

ADMINISTRATIVE PANEL DECISION

Mylan Inc. v. Super Privacy Service LTD c/o Dynadot / wenwei feng, yi lu fa
Case No. D2022-2597

1. The Parties

The Complainant is Mylan Inc., United States of America (“United States”), represented by The Webb Law Firm, United States.

The Respondent is Super Privacy Service LTD c/o Dynadot, United States / wenwei feng, yi lu fa, China.

2. The Domain Name and Registrar

The disputed domain name <ermeza.com> is registered with Dynadot, LLC (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on July 15, 2022. On July 18, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On July 19, 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 July 22, 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 July 28, 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 July 29, 2022. In accordance with the Rules, paragraph 5, the due date for Response was August 18, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on August 22, 2022.

The Center appointed Luca Barbero as the sole panelist in this matter on August 25, 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.

On September 14, 2022, the Center notified to the Parties the Administrative Panel Procedural Order No. 1 ("Panel Order"), requesting the Complainant to:

- i) clarify what relationship it has with Mylan Pharmaceuticals, Inc., indicated as applicant of the trademark registration on which the Complainant relies; and
- ii) provide further comments and possible additional documents to demonstrate that it has trademark rights on ERMEZA, on a registered or unregistered basis.

The Complainant was requested to provide such information by September 19, 2022. The Respondent was invited to submit any additional comments on information supplied by the Complainant in response to the Panel Order by September 24, 2022. The due date for the Decision was extended to at least September 26, 2022.

The Complainant filed its reply to the Panel Order on September 16, 2022. The Respondent did not submit any comment on the information supplied by the Complainant.

4. Factual Background

The Complainant is a member company of the global healthcare company Viatris and is specialized in global generic and specialty pharmaceuticals.

Founded in 1961, the Complainant has become distinguished in various fields of medicine and pharmaceuticals and has acquired controlling interests in a number of top producing active pharmaceutical companies for generic drugs, such as Matrix-Laboratories Limited and Merck KgaA, developing and producing medicines for a wide range of medical disciplines, including oncology, anaphylaxis, antiretrovirals, cardiovascular, respiratory, dermatology, immunology, anesthesia, pain management, infectious disease, gastroenterology, diabetology, endocrinology, and women's healthcare.

The Complainant has been recognized on the Forbes List of World's Best Employers, and Newsweek's One of America's Most Responsible Companies.

The Complainant is using the trademark ERMEZA in connection with pharmaceutical preparations for the treatment of thyroid disorders.

The Complainant is the parent company of Mylan Pharmaceuticals, Inc., which is the owner of the United States trademark application No. 88826046 for ERMEZA (word mark), filed on March 9, 2020, in international class 5 (Annex 7 to the Complaint). The trademark records published on the online database of the United States Patent and Trademark Office (USPTO) show that a Notice of Allowance was issued on September 1, 2020 and that a fourth request for extension of time to file a Statement of Use has been granted.

The Complainant's ERMEZA (levothyroxine sodium) oral solution has been approved on April 29, 2022 by the United States Food and Drug Administration (FDA), as shown in the document submitted by the Complainant as Annex 5 (an excerpt from the website www.optum.com about the new drug approval) and the highlights available on the FDA's website at the URL "https://www.accessdata.fda.gov/drugsatfda_docs/label/2022/215809s000lbl.pdf".

The disputed domain name was registered on January 9, 2022 and is currently pointed to an adult content website. According to the screenshot submitted as Annex 6 to the Complaint, the disputed domain name was previously pointed to a blank page.

A. Complainant

The Complainant contends that disputed domain name is identical to the trademark ERMEZA in which the Complainant has rights, as it reproduces the trademark in its entirety without any variation.

With reference to rights or legitimate interests in respect of the disputed domain name, the Complainant states that the Respondent, by redirecting the disputed domain name to a blank page, has not made active use of the same in connection with a *bona fide* offering of goods or services or for a legitimate noncommercial or fair use.

