

ADMINISTRATIVE PANEL DECISION

Mixcloud Limited v. Privacy Protection / Ping Cao, jiang an qu he xie da dao
Case No. D2022-1663

1. The Parties

The Complainant is Mixcloud Limited, United Kingdom, internally represented.

The Respondent is Privacy Protection, United States of America / Ping Cao, jiang an qu he xie da dao, China.

2. The Domain Name and Registrar

The disputed domain name <mixcloud.xyz> is registered with Sav.com, LLC (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 6, 2022. On May 9, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On May 12, 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 the Complainant on May 17, 2022, 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 amendment to the Complaint on May 19, 2022.

The Center verified that the Complaint together with the amendment to the 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 20, 2022. In accordance with the Rules, paragraph 5, the due date for Response was June 9, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on June 11, 2022. On June 22, 2022, the Center sent a notice to the privacy details and granted the Respondent a five day period in which to indicate whether it wishes to participate to this proceeding. The Respondent did not submit any response.

The Center appointed William R. Towns as the sole panelist in this matter on July 1, 2022. 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 a popular British online music streaming service for listening and distribution of radio shows, DJ mixes, and podcasts, many of which are crowdsourced by the Complainant's registered users. The Complainant operates an online streaming service marketed under its MIXCLOUD mark, and is the owner of trademark registrations for its MIXCLOUD mark issued in the United States of America ("US"), the European Union ("EU"), and other jurisdictions, including among the following:

- European Union Trade Mark (" EUTM") No. 014679146, applied for October 14, 2015, and registered February 19, 2016;
- US Reg. No.5030276 (stylized), applied for October 12, 2015, and registered August 30, 2016; and
- US Reg. No. 5030277, applied for October 12, 2015, and registered August 30, 2016.

The disputed domain name was registered on May 21, 2021, according to the concerned Registrar's Whois records. Insofar as the record reflects, it would appear that the disputed domain name is not being used by the Respondent with an active website and otherwise is being passively held.

5. Parties' Contentions

A. Complainant

The Complainant submits that the disputed domain name is identical or confusingly similar to the Complainant's registered MIXCLOUD mark. The Complainant asserts that the disputed domain name presents a clear and direct reference to the Complainant's MIXCLOUD mark, which has been registered in the EU and the US.

The Complainant maintains that the Respondent lacks rights or legitimate interests in respect of the disputed domain name. According to the Complainant, the Respondent has not been licensed, authorized, or otherwise permitted by the Respondent or by other affiliated persons or entities to use the Complainant's MIXCLOUD mark in connection with a domain name. According to the Complainant, the disputed domain name has to date not been used with a website.

The Complainant asserts that the Respondent registered and is using the disputed domain name in bad faith. According to the Complainant, the Respondent appears to be passively holding the disputed domain name and has engaged in the bad faith practice of cybersquatting. The Complainant maintains that the Respondent's lack of interest in using the disputed domain name makes evident that the Respondent purposefully registered the dispute domain name with the intention of selling, renting or otherwise transferring the dispute domain name to the Complainant at an exorbitant price.

B. Respondent

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

6. Discussion and Findings

A. Scope of the Policy

The Policy is addressed to resolving disputes concerning allegations of abusive domain name registration and use. *Milwaukee Electric Tool Corporation v. Bay Verte Machinery, Inc. d/b/a The Power Tool Store*, WIPO Case No. [D2002-0774](#). Accordingly, the jurisdiction of this Panel is limited to providing a remedy in cases of “the abusive registration of domain names”, also known as “cybersquatting”. *Weber-Stephen Products Co. v. Armitage Hardware*, WIPO Case No. [D2000-0187](#). See Final Report of the First WIPO Internet Domain Name Process, April 30, 1999, paragraphs 169-177. The term “cybersquatting” is most frequently used to describe the deliberate, bad faith abusive registration of a domain name in violation of rights in trademarks or service marks. *Id.* at paragraph 170. Paragraph 15(a) of the Rules provides that the panel shall decide a complaint on the basis of statements and documents submitted and in accordance with the Policy, the Rules and any other rules or principles of law that the panel deems applicable.

