Decision for dispute CAC-UDRP-106674

Case number	CAC-UDRP-106674
Time of filing	2024-07-15 09:50:46
Domain names	lostmarycanada.com, lostmaryargentina.com, lostmaryaustralia.com, lostmaryaustria.com, lostmarybelgique.com, lostmarybulgaria.com, lostmarycolombia.com, lostmarycyprus.com, lostmarycz.com, lostmarydanmark.com, lostmarydeutschland.com, lostmaryfrance.com, lostmarygeorgia.com, lostmarygreece.com, lostmaryhrvatska.com, lostmaryireland.com, lostmaryisrael.com, lostmaryjapan.com, lostmarykuwait.com, lostmarynederland.com, lostmaryhungary.com, lostmarylatvija.com, lostmarylietuva.com, lostmarymexico.com, lostmarynorge.com, lostmarynz.com, lostmaryperu.com, lostmarypolska.com, lostmaryportugal.com, lostmaryromania.com, lostmaryrussia.com, lostmaryschweiz.com, lostmarysuisse.com, lostmaryslovenija.com, lostmaryslovensko.com, lostmarysouthafrica.com, lostmarysrbija.com, lostmaryspain.com, lostmarysuomi.com, lostmarysverige.com, lostmaryuae.com, lostmaryuruguay.com, lostmaryitalia.com, lostmarychile.com, lostmaryeesti.com, lostmarybrasil.net, lostmaryuk.net, lostmarybelgie.com, lostmaryturkey.com

Case administrator

Name	Olga Slanařová (Case admin)

Complainant

Organization	DASHING JOYS LIMITED
Organization	Imiracle(Shenzhen)Technology Co.,Ltd.

Complainant representative

Organization	Shenzhen Chofn Intellectual Property Agency Co, LTD.

Respondent

Name	Zhang Qiang

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 first Complainant is the owner of the following trade marks, which were registered long before the registration of the disputed domain names:

International Registration Trade Mark No. 1616521A for LOST MARY, registered on 4 August 2021, designating goods and services in the International Class 34.

European Union Trade Mark No. 018937635 for LOST MARY, registered on 16 October 2023, designating goods and services in international classes 10, 32.

United Kingdom Trade Mark No. UK00003967951 for LOST MARY, registered on 16 October 2023, designating goods and services in international classes 10, 32.

FACTUAL BACKGROUND

DASHING JOYS LIMITED, the first Complainant, was established in 2023. Imiracle (Shenzhen) Technology Co., Ltd., the second Complainant, was established in 2017. Due to the adjustment of the company's business strategy, the first Complainant is now taking over the main business and trademark rights. The first Complainant and the second Complainant will jointly be referred to as "the Complainants".

Launched in 2022, LOST MARY is the sister brand of the famous disposable e-cigarette brand ELF BAR, which is designed and produced by the original ELF BAR team. The LOST MARY range consists of disposable vapes that, despite only being launched in 2022, have become one of the most popular brands on the market. LOST MARY offers a wide range of flavors based on smokers' preferences and is constantly updating its products based on market feedback. LOST MARY has performed strongly in the disposable e-cigarette market by utilizing readily available e-cigarette distribution channels. As of today, LOST MARY has a commercial presence in more than 50 markets around the world, serving more than 10 million users and more than 100,000 retail stores worldwide.

The UK is the second largest consumer market for e-cigarettes in the world, and LOST MARY is one of the top-selling e-cigarette brands in the UK. The Lost Mary BM600 disposable vapes range was launched in the UK in April 2022 and was one of the very first 'box-style' disposables to enter the market. Upon launch, the BM600 quickly became popular with existing ELF BAR users and e-cigarette users who were new to the brand. Following its launch, LOST MARY added to the range by releasing a more traditional pen-style disposable range as well as a modern looking and slightly wider proportioned QM600 vape device range. As of the end of 2023, according to data from Nielsen IQ, ELFBAR and LOST MARY e-cigarette sales account for over half of the disposable e-cigarette market in the UK. Both of these brands are owned by the Complainants. According to TIKTOK data, the three official videos on the official LOST MARY UK account have accumulated over 240,000 views and has millions of views on YouTube. The data provided by similarweb shows that the official website of the LOST MARY brand had about 94,600 visits in November 2023, with visitors coming from the United States, the United Kingdom, France, China, etc.

The Complainants allege that LOST MARY products are currently available for sale on a number of online e-cigarette retail platforms in the UK. In the United States, the Complainants currently have a large number of offline shops, the addresses of which can be found on the Complainant's official website.

Based on the above, it can be seen that the LOST MARY brand has a high level of popularity and influence as the core trademark of the Complainants, LOST MARY, has gained high distinctiveness through extensive publicity and use. When searching LOST MARY on Google, all of the results point to the Complainant.

The LOST MARY trademarks were registered prior to the disputed domain name.

PARTIES CONTENTIONS

The Complainants contend that the requirements of the Policy have been met and that the disputed domain names should be transferred.
No administratively compliant Response has been filed.

