

ADMINISTRATIVE PANEL DECISION

Comair Limited v. xiao xing, lan tian ji tuan
Case No. D2023-2057

1. The Parties

The Complainant is Comair Limited, South Africa, represented by Adams & Adams Attorneys, South Africa.

The Respondent is xiao xing, lan tian ji tuan, China.

2. The Domain Name and Registrar

The disputed domain name <kululah.com> is registered with EUTurbo.com LLC (the "Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on May 9, 2023. On May 9, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On May 10, 2023, 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 (Perfect Privacy, LLC) and contact information in the Complaint. The Center sent an email communication to the Complainant on May 12, 2023 providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on May 13, 2023.

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 the Respondent of the Complaint, and the proceedings commenced on May 17, 2023. In accordance with the Rules, paragraph 5, the due date for Response was June 6, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on June 7, 2023.

The Center appointed Cherise Valles as the sole panelist in this matter on June 29, 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

The Complainant is the proprietor of the well-known trade mark KULULA and various marks incorporating the term KULULA, which it has registered in various classes covering a wide range of goods and services in various jurisdictions, including Botswana, Kenya, Malawi, and Zambia (see Annex 6 of the Complaint). In particular, the Complainant is the proprietor of, *inter alia*, the following trade mark registrations for KULULA:

In Botswana:

No. BW/M/2001/00235 KULULA registered on November 16, 2004 in classes 37, 39 and 42;
No. BW/M/2002/00698 KULULA registered on August 19, 2008 in classes 9, 12, 16, 25, 35, 36, 38, 41, 43 and 45;

In Kenya:

No. 1003067 KULULA registered on April 6, 2004 in class 35;
No. 1054037 KULULA registered on February 25, 2005 in class 9.

The Complainant Comair Limited had been listed on the Johannesburg Stock Exchange since 1998, and which offered scheduled and non-scheduled airline services within South Africa, sub-Saharan African and the Indian Ocean Islands as its core business. Due to the impact of the COVID-19 pandemic, the Complainant has filed for voluntary liquidation. The Complainant has indicated this this Complaint was brought with the consent of the liquidator.

The Complainant operated one of the biggest online retailers in South Africa from its website at the domain name <kulula.com>, which was first registered by the Complainant in 2001.

The disputed domain name <kululah.com> was registered on November 6, 2022.

According to the Complainant, the disputed domain name initially resolved to an inactive webpage, but at the time of the decision resolves to a website depicting pornographic content.

5. Parties' Contentions

A. Complainant

The Complainant asserts that each of the elements enumerated in paragraph 4(a) of the Policy and the corresponding provisions in the Rules have been satisfied. In particular, the Complainant asserts that:

The disputed domain name is identical or confusingly similar to a trademark in which the Complainant has rights.

- The disputed domain name is confusingly similar to the Complainant's registered KULULA trademark, in light of the fact that it wholly incorporates the Complainant's mark.

The Respondent lacks rights or legitimate interests in the disputed domain name.

- The Complainant states that the Respondent should be considered as having no rights or legitimate interests in the disputed domain name. The Complainant has never licensed or otherwise permitted the Respondent to use its trademarks or to register any domain name that included its trademarks.

The disputed domain name has been registered and is being used in bad faith.

- The Complainant asserts that the disputed domain name was registered and is being used in bad faith. The mere fact of registration of a domain name that is confusingly similar or identical to a famous trademark by an entity that has no relationship to that mark is itself evidence of bad faith registration and use. Furthermore, the Respondent's impersonating and/or competing uses of the disputed domain name is clear evidence of bad faith.

The Complainant requests the Panel to issue a decision finding that the disputed domain name be transferred to the Complainant, in accordance with paragraph 4(i) of the Policy.

B. Respondent

The Respondent did not reply to the Complainant's contentions.

6. Discussion and Findings

In terms of paragraph 4(a) of the Policy, for a Complaint to succeed, the Complainant must prove each of the following elements:

- (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.

The Respondent has failed to file a Response in this proceeding. The Panel may draw appropriate inferences from the available evidence submitted by the Complainant.

A. Identical or Confusingly Similar

To prove this element, the Complainant must have relevant UDRP rights in a trademark and the disputed domain name must be identical or confusingly similar to such trademark.

The Complainant submits that the disputed domain name is confusingly similar to the trade mark in which it has rights. The disputed domain name incorporates the KULULA trademark in its entirety with the addition of the letter "h". Given the Complainant's trademark registration as detailed above, the Panel finds that the Complainant has established its trade mark rights in the term KULULA for the purposes of paragraph 4(a)(i) of the Policy.

As stated in section 1.8 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)") "[w]here the relevant trademark is recognizable within the disputed domain name, the addition of other terms (whether descriptive, geographical, pejorative, meaningless, or otherwise) would not prevent a finding of confusing similarity under the first element".

The Complainant asserts that the disputed domain name is confusing similar to such mark. It argues

that the addition of the letter “h” simply emphasises the pronunciation of its KULULA trade mark and is a common misspelling of KULULA.

The disputed domain name incorporates said trademark in its entirety with the addition of the letter “h”. As stated in section 1.9 of the [WIPO Overview 3.0](#), “[a] domain name which consists of a common, obvious, or intentional misspelling of a trademark is considered by panels to be confusingly similar to the relevant mark for purposes of the first element”. Thus, the inclusion of the letter “h” in the disputed domain name does not prevent a finding of confusing similarity between the disputed domain name and the Complainant’s KULULA trademark.

