Decision for dispute CAC-UDRP-103672

Case number	CAC-UDRP-103672
Time of filing	2021-04-15 10:05:04
Domain names	mineraglencoreperu.com

Case administrator

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

Complainant

Organization	Glencore International AG

Complainant representative

Organization	BRANDIT GmbH

Respondent

Organization	Megaserver Hardsoft SAC

OTHER LEGAL PROCEEDINGS

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

IDENTIFICATION OF RIGHTS

The Complainant owns numerous trademarks GLENCORE registered in numerous jurisdictions (thereafter “the GLENCORE trademark”), which were registered many years before the registration of the disputed domain name on June 12, 2020, such as but not limited to:

- The Swiss trademark GLENCORE No. P-450144, registered on March 19, 1998, in classes 1, 4, 6, 22, 29, 30, 31, 35, 36, 39, 40 and 42;

- The Peru trademark GLENCORE No. 134961-2001, registered on December 18, 2001, in class 6;

- The Peru trademark GLENCORE No. 134967-2001, registered on December 12, 2001, in class 36;

- The Peru trademark GLENCORE No. 544004-2013, registered on April 14, 2014 in classes 14;

- The European Union trademark GLENCORE No. 012054128, registered on January 5, 2014, in classes 1, 4, 6, 14, 22, 29, 30,

31, 35, 36, 37, 39, 40 and 42;

- The International trademark GLENCORE No. 691954, registered on March 19, 1998, in classes 1, 4, 6, 22, 29, 30, 31, 35, 36, 39, 40, and 42; and

- The International trademark GLENCORE No. 1192353, registered on November 6, 2013, in classes 14 and 37.

FACTUAL BACKGROUND

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

The Complainant and its subsidiaries have operations in 35 countries, including in Peru, with around 150 mining and metallurgical sites, oil production assets and agricultural facilities. The Complainant is a major supplier of energy and mobility transition materials. It is a large producer of the enabling commodities (copper, cobalt, nickel) that underpin the battery chemistry and infrastructure likely to power electric vehicles and energy storage systems. The Complainant is the owner of the registered trademark GLENCORE in numerous jurisdictions all over the world.

The disputed domain name was registered by the Respondent in June 12, 2020. The Respondent is based in Peru. The disputed domain name is currently passively held. It resolves to Webmail login page. It is not associated to an active website. The Complainant sent a cease and desist letter to the Respondent informing of the Complainant's rights with respect of the trademark. in question. The Respondent chose not to reply to the cease and desist letters sent by the Complainant. Moreover, the disputed domain name is associated with an active MX record.

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).

The disputed domain name <mineraglencoreperu.com>, in its second-level portion, incorporates in its entirety the Complainant's registered and widely known trademark GLENCORE with the addition of the terms "minera" and "peru". The presence of the generic Top-Level Domain ("gTLD") extension ".com" in the first level portion of the disputed domain name is a standard registration requirement and may be disregarded when assessing whether the disputed domain name is confusingly similar to the trademark in which the Complainant has rights (see Rollerblade, Inc. c. Chris McCrady, WIPO Case No. D2000-0429; Can Pro Pet Products LTD. v. Matthew Dweck, WIPO Case No. D2020-0615).

The disputed domain name is therefore confusingly similar to the Complainant's trademark GLENCORE.

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 has not licensed or authorized the Respondent to register or use the disputed domain name, nor is the Respondent affiliated to the Complainant in any form.

There is no evidence that the Respondent is known by the disputed domain name or owns any corresponding registered trademarks.

The Registrant names "Gustavo Grados" and "Megaserver Hardsoft SAC" do not correspond to the disputed domain name <mineraglencoreperu.com> or the terms "mineraglencoreperu" or "minera glencore peru".

When conducting searches on online trademark databases, no information is found in relation with trademarks corresponding to the terms “mineraglencoreperu.com”, “mineraglencoreperu” or “minera glencore peru”. Moreover, Gustavo Grados or Megaserver Hardsoft SAC appear not to own any trademark.

When conducting search online on popular search engines associating the Registrant organization name “Megaserver Hardsoft SAC” or the Registrant names “Gustavo Grados” with the terms “mineraglencoreperu.com”, “mineraglencoreperu” or “minera glencore peru” no relevant results are found. When associating in the “Google.com” search engine the names “Gustavo Grados”, “Megaserver Hardsoft SAC” with the terms “mineraglencoreperu.com”, “mineraglencoreperu” or “minera glencore peru” no results appear. When conducting the same search in the search engine “Bing.com”, most of the results are irrelevant, except one related to the LinkedIn account of a person named “Gustavo Grados” working at “Megaserver Hardsoft SAC”.

