

Decision of the Panel of Third-Party Deciders

Case no. 444218 : observo.be

1. Parties

1.1 Complainant in appeal

Fonds voor de bevordering van de werkgelegenheid en de opleiding in de verzekeringssector (in short “FOPAS”), de Meeÿsquare 35, 1000 Brussels, Belgium (e-mail guy.danau@fopas.be ; support@bizzpro.be), hereafter referred to as “the Complainant”

Represented by Mr. Tom Heremans and Ms. Lisbeth Depypere, attorneys at law – CMS, Terhulpsesteenweg 178, 1170 Brussels, Belgium (e-mail tom.heremans@cms-db.com; lisbeth.depypere@cms-db.com)

1.2 Respondent in appeal

Mr. Jurij Kacanov, Bangu g. 6 ap.2, LT-91251 Klaipeda, Lithuania, hereafter referred to as “the Respondent”.

2. Domain Name

Domain name: observo.be

Registered by Respondent on June 28, 2024

3. Appealed Decision

The appeal is made against the Decision rendered on August 20, 2024 by the Third-Party Decider, Ms. Alissia Shchichka, in case no. 444218 / observo.be (hereafter referred to as “the Appealed Decision”).

4. Procedural Documents

Request for appeal by Complainant dated September 5, 2024 and supporting documents;

Appointment of the Panel of Third-Party Deciders by CEPANI by letter of September 26, 2024;

Communication by CEPANI on October 17, 2024 of the evidence from the Complainant which the Third-Party Decider had been provided with prior to rendering the Appealed Decision;

5. Facts

The Complainant, FOPAS, is a fund for training and skills development in the insurance industry.

On May 18, 2016 the Complainant registered the domain name `observo.be`.

At least on October 5, 2016 the Complainant launched a website under its `observo.be` domain name, used by the Complainant as a platform dedicated to its expertise in evolving skills and functions in the insurance sector.

On the sixth anniversary of the registration of the `observo.be` domain name, the latter was not renewed. According to the Complainant this failure to timely renew the domain name was due to a mistake by its IT partner. As a result, on June 28, 2024, at the expiration of the 40-day quarantine period, the `observo.be` domain name was released.

On that same day (i.e. June 28, 2024) the Respondent registered the `observo.be` domain name (hereafter referred to as “the Disputed domain name”).

It appears from evidence provided by the Complainant that the Disputed domain name was then used by the Respondent to redirect internet users to other websites featuring pornographic content using other URL's. These websites did not seem to be otherwise linked to the disputed domain name (the original URL does not seem to be used as such) nor was any reference made to “`observo`” on these websites. As indicated in the Appealed Decision, the Disputed domain name now redirects to a parking page with the message “Access Denied. This website is not available in your country”.

The Complainant subsequently submitted a complaint to CEPANI seeking the transfer of the Disputed domain name pursuant to the CEPANI Rules for domain name resolution and the Terms and Conditions of `.be` domain names (hereafter respectively referred to as “the Rules” and “the Terms and Conditions”).

In the meanwhile, as the registration by the Respondent of the disputed domain name resulted in the Complainant no longer being able to reach the customers interested in its services offered under its `OBSERVO` name, the Complainant registered the domain name `observoo.be` to continue offering its `OBSERVO` services awaiting the outcome of its complaint filed with CEPANI.

On 30 August 2024 the Complainant registered a Benelux trademark covering the word `OBSERVO` under nr. 1510074.

It appears from the registration information relating to the disputed domain name that the Respondent, Mr. Jurij Kacanov, has his residence at Bangu g. 6 ap.2, LT-91251 Klaipeda, Lithuania. No further information is known about the Respondent as he did not reply to the Complainant's contentions, not in the proceedings which led to the Appealed Decision nor in the present appeal proceedings.

6. The Appealed Decision

In the Appealed Decision the Third-Party Decider rightly observed that the rights which can be invoked to obtain the transfer of a domain name are exhaustively listed in Article 10(b)(1) (i) and that his list includes rights to a trade name but not the mere prior possession of a domain name.

The Third-Party Decider then proceeded with an analysis of the documentation which the Complainant had provided to prove its use of the term OBSERVO. This analysis led the Third-Party Decider to the following conclusion:

“Therefore, the term “Observo” appears to be used in connection with the [read: Observo] tool or platform, and services offered by the Complainant to indicate their source in the market, rather than as a trade name to identify a business or commercial establishment. In this context, ‘Observo’ would function as a trademark, which requires registration to assert rights over it. (...)

