

Decision for dispute CAC-UDRP-103768

Case number **CAC-UDRP-103768**

Time of filing **2021-04-30 09:33:07**

Domain names **brevillebes870xl.net**

Case administrator

Organization **Denisa Bilík (CAC) (Case admin)**

Complainant

Organization **Breville Pty Ltd**

Complainant representative

Organization **Coöperatieve Vereniging SNB-REACT U.A.**

Respondent

Organization **Webspreso Netmedia**

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 is the owner of the following registered trademarks in respect of the BREVILLE mark:

International registered trademark no. 1260519 for the word mark BREVILLE, granted on March 17, 2015 in classes 7, 11, and 21 and designated in respect of 2 jurisdictions;

Australian registered trademark no. 1612570 for the word mark BREVILLE, granted on March 20, 2014 in classes 7, 8, 9, 11, 21, 35, 41, 42 and 43;

Australian registered trademark no. 1114792 for the word mark BREVILLE, granted on May 23, 2006 in classes 8, 11 and 21; and

New Zealand registered trademark no. 167499 for the word mark BREVILLE, granted on December 21, 1989 in class 9.

FACTUAL BACKGROUND

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

The Complainant has been the exclusive rights owner of the BREVILLE trademarks since at least 1989 and its rights predate the registration of the disputed domain name, which was created on October 3, 2015. The disputed domain name incorporates such trademark in its entirety together with the term “BES870XL”, which represents the model name of one of the espresso coffee makers sold under the BREVILLE trademarks. The incorporation of the trademark in the disputed domain name is sufficient to find confusing similarity. Such confusing similarity is strengthened by the addition of the model number as it suggests a commercial connection between the Complainant and the Respondent where there is none.

The disputed domain name has been registered for commercial purposes, namely the use of the Amazon affiliate system. The website associated with the disputed domain name claims to provide a review of the relative espresso maker which features Amazon affiliate links containing a monetization tag redirecting to the well-known online retail platform at “www.amazon.com”. The earliest historic Whois entry for the disputed domain name dates from September 2017 and features the same use, such that the Complainant concludes that the said use has been continued since at least 2017.

The Respondent is not making a bona fide offering of goods or services. The Complainant has no existing or past commercial ties with the Respondent. The Respondent’s website contains unverified consumer reviews in order to appear as if it is a promotional website for the Complainant’s products. The Respondent hopes to achieve commercial gain through the Amazon affiliate system. The Respondent has not received authorization for its use of the disputed domain name and has never been granted any rights for the use of the Complainant’s trademarks. In the absence of such, no actual or contemplated bona fide or legitimate use of the disputed domain name can reasonably be claimed.

It is generally not permissible to register knowingly a domain name that is the same as another’s trademark rights in order to seek traffic to a commercial website. The Respondent cannot satisfy the narrow exception to the general rule found in the “Ok! Data” test, in that there is no indication that the Respondent is actually offering the goods at issue or has ever acquired such goods for resale, nor does the Respondent accurately and prominently disclose its lack of a commercial relationship with the Complainant. The Respondent’s “Disclaimer” page is linked only from the bottom of the homepage and merely disclaims the accuracy of the information on the Respondent’s website. The fact that the Respondent is seeking affiliate revenue does not constitute a bona fide purpose. The Respondent is not commonly known by the disputed domain name and there is no credible concrete evidence of such on the Respondent’s website. The Respondent does not hold any genuine trademark right. Use of the Complainant’s trademark, even if used in a “trademark sense” does not prove that the Respondent is commonly known by that expression.

The Respondent is not making a non-commercial use of the disputed domain name. The Respondent is not making fair use of the disputed domain name. Its use effectively suggests sponsorship or endorsement by the Complainant. The website content does not prima facie support a bona fide referential use as it is a pretext for commercial gain via affiliate links. The consumer reviews are unverified at best and without source or identity of the author.

