Decision for dispute CAC-UDRP-103091

Case number	CAC-UDRP-103091
Time of filing	2020-06-05 11:20:01
Domain names	wehealthmedical.com

Case administrator

Name	Iveta Špiclová (Case admin)

Complainant

Organization	BIOFARMA
Organization	LES LABORATOIRES SERVIER

Complainant representative

Organization	IP TWINS

Respondent

Name	Zhang Chao Zhang Chao

OTHER LEGAL PROCEEDINGS

None of which the Panel is aware.

IDENTIFICATION OF RIGHTS

The Complainants rely upon various registered trade marks that comprise or incorporate the term "WEHEALTH". These include the following trade marks registered in the name of the First Complainant, Biofarma:

• French trade mark registration n° 4280290, dated June 15, 2016, for the standard character mark WEHEALTH covering products in classes 5, 9, 10, 35, 36, 41, 42 and 44;

• International trade mark registration n° 1329611, dated 5 October, 2016, for the standard character mark WEHEALTH covering products in classes 5, 9, 10 and 44. The registration designated a large number of territories, and the mark has proceeded to registration in significant number of these territories albeit in some cases only in part.

FACTUAL BACKGROUND

Both Complainants are part of the Servier pharmaceutical group. The group is active in 149 countries and employs more

than 22,000 people throughout the world.

The "WEHEALTH" division of the Servier group was launched in 2016 and focuses on establishing and developing partnerships between the group and startups in the domain of digital health. It has benefited from publicity in the form of various press articles. On 20 June 2017, the Servier group launched a roadshow of medical health business plans in Beijing, China, in conjunction with DayDayUp, a Chinese innovation service company.

In addition to the "WEHEALTH" marks registered in the name of the First Complainant already identified above, the Second Complainant, Le Laboratoires Servier SAS, also owns various registered trade marks taking the form "WEHEALTH BY SERVIER".

The First Complainant is the registrant of the domain names <wehealth.fr>, registered on 8 June 2016. It is also the registrant of the domain name <wehealth.com>, but when this was acquired is not clear and it does not appear to be presently in use. The Complainants' activities instead appear to be promoted on a website operating from the domain name <wehealth-digitalmedicine.com>.

The disputed domain name (the "Domain Name") was first registered on 23 April 2020.

Subsequent to registration the Domain Name was used for what appeared to be a web page for a magazine with the name “Umami Food Magazine”. However, this was not a website for a real magazine, but a Drupal template (Drupal being an open-source Content Management System). This was reflected in the text of the bottom of the home page of the website, which stated "Umami Magazine & Umami Publications is a fictional magazine and publisher for illustrative purposes only".

Currently, a different website operates from the Domain Name. It purports to offer health and medical services under the name "We Health Medical". However, the website is clearly incomplete, with little content and an empty page in respect of "Recipes". Further, the website does not disclose who is "We Health Medical" or where it is based, and the contact page takes the form of a web form inviting "Website feedback". The timing of certain "articles" on that website suggests that it was created after the Complainants commenced these proceedings.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS:

COMPLAINANT:

The Complaint describe the Complainants' business and marks. It claims that the Domain Name wholly incorporates the Complainants' registered trade marks and claims that this is sufficient to establish identity or confusing similarity for the purposes of the Policy. It also contends that the addition of the term "medical" in the Domain Name does not lessen the "inevitable confusion" of the Domain Name with its trade mark.

The Complainants further contend that although the lack of information available on the WHOIS database has made it difficult to make enquiries, such enquiries as have been undertaken suggest that the Respondent has no right or legitimate interest in the Domain Name. In this respect reference is also made to the use of a Drupal template, which is said to demonstrate that the Domain Name is not being used in connection with a bona fide offering of goods or services. The Complainants also contend that they have put forward a prima facie case of lack of rights or legitimate interests and that consequentially the burden of proof in this respect has passed to the Respondent.

So far as bad faith is concerned, the Complainants allege that the Servier group is so widely well-known that it is very unlikely that the Respondent were not aware of the rights of the Complainants in the term WEHEALTH. They also rely upon press releases, communiqués and news articles in respect of the Complainants' use of the WEHEALTH name and the launch of their roadshow in China, all of which are said to predate the registration of the Domain Name.

