Decision for dispute CAC-UDRP-100868

Case number	**CAC-UDRP-100868**
Time of filing	**2014-12-10 10:13:40**
Domain names	**bilink.tv**

Case administrator

Name	**Lada Válková (Case admin)**

Complainant

Organization	**Bilink LLC**

Respondent

Organization	**Domains By Proxy, LLC**

OTHER LEGAL PROCEEDINGS

The Complainant has filed a criminal complaint in Ukraine in connection with the Domain Name and has provided evidence thereof (Complaint No. 21299 dated 08.10.2014, registered on 11 October 2014 under Complaint No. 49523 in the Shevchenkivskyi District Department).

The fact that the Complainant has filed a criminal complaint does not prevent the Panel from deciding this case. The Panel therefore rules to proceed with a decision on the merits.

IDENTIFICATION OF RIGHTS

The Complainant relies on its company name BILINK LLC (registered in 2007) and a pending trade mark application in the term BILINK filed in 2014 with the Ukrainian Industrial Property Institute to demonstrate that it has rights in the term BILINK.

As discussed further below, the Complainant also has unregistered rights in BILINK.

FACTUAL BACKGROUND

The Complainant is an internet and television company based in Ukraine and founded in 2007. Since 2012, it provides television services through the website www.bilink.tv.

The Domain Name was registered in the name of the Complainant and on behalf of the Complainant on 18 September 2012 by the Respondent, then an employee of the Complainant.

On 2 November 2013, the Respondent transferred the Domain Name to another registrar without the Complainant's authorisation and concealed the registrant details of the Domain Name using a privacy protection service. The Respondent resigned his employment thereafter.

The Domain Name has always pointed since it was registered to the Complainant's website.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS

THE COMPLAINANT

The Complainant asserts that it provides television services to subscribers through the website www.bilink.tv since 2012. Through the Complainant's website subscribers can register themselves and choose the type of equipment on which they can view TV, and download the necessary software to be installed on the equipment, amongst other things.

The Complainant states that its company, Bilink LLC, was registered in 2007 in Ukraine. As evidence, it has provided an extract from the Uniform State Register of Legal Entities and Individual Entrepreneurs in Ukraine. The Complainant further states that "Bilink" is the commercial name of the Complainant since it was registered. In addition, the Complainant further asserts that on 10 July 2014 it filed a trade mark application for BILINK (semi-figurative) for goods and services in Class 38. As evidence, the Complainant has provided a copy of the receipt of the trade mark application issued by the "Ukrainian Industrial Property Institute" No.96916 dated 10 July 2014.

The Complainant asserts that it registered the domain name <bilink.tv> (the "Domain Name") on 18 September 2012 through the registrar LLC BTM GLOBAL GROUP (Parkovka.UA) (the "First Registrar"). As evidence, the Complainant has provided payment orders for 2012, 2013 and 2014.

The Complainant asserts that in September 2014, during the process of renewing the Domain Name, it was informed that the Domain Name was transferred to another registrar on 2 November 2013. As evidence, the Complainant has submitted a letter dated 17 September 2014 from the First Registrar where it states the transfer request was made on 23 October 2013 by an individual named Mr. Dyatel Dmitriy Vladimirovich, with his email address "xxxxx@bilink.ua".

The Complainant asserts that further to an internal investigation, it was determined that Mr. Dyatel Dmitriy Vladimirovich, the individual who made the transfer request, is a former employee of the Complainant, who held the position of Technical Director at the Complainant's company. The Complainant states that whilst in September 2012 Mr. Dyatel Dmitriy Vladimirovich was tasked to register the Domain Name on behalf of the Complainant, Mr. Dyatel Dmitriy Vladimirovich made the transfer request of the Domain Name without the Complainant's knowledge and consent.

The Complainant further asserts that the WHOIS record of the Domain Name shows that the Domain Name was registered using a privacy protection service.

The Complainant further submits that it does not have the authorisation codes of the Domain Name.

The Complainant further submits that the DNS-servers of the Complainant are attached to the Domain Name: NS.BILINK.UA and NS2.BILINK.UA. Thus the Complainant submits that it is limited in using the website www.bilink.tv, and does not have the ability to make changes to the website.

The Complainant asserts that the Respondent unlawfully and illegally transferred the Domain Name with the purpose of preventing the Complainant, the rightful owner of the Domain Name, to use the Domain Name in the course of its activities. The Complainant further submits that the Respondent may at any time make changes to the settings of the DNS configuration of the Domain Name, which would entail for the Complainant the loss of control over services, uncontrolled situation with the software, loss of personal data of subscribers, etc. As a result, the Complainant asserts that it will suffer considerable loss, including to its reputation as a reliable supplier of TV services. In addition, the Complainant asserts that it may be held liable for failing to fulfil obligations regarding the rebroadcasting of their television channels.

