

**IN THE MATTER OF A COMPLAINT PURSUANT TO THE
CANADIAN INTERNET REGISTRATION AUTHORITY
DOMAIN NAME DISPUTE RESOLUTION POLICY**

Domain Names: THRIFTY.CA and WWWTHRIFTY.CA

Complainant: Thrifty, Inc.
Registrant: Supriyo Malaker o/a DotCrafter
Registrars: Sibername Internet and Software Technologies Inc. (for
THRIFTY.CA)
10 Dollar Domain Names, Inc. (for WWWTHRIFTY.CA)
Panelists: David Allsebrook
Jay Josefo
David Lametti, Chair
Service Provider: Resolution Canada

DECISION

A. The Parties

1. The Complainant is Thrifty, Inc., a business corporation presently incorporated under the laws of Oklahoma with its corporate headquarters at 5330 E. 31st Street, Tulsa, Oklahoma. The Complainant is represented by Nicole M. Meyer, Esquire of Dickinson Wright, PLLC, located at 1901 "L" Street, N.W., Suite 800, Washington, D.C. The Complainant satisfies Canadian Presence requirements under s. 2(q) of the Policy.

2. The Registrant is Mr Supriyo Malaker, and his company name Dotcrafter. His registered address is 2 Silver Maple Court, Unit 2009, Brampton, Ontario. Despite some doubt raised by the Complainant, the Registrant has in fact proven that he is a Canadian citizen.

B. The Domain Name and Registrar

3. The domain names at issue are < THRIFTY.CA > and < WWWTHRIFTY.CA >. The former domain name is registered with Sibername Internet and Software Technologies Inc. of Ottawa, Ontario. The latter domain name is registered with 10 Dollar Domain Names, Inc. of Toronto, Ontario.

C. Procedural History

4. The Complainant submitted this Complaint to the Domain Name Dispute Resolution Provider, Resolution Canada. The Provider served notice of the Complaint to the Registrant as required by paragraph 4.3 of the *CIRA Domain Name Dispute Resolution Rules* ["Rules"]. A Response to the Complaint was received from the Registrant. The

Provider selected the panel of three and appointed the Chair according to the process outlined in the Rules.

D. Panel Members' Impartiality and Independence Statements

5. As required by paragraph 7.1 of the Rules, all three panelists have declared to the Provider that they can act impartially and independently in this matter as there are no circumstances known to any of us which would prevent us from so acting.

E. Factual Background

6. The facts of this dispute are as follows. Thrifty, Inc. is the registered owner of the registered Canadian trademarks THRIFTY for automobile and other vehicle rental and leasing, as well as online services for vehicle rental and leasing. Thrifty, Inc., through its wholly-owned subsidiary Thrifty Rent-A-Car System, Inc. rents car at other vehicles throughout the world. Thrifty rents cars at more than 1,100 locations in 64 countries and territories throughout the world, and with 120 locations in Canada. It has promoted the THRIFTY and THRIFTY RENT A CAR trademarks which are now widely associated with car rental services provided by Thrifty.

7. Thrifty, Inc. owns a number of trademark registrations in the United States and Canada, and around the world. It also owns the domain name < THRIFTY.COM > and uses the web site to provide the full panoply of online car rental services.

8. The Registrant is a civil/structural engineer, artist and web designer, doing business as DotCrafter. He develops websites to offer Canadians a variety of "useful information and services", such as thematic search portals for *inter alia* travel services, insurance services, and employment services. He also provides other web-based services such as directory listings, email, web page provision, and e-commerce services. He owns a large number of domain names, many of which are not in use.

9. The disputed domain name < THRIFTY.CA > was registered by the Registrant on 4 June 2004 and the registration is valid until 4 June 2006. The disputed domain name < WWWTHRIFTY.CA > was registered by the Registrant on 28 July 2005 and is valid until 28 July 2006.

F. CIRA Domain Name Dispute Resolution Policy Requirements

10. The *CIRA Domain Name Dispute Resolution Policy* ["Policy"] sets out at paragraph 4.1 what the Complainant must establish in order to successfully prove the complaint:

To succeed in the Proceeding, the Complainant must prove, on a balance of probabilities, that:

- (a) the Registrant's dot-ca domain name is Confusingly Similar to a Mark in which the Complainant had Rights prior to the date of registration of the domain name and continues to have such Rights; and

(b) the Registrant has registered the domain name in bad faith as described in paragraph 3.7;

and the Complainant must provide some evidence that:

(c) the Registrant has no legitimate interest in the domain name as described in paragraph 3.6.

Even if the Complainant proves (a) and (b) and provides some evidence of (c), the Registrant will succeed in the Proceeding if the Registrant proves, on a balance of probabilities, that the Registrant has a legitimate interest in the domain name . . .

