

ADMINISTRATIVE PANEL DECISION

OBAGI Holdings Company Limited v. LE MINH DUC
Case No. D2023-2820

1. The Parties

The Complainant is OBAGI Holdings Company Limited, United Kingdom, represented by MSA IP - Milojevic Sekulic & Associates, Serbia.

The Respondent is LE MINH DUC, Viet Nam.

2. The Domain Name and Registrar

The disputed domain name <myphamobagi.net> is registered with P.A. Viet Nam Company Limited (the "Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on June 30, 2023. On July 3, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On August 8, 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 (Domain Admin, Domain Whois Protection Service) and contact information in the Complaint. The Center sent an email communication to the Complainant on August 8, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Center sent an email communication to the parties on August 8, 2023, regarding the language of the proceeding, as the Complaint has been submitted in English and the language of the registration agreement for the disputed domain name is Vietnamese. The Complainant filed an amended Complaint on August 11, 2023, and requested English as 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 of the Complaint, and the proceedings commenced on August 15, 2023. In accordance with the Rules,

paragraph 5, the due date for Response was September 4, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on September 6, 2023.

The Center appointed Zoltán Takács as the sole panelist in this matter on September 15, 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

Founded in 1988 the Complainant is a global skincare product company that developed and manufactures a number of skin care line products, including the OBAGI line.

The Complainant's portfolio of trademark registrations for the mark OBAGI include by way of example the Vietnamese Trademark Registration No. 4-0106470-000 registered on August 4, 2008, for various skin care products.

The Complainant's corporate website is available at "www.obagi.com". The corresponding domain name <obagi.com> was registered on January 26, 1998.

The disputed domain name was registered on December 16, 2022, and was used for a Vietnamese language website that prominently featured the Complainant's trademark purporting to offer the Complainant's OBAGI line of skin care products.

Currently, the disputed domain name redirects to a web page that displays the following text:

"Welcome to nginx! If you see this page, the nginx web server is successfully installed and working. Further configuration is required. For online documentation and support please refer to nginx.org. Commercial support is available at nginx.com. Thank you for using nginx".

5. Parties' Contentions

A. Complainant

The Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the disputed domain name.

Notably, the Complainant contends that:

- the disputed domain name, which fully incorporates its OBAGI trademark is confusingly similar to it because the addition of the term "my pham" (mỹ phẩm translates into cosmetics in Vietnamese) to the trademark in the disputed domain name is not sufficient to distinguish the disputed domain name from the trademark;
- the Respondent has no rights or legitimate interests in respect of the disputed domain name, and
- the use of its trademark and product images on the website at the disputed domain name shows the Respondent's awareness of its trademark at the time of registration of the disputed domain name as well as the Respondent's intent to deceive consumers into believing that it is a website operated or authorized by the Complainant.

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;
- (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.

6.1 Procedural Matter - Language of the Proceeding

Noting the aim of conducting the proceedings with due expedition, paragraph 10 of the Rules vests a panel with authority to conduct the proceedings in a manner it considers appropriate while also ensuring both that the parties are treated with equality, and that each party is given a fair opportunity to present its case.

Under paragraph 11(a) of the Rules, "unless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, 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".

The Registration Agreement in this case is in the Vietnamese language.

The Complainant has submitted its Complaint in English and requested that English be the language of the proceeding. The Complainant argues that it conducts its business in English and that translating the Complaint and the supporting documents into Vietnamese would cause an unnecessary burden to the Complainant and unnecessarily delay the proceeding.

The Center has sent the case-related documents to the Respondent in both English and Vietnamese, but the Respondent has shown no inclination to participate in this proceeding; it failed to file a Response and failed to object to the Complainant's request that English be the language of this proceeding.

In light of the Policy's aim of facilitating a time and cost-efficient procedure for the resolution of domain name disputes and in particular of the Respondent's default and failure to object to the Complainant's request, in accordance with paragraph 10(b) and paragraph 11(a) of the Rules the Panel determines that English be the language of this administrative proceeding.

6.2 Substantive Matters

A. Identical or Confusingly Similar

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the disputed domain name. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, (["WIPO Overview 3.0"](#)), section 1.7.

Based on the available record, the Panel finds the Complainant has shown rights in respect of a trademark or service mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.2.1.

