

## **ADMINISTRATIVE PANEL DECISION**

Draco Distribution Ltd v. xiaxia liu

Case No. D2022-4340

### **1. The Parties**

The Complainant is Draco Distribution Ltd, United Kingdom, represented by Burness Paull LLP, United Kingdom (“UK”).

The Respondent is xiaxia liu, China.

### **2. The Domain Name and Registrar**

The disputed domain name <killstarsale.com> is registered with Name.com, Inc. (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on November 15, 2022. On November 15, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 16, 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 (Whois Agent, Domain Protection Services, Inc.) and contact information in the Complaint. The Center sent an email communication to the Complainant on November 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 amended Complaint on November 22, 2022.

The Center verified that the Complaint, together with the amendment to the Complaint/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 November 24, 2022. In accordance with the Rules, paragraph 5, the due date for Response was December 14, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on December 15, 2022.

The Center appointed Zoltán Takács as the sole panelist in this matter on December 19, 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 women's and men's clothing retailer selling gothic and alternative rock inspired items since 2010.

The Complainant has extensive social media presence, boasting 1.9 million Instagram followers and nearly 800 thousand likes on Facebook.

The Complainant is among others owner of the UK Trademark Registration No. UK 00914102231 for the word mark KILLSTAR registered since September 24, 2015 for goods and services of classes 14, 18, 25 and 35.

The Complainant owns the domain name <killstar.com>, which was registered on June 7, 2005 and is linking to its official web store.

The disputed domain name was registered on December 21, 2021 and has been resolving to a website that copies the Complainant's official website (including its trademark, texts and images) and purports to sell the Complainant's products.

#### **5. Parties' Contentions**

##### **A. Complainant**

The Complainant contends that the disputed domain name, which incorporates the entirety of its KILLSTAR trademark, is confusingly similar to it because addition of the term "sale" to the trademark does not sufficiently distinguish the disputed domain name.

The Complainant alleges that the Respondent has no rights or legitimate interests in respect of the disputed domain name and is unable to rely on any of the circumstances set out in paragraphs 4(c)(i), (ii), or (iii) of the Policy.

The Complainant contends that the Respondent's use of its trademark, text and images on the website under the disputed domain name shows the Respondent's intent to mislead consumers into believing that it is a website authorized by the Complainant.

The Complainant submits that it has received a number of complaints about the website to which the disputed domain name resolves from customers who have placed orders on said website without actually receiving any confirmation, let alone the products they have paid for.

The Complainant requests that the disputed domain name be transferred from the Respondent to the Complainant.

##### **B. Respondent**

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

## 6. Discussion and Findings

Paragraph 15(a) of the Rules requires that the Panel's decision be made "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".

A Complainant must evidence each of the three elements required by paragraph 4(a) of the Policy in order to succeed on the complaint, namely that;

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

### A. Identical or Confusingly Similar

Under paragraph 4(a)(i) of the Policy, there are two requirements which the Complainant must establish, first that it has rights in a trademark or service mark, and second that the disputed domain name is identical or confusingly similar to the trademark or service mark.

It has been a consensus view among UDRP panels that if the complainant owns a nationally or regionally registered trademark, then it generally satisfies the threshold requirement of having trademark rights.

The Complainant produced evidence of having registered rights in the KILLSTAR trademark and for the purpose of this proceeding the Panel establishes that the UK Trademark Registration No. 00914102231 satisfies the requirement of having trademark rights for the purpose of the Policy.

Having determined the presence of the Complainant's trademark rights, the Panel next assesses whether the disputed domain name is identical or confusingly similar to the Complainant's trademark.

According to section 1.7 of the [WIPO Overview 3.0](#), the standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the complainant's trademark and the domain name. This test 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 domain name.

According to section 1.8 of the [WIPO Overview 3.0](#), where the relevant trademark is recognizable within the 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.

According to section 1.11.1 of the [WIPO Overview 3.0](#), the applicable Top-Level Domain ("TLD") in a domain name (in this case ".com") is viewed as a standard registration requirement and as such is generally disregarded under the first element confusingly similar test.

The disputed domain name incorporates the Complainant's trademark in its entirety. In view of the Panel, the addition of the term "sale" to the Complainant's trademark does not prevent a finding of confusing similarity between the Complainant's trademark and the disputed domain name.