Moreover, when searching on popular Internet search engines for the terms “glencore”, alone or in combination with the terms “minera” and “peru”, the vast majority of the results directly relate to the Complainant, its website, its social medias accounts or related topics.

The Respondent is also using a privacy shield service, masking its identity on the publicly available Registrar’s WhoIs. It appears that the Respondent is aiming at hiding its true identity rather than being known by the disputed domain name.

Moreover, the structure of the disputed domain name reveals that that Respondent’s initial intention in registering the disputed domain name was to refer to the Complainant, its trademark and business. The disputed domain name indeed incorporates the Complainant’s trademark GLENCORE with the addition of the term “minera” – which in several languages refers to minerals or the activity of mining (see for example in Danish, Estonian, Spanish and Romanian languages) – and the country name “peru” where the Complainant operates business activities. This association is a direct reference to the Complainant, its GLENCORE trademark and the mining field in which it operates.

In this regard, previous UDRP panels have constantly held that where a domain name consists of a trademark plus an additional term (at the second- or top-level), such composition cannot constitute fair use if it effectively impersonates or suggests sponsorship or endorsement by the trademark owner (see WIPO Jurisprudential Overview 3.0, section 2.5.1). It has been for instance been held that a domain name incorporating “not only the registered trademark AXA but also the expression ‘assurance’ that corresponds in French language to one of the most recognized commercial activities of the Complainant […] [s]uch composition cannot constitute fair use as it effectively impersonates or suggests sponsorship or endorsement by the Complainant (see AXA SA v. Contact Privacy Inc. Customer 1243937279 / Franck Duprey, AXAASSURANCE, WIPO Case No. D2020-0269). The structure of the disputed domain name described above – which incorporates the Complainant’s trademark GLENCORE, the term “minera” and the country name “peru” – clearly suggest that the disputed domain name is directly related to and authorized by the Complainant. Such composition of terms within the structure of the dispute domain name cannot constitute fair use.

Furthermore, from publicly available WhoIs record online, the Respondent appears to be located in Peru. The Complainant’s subsidiaries – Compania Minera Antapaccay S.A., Volcan Compania Minera S.A.A., Empresa Minera Los Quenuales S.A. – and associate company – Compania Minera Antamina S.A. – are based in Peru. Due to this geographical proximity, the presence of the Complainant online and the active use of its trademark in Peru, it is very likely that the Respondent knew the Complainant when it registered the disputed domain name.

Moreover, the disputed domain name is passively held. It resolves to a cPanel Webmail Login page. cPanel is a software tool allowing users to set up domain name technical details on corresponding web servers. The disputed domain name appears to resolve to the Webmail login page from which the Registrant can access the hosting provider’s webmail associated with the domain name <mineraglencoreperu.com>. Once logged in this cPanel interface, the Registrant would therefore be able to set up email addresses associated to the disputed domain name. In similar circumstances, when the Webmail login page “bears no real content but merely a login section and statement about the hosting web”, it has been held that such use equals “passive holding” (see Pfizer Inc. v. Freda Atagamen, Michael Chucks, WIPO Case No. D2014-2207).

In view of the structure of the disputed domain name – referring to the Complainant, its trademark and its activity – and the absence of continuous and active use of the disputed domain name, there is no evidence showing that the Respondent has used, or preparing to use, the disputed domain name in connection with a bona fide offering of goods or services, nor that the Respondent is making a legitimate noncommercial or fair use of the disputed domain name.

For the foregoing reasons, the Respondent has no rights or legitimate interests in respect of the disputed domain name, within the meaning of the Paragraphs 4(iii) and (4)(c) 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).

