Decision for dispute CAC-UDRP-103047

Case number	CAC-UDRP-103047
Time of filing	2020-05-05 09:55:49
Domain names	arcalion.net

Case administrator

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

Complainant

Organization	BIOFARMA

Complainant representative

Organization	IP TWINS

Respondent

Organization	Cong ty TNHH Duoc Kim Do

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 is the holder of trademark rights related to the sign ARCALION, including the following word marks:

- ARCALION, European Union trademark registration n°010735223, dated March 16, 2012 and covering products in class 5;
- ARCALION, International trademark registration n° 357921, dated June 5, 1969 and covering products in class 5, designating several countries including Vietnam where the Respondent is located.

FACTUAL BACKGROUND

The Complainant, Biofarma, is part of the Servier Group, a leading French independent pharmaceutical company. The group is active in 149 countries and employs more than 22,000 people throughout the world.

The Complainant commercializes Sulbutiamine, a synthetic derivative of vitamin B1, under the trademark ARCALION. The mark is registered in numerous countries including in Vietnam where the Respondent is located.

The disputed domain name has been registered on February 28, 2020, and refers to a black web page displaying no content but a logo representing two blue arrows.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS:

COMPLAINANT:
The Complainant considers the disputed domain name to be confusingly similar to trademarks in which it has rights. The Complainant claims that the Respondent has no rights or legitimate interests in respect of the disputed domain name. According to the Complainant, the Respondent does not use the disputed domain name in connection with any legitimate use. Also, according to the Complainant, the Respondent has not been authorized to register or use the disputed domain name. Finally, the Complainant considers that the disputed domain name was registered and is being used in bad faith. The Complainant contends that the Respondent knew, or at least should have known, of the existence of the Complainant's trademarks. The Complainant further contends that the incorporation of the Complainant's well-known trademark in the disputed domain name by the Respondent coupled with an inactive website evidences bad faith registration and use.

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

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.

The Panel notes that the Complaint was filed in English and that the language of the Registration Agreement is Vietnamese. On June 3, 2020, the Case Administrator informed the Panel that the Complainant asked for a change of the language to English.

WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("WIPO Overview 3.0"), section 4.5.1, states: "panels have found that certain scenarios may warrant proceeding in a language other than that of the registration agreement. Such scenarios include (i) evidence showing that the respondent can understand the language of the complaint, (ii) the language/script of the domain name particularly where the same as that of the complainant's mark, (iii) any content on the webpage under the disputed domain name, (iv) prior cases involving the respondent in a particular language, (v) prior correspondence between the parties, (vi) potential unfairness or unwarranted delay in ordering the complainant to translate the complaint, (vii) evidence of other respondent-controlled domain names registered, used, or corresponding to a particular language, (viii) in cases involving multiple domain names, the use of a particular language agreement for some (but not all) of the disputed domain names, (ix) currencies accepted on the webpage under the disputed domain name, or (x) other indicia tending to show that it would not be unfair to proceed in a language other than that of the registration agreement."

Here, the language/script of the disputed domain name is the same as that of the Complainant's marks. Further, according to the Case Administrator, the initial notification of the commencement of the present proceeding was sent in both languages. The Respondent has not objected to English as the language of this proceeding. Finally, given the circumstances

in the present case as explained below, the Panel finds that it would be unfair to order the Complainant to translate the Complaint. Accordingly, the Panel accepts the Complaint in English.

PRINCIPAL REASONS FOR THE DECISION

Paragraph 15 of the Rules provides that the Panel is to decide the Complaint on the basis of the statements and documents submitted in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable.

The onus is on the Complainant to make out its case and it is apparent, both from the terms of the Policy and the decisions of past UDRP panels, that the Complainant must show that all three elements set out in Paragraph 4 (a) of the Policy have been established before any order can be made to transfer a domain name. As the proceedings are administrative, the standard of proof is the balance of probabilities.

Thus, for the Complainant to succeed it must prove, within the meaning of Paragraph 4(a) of the Policy and on the balance of probabilities that:

1. The domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;

2. The Respondent has no rights or legitimate interests in respect of the domain name; and

3. The domain name has been registered and is being used in bad faith.

The Panel has therefore dealt with each of these requirements in turn.

1. Identity or confusing similarity

The Complainant must first establish that there is a trademark or service mark in which it has rights. Since the Complainant is the holder of the registered ARCALION trademark, which is used in connection with its business, it is established that there are trademarks in which the Complainant has rights.

The disputed domain name <arcalion.net> incorporates the Complainant's ARCALION trademark in its entirety.

It is well established that the Top Level Domains ("TLDs") such as ".net" may be disregarded when considering whether the disputed domain name is identical or confusingly similar to the trademark in which the Complainant has rights (see section 1.11 WIPO Overview 3.0).

Therefore, the Panel finds that the disputed domain name is identical to the Complainant's trademarks. Accordingly, the Complainant has made out the first of the three elements that it must establish.

