

ADMINISTRATIVE PANEL DECISION

Nicoventures Holdings Limited v. 张金山 (zhang jin shan)
Case No. D2022-4541

1. The Parties

Complainant is Nicoventures Holdings Limited, United Kingdom (“UK”), represented by Demys Limited, UK.

Respondent is 张金山 (zhang jin shan), China.

2. The Domain Name and Registrar

The disputed domain name <vusepods.com> is registered with Alibaba Cloud Computing Ltd. d/b/a HiChina (www.net.cn) (the “Registrar”).

3. Procedural History

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the “Center”) on November 29, 2022. On November 29, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 30, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to Complainant on December 7, 2022, providing the registrant and contact information disclosed by the Registrar, and inviting Complainant to submit an amendment to the Complaint. Complainant filed an amended Complaint in English on December 8, 2022.

On December 7, 2022, the Center transmitted an email communication to the Parties in English and Chinese regarding the language of the proceeding. On December 8, 2022, Complainant confirmed its request that English be the language of the proceeding. Respondent did not comment on the language of the proceeding.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified Respondent in English and Chinese of the Complaint, and the proceedings commenced on December 14, 2022. In accordance with the

Rules, paragraph 5, the due date for Response was January 3, 2023. Respondent did not submit any response. Accordingly, the Center notified Respondent's default on January 5, 2023.

The Center appointed Yijun Tian as the sole panelist in this matter on January 20, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

A. Complainant

Complainant, Nicoventures Holdings Limited, is a company incorporated in London, UK. It is part of the British American Tobacco group of companies ("BAT"), which is a multi-national manufacturing company of tobacco and related products. BAT was founded in 1902 and now operates in around 160 countries and employs over 50,000 staff. BAT has a primary listing on the London Stock Exchange and is a constituent of the Financial Times Stock Exchange ("FTSE") 100 Index. In 2021, it reported revenues of GBP 25.684 billion (Annex 5 to the Complaint).

Complainant has exclusive rights in the VUSE and VUSE related marks. Complainant is the exclusive owner of numerous VUSE trademarks worldwide, including the UK trademark registered on November 27, 2012 (registration number UK00910885994), and the European Union ("EU") trademark registered on the same day (registration number 010885994).

B. Respondent

Respondent is 张金山 (zhang jin shan), reportedly based in China. The disputed domain name was registered on April 18, 2022. According to the Complaint and relevant evidence provided by Complainant, the disputed domain name used to resolve to a website purporting to be an authorized online store for Complainant's products. The disputed domain name is currently resolving to the same website in English, however, the original contents on the front page have been removed.¹

5. Parties' Contentions

A. Complainant

Complainant contends that the disputed domain name is confusingly similar to the VUSE trademark. Simply adding the term "pods". Pods are integral part of non-combustible vaping products, such as those sold under Complainant's VUSE brand, and the use of such term in tandem with the VUSE trademark does not prevent the finding of confusing similarity. By contrast, it actually increases the likelihood of confusion.

Complainant contends that Respondent has no rights or legitimate interests in respect of the disputed domain name.

Complainant contends that Respondent has registered and used the disputed domain name in bad faith.

Complainant requests that the disputed domain name be transferred to Complainant.

¹ Click the "Shop" tab and a webpage selling VUSE-branded products will show up. See "<https://www.vusepods.com/VUSE-Compatible-Pods-c686927.html>".

B. Respondent

Respondent did not reply to Complainant's contentions.

6. Discussion and Findings

6.1. Language of the Proceeding

The language of the Registration Agreement for the disputed domain name is Chinese. Pursuant to the Rules, paragraph 11(a), in the absence of an agreement between the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding. From the evidence presented on the record, no agreement appears to have been entered into between Complainant and Respondent to the effect that the language of the proceeding should be English. Complainant filed initially its Complaint in English, and has requested that English be the language of the proceeding for the following main reasons:

- (a) the disputed domain name incorporates Complainant's VUSE mark along the English dictionary word "pods";
- (b) the disputed domain name is registered in the Top-Level Domain ("gTLD") ".com" rather than ".cn", which is indicative of Respondent's intent to target English-speaking Internet users;
- (c) the website associated with the disputed domain name is in English and the only available payment currency is USD. In all these circumstances, it is more likely than not that Respondent is familiar with the English language; and
- (d) Complainant's authorized representative's working language is English. Complainant will be put to great expense and inconvenience to translate its submissions to a language other than English.