a) Registration of the disputed domain name in bad faith

The Respondent registered the disputed domain name many years after the registrations of the Complainant's GLENCORE trademarks. The GLENCORE trademark is a widely known trademark (see Glencore International AG v. Domain Administrator, See PrivacyGuardian.org / Alanna Wisozk, Fisher LLC, WhoisGuard Protected, WhoisGuard, Inc. / Edswe Henry, Hassan Benda, dgt, Mark David, Donald Ugbebor, Dsenator.club and Leo Smart, Dsenator.club, WIPO Case No. D2020-2908), registered many countries and the Complainant enjoys a strong online presence. The Complainant is also very active on social media (Twitter, Facebook, Instagram) to promote its mark, products and services. The Complainant is followed by 173,757 on Facebook and 158,800 people on Twitter (See, Laboratoires M&L v. Zhaoxingming, CAC Case No. 102277). By conducting a simple online search regarding the term "Glencore" on popular search engines, the Respondent would have inevitably learnt about the Complainant, its trademark and business (see Intesa Sanpaolo S.p.A. v. Abayomi Ajileye, CAC Case No. 102396). Moreover, the Respondent owns several domain names, some of which incorporate third-party company names. The fact that the Respondent owns 17 domain names shows that it is familiar with the Internet system and search engines tools. It therefore inconceivable that the Respondent was unaware of the existence of the Complainant when it registered the disputed domain name.

The Respondent is based in Peru, country where the Complainant's associated company and subsidiaries are located.

Furthermore, the disputed domain name alongside the Complainant's trademark includes the country name "Peru" and the generic term "minera". The Glencore group has three subsidiaries and one associated company based in Peru (Compania Minera Antapaccay S.A., Volcan Compania Minera S.A.A., Empresa Minera Los Quenuales S.A., Compania Minera Antamina S.A.), conducts mining operations in several sites in Peru and contributes to social programmes. The term "minera" in several languages refers either to minerals or the activity of mining. Moreover, the company names of subsidiaries or associated companies of the Glencore group in Peru as well as in other countries – such as Glencore Minera AG in Switzerland – comprise the term "minera". As mentioned above, the Complainant also owns domain names incorporating the GLENCORE trademark and the terms "minerals", "metals" or "peru" (<glencoreminerals.com>, <glencoremetals.com> and <glencoreperu.pe>). Given that the Complainant is part of the Glencore group which has an active business presence in Peru as well as many subsidiaries having the term "minera" in their company name and owns several domain names to which the disputed domain name is similar, it appears that the Respondent registered the disputed domain name having the Complainant in mind. Hence, the Respondent knew the Complainant and its trademark GLENCORE at the time it registered the disputed domain name. The inclusion in the second level portion of the disputed domain name of the Complainant's trademark GLENCORE with the generic term "minera" and the geographical term "Peru" reflects the Respondent's clear intention to create an association, and a subsequent likelihood of confusion, with the Complainant's trademark in Internet users' mind. By reading the disputed domain name, the Internet users may believe that it is connected or authorized by the Complainant, which is not the case.

In view of the above, the Respondent registered the disputed domain name in bad faith.

b) Use of the disputed domain name in bad faith

Paragraph 4(b) of the Policy identifies, in particular but without limitation, four circumstances which shall be evidence of the registration and use of a domain name in bad faith.

The disputed domain name is currently passively held. Previous UDRP panels have considered, under the doctrine of passive holding, that "the non-use of a domain would not prevent a finding of bad faith" (see "WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition", section 3.3). More precisely, "it is possible, in certain circumstances, for inactivity by the Respondent to amount to the domain name being used in bad faith." (see Telstra Corporation Limited v. Nuclear Marshmallows, WIPO Case No. D2000-0003). The circumstances of the case may indeed be such that "it is not possible to conceive of any plausible actual or contemplated active use of the domain name by the Respondent that would not be illegitimate, such as by being a passing off, an infringement of consumer protection legislation, or an infringement of the Complainant's rights under trademark law" (see Telstra Corporation Limited v. Nuclear Marshmallows, supra).

In the present case, several factual considerations are clear indicators of the Respondent's behaviour and use in bad faith of the disputed domain name, under the passive holding doctrine.

The disputed domain name entirely comprises the Complaint's widely known trademark GLENCORE which is registered and has been used for many years in Peru, country where the Respondent is located. In similar circumstances, the high degree of distinctiveness or reputation of the Complainant's trademark is considered as an indication of bad faith registration and use of the disputed domain name by the Respondent (see Compagnie Générale des Etablissements Michelin v. Le Van Dong, WIPO Case No. D2018-1522; Carrefour v. Ye Mao, WIPO Case No. D2018-0719). Moreover, as mentioned above, the Respondent could not ignore the Complainant and its GLENCORE trademark when it registered the disputed domain name because the Complainant has a strong online presence and four companies associated to the Glencore group have been established in Peru for many years.

The disputed domain name is currently passively held. It resolves to Webmail login page. It is not associated to an active website. There is therefore no evidence of any actual or contemplated good-faith use of the disputed domain name, as previous UDRP panels held (see British Airways Plc. v. David Moor, WIPO Case No. D2006-1224; Boehringer Ingelheim Pharma GmbH & Co.KG v. Raju Khan, CAC Case No. 101517).

