Decision for dispute CAC-UDRP-102443

Case number	CAC-UDRP-102443
Time of filing	2019-05-06 13:45:21
Domain names	bitmex.digital

Case administrator

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

Complainant

Organization	HDR Global Trading Limited

Complainant representative

Organization	RiskIQ, Inc. c/o Jonathan Matkowsky

Respondent

Name	Maria Valentova

OTHER LEGAL PROCEEDINGS

The Panel is not aware of any other legal proceedings pending or decided which relate to the disputed domain name.

IDENTIFICATION OF RIGHTS

The Complainant's trademark "BITMEX" (or in the form "BitMEX") is registered in several jurisdictions around the world in Class 36 of the Nice Classification Scheme. Class 36 protects trademarks associated with financial services.

The registrations include UK trademark 00003218498 registered on 2 June 2017, EU trademark 016462327 registered on 11 August 2017, and Hong Kong text trademark 304417902 registered on 9 April 2019. Evidence was also adduced of further registrations in Australia, Japan, Singapore, Taiwan and New Zealand, as well as of a trademark filing in India.

In addition, the Complainant is the registrant for the <bitmex.com> domain name on which it operates its online platform.

FACTUAL BACKGROUND

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

The Complainant is HDR Global Trading Limited, a Seychelles company, which established and operates BitMEX, a Bitcoin derivatives trading platform that the Complainant has shown to have been active since 2015. BitMEX was incorporated in 2014 and has since then attracted coverage in media interested in the financial and digital technology fields globally, especially the FinTech sector.

The person named as the Respondent is a private citizen in Russia. Attempts to contact the Respondent by the Complainant in a cease and desist letter prior to the present proceeding, and by the CAC after it was initiated, elicited no response, merely an indication of relay from the WHOIS privacy protected e-mail address to a Gmail address that itself did not disclose identifying personal information.

The disputed domain name was registered under the aforementioned Russian citizen's name on 27 August 2018. It has since then been used in conjunction with a website whose address resolves by automatic redirection to www.binance.com's registration page. Binance.com is a major cryptocurrency trading exchange and is a competitor of the Complainant.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS:

COMPLAINANT:

The Complainant cited earlier ADR case law as to the standard of proof that is applicable being the balance of probabilities and urged upon the Panel that it is entitled to accept all reasonable allegations and inferences set forth in the Complaint as true unless the evidence is clearly contradictory.

(i) The disputed domain name registered by the Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights.

The Complainant referred to its existing trademark registrations and mentioned that there are further pending ones. These served, it argued, to surmount the UDRP threshold of a Complainant having relevant rights, consistent also with previous decisions made in the Complainant's favour before earlier UDRP Panels. As its registered mark was fully incorporated within the disputed domain name, save the addition of the generic Top-Level Domain ".digital", the Complainant claimed, referring again to earlier UDRP case law, that substantial identicality had been shown.

(ii) The Respondent has no rights to or legitimate interests in respect of the disputed domain name.

The Complainant here relied on earlier UDRP case-law to claim that its making out of a prima facie case that the Respondent lacks rights or legitimate interests suffices and that this is afforded by the facts that the Respondent is not commonly known by the (stem of the) disputed domain name and that the Complainant has not authorized, licensed, or otherwise permitted the Respondent to use the Complainant's trademark in the disputed domain name. Again relying on the line of UDRP jurisprudence it cites, the Complainant asserts that the burden is thus now upon the Respondent to come forward with evidence of its own showing its right(s) or legitimate interest, which it has failed to do. Rather, the Respondent is using the disputed domain name permanently and illegitimately to re-direct traffic to the Binance.com sign-up page.

(iii) The Respondent has registered and is using the disputed domain name in bad faith.

The Complainant contends that it is very likely that the Respondent registered the disputed domain name with the

Complainant's distinctive mark in mind because it then misdirected traffic from the disputed domain name, whose stem is identical to the trademark, to a highly related commercial site in the same competitive sector as BITMEX. This serves to be disruptive to the Complainant, and, the Complainant continues, is being done for some commercial gain, on which it offered speculation. The Complainant asserted that the Respondent's intention is to attract internet users by creating a likelihood of confusion with BITMEX as to the source, sponsorship, affiliation or endorsement of the services at <www.binance.com>. Previous UDRP case law has already found redirection to competitors as being capable of being indicative of bad faith. Furthermore, the Complainant assigned importance to lack of a response by the Respondent to the Complainant's cease and desist letter, again referring to earlier UDRP decisions in this regard.

