ix) any evidence of respondent affiliation with respect to the ability to control the disputed domain name(s), (x) any (prior) pattern of similar respondent behavior, or (xi) other arguments made by the complainant and/or disclosures by the respondent(s)".

The Panel agrees with the Complainant that the disputed domain names are under the same control: this is irrefutable in view of the quasi-identity of the elaborated content of the websites hosted under each of them. The adoption of a similar structure for the disputed domain names, while not decisive, supports this finding. Moreover, the Panel notes the Respondents have not objected to the requested consolidation, or otherwise participated in the present proceeding, and the Panel is unable to consider any disadvantage to the Parties by accepting the Complainant's request.

Therefore, the Panel determines that the Complaint be consolidated.

B. Language of proceeding

The Second Registrar has indicated that the language of the registration agreement was French. However, the Complainant requests that English be adopted as a language for this proceeding, alleging the following: "(1) the Respondent is familiar with the English language, as evidenced by the Disputed Domain Names ('ETS-PORTALS-TOEIC' and 'ETS-PORTAL') and generic Top-Level-Domain (.ORG), both being in Latin characters; (2) the evidence further exemplifies Respondent is familiar with the English language as the websites at both Disputed Domain Names were in English and mimicked Complainant's website which is in English; and (3) it would be unfair to require the Complainant to translate into French because it would result in additional expenses for the Complainant and cause unnecessary delay of the proceeding."

Regarding the determination of languages, pursuant to paragraph 11 of the UDRP Rules, unless otherwise agreed by the parties, the default language of the proceeding is the language of the registration agreement, subject to the authority of the panel to determine otherwise.

On the issue of the language of proceeding, section 4.5.1 of [WIPO Overview 3.0](#) states in particular that "Noting the aim of conducting the proceedings with due expedition, paragraph 10 of the UDRP Rules vests a panel with authority to conduct the proceedings in a manner it considers appropriate while also ensuring both that the parties are treated with equality, and that each party is given a fair opportunity to present its case.

Against this background, panels have found that certain scenarios may warrant proceeding in a language other than that of the registration agreement. Such scenarios include (i) evidence showing that the respondent can understand the language of the complaint, (ii) the language/script of the domain name particularly where the same as that of the complainant's mark, (iii) any content on the webpage under the disputed domain name, (iv) prior cases involving the respondent in a particular language, (v) prior correspondence between the parties, (vi) potential unfairness or unwarranted delay in ordering the complainant to translate the complaint, (vii) evidence of other respondent-controlled domain names registered, used, or corresponding to a particular language, (viii) in cases involving multiple domain names, the use of a particular language agreement for some (but not all) of the disputed domain names, (ix) currencies accepted on the webpage under the disputed domain name, or (x) other indicia tending to show that it would not be unfair to proceed in a language other than that of the registration agreement".

In this case the adoption of English as language of the proceeding is amply justified, for multiple reasons. First, the disputed domain names have been configured using the English term "portal", which indicates an initial understanding of this language by the Respondents. Second, the disputed domain names display extensive content written in English, which confirms the good dominion of English by the Respondent. Third, English is the language of the registration agreements of one of the disputed domain names. Fourth, the Respondents have not objected to the adoption of English as language of the proceeding.

The Panel notes that the Complainant has already incurred considerable expenses to enforce its rights in this proceeding. It would be unfair to require additional investment and to delay the outcome of this case, while not required for an equitable treatment of the Parties.

Therefore, the Panel determines that English be the language of the proceeding in this consolidated Complaint.

5. Factual Background

The Complainant is Educational Testing Service, a world leader in educational testing and assessment organization. The Complaint indicates that “ETS develops, administers and scores more than 50 million tests per year, in more than 180 countries and 9,000 locations worldwide. The many well-known tests developed and administered by ETS or its related companies include the TOEFL® test, the TOEIC® test, the PRAXIS® test, and the GRE® test. In addition to assessments, ETS conducts educational research, analysis and policy studies and develops a variety of customized services and products for teacher certification, English language learning and elementary, secondary and postsecondary education”.

