Decision for dispute CAC-UDRP-102244

Case number	CAC-UDRP-102244
Time of filing	2018-12-17 08:55:37
Domain names	shopmilletmountainoutlet.com

Case administrator

Organization	Iveta Špiclová (Czech Arbitration Court) (Case admin)

Complainant

Organization	MILLET MOUNTAIN GROUP

Complainant representative

Organization	Cabinet Germain & Maureau

Respondent

Name	Xu Gueijuan

OTHER LEGAL PROCEEDINGS

The Complainant has declared that there are no other legal proceedings, pending or decided, which relate to the disputed domain name. The Panel is not aware of any such proceedings.

IDENTIFICATION OF RIGHTS

The Complainant has identified a number of relevant rights, including the trade mark MILLET, of which it is the proprietor in France (96638411, first registered 1996, in classes 18 (luggage/bags) and 25 (clothing/footware) and in the European Union (000341743, also first registered 1996, in the same classes). The Panel has identified (for the reasons set out below) further marks held by the Complainant, including an image (96614353, first registered 1996, France) which is used by the Complaint as a logo on its website.

FACTUAL BACKGROUND

The Complainant, Millet Mountain Group SAS, is a company, ultimately founded in 1921, with its seat in France. It retails clothing and mountain equipment through a number of brands (including 'Millet') and operates in France and in other jurisdictions. It operates a number of websites, e.g. <MILLET.FR> (first registered 1997).

The Respondent is an individual with an address in Guangdong, China. The Respondent registered the disputed domain name on 13 January 2018.

The Complainant has provided evidence of (unsuccessful) attempts to contact the Respondent, by letter, in advance of the commencement of the present proceedings.

PARTIES CONTENTIONS

No administratively compliant response has been filed. The CAC could not determine whether the written notice of the Complaint was delivered to the Respondent. An e-mail sent to the WHOIS contact was successfully delivered.

The Complainant submits that the disputed domain name is confusingly similar to its trade marks. It contends that the Respondent has no rights or legitimate interests in respect of said domain name, and that (citing various grounds) it was registered and is used in bad faith. It seeks the transfer of the disputed domain name to itself.

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).

Disregarding the TLD .COM in accordance with established UDRP practice, the Panel notes that the disputed domain name contains the string 'MILLET' (which is identical to the Complainant's mark), preceeded by 'SHOP' and followed by 'MOUNTAINOUTLET'. The string 'MILLETMOUNTAIN' clearly resembles the company name 'MILLET MOUNTAIN GROUP'. Moreover, the remaining text 'SHOP' and 'OUTLET' can easily be characterised as 'descriptive' terms which do not displace the confusing similarity. Indeed, because they are descriptive of the activities of the Complainant, they arguably contribute to the possible confusion. (See, for instance, WIPO Jurisprudential Overview, para 1.8; see further NAF Case FA0701000890812, Kohler Co. v. Thomas Curley, regarding the mark KOHLER and the domain name <KOHLERBATHS.COM>, cited by the Complaint; see also various recent decisions by Panels operation with the present Provider, e.g. Case 102074 Lovehoney Group v lu qiu ping; Case 102121 RATP v petek sarigul).

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).

The Complainant declares that the Respondent is not affiliated with nor authorized by it, and in particular has not been granted any licence nor authorization to use the Complainant’s trade marks.

The Respondent has not participated in the proceedings, and so made no cases as to rights or legitimate interests.

There is the remote possibility of such under a 'reseller' argument (within the terms of the Policy, such as in circumstances where the name is used 'in connection with the bona fide offering of goods or services'), which is also considered under the 'bad faith' analysis regarding paragraph 4(a)(iii), below. The Panel notes (although the Complainant does not) the many cases decided under the Policy regarding resellers, commonly referred to as the application of the 'Oki Data' test (i.e. following WIPO AMC Case D2001-0903, Oki Data Americas v. ASD).

