

Decision for dispute CAC-UDRP-104756

Case number	CAC-UDRP-104756
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Time of filing	2022-08-03 09:28:52
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Domain names	IVIR-OPTICS.COM
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Case administrator

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

Organization	Hellma GmbH & Co. KG
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Respondent

Name	dawson smith
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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 names.

IDENTIFICATION OF RIGHTS

The Complainant's affiliated company Hellma Materials GmbH owns rights in the word mark "IV IR OPTICS" (UK trademark registration number UK00003777839 registered on July 29, 2022). The Hellma Materials GmbH signed a contract to acquire rights in the word mark "PHOTONIC SENSE" (e.g., EUIPO trademark registration number 005454211 registered on April 2, 2008) from Photonic Sense GmbH on July 5, 2021.

FACTUAL BACKGROUND

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

The Complainant's affiliated company Hellma Materials GmbH is a specialist in the production of synthetic crystals and optical ceramics for various applications, primarily for microlithography, optics, laser technology and radiation detection. It was publicly announced that on July 5, 2021 the Hellma Materials GmbH signed a contract to take over the germanium crystal growth business which was bundled in Photonic Sense GmbH, Eisenach (Thuringia), subsequently rebranded to IV-IR-Optics GmbH.

The disputed domain names were registered soon after the acquisition was publicly announced. The disputed domain name <ivir-optics.com> was registered on October 30, 2021. The disputed domain name <photonic-senes.com> was registered on August 26, 2021.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

PARTIES' CONTENTIONS:

COMPLAINANT:

i) The Complainant's affiliated company Hellma Materials GmbH owns rights in the word mark "IV IR OPTICS". The Hellma Materials GmbH signed a contract to acquire rights in the word mark "PHOTONIC SENSE" from Photonic Sense GmbH on July 5, 2021. The disputed domain names are confusingly similar to the domain names <photonic-sense.com> and <iv-ir-optics.com> owned by the Complainant Group.

ii) The Respondent has no rights or legitimate interests in respect of the disputed domain names. The disputed domain names are not general terms, but reflect the Complainant's names, trademarks, and services. There are no goods or services being offered by the Respondent. There is no obvious evidence that the Respondent is in any way commonly known as the disputed domain names or offers any services in this regard. The disputed domain names were used to commit fraud by conducting a phishing scheme.

iii) The Respondent has registered and is using the disputed domain names in bad faith. The Respondent registered the disputed domain names soon after the public announcement that the Complainant's affiliated company Hellma Materials GmbH signed a contract on July 5, 2021 to take over the germanium crystal growth business which was bundled in Photonic Sense GmbH, and rebranded to IV-IR-Optics GmbH. The disputed domain names were registered intending to contact customers by mail to fraudulently inform them to change the banking accounts, which led to a company/bank account in the UK not affiliated in any way to the Hellma Group. The Complainant Group contacted the Registrars of the disputed domain names, and as a result the Registrars suspended the disputed domain names due to the Respondent's violations of the terms of the Registration Agreement.

RESPONDENT:

Respondent did not submit a response in this proceeding.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the disputed domain names are 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 names (within the meaning of paragraph 4(a)(ii) of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the disputed domain names have been registered and are being used in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy).

PROCEDURAL FACTORS

Preliminary Issue: Language of the Proceedings

The Panel notes that the Registration Agreement for the disputed domain name <ivir-optics.com> is written in Japanese, thereby making the language of the proceedings in Japanese. The Complainant has requested that the proceeding should be conducted in English. The Panel has the discretion under UDRP Rule 11(a) to determine the appropriate language of the proceedings taking the particular circumstances of the administrative proceeding into consideration. See Section 4.5, "WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition" (hereinafter referred to as "WIPO Overview 3.0"); see also Lovehoney Group Limited v yan zhang, CAC 103917 (CAC August 17, 2021) (finding it appropriate to conduct the proceeding in English under Rule 11, despite Japanese being designated as the required language in the registration agreement).

The Panel notes that the Registration Agreement for the disputed domain name <photonic-senes.com> is written in English thereby making the language of the proceedings in English. Therefore, pursuant to UDRP Rule 11(a) the Panel finds the likely possibility that the Respondent is conversant and proficient in the English language. After considering the circumstance of the present case, in the absence of Response and no objection to the Complainant's request for the language of proceeding, the

Panel decides that the proceeding for the disputed domain name <ivir-optics.com> as well as the disputed domain name <photonic-senes.com> should be in English.