Given the above, the Third-Party Decider concludes that the Complainant has not claimed a trade name, nor provided sufficient evidence of the public and continuous use of the sign “Observo” as a trade name in Belgium (CEPANI, 44169, tektvshop.be). Since the Complainant has not demonstrated exclusive rights in Belgium to the sign “Observo” prior to the registration of the domain name, the first condition is not met.

Consequently, the Complaint must be rejected without the need to examine whether the two other conditions are fulfilled.”

7. Parties’ Contentions

7.1. The Complainant

The Complainant contends that it has satisfied each of the three elements required under Article 10(b)(1) of the Terms and Conditions.

Notably, the Complainant contends that on October 5, 2016 it launched a website under its observo.be domain name and has since then been using the trade name OBSERVO under which it has been offering its services. As a result, the Complainant enjoys trade name protection on the trade name OBSERVO which is identical to the Disputed domain name.

The Complainant also states that there are no reasons or circumstances that are indicative of any rights or legitimate interests which the Respondent would have in the Disputed domain name. The Complainant thereby refers, amongst others, to the fact that the Respondent does not itself use the Disputed domain name which is only used to redirect visitors to pornographic websites and is not commonly known by the Disputed domain name.

According to the Complainant the disputed domain name has been registered in bad faith or is at least used in bad faith. The Complaint thereby refers to the fact that the Respondent would have intentionally used the Disputed domain name to redirect for commercial gain Internet users to websites containing pornographic images, without any link with the term “Observo”.

Reference is also made to the fact that the Respondent would have deliberately appropriated the Disputed domain name in bad faith during the short period in which it was not registered because the registrar of the Complainant had failed to timely renew it. The Respondent would have done so with the mere aim of redirecting Belgian users to the abovementioned websites.

7.2. The Respondent

The Respondent did not reply to the Complainant's contentions, not in the proceedings which led to the Appealed Decision nor in the present appeal proceedings.

8. Discussions and Findings

Pursuant to Article 10(b)(1) of the Terms and Conditions, the Complainant must prove that:

1. the domain name holder's domain is identical or confusingly similar to a trademark, a trade name, a social name or corporation name, a geographical designation, a name of origin, a designation of source, a personal name or name of a geographical entity in which the complainant has rights; and
2. the domain name holder has no rights or legitimate interests in the domain name; and
3. the domain name holder's domain name has been registered or is being used in bad faith.

8.1 The assessment of the first condition (identical or confusingly similar domain name)

According to this first condition, the Complainant has to prove that it has rights in a protected sign and that the Disputed domain name is identical or confusingly similar to such protected sign. The protected sign may be a trademark or a trade name, for example.

The Panel of Third-Party Deciders is of the opinion that regarding distinctive signs that allow a service to be identified in the eyes of the public, clients, or third parties, the assessment is carried out in the same way whether the underlying service is offered online or not, neither more strictly nor less.

The Panel of Third-Party Deciders concurs with the Appealed Decision where it lists the conditions the use of a sign needs to fulfil in order to qualify as a trade name and consequently to benefit from the legal protection a trade name enjoys pursuant to Article 8 of the Paris Convention for the Protection of Industrial Property.

It however appears to this Panel that the evidence provided by the Complainant as to its use of the sign OBSERVO does show that it operates, provides services and has become known under this name, even if this sign identifies only part of the Complainant's activities. Reference is thereby made to the prominent use of the OBSERVO name on and in the materials the Complainant uses in its communication with its customers, as provided as evidence by the Complainant. The Appealed Decision mentions that the name OBSERVO would thereby more function as a trademark. Such finding does however not exclude that in the services industry a given sign can function both as service mark and as a trade name for the entity offering such services. This point now seems to be confirmed by

the recent registration of a Benelux trademark OBSERVO by the Complainant, of which the Third-Party Decider was unaware at the time.

As a result, the Panel of Third-Party Deciders confirms that the Complainant enjoys rights in the trade name OBSERVO. As the Disputed domain name is identical to this trade name, the Panel of Third-Party Deciders finds that the first element has been established.

