

ADMINISTRATIVE PANEL DECISION

Accent Lifestyle Pty Ltd v. Lin Ruifu
Case No. D2023-1150

1. The Parties

The Complainant is Accent Lifestyle Pty Ltd, Australia, represented by Clayton Utz, Australia.

The Respondent is Lin Ruifu, China.

2. The Domain Name and Registrar

The disputed domain name <newfirstmse.com> is registered with Gname.com Pte. Ltd. (the “Registrar”).

3. Procedural History

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the “Center”) on March 15, 2023. On March 15, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On March 17, 2023, 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 (Redacted for Privacy) and contact information in the Complaint. The Center sent an email communication to the Complainant on March 17, 2023, 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 in English on March 21, 2023.

On March 17, 2023, the Center transmitted an email communication to the Parties in English and Chinese regarding the language of the proceeding. On March 20, 2023, the Complainant submitted a request that English be the language of the proceeding. The Respondent did not comment on the language of the proceeding.

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 in English and Chinese of the Complaint, and the proceedings commenced on March 24, 2023. In accordance with the Rules, paragraph 5, the due date for Response was April 13, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on April 14, 2023.

The Center appointed Joseph Simone as the sole panelist in this matter on April 27, 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

The Complainant, Accent Lifestyle Pty Ltd, is an Australian company and a wholly owned subsidiary of Accent Group Limited (Accent Group), which is a leading business in online retail distribution of apparel, clothing, footwear, headgear, bags and related accessories.

The FIRST MSE trade mark is one of Accent Group's key brands.

The Complainant has an extensive global portfolio of trade marks, including the following:

- Australian Trade Mark Registration No. 2175117 for FIRST MSE in Classes 18 and 25, registered on May 17, 2021; and
- New Zealand Trade Mark Registration No. 1188141 for FIRST MSE in Classes 18 and 25, registered on March 1, 2022 (held in the name of Accent Lifestyle (NZ) Limited, the Complainant's affiliate based in New Zealand).

The disputed domain name <newfirstmse.com> was registered on December 30, 2022.

The Complainant's evidence indicates that at the time of filing of the Complaint, the disputed domain name <newfirstmse.com> resolved to a web page displaying the Complainant's trade mark and purporting to promote the sale of the same type of apparel products offered by the Complainant. At the time of this decision, the disputed domain name <newfirstmse.com> does not resolve to any website.

5. Parties' Contentions

A. Complainant

The Complainant asserts that it has prior rights in the FIRST MSE trade mark and that it has acquired a strong reputation in its field of business.

The Complainant further notes that the disputed domain name registered by the Respondent is confusingly similar to the Complainant's FIRST MSE trade mark.

The Complainant asserts that it has not authorized the Respondent to use its FIRST MSE mark, and there is no evidence to suggest that the Respondent has used, or undertaken any demonstrable preparations to use, the disputed domain name in connection with a *bona fide* offering of goods or services.

The Complainant has presented evidence showing that the disputed domain name was used in association with very similar site purportedly offering for sale products under the Complainant's trade mark, that it is implausible that the Respondent registered the disputed domain name in good faith, and that any use of the disputed domain name must be in bad faith.

B. Respondent

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

6. Discussion and Findings

6.1. Preliminary Issue: Language of the Proceeding

In accordance with paragraph 11(a) of the Rules:

"[...] the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding."

In this case, the language of the Registration Agreement for the disputed domain name is Chinese. Hence, the default language of the proceeding should be Chinese.

However, the Complainant filed the Complaint in English, and requested that English be the language of the proceeding, asserting mainly the followings:

- The website associated with the disputed domain name has only ever depicted the English language and the address listed on the Contact Us page of this website is in the United States of America where English is the most commonly spoken language;
- All the legal agreements on the website associated with the disputed domain name are in the English language; and
- The Complainant has no knowledge of the Chinese language, and the Complainant will suffer prejudice if the proceedings are conducted in Chinese.

The Respondent was notified in both Chinese and English of the language of the proceeding and the commencement of the proceeding and did not comment on the language of the proceeding or submit any response in either Chinese or English.

Considering the circumstances of this case, the Panel has determined that the language of the proceeding shall be English, and as such, the Panel has issued this decision in English. The Panel further finds that such determination should not cause any prejudice to either Party and should ensure that the proceeding takes place with due expedition.

