

ADMINISTRATIVE PANEL DECISION

Educational Testing Service v. Nishit Kumar, Collegedunia Web Pvt Ltd
Case No. D2024-3687

1. The Parties

The Complainant is Educational Testing Service, United States of America (“USA”), represented by Cantor Colburn LLP, USA.

The Respondent is Nishit Kumar, Collegedunia Web Pvt Ltd, India.

2. The Domain Name and Registrar

The disputed domain name <etstoeftl.info> is registered with NameCheap, Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on September 11, 2024. On September 12, 2024, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On September 12, 2024, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent (REDACTED FOR PRIVACY) and contact information in the Complaint. The Center sent an email communication to the Complainant on September 13, 2024, 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 September 17, 2024.

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, and the proceedings commenced on September 26, 2024. In accordance with the Rules, paragraph 5, the due date for the Response was October 16, 2024. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on October 17, 2024.

The Center appointed Jon Lang as the sole panelist in this matter on October 24, 2024. 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 is a private educational testing and measurement organization. It was formed in 1947 and is headquartered in Princeton, NJ, USA and has a global footprint extending to various locations in the USA and beyond, including France, China, and India. Each year, the Complainant develops, administers, and scores more than 50 million tests in more than 180 countries at more than 9000 locations. The TOEFL iBT test is a widely respected English-language assessment and is used for admissions purposes in more than 160 countries. The Complainant has used the TOEFL mark in connection with its business continuously since November 1964.

The Complainant owns several trademark registrations in the USA and other jurisdictions for marks comprising or consisting of TOEFL e.g. USA registration no: 1103427 with a registration date of October 3, 1978, and Indian Patent Office trademark registration no: 4039146 with a registration date of December 27, 2018. It also owns several trademark registrations in the USA and other jurisdictions for ETS. By way of example, USA registration no: 559686 with a registration date of June 3, 1952 and Indian Patent Office trademark registration no: 377188 with a registration date of June 17, 1981.

The Complainant owns the domain names <toefl.com> and <ets.org>.

The domain name in dispute (the Domain Name) was registered on April 25, 2024, and resolves to a website (the Respondent's website) that has the appearance of an old website of the Complainant. The Respondent's website extensively displays the TOEFL mark and includes a pop-up window that asks individuals to fill out a form with personal information.

5. Parties' Contentions

The Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the Domain Name.

The following is a summary of the main assertions of the Complainant. The Respondent did not respond to the Complaint.

The Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights

The Complainant owns exclusive rights in and to the well-known TOEFL mark (which pre-date registration of the Domain Name) and the Complainant enjoys wide consumer recognition of its TOEFL brand.

The Domain Name is confusingly similar to Complainant's TOEFL mark which it wholly incorporates and which is its distinctive and dominant element. The Domain Name adds the Complainant's ETS mark and includes the generic Top-Level domain ".info". The ETS mark also predates registration of the Domain Name.

The Respondent has no rights or legitimate interests with respect to the Domain Name

The Complainant's rights in the TOEFL and ETS marks had been firmly established by the time the Domain Name was registered. The Respondent cannot claim any rights to the Domain Name that are superior to the Complainant's rights in the TOEFL and ETS marks. The Complainant is unaware of any prior rights that the

Respondent has in the Domain Name, or of any relationship between it and the Respondent that would give rise to any license, permission, or authorization that would allow the Respondent to own or use the Domain Name. The Complainant does not believe that the Respondent is commonly known by the Domain Name.

The Domain Name is being used to intentionally mislead consumers into believing that the Respondent's website is connected with the Complainant. The improper use of the Complainant's marks on the Respondent's website adds to the likelihood of website visitors being misled into believing that the content on the website is approved of, sponsored by, or affiliated with the Complainant, when in fact the Respondent is attempting to interrupt the Complainant's business. The Respondent is therefore not making a legitimate noncommercial or fair use of the Domain Name.

The Complainant believes that the Domain Name resolves to a website created to mislead potential customers of the Complainant into believing that the Domain Name is connected to the Complainant.

The Domain Name appears to be used for phishing - it resolves to a page that looks like the Complainant's old "TOEFL website" and includes a pop-up window that asks individuals to fill out a form with personal information.

The Domain Name was registered and is being used in bad faith

It is apparent that the Respondent has selected the Domain Name to disrupt the business of the Complainant and/or to attract Internet users to its website by creating a likelihood of confusion with the Complainant's TOEFL and ETS marks. It is not possible to conceive of any use of the Domain Name that would not constitute an infringement of the Complainant's rights in the TOEFL and ETS marks. Bad faith can be found where a domain name "is so obviously connected with such a well-known product that its very use by someone with no connection with the product suggests opportunistic bad faith." Mere registration of the Domain Name in this case is evidence of bad faith.

In view of the notoriety of the TOEFL and ETS marks, the inclusion of "TOEFL" and "ETS" in the Domain Name and the use to which the Domain Name has been put, it is clear that the Respondent knew of the existence of the Complainant's strong and well-known marks at the time of registration of the Domain Name.