RIGHTS

The Complainants have, 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 Complainants have, 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 Complainants have, to the satisfaction of the Panel, shown the disputed domain names have 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

In view of the Respondent's failure to submit a response, the Panel shall decide this matter on the basis of the Complainants' 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.

According to Paragraph 4(a) of the Policy, a Complainant is required to prove each of the following three elements to obtain an order that the disputed domain name should be transferred or cancelled:

(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 in respect of the disputed domain name; and

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

The Panel has examined the evidence available to it and has come to the following conclusion concerning the satisfaction of the three elements of paragraph 4(a) of the Policy in these proceedings:

RIGHTS

The Complainants have established rights in the name LOST MARY. The disputed domain names all include this name identically together with a reference to a geographical location and the gTLD .COM. Thus, the structure of every single one of the disputed domain names is:

<LOSTMARYGEOGRAPHICREFERENCE.COM>

This applies to all of the disputed domain names:

<lostmarycanada.com>, <lostmaryargentina.com>, <lostmaryaustralia.com>, <lostmaryaustria.com>, <lostmarybelgique.com>, <lostmarybulgaria.com>, <lostmarycolombia.com>, <lostmarycyprus.com, <lostmarycz.com, <lostmarydanmark.com>, <lostmarydeutschland.com>, <lostmaryfrance.com>, <lostmarygeorgia.com>, <lostmarygreece.com>, <lostmaryhrvatska.com>, <lostmaryireland.com>, <lostmaryisrael.com>, <lostmaryjapan.com>, <lostmarykuwait.com>, <lostmarynederland.com>, <lostmaryhungary.com>, <lostmarylatvija.com>, <lostmarylietuva.com>, <lostmarymexico.com>, <lostmarynorge.com>, <lostmarynz.com>, <lostmaryperu.com>, <lostmarypolska.com>, <lostmaryportugal.com>, <lostmaryromania.com>, <lostmaryrussia.com>, <lostmaryschweiz.com>, <lostmarysuisse.com>, <lostmaryslovenija.com>, <lostmaryslovensko.com>, <lostmarysouthafrica.com>, <lostmarysrbija.com>, <lostmaryspain.com>, <lostmarysuomi.com>, <lostmarysverige.com>, <lostmaryuae.com>, <lostmaryuruguay.com>, <lostmaryitalia.com>, <lostmarychile.com>, <lostmaryeesti.com>, <lostmarybrasil.net <lostmaryuk.net <lostmarybelgie.com> and <lostmaryturkey.com>

The only variant is the fact that the language of the geographic reference is not always English but in some cases the language of the country concerned.

All of these disputed domain names are found to be confusingly similar to the Complainants' trademarks. This finding is based on the settled practice in evaluating the existence of a likelihood of confusion of:

1. a) disregarding the top-level suffix in the domain names (i.e. ".COM" in this case) in the comparison; and

   b) holding that the addition of generic or generally non-distinctive elements such as geographical references to the protected trademark (in this case the names of countries) as an indication of a country in which products may or may

not be made available for sale by the Complainants would by no means be considered sufficient to distinguish a domain name from a trademark.

On the contrary, the one distinctive feature shared by all these domain names is the trademark in which the Complainants have established earlier rights, i.e. LOST MARY. The fact that there is no space between the words “LOST” and “MARY” in the disputed domain names does not serve to differentiate the signs. On the contrary, the omission of such spaces between words is common practice in domain names.

Therefore, the Panel concludes that the Complainants have satisfied the requirement under paragraph 4(a)(i) of the Policy.

NO RIGHTS OR LEGITIMATE INTERESTS

The onus to make out a prima facie case that the respondent lacks rights or legitimate interests is placed on the complainants. However, once such a prima facie case is made, it is the respondent's burden to demonstrate rights or legitimate interests in the disputed domain name. If the respondent fails to do so, the complainants are deemed to have satisfied paragraph 4(a)(ii) of the Policy (see e.g. WIPO case no. D2003-0455, Croatia Airlines d.d. v. Modern Empire Internet Ltd.).

The Respondent has no rights or legitimate interests in the disputed domain names. The Complainants have not authorized the use of the LOST MARY trademark, and the Respondent is not commonly known under any of the disputed domain names, respectively their common distinctive element LOST MARY.

The reputation of the LOST MARY trademarks is accepted by the Panel. The Respondent is using the disputed domain names which are currently being or have been redirected by the Respondent to websites with similar layouts where the Complainants’ trademark LOST MARY is used to attract customers. Additionally, the Respondent appears to have misappropriated copyrighted images from the Complainants’ website.

It is evident that the Respondent's use cannot be considered either a bona fide offering of goods or services or a legitimate non-commercial or fair use of the disputed domain names. On the contrary, this conduct clearly demonstrates that Respondent did not intend to use the disputed domain names in connection with any legitimate purpose.

Furthermore, such use of the disputed domain names cannot be considered a legitimate non-commercial or fair use without intent for commercial gain, because the Respondent is clearly attempting to gain profit from redirecting internet users to websites not connected to the complainants. It is the Respondent’s intention to benefit from the Complainants’ trademarks’ reputation to disrupt the Complainants’ business and to illegitimately trade on the Complainants’ trademark’s fame for commercial gain.