The Oki Data principles are summarised as follows:

(a) The use involves the actual offering of goods and services in issue;
(b) The site sells only the trademarked goods;
(c) The site accurately and prominently discloses the registrant's relationship with the trademark holder.
(d) The Respondent must not try to "corner the market" in domain names that reflect the trademark.

The principles are widely accepted in UDRP caselaw (noted in T Bettinger and A Waddell, Domain name law and practice (2nd edn, Oxford University Press, 2015) at IIIE.305 as 'nearing full consensus'), and have been found applicable to 'unauthorised' resellers - e.g. WIPO AMC Case D2017-0540 Supercell Oy v. Jason M Jordan (which is assumed in the present cases in light of the Complainant's declarations and the lack of a response from the Respondent).

The Panel finds that, in the present case, the Respondent does not satisfy criterion (c), owing to the lack of any explanation of the Respondent's status (or indeed contact details or business activities), and the prominent use of the Complainant's logo on the Respondent's website (and the footer 'Millet Mountain Outlet © 2019' on each page). In particular, the positioning of the logo is such that it is the only visual identity of the site and appears prominently at the top left of the page (rather than, for instance, being confined to use for the identification or depiction of products).

In reaching this decision on the facts of this case, the Panel takes careful note of recent decisions by differently constituted Panels at this Provider, most notably Case 102168 Interparfums v Congj Buxar, concerning the domain name <ROCHASSHOP.COM>. In particular, this Panel endorses the findings of the Panel in said case regarding the importance of applying Oki Data in a way that is consistent with the objectives of the Policy, including providing for descriptive uses and striking a balance between the interests of various parties, including resellers.

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).

This case is, as the Complainant contends, one falling within paragraph 4(b(iv) of the Policy, 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'. This is one of the examples of bad faith set out in the Policy. It is also very clear that the Respondent would have been aware of the Complaint and would or should have been aware of its marks, given the deliberate incorporation of the distinctive name of the Complainant into the disputed domain name and the use of its logo and attempts to sell its products via the Respondent's website.

The Panel is conscious of the possibility of third parties acting as resellers of goods and registering domain names that contain disputed text (and so meet the criteria under paragraph 4(a)(i)), where bad faith is not shown. Such cases are characterised by clarity and transparency regarding the nature of the Respondent and the goods marketed and/or offered for sale. In the present case, however, the Panel finds (from its own consultation of the Respondent's website), as also noted above, that the site in question does not contain any disclaimer or explanation of the Respondent's third party status. Moreover, the Respondent's website uses the logo used by the Complainant on its own website. This logo is also one of the marks held by the Complainant. This is a very strong indication of bad faith - that it appears to have been used in this fashion, without explanation or justification, and also without consent, is an important factor.

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.

The language of the registration agreement is English, and the Complaint is in English. However, a lengthy Annex (providing evidence of the trade marks held by the Complainant) is in French. The Panel has been able to verify relevant information through trade mark databases. However, it is more appropriate for parties to ensure that the entire Complaint, including annexes, is in a single language.

Where an Annex runs to many pages (33 in this case), care should be taken to ensure that all of the material is relevant and is properly referred to in the Complaint itself. Morever, the said Annex was dated 05//04/2018. This is a number of months before the Complaint was filed. Again the availability of verifying information in accessible sources has meant that the Complaint can be considered on this occasion, but parties should note that all Annexes should contain information that is current and accurate as of the time of the Complaint.

PRINCIPAL REASONS FOR THE DECISION

The reasons for the decision are set out above. The Respondent has registered a domain name which incorporates the

Complainant's mark and a number of additional terms descriptive of the Complainant's activities, which means that the disputed domain name is confusingly similar to the mark in which the Complainant has rights. However, the Respondent is not found to have any rights or legitimate interests in the name, and, through the activities carried out via its website, without disclaimer or explanation, to have registered and be using the disputed domain name in bad faith.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **SHOPMILLETMOUNTAINOUTLET.COM**: Transferred

PANELLISTS

Name	**Prof Daithi Mac Sithigh**

DATE OF PANEL DECISION 2019-01-22

Publish the Decision