2. No rights or legitimate interests

Under paragraph 4(a)(ii) of the Policy, the Complainant has the burden of establishing that the Respondent has no rights or legitimate interests in respect of the disputed domain name.

It is established case law that it is sufficient for the Complainant to make a prima facie showing that the Respondent has no right or legitimate interest in the disputed domain name in order to shift the burden of proof to the Respondent (see section 2.1 WIPO Overview 3.0 and Champion Innovations, Ltd. V. Udo Dussling (45FHH), WIPO case No. D2005-1094; Croatia Airlines d.d. v. Modern Empire Internet Ltd., WIPO case No. D2003-0455; Belupo d.d. v. WACHEM d.o.o., WIPO case No. 2004-0110).

The Panel notes that the Respondent has not been commonly known by the disputed domain name and that the Respondent has not acquired trademark or service mark rights. The Respondent's use and registration of the disputed domain name was not authorized by the Complainant. There are no indications that a connection between the Complainant and the

Respondent existed.

Moreover, the Panel is of the opinion that the Respondent is not making a legitimate noncommercial or fair use of the disputed domain name. The disputed domain name refers to a web page without any content but a blue logo. The Complainant also provides evidence of another website mentioning the Respondent's name and offering pharmaceutical products for sale including the Complainant's ARCALION drug. The passive holding or non-use of a domain name is, in appropriate circumstances, evidence of a lack of rights or legitimate interests in the domain name (see Red Bull GmbH v. Credit du Léman SA, Jean-Denis Deletraz, WIPO Case No. D2011-2209; American Home Products Corporation vs. Ben Malgioglio, WIPO Case No. D2000-1602; Vestel Elektronik Sanayi ve Ticaret AS v. Mehmet Kahveci, WIPO Case No. D2000-1244).

A respondent's use of a domain name will not be considered "fair" if it falsely suggests affiliation with the trademark owner. The correlation between a domain name and the complainant's mark is often central to this inquiry. Generally speaking, UDRP panels have found that domain names identical to a complainant's trademark carry a high risk of implied affiliation (see section 2.5 WIPO Overview 3.0). As the disputed domain name is identical to the Complainant's trademark, the Panel finds that this applies in the present case.

Based on the available record, the Panel finds that the Complainant has established a prima facie case, which was not refuted, that the Respondent lacks rights or legitimate interests in the disputed domain name. Therefore, the Complainant has satisfied the second requirement that the Respondent has no rights or legitimate interests in the disputed domain name, under paragraph 4(a)(ii) of the Policy.

3. Bad faith

Complainant must prove on the balance of probabilities that the disputed domain name was registered in bad faith and that it is being used in bad faith (see section 4.2 WIPO Overview 3.0 and e.g. Telstra Corporation Limited v. Nuclear Marshmallows, WIPO Case No. D2000-0003; Control Techniques Limited v. Lektronix Ltd, WIPO Case No. D2006-1052).

According to the Panel, the awareness of a respondent of the complainant and/or the complainant's trademark rights at the time of registration can evidence bad faith (see Red Bull GmbH v. Credit du Léman SA, Jean-Denis Deletraz, WIPO Case No. D2011-2209; Nintendo of America Inc v. Marco Beijen, Beijen Consulting, Pokemon Fan Clubs Org., and Pokemon Fans Unite, WIPO Case No. D2001-1070). In the instant case, evidence suggests that the Respondent is active as a pharmacy and is selling the Complainant's ARCALION drug on another website. In any event, the Panel finds that the Respondent must have had knowledge of the Complainant's rights in the ARCALION trademarks at the moment it registered the disputed domain name. The Complainant's ARCALION trademarks are distinctive and widely used, including in Vietnam where the Respondent is located, and the disputed domain name is identical to the mark.

The Respondent is not actively using the disputed domain name. The fact that a complainant's trademark is distinctive and widely used and the absence of evidence whatsoever of any actual or contemplated good faith use are further circumstances that may evidence bad faith registration and use in the event of passive use of domain names (see section 3.3 WIPO Overview 3.0; Inter-IKEA v Polanski, WIPO Case No. D2000 1614; Inter-IKEA Systems B.V. v. Hoon Huh, WIPO Case No. D2000 0438; Telstra Corporation Limited v. Nuclear Marshmallows, WIPO Case No. D2000-0003).

In the present case, the Panel is of the opinion that the Complainant's ARCALION trademarks are distinctive and widely used, which makes it difficult to conceive any plausible legitimate future use of the disputed domain name by the Respondent.

The Panel also notes that Respondent did not participate in the present proceedings. Therefore, the Panel considers that the inference of bad faith is strengthened, in light of the cumulative circumstances indicating bad faith (See Telstra Corporation Limited v. Nuclear Marshmallows, supra).

Therefore, the Panel finds that, on the balance of probabilities, it is sufficiently shown that the disputed domain name was registered and is being used in bad faith.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **ARCALION.NET**: Transferred

PANELLISTS

Name	**Flip Petillion**

DATE OF PANEL DECISION 2020-06-08

Publish the Decision