

ADMINISTRATIVE PANEL DECISION

Fermliving ApS v. 金林山 (LinShan Jin)

Case No. D2024-0066

1. The Parties

The Complainant is Fermliving ApS, Denmark, represented by Aera A/S, Denmark.

The Respondent is 金林山 (LinShan Jin), China.

2. The Domain Name and Registrar

The disputed domain name <fermlivingusa.com> is registered with Cloud Yuqu LLC (the "Registrar").

3. Procedural History

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the "Center") on January 10, 2024. On January 10, 2024, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On January 11, 2024, 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 January 11, 2024, 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 January 12, 2024.

On January 11, 2024, the Center informed the Parties in Chinese and English, that the language of the Registration Agreement for the disputed domain name is Chinese. On January 12, 2024, the Complainant confirmed its request that English be the language of the proceeding. The Respondent did not submit any comment on the Complainant's submission.

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 January 17, 2024. In accordance with the Rules, paragraph 5, the due date for Response was February 6, 2024. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on February 7, 2024.

The Center appointed Rachel Tan as the sole panelist in this matter on February 14, 2024. 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 company based in Copenhagen which specialises in the manufacture and sale of furnishings and interior designs since its foundation in 2006. The products produced and distributed by the Complainant are sold in more than 75 countries worldwide.

The Complainant is the owner of marks consisting of the element “ferm living” in multiple jurisdictions. For example, Danish Trade Mark Registration No. VR 2007 00835, registered on March 27, 2007 in classes 16, 20, and 35; International Trade Mark Registration No. 1391990, registered on August 16, 2017, designating, inter alia, China, in classes 8, 11, 16, 20, 21, 24, 25, 27, 28, and 35; and European Union Trade Mark Registration No. 16389439, registered on September 7, 2017 in classes 6, 8, 11, 16, 18, 20, 21, 24, 25, 27, 28, and 35.

The Complainant is the owner of the domain name <fermliving.com>.

The Respondent is 金林山 (LinShan Jin), China.

The disputed domain name was registered on September 25, 2023, and does not resolve to any active website.

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 is confusingly similar to the Complainant's FERM LIVING mark as it incorporates the entirety of the mark along with the word “usa”. The addition of the suffix “usa” does not impact the overall impression of the dominant part of the disputed domain name “ferm living” and hence is not sufficient to overcome the confusing similarity with respect to the FERM LIVING mark which remains the dominant and only distinctive element in the disputed domain name. Further, the generic Top-Level Domain (“gTLD”) “.com” has no legal significance and may be disregarded.

The Complainant further alleges that the Respondent has no rights or legitimate interests in respect of the disputed domain name. There is no evidence to conclude that the Respondent owns any service marks or word marks that reflect the disputed domain name and nothing in the records suggests that the Respondent is commonly known by the disputed domain name. Further, the Respondent is not using the disputed domain name in connection with any bona fide offering of goods or services as the disputed domain name is inactive.

The Complainant finally asserts that the disputed domain name has been registered and is being used in bad faith. It is apparent from the composition of the disputed domain name that the Respondent must have known of the Complainant's FERM LIVING mark and its business. The Respondent has not made demonstrable preparations to use the disputed domain name as it resolves to a website that is inactive. Given the Respondent's lack of rights or legitimate interests in the disputed domain name and the confusingly similarity of the disputed domain name with the Complainant's well reputed FERM LIVING mark, any use of the disputed domain name will carry a risk of implied affiliation with Complainant and be a use in bad faith.

B. Respondent

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

6. Discussion and Findings

6.1 Procedural Issue: Language of the Proceeding

The language of the Registration Agreement for the disputed domain name is Chinese. Pursuant to the Rules, paragraph 11(a), in the absence of an agreement between the parties, or unless specified otherwise in the registration agreement, the language of the administrative proceeding shall be the language of the registration agreement.

The Complaint was filed in English. The Complainant has requested that the language of the proceeding be English for several reasons, including the fact that (i) the disputed domain name is comprised of Latin characters; (ii) the suffix "usa" added to the disputed domain name is a geographical indicator to attract American or other English-speaking visitors to the website; and (iii) the Complainant is unable to communicate in Chinese and hence the translation of the complaint would unfairly be a disadvantage and burden for the Complainant which also will delay the proceedings and adjudication of this matter.