With reference to the circumstances evidencing bad faith, the Complainant indicates that the Respondent had actual or constructive knowledge of the Complainant's trademark ERMEZA since the Respondent registered the disputed domain name more than one year after the allowance of the Complainant's trademark ERMEZA.

The Complainant also submits that the Respondent is only squatting on the Complainant's trademark ERMEZA in order to disrupt the business of the Complainant.

The Complainant highlights that the Respondent registered the domain name only for about six months and that the disputed domain name was pointed to a blank page displaying only in the heading the name of a Chinese company about which no information could be found.

B. Respondent

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

6. Discussion and Findings

According to paragraph 15(a) of the Rules: "A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable." Paragraph 4(a) of the Policy directs that the Complainant must prove each of the following:

- (i) that the disputed domain name registered by the Respondent is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
- (ii) that the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) that the disputed domain name has been registered and is being used in bad faith.

A. Identical or Confusingly Similar

As indicated above, the Complainant is the parent company of Mylan Pharmaceuticals, Inc., which is the owner of the United States pending trademark application No. 88826046 for ERMEZA, filed on March 9, 2020.

As stated in section 1.4.1 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), a trademark owner's affiliate such as a parent company is considered to have rights in a trademark under the UDRP for purposes of standing to file a complaint.

According to the trademark records published on the USPTO online database, a Notice of Allowance was issued in connection with the United States trademark application No. 88826046 on September 1, 2020 and a fourth request for extension of time to file a Statement of Use has been granted.

As indicated in section 1.1.4 of the [WIPO Overview 3.0](#), “A pending trademark application would not by itself establish trademark rights within the meaning of UDRP paragraph 4(a)(i)”. However, a complainant could have standing on the basis of common law trademark rights. As mentioned in section 1.3 of the [WIPO Overview 3.0](#), “To establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant’s goods and/or services”.

The Complainant has demonstrated that its ERMEZA drug has been approved on April 29, 2022 by the United States FDA. The FDA’s approval occurs at the end of a process which includes evaluation of clinical benefit and risk information submitted by the drug maker, based on results obtained via clinical trials and testing. Prior decisions issued by United States Courts have held that, because clinical trials and testing are in the “ordinary course of trade”, this is sufficient to demonstrate use of a trademark for a pharmaceutical product. See *G.D. Searle & Co. v. Nutrapharm, Inc.*, No. 98-6890 (S.D.N.Y. Oct. 29, 1999). See also *Automedx, Inc. v. Artivent Corp.*, 95 U.S.P.Q. 2d 1976 (T.T.A.B. 2010) (finding use where sales were made for purposes of testing and prior to FDA approval).

Noting that the relevant consumer of the Complainant’s pharmaceutical products – such as practitioners involved in clinical trials – may perceive ERMEZA as a distinctive identifier of the Complainant’s pharmaceutical product, the Panel finds that the Complainant has sufficiently established trademark rights for the purpose of standing in this proceeding, according to paragraph 4(a)(i) of the Policy.

As highlighted in section 1.7 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”), the first element functions primarily as a standing requirement, and the threshold test for confusing similarity typically involves a side-by-side comparison of the domain name and the textual components of the relevant trademark to assess whether the mark is recognizable within the disputed domain name.

In the case at hand, the Complainant’s trademark ERMEZA is entirely reproduced in the disputed domain name, with the mere addition of the Top-Level Domain “.com”, which is commonly disregarded under the first element confusing similarity test (section 1.11 of the [WIPO Overview 3.0](#)).

Therefore, the Panel finds that the Complainant has proven that the disputed domain name is identical to a trademark in which the Complainant has established rights according to paragraph 4(a)(i) of the Policy.

B. Rights or Legitimate Interests

It is well established that the burden of proof lies on the complainant. However, satisfying the burden of proving a lack of the respondent’s rights or legitimate interests in respect of the domain name according to paragraph 4(a)(ii) of the Policy is potentially onerous, since proving a negative can be difficult considering such information is often primarily within the knowledge or control of the respondent.

