

ADMINISTRATIVE PANEL DECISION

Jung S.A.S. v. Демьян Шинкаренко
Case No. D2022-4421

1. The Parties

The Complainant is Jung S.A.S., France, represented by AB INITIO, France.

The Respondent is Демьян Шинкаренко, Ukraine.

2. The Domain Name and Registrar

The disputed domain name <backmarketnow.online> is registered with NameCheap, Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on November 18, 2022. On November 21, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 21, 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 November 23, 2022 providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. On November 23, 2022, the Center received two email communications from the Respondent. The Complainant filed an amended Complaint on November 24, 2022.

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 November 29, 2022. In accordance with the Rules, paragraph 5, the due date for Response was December 19, 2022. The Respondent sent two informal communications on November 23, 2022, but did not submit any formal response. Accordingly, the Center notified the commencement of panel appointment process on December 20, 2022.

The Center appointed Assen Alexiev as the sole panelist in this matter on December 22, 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. Further procedural considerations

Under paragraph 10 of the Rules, the Panel is required to ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case, and also that the administrative proceeding takes place with due expedition.

The Respondent's mailing address is stated to be in Ukraine which is subject to an international conflict at the date of this Decision that may impact case notification, it is appropriate for the Panel to consider, in accordance with its discretion under paragraph 10 of the Rules, whether the proceeding should continue.

Having considered all the circumstances of the case, the Panel is of the view that it should. The Panel has reached this conclusion in part because the Panel does not believe the Respondent's purported mailing address in Ukraine to be genuine, as it contains no indication of a city, street number and postal code. This is corroborated by the fact that the courier used for delivering written notice was also unable to locate the address.

The Panel also notes that the website hosted at the disputed domain name is in the French language, which further supports an inference that the Respondent is not located in Ukraine. The Panel notes that the Center sent the Notification of Complaint by email to the Respondent at its email address as registered with the Registrar, and there is no evidence that the case notification email to this email address was not successfully delivered. Moreover, the Respondent sent two email communications to the Center from the same email address.

The Respondent maintains that it is not the owner of the disputed domain name. However, the Registrar has identified it as the registrant of the disputed domain name, with mailing address "Default adresse (sic), Default city, Default region, Postal Code 100000, Ukraine". In view of this, the only way to contact the Respondent is through its email address provided to the Registrar, and as discussed above, the Respondent has confirmed its validity through the sending of communications to the Center in response to communications from the Center related to the present proceeding. Taking this into account, the Panel sees no reason not to accept that the Respondent is the registrant of the disputed domain name and that it can send and receive communications about this proceeding at its email address identified by the Registrar.

The Panel also notes that the Complainant has specified in the Complaint that any challenge made by the Respondent to any decision to transfer or cancel the disputed domain name shall be referred to the jurisdiction of the Courts of the location of the principal office of the concerned registrar. In this case, the principal office of the Registrar, Namecheap, Inc., is in Arizona, United States of America.

It is moreover noted that, for the reasons which are set out later in this Decision, the Panel has no serious doubt (albeit in the absence of a formal Response) that the Respondent registered and has used the disputed domain name in bad faith and with the intention of unfairly targeting the Complainant's goodwill in its trademark.

On this basis, the Panel concludes that the Parties have been given a fair opportunity to present their cases, and proceeds to issue the present decision on the substance of the dispute.

5. Factual Background

The Complainant is a French company established in 2014 and doing business under the trade name and brand name BACK MARKET. It is a leading online marketplace dedicated to refurbished electronic products such as smartphones, computers and televisions.

The Complainant is the owner of the following trademark registrations for the sign “BACK MARKET” (the “BACK MARKET trademark”):

- the French trademark BACK MARKET with registration No. 4135314, registered on March 13, 2015 for services in International Classes 35, 38 and 41;
- the French trademark BACK MARKET with registration No. 4390627, registered on February 16, 2018 for goods and services in International Classes 7, 8, 9, 11, 12, 14, 21, 28, 34, 35, 37, 38, 39 and 42;
- the International trademark BACK MARKET with registration No. 1415150, registered on January 17, 2018 for goods and services in International Classes 9, 35 and 37; and
- the International trademark BACK MARKET (logo) with registration No. 1514729, registered on November 19, 2019 for goods and services in International Classes 9, 35 and 37.

The Complainant is the owner of the domain names <backmarket.com>, registered on May 10, 2002, <backmarket.fr>, registered on September 12, 2014, and <backmarket.co.uk>, registered on April 8, 2015.

The disputed domain name was registered on September 18, 2022. It is currently inactive. At the time of filing the Complaint, the disputed domain name directed to a French language website that offered second-hand electronic goods and featured the Complainant’s BACK MARKET trademark and logo.

6. Parties’ Contentions

A. Complainant

The Complainant states that the disputed domain name is confusingly similar to the BACK MARKET trademark, because the disputed domain name reproduces it with the addition of the word “now”, which does not reduce the risk of confusion. The Complainant adds that the website at the disputed domain name is an exact reproduction of the Complainant’s website, using the same trademark, design, color, and product pages, and it features the brand BACK MARKET and not BACK MARKET NOW.

According to the Complainant, the Respondent has no rights or legitimate interests in respect of the disputed domain name, because it is not affiliated with the Complainant or authorized to register and use the Complainant’s BACK MARKET trademark. The Complainant adds that the term “Back market” is distinctive and arbitrary, so the registration of the disputed domain name by the Respondent could not have been a coincidence.