Further, the Complainants contend that the term WEHEALTH is a fanciful term. Although they acknowledge that "we" and

"health" are ordinary English words, the combination of those words makes no grammatical sense. Accordingly, the Complainants contend that the second level of the Domain Name should be read “Wehealth Medical” and that the Respondent could not have registered the Domain Name due to its dictionary meaning and/or its supposed value as a generic term.

Instead, it is alleged that the Domain Name was registered primarily for the purpose of selling it to the Complainants for valuable consideration in excess of out-of-pocket costs directly related to the Domain Name. The Complainants also claim that there is no possible way in which the Respondent could use the Domain Name in connection with a bona fide offering of products or services.

RESPONDENT:

The Response in this case is problematic. It is difficult to read this as a coherent document and for that reason the Czech Arbitration Court (the "Provider") initially concluded that it was not administratively compliant (a point that is explored in greater detail in the procedural factors section of this decision).

Nevertheless, it does contain the statement "we here are china .. we china people never heard about your 'we health' or something". Although the English used here is broken, the Panel nevertheless understands this to be a contention that the Respondent was not aware of the Complainants or their rights prior to the commencement of these proceedings and therefore was unaware of the Complainants or their rights at the time registration.

The rest of the "Response" comprised a series of "Additional Explanations" taken from a Response template. This appears to be no more than a series of headings without further explanation. However, it does appear that an attempt has been made by way of the selection of these headings to set out a series of reasons as to why the Complaint should not succeed, including an allegation that the Complainants have failed to prove their case.

RIGHTS

The Panel accepts that the First Complainant has registered trade mark rights in the term "Wehealth". It also accepts that the only sensible readings of the Domain Name are as "We Health Medical" or "Wehealth Medical", in combination with the ".com", top level domain.

In order to satisfy the first element of the Policy it is usually sufficient for a complainant to show that the relevant mark is “recognizable with the disputed domain name”; as to which see section 1.7 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“WIPO Overview 3.0”). This is clearly so in this case.

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

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainants have taken the position that none of the examples of a right or legitimate interest set out in the Policy appear to apply in this case and assert that the Respondent's registration and holding of the Domain Name was not authorised by them. As a consequence, the burden of proof is said to pass to the Respondent in showing a right or legitimate interest in the Domain Name.

The approach of the Complainants here is a perfectly conventional one, has been adopted in a very large number of cases under the Policy and is endorsed by paragraph 2.1 of the WIPO Overview 3.0. Nevertheless, it is an approach that the Panel prefers to avoid if at all possible. More often than not a panel is able to form a view as to why the domain name was registered and from this reach a conclusion as to whether a right or legitimate interest exists. That is so even if that view is only that on the balance of probabilities the domain name is being registered and held for the purpose of taking some illegitimate advantage of the reputation of a complaint's marks, but the exact way in which that will be achieved is unclear. That itself is evidence that no right or legitimate interest exists.

Given this, the Panel is of the view that wherever possible a panel should grasp the nettle, and form a view on the material before it as to what is the purpose of the registration and from that then reach conclusions as to whether rights or legitimate interest, rather than resort to the procedural device of deciding the matter on who bears the burden of proof.

In the present case, for the reasons that are set out in the context of considering bad faith below, the Panel has concluded that the Domain Name was registered to take unfair advantage of the Complaints' business and marks and not because of any generic or descriptive meaning of the words in the Domain Name. There is no right or legitimate interest in holding a domain name for such a purpose and this constitutes positive evidence that no such right or legitimate interests exist.

Accordingly, the Complainants have 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

As has already been addressed earlier in this decision, the Response is problematic, but the Panel understands it to include an assertion that the Respondent was not aware of the Complainants or their rights at the time registration of the Domain Name. Were this true, it would most likely provide a complete answer to the Complaint. Leaving aside the complications that can arise in some cases where there are automated or bulk registrations (and there is no evidence of this being relevant in this case), if the Domain Name was registered without knowledge of the Complainants activities, there cannot have been registration in bad faith.

