



(Hong Kong Office)

ADMINISTRATIVE PANEL DECISION

Case No.	HK-2201637
Complainant:	Educational Testing Service
Respondent:	Hong Wei Chen
Disputed Domain Name(s):	<besttoefl.com>

1. The Parties and Contested Domain Name

The Complainant is Educational Testing Service, of 660 Rosedale Road, Princeton NJ 08541, United States of America.

The Respondent is Hong Wei Chen, of Shizhong District, Jinan, Shandong Province 250000, China.

The domain name at issue is <besttoefl.com>, registered by Respondent with Wild West Domains, LLC, of “www.wildwestdomains.com”.

2. Procedural History

The Complainant filed the Complaint with the Hong Kong Office of Asian Domain Name Dispute Resolution Centre on 7 and 10 July 2022 in accordance with the Uniform Policy for Domain Name Dispute Resolution approved by the Internet Corporation for Assigned Names and Numbers (“ICANN”) on 24 October 1999 (the “Policy”), the Rules for Uniform Domain Name Dispute Resolution Policy approved by the ICANN Board of Directors on 28 September 2013 (the “Rules”) and the ADNDRC Supplemental Rules for Uniform Domain Name Dispute Resolution Policy effective from 31 July 2015 (the “Supplemental Rules”). On 11 July 2022, the Hong Kong Office acknowledged receipt of the Complaint and sent an email to the Registrar requesting verification of information regarding the domain name at issue. On 12 July 2022, the Registrar sent a confirmation email disclosing registrant and contact information for the disputed domain name that differed from the named respondent and contact information in the Complaint. On the same day, the Center sent an email to the Complainant providing the registrant and contact information disclosed by the Registrar and requiring the Complainant to update the information regarding the Respondent in the Complaint. On 13 July 2022, the Complainant filed an amended Complaint.

The Hong Kong Office confirmed that the Complaint, as amended, was in administrative compliance with the Policy and the Rules. On 16 July 2022, the Hong Kong Office sent

the Respondent a written notice of the Complaint, informing it that it was required to submit a Response within 20 days (that is, on or before 5 August 2022). The Hong Kong Office did not receive a Response from the Respondent regarding the Complaint. Accordingly, on 6 August 2022, the Hong Kong Office notified the parties of the Respondent's default.

On 8 August 2022, the Hong Kong Office appointed Matthew Kennedy as the sole Panelist in this dispute, who confirmed that he was available to act independently and impartially between the Parties in this matter. On the same day, the Hong Kong Office transferred the case file to the Panel.

3. Factual background

The Complainant, founded in 1947, is a private nonprofit educational testing and assessment organization. It administers international tests including the TOEFL in more than 180 countries and at over 10,000 locations worldwide. The Complainant owns multiple trademark registrations in multiple jurisdictions, including the following Chinese trademark registrations:

Trademark	Registration number	Registration date	Class
TOEFL	176265	30 April 1983	16
TOEFL	746636	21 May 1995	9
TOEFL	771160	7 November 1994	41
托福	1129730	21 November 1997	42
托福	1129840	21 November 1997	41
托福	1136266	21 December 1997	16

The above trademark registrations remain valid.

The Respondent is an individual resident in China.

The disputed domain name was registered on 7 May 2022. It resolves to a website in English that offers for sale sample examination questions and materials for candidates taking the TOEFL examination. The website header reads "Best TOEFL – a higher score". The website displays TOEFL in the names of the Complainant's reading examination papers.

The Registrar confirmed that the Registration Agreement for the disputed domain name is in English.

4. Parties' Contentions

A. Complainant

The Complainant's contentions may be summarized as follows:

- i. The disputed domain name is identical or confusingly similar to the TOEFL and 托福 trademarks of the Complainant.

- ii. The Respondent has no rights or legitimate interests in respect of the disputed domain name. The Complainant has never authorized the Respondent to use TOEFL or to register it as part of a domain name on the Complainant's behalf. The Respondent is not in any way related to the Complainant.
- iii. The Respondent has actual knowledge of the Complainant's TOEFL and 托福 trademarks. There is no reason for the Respondent to adopt the disputed domain name other than to free ride on the fame and reputation of the Complainant and to attract, for commercial gain, Internet users to the Respondent's website.

B. Respondent

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

5. Findings

The ICANN Uniform Domain Name Dispute Resolution Policy provides, at Paragraph 4(a), that each of three findings must be made in order for a Complainant to prevail:

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

The burden of proof of each of the above three elements is borne by the Complainant. The Respondent's default does not automatically result in a decision in favour of the Complainant.