6.2. Substantive Elements

A. Identical or Confusingly Similar

The Panel acknowledges that the Complainant has established rights in the FIRST MSE trade mark.

Disregarding the generic Top-Level Domain ("gTLD") ".com", the disputed domain name incorporates the Complainant's trade mark FIRST MSE in its entirety.

The additional word "new" does not prevent a finding of confusing similarity pursuant to the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 1.8.

The Panel therefore finds that the Complainant has satisfied the requirements of paragraph 4(a)(i) of the Policy in establishing its rights in the FIRST MSE trade mark and in showing that the disputed domain name is confusingly similar to its mark.

B. Rights or Legitimate Interests

Pursuant to paragraph 4(c) of the Policy, a complainant is required to establish a *prima facie* case that the respondent lacks rights or legitimate interests in the disputed domain name. Once such this *prima facie*

case has been established, the respondent bears the burden of producing evidence in support of its rights or legitimate interests in the disputed domain name. If the respondent fails to do so, the complainant may be deemed to have satisfied paragraph 4(a)(ii) of the Policy. See [WIPO Overview 3.0](#), section 2.1.

The Complainant asserts that it has not authorized the Respondent to use its trade marks and there is no evidence to suggest that the Respondent has used, or undertaken any demonstrable preparations to use, the disputed domain name in connection with a *bona fide* offering of goods or services.

As such, the Complainant has established its *prima facie* case with satisfactory evidence.

The Respondent did not file a response and has therefore failed to assert factors or put forth evidence to establish that he or she enjoys rights or legitimate interests in the disputed domain name. As such, the Respondent has failed to rebut the Complainant's *prima facie* showing of the Respondent's lack of rights or legitimate interests in the disputed domain name, and none of the circumstances of paragraph 4(c) of the Policy is applicable in this case.

The Respondent has failed to demonstrate that prior to the notice of the dispute, he or she used or made preparations to use the disputed domain name in connection with a *bona fide* offering of goods or services. There is also no evidence showing that the Respondent is commonly known by the disputed domain name or that the Respondent is making legitimate noncommercial or fair use of the disputed domain name.

Furthermore, given the composition of the disputed domain name, which combines the Complainant's trade mark with the purely descriptive term "new," the disputed domain name carries a risk of implied affiliation, contrary to the fact, which cannot constitute fair use. [WIPO Overview 3.0](#), section 2.5.1.

Accordingly, and based on the Panel's findings below, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name pursuant to paragraph 4(a)(ii) of the Policy.

C. 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 as 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 trade mark 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 trade mark 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 has 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.

For reasons discussed under this and the preceding heading, the Panel believes that the Respondent's conduct in this case constitutes bad faith registration and use of the disputed domain name.

When the Respondent registered the disputed domain name, the FIRST MSE trade marks were already known and directly associated with the Complainant's activities. Given the prior use and fame of the Complainant's marks, in the Panel's view, the Respondent should have been aware of the Complainant's marks when registering the disputed domain name and ultimately, given the prior use of the disputed domain name, it is clear that the Respondent was aware of the Complainant and intentionally targeted the Complainant when registering the disputed domain name.

At the time of filing of the Complaint, the disputed domain name resolved to a website very similar to the Complainant's, displaying the Complainant's trade mark and purporting to promote the sale of the same type of apparel products offered by the Complainant.

In light of the foregoing, the Panel has determined there is no reasonable basis for concluding that the Respondent has registered and is using the disputed domain name in good faith and as such the Respondent's registration and use of the disputed domain name constitutes bad faith under paragraph 4(b)(iv) of the Policy.

While the disputed domain name no longer resolves to an active website, the doctrine of passive holding provides that the non-use of domain name does not necessarily prevent a finding of bad faith. See [WIPO Overview 3.0](#), section 3.3. Accordingly, given the prior bad faith use of the disputed domain name, the confusing nature of the disputed domain name, and the implausibility of any good faith use that the disputed domain name may be put, the current passive holding of the disputed domain name does not prevent a finding of bad faith.

The Panel thus finds that the Respondent registered and is using the disputed 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 disputed domain name <newfirstmse.com> be transferred to the Complainant.

/Joseph Simone/

Joseph Simone

Sole Panelist

Date: May 10, 2023