Decision for dispute CAC-UDRP-101998

Case number	CAC-UDRP-101998
Time of filing	2018-05-14 11:20:23
Domain names	milletclothing.com

Case administrator

Name	Sandra Lanczová (Case admin)

Complainant

Organization	MILLET MOUNTAIN GROUP

Complainant representative

Organization	Cabinet Germain & Maureau

Respondent

Name	Uwe Gloeckner

OTHER LEGAL PROCEEDINGS

The Panel is not aware of any other legal proceedings that relate to the Disputed domain name.

IDENTIFICATION OF RIGHTS

The Complainant is the owner of numerous registrations for the trademark "MILLET", including the French trademark No 96638411, registered on August 7, 1996, for goods and services in classes 18 and 25 and the EU trademark No 000341743, registered on May 29, 2000, for goods and services in classes 18 and 25.

The Disputed domain name was registered by the Respondent on March 24, 2017.

FACTUAL BACKGROUND

FACTS ASSERTED BY THE COMPLAINANT AND NOT CONTESTED BY THE RESPONDENT:

The Complainant states that it is a company founded in France in 1921 by Marc Millet.

The Complainant explains that it is an adult clothing and mountain equipment company, covering trekking, mountaineering and skiing activities, using three different brands : "LAFUMA", "MILLET" and "EIDER".

The Complainant points out that it is the owner of several trademarks and domain names, including the distinctive word

"MILLET".

The Complainant observes that the Disputed domain name was registered by the Respondent on March 24, 2017.

The Complainant submits that the Disputed domain name points to an active website, where the Complainant's trademark "MILLET" is shown.

The Complainant states that the Disputed domain name is confusingly similar to its trademark "MILLET" and to its domain names relating to the above-mentioned trademark.

The Complainant observes that the Disputed domain Name contains the Complainant's registered trademark "MILLET" in its entirety.

The Complainant contends that the Disputed domain name only differs from the trademark "MILLET" by the addition of the generic word "CLOTHING", which is related to the Complainant's activity. The Complainant reminds that it sells clothing and equipment for trekking, mountaineering and skiing activities.

The Complainant observes that it is required to make out a prima facie case that the Respondent lacks rights or legitimate interest and, once such prima facie case is made, the Respondent carries the burden of demonstrating rights or legitimate interests in the Disputed domain name. The Complainant adds that if the Respondent fails to do so, the Complainant is deemed to have satisfied paragraph 4(a) (ii) of the UDRP.

The Complainant argues that the Respondent is not known as "MILLETCLOTHING", but has a completely different name.

The Complainant submits that the Respondent has not acquired trademarks rights on this the term "MILLETCLOTHING".

The Complainant contends that the Respondent is not affiliated with nor authorized by it in any way.

The Complainant states that it does not carry out any activity for, nor has any business with the Respondent.

The Complainant underlines that neither licence nor authorization has been granted to the Respondent to make any use of the Complainant's trademark "MILLET".

The Complainant points out that it has never delegated the Respondent to apply for registration of the Disputed domain name on behalf of the Complainant.

The Complainant observes that the Complainant's figurative trademarks and the Complainant's products are shown on the Respondent's website.

The Complainant notes that on the Respondent's website there is no disclaimer or any information explaining that the Respondent is not affiliated with the Complainant.

The Complainant takes the view that the Respondent's sole intention in registering the Disputed domain name must have been to obtain financial gain from the use of the Complainant's trademark by pretending to be an official reseller of the Complainant's products.

The Complainant argues that, for the above-mentioned reasons, the Respondent has no rights or legitimate interests in the Disputed domain name.

The Complainant submits that, given the distinctiveness of the Complainant's trademark and the content of the website, the Respondent has registered the Disputed domain name with full knowledge of the Complainant's trademarks.

The Complainant contends that the Respondent is attempting to pass itself off as the Complainant by using its registered trademark "MILLET" in violation of Policy.

The Complainant considers that the Disputed domain name has also been registered in an effort to take advantage of the goodwill that the Complainant had built up in its MILLET trademark, and to unduly benefit from creating a diversion of the internet users of the Complainant by pretending to be an official online partner of the Complainant.

The Complainant points out that the Respondent is offering for sale the Complainant's products and is displaying the Complainant's trademarks.

