

ADMINISTRATIVE PANEL DECISION

Société des Produits Nestlé S.A. v. Cheng Huang
Case No. D2023-0323

1. The Parties

The Complainant is Société des Produits Nestlé S.A., Switzerland, represented by Studio Barbero, Italy.

The Respondent is Cheng Huang, China.

2. The Domain Name and Registrar

The disputed domain name <newgerberchi.com> (the “Domain Name”) 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 January 25, 2023. On January 26, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On January 26, 2023, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that 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 proceeding commenced on February 7, 2023. In accordance with the Rules, paragraph 5, the due date for Response was February 27, 2023. The Respondent did not submit a response. Accordingly, the Center notified the Respondent’s default on February 28, 2023.

The Center appointed A. Justin Ourso III as the sole panelist in this matter on March 6, 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

Société des Produits Nestlé S.A. (“SPN”), the named Complainant, is a wholly-owned subsidiary of Nestlé S.A. (“Nestlé”), a publicly-held Swiss company. Gerber Products Company (“GPC”), another subsidiary of Nestlé, sells the Gerber-branded baby food products of Nestlé, Gerber-branded skincare products for babies and breastfeeding supplies, and operates the website “www.gerber.com”. SPN’s licensee, Gerber Childrenswear LLC (“GCC”), sells children’s apparel under the GERBER trademark at its website “www.gerberchildrenswear.com”. This Decision refers to the affiliated companies SPN, Nestlé, GPC, and GCC collectively as the “Complainant.”

SPN owns the majority of the trademarks of the Nestlé Group, which includes hundreds of registrations throughout the world for its GERBER trademark and for its composite figurative mark, GERBER + “baby’s head sketch” design, for baby food products and for various articles of children’s clothing in Class 25, including a European Union Trade Mark registration for its composite figurative mark, GERBER + “baby’s head sketch” design, Reg. No., 003,232,097, which issued on March 31, 2005, for goods including “Clothing, footwear, headgear” in Class 25, and a United States of America (“U.S.”) trademark registration for its composite figurative mark, GERBER + “baby’s head sketch” design, Reg. No. 963,676, which issued on July 10, 1973, for “babies’ and children’s pants and shirt underclothing, vinyl pants, socks, gowns, bibs and coveralls” in Class 25.

GPC operates the domain name <gerber.com>, which it uses for its company website “www.gerber.com” and GCC operates its company website at “www.gerberchildrenswear.com”, using the domain name <gerberchildrenswear.com>.

The Respondent registered the Domain Name on September 9, 2022, without any authorization from the Complainant. The Domain Name resolves to a website that offers children’s wear goods for sale.

5. Parties’ Contentions

A. Complainant

In addition to facts set forth in the Factual Background in Part 4 above, the Complainant contends the following.

Regarding the element of confusing similarity with a mark in which it has rights, the Complainant contends that its trademark GERBER is well known worldwide; the Domain Name incorporates the whole of this mark; the addition of the descriptive or generic non-distinctive elements “new” and “chi” does not affect the assessment of confusing similarity; and the content of the website to which the Domain Name resolves, which features GERBER registered trademarks and offers purported GERBER products supports a conclusion that the Domain Name is confusingly similar to its GERBER trademark.

Regarding the element of rights or legitimate interests in the Domain Name, the Complainant contends that it has not licensed its mark to the Respondent or otherwise authorized the Respondent to use its GERBER mark; it is unaware of any evidence that the Respondent might be commonly known by a name corresponding to the Domain Name; the Domain Name resolves to a website on which the Respondent offers for sale products under the Complainant’s trademarks without disclaiming an affiliation with the Complainant or disclosing its relationship with the Complainant, so that the Respondent’s activity is not a legitimate commercial use or a fair use without intent for commercial gain; the content of the website is designed to give the impression that it is the Complainant’s; and the Respondent failed to reply to the Complainant’s demand letter, all of which demonstrate that the Respondent has no rights or legitimate interests in the Domain Name.