G. Is the Registrant's Domain Name Confusingly Similar to the Complainant's Mark?

1) The Complainant's Marks

11. Paragraph 3.2 of the Policy includes the following in the definition of what constitutes a "mark" for the purposes of the Policy:

A "Mark" is:

- (a) a trade-mark . . . or a trade name that has been used in Canada . . . for the purpose of distinguishing the wares, services or business of that person . . . from the wares, services or business of another person; [and]
- (c) a trade-mark . . . that is registered in CIPO . . .

12. The Complainant has shown evidence of its current ownership of the registered mark THRIFTY in Canada.

2) "Confusingly Similar"

a) "Confusingly Similar"

13. Paragraph 3.4 of the Policy defines "confusingly similar" in the following terms:

A domain name is "Confusingly Similar" to a Mark if the domain name so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely to be mistaken for the Mark.

14. Regarding < THRIFTY.CA >, discounting as one should the .ca portion of the domain name and the spacing between words, the THRIFTY mark is identical to disputed domain name. Regarding < WWWTHRIFTY.CA >, the Panel accepts the proposition that the missing period is a typing error which does not constitute a marked difference in terms of appearance, sound and ideas suggested by the portion after "www". As such, "www" should be discounted in assessing the domain name. Once done, this domain

name too is identical to the THRIFTY mark. Indeed, the Registrant agrees with this conclusion.

15. The Panel notes that the word “thrifty” has a well-known and often-used descriptive and generic meaning: “economical”, “careful with money and resources”, “prudent”, “frugal”, “wisely economical”, etc. The word is used extensively in a marketing a variety of websites and other traditional means of conveying information and advertising, for a variety of businesses and in a variety of contexts.

16. As a result of the descriptive and generic nature of the word, the use of the word “thrifty” in a domain name or for a website does not per se cause confusion with the trademark. The word can apply in a number of contexts, and thus the appearance, sound and idea of the word do not necessarily or even probably point to the Complainant’s particular use of the word.

17. The Registrant’s site is a directory of services, which are organized by subject matter. On the thrifty.ca home page the user is presented with one of several pages chosen at random. All are in the same format. The main portion of the page is the same, regardless of which page is presented. It consists of a list of six “Favorite [sic] Categories”, which are “Travel”, “Finance”, “Home”, “Business”, “Entertainment” and “Lifestyles”. Lists of services are provided under each. For example, under “Finance” appear hyperlinks marked “Free Credit Report”, “Online Payment”, “Credit Card Application”, “Car Insurance”, and “Health Insurance”. Under “Travel”, one of the five entries is “Car Rental”. Only one of about forty subject matter hyperlinks links on the page is “Car Rental”. It is readily apparent to the user viewing this page that it serves as a directory and referral service. No business names or trade marks appear on the page in connection with the listed services, and the only trade mark or business name on the page at all is “thrifty.ca” with a maple leaf logo overlaid on the concluding “.ca” at the top of the page.

18. The site set up by the Registrant is clearly a site purporting to offer a number of different “deals” in a number of different areas of interest to consumers. The site is aiming to attract anyone interested in getting the lowest price or best deal – the thrifty consumer – for whatever specific service he happens to be looking for. While there are car rental links available through the site, including links to the Complainant, they appear as search engine results. They appear in a list of references to third party services, alongside references to competing car rental services such as Budget’s and indirect references to Thrifty car rentals accessed through third party web sites such as www.comparisontravel.com. It would be very clear to any user expecting to encounter Thrifty’ business that the Registrant’s site is not operated by Thrifty and is not part of a car rental business. No confusion will ensue.

b) Conclusion on Confusingly Similar

19. Interpreting “confusingly similar” under the Policy, the Panel finds that the Registrant’s domain names < THRIFTY.CA > and < WWWTHRIFTY.CA > are not confusingly similar to the Complainant’s mark.

H. Was the Registration of the Domain Name Made in Bad Faith?

20. In order to succeed, the Complainant must show, on the balance of probabilities, that the Registrant registered the domain name in bad faith. Like the ICANN UDRP, the inquiry into bad faith in the Policy requires making findings on what one might consider to be the subjective behaviour of the Registrant. The Policy, however, unlike the UDRP, has expressly and purposely adopted a restricted definition of “bad faith”. Paragraph 3.7 of the Policy states that the Registrant will be considered to have registered the domain name in bad faith, if and only if one of the following three conditions is met:

- (a) the Registrant registered the domain name . . . primarily for the purpose of selling, renting, licensing or otherwise transferring the Registration to the Complainant [or others related to or competing with the Complainant] for valuable consideration in excess of the Registrant’s actual costs in registering the domain name . . . ;
- (b) the Registrant registered the domain name . . . in order to prevent the Complainant [or others related to the Complainant] from registering the Mark as a domain name, provided that the Registrant, alone or in concert with one or more additional persons has engaged in a pattern of registering domain names in order to prevent persons who have Rights in Marks from registering the Marks as domain names; or
- (c) the Registrant registered the domain name . . . primarily for the purpose of disrupting the business of the Complainant, or the Complainant’s licensor or licensee of the Mark, who is a competitor of the Registrant.