Respondent did not make any submissions with respect to the language of the proceeding and did not object to the use of English as the language of the proceeding.

Paragraph 11(a) of the Rules allows the panel to determine the language of the proceeding having regard to all the circumstances. In particular, it is established practice to take paragraphs 10(b) and (c) of the Rules into consideration for the purpose of determining the language of the proceeding. In other words, it is important to ensure fairness to the parties and the maintenance of an inexpensive and expeditious avenue for resolving domain name disputes (*Whirlpool Corporation, Whirlpool Properties, Inc. v. Hui'erpu (HK) electrical appliance co. ltd.*, WIPO Case No. [D2008-0293](#); *Solvay S.A. v. Hyun-Jun Shin*, WIPO Case No. [D2006-0593](#)). The language finally decided by the panel for the proceeding should not be prejudicial to either one of the parties in its abilities to articulate the arguments for the case (*Groupe Auchan v. xmxzl*, WIPO Case No. [DCC2006-0004](#)). Section 4.5.1 of WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)") further states:

"Noting the aim of conducting the proceedings with due expedition, paragraph 10 of the UDRP Rules vests a panel with authority to conduct the proceedings in a manner it considers appropriate while also ensuring both that the parties are treated with equality, and that each party is given a fair opportunity to present its case.

Against this background, panels have found that certain scenarios may warrant proceeding in a language other than that of the registration agreement. Such scenarios include (i) evidence showing that the respondent can understand the language of the complaint, (ii) the language/script of the domain name particularly where the same as that of the complainant's mark, (iii) any content on the webpage under the disputed domain name, (iv) prior cases involving the respondent in a particular language, (v) prior

correspondence between the parties, (vi) potential unfairness or unwarranted delay in ordering the complainant to translate the complaint, (vii) evidence of other respondent-controlled domain names registered, used, or corresponding to a particular language, (viii) in cases involving multiple domain names, the use of a particular language agreement for some (but not all) of the disputed domain names, (ix) currencies accepted on the webpage under the disputed domain name, or (x) other indicia tending to show that it would not be unfair to proceed in a language other than that of the registration agreement.” (See also *L’Oreal S.A. v. MUNHYUNJA*, WIPO Case No. [D2003-0585](#)).

The Panel has taken into consideration the facts that Complainant is a company from the UK, and Complainant will be spared the burden of working in Chinese as the language of the proceeding. The Panel has also taken into consideration the fact that the disputed domain name includes Latin characters and particularly English words (“pods”), and is registered in the gTLD “.com” (*Compagnie Gervais Danone v. Xiaole Zhang*, WIPO Case No. [D2008-1047](#)).

On the record, Respondent appears to be a Chinese resident and is thus presumably not a native English speaker. However, considering the following, the Panel has decided that English should be the language of the proceeding: (a) the disputed domain name includes Latin characters, and particularly English words (“pods”), rather than mere Chinese scripts; (b) the website resolved by the disputed domain name is in the English language also;² (c) the Center has notified Respondent of the proceeding in both Chinese and English, and Respondent has indicated no objection to Complainant’s request that English be the language of the proceeding; and (d) the Center informed the Parties, in English and Chinese, that it would accept a Response in either English or Chinese. The Panel would have accepted a response in either English or Chinese but none was filed.

Accordingly, the Panel finds the choice of English as the language of the present proceeding is fair to both Parties and is not prejudicial to either one of the Parties in its ability to articulate the arguments for this case. Having considered all the matters above, the Panel determines under paragraph 11(a) of the Rules that English shall be the language of the proceeding, and the decision will be rendered in English.

6.2. Substantive Issues

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

- (i) the disputed domain name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- (ii) 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.

On the basis of the evidence introduced by Complainant and in particular with regard to the content of the relevant provisions of the Policy (paragraphs 4(a)-(c)), the Panel concludes as follows:

A. Identical or Confusingly Similar

The Panel finds that Complainant has rights in the VUSE marks. The disputed domain name comprises the VUSE mark in its entirety. The disputed domain name only differs from Complainant’s trademarks by the suffix “pods”, and the gTLD suffix “.com” to the VUSE marks. This does not prevent the recognizability of Complainant’s marks within the disputed domain name, nor eliminate the confusing similarity between Complainant’s registered trademarks and the disputed domain name (*Decathlon v. Zheng Jianmeng*, WIPO Case No. [D2019-0234](#)).