Among the products and services provided for by the Complainant, is a measurement of English-language proficiency, designated under the brand TOEIC.

The Complainant hold hundreds of trademarks registered worldwide over ETS and TOEIC. In particular, the following trademarks are relied upon for the purpose of this Complaint:

- United States trademark ETS (fig.), No. 2363333, registered on June 27, 2000;
- United States trademark ETS (word), No. 1166461, registered on November 30, 1998;
- United States trademark TOEIC (word), No. 1191669, registered on March 9, 1982;
- Organisation Africaine de la Propriété Intellectuelle trademark ETS (fig.), No. 38292, registered on November 30, 1998.

The disputed domain name <ets-portal.org> was registered on January 21, 2021. The disputed domain name <ets-portals-toeic.org> was registered on November 19, 2021.

Both disputed domain names were used to host substantially identical websites, although at different times as the Complainant succeeded in having their content shut down. Indeed, on July 14, 2021 the Complainant sent a complaint to the First Registrar, and on the following day the Registrar responded that its content had been disabled. A similar complaint was sent to the Second Registrar on December 23, 2021. Again, the registrar responded positively the following day, confirming that the litigious website had been closed.

Cease and desist letters were also sent to the Respondents, respectively on July 19, 2021, and January 21, 2022. The Respondents did not respond.

The Complainant has annexed to the Complaint full extracts of the websites hosted under the disputed domain names. It has also provided a table which allows a direct comparison of the similarities existing between its own website, hosted at “www.ets.org”, and that of the Respondents. It suffices here to note that the webpages of the Respondents take the appearance of an official webpage of the Complainant: they reproduce the trademark ETS, with its registered logo, reproduce also a number of different trademarks registered and used by the Complainant, such as TOEFL, HISET, and others, and they do so with a claim of trademark ownership: “®”.

The webpages of the Respondents also have a similar layout and display texts reproduced in boxes, with color combinations quite similar to those featured in the Complainant’s website, as well as identical illustrating pictures on some occasions. The content of the websites is directly linked to the activities

conducted by the Complainant. Finally, the Panel notes that the websites of the Respondents allow for the collection of personal data of Internet users, in a section which is nearly identical to that of the Complainant's home page.

6. Parties' Contentions

A. Complainant

The Complainant has made detailed statements, supported by extensive evidence. Its arguments can be summarized as follows:

On the first element of the Policy, it indicates that the disputed domain names incorporate the trademark ETS in its entirety. Besides, one of the disputed domain names also incorporates another trademark of the Complainant, TOEIC. In both cases the reproduction of the trademarks creates sufficient similarity for a finding of confusing similarity. Also, the use of the generic words "portal" and "portals" does not decrease confusing similarity.

On the second element of the Policy, the Complainant indicates in particular that "there is no relationship or affiliation between ETS and Respondent giving rise to any license, permission, or other right by which Respondent could own or use any domain name incorporating the ETS and TOEIC Marks. To be sure, Respondent is not a licensee of nor otherwise affiliated with ETS. ETS has never authorized nor otherwise condoned or consented to Respondent's registration of the Disputed Domain Names". Moreover, the Respondents are not using the disputed domain names in connection with a *bona fide* offering of goods and services. Much to the contrary, they are using the disputed domain names in a misleading and abusive manner, by impersonating the Complainant and its activities.

On the third element of the Policy, the Complainant states that the Respondents knew of the existence of the trademarks ETS and TOEIC when registering the disputed domain names. Also, the Respondents have "registered and utilized the Disputed Domain Names in connection with the provision of a website engaging in fraudulent phishing activities, in a bad faith effort to interfere with ETS's offering of goods and services by intercepting, misdirecting and misleading members of the consuming public".

B. Respondents

The Respondents did not reply to the Complainant's contentions.

7. Discussion and Findings

Paragraph 4(a) of the Policy requires that the Complainant prove all of the following three elements in order to be successful in this proceeding:

- (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 was registered and is being used in bad faith.