Paragraph 4(a) of the Policy requires that the complainant prove each of the following three elements to obtain a decision that a domain name should be either cancelled or transferred:

- (i) the 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 with respect to the domain name; and
- (iii) the domain name has been registered and is being used in bad faith.

Cancellation or transfer of the domain name is the sole remedy provided to the complainant under the Policy, as set forth in paragraph 4(i).

Paragraph 4(b) of the Policy sets forth four situations under which the registration and use of a domain name is deemed to be in bad faith, but does not limit a finding of bad faith to only these situations.

Paragraph 4(c) of the Policy in turn identifies three means through which a respondent may establish rights or legitimate interests in a domain name. Although the complainant bears the ultimate burden of establishing all three elements of paragraph 4(a) of the Policy, prior UDRP panels have recognized this could result in the often impossible task of proving a negative, requiring information that is primarily, if not exclusively, within the knowledge of the respondent. Thus, the view is that the burden of production shifts to the respondent to come forward with evidence of rights or legitimate interests in the domain name, once the complainant has made a *prima facie* showing. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”), section 2.1. See, e.g., *Document Technologies, Inc. v. International Electronic Communications Inc.*, WIPO Case No. [D2000-0270](#).

B. Identical or Confusingly Similar

The Panel finds that the disputed domain name is confusingly similar if not identical to the Complainant’s MIXCLOUD mark, in which the Complainant has established rights through registration and substantial use. In considering identity and confusing similarity, the first element of the Policy serves essentially as a standing requirement.¹ The threshold inquiry under the first element of the Policy involves a relatively straightforward comparison between the Complainant’s trademark and the disputed domain name.

The Complainant’s MIXCLOUD mark is clearly recognizable in the disputed domain name.² The first element test typically involves a side-by-side comparison of the domain name and the textual components of

¹ See [WIPO Overview 3.0](#), section 1.7.

² *Id.*

the relevant trademark to assess whether the mark is recognizable within the disputed domain name.³ The Panel notes that Top Level Domains (“TLDs”) – in this instance “.xyz” – are generally disregarded when evaluating the identity or confusing similarity of the complainant’s mark to the disputed domain name under paragraph 4(a)(i) of the Policy, irrespective of any ordinary meaning that might be ascribed to the TLD.⁴ In this case, when disregarding the TLD “.xyz” the disputed domain name is identical to the Complainant’s MIXCLOUD mark.

The Panel thus finds the Complainant has satisfied the requirements of paragraph 4(a)(i) of the Policy.

C. Rights or Legitimate Interests

As noted above, once the complainant makes a *prima facie* showing under paragraph 4(a)(ii) of the Policy, paragraph 4(c) shifts the burden of production to the respondent to come forward with evidence of rights or legitimate interests in a domain name. The Panel is persuaded from the record of this case that a *prima facie* showing under paragraph 4(a)(ii) of the Policy has been made. The disputed domain name is virtually identical to the Complainant’s MIXCLOUD mark, and it is undisputed that the Respondent has not been authorized to use the Complainant’s mark. The record nonetheless reflects that the Respondent has registered the disputed domain name, which misappropriates the Complainant’s MIXCLOUD mark, and which the Respondent now appears to be passively holding.

Pursuant to paragraph 4(c) of the Policy, a respondent may establish rights or legitimate interests in a domain name by demonstrating any of the following:

- (i) before any notice to it of the dispute, the respondent’s use of, or demonstrable preparations to use, the domain name or a name corresponding to the disputed domain name in connection with a *bona fide* offering of goods or services; or
- (ii) the respondent has been commonly known by the domain name, even if it has acquired no trademark or service mark rights; or
- (iii) the respondent is 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 has not submitted a formal response to the Complaint, in the absence of which the Panel may accept all reasonable inferences and allegations in the Complaint as true. See *Talk City, Inc. v. Michael Robertson*, WIPO Case No. [D2000-0009](#). The Panel has carefully reviewed the record in this case, and finds nothing therein that would bring the Respondent’s registration and use of the disputed domain name within any of the “safe harbors” of paragraph 4(c) of the Policy.