² See website at “vusepods.com”.

Previous UDRP panels have consistently held that a domain name is identical or confusingly similar to a trademark for purposes of the Policy “when the domain name includes the trademark, or a confusingly similar approximation, regardless of the other terms in the domain name”. (*Wal-Mart Stores, Inc. v. Richard MacLeod d/b/a For Sale*, WIPO Case No. [D2000-0662](#)).

Further, in relation to the gTLD suffix, [WIPO Overview 3.0](#) further states: “The applicable Top-Level Domain (‘TLD’) in a domain name (e.g., ‘.com’, ‘.club’, ‘.nyc’) is viewed as a standard registration requirement and as such is disregarded under the first element confusing similarity test.” ([WIPO Overview 3.0](#), section 1.11.1.)

The Panel therefore holds that the Complaint fulfils the first condition of paragraph 4(a) of the Policy.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy provides a list of circumstances any of which is sufficient to demonstrate that Respondent has rights or legitimate interests in the disputed domain name:

(i) before any notice to Respondent of the dispute, the use by Respondent of, or demonstrable preparations to use, the disputed domain name or a name corresponding to the disputed domain name in connection with a *bona fide* offering of goods or services; or

(ii) Respondent has been commonly known by the disputed domain name, even if Respondent has acquired no trademark or service mark rights; or

(iii) Respondent is making a legitimate noncommercial or fair use of the disputed domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish Complainant’s trademarks.

The overall burden of proof on this element rests with Complainant. However, it is well established by previous UDRP panel decisions that once a complainant establishes a *prima facie* case that a respondent lacks rights or legitimate interests in a domain name, the burden of production shifts to respondent to rebut complainant’s contentions. If respondent fails to do so, complainant is deemed to have satisfied paragraph 4(a)(ii) of the Policy. (*Danzas Holding AG, DHL Operations B.V. v. Ma Shikai*, WIPO Case No. [D2008-0441](#); [WIPO Overview 3.0](#), section 2.1 and cases cited therein).

According to the Complaint, Complainant is a leading international tobacco company, which has business in approximately 160 countries. Complainant has innovated, developed, and sold a number of products, including smoke-free products, and one of such products is branded as VUSE. The VUSE marks have been registered internationally, including UK and EU since 2012, which precede Respondent’s registration of the disputed domain name (in 2022).

Moreover, Respondent, while not affiliated with Complainant, is offering purported VUSE branded products and services, and using VUSE trademark and product images from Complainant’s official website, and using the disputed domain name to allegedly sell Complainant’s VUSE branded products. (*The Argento Wine Company Limited v. Argento Beijing Trading Company*, WIPO Case No. [D2009-0610](#); *Do The Hustle, LLC v. Tropic Web*, WIPO Case No. [D2000-0624](#); *Croatia Airlines d.d. v. Modern Empire Internet Ltd.*, WIPO Case No. [D2003-0455](#); *Philip Morris Products S.A. v. Lin Cheng, Han Ming*, WIPO Case No. [D2018-2688](#)).

Based on the following reasons, the Panel finds that Respondent has no rights or legitimate interests in the disputed domain name:

(a) there has been no evidence adduced to show that Respondent is using the disputed domain name in connection with a *bona fide* offering of goods or services. Respondent has not provided evidence of legitimate use of the disputed domain name or reasons to justify the choice of the term “vuse” in the disputed domain name and in his/her business operation. There has been no evidence to show that Complainant has licensed or otherwise permitted Respondent to use the VUSE marks or to apply for or use any domain name incorporating the VUSE marks, and Respondent has, through the use of the confusingly similar disputed

domain name and its webpage contents, created a risk of implied affiliation with the Complainant and its VUSE marks;

(b) there has been no evidence adduced to show that Respondent has been commonly known by the disputed domain name. There has been no evidence adduced to show that Respondent has any registered trademark rights with respect to the disputed domain name. Respondent registered the disputed domain name in 2022, after the VUSE marks became internationally known. The disputed domain name is confusingly similar to the VUSE marks; and

(c) there has been no evidence adduced to show that Respondent is making a legitimate noncommercial or fair use of the disputed domain name. By contrast, the Panel finds that the disputed domain name resolves to a website allegedly selling purported VUSE products and third party accessories, without any statement clarifying the website's ownership or (lack of) affiliation to the Complainant.