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 the UDRP were met and that there is no other reason why it would be inappropriate to provide a decision.

PRINCIPAL REASONS FOR THE DECISION

Findings

1. Identity of the Respondent

The Panel finds that in this case the identifying details which are given in the disputed domain name's WHOIS registrant information, and as revealed by the name's registrar following the CAC Case Administrator's Request for Registrar Verification, are inconclusive.

The WHOIS details are redacted in their entirety to achieve "privacy" protection. The registrar's verification information does name a natural person and gives her contact details. But that is all: their veracity has not been established by the registrar, the CAC or the Complainant. Nor do the additional possibilities exist in a UDRP proceeding for determining identity equivalent to those that are generally available before a court.

The Panel thus conducted a rudimentary check itself of the Registrar Verification details pursuant to its general powers under the Rules. This check revealed that the street address given is associated with what appear to be government offices, while the same e-mail address seems to be attributed elsewhere to another person and the mobile number may also be that of another person.

This pattern of inconclusive or false information as regards a registrant's identity is not unknown from other UDRP cases, particularly where suspect conduct is involved. In the present case, that conduct subsists in the disputed domain name's website redirecting to the registration page of a competitor platform to the Complainant's, i.e. Binance.com.

The Panel notes that the lack of adequately reliable registrant information may wrongly have an adverse effect upon a person who is falsely named as Respondent. This is because the conduct that is allegedly attributable to that person will be published in the UDRP decision concerned and, if bad faith in particular is found, this carries with it a degree of moral turpitude.

The Panel accordingly directs its decision as concerns the Respondent to whichever person(s) actually effected the registration of the disputed domain name and use(s) it. The Panel makes no finding specifically as to the person named in the Amended Complaint as the Respondent.

2. Modalities of proof

The Complainant advises the Panel that it is "entitled to accept all reasonable allegations and inferences set forth in the Complaint as true unless the evidence is clearly contradictory", citing an earlier Panel's finding in this connection, namely Vertical Solutions Mgmt., Inc. v. webnet-marketing, inc., National Arbitration Forum decision FA 95095 of 31 July 2000.

The Panel in that case was referring to circumstances in which "telephone communications between the Respondent and Complainant [were alleged, during which] the Respondent agreed to transfer the domain name to the Complainant based on the Complainant's registered service mark" and in which the "Respondent suggested that this ICANN dispute resolution process be initiated to [sic – missing word, presumably "avoid"] any possibility that any other organization could make a claim against the Respondent based on its decision to transfer the domain name to the Complainant".

That case was thus confined to a highly specific and exceptional situation, in which, indeed, the Complainant was in some measure acting on the basis of an understanding with the Respondent.

That situation hence provides slender foundation for the rather more widely-framed advice proffered by the Complainant. By contrast, paragraphs 7 and 10 of the UDRP Rules set down the requirement that the Panel is to observe impartiality and independence and they go on to stipulate that the Panel is to conduct the proceeding in such manner as it considers appropriate in accordance with the Policy and the Rules, notably as to determining the admissibility, relevance, materiality and weight of the evidence.

The Panel thus prefers to regard all relevant circumstances that allow it to come to a fair and justified decision, principally those appearing from the contents of the Case File.

The Complainant further contends that the standard of proof in UDRP proceedings is that of the balance of probabilities and that this calls for the Complainant, as regards the second cumulative UDRP criterion (see below), to establish a prima facie case, whereafter the burden of proof shifts to the Respondent. The difficulty of proving a negative is referred to in the line of cases which the Complainant cites to support this approach.

The Panel again refers to paragraphs 7 and 10 of the UDRP Rules as providing its guidance and affirms that, while findings in

previous ADR proceedings may certainly be valuable in considering modalities of proof, it is the circumstances and evidence with which the Panel is presented in the instant case that are finally determinant. It remarks, further, that the UDRP serves as a basis for resolving disputes within a global community encompassing different legal traditions with varying approaches both as to the role of the parties and of the tribunal and as to describing the evidential task.

This said, a common juridical denominator in deciding a case is that the evidence before a tribunal must be capable of eliciting a sufficient level of belief in one state of affairs as opposed to an alternative one.