However, the Panel rejects the Respondent's claims and holds that the Domain Name was registered with knowledge of the Complainant business under the "Wehealth" name. The Panel has not reached that conclusion on the basis of the Complainants assertions as to the size and extent of the Servier group. What is relevant here is not the size of the Servier business as a whole, but the extent of the activities under the "Wehealth" name, and, although the Complainants have supplied copes of multiple "Wehealth" press releases, the extent of the activities under that name is far from clear from the Complainant. Nevertheless, the Complainants have satisfied the Panel by way of the provision of press articles and the like that they have engaged in substantial activities under that name prior to the registration of the Domain Name and that this has included activities in China to some degree since July 2017.

Further, there is the form of the Complainant's trade mark and the Domain Name. The Panel accepts the Complainants' contention that although the words "we" and "health" are ordinary English words, the combination of these terms makes no grammatical sense. The term "We Health Medical", similarly makes little or no sense. Therefore, in the absence of any explanation from the Respondent as to why the term was chosen, the Panel accepts that it is most likely that the Domain Name was registered both with the knowledge of and with the intention of referring to the Complainants' business and marks.

The exactly purpose for which the Domain Name was registered and held, is not clear. The Panel doubts that there is any genuine business being operated by the Respondent under the name "We Health Medical" in China, in light of the initial use of the Domain Name to display a Drupal template. Further the most recent website operating from the Domain Name appears on its face to be contrived and not to relate to any genuine business.

The Complainants contend that the real and primary reason for the registration in this case is with a view to sale to the Complainants or their competitors for more than out of pocket expenses. That may be so, but ultimately the Panel does not need to conclude that this is so to find in the Complainants' favour. The Panel is instead satisfied that the form and timing of the registration, and the way in which the Domain Name has been used since registration, that the Respondent has registered and held it the intention of taking unfair advantage of the reputation of the Complainants' marks for financial advantage. That is sufficient, for a finding of bad faith registration and use (see, for example, Match.com, LP v. Bill Zag and NWLAWS.ORG, WIPO Case No. D2004-0230).

Accordingly, the Complainants have, to the satisfaction of the Panel, shown 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).

The Panel is satisfied that there no reason why it would be procedurally inappropriate to provide a decision. Nevertheless, it is necessary to address the status of the Response in this case and the procedural consequences that follow.

Initially, the Provider concluded that the Response was not administratively complaint. The Panel was not certain that this was the case and believed that this in turn raised a number of important questions including: (a) whether a Panel can and should take into account a purported response that the Provider has deemed to be administratively non-compliant; (b) whether it is appropriate for a Panel to consider issues of administrative compliance or whether these are issues that that are solely within the competence of the Provider; and (c) what constitutes a Response “in administrative compliance with Art. 5 of the Rules” for the purposes of paragraph 1(a) of Annex A of the Supplemental Rules.

As far as the Panel is aware, these issues have not previously been considered by any panel and the Panel concluded that it was both convenient and necessary for the Panel to do so in this case. The Panel, therefore, considered it appropriate having regard the complexity of these proceedings to make a determination under paragraph 1 (b) of Annex A of the Supplemental Rules. This notification was made on 17 June 2020 and was communicated to the Complainants on 19 June 2020, with the Complainants paying the relevant further fee on 25 June 2020.

The Rules expressly state that the Provider should check a Complaint for administrative compliance (paragraphs 4(c) to (e)). This is an important part of the Provider's role, since if the Complaint is not administratively compliant and that non-compliance is not corrected within 5 days, the Complaint is deemed withdrawn. This is also supplemented by section 5 of the CAC's Supplemental rules providing a mechanism for challenging the Provider's determination of non-compliance, and which involves the appointment of a single person panel to decide that issue. (Although this relevant provision refers to Article 4(b) of the Rules and it appears that this is a reference back to a pre-existing version of the Rules that applied to Complaints submitted up to 30 July 2015).