The Complainant also contends that the Respondent has used the Disputed domain name to intentionally attract visitors for commercial gain by confusion with the Complainant's trademarks. The Complainant adds that the Respondent has made the registration with that intention, and that this circumstance constitutes registration and use in bad faith.

The Complainant asserts that all these elements lead to the conclusion that the Respondent has intentionally attempted to attract Internet users to the Respondent's website for commercial gain by creating a likelihood of confusion with the Complainant's trademarks as to the source, sponsorship, affiliation, or endorsement of such websites. The Complainant observes that these activities amount to bad faith use of the Disputed domain name pursuant to paragraph 4(b)(iv) of the Policy.

For these reasons, the Complainant concludes that the Respondent has registered and is using the Disputed domain name in bad faith.

PARTIES CONTENTIONS

No administratively compliant Response has been filed.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the Disputed domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights (within the meaning of paragraph 4(a)(i) of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the Disputed domain name (within the meaning of paragraph 4(a)(ii) of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the Disputed domain name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy).

PROCEDURAL FACTORS

The Panel is satisfied that all procedural requirements under UDRP were met and there is no other reason why it would be inappropriate to provide a decision.

PRINCIPAL REASONS FOR THE DECISION

In accordance with paragraph 4(a) of the Policy, in order to obtain the transfer of the Disputed domain name, the Complainant has to demonstrate that:

(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 has been registered and is being used in bad faith.

IDENTICAL OR CONFUSINGLY SIMILAR

The first requirement that the Complainant must establish is that the Disputed domain name is identical with, or confusingly similar to, the Complainant's trademark or service mark.

There are two elements of this test: the Complainant must demonstrate that it has rights in a trademark or service mark and, if so, the Disputed domain name must be shown to be identical or confusingly similar to the trademark or service mark.

The Complainant has proven ownership of the registered trademark "MILLET", identified in section "Identification of rights" above.

On the question of identity or confusing similarity, what is required is simply a comparison and assessment of the Disputed domain name itself to the Complainant's trademark.

The Disputed domain name differs from the Complainant's trademark "MILLET" only by the addition of the word "CLOTHING", and of the top-level domain ".com". It is well established that where the relevant trademark is recognizable within the domain name, the addition of other non-distinctive terms does not prevent a finding of confusing similarity (see, for example, WIPO case No. D2008-2002).

It is a common view that where a trademark is the distinctive part of a domain name, the domain name is considered to be confusingly similar to the trademark (see, for example, WIPO case No. D2017-1266).

It is also well established that the top-level domain may generally be disregarded in the confusing similarity test (see, for example, WIPO case No. D2016-2547).

The Panel considers that the addition of the generic word "CLOTHING", which is related to the Complainant's activity, at the end of the Disputed domain name does not prevent a finding of confusing similarity.

Therefore, the Panel considers that the Disputed domain name is confusingly similar to the Complainant's trademark.

Accordingly, the Panel finds that the Complainant has satisfied paragraph 4(a)(i) of the Policy.

RIGHTS OR LEGITIMATE INTERESTS

The second requirement that the Complainant must prove is that the Respondent has no rights or legitimate interests in the Disputed domain name.

Paragraph 4(c) of the Policy provides that the following circumstances can be situations in which the Respondent has rights or legitimate interests in the Disputed domain name:

(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 non-commercial 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.

This is a non-exhaustive list of circumstances in which a respondent can show rights or legitimate interests in a domain name.

The onus of proving this requirement falls on the Complainant. UDRP panels have recognized that proving that a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of “proving a negative”.

Accordingly, it is usually sufficient for a complainant to raise a prima facie case against the respondent and the burden of proof on this requirement shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the Disputed domain name.

The Panel finds that the Complainant has made out a prima facie case that the Respondent does not have rights or legitimate interests in the Disputed domain name.

In particular, the Complainant states that:

- the Respondent is not affiliated to the Complainant;

- the Respondent is not authorized by the Complainant in any way;

- the Complainant does not carry out any activity for, nor has any business with the Respondent;

- the Respondent has not been licensed nor authorized to make any use of the Complainant's trademark;

- the Complainant has not delegated the Respondent to apply for registration of the Disputed domain name;

- in the Respondent's website, which appears as an online shop selling the Complainant's products, there is no disclaimer or any information explaining that the Respondent is not affiliated with the Complainant.