The Complainant sent a cease and desist letter to the Respondent informing of the Complainant's rights with respect of the GLENCORE trademark. The Respondent chose not to reply to the cease and desist letters sent by the Complainant which infers bad faith (see Arla Foods Amba v. Mlanie Guerin, CAC case No. 101640; Medela AG v. Donna Lucius, CAC case No. 101808).

Moreover, the disputed domain name is associated with an active MX record. Furthermore, the fact that the disputed domain name resolves to a Webmail login page implies that the Registrant has access to the Webmail hosting server parameters related to <mineraglencoreperu.com> and could set up corresponding e-mail addresses ("[…]@mineraglencoreperu.com"). Hence, a risk exists that the disputed domain name might have been incorporated in an e-mail address and used to send fraudulent e-mails, making recipients believed that the e-mail address is connected to the Complainant or the Glencore group (see Crédit Industriel et Commercial S.A. v. Atin, Miguel, WIPO Case No. D2020-0086; Boursorama S.A. v. Osaki Kyle, WIPO Case No. D2014-1522; Dewberry Engineers Inc. v. Peggy Cumberledge, Island Service, WIPO Case No. D2020-0346).

The overall described circumstances are clear demonstration of the registration and use of the disputed domain name is in bad faith.

In view of the above, the Complainant's conduct falls 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.

In accordance with Paragraph 11 of the UDRP Rules, unless otherwise agreed by the parties, the language of the proceeding is the language of the registration agreement, subject to the authority of the panel to determine otherwise, exercising its "discretion in the spirit of fairness to both parties, which pursuant to paragraph 10(b) of the Rules have to be treated with equality, taking into account all relevant circumstances of the case, including matters such as the parties' ability to understand and use the proposed language, time and costs" (see Tetra Laval Holdings & Finance S.A. v. Bartosz Karalus, WIPO Case No. D2015-1615).

The Complaint hereby requests that the language of the proceeding be English based on the following reasons:

- The fact that the Respondent agreed to and signed the Registration Agreement in English demonstrates that it understands well this language;

- When entering the domain name <mineraglencoreperu.com> (hereafter "the disputed domain name") in the browser, it shortly resolves to a web page in English displaying mentions such as "If you are behind a firewall and can not connect to port 2096 Enter Here" and "Trying: preferred". Then, immediately after, the disputed domain name resolves to an "login page" in English. Different languages options appear at the bottom of the web page. However, when accessing the login page, the content appears directly in English. Each text fields are indeed in English as follows: "Email Address", "Enter your email address", "Password", "Enter your password" and "Login". Such facts show that the Respondent understands English and is also targeting Internet users speaking English;

- In previous cases in which the language of the Registration agreement was English and the disputed domain name was passively held by the Respondent, it has been held that the language of the proceeding was English (see La Quinta Worldwide, L.L.C. v. Andi Perdana, Andirich; WIPO Case No. D2011-1279; Pierre Hardy v. Registration Private, Domains by Proxy, Inc. / Yang Le, WIPO Case No. D2011-2278);

- The Complainant is based in Switzerland. The Respondent is located in Peru. The English language, being commonly used internationally, would be considered as neutral for both parties in the present case. It would therefore be fair to the Parties that the language of the present proceeding be English (See Intesa Sanpaolo S.p.A. v. Ida Ekkert, CAC Case No. 102263);

- Furthermore, should the language of the proceedings be different of English, translating the Complaint in a different language would entail significant additional costs for the Complainant and delay in the proceedings.

PRINCIPAL REASONS FOR THE DECISION

The disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights. The disputed domain name was registered in June 12, 2020, many years after the registrations of the Complainant's trademarks. The Complainant has not licensed or authorized the Respondent to register or use the disputed domain name, nor is the Respondent affiliated to the Complainant in any form. There is no evidence that the Respondent is known by the disputed domain name or owns any corresponding registered trademarks. The disputed domain name is currently passively held. The Complainant sent a cease and desist letter to the Respondent informing of the Complainant's rights with respect of the trademark. The Respondent chose not to reply to the cease and desist letters sent by the Complainant which infers bad faith.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **MINERAGLENCOREPERU.COM**: Transferred

PANELLISTS

Name	Thomas Hoeren

DATE OF PANEL DECISION 2021-05-19

Publish the Decision