As indicated, the case file reveals that the Complainant filed for a Benelux "OBSERVO" trademark on August 30, 2024 which is after the Appealed Decision had been rendered but prior to the filing of its request for appeal. The Panel of Third-Party Deciders will not take this new element into account. There is indeed no need to address the question whether a trademark applied for after the Appealed Decision can be taken into account during these appeal proceedings since the Panel of Third-Party Deciders has come to the conclusion that the Complainant enjoys rights in its trade name OBSERVO which it is entitled to invoke in the framework of this first condition.

8.2 The assessment of the second condition (no rights or legitimate interests)

According to this second condition, the Complainant has to prove that the Respondent has no rights or legitimate interests in the Disputed domain name.

It is settled CEPANI case-law 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 proof shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name.

Having reviewed the available record, the Panel of Third-Party Deciders finds the Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the Disputed domain name.

There is indeed no evidence that any of the circumstances listed in Article 10(b)(3) of the Terms and Conditions and which can demonstrate that the Respondent would have rights or legitimate interests in the Disputed domain name would be present in the current case:

- the Respondent does not seem to have made a prior use of the Disputed domain name in connection with a *bona fide* offering of goods or services linked to the sign "OBSERVO";
- the Respondent does not seem to be commonly known by the Disputed domain name; and
- the Respondent does not seem to be making a legitimate and non-commercial or fair use of the disputed domain without intent to misleadingly divert consumers for commercial gain or to tarnish the trade name at issue.

To the contrary, the only use which Respondent seems to have made of the Disputed domain name is to redirect Internet users to other websites with others URL's on the .top TLD which feature pornographic content.

In view of the above and the fact that the Respondent has not rebutted the Complainant's *prima facie* showing by coming forward with any relevant evidence demonstrating rights or legitimate interests in the Disputed domain name, the Panel of Third-Party Deciders finds that the second element has been established.

8.3 The assessment of the third condition (registration or use in bad faith)

According to this third condition, the Complainant has to prove that the Respondent either registered the Disputed domain name in faith or has been using the Disputed domain name in bad faith.

The use of a domain name for the mere purpose of redirecting traffic to other sites can constitute an intentional use to attract, for commercial gain, Internet users to an on-line location. This is particularly the case when there does not seem to be any link between the domain name and the sites to which it redirects. In other words, the services provided through these redirects, are offered under URLs other than the Disputed domain name.

In this particular case, it appears from evidence accessible to the Panel of Third-Party Deciders that the Disputed domain name is merely used by the Complainant for the purpose of redirecting Internet users to other websites on the .top TLD which feature pornographic content without being used as such. There does not appear to be any other link between these other websites and the Disputed domain name nor do these websites contain any direct or indirect reference to the "obscuro" element of the Disputed domain name. The Panel of Third-Party Deciders considers this use of the Disputed domain name by the Respondent as being made in bad faith.

This finding of bad faith is further corroborated and confirmed by the following elements:

- The fact that the Disputed domain name was registered by the Respondent on June 28, 2024, which was the same day on which the Domain Name was released after the applicable 40-day quarantine period;
- The lack of any apparent link between Belgium, of which .be is the ccTLD, and the Respondent or the sites to which the Disputed domain name redirects;
- The absence of any apparent connection between the Respondent and the Disputed domain name;
- The fact that the Respondent failed to reply to the initial complaint and to the request for appeal and by doing so opted not to seize these opportunities to bring forward any argument or fact in support of his use of the Disputed domain name.
- The specific nature of the services which the Respondent allowed to be offered under the Disputed domain name (when a visitor uses the Disputed domain name, they are redirected to pornographic content). Regardless of the legality of this content, this could be understood as additional pressure exerted on the Complainant to monetize the domain name. It would have been appropriate for the Respondent to address this issue, which it failed to do, both before the initial Third-Party Decider and on appeal. In the context of

the case and considering the other elements, the Panel of Third-Party Deciders views this conduct as a further indication of bad faith.

As a result, and based on the available record, the Panel of Third-Party Deciders finds that the Disputed domain name was used in bad faith by the Respondent and as a result that the third condition has been established.

9. Decision

For the foregoing reasons, pursuant to Article 10 (e) of the Terms and Conditions, the Panel of Third-Party Deciders hereby rules that the domain name registration of “observo.be” is to be transferred to the Complainant.

Brussels, 5 November 2024

The Panel of Third-Party Deciders

Geert Glas

Signed by:
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