In addition, the Complainant asserts that the Respondent transferred the Domain Name with the purpose of selling the Domain Name to the Complainant or to one of its competitor for an amount exceeding the cost of registration and service of the Domain Name. As evidence, the Complainant has submitted a transcript of a conversation through Skype between the Complainant and the Respondent in which the Respondent stated that "The Domain Name is for Sale". In further support of

its claim, the Complainant states that the Respondent does not provide television services as he does not have the appropriate permissions, contracts with the owners of TV channels and does not have adequate technical capabilities to provide such services in the field of television.

Based on the above, the Complainant requests that the Domain Name is transferred to the Complainant.

RESPONDENT

No administratively compliant Response was filed by the Respondent.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the 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 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 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.

PRINCIPAL REASONS FOR THE DECISION

Pursuant to paragraph 4(a) of the Policy, the Complainant must prove that:

(i) the domain name is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights; and
(ii) the Respondent has no rights or legitimate interests in respect of the Domain Name; and
(iii) the Domain Name has been registered and is being used in bad faith.

The Panel finds as follows:

Preliminary issue : Identification of the proper respondent

Prior to turning to the merits of this case, an important issue to address is the use of a privacy protection service and the subsequent disclosure of an underlying registrant different to that originally named in the Complaint, further to a verification request submitted by the Czech Arbitration Court (CAC) to the concerned registrar.

The CAC informed the Complainant of the fact that the concerned registrar had revealed a different identification of the Domain Name holder than originally stated in the Complaint (ie. Domains by Proxy LLC). The concerned registrar revealed that the underlying registrant was Mr. Dyatel Dmitriy Vladimirovich.

The CAC sent a non-standard communication to the Complainant in which it provided that "based on the decision No. 100221 the CAC shall not require the Complainant to amend its Complaint; nevertheless we ask the Complainant to inform us whether it prefers to stay with its original filing or amend the Complaint instead within 5 days of receiving this communication".

Further to the CAC's non-standard communication, the Complainant informed the CAC of its decision not to amend the Complaint.

In such circumstances, a panel may ultimately determine who is the proper respondent, as what is important is that a complainant or provider have discharged its communication responsibility under the UDRP Rules (in this regard, see paragraph 4.9 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition).

In the present case, the registrar has revealed that the underlying registrant is Mr. Dyatel Dmitriy Vladimirovich, who had hidden his details using a privacy protection service (against which the Complainant originally filed its Complaint). In addition, the Complaint refers to the underlying registrant, Mr. Dyatel Dmitriy Vladimirovich, who is a former employee of the Complainant.

Thus, the Panel is of the view that the underlying registrant of the Domain Name, Mr. Dyatel Dmitriy Vladimirovich, should also be considered as a Respondent in this Complaint. The Panel is satisfied that the underlying registrant was duly notified of the Complaint.

(i) Rights

Paragraph 4(a)(i) of the Policy requires the Complainant to prove that the Domain Name registered by the Respondent is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights.

Under the Policy, a company name and/or a pending trade mark application by itself would be insufficient to establish trade mark rights in a name. Whilst the Complainant does not appear to have as of yet registered trade mark rights in the term BILINK, the Panel is prepared to accept that the Complainant has unregistered rights in the term BILINK for the purpose of the Policy. The Complainant operates its services via a website at www.bilink.tv (it also operates www.bilink.ua and www.bilink.com.ua) and it has a sophisticated and distinctive logo which is displayed on its websites and stationary. Thus the Panel finds that the Complainant is using BILINK as a distinctive source identifier of its services since at least 2012.

Having determined that the Complainant has rights in the term BILINK, the Panel notes that the Domain Name identically reproduces the Complainant's BILINK trade mark. In addition, the Panel is of the view that the suffix .TV in this particular case reinforces the confusion with the Complainant's trade mark as it is descriptive of the Complainant's television (or "T.V.") services.

The Complainant has therefore shown, to the satisfaction of the Panel, that the Domain Name is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights, within the meaning of paragraph 4(a)(i)of the Policy.

(ii) Rights or legitimate interests

Paragraph 4(a)(ii) of the Policy requires the Complainant to prove that the Respondent has no rights or legitimate interests in the Domain Name. Paragraph 4(c) of the Policy sets out a list of circumstances on which a respondent may rely to demonstrate rights or legitimate interests in a domain name, including but not limited to:

(i) before any notice to the Respondent of the dispute, the Respondent used, or made demonstrable preparations to use, the Domain Name or a name corresponding to the Domain Name in connection with a bona fide offering of goods or services; or

(ii) the Respondent is commonly known by the Domain Name, even if the Respondent has acquired no trade mark or service mark rights; or

(iii) the Respondent is making a legitimate non-commercial or fair use of the Domain Name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark at issue.