21. On the facts of and evidence adduced in this dispute two of the three tests may be applicable: paragraph 3.7 (b) and (c).

22. First, the Registrant is alleged to have violated paragraph 3.7 (b), that is, it has “registered the domain name . . . in order to prevent the Complainant from registering the Mark as a domain name, provided that the Registrant, alone or in concert with one or more additional persons has engaged in a pattern of registering domain names in order to prevent persons ... from registering.”

23. The Complainant has adduced evidence that the Registrant has in fact engaged in such a pattern of behaviour, as the Registrant has a number of other domain name registrations which have some similarity to commonly known marks, as well as allegations of “typo-squatting”. Indeed, the Complainant calls the Registrant a “serial cyber-squatter”.

24. The Registrant does admit to “collecting” domain names. He has, however, adduced evidence of a business plan in which he registers generic names that include terms that allude to thrift: “markdown”, “cheap”, “deal”, etc. He also responds that he does routinely register names that have generic or descriptive elements that have recently become available. He did so on 4 June 2004 when < THRIFTY.CA > became available. All registered names collected are retained for development: the Registrant has never sold a domain name.

25. Finally, the Registrant acknowledges having domain names which are similar to trademarks or misspellings of them. The Registrant asserts that these were acquired incidentally, when he acquired portfolios of domain names from others, and that they comprise less than three percent of his portfolios of domain names. He provided a copy of his published policy to relinquish them (which policy expressly excludes descriptive domain names) and relates his efforts to date to get rid of such domain names, including 38 said to have been transferred to the rightful trade mark owners. Three such transfers are documented. In any event, he asserts that the overall percentage of disputable names in his possession is quite low.

26. Annex 5 to the Complainant's evidence lists the registrant's hundreds of .ca domain names, and highlights the ones it deems to include third party trade marks or misspellings thereof. Annex 5 is consistent with the Registrant's estimate of three percent.

27. The Registrant appears to be attempting to exploit business opportunities made possible by the Internet, in registering and developing sites that are of general or specific use to the consumer. Part of this strategy is to register domain names. While it may be true that in a very small number of cases – fewer than three percent – registrations may infringe on the rights of *some* right-holders under the Policy (or other domain name policies and governance regimes) [See, e.g., *Priceline.com Inc. v. Supriyo Malaker*, CIRA Dispute Resolution Case 00045, November 25, 2005], the general pattern and overall business plan in no way can be said to constitute a simple “pattern of registering domain names in order to prevent persons ... from registering.” Thus, the Registrant has not violated paragraph 3.7 (b) of the Policy.

28. Second, the Registrant is alleged to have violated paragraph 3.7 (c), that is, of having registered the domain name “primarily for the purpose of disrupting the business of the Complainant”, who is also a competitor of the Registrant. This disruption is not the normal disruption that one associates with the usual dictates of business practice in a competitive market; rather, it is a disruption whose deleterious effects are the primary purpose of the Registrant. While the former might have been caught under paragraph 4(b)(iv) of the ICANN UDRP Policy, this provision was expressly omitted from this Policy.

29. CIRA Policy, paragraph 3,7(c) requires more than that the *effect* of the Registrant's registration and use of the domain name disrupt the business of its Complainant

competitor. The Panel must be able to find that the *primary purpose* of the Registrant in registering that domain name was to disrupt the business of Complainant competitor.

30. This is a finding that the Panel is unable to make in this case. The Registrant's business plan, while it perhaps has some impact on the Complainant, is in its primary function independent of the Complainant. The Complainant's website allows customers to rent vehicles. The Registrant's websites points users to a number of different services provided not by the Registrant but third parties. In addition, this is not the only kind of service offered by the Registrant related to registering domain names and developing them.. Indeed, the registrant's business plan appears to be much wider and more complex in terms of the services it offers.

31. Moreover, it can hardly be said that the Complainant and Registrant are Competitors. While the registrant's sites have links to car rental companies, they contain many more links to other sorts of goods and services. Moreover, the Registrant does not offer those services himself, but points internet traffic to people who do, including the Complainant. In fact, some of the links from the Registrant's site to the Complainant's are described as "Sponsored links". (Complainants' submission, Annex 4). Neither party commented on this. The businesses do not resemble each other in the least, and are far from the definition of competitor in which "competitor" is understood in its economic sense:

The Panel finds that the meaning of "competitor" is, in substance, that from business or economic theory. For the Registrant and the Complainant to be competitors they would each have to offer in a marketplace, a good or a service, that could be at least imperfect substitutes for each other – such that in the right conditions of relative prices, etc., some consumers would consider buying the Registrant's good or service instead of the Complainant's good or service. [*Microsoft Corp. v. Microscience Corp.* CIRA Dispute Resolution Case 00034, July 19, 2005 at p. 6.]