Accordingly, in line with previous UDRP decisions, it is sufficient that the complainant show a *prima facie* case that the respondent lacks rights or legitimate interests in the disputed domain name in order to shift the burden of production on the respondent. If the respondent fails to demonstrate 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.

The Panel finds that the Complainant has made a *prima facie* case and that the Respondent, by not having submitted a Response, has failed to demonstrate rights or legitimate interests in the disputed domain name in accordance with paragraph 4(c) of the Policy for the following reasons.

According to the evidence on record, there is no relationship between the Complainant and the Respondent and the Complainant has not authorized the Respondent to register or use its trademark or the disputed domain name.

Furthermore, there is no indication before the Panel that the Respondent is commonly known by the disputed domain name, has made preparations to use the disputed domain name in connection with a *bona fide* offering of goods or services, or that it intends to make a legitimate, noncommercial or fair use of the disputed domain name.

Indeed, according to the screenshot submitted by the Complainant, which has not been challenged by the Respondent, the disputed domain name was previously pointed to a mere blank page, showing only the name of what appears to be an unrelated company, in Chinese characters, which did not correspond to “Ermeza”.

Moreover, the current pointing of the disputed domain name to a website in Chinese language displaying adult content cannot be regarded as use in good faith. See, amongst others, *Prada S.A. v. Roberto Baggio*, WIPO Case No. [D2009-1187](#).

Therefore, the Panel finds that the Complainant has proven that the Respondent has no rights or legitimate interests in the disputed domain name according to paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

Paragraph 4(a)(iii) of the Policy requires that the Complainant prove that the disputed domain name was registered and is being used by the Respondent in bad faith.

The Panel notes that the disputed domain name was registered on January 9, 2022, almost two years after the filing of Complainant’s United States trademark application No. 88826046 for ERMEZA, filed on March 9, 2020.

The Panel further notes that “Ermeza” appears to be a coined mark with no meaning in any language, and that searches for “Ermeza” on main search engines return results exclusively associated with the Complainant’s pharmaceutical products in the first pages. Although most of the webpages about the ERMEZA drug are dated after the registration of the disputed domain name, also webpages reporting the Complainant’s filing of the Complainant’s trademark in the United States are displayed. Moreover, searches for “Ermeza” on the USPTO as well as on the WIPO Global Brand databases return as results only the Complainant’s trademark application filed in 2020, besides a prior trademark application filed by the Complainant’s subsidiary Mylan Pharmaceuticals, Inc. on October 25, 2016 and abandoned on November 4, 2019.¹

In view of the above and considering the identity of the disputed domain name with the Complainant’s trademark and the absence of any explanation from the Respondent about the reason why it selected the disputed domain name, the Panel finds that the Respondent was likely aware of the Complainant’s trademark at the time of registration of the disputed domain name.

The Respondent’s prior redirection of the disputed domain name to a blank page and the current pointing of the same to an adult content website indeed support the conclusion that the Respondent did not register and use the disputed domain name in good faith for a legitimate purpose but, on the contrary, intended to capitalize on the Complainant’s trademark rights.

¹ As indicated in section 4.8 of the [WIPO Overview 3.0](#), “[n]oting in particular the general powers of a panel articulated *inter alia* in paragraphs 10 and 12 of the UDRP Rules, it has been accepted that a panel may undertake limited factual research into matters of public record if it would consider such information useful to assessing the case merits and reaching a decision”.

In light of the current redirection of the disputed domain name, the Panel finds that the Respondent intentionally attempted to attract, likely for commercial gain, internet users to its website, by creating a likelihood of confusion with the Complainant's trademark as to the source, sponsorship, affiliation or endorsement of the website, according to paragraph 4(b)(iv) of the Policy.

Therefore, the Panel finds that the Complainant has also proven that the Respondent registered and is using the disputed domain name in bad faith according to 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 <ermeza.com> be transferred to the Complainant.

/Luca Barbero/

Luca Barbero

Sole Panelist

Date: September 26, 2022