The Panel finds that the disputed domain name is therefore confusingly similar to the Complainant's trademark and that the first ground of the Policy is established.

## B. Rights or Legitimate Interests

Under paragraph 4(c) of the Policy, a respondent may demonstrate its rights or legitimate interests in a domain name by showing any of the following circumstances, in particular but without limitation:

- (i) before any notice to it of the dispute, its use of, or demonstrable preparation to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods and services; or
- (ii) it has been commonly known by the domain name; or
- (iii) it is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert customers or to tarnish the trademark or service mark at issue.

According to section 2.1 of the [WIPO Overview 3.0](#), while the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of “proving a negative”, requiring information that is often primarily within the knowledge or control of the respondent.

As such, where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with the relevant evidence demonstrating its rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element.

In the present case, the Complainant has submitted sufficient and uncontested evidence that it holds well-established rights in the KILLSTAR trademark and that it has never authorized the Respondent to use its trademark in any way.

The website at the disputed domain name effectively impersonates the Complainant, as the Respondent is prominently using on its website the trademark, texts and images found in the Complainant’s official website.

What’s more, the Complainant had been contacted by a number of consumers who purchased items from the website at the disputed domain name and have instead of getting the goods purchased received notifications of their banks of fraud alerts.

UDRP panels have categorically held that the use of a domain name for illegal activity, such as impersonation/passing of, or other types of fraud can never confer rights or legitimate interests on a respondent (see section 2.13.1 of the [WIPO Overview 3.0](#)).

Moreover, the inherently misleading nature of the disputed domain name, incorporating the Complainant’s trademark and a descriptive term, carries risk of implied affiliation (see section 2.5.1 of the [WIPO Overview 3.0](#)).

The Panel notes that even if the products offered for sale on the Respondent’s website under the disputed domain name would be genuine products from the Complainant, the website still does not qualify as fair use (see sections 2.13.2 and 2.8.1 of the [WIPO Overview 3.0](#) and *Ok! Data Americas, Inc. v. ASD, Inc.*, WIPO Case No. [D2001-0903](#)).

The Respondent failed to respond, and by doing so failed to offer the Panel any type of evidence set forth in paragraph 4(c) of the Policy, or otherwise counter to the Complainant’s *prima facie* case and the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name in accordance with paragraph 4(a)(ii) of the Policy.

### **C. Registered and Used in Bad Faith**

Paragraph 4(b) of the Policy lists a number of factors which, if found by the panel to be present, shall be evidence of registration and use of a domain name in bad faith. This non-exclusive list includes:

- (i) circumstances indicating that you have registered or you have 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 your documented out-of-pocket costs directly related to the domain name; or
- (ii) you have 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 you have engaged in a pattern of such conduct; or
- (iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- (iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your 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 your website or location or of a product or service on your website or location.

The Complainant's KILLSTAR trademark is inherently distinctive for the corresponding goods, namely clothing and apparel, and predates the registration of the disputed domain name by years.

The Respondent reproduced the Complainant's trademark in the disputed domain name and is using the Complainant's signature texts and copyrighted materials at the website under the disputed domain name. Thus, it is clear that the Respondent had full knowledge of the Complainant's business and trademark at the time of registration of the disputed domain name and had registered it in order to take unfair advantage of it.

The use to which the Respondent has put the disputed domain name in view of the Panel amounts to bad faith registration and use within the meaning of paragraph 4(b)(iv) of the Policy.

First, the Respondent is using the disputed domain name to direct Internet traffic to its website in order to gain illegitimate profit through impersonation or false association.

Second, the Complainant has been contacted on a number of occasions by consumers who have mistakenly tried to purchase items from the website at the disputed domain name believing that is connected and/or authorized by the Complainant. Those consumers have however, instead of receiving confirmation on their purchases and the goods they paid for received notifications of their banks of fraud alerts. This is in view of the Panel evidence that the disputed domain name is used for fraudulent monetary gain, which is compelling evidence of bad faith under the Policy.

The Respondent chose not to respond to the Complaint and rebut the Complainant's credible assertions and evidence, which the Panel accepts and finds that the disputed domain name was registered and is being used in bad faith within the meaning 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 <killstarsale.com> be transferred to the Complainant.

*/Zoltán Takács/*

**Zoltán Takács**

Sole Panelist

Date: January 11, 2023