Regarding the element of bad faith registration and use of the Domain Name, among other contentions, the Complainant contends that because its GERBER trademark is well-known, and has been used extensively

since 1927, it is inconceivable that the Respondent was unaware of the trademark and its worldwide reputation when it registered the Domain Name; the misappropriation of a well-known trademark as a domain name constitutes bad faith registration; the Respondent's use of the Complainant's trademarks on the website to which the Domain Name resolves demonstrates that the Respondent was aware of the trademarks; the content of the website, using the well-known trademarks and selling clothing, is intended to generate the impression that the Complainant operates the website and to pass off the website as an official website of the Complainant; the Respondent provided fictitious contact details on the website, namely, a false address in Los Altos, California; the email address on the Respondent's website is inactive; and the Respondent failed to reply to the Complainant's multiple demand letters, all of which demonstrates that the Respondent was intentionally attempting to use the Domain Name to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's trademarks as to the source or affiliation of the website and the products offered there, taking unfair advantage of the Complainant's well-known trademarks for the Respondent's profit.

The Complainant requested transfer of the Domain Name.

B. Respondent

The Respondent did not submit a response to the Complaint.

6. Discussion and Findings

A. The Effect of the Respondent's Default

If a respondent does not submit a response to a complaint, a panel decides the dispute based upon the complaint. Rules, paragraphs 5(f) and 14(a). Because the Complainant has the burden of proof, Policy, paragraph 4(a), the Complainant must still prove the elements of a claim to obtain the requested relief, notwithstanding the Respondent's default. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.3.

In the absence of exceptional circumstances, a respondent's failure to respond to a complaint requires that a panel draw the inferences from this failure that it considers proper. Rules, paragraph 14(b). The Panel finds that no exceptional circumstances exist for the failure of the Respondent to submit a response. Accordingly, the Panel infers that the Respondent does not deny the facts alleged and the contentions urged by the Complainant based upon these facts, and will draw all reasonable inferences that are proper from the evidence and the facts found by the Panel. *Id.*

Although the Panel may draw negative inferences from the Respondent's default, the Complainant may not rely on conclusory allegations and must support its allegations with evidence to prove the three elements. [WIPO Overview 3.0](#), section 4.3.

B. Elements of a Claim

A complainant must prove three elements to obtain relief: (i) the domain name is identical or confusingly similar to a trademark in which the complainant has rights; (ii) the respondent has no rights or legitimate interests in the domain name; and (iii) the respondent registered and is using the domain name in bad faith. Policy, paragraph 4(a).

(i). Identical or Confusingly Similar

On the first element, the Complainant must prove that (1) it has rights in a trademark, and (2) the Domain Name is identical or confusingly similar to this trademark. Policy, paragraph 4(a)(i).

The Panel finds that the Domain Name is confusingly similar to the Complainant's GERBER trademark. The Domain Name incorporates the entire trademark, and the trademark is easily recognizable within the Domain Name. [WIPO Overview 3.0](#), section 1.7. The addition in the Domain Name of (1) the descriptive word "new" before the trademark; and (2) the letters "chi," which form the first three letters of the word "children's," does not prevent a finding of confusing similarity. [WIPO Overview 3.0](#), section 1.8. Unless it contributes to confusing similarity, panels disregard the generic Top-Level Domain in determining confusing similarity. [WIPO Overview 3.0](#), section 1.11.1.

Accordingly, the Panel concludes that the Complainant has proven the first element - the Domain Name is confusingly similar to a trademark in which it has rights.

(ii). Rights or Legitimate Interests

The Policy provides a non-exclusive list of circumstances that, if a UDRP panel finds proved, demonstrates that a respondent has rights to, or legitimate interests in, a domain name for the purposes of paragraph 4(a)(ii) of the Policy: (i) before any notice to a respondent of the dispute, its 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) a respondent has been commonly known by the domain name, even if it has acquired no trademark or service mark rights; or (iii) a respondent is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to divert consumers misleadingly or to tarnish the trademark or service mark at issue. Policy, paragraph 4(c).

The Respondent has not claimed the existence of any of these circumstances. The Complainant, on the other hand, has made a *prima facie* showing that the Respondent lacks any rights or legitimate interests in the Domain Name. Rules, paragraphs 10(d) and 14(b); [WIPO Overview 3.0](#), section 4.3. Where a complainant shows *prima facie* that a respondent lacks rights or legitimate interests, the burden of production on this second element shifts to the respondent to come forward with relevant evidence proving rights or legitimate interests in the domain name. [WIPO Overview 3.0](#), section 2.1. The Respondent here has not submitted any evidence to rebut the *prima facie* showing.