The Respondent acted with opportunistic bad faith by registering the Domain Name that is confusingly similar to the Complainant's well-known TOEFL and ETS marks.

The Respondent has no connection with the TOEFL and ETS marks and it is believed that the Respondent's website has been created to mislead potential customers of the Complainant into believing that the Domain Name is connected to the Complainant.

The Respondent's website appears to be a phishing site as described earlier.

The Respondent's use of the Domain Name demonstrates an intention to unlawfully profit from use of the Complainant's marks for illegal phishing purposes and to misdirect customer traffic from the Complainant's legitimate websites, thereby disrupting its business. The use of a domain name for illegitimate activities e.g. the sale of counterfeit goods or phishing, can never confer rights or legitimate interests on a respondent and such behavior is considered to be evidence of bad faith.

The Respondent is intentionally attempting to attract, for illegal phishing purposes and commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's TOEFL and ETS marks.

Registration of the Domain Name violates the Registrar's Domain Name Registration Agreement in that the Respondent represented and warranted not to "...infringe any copyright, trademark, patent, trade secret, or other proprietary rights of any third-party information...". This also constitutes bad faith.

The Complainant submits that it has demonstrated not only its legitimate rights in the TOEFL and ETS marks, but also that the Respondent has used the confusingly similar Domain Name to unlawfully profit by creating a likelihood of confusion with the TOEFL and ETS marks such that consumers mistakenly believe that the Respondent's website is approved, sponsored by or affiliated with the Complainant, when it is not.

6. Discussion and Findings

Paragraph 4(a) of the Policy requires a complainant to prove that a respondent has registered a domain name which is: (i) identical or confusingly similar to a trademark or service mark in which a complainant has rights; and (ii) that the respondent has no rights or legitimate interests in respect of the domain name; and (iii) that the domain name has been registered and is being used in bad faith. A complainant must prove each of these three elements to succeed.

A. Identical or Confusingly Similar

It is well established that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the disputed domain name. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ("[WIPO Overview 3.0](#)"), section 1.7.

The Complainant has shown rights in respect of a trademark or service mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.2.1. In fact, the Complainant has demonstrated rights in both the TOEFL and ETS marks.

The entirety of each of the TOEFL and ETS marks has been reproduced within the Domain Name. The use of both, whilst rendering the Domain Name something other than identical to either one, does not prevent the Domain Name being confusingly similar to both marks for the purposes of the Policy – each is recognizable within the Domain Name. [WIPO Overview 3.0](#), section 1.7.

The Panel finds the first element of the Policy has been established.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy provides a list of circumstances in which the Respondent may demonstrate rights or legitimate interests in a disputed domain name.

Although 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 difficult 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 (although the burden of proof always remains on the complainant). If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1.

Having reviewed the available record, the Panel finds that the Complainant has established a prima facie case that the Respondent lacks rights or legitimate interests in the Domain Name. The Respondent has not rebutted the Complainant's prima facie case. In fact, the Respondent has not come forward with any evidence at all, let alone evidence demonstrating rights or legitimate interests in the Domain Name.

The use to which the Respondent has put Domain Name, namely to resolve to an unauthorised “copycat” website (albeit with the appearance of a former website of the Complainant), which extensively displays the TOEFL mark and which includes a pop-up window that asks individuals for personal information, cannot establish rights or legitimate interests in the Domain Name.

The Respondent’s website has the hallmarks of a phishing site.

Panels have held that the use of a domain name for illegitimate activity, e.g. impersonation or phishing, can never confer rights or legitimate interests on a respondent. [WIPO Overview 3.0](#), section 2.13.1.

The Panel finds that the second element of the Policy has been established.

C. Registered and Used in Bad Faith

The Panel notes that, for the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy establishes circumstances, in particular, but without limitation, that, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith. They include a respondent registering a domain name primarily for the purpose of disrupting the business of a competitor, or intentionally attempting to attract, for commercial gain (by use of the domain name), Internet users to its 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 its website or location or of a product or service on its website or location.

Panels have held that the use of a domain name for illegitimate activity, here claimed as impersonation and phishing, constitutes bad faith. [WIPO Overview 3.0](#), section 3.4. Having reviewed the record, the Panel finds that the Respondent’s registration and use of the Domain Name constitutes bad faith under the Policy on the basis of the Respondent’s use of the Domain Name for illegitimate activity. Even if there was no evidence of phishing, it seems very likely that there would be some financial benefit to the Respondent in using the Domain Name in the way that it has and accordingly, such use would fall squarely into (at least) one scenario expressly envisaged under paragraph 4(b) of the Policy namely, using the Domain Name to intentionally attempt to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant’s marks as to the source, sponsorship, affiliation or endorsement of its website or of products or services on it.

The Panel finds that the Complainant has established the third element 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 <etstoefl.info> be transferred to the Complainant.

/Jon Lang/

Jon Lang

Sole Panelist

Date: November 6, 2024