The Panel's Procedural Orders and the Complainant's Additional Submissions

On September 2, 2022, the Panel issued the Procedural Order to the Complainant to submit supporting evidence in terms of the three elements of Policy paragraph (a) by setting a deadline "within 5 calendar days" from the receipt of the Procedural Order. On September 5, 2022, the Panel granted the extension of the deadline to September 12, 2022 pursuant to the Complainant's request. On September 11, 2022, the Complainant submitted an additional submission in response to the Panel's Procedural Order. On September 12, 2022, the Panel issued another Procedural Order to the Complainant to file evidence showing the trademark right holder's authorization to file the Complaint setting a deadline of September 17, 2022. In the Procedural Order, the Panel notified the parties of the extension of the projected decision date to October 1, 2022 accordingly. On September 14, 2022, the Complainant submitted the trademark right holder's authorization to file the Complaint. All of the Procedural Orders and the Complainant's Additional Submissions were properly communicated to the Respondent.

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 15(a) of the Rules for the UDRP ('the Policy') instructs this Panel to "decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

Paragraph 4(a) of the Policy requires that Complainant must prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

(1) the domain name registered by respondent is identical or confusingly similar to a trademark or service mark in which complainant has rights; and

(2) respondent has no rights or legitimate interests in respect of the domain name; and

(3) the domain name has been registered and is being used in bad faith.

In view of the Respondent's failure to submit a response, the Panel shall decide this administrative proceeding on the basis of the Complainant's undisputed representations pursuant to paragraphs 5(f), 14(a) and 15(a) of the Rules and draw such inferences it considers appropriate pursuant to paragraph 14(b) of the Rules. The Panel is entitled to accept all reasonable allegations and inferences set forth in the Complaint as true unless the evidence is clearly contradictory. See *Vertical Solutions Mgmt., Inc. v. webnet-marketing, inc.*, FA 95095 (FORUM July 31, 2000) (holding that the respondent's failure to respond allows all reasonable inferences of fact in the allegations of the complaint to be deemed true); see also *Talk City, Inc. v. Robertson*, D2000-0009 (WIPO February 29, 2000) ("In the absence of a response, it is appropriate to accept as true all allegations of the Complaint.").

Rights

The Complainant claims rights in the mark "IV IR OPTICS" (UK trademark registration number UK00003777839 registered on July 29, 2022) owned in the name of the Hellma Materials GmbH and the mark "PHOTONIC SENSE" (e.g., EUIPO trademark registration number 005454211 registered on April 2, 2008). The Hellma Materials GmbH signed a contract to acquire rights in mark "PHOTONIC SENSE" (e.g., EUIPO trademark registration number 005454211 registered on April 2, 2008) from Photonic Sense GmbH on July 5, 2021. The Panel notes that a national trademark registration or an international trademark registration is sufficient to establish rights in that mark. The Complainant has provided the evidence of trademark registrations in the mark "IV IR OPTICS" and the Hellma Materials GmbH signed a contract to acquire rights in the mark "PHOTONIC SENSE" from Photonic Sense GmbH on July 5, 2021.

The Panel notes that the “Hellma Materials GmbH” is a subsidiary or an affiliated company of the Complainant “Hellma GmbH & Co. KG”. A trademark owner’s affiliate such as a subsidiary of a parent or of a holding company is considered to have rights in a trademark under the UDRP for purposes of standing to file a complaint. See Section 1.4.1, “WIPO Overview 3.0.” The Complainant has provided the Panel with the relevant evidence of the right holder Hellma Materials GmbH’s authorization for the Complainant to file a UDRP complaint per the Panel’s Procedural Order. Therefore, the Panel finds that the Complainant has established rights in the marks “IV IR OPTICS” and “PHOTONIC SENSE” for purposes of standing to file a complaint per Policy paragraph 4(a)(i). The Panel finds that the disputed domain names are mere misspellings of the Complainant’s marks, and thus they are confusingly similar to the Complainant’s marks.

No rights or legitimate interests

Complainant must first make a prima facie case that Respondent lacks rights and legitimate interests in the disputed domain name under Policy paragraph 4(a)(ii), then the burden shifts to Respondent to show it does have rights or legitimate interests. See *Croatia Airlines d. d. v. Modern Empire Internet Ltd.*, WIPO Case No. D2003-0455 (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 domain name. If the Respondent fails to do so, the Complainant is deemed to have satisfied paragraph 4(a) (ii) of the UDRP). See also *Advanced International Marketing Corporation v. AA-1 Corp*, FA 780200 (FORUM November 2, 2011) (finding that a complainant must offer some evidence to make its prima facie case and satisfy Policy paragraph 4(a)(ii).