The Respondent did not make any submissions with respect to the language of the proceeding.

In exercising its discretion to use a language other than that of the registration agreement, the Panel has to exercise such discretion judicially in the spirit of fairness and justice to both parties, taking into account all relevant circumstances of the case, including matters such as the parties' ability to understand and use the proposed language, time and costs (see WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.5.1).

Having considered all the matters above, the Panel determines under paragraph 11(a) of the Rules that the language of the proceeding shall be English.

6.2 Substantive Issues

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 3.0](#), section 1.7.

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 entirety of the mark is reproduced within the disputed domain name. Accordingly, the disputed domain name is confusingly similar to the mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.7.

Although the addition of another term here, "usa", may bear on assessment of the second and third elements, the Panel finds the addition of such term 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 1.8. Lastly, it is permissible for the Panel to ignore the gTLD, in this case ".com", under the first element confusing similarity test. [WIPO Overview 3.0](#), section 1.11.1.

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.

Although 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 difficult 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 (although the burden of proof always remains on the complainant). 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 available record, the Panel finds 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 such as those enumerated in the Policy or otherwise.

The Respondent has not provided evidence of a legitimate noncommercial or fair use of the disputed domain name or reasons to justify his or her choice of the term “ferm living” in the disputed domain name. There is no indication to show that the Respondent is commonly known by the disputed domain name or otherwise has rights or legitimate interests in it. Moreover, the Complainant has not granted the Respondent any license or authorization to use the Complainant’s marks or register the disputed domain name. Therefore, none of the circumstances in paragraph 4(c) of the Policy are presented in this case.

Further, the Panel considers that the composition of the disputed domain name carries a risk of implied affiliation with the Complainant. [WIPO Overview 3.0](#), section 2.5.1. For these reasons, the Panel finds that the Respondent has no 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

Paragraph 4(b) of the Policy sets out a list of non-exhaustive circumstances that may indicate that a domain name was registered and used in bad faith, but other circumstances may be relevant in assessing whether a respondent’s registration and use of a domain name is in bad faith. [WIPO Overview 3.0](#), section 3.2.1.

In the present case, the Panel notes that the Complainant’s FERM LIVING mark was registered well before the registration of the disputed domain name. Through use and advertising, the Complainant’s FERM LIVING mark is known throughout the world, including in China. Search results using the term “ferm living” on the Internet search engines direct Internet users to the Complainant and its products, which indicates that an exclusive connection between the FERM LIVING mark and the Complainant has been established. As such, the Respondent should have known of the Complainant’s FERM LIVING mark when registering the disputed domain name.

Section 3.1.4 of the [WIPO Overview 3.0](#) states that the “mere registration of a domain name that is identical or confusingly similar (particularly domain names comprising typos or incorporating the mark plus a descriptive term) to a famous or widely known trademark by an unaffiliated entity can by itself create a presumption of bad faith”. In this case, the disputed domain name incorporates the Complainant’s widely known FERM LIVING mark and was registered by the Respondent who has no relationship with the Complainant, thus creating a presumption of bad faith.

Panels have found that the non-use of a domain name (including a page displaying the message “404 Not Found”) would not prevent a finding of bad faith under the doctrine of passive holding. Having reviewed the available record, the Panel finds the non-use of the disputed domain name does not prevent a finding of bad faith in the circumstances of this proceeding. Although panelists will look at the totality of the circumstances in each case, factors that have been considered relevant in applying the passive holding doctrine include: (i) the degree of distinctiveness or reputation of the complainant’s mark, (ii) the failure of the respondent to submit a response or to provide any evidence of actual or contemplated good-faith use, and (iii) the respondent’s concealing its identity or use of false contact details (noted to be in breach of its registration agreement). [WIPO Overview 3.0](#), section 3.3. Having reviewed the available record, the Panel notes the distinctiveness or reputation of the Complainant’s trademark, the composition of the disputed domain name, and apparently false contact details provided by the Respondent when registering the disputed domain name (the Written Notice was not delivered to the Respondent by the courier service), and finds that in the circumstances of this case the passive holding of the disputed domain name does not prevent a finding of bad faith under the Policy.

Based on the available record, the Panel finds that the Complainant has established the third element 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 <fermlivingusa.com> be transferred to the Complainant.

/Rachel Tan/

Rachel Tan

Sole Panelist

Date: February 27, 2024