It is standard practice when comparing a disputed domain name to a complainant’s trademark not to take the Top-Level Domain (“TLD”) into account. See section 1.11.1 of the [WIPO Overview 3.0](#), which states that the “applicable 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 of the confusing similarity test”. In the present case, the TLD “.com” is disregarded under the first element of the confusing similarity test.

In the light of the foregoing, the Panel finds that the disputed domain name is confusingly similar to the Complainant’s registered trademark and that the Complainant has met its burden with respect to paragraph 4(a)(i) of the Policy.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy sets out a non-exhaustive set of circumstances, any of which, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate a respondent’s rights or legitimate interests to a domain name for the purposes of paragraph 4(a)(ii) of the Policy, namely:

“[a]ny of the following circumstances, in particular but without limitation, if found by the panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of paragraph 4(a)(ii):

- (i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services; or
- (ii) you (as an individual, business or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
- (iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.”

The Respondent did not submit a Response or attempt to demonstrate any rights or legitimate interests in the disputed domain name, whether on the basis of the non-exhaustive examples set out in paragraph 4(c) of the Policy or on any other basis, and the Panel draws inferences from this failure, where appropriate, in accordance with paragraph 14(b) of the Rules.

It is recognised in cases under the Policy that it is sufficient for a complainant to make a *prima facie* case under the second element of the Policy, not rebutted by the respondent, that the respondent has no rights or legitimate interests in the domain name concerned (see, for example, *Paris Saint-Germain Football v. Daniel Macias Barajas, International Camps Network*, WIPO Case No. [D2021-0019](#); *Spinrite Inc. v. WhoisGuard, Inc. / Gabriella Garlo*, WIPO Case No. [D2021-0012](#) and section 2.1 of the [WIPO Overview 3.0](#)). If a respondent fails to rebut such a *prima facie* case by demonstrating rights or legitimate interests in the disputed domain name in accordance with paragraph 4(c) of the

Policy, or on any other basis, the complainant is deemed to have satisfied paragraph 4(a)(ii) of the Policy.

On the evidence before the Panel, it appears that there has never been any relationship between the Complainant and the Respondent. The Respondent does not seem to be licensed, or otherwise authorized, be it directly or indirectly, to register or use the Complainant's KULULA trademark in any manner, including in, or as part of, the disputed domain name. The Complainant has confirmed that it has not authorised the Respondent's use of the KULULA trade mark, as part of a domain name or otherwise. It has also confirmed that there is no relationship or association between the Complainant and the Respondent, whether by licence or otherwise.

The Complainant asserts that the Respondent is unable to invoke any of the circumstances set out in paragraph 4(c) of the Policy in order to demonstrate rights or legitimate interests in the disputed domain name. In particular, the Respondent cannot assert that, prior to any notice of this dispute, he was using, or had made demonstrable preparations to use, the disputed domain name in connection with a *bona fide* offering of goods or services in accordance with paragraph 4(c)(i) of the Policy.

In light of the foregoing, the Panel finds that the Complainant has established an unrebutted *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name, and concludes that paragraph 4(a)(ii) of the Policy is satisfied.

C. Registered and Used in Bad Faith

For this element, the Complainant is required to prove that the disputed domain name was registered or that it was used in bad faith. The term "bad faith" is "broadly understood to occur where a respondent takes unfair advantage of, or otherwise abuses, a complainant's mark". See section 3.1 of the [WIPO Overview 3.0](#). Paragraph 4(b) of the Policy sets out four non-exhaustive examples of circumstances which, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith, namely:

- (i) circumstances indicating that the respondent 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 complainant, for valuable consideration in excess of the 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 its website or location.

In the present case, the Complainant's submissions relate to paragraph 4(b)(iv) of the Policy.

Previous UDRP panels have found that the mere registration of a domain name that is identical or confusingly similar (particularly domain names comprising typographical errors or incorporating the mark plus a descriptive term) to a famous or widely-known trademark by an unaffiliated entity can by itself create a presumption of bad faith. See section 3.1.4 of the [WIPO Overview 3.0](#).

Furthermore, the nature of the disputed domain name, consisting of the Complainant's trademark with the addition of the letter "h", carries a risk of implied affiliation and cannot constitute fair use as it effectively impersonates or suggests sponsorship or endorsement by the Complainant (see section 2.5.1 of the [WIPO Overview 3.0](#)). In the present case, the Respondent seeks to attract Internet users to its website by creating a likelihood of confusion with the Complainant's trademark.

The disputed domain name initially resolved to an inactive page (Annex 2 to the Complaint) but now resolves to an explicit and pornographic website, situated at "www.kululah.com", which the Respondent is using to attract commercial gain. (Annex 4 to the Complaint). The Respondent, is therefore, not using the domain name in connection with a *bona fide* offering of goods or services or legitimate non-commercial or fair use of the domain name.

The Respondent has not participated in the administrative proceeding and has not answered the Complainant's contentions. The fact that the Respondent has decided not to provide any legitimate explanation or to assert any alleged good faith motivation in respect of the registration or use of the disputed domain name in the face of the Complainant's contentions can be regarded as an indicator of registration and use in bad faith.

Accordingly, the Panel concludes that the Complainant has satisfied its burden of showing bad faith registration and use of the disputed domain name under paragraph 4(a)(iii) of the Policy.

7. Decision

For 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 <kululah.com> be transferred to the Complainant.

/Cherise Valles/

Cherise Valles

Sole Panelist

Date: July 13, 2023