

Decision for dispute CAC-UDRP-104647

Case number	CAC-UDRP-104647
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Time of filing	2022-06-17 09:08:50
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Domain names	atomicbarato.com
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Case administrator

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

Organization	ATOMIC Austria GmbH
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Complainant representative

Organization	INSIDERS
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Respondent

Organization	Trwiop Qdewe
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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

Complainant owns rights in the “ATOMIC” sign and shows valid trademark rights as follow:

- The International trademark “ATOMIC” No. 465608, dated September 7, 1981 (renewed), for goods in classes 7, 9, 18, 25, 28 and that designated among others China;
- The US trademark “ATOMIC” No. 1048126, dated September 14, 1976 (renewed), for goods in classes 18, 25 and 28;
- The US trademark “ATOMIC” No. 3193143, dated January 2, 2007 (renewed), for goods in classes 9 and 25.

FACTUAL BACKGROUND

Complainant is an Austrian company specialised in professional ski set-up. Complainant introduces itself as the world's No. 1 ski brand.

Respondent is Trwiop Qdewe. He is located in Hong-Kong, China.

On February 23, 2022, Respondent registered the disputed domain name <atomicbarato.com>, domain name that is currently active, offering ski equipment and displaying the trademark ATOMIC.

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

The word ATOMIC is registered in several different goods classes (including classes 9, 18, 25 and 28) as both an international trademark (registration number: 465608) and in the United States (the country where the Respondent resides, according to the whois information) under the numbers 1048126 and 3193143 (clothes, including shoes; sports equipment including skis, ski poles; bags; helmet; goggles).

The Complainant, ATOMIC Austria GmbH, is the rights holder for all of the above.

The domain name contains in its entirety the word ATOMIC, identical to the registered ATOMIC word marks.

In the domain name in question, ATOMIC is followed by “barato” which means “cheap” in Spanish.

This simple addition does not allow a clear distinction between the registered trademark and the domain name in question, and creates a strong likelihood of confusion among the public.

The Respondent is not affiliated with the Complainant in any way and was not authorized by ATOMIC Austria GmbH to use the registered ATOMIC trademark.

The Respondent has no legitimate interest in the domain names in question, since the whois records show no business name that may justify an interest in the domains. The Respondent is also not an authorized ATOMIC retailer, nor are they commonly known by the disputed domain name – in fact their name is not known via WHOIS records.

ATOMIC Austria GmbH is a well-known winter sports equipment company, present in countries all over the world. It promotes its products under the brand ATOMIC on the website atomic.com and sells them in both physical and online stores. The sales are made directly on the official atomic.com website, and also via a network of authorized retailers.

The domain name in question here has been both acquired and is being used in bad faith. The Respondent knows ATOMIC brand and its products.

The website to which the domain name resolves was designed to create an appearance of connection with ATOMIC. Therefore, the Respondent intentionally attracts potential ATOMIC clients by creating a likelihood of confusion with the brand ATOMIC: the website displays ATOMIC products and logo (both on the websites and as favicon). The Respondent had therefore put themselves in a perfect position to exploit ATOMIC’s popularity and renown for their own gain.

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).

Complainant considers that the disputed domain name is confusingly similar to its “ATOMIC” registered trademark.

Indeed, Complainant states that the disputed domain name fully incorporates the word “ATOMIC” which is identical to its prior trademark rights, merely associated with the term “BARATO” meaning “cheap” in Spanish.

Complainant states that the use of the word “BARATO” is not enough to distinguish the disputed domain name from the Complainant’s trademarks, thus creating a strong likelihood of confusion.

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).

Complainant asserts that Respondent has no legitimate interest in the disputed domain name, as Respondent is not known in the WHOIS records nor is commonly known by the disputed domain name.

Complainant states that Respondent is not affiliated to Complainant nor authorised by Complainant to use the registered “ATOMIC” trademark via a licence or any other authorization.

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).

Complainant asserts that the disputed domain name creates a strong likelihood of confusion with Complainant’s well-known trademark “ATOMIC”. Complainant infers that Respondent registered and used the disputed domain name with full knowledge of Complainant’s well-known trademark.

To support this claim, Complainant brings in evidence that the website configured on the disputed domain name displays ATOMIC products and logo, both on the websites and as favicon. Complainant considers that such use of the disputed domain name shows Respondent’s intention to attract ATOMIC’s clients by created a likelihood of confusion and exploit Complainant’s well-known trademarks for personal gain.

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

Paragraph 4(a) of the Policy requires the Complainant to prove three elements in order to the transfer of the domain name:

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

- (i) The disputed domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights

Complainant demonstrates that it owns valid trademark rights in the “ATOMIC” sign.