The Panel notes that Respondent has not produced any evidence to establish his/her rights or legitimate interests in the disputed domain name.

Accordingly, Complainant has established that Respondent has no rights or legitimate interests in the disputed domain name. The Panel therefore holds that the Complaint fulfils the second condition of paragraph 4(a) of the Policy.

C. Registered and Used in Bad Faith

Paragraph 4(b) of the Policy sets out four circumstances, which, without limitation, shall be evidence of the registration and use of the disputed domain name in bad faith, namely:

(i) circumstances indicating that Respondent has registered or acquired the disputed domain name primarily for the purpose of selling, renting, or otherwise transferring the disputed domain name registration to Complainant who is the owner of the trademark or service mark or to a competitor of Complainant, for valuable consideration in excess of Respondent's documented out-of-pocket costs directly related to the disputed domain name; or

(ii) Respondent has registered the disputed 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 Respondent has engaged in a pattern of such conduct; or

(iii) 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, Respondent has intentionally attempted to attract, for commercial gain, Internet users to Respondent's website or other online location, by creating a likelihood of confusion with Complainant's mark as to the source, sponsorship, affiliation, or endorsement of Respondent's website or location or of a product or service on the website or location.

The Panel concludes that the circumstances referred to in paragraph 4(b)(iv) of the Policy are applicable to the present case and upon the evidence of these circumstances and other relevant circumstances, it is adequate to conclude that Respondent has registered and used the disputed domain name in bad faith.

(a) Registration in Bad Faith

The Panel finds that Complainant has a widespread reputation in the VUSE marks with regard to its products and services. Complainant is part of the BAT, which is a multi-national manufacturing company of tobacco and related products operating in around 160 countries and employs over 50,000 staff. As mentioned above, VUSE marks are registered internationally, including in the UK and the EU (since 2012). It is not conceivable that Respondent would not have had actual notice of the VUSE marks at the time of the

registration of the disputed domain name (in 2022), particularly given that Respondent has used the VUSE logo and product photos taken from Complainant's official website on the website at the disputed domain name, and is selling purported VUSE products. The Panel therefore finds that the VUSE mark is not one that a trader could legitimately adopt other than for the purpose of creating an impression of an association with Complainant (*The Argento Wine Company Limited v. Argento Beijing Trading Company, supra*).

Moreover, Respondent has chosen not to respond to Complainant's allegations. According to the UDRP decision in *The Argento Wine Company Limited v. Argento Beijing Trading Company, supra*, "the failure of the Respondent to respond to the Complaint further supports an inference of bad faith". See also *Bayerische Motoren Werke AG v. (This Domain is For Sale) Joshuathan Investments, Inc.*, WIPO Case No. [D2002-0787](#).

Thus, the Panel concludes that the disputed domain name was registered in bad faith.

(b) Use in Bad Faith

Respondent is using the website resolved by the disputed domain name to allegedly sell purported VUSE products. Thus, the Panel concludes that Respondent is currently using the confusingly similar disputed domain name with the intention to attract, for commercial gain, Internet users to Respondent's website.

Given the reputation of the VUSE marks, the Panel finds that the public is likely to be confused into thinking that the disputed domain name has a connection with Complainant, contrary to the fact. There is a strong likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the website to which the disputed domain name resolves. In other words, Respondent has, through the use of a confusingly similar disputed domain name, created a likelihood of confusion with the VUSE marks. Moreover, as mentioned above, Respondent allegedly sells purported VUSE products and third party accessories via the website to which the disputed domain name resolves, presumably for commercial gain.

The Panel concludes that the disputed domain name was registered and is being used by Respondent in bad faith. Such use of the disputed domain name is also disruptive in relation to the interests of Complainant.

In summary, by choosing to register and use the disputed domain name, which is confusingly similar to the VUSE marks, Respondent intended to ride on the goodwill of this trademark in an attempt to exploit Internet users for commercial gain destined for Complainant. In the absence of evidence to the contrary and rebuttal from Respondent, the choice of the disputed domain name and the conduct of Respondent as far as the website to which the disputed domain name resolves is indicative of registration and use of the disputed domain name in bad faith.

The Panel, therefore, holds that Complaint fulfils the third condition of paragraph 4(a) of the Policy.

7. Decision

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the disputed domain name <vusepods.com> be transferred to Complainant.

/Yijun Tian/

Yijun Tian

Sole Panelist

Date: February 4, 2023