In the absence of a Response, there is no indication in the present case that the Respondent is commonly known by the Disputed domain name.

Furthermore, the Respondent has failed to demonstrate any of the other non-exclusive circumstances evidencing rights or legitimate interests under the Policy, paragraph 4(c) or other evidence of rights or legitimate interests in the Disputed domain name.

The Respondent does not appear to be commonly known by the name "MILLETCLOTHING" or by a similar name.

The Respondent has used the Disputed domain name to operate a website to sell the Complainant's products.

The consensus view of UDRP panels about the assessment of fair use by resellers, distributors or service providers of domain names containing third parties' trademarks is summarized in the so-called "Oki Data test".

According to the “Oki Data test”, if the following cumulative requirements are applied in the specific conditions of a UDRP case, the use of a third party's trademark may be considered a bona fide offering of goods or services:
(i) the respondent must actually be offering the goods or services at issue;
(ii) the respondent must use the site to sell only the trademarked goods or services;
(iii) the site must accurately and prominently disclose the registrant’s relationship with the trademark holder; and
(iv) the respondent must not try to “corner the market” in domain names that reflect the trademark.
The Oki Data test does not apply where any prior agreement, express or otherwise, between the parties expressly prohibits (or allows) the registration or use of domain names incorporating the complainant’s trademark.

In the current case, at least the condition at point (iii) is not applicable. Indeed, the Panel agrees with the Complainant's argument that there is no disclaimer or any information explaining that the Respondent is not affiliated with the Complainant.

Therefore, the Respondent's website does not accurately or prominently disclose the relationship with the Complainant.

For this reason, the Respondent does not appear to make any legitimate non-commercial or fair use of the Disputed domain name, nor any use in connection with a bona fide offering of goods or services.

Accordingly, the Panel finds that the Complainant has satisfied paragraph 4(a)(ii) of the Policy.

REGISTERED AND USED IN BAD FAITH

Under the third requirement of the Policy, the Complainant must establish that the Disputed domain name has been both registered and used in bad faith by the Respondent.

Paragraph 4(b) of the Policy sets out a list of non-exhaustive circumstances that may indicate that a domain name was registered and used in bad faith, including:

(i) circumstances indicating that [the Respondent] [has] registered or [has] acquired the [Disputed] domain name primarily for the purpose of selling, renting, or otherwise transferring the [Disputed] domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that 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 owner of the trademark or service mark from reflecting the 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] 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 Panel, on the basis of the evidence presented, agrees with the Complainant's contentions that the Disputed domain name was registered in bad faith and that it has been used in bad faith.

The Panel accepts the Complainant's view that the mere registration of a domain name that is confusingly similar to a distinctive trademark by an unaffiliated entity, as it is the case of the Disputed domain name, can by itself create a presumption of bad faith.

In addition, the Panel notes that the content of the Respondent's website is clearly designed as an online shop selling the Complainant's products. Indeed, the Panel agrees with the Complainant's argument that the Respondent has intentionally attempted to attract Internet users to the Respondent's website for commercial gain by creating a likelihood of confusion with the Complainant's trademarks as to the source, sponsorship, affiliation, or endorsement of such website.

For these reasons and in the absence of any allegations and explanations from the Respondent indicating the contrary, the Panel is convinced that the Respondent actually knew that the Disputed domain name was highly similar to the Complainant’s trademark when registering the Disputed domain name. Registration of a confusingly similar domain name in awareness of a reputed trademark and in the absence of rights or legitimate interests amounts to registration in bad faith

(see, for example, CAC Case No. 101661).

The Panel observes that if the Respondent had legitimate purposes in registering and using the Disputed domain name it would have filed a Response in this proceeding.

The Panel, for all the above-mentioned reasons, considers that the Disputed domain name was registered and is being used in bad faith.

Accordingly, the Panel finds that the Disputed domain name was registered and is being used in bad faith within the meaning of paragraph 4(b)(iv) of the Policy.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

1. **MILLETCLOTHING.COM**: Transferred

PANELLISTS

Name	**Michele Antonini**

DATE OF PANEL DECISION 2018-06-20

Publish the Decision