The Panel recognises that Complainant’s trademark rights in the “ATOMIC” sign are established.

The Panel also agrees that the disputed domain name is confusingly similar to Complainant's ATOMIC trademark. The addition of the term "BARATO" does not allow to dismiss the likelihood of confusion with the "ATOMIC" trademark (see ARCELORMITTAL (SA) v. acero, Case n° 102399 (CAC March 20, 2019) "As stated in WIPO Overview 3.0 "In cases where a domain name incorporates the entirety of a trademark, or where at least a dominant feature of the relevant mark is recognizable in the domain name, the domain name will normally be considered confusingly similar to that mark for purposes of UDRP standing").

Therefore, the Panel concludes that Complainant has satisfied Policy 4(a)(i).

(ii) The Respondent has no rights or legitimate interests in respect of the disputed domain name

The rule is that Complainant shall provide a prima facie case that Respondent lacks rights and legitimate interests in the disputed domain name, under Policy 4 (a)(ii).

This rule has been recognised throughout continuous case law, such as in LESAFFRE ET COMPAGNIE v. Tims Dozman, Case No. 102430 (CAC, April 2nd, 2019) where it has been held that 'The Complainant is required to make out a prima facie case that the Respondent lacks rights or legitimate interests. Once such prima facie case is made, the Respondent carries the burden of demonstrating rights or legitimate interests in the disputed domain name. If the Respondent fails to do so, the Complainant is deemed to have satisfied paragraph 4(a)(ii) of the UDRP (please see, for example, WIPO case no. D2003-0455, Croatia Airlines d.d. v. Modern Empire Internet Ltd.)'.

Complainant asserts that Respondent is not commonly known under the disputed domain name, and that Complainant has never granted Respondent an authorisation to use its trademark, nor to register the domain name.

What is more, Respondent did not provide a response to the Complaint. Previous Panels have held that such lack of response from the Respondent's part was proof that Complainant and Respondent had no relation and that Respondent is not commonly known under the disputed domain name (See FILEHIPPO S.R.O. v. whois agent, Case No. 102279 (CAC January 31st, 2019), "In the absence of a response, the Panel accepts the Complainant's allegations as true that the Respondent has no authorization to use the Complainant's trademarks in the disputed domain name. Hence, as the Complainant has made out its prima facie case, and as the Respondent has not demonstrated any rights or legitimate interests as illustrated under paragraph 4(c) of the Policy, nor has the Panel found any other basis for finding any rights or legitimate interests of the Respondent in the disputed domain name, the Panel concludes that the Complainant has satisfied the requirements of paragraph 4(a)(ii) of the Policy.").

The Panel concludes that Complainant has made a prima facie case that Respondent lacks rights or legitimate interests in the disputed domain name, and has therefore satisfied Policy 4(a)(ii).

(iii) The disputed domain name has been registered and is being used in bad faith

Complainant argues that given the renown of its trademark "ATOMIC", Respondent could not ignore Complainant's prior rights when registering the disputed domain name and necessarily knew Complainant's brand and its products.

Given the content configured on the domain name, reproducing Complainant's trademarks and offering what appears to be Complainant's products for sale at a lower price, it appears that the incorporation of the Complainant's registered trademark was done for the sole purpose to mislead consumers into believing that the disputed domain name was somehow linked to Complainant and its trademarks.

In light of the above, the Panel considers that Respondent had Complainant's trademarks and products in mind when registering the domain name and has therefore registered the domain name in bad faith, aiming at misleading Complainant's

consumers.

Furthermore, the use of the domain name to sell what appears to be Complainant's products at lower prices while reproducing Complainant's trademark and logo, all of the aforementioned without Complainant's authorization, amounts to a bad faith use of the domain name.

The Panel thus considers that the disputed domain name has been registered and used in bad faith by Respondent within the meaning of Paragraph 4(a)(iii) of the Policy.

The Panel ultimately considers that:

Complainant holds trademark rights in the "ATOMIC" sign. The disputed domain name reproduces Complainant's trademark and is therefore confusingly similar to Complainant's trademark, the mere addition of the Spanish term "BARATO" being insufficient to avoid a likelihood of confusion.

Respondent failed to establish legitimate rights in the disputed domain name. Complainant has established that Respondent registered and uses the disputed domain name in bad faith.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **ATOMICBARATO.COM**: Transferred

PANELLISTS

Name	Nathalie Dreyfus
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DATE OF PANEL DECISION	2022-07-28
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Publish the Decision