The Complainant contends that the disputed domain name was registered and is being used in bad faith. According to it, the Respondent selected the disputed domain name solely for the reason that it is a reproduction of the Complainant’s BACK MARKET trademark. The Complainant adds that the disputed domain name is highly similar to the Complainant’s domain name <backmarket.com>, and it is inconceivable that the Respondent could have registered the disputed domain name without knowledge of the Complainant’s rights over its BACK MARKET trademark.

The Complainant points out that the website under the disputed domain name is a copy of the website owned by the Complainant. According to it, by creating a confusion in the consumers’ mind who may believe that this copycat website is owned and operated by the Complainant, the registrant of the disputed domain name gives consumers a false feeling of trust and reliability, based on the Complainant’s reputation. The Complainant maintains that deceived consumers become victims of fraud when purchasing a product from the website at the disputed domain name. The Complainant concludes that the identical activity, the use of the same name, design, graphical charter, color and product pages show that the Respondent registered and uses the disputed domain name in order to benefit from the reputation of the Complainant and to scam consumers on the origin of the products offered on its website.

B. Respondent

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

In its informal email communications to the Center, the Respondent stated: "Hello, I have not made any complaints, you are mistaken" and "I don't own this domain name".

7. Discussion and Findings

Pursuant to the Policy, paragraph 4(a), the Complainant must prove each of the following to justify the transfer of the disputed domain name:

- (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 was registered and is being used in bad faith.

In this case, the Center has employed the required measures to achieve actual notice of the Complaint to the Respondent, in compliance with the Rules, paragraph 2(a), and the Respondent was given a fair opportunity to present its case.

By the Rules, paragraph 5(c)(i), it is expected of a respondent to: "[r]espond specifically to the statements and allegations contained in the complaint and include any and all bases for the Respondent (domain name holder) to retain registration and use of the disputed domain name [...]"

The Respondent however did not specifically respond to the statements and allegations contained in the Complaint and did not include any bases for the Respondent to retain registration and use of the disputed domain name.

A. Identical or Confusingly Similar

The Complainant has provided evidence that it is the owner of the BACK MARKET trademark. Therefore, the Panel is satisfied that the Complainant has established its rights in this trademark for the purposes of the present UDRP proceeding.

The Panel notes that a common practice has emerged under the Policy to disregard in appropriate circumstances the Top-Level Domain ("TLD") section of domain names for the purposes of the comparison under the Policy, paragraph 4(a)(i). See section 1.11.1 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"). The Panel sees no reason not to follow the same approach here, so it will disregard the ".online" gTLD section of the disputed domain name for the purposes of its comparison to the Complainant's trademark.

The disputed domain name reproduces the BACK MARKET trademark in its entirety with the addition of the dictionary word "now". This additional element does not prevent a finding of confusing similarity and the BACK MARKET trademark remains easily recognizable in it. As discussed in section 1.8 of the [WIPO Overview 3.0](#), where 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.

Therefore, the Panel finds that the disputed domain name is confusingly similar to the BACK MARKET trademark in which the Complainant has rights.

B. Rights or Legitimate Interests

While the overall burden of proof in UDRP proceedings is on the complainant, UDRP 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 relevant evidence demonstrating 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. See section 2.1 of the [WIPO Overview 3.0](#).

The Complainant contends that the Respondent has no rights or legitimate interests in the disputed domain name, because it has not authorized it to use the BACK MARKET trademark and there is no relationship between the Parties. The Complainant maintains that the disputed domain name has been used to resolve to a website that copies the design of the Complainant’s website, features the BACK MARKET trademark, and offers similar goods in an attempt to mislead and defraud consumers to purchase products from the website at the disputed domain name. The Complainant has thus established a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name.

The Respondent has not submitted a Response or disputed the contentions of the Complainant.

The disputed domain name is confusingly similar to the BACK MARKET trademark, and the evidence submitted by the Complainant shows that it has been used for a website offering second-hand electronic goods and featuring the BACK MARKET trademark. There was no disclaimer on this website for the lack of relationship with the Complainant.

Taking the above into account, it appears as more likely than not that the Respondent has registered the disputed domain name with knowledge of the Complainant’s BACK MARKET trademark and targeted it when registering and using the disputed domain name for a website that is similar to the Complainant’s website and appears to be competing with the business of the Complainant. Such use of the disputed domain name cannot be regarded as a legitimate activity giving rise to rights or legitimate interests in the disputed domain name.

The Panel therefore reaches the conclusion that the Respondent does not have rights or legitimate interests in the disputed domain name.

C. Registered and Used in Bad Faith

Paragraph 4(b) of the Policy lists four illustrative alternative circumstances that shall be evidence of the registration and use of a domain name in bad faith by a respondent, namely:

“(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 disputed domain name is confusingly similar to the BACK MARKET trademark and has been used for a website that is similar to the Complainant’s website and offers similar goods. In view of this, the Panel concludes that it is more likely than not that the Respondent has registered the disputed domain name with knowledge of the Complainant and targeting the BACK MARKET trademark, and has used it to attract, for commercial gain, Internet users to the associated website by creating a likelihood of confusion with the Complainant’s BACK MARKET trademark as to the source, sponsorship, affiliation, or endorsement of this website or of the products offered there.

In view of the above, the Panel finds that the disputed domain name has been registered and used in bad faith.

8. 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 <backmarketnow.online> be transferred to the Complainant.

/Assen Alexiev/

Assen Alexiev

Sole Panelist

Date: January 5, 2023