At the minimum this requires a level of justification, which can when appropriate include the product of reasoned deduction – as opposed to a necessity to adduce proof positive – and this can apply just as much to establishing a negative state of affairs as to establishing a positive one. Thus, while the “prima facie” theory to which the Complainant refers might hold sway in some circumstances, its mechanistic application by a Panel in other circumstances – particularly where a Respondent is passive in a proceeding – accords an inference in favour of one party, the Complainant, which may risk impinging upon the UDRP principle of observing impartiality between the parties. To the extent that resort to prima facie reasoning is required, reliance upon it needs therefore to be sufficiently justified in the circumstances of the case and not to be resorted to as the rule.

The Panel accordingly distances itself in the present case from the Complainant's argumentation in this regard, given the state of the circumstances and evidence in the present case, as discussed below.

3. Application of the UDRP's three cumulative criteria

3.1. The 1st UDRP criterion of confusing similarity or identicality with a name in which the Complainant has rights

This criterion has easily been satisfied by the Complainant, since the only variation from the Complainant's registered trademarks as adduced (and the domain name bitmex.com) lies in the gTLD suffix ".digital" which, being generic and serving solely to designate this gTLD's addressing space within the Domain Name System, should be disregarded.

3.2. The 2nd UDRP criterion of the Respondent's lack of rights or legitimate interest in the disputed domain name

The "bitmex" stem of the disputed domain name clearly bears on its face no relation whatsoever to registrant information from the disputed domain name's WHOIS data, since none is revealed there, and no apparent relation either to the name of the natural person elicited by the Registrar Verification Request.

The Complainant moreover denies having had any relationship with the Respondent or having granted any form of permission to the Respondent to use its trademark.

The Panel in addition accords significance to the registration of the Complainant's trademark in conjunction with the ".digital" gTLD name. This is a relatively new gTLD which became operational at around the same time as the Complainant's BITMEX platform. The gTLD is oriented towards the fast-moving digital market sector in which that platform is active while the publicity BITMEX has attracted in that sector makes it practically certain that the registrant's choice of the Complainant’s distinctive protected name for .digital registration was based on knowledge of its growing notoriety and not on some other ground.

Finally, the deliberate redirection of traffic arriving at the disputed domain name's website to the competitor Binance.com registration page suggests anything but the exercise of a legitimate interest.

Applying the reasoning exposed in paragraph 2 above, the Panel thus holds that the Respondent's lack of rights and legitimate interest has been sufficiently established in these circumstances.

3.3. The 3rd UDRP criterion of bad faith registration of the disputed domain name and its use on the Respondent's part

It should be noted first of all that the UDRP provides no exhaustive list of what constitutes bad faith registration and use, providing only some indicative examples in paragraph 4(b) of the Policy and leaving the presence of bad faith to be established or not in each case.

In the present instance, the Complainant sought in its contentions to explain how the Respondent's conduct falls within the UDRP's examples. It also referred to its cease and desist letter to the registrant's WHOIS e-mail address and to previous Panel decisions as to the probative value of such letters.

One remains, however, still somewhat in the realm of speculation if one seeks to fit the facts of this case into the examples given in paragraph 4(b) of the Policy, which themselves are couched in qualified terms.

This said, it is undoubted that the redirection of BITMEX traffic to a competitor platform could be disruptive. Redirection statistics could furthermore afford some illegitimate benefit to the registrant that could conceivably be of commercial value, as might other visitor data.

The cease and desist letter in this case cannot be shown to have been delivered and the lack of response to it is in itself inconclusive, as there is no obligation under the Rules to respond to it.

Such lack of response, including during this proceeding, does nevertheless add to the overall impression that the person(s) behind the disputed domain name's registration and use aims not to disclose its identity, the suspect motivation for such concealment being indicated when one considers the facts presented of how the person(s) behind the registration and use of the disputed domain name has:

• impersonated the Complainant's brand;

• disregarded the rights it has in its trademark;

• rechannelled visitor traffic intended for the Complainant's platform away from it to a competitor's through reconfiguration of the server hosting the disputed domain name to redirect visitors very precisely to the https://www.binance.com/register.html URL; and

• chosen the gTLD .digital for this purpose, which its registry, Donuts, classifies under "Marketing and Communication" in, of course, the broad digital sector in which the Complainant's platform operates.

Even disregarding the further possibility that the person named as the name's registrant might be being used as a decoy, the combination of these circumstances do not admit of any obvious grounds for justification but instead provide ample foundation for the Panel to arrive at a conclusion of bad faith registration and use of the disputed domain name.

The Panel accordingly finds for the Complainant and orders the transfer of the disputed domain name to it.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **BITMEX.DIGITAL**: Transferred

PANELLISTS

Name	**Kevin J. Madders**

DATE OF PANEL DECISION 2019-06-14

Publish the Decision