In summary, the Panel concludes that the Respondent did not establish any rights or legitimate interest in the disputed domain names (within the meaning of paragraph 4(a)(ii) of the Policy). The Complainants have therefore also satisfied the requirement under paragraph 4(a)(ii) of the Policy.

BAD FAITH

The Panel finds that the Complainants have established that the disputed domain names were registered by the Respondent and are being used by the Respondent in bad faith. For this purpose, the Complainants have successfully put forward prima facie evidence that the Respondent has not made use, or demonstrable preparations to use, of either the disputed domain names 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 names. The Respondent is also in no way commonly known under the disputed domain names. This prima facie evidence was not challenged by the Respondent.

The Complainants’ trademark LOST MARY is distinctive and well known in numerous countries as a result of extensive marketing activities. The fact that the Respondent has registered more than forty domain names with a distinctive element that is identical to the earlier rights indicates that the Respondent had knowledge of the Complainants’ trademarks at the time of registration of the disputed domain names. No other reason for registering a large number of combinations of the trademark of the Complainants together with geographic terms appears even remotely feasible. Any, even the most basic Google search in respect of the wording LOST MARY would have yielded obvious references to the Complainants’ trademark.

The disputed domain names are not used for any bona fide offerings. Instead, by using all of the disputed domain names for a single purpose, the Respondent has intentionally attempted to attract, for commercial gain, internet users to his websites, by creating a likelihood of confusion with the Complainants' trademarks as to the source, sponsorship, affiliation, or endorsement of his websites. The disputed domain names are or were all connected to websites replicating the names and trademarks of the Complainants. Therefore, Internet users searching for information on the Complainants’ goods are confusingly and purposefully led to the Respondent’s websites.

The Respondent has intentionally attempted to attract, for commercial gain, internet users to its websites, by creating a likelihood of confusion with the Complainants’ trademarks. The Respondent, through the use of misleading information on its websites, and copying the trademark and product images of the Complainants' official LOST MARY websites, is passing itself off as the authorized distributor of LOST MARY products in numerous locations, which it is in fact not.

The Panel is convinced that the disputed domain names were registered in full awareness of the Complainants' earlier rights and are being used for attracting internet users to its websites for commercial gain by creating a likelihood of confusion with the Complainants' marks.

The Panel therefore concludes that the Respondent has registered and is using the disputed domain names in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy). The Complainants have therefore also satisfied the requirement under 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. **lostmarycanada.com**: Transferred
2. **lostmaryargentina.com**: Transferred
3. **lostmaryaustralia.com**: Transferred
4. **lostmaryaustria.com**: Transferred
5. **lostmarybelgique.com**: Transferred
6. **lostmarybulgaria.com**: Transferred
7. **lostmarycolombia.com**: Transferred
8. **lostmarycyprus.com**: Transferred
9. **lostmarycz.com**: Transferred
10. **lostmarydanmark.com**: Transferred
11. **lostmarydeutschland.com**: Transferred
12. **lostmaryfrance.com**: Transferred
13. **lostmarygeorgia.com**: Transferred
14. **lostmarygreece.com**: Transferred
15. **lostmaryhrvatska.com**: Transferred
16. **lostmaryireland.com**: Transferred
17. **lostmaryisrael.com**: Transferred
18. **lostmaryjapan.com**: Transferred
19. **lostmarykuwait.com**: Transferred
20. **lostmarynederland.com**: Transferred
21. **lostmaryhungary.com**: Transferred
22. **lostmarylatvija.com**: Transferred
23. **lostmarylietuva.com**: Transferred
24. **lostmarymexico.com**: Transferred
25. **lostmarynorge.com**: Transferred
26. **lostmarynz.com**: Transferred
27. **lostmaryperu.com**: Transferred
28. **lostmarypolska.com**: Transferred
29. **lostmaryportugal.com**: Transferred
30. **lostmaryromania.com**: Transferred
31. **lostmaryrussia.com**: Transferred
32. **lostmaryschweiz.com**: Transferred
33. **lostmarysuisse.com**: Transferred
34. **lostmaryslovenija.com**: Transferred
35. **lostmaryslovensko.com**: Transferred
36. **lostmarysouthafrica.com**: Transferred
37. **lostmarysrbija.com**: Transferred
38. **lostmaryspain.com**: Transferred
39. **lostmarysuomi.com**: Transferred
40. **lostmarysverige.com**: Transferred

41. **lostmaryuae.com**: Transferred
42. **lostmaryuruguay.com**: Transferred
43. **lostmaryitalia.com**: Transferred
44. **lostmarychile.com**: Transferred
45. **lostmaryeesti.com**: Transferred
46. **lostmarybrasil.net**: Transferred
47. **lostmaryuk.net**: Transferred
48. **lostmarybelgie.com**: Transferred
49. **lostmaryturkey.com**: Transferred

PANELLISTS

Name	**Udo Pfleghar B.A. (Melb.)**

DATE OF PANEL DECISION 2024-08-21

Publish the Decision