The disputed domain name was registered in bad faith and in the knowledge of the Complainant’s rights. The Respondent was aware of the Complainant’s mark because it seeks to derive revenue from an affiliate programme through the website mentioning the Complainant’s goods. The Respondent’s website copies the Complainant’s copyright protected product photographs. It attempts to give the false impression that the website is affiliated with the Complainant. The Respondent cannot pass itself off as an affiliate of the Complainant for commercial gain. Amazon’s own affiliate policy prohibits misappropriation of copyright and trademarks. The registration and use of a domain name identical or confusingly similar to a trademark solely for the purpose of collecting affiliate fees has been held to satisfy the requirement of bad faith.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown that 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 that 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 there is no other reason why it would be inappropriate to provide a decision.

PRINCIPAL REASONS FOR THE DECISION

The Panel notes that the second level of the disputed domain name incorporates the Complainant's BREVILLE registered trademark in its entirety as the first element. As a second element, the Respondent has merely added the model number of one of the Complainant's products. This in no way serves to distinguish the disputed domain name from the mark concerned. The Complainant's mark remains entirely recognizable within the disputed domain name. The generic Top-Level Domain, in this case ".net", is typically disregarded for the purposes of the comparison exercise. In these circumstances, the Panel finds that the disputed domain name is confusingly similar to the Complainant's trademark.

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. The Complainant asserts that the Respondent is not commonly known by the disputed domain name, that the Complainant has not authorized or licensed the Respondent to use its mark in the disputed domain name and that the Respondent is not making a legitimate non-commercial or fair use of the disputed domain name.

It is evident to the Panel from the facts and circumstances of this case that the Respondent's use of the disputed domain name constitutes pretextual use for commercial gain under the guise of a website offering alleged reviews of the Complainant's product, the model number of which is represented in the disputed domain name. This fact alone is sufficient for a finding of no rights or legitimate interests on the part of the Respondent.

The Complainant suggests that the "Oki Data" test may apply in this case. The Panel agrees that if the test were to be applied, the Respondent could not satisfy all of the elements. In particular, the Respondent does not make clear in a prominent disclaimer the nature of its relationship (or lack thereof) with the Complainant. In any event, the Panel does not consider that the "Oki Data" test is particularly apposite in this case, given that the Respondent does not claim to be a reseller of the Complainant's goods itself and is merely using the disputed domain name to redirect traffic to a third party reseller for its own commercial gain.

The Respondent has not filed a Response in this case. Accordingly, it has not taken the opportunity to set out any alleged rights or legitimate interests in the disputed domain name. There are no submissions or evidence on the record which might serve to rebut the Complainant's prima facie case. In all of the above circumstances, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name.

The Panel also finds that the Complainant has established that the disputed domain name has been registered and is being used in bad faith. Given the nature of the content at the disputed domain name, based upon both historic and recent screenshots, it is evident that the Respondent registered the disputed domain name in full knowledge of the Complainant's rights and with intent to target these via pretextual content incorporating affiliate links. The Panel is satisfied, based on the Complainant's submissions and evidence, that this pretextual "review" aspect neither gives rise to any considerations of non-commercial or fair use, nor does it suggest a good faith motivation in the registration and use of the disputed domain name. The Panel accepts the Complainant's submission that a finding of registration and use in bad faith on the basis of paragraph 4(b)(iv)

of the Policy is warranted, given that the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's mark as to source, sponsorship, affiliation, or endorsement of its website.

The Respondent has not replied to the Complainant's allegations of bad faith registration and use, nor has it advanced any explanation which might indicate that its actions regarding the disputed domain name were in good faith. In the absence of such, the Panel has not identified any likely or reasonable explanation based upon the present record which the Respondent might have tendered relative to its registration and use of the disputed domain name which would have avoided the present finding.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **BREVILLEBES870XL.NET**: Transferred

PANELLISTS

Name	Andrew Lothian
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DATE OF PANEL DECISION 2021-05-27

Publish the Decision