32. The Panel therefore concludes that the Registrant did not register the domain names < THRIFTY.CA > and < WWWTHRIFTY.CA > in bad faith under paragraphs 3.7 (b) and (c) of the Policy.

I. Does the Registrant Have a "Legitimate Interest" In the Domain Name?

33. The final element of the test set out in the Policy is to determine whether or not the Registrant has a legitimate interest in the domain name. Paragraph 3.6 of the Policy states:

The Registrant has a legitimate interest in a domain name if, and only if, before the receipt by the Registrant of notice from or on behalf of the Complainant that a Complaint was submitted

- (a) the domain name was a Mark, the Registrant used the Mark in good faith and the Registrant had Rights in the Mark;
- (b) the Registrant used the domain name in Canada in good faith in association with any wares, services or business and the domain name was clearly descriptive in Canada in the English or French language of: (i) the character or quality of the wares, services or business; (ii) the conditions of, or the persons employed in, production of the wares, performance of the services or operation of the business; or (iii) the place of origin of the wares, services or business;
- (c) the Registrant used the domain name in Canada in good faith in association with any wares, services or business and the domain name was understood in Canada to be the generic name thereof in any language;
- (d) the Registrant used the domain name in Canada in good faith in association with a non-commercial activity including, without limitation, criticism, review or news reporting;
- (e) the domain name comprised the legal name of the Registrant or was a name, surname or other reference by which the Registrant was commonly identified; or
- (f) the domain name was the geographical name of the location of the Registrant's non-commercial activity or place of business.

34. This definition is restrictive – only the interests listed in subparagraphs (a) through (f) below can be considered legitimate interests. In terms of procedure the Complainant must provide some evidence that none of these interests applied to the Registrant. The burden would then shift to the Registrant to show that it has, on the balance of probabilities, any one of these legitimate interests as defined under these subparagraphs.

35. The Complainant has asserted that the Registrant has no legitimate interest. The Complainant's assertion rests on the unsubstantiated assumption that the Registrant knew of the "THRIFTY" trade mark and set out to prevent the Complainant from registering. This assertion, however, ignores the fact that the word "thrifty" in the English language as commonly spoken has a descriptive nature and a generic aspect that allows the word to be used in a variety contexts, a number of which are in fact commercial. Thus, without more evidence, the descriptive nature of the word "thrifty" is sufficient to rebut this assertion of no legitimate interest at the outset. The Complainant has thus failed to show "some evidence", and thus fails to shift the burden of showing legitimate interest to the Registrant.

36. The Panel therefore concludes that the Complainant has failed to show some evidence that the Registrant did not have a legitimate interest in the domain names < THRIFTY.CA > and < WWWTHRIFTY.CA > under paragraph 3.6 of the Policy.

J. Domain Name Hijacking

37. The Registrant points out that the Complainant has lost a similar case for the domain name < THRIFTY.ORG >. In that case, the mere registration of a generic was seen to be legitimate in and of itself, even though the case was uncontested and the Registrant in that case had clearly attempted to sell the name to Thrifty, Inc. for an inflated sum. The Registrant also contends, at paragraph 4.B9 of his response, that this is clearly a case of “domain hijacking” as was the < THRIFTY.ORG > case. Rule 5.1 of the Policy provides for consequences if “...the Complaint was commenced by the Complainant for the purpose of attempting, unfairly and without colour of right, to cancel or obtain a transfer of any Registration which is the subject of the Proceeding.” While the Panel is not prepared to make a ruling on this contention, it does point out that the Complainant might have made an effort to identify and distinguish this proceeding under the ICANN UDRP from the present dispute.

K. Conclusion and Decision

38. The Complainant has not established on the balance of probabilities that the Registrant’s domain names < THRIFTY.CA > and < WWWTHRIFTY.CA > are confusingly similar to the Complainant’s mark.

39. The Complainant has not established on the balance of probabilities that the Registrant had registered the domain names < THRIFTY.CA > and < WWWTHRIFTY.CA > in bad faith, as defined in the Policy.

40. The Complainant has not provided some evidence that the Registrant has no legitimate interest, as defined in the Policy, in the domain names < THRIFTY.CA > and < WWWTHRIFTY.CA >.

41. For these reasons, the complaint regarding the domain names < THRIFTY.CA > and < WWWTHRIFTY.CA > is not successful.

Dated 20 January 2006,

David Allsebrook, Jay Josefo, David Lametti (Chair)

David Allsebrook
20 January 2006

Jay Josefo
20 January 2006

David Lametti
20 January 2006