Whilst the burden of proof rests on the Complainant, it is often difficult for a complainant to prove a negative, i.e. that a respondent does not have a right or legitimate interests in respect of a domain name. Thus, a complainant must first show a prima facie case that a respondent lacks rights or legitimate interests in the disputed domain name, and upon such a showing, then this burden shifts back to the respondent.

The Respondent is a former employee of the Complainant who registered the Domain Name on behalf of the Complainant during the course of his employment and transferred it to his own name without the Complainant's authorisation. The Panel is of the view that the Respondent's former relationship with the Complainant does not give rise to rights or legitimate interests in the Domain Name.

The Panel is therefore of the opinion that the Complainant has made a prima facie showing of the Respondent's lack of rights or legitimate interests in the Domain Name and that the Respondent has failed to rebut such a showing as a result of his default. Whilst a respondent's default does not mean that a decision will be rendered against him, the Panel is entitled to draw appropriate inferences therefrom.

The Panel has examined the circumstances set out in paragraph 4(c) of the Policy and finds that none of them appear to assist the Respondent. There is no evidence suggesting that the Respondent is using, or has made preparations to use, the Domain Name in connection with a bona fide offering of goods or services, that the Respondent is commonly known by the Domain Name or that the Respondent is making a legitimate non-commercial or fair use of the Domain Name. On the contrary, the Panel finds that the Respondent's use of the Domain Name to point to the Complainant's website is neither fair nor legitimate and is a further strong indication in support of his lack of rights or legitimate interests in the Domain Name.

The Complainant therefore has shown, to the satisfaction of the Panel, that the Respondent does not have rights or legitimate interests in respect of the Domain Name, within the meaning of paragraph 4(a)(ii)of the Policy.

(iii) Bad faith

Paragraph 4(b) of the Policy sets out a non-exhaustive list of circumstances that may indicate that the Domain Name was registered and used in bad faith, as follows:

(i) circumstances indicating that [the respondent has] registered or acquired a disputed domain name primarily for the purpose of selling, renting, or otherwise transferring the disputed domain name to the complainant or to a competitor of the complainant, for valuable consideration in excess of [the respondent's] documented out-of-pocket costs directly related to the disputed domain name; or

(ii) [the respondent has] registered the disputed domain name in order to prevent the complainant from reflecting the complainant's trade mark or service mark in a corresponding domain name, provided that [the respondent has] engaged in a pattern of such conduct; or

(iii) the respondent has registered the disputed domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the disputed domain name, [the respondent has] intentionally attempted to attract, for commercial gain, Internet users to [the respondent's] website or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of [the respondent's] website or location or of a product or service on [the respondent's] website or location.

The Panel finds that the Domain Name was both registered and is being used in bad faith, as explained as follows.

As demonstrated by the evidence put forward by the Complainant, the Domain Name was originally registered in 2012 in the name of the Complainant but was then transferred upon request of the Respondent, an employee of the Complainant, to his own name. The Complainant has asserted that it has not authorised said transfer and, in the absence of any explanation

from the Respondent, the Panel draws the inference that the Respondent did so in bad faith, especially as he chose to retain the Domain Name after having ended his relationship with the Complainant. Thus the Panel is of the view that the Respondent's subsequent act of transferring the Domain Name from the Complainant's name to the Respondent's own name amounts to a new registration in bad faith, as the Respondent was most likely seeking to sell or otherwise transfer the Domain Name to the Complainant for valuable consideration in excess of the documented out-of-pocket costs directly related to the Domain Name, in accordance with paragraph 4(b)(i) of the Policy.

In addition, the Panel is of the view that the fact that the Respondent's underlying contact details were concealed using a privacy protection service is a further strong indication of the Respondent's bad faith, as it most likely represents an attempt by the Respondent to avoid potential liability for his actions.

The Panel is also of the view that the Respondent is using the Domain Name in bad faith. The Respondent is pointing the Domain Name to the Complainant's website, where the Complainant offers its television services. The Panel is of the opinion that the fact that the Respondent controls the Domain Name and thus retains the possibility of disrupting the Complainant's business at any given time constitutes a threat hanging over the Complainant's head and as such a bad faith use of the Domain Name.

The Complainant has therefore shown, to the satisfaction of the Panel, that the Domain Name has been registered and is being used in bad faith, within the meaning of paragraph 4(a)(iii)of the Policy.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **BILINK.TV**: Transferred

PANELLISTS

Name	**David Taylor**

DATE OF PANEL DECISION 2015-02-10

Publish the Decision