In contrast, there is no provision in the Rules for checking the administrative compliance of the Response. It is instead a process that appears implicit in the CAC Supplemental Rules, being mentioned in two places. One is simply a reference in the list of forms in Annex B to form "A12 Administrative Compliance Checklist - Response". The other is to be found at paragraph 1 at the end of Annex A of the CAC Supplemental Rules, which sets out the fees payable in CAC proceedings. This states as follows:

"1. The Complainant must pay the Additional UDRP Fees within 5 days of notification by the Provider or, after its appointment, the Panel when (a) a Response is filed that is in administrative compliance with Art. 5 of the Rules; ..."

So, essentially, the purpose of checking administrative compliance of a Response appears to be to assess whether an additional fee is payable by the Complainant.

Further, it seems that a conclusion on the part of the Provider that a response is non-compliant does not prevent a panel from taking its contents into account for the purposes of its decision. The response remains accessible on the Provider's system and can still be viewed by the panel (as happened in the present case). Further, there is nothing in the Policy, the Rules or Supplemental Rules that would stop the panel from considering that document. It could, therefore, be argued that the Provider's determination in this regard is not something that the panel should or needs to consider or second guess.

However, ultimately the Panel is of the view that it is appropriate for the Panel to consider whether the reasons given for non-compliance are truly administrative in nature or whether they stray into consideration of the substantive validity of any response.

In this respect, paragraph 10(d) of the Rules makes it clear that it is the Panel that "shall determine the admissibility, relevance, materiality and weight of the evidence". Significant here is that the term "evidence" relates not just to material exhibited to a complaint or response, but also to assertions made in the complaint or response itself, particularly when those assertions supported by an appropriate statement of truth in accordance with paragraph 5(c)(viii) or 3(b)(xiii) of the Rules

(see, for example, paragraph 6.22 of the decision in Express Scripts, Inc. v. Windgather Investments Ltd. / Mr. Cartwright WIPO Case No. D2007-0267).

Further, paragraph 4 of the Supplemental Rules makes it clear that "[t]he Case Administrator [appointed by the Provider] may provide administrative assistance to the Panel or Panellist(s), but shall have no authority to decide matters of a substantive nature concerning the dispute".

Therefore, it is simply wrong in principle for a provider to express any view upon whether a response is a good substantive response to points made in a complaint. That is the sole preserve of the panel. It is, therefore, unhelpful for a provider to stray into these realms, even if a panel could ignore a provider's conclusions in that regard.

Further, there is a considerable number of UDRP cases where panels have sought fit to comment upon (and even suggest that ICANN further investigate) where there appears to be non-compliance with either the wording or the spirit of the Policy or Rules by an entity who is not a party to proceedings but has obligations and responsibilities so far as the operation of the UDRP is concerned. In this respect see the analysis and the lengthy list of cases cited in LEGO Juris A/S v. Whois Privacy Protection Service, Inc. / Domains Secured, LLC WIPO Case No. D2011-1857, where questions arose as to the conduct of registrars, who have their own distinct and important role in the operation of the UDRP. There seems to be no reason why providers should be in any different position in this respect.

Turning to the specific circumstances of the present case, the reasons why the Provider concluded that the Response was not administratively compliant were set out in its Notification of Respondent's Default dated 28 June 2020. In essence this contended that there had been failure to comply with paragraphs 5(c)(i) and 5(c)(ix) of the Rules. These state as follows:

"5(c)(i) Respond specifically to the statements and allegations contained in the complaint and include any and all bases for the Respondent (domain-name holder) to retain registration and use of the disputed domain name (This portion of the response shall comply with any word or page limit set forth in the Provider's Supplemental Rules.)" and

"5(c)(ix) Annex any documentary or other evidence upon which the Respondent relies, together with a schedule indexing such documents."

Save perhaps for compliance with the relevant word or page limit (which is not an issue in this case), the Panel is not convinced that compliance with 5(c)(i) is an administrative issue at all. The Panel can see why if the response is mere gibberish (for example a random string of letters) it could be said that this is not really a response and should be rejected as such. But where there is text that could conceivably be read as responding to the complaint, then that is something that should be left to a panel as part of its substantive review and is not for the provider to take a view and opine upon that issue under the guise of assessment of administrative compliance.