A) Identical / Confusingly Similar

Based on the evidence submitted, the Panel finds that the Complainant has rights in the TOEFL mark, among others.

The disputed domain name wholly incorporates the TOEFL mark. The disputed domain name also includes the English word "best" before the mark. However, given that the TOEFL mark remains clearly recognizable within the disputed domain name, the addition of this word does not prevent a finding of confusing similarity for the purposes of the first element of paragraph 4(a) of the Policy. See *HK-1600893 <suninghk.com, suningbest.com & others>*.

The only other element in the disputed domain name is a generic Top-Level Domain ("gTLD") suffix (".com"). As a standard requirement of domain name registration, this element may be disregarded in the comparison between the disputed domain name and the Complainant's mark for the purposes of the first element of paragraph 4(a) of the Policy.

Therefore, the Panel finds that the disputed domain name is confusingly similar to a trademark in which the Complainant has rights. The Complainant has satisfied the first element in paragraph 4(a) of the Policy.

B) Rights and Legitimate Interests

Paragraph 4(c) of the Policy sets out the following circumstances which, without limitation,

if found by the Panel, shall demonstrate that a respondent has rights to, or legitimate interests in, a disputed domain name, for the purposes of paragraph 4(a)(ii) of the Policy:

- (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.

As regards the first and third circumstances set out above, the disputed domain name wholly incorporates the Complainant's TOEFL mark, preceded by the word "best", and it resolves to a website that offers sample examination questions and materials for candidates taking the Complainant's TOEFL reading examinations. The website displays the TOEFL mark in the website header and in the names of the examination papers. The Complainant submits that it has never authorized the Respondent to use TOEFL and that the Respondent is not in any way related to it. The website does not accurately disclose the Respondent's lack of relationship with the Complainant. On the contrary, it gives the false impression that it is somehow affiliated with, or endorsed by, the Complainant. Accordingly, the Panel does not consider this offering of goods or services to be *bona fide*. Given that the website offers sample examination questions and materials for sale, the Panel does not consider that the Respondent is making a legitimate noncommercial or fair use of the disputed domain name either.

As regards the second circumstance set out above, the Respondent's name is listed in the Registrar's WhoIs database as "Hong Wei Chen", not the disputed domain name. Nothing in the record indicates that the Respondent has been commonly known by the disputed domain name.

In summary, the Panel considers that the Complainant has made a *prima facie* case that the Respondent has no rights or legitimate interests in respect of the disputed domain name. The Respondent failed to rebut that *prima facie* case because he did not respond to the Complainant's contentions.

Therefore, based on the record of this proceeding, the Panel finds that the Complainant has satisfied the second element in paragraph 4(a) of the Policy.

C) Bad Faith

Paragraph 4(b) of the Policy provides that certain circumstances, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith. The fourth circumstance is as follows:

"(iv) by using the [disputed] domain name, [the respondent has] intentionally attempted to attract, for commercial gain, Internet users to [the respondent's] web site 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 [the respondent's] web site or location or of a product or service on [the respondent's] web site or location."

The disputed domain name was registered in 2022, many years after the registration of the

Complainant's TOEFL mark, including in China where the Respondent is resident. The disputed domain name wholly incorporates the TOEFL mark, preceded by the word "best". The website to which the disputed domain name resolves prominently displays the Complainant's TOEFL mark in the website header and in the name of the Complainant's reading examination papers. In view of these circumstances, the Panel has reason to find that the Respondent had the Complainant's TOEFL mark in mind when he registered the disputed domain name.

The Respondent uses the disputed domain name in connection with a website that is falsely presented as a website somehow affiliated with, or endorsed by, the Complainant, and offering for sale sample examination papers and other materials for commercial gain. Given these facts and the findings in Section 5B above, the Panel finds that the disputed domain name operates by creating a likelihood of confusion with the Complainant's trademark as to the source, sponsorship, affiliation or endorsement of the website or the products offered for sale on it. This use of the disputed domain name is intended to attract Internet users to the Respondent's website for commercial gain as contemplated by paragraph 4(b)(iv) of the Policy.

Therefore, the Panel finds that the disputed domain name has been registered and is being used in bad faith. The Complainant has satisfied the third element in paragraph 4(a) of 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 <besttoefl.com> be transferred to the Complainant.



Matthew Kennedy
Panelist

Dated: 18 August 2022