Additionally, the Panel finds that the Registrar identified the Respondent as "cheng huang," a name that does not resemble the Domain Name; the Complainant's trademark rights long precede the registration of the Domain Name; and no evidence exists of a *bona fide* commercial, noncommercial, or fair use of the Domain Name, which corroborate that the Respondent is not known by the Domain Name and is not using the Domain Name for a legitimate commercial, noncommercial, or fair use. To the contrary, the Panel finds that the evidence shows an intended deceptive use for commercial gain.

Accordingly, the Panel concludes that the Complainant has proven the second element - the Respondent lacks rights or legitimate interests in the Domain Name.

(iii). Registered and Used in Bad Faith

The Policy provides that the following circumstance is "evidence of the registration and use of a domain name in bad faith: [. . .] by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site . . ., by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site." Policy, paragraph 4(b)(iv).

Panels have consistently found that the mere registration of a domain name that is identical or confusingly similar to a well-known trademark can create a presumption of bad faith registration, which here is un rebutted by the Respondent. [WIPO Overview 3.0](#), section 3.1.4. In addition to incorporating the mark in the Domain Name, the Respondent also used the Complainant's well-known composite figurative "baby's head sketch" trademark on the Respondent's website. The Panel, therefore, finds that the Respondent must have been aware of the Complainant's trademark and of the Complainant's rights in its mark at the time that

the Respondent registered the Domain Name and that the Respondent registered the Domain Name in bad faith. Rules, paragraph 14(b); [WIPO Overview 3.0](#), section 3.2.2.

The content of the website, while displaying the Complainant's figurative trademark, fails to state the Respondent's relationship to the Complainant, which warrants an explanation. The Respondent's failure to respond to the Complainant's demand letters and to the Complaint amplifies the Respondent's failure to explain any relationship. Panels have found a respondent's lack of an explanation, coupled with an absence of rights or legitimate interests, to be a factor tending to show bad faith. [WIPO Overview 3.0](#), section 3.2.1.

Here, the Panel finds that (1) the Complainant's mark is well-known worldwide and of longstanding use; (2) the elements in the Domain Name in addition to the trademark betray an intent to misleadingly associate the Domain Name with the Complainant's children's wear website; (3) the Respondent's website displays the Complainant's well-known figurative trademark and offers children's wear goods for sale, in effect passing off the site as a site associated with the Complainant; (4) the Respondent's site appears to misleadingly and deceptively attract customers and potential customers of the Complainant for the Respondent's commercial gain; (5) the Respondent, whose Whols contact details show an address in China to which the Written Notice sent by the Center failed to deliver, has on its website an address in the state of California in the U.S., which is inactive, suggesting false contact information on the site, especially when compared with the Respondent's Whols contact details; and (6) the Respondent failed to respond to the Complainant's demand letters or to the Complaint, all of which, collectively, compel the Panel to conclude that the Respondent intentionally chose the Domain Name in bad faith to take unfair advantage of the Complainant's trademark and that it has used the Domain Name in bad faith intentionally to attract Internet users to its site for commercial gain, by creating a likelihood of confusion with the Complainant's trademark as to the source of the site or the source of the goods offered on the site, in violation of the Policy, paragraph 4(b)(iv). [WIPO Overview 3.0](#), sections 3.1.4, 3.2.1, and 3.2.2.

In particular, the content of the Respondent's website, which displays the Complainant's composite figurative "baby's head sketch" trademark and sells competitive children's wear demonstrates that the Respondent opportunistically registered and has used the Domain Name to attract Internet users to the site for the Respondent's own profit. The Respondent's actions in ignoring the Complainant's demand letters and continuing to use the Domain Name, and the Respondent's failure to submit a response to the Complaint, confirm this finding. Its actions further undermine any possibility that the Respondent was in good faith when it registered and used the Domain Name to sell children's wear.

Accordingly, the Panel concludes that the Complainant has proven the third element - the Respondent registered and has used the Domain Name in bad faith.

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 Domain Name <newgerberchi.com> be transferred to the Complainant.

/A. Justin Ourso III/

A. Justin Ourso III

Sole Panelist

Date: March 16, 2023