The Panel finds that the disputed domain name is confusingly similar to the mark for the purposes of the Policy.

The entirety of the mark is reproduced within the disputed domain name. While the addition of other terms may bear on assessment of the second and third elements, the Panel finds the addition of the descriptive term “my pham” (mỹ phẩm translates into cosmetics in Vietnamese) to the mark in the disputed domain name does not prevent a finding of confusing similarity between the disputed domain name and the mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.7 and 1.8.

Based on the available record, the Panel finds the first element of the Policy has been established.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy provides a list of circumstances in which the Respondent may demonstrate rights or legitimate interests in a disputed domain name.

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 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. [WIPO Overview 3.0](#), section 2.1.

Having reviewed the record, the Panel finds that the Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name. The Respondent has not rebutted the Complainant’s *prima facie* showing and has not come forward with any relevant evidence demonstrating rights or legitimate interests in the disputed domain name.

The Panel considers that the record of this case reflects that:

- before any notice to the Respondent of the dispute, the Respondent did not use, nor has made demonstrable preparations to use the disputed domain name or a name corresponding to the disputed domain name in connection with a *bona fide* offering of goods or services. Paragraph 4(c)(i) of the Policy, and [WIPO Overview 3.0](#), section 2.2;
- the Respondent (as an individual, business, or other organization) has not been commonly known by the disputed domain name. Paragraph 4(c)(ii) of the Policy, and [WIPO Overview 3.0](#), section 2.3;
- the Respondent is not making a legitimate noncommercial or fair use of the disputed domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue. Paragraph 4(c)(iii) of the Policy, and [WIPO Overview 3.0](#), section 2.4;
- the record contains no other factors demonstrating rights or legitimate interests of the Respondent in the disputed domain name, and
- the composition of the disputed domain name – comprising the Complainant’s trademark together with the term clearly describing the Complainant’s products - carries a risk of implied affiliation with the Complainant. [WIPO Overview 3.0](#), section 2.5.1.

The Respondent is not affiliated with the Complainant in any respect and the Complainant has not authorized the Respondent to use its OBAGI trademark in a domain name or otherwise. In addition, the Panel notes that the website at the disputed domain name includes references to competing products such as Bioderma, Vichy, and Eucerin. Such use cannot give rise to rights or legitimate interests in the disputed domain name.

Based on the available record, the Panel finds the second element of the Policy has been established.

C. Registered and Used in Bad Faith

The Panel notes that for the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy establishes circumstances, in particular but without limitation, that if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith.

Having reviewed the record, the Panel finds the Respondent's registration and use of the disputed domain name constitutes bad faith under the Policy.

The Panel considers that the record of this case reflects that the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its website or other online locations, 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 the Respondent's website or location. Paragraph 4(b)(iv) of the Policy, and [WIPO Overview 3.0](#), section 3.1.4.

The Complainant's OBAGI trademark is inherently distinctive and has been registered in Viet Nam, the Respondent's domicile for more than 30 years. The Respondent reproduced the Complainant's trademark in the disputed domain name together with the term describing the Complainant's products and used it to redirect Internet users to its website purportedly offering the Complainant's OBAGI line of skin care products, while also including in the website references to competing products.

Given the above-mentioned, in view of the Panel, it is implausible that the Respondent registered the disputed domain name without actual knowledge of the Complainant and its OBAGI trademark and for any other purpose than to refer to and target the Complainant through false impersonation or association. Such conduct constitutes bad faith under the Policy (see *Weber-Stephen Products LLC v. WhoisGuard Protected, WhoisGuard, Inc. / Daniela Gebauer, Kitchenhelpers GmbH*, WIPO Case No. [D2017-0118](#)).

As discussed above, currently the disputed domain name resolves to a web page with content that may misdirect Internet traffic, in the present case to the open-source web application server called Nginx. Although the Respondent has defaulted and provided no explanation for this redirection of the disputed domain name, the Panel finds that such use of the disputed domain name based on profiting from trading on the Complainant's trademark amounts to bad faith.

Based on the available record, the Panel finds the third element of the Policy has been established.

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, <myphamobagi.net> be transferred to the Complainant.

/Zoltán Takács/

Zoltán Takács

Sole Panelist

Date: September 29, 2023