A. Identical or Confusingly Similar

The Complainant, under the first requirement of paragraph 4(a) of the Policy, needs to establish that the disputed domain name is identical or confusingly similar to a trademark or a service mark in which it has rights.

The Complainant has shown that it holds extensive rights over the trademarks ETS and TOEIC. The disputed domain names include the Complainant's trademark ETS in its entirety. The disputed domain name <ets-portals-toeic.org> also includes the Complainant's trademark TOEIC. Both disputed domain names also include the terms "portal" or "portals", and all these elements are separated by hyphens.

In the disputed domain names, as configured, the Complainant's trademarks are immediately recognizable. See section 1.8 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"): "Where the relevant trademark is recognizable within the disputed domain name, the addition of other terms (whether descriptive, geographical, pejorative, meaningless, or otherwise) would not prevent a finding of confusing similarity under the first element. The nature of such additional term(s) may however bear on assessment of the second and third elements."

As the disputed domain names include the Complainant's trademark(s) in their entirety combined with a term that does not prevent the Complainant's trademark from being recognizable in the disputed domain names, the Panel finds that the disputed domain names are confusingly similar to the Complainant's trademarks.

Therefore, the first element of the Policy is satisfied.

B. Rights or Legitimate Interests

Under the Policy, a complainant is required to make out a *prima facie* case that the respondent lacks rights or legitimate interests in the disputed domain name. Once such a *prima facie* case is made, the respondent carries the burden of production to demonstrate rights or legitimate interests in the disputed domain name. If the respondent fails to do so, the complainant is deemed to have satisfied paragraph 4(a)(ii) of the Policy (see [WIPO Overview 3.0](#), section 2.1).

As outlined by the Complainant, the Respondents do not appear to have any rights or legitimate interests in the disputed domain names. Also, the Respondents do not appear to be conducting a legitimate business with a *bone fide* offering of goods and services. Much to the contrary, they are usurping the Complainant's trademark rights and impersonating its activities for illegal purposes. The Complainant has put forward a *prima facie* case that the Respondents lack rights or legitimate interests in the dispute domain names.

Accordingly, and failing any rebuttal from the Respondents, the Panel finds that the second element of the Policy is satisfied.

C. Registered and Used in Bad Faith

In order to prevail under the third element of paragraph 4(a) of the Policy, the Complainant must demonstrate that the disputed domain names were registered and are being used in bad faith.

Paragraph 4(b) of the Policy lists a number of circumstances, which, without limitation, are deemed to be evidence of the registration and use of a domain name in bad faith. These are:

- (i) circumstances indicating that [a respondent has] registered or acquired a disputed domain name primarily for the purpose of selling, renting, or otherwise transferring the disputed domain name to the complainant or to a competitor of the complainant, for valuable consideration in excess of [the respondent's] documented out-of-pocket costs directly related to the disputed domain name; or
- (ii) [the respondent has] registered the disputed domain name in order to prevent the complainant from reflecting the complainant's trademark or service 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 disputed domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the disputed domain name, [the respondent has] intentionally attempted to attract, for commercial gain, Internet users to [the respondent's] website or other online 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 respondent's] website or location.

In this case it is obvious that the Respondents acted in bad faith when registering and using the disputed domain names.

This results at the outset from the very configuration of the disputed domain names, which incorporate the Complainant's well-known trademarks, together with an additional word which reinforces the confusion.

Also, as explained in the description of the facts, the Respondents have used the disputed domain names to host webpages which deliberately infringe several of its trademarks rights, and which imitate the content and layout of the Complainant's own webpage.

By doing so, the Respondents are attracting and confusing Internet users, very likely for phishing purposes. This is a clear case of harmful cybersquatting and the Complainant is entitled to request the transfer of the disputed domain names.

The Panel finds that the third element of the Policy is fulfilled, and the Complaint succeeds.

8. 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 names, <ets-portal.org> and <ets-portals-toeic.org>, be transferred to the Complainant.

/Benjamin Fontaine/

Benjamin Fontaine

Sole Panelist

Date: May 4, 2022