The Complainant contends that the Respondent has no rights or legitimate interests in respect of the disputed domain names. The Panel notes that the disputed domain names are not general terms, but reflect the Complainant’s names, trademarks, and services. There are no goods or services being offered by the Respondent. There is no obvious evidence that the Respondent is in any way commonly known as the disputed domain names or offers any services in this regard. The Complainant has provided the evidence supporting that the disputed domain names were used to commit fraud by conducting a phishing scheme. Phishing is not indicative of rights or legitimate interests. See *Emerson Electric Co. v. Adilcon Rocha*, FA 1735949 (Forum July 11, 2017) (finding that respondent’s attempt to pass off as complainant through emails does not constitute a bona fide offering of goods or services and, as such, respondent lacked rights or legitimate interests in the disputed domain name). Thus, the Panel finds that the use of the disputed domain names does not amount to a bona fide offering of goods or services or a legitimate non-commercial or fair use per Policy paragraph 4(c)(i) or (iii).

The Panel finds that the Complainant has made out a prima facie case that arises from the considerations above. All of these matters go to make out the prima facie case against the Respondent. As the Respondent has not filed a Response or attempted by any other means to rebut the prima facie case against it, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain names.

Bad faith

Paragraph 4(b) of the Policy provides a non-exclusive list of circumstances that evidence registration and use of a domain name in bad faith. Any one of the following is sufficient to support a finding of bad faith:

- (i) circumstances indicating that the respondent has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that the complainant, for valuable consideration in excess of the respondent’s documented out-of-pocket costs directly related to the domain name; or
- (ii) the respondent has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the 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 domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to its website or other online 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 Complainant contends that the Respondent has registered and is using the disputed domain names in bad faith. The Complainant asserts that the Respondent registered the domain names soon after the public announcement that the Complainant's affiliated company Hellma Materials GmbH signed a contract to take over the germanium crystal growth business which was bundled in Photonic Sense GmbH, and rebranded to IV-IR-Optics GmbH. The Complainant contends that the Respondent registered the disputed domain names in order to contact customers by mail to fraudulently inform them to change the banking accounts, which led to a company/bank account in the UK not affiliated in any way to the Hellma Group. The disputed domain names look very similar to the Complainant Group's own domain names <photonic-sense.com> and <iv-ir-optics.com>. The Complainant Group contacted the Registrars of the disputed domain names, and as a result the Registrars suspended the disputed domain names due to the Respondent's violations of the terms of the Registration Agreement.

The Panel notes that the registration of the disputed domain name <ivir-optics.com>(registered on October 30, 2021) predates the Complainant's mark "IV IR OPTICS" (UK trademark registration number UK00003777839 registered on July 29, 2022). The Panel observes that where a respondent registers a domain name before the complainant's trademark rights accrue, panels will not normally find bad faith on the part of the respondent. See Section 3.8.1. of "WIPO Overview 3.0." However, merely because a domain name is initially created by a registrant other than the respondent before a complainant's trademark rights accrue does not mean that a UDRP respondent cannot be found to have registered the domain name in bad faith. Irrespective of the original creation date, if a respondent acquires a domain name after the complainant's trademark rights accrue, the panel will look to the circumstances at the date the UDRP respondent itself acquired the domain. In certain limited circumstances where the facts of the case establish that the respondent's intent in registering the domain name was to unfairly capitalize on the complainant's nascent (typically as yet unregistered) trademark rights, panels have been prepared to find that the respondent has acted in bad faith. Such scenarios include registration of a domain name: "shortly before or after announcement of a corporate merger." See Section 3.8.2 of "WIPO Overview 3.0."

The Panel notes that the disputed domain name <ivir-optics.com> was registered on October 30, 2021; and the disputed domain name <photonic-senes.com> was registered on August 26, 2021 soon after the public announcement which was first made on July 6, 2021 that the Complainant's affiliated company Hellma Materials GmbH signed a contract to take over the germanium crystal growth business which was bundled in Photonic Sense GmbH, and rebranded to IV-IR-Optics GmbH. The Complainant has provided the Panel with copies of the relevant public announcement and the media coverage. Therefore, the Panel finds that the Respondent registered the disputed domain names in bad faith.

The Panel recalls that the Respondent contacted customers by mail to fraudulently inform them to change the banking accounts, which led to a company/bank account in the UK not affiliated in any way to the Complainant Group. The Complainant has provided evidence that the Complainant Group contacted the Registrars of the disputed domain names, and as a result the Registrars suspended the disputed domain names due to the Respondent's violations of the terms of the Registration Agreement. Therefore, the Panel finds that the Respondent registered and used the disputed domain names in bad faith.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **IVIR-OPTICS.COM**: Transferred
2. **PHOTONIC-SENES.COM**: Transferred

PANELLISTS

Name	Mr. Ho-Hyun Nahm, Esq.
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DATE OF PANEL DECISION 2022-09-10

Publish the Decision