

Decision for dispute CAC-UDRP-104056

Case number	CAC-UDRP-104056
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Time of filing	2021-10-07 10:00:15
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Domain names	swinertonn.com
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Case administrator

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

Organization	Swinerton Incorporated
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Complainant representative

Organization	RiskIQ, Inc. - Incident Investigation and Intelligence (i3), Jonathan Matkowsky
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Respondent

Name	Frank Willetts
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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

Swinerton owns U.S. Reg. No. 2,284,825, issued October 12, 1999, in Int'l Cl. 35, first use October 11, 1923, for SWINERTON (Standard Characters); U.S. Reg. No. 2,282,855, issued October 5, 1999, in Int'l Cl. 37, first use 1923, for SWINERTON (Standard Characters); U.S. Reg. No. 5,756,816, issued May 21, 2019, Int'l Cl. 35,37, first use in 2018 for SWINERTON (& Design). Swinerton also has common law rights in the United States going as far back as 1923 based on the certified first-use dates in the '825 and '855 registrations".

FACTUAL BACKGROUND

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

Recognized nationally in the U.S. since its founding in 1888, through its predecessors-in-interest and subsidiaries, Swinerton is one of the largest private companies across all industries--providing commercial construction and construction management services throughout the U.S.

[I] The disputed domain name is confusingly similar to a mark in which Swinerton has Rights (Policy 4(a)(i))

The disputed domain name includes a typographical (duplicate character) error of the SWINERTON mark. Targeting a common typographical error does not negate confusion under the first element of the Policy.

Therefore, the disputed domain name is confusingly similar to a mark in which Complainant has established rights within the meaning of the Policy.

[II.] The Respondent has no Rights or Legitimate Interests Within the Meaning of Policy (4(a)(ii))

The Respondent is not affiliated with, nor authorized by the Complainant in any way. The Complainant does not carry out any activity for, nor has any business with the Respondent. Neither license, nor authorization has been granted by the Complainant to the Respondent to make any use of the Complainant's trademark, or apply for registration of the disputed domain name or any other domain name. The Whois contact information also supports that Respondent is not commonly known by the disputed domain name.

The Respondent configured Mail server (MX) records on the Domain:

ANSWER SECTION:

swinertonn.com. 38400 IN MX 100 us2.mx2.mailhostbox.com.

swinertonn.com. 38400 IN MX 100 us2.mx1.mailhostbox.com.

swinertonn.com. 38400 IN MX 100 us2.mx3.mailhostbox.com.

These preparatory steps (configuring 'MX' or mail exchange records) have been considered in relation to 'use' for the purposes of the Policy by other panels. The Respondent has no legitimate interest in sending or receiving e-mail from the disputed domain name because it will likely lead recipients of the email to mistakenly believe that the mail originates with permission or approval of the trademark owner. Worse, senders might mistakenly send sensitive data to the Respondent under the mistaken assumption that the mail account is under Swinerton's control or management, as would be expected given the disputed domain name is a typosquat, which means it would likely be used to send or receive e-mail under the mistaken belief it is an account authorized or originating with Complainant. This certainly does not constitute making use, or demonstrable preparations for use, of the disputed domain name in connection with a bona fide offering of goods or services, or of making a legitimate non-commercial or fair use of the disputed domain name.

There is no legitimate interest under these circumstances in also using the disputed domain name to host CentOS—which is short for Community Enterprise Linux Operating System. Circumstantial evidence, such as the complaint received by Complainant of the disputed domain name being used for an attempted BEC scam, together with the mail server on the disputed domain name, supports that the disputed domain name is likely being used for illegal Respondent activity.

[III.] The disputed domain name was Registered and is Being Used in Bad Faith (4(a)(iii) of the Policy)

Swinerton has already received at least one complaint from someone that the disputed domain name was used in an attempted BEC scam. At this time, the forensic evidence of Mail headers has not yet been made available, but Complainant intends to update the Complaint to include such evidence if it becomes available.

The Complainant has submitted evidence that the disputed domain name was created long after the SWINERTON mark was registered. The Complainant's evidence shows that the SWINERTON mark has been registered since 1995 whereas the

disputed domain name was created less than a month ago. Before registering the disputed domain name, it is likely that Respondent did a search on Google for the term, and would have seen that Google search believes that the searcher is actually looking for SWINERTON and that the term is a typographical error. This re-enforces that Respondent was well-aware of the well-known SWINERTON mark when it was registered, and did so for Respondent's own commercial gain to profit from the confusion that inevitably results when users believe that the mail server on the disputed domain name belongs to Complainant, when that is not the case.