It is evident to the Panel from the record in this case that the Respondent was aware of the Complainant and had the Complainant’s MIXCLOUD mark in mind when registering the disputed domain name. The record strongly suggests in the attendant circumstances that the Respondent registered the disputed domain name with the intention of exploiting and profiting from the Complainant’s mark.

Having regard to the relevant circumstances in this case, and absent any explanation by the Respondent, the Panel concludes that the Respondent has neither used or demonstrated preparations to use the disputed domain name in connection with a *bona fide* offering of goods or services under paragraph 4(c)(i) of the Policy, and is not making a legitimate noncommercial or other fair use of the disputed domain name for purposes of paragraph 4(c)(iii) of the Policy. The Respondent has not been authorized to use the Complainant’s MIXCLOUD mark; nor is there indication that the Respondent has been commonly known by the disputed domain name within the meaning of paragraph 4(c)(ii) of the Policy.

³ *Id.*

⁴ See [WIPO Overview 3.0](#), section 1.11.2 and cases cited therein.

In short, nothing in the record supports a claim by the Respondent of rights or legitimate interests in the disputed domain name. Further, the nature of the disputed domain name, being virtually identical to the Complainant's MIXCLOUD trademark, carries a high risk of implied affiliation. See [WIPO Overview 3.0](#), section 2.5.1.

Accordingly, the Panel finds the Complainant has satisfied the requirements of paragraph 4(a)(ii) of the Policy.

D. Registered and Used in Bad Faith

Paragraph 4(b) of the Policy states that any of the following circumstances, in particular but without limitation, shall be considered evidence of the registration and use of a domain name in bad faith:

- (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 (the owner of the trademark or service mark) or to a competitor of that complainant, for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the domain name; or
- (ii) circumstances indicating that the respondent 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) circumstances indicating that the respondent registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- (iv) circumstances indicating that the respondent is using the domain name to intentionally attempt 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.

The examples of bad faith registration and use set forth in paragraph 4(b) of the Policy are not meant to be exhaustive of all circumstances from which such bad faith may be found. See *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Case No. [D2000-0003](#). The overriding objective of the Policy is to curb the abusive registration of domain names in circumstances where the registrant seeks to profit from and exploit the trademark of another. See *Match.com, LP v. Bill Zag and NWLAWS.ORG*, WIPO Case No. [D2004-0230](#).

For the reasons discussed under this and the preceding heading, the Panel considers that the Respondent's conduct in this case constitutes bad faith registration and use of the disputed domain name within the meaning of paragraph 4(a)(iii) of the Policy. The Panel concludes that the Respondent was aware of the Complainant and had the Complainant's MIXCLOUD mark in mind when registering the virtually identical disputed domain name. The Panel finds that the Respondent in all likelihood registered the disputed domain name seeking to exploit and profit from the Complainant's MIXCLOUD mark.

What might now appear to be the Respondent's passive holding of the disputed domain name does not preclude a finding of bad faith in the attendant circumstances of this case. As set forth in *Telstra Corporation Limited v. Nuclear Marshmallows*, *supra*, "the relevant issue is not whether the Respondent is taking a positive action in bad faith in relation to the domain name, but instead whether, in all the circumstances of the case, it can be said that the Respondent is acting in bad faith. [...] [I]t is possible, in certain circumstances, for inactivity by the Respondent to amount to the domain name being used in bad faith". See also *Red Bull GmbH v. Kevin Franke*, WIPO Case No. [D2012-1531](#).

The Panel considers such circumstances to be indicative of the Respondent's bad faith under *Telstra Corporation Limited v. Nuclear Marshmallows*, *supra*. The Panel concludes that the Respondent more likely than not sought to capitalize on the Complainant's trademark rights, incorporating the Complainant's distinctive MIXCLOUD mark in the disputed domain name, and seeking to create a likelihood of confusion

with the Complainant's mark as to source, sponsorship, affiliation, or endorsement of the Respondent's website. Moreover, the Respondent has failed to submit any comments as to the Complainant's contentions and engaged the use of a privacy service for purposes of masking its identity, further supporting an inference of bad faith.

Accordingly, the Panel finds that the Complainant has satisfied the requirements of 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 <mixcloud.xyz> be transferred to the Complainant.

/William R. Towns/

William R. Towns

Sole Panelist

Date: July 11, 2022