The Panel is of the view that there was material in the Response in the present case that was more than mere gibberish. Albeit poorly expressed, there was an allegation of lack of knowledge that if correct might well have provided a complete answer to the Complaint. Further, although an inadvisable approach that rarely succeeds, it is open to a respondent to assert that the Complainant has failed to prove its case and this also seemed to being alleged in the Response (albeit without supporting reasoning).

For reasons that the Panel has already set out, the claim of lack of knowledge has been rejected. The Panel has also concluded that the Complainant has proved its case. But these are matters for the Panel and not issues to have been pre-judged by the Provider.

Paragraph 5(c)(ix) also takes matters no further, since although annexing material is clearly advisable for a respondent in that it lends weight to assertions in a response, a response cannot sensibly be said to be non-compliant if it does not do so. Take the position where, for example, a respondent contends that the complaint should fail because the marks relied upon post date the registration of the domain name. That is unlikely to require the annexing of material and it would be absurd to suggest that the response is non-compliant in any serious or important sense as a result.

This analysis is also supported by the content of the Provider's own website and in particular the page of the website that sets out a "a checklist of issues which must be addressed in the Response so that it is administratively compliant". As far as the Panel can tell the checklist has no formal status under the Supplemental Rules, but it does provide what appears to the Panel to be a helpful and at first glance well founded list of ten requirements for such compliance. Significant for present purposes is that compliance with paragraphs 5(c)(i) and 5(c)(ix) are not included in that list.

Accordingly, the Panel concludes that the reasons provided by the Provider for administrative non-compliance are not made out in this case.

However, the Panel would also observe that the practical consequence of it having made a determination under paragraph 1 (b) of Annex A of the Supplemental Rules is that at least so far as fees are concerned, the Complainant is now in no better, and in no worse, a position than would have been the case if the Provider had held that the Response was administratively compliant.

Finally, the Panel wishes to make it quite clear that although it has concluded that the Provider made the wrong determination in this case, it nevertheless has a great deal of sympathy with the position of the Provider. In broad terms the form of the Response was such that although not gibberish, it was of very poor quality and what the Panel read as providing a response was hidden among material that did not. In large part, the Respondent brought the Panel’s determination on itself.

PRINCIPAL REASONS FOR THE DECISION

The First Complaint's marks were clearly recognisable in the Domain Name and accordingly the Complainants had satisfied the requirements of paragraph 4(a)(i) of the Policy.

The Panel also concluded from the facts that the Complainants had been active for some time in China prior to registration of the Domain Name, the unusual and ungrammatical combination of the words "We" and "Health" in the Complainant's mark and in the Domain Name and the way that the Domain Name had been used for websites that did not relate to any real business, that it was more likely than not that the Complainant had registered and was holding the Domain Name to take some unfair advantage of the reputation of the Complainants' marks with a view to commercial gain. In doing so the Panel rejected a contention in the Response that appeared to amount to an assertion that the Respondent did not know of the Complainants or their marks when the Domain Name was registered. That provided evidence of a lack of rights or legitimate interests and demonstrated that the Domain Name had been registered and was being held in bad faith. Accordingly, the Complainants had satisfied the requirements of paragraph 4(a)(ii) and (iii) of the Policy.

In this case the Provider had initially held that the Response in this case was not administratively compliant in not complying with paragraphs 5(c)(i) and 5(c)(ix) of the Rules. The Panel was of the view that this was not correct, and that in so doing the Provider had illegitimately strayed into a realm that was the sole preserve of the Panel. The Panel also concluded that it was legitimate and appropriate for it to set out its reasons as to why this was the case in this decision.

However, the Panel also observed that as it had made a determination in this case under paragraph 1 (b) of Annex A of the Supplemental Rules, the Complainant was in no better and in no worse a position than it would have been if the Provider had held that the Response was administratively compliant.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **WEHEALTHMEDICAL.COM**: Transferred

PANELLISTS

Name	Matthew Harris

DATE OF PANEL DECISION 2020-06-29

Publish the Decision