By connecting the mail server to the disputed domain name and creating the false impression that it is Swinerton's server, it is implausible that there is any good faith use to which the disputed domain name is being used. Configuring email on this disputed domain name that confuses people into thinking the disputed domain name belongs to Swinerton is likely part of a fraudulent scheme, such as to obtain sensitive or confidential personal information, or to solicit payment of fraudulent invoices. The disputed domain name is under Respondent's control, and the MX (mail server) records were specifically configured through the registrar's parent company using Mailhostbox infrastructure. Respondent is responsible for these Mail records.

Per Paragraph 4(b)(iv) of the Policy, Respondent likely registered and is using the disputed domain name to intentionally attempt to attract, for commercial gain, Internet users to an online location, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation or endorsement of a location of a mail server sending and receiving e-mails likely intended for Complainant. This is evidenced by the mail server (MX) records on the disputed domain name indicating the confusingly similar domain was registered to receive e-mail through the disputed domain name that would likely be intended for the Complainant.

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).

This is a case of "typosquatting", i.e. the disputed domain name contains the Complainant's trademark SWINERTON in its entirety only with the addition of an extra "N" at the end making the disputed domain name quasi identical to the trademark. It is well established that the specific top level of a domain name such as ".com", ".org" does not affect the domain name for the purpose of determining whether it is identical or confusingly similar.

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 contends that the Respondent is not affiliated with him nor authorized by him in any way to use his trademarks in a domain name or on a website. The Complainant does not carry out any activity for, nor has any business with the Respondent.

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).

Given the circumstances of the case, including the provided information of the use and reputation of the Complainant's trademark SWINETON and the distinctive nature of this mark, it is inconceivable to the Panel in the current circumstances that the Respondent registered the disputed domain name without prior knowledge of the Complainant and the Complainant's mark. The Panel therefore finds that the disputed domain name was registered in bad faith.

The disputed domain name does not currently resolve to a website. The disputed domain name enables the Respondent to send e-mails using an e-mail address that contains the disputed domain name.

It is inconceivable that the Respondent can use the e-mails connected to the disputed domain name for good faith use of the disputed domain name as part of an e-mail address.

The Panel agrees with the Complainant that presently the disputed domain name is not used for any bona fide offering of goods and that it is entirely inconceivable that the disputed domain name might be used by the Respondent for such purpose. The Panel finds it more conceivable as also argued by the Complainant, and not disputed by the Respondent, that the disputed domain name is registered and used by the Respondent for phishing purposes or alternatively with the intention of selling, renting, or otherwise transferring the disputed domain name for valuable consideration in excess of the Respondent documented costs related to the disputed domain name. Even if the registration of the disputed domain name by the Respondent is with the sole purpose of continued passive holding the Panel in conclusion finds that the disputed domain name has been registered and is being used in bad faith.

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.

PRINCIPAL REASONS FOR THE DECISION

1. The three essential issues under the paragraph 4(a) of the Policy are whether:

- i. the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- ii. the Respondent has no rights or legitimate interests with respect to the disputed domain name; and
- iii. the disputed domain name has been registered and is being used in bad faith.

2. The Panel reviewed carefully all documents provided by the Complainant. The Respondent did not provide the Panel with any documents or statements. The Panel also visited all available websites and public information concerning the disputed domain name, namely the WHOIS databases.

3. The UDRP Rules clearly say in its Article 3 that any person or entity may initiate an administrative proceeding by submitting a complaint in accordance with the Policy and these Rules.

4. The Panel therefore came to the following conclusions:

a) The Complainant states and proves that the disputed domain name is confusingly similar even quasi identical to its trademarks. Indeed, the trademark is fully incorporated in the disputed domain name.

The disputed domain name is therefore deemed identical or confusingly similar.

b) The Respondent is not generally known by the disputed domain name and have not acquired any trademark or service mark rights in the name or mark, nor is there any authorization for the Respondent by the Complainant to use or register the disputed domain name.

The Panel therefore finds that the Respondent does not have rights or legitimate interest with respect to the disputed domain

name.

c) It is clear that the Complainant's trademarks were used by the Complainant long time before the disputed domain name was registered. The present use of the disputed domain name is evidently causing dilution to the Complainant's marks and image. Furthermore there are indications that the disputed domain name is likely used as part of e-mail addresses for fraudulent purposes. It is concluded that even if there is merely passive holding of the disputed domain name the Respondent makes bad faith use of the disputed domain name.

The Panel therefore finds that the disputed domain name has been registered and is being used in bad faith.

For the reasons stated above, it is the decision of this Panel that the Complainant has satisfied all three elements of paragraph 4(a) of the Policy.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **SWINERTONN.COM**: Transferred

PANELLISTS

Name	Lars Karnoe
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DATE OF PANEL DECISION 2021-11-15

Publish the Decision