

ADMINISTRATIVE PANEL DECISION

Whaleco Inc. v. weixin hong
Case No. D2024-0847

1. The Parties

Complainant is Whaleco Inc., United States of America (“United States” or “US”), represented by Law Office of David Gulbransen, United States.

Respondent is weixin hong, United States.

2. The Domain Name and Registrar

The disputed domain name <temuapp.org> (the “Domain Name”) is registered with GoDaddy.com, LLC (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on February 27, 2024. On February 27, 2024, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On February 28, 2024, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name which differed from the named Respondent (Registration Private, Domains by Proxy, LLC) and contact information in the Complaint. The Center sent an email to Complainant on February 29, 2024 providing the registrant and contact information disclosed by the Registrar, and inviting Complainant to submit an amendment to the Complaint. Complainant filed an amendment to the Complaint on February 29, 2024.

The Center verified that the Complaint together with the amendment to 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 Respondent of the Complaint, and the proceedings commenced on March 1, 2024. In accordance with the Rules, paragraph 5, the due date for Response was March 21, 2024. The Response was filed with the Center on March 20, 2024.

The Center appointed Robert A. Badgley as the sole panelist in this matter on March 26, 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.

On March 25, 2024, Complainant submitted an unsolicited supplemental filing and annexes. Because this filing addressed arguments that Complainant could not have reasonably anticipated when submitting its original Complaint – including the fact that Respondent redirected the Domain Name to a new website after receiving notice of this UDRP proceeding – the Panel, in its discretion, has opted to consider the supplemental filing.

4. Factual Background

According to the Complaint, Complainant “operates an online shopping platform (“TEMU.COM” or the “Platform”) accessible through its website (“https://temu.com”) and mobile applications available for free to download through the Apple App Store and the Google Play Store.” Complainant’s TEMU.COM app launched in the United States in September 2022, and, according to Complainant, it “quickly became the most downloaded e-commerce app for the fourth quarter of 2022.”

According to a Declaration by Complainant’s Senior Legal Counsel (“JMC Declaration”), the “rapid rise” of the TEMU.COM app is due to its “innovative ecommerce combination of online shopping and entertainment known as ‘discovery-based shopping.’” According to the JMC Declaration, “TEMU.COM is an online marketplace that connects consumers with sellers, manufacturers, and brands around the world,” and the platform “strives to continually offer the most affordable quality products to create an inclusive environment for consumers and sellers.”

According to Respondent’s website (discussed below), the TEMU app receives more than 90.5 million unique visitors each month.

Through Complainant’s affiliate Five Bells Limited, Complainant is the exclusive licensee to the trademark TEMU, including United States Patent and Trademark (“USPTO”) Reg. No. 7,164,306 for the word mark TEMU, registered on September 12, 2023 in connection with “Provision of an online marketplace for buyers and sellers of goods and services,” with a September 1, 2022 date of first use in commerce, as well as USPTO Reg. No. 7,157,165 for the word mark TEMU, registered on September 5, 2023 in connection with “Downloadable computer application software for mobile phones, namely, software for online shopping; Downloadable computer programs for online shopping; Downloadable computer software for use as an electronic wallet; Downloadable computer software for online shopping; Recorded computer programs for online shopping,” with a September 1, 2022 date of first use in commerce.

Annexed to the Complaint are two court decisions by United States federal courts recognizing that Complainant, by virtue of its status as Five Bells Limited’s exclusive licensee, has rights in the mark TEMU.

The Domain Name was registered on May 1, 2023. The Domain Name currently is redirected to a website at “www.truegault.com”, a website that Respondent claims to operate. The True Gault website contains numerous pages devoted to a discussion of the TEMU app and its features.

Before the Complaint in this proceeding was filed, the Domain Name resolved to a website featuring and widely using Complainant’s TEMU mark, as well as Complainant’s logo and orange color scheme. The earliest iterations of this website (including a Wayback Machine screenshot from “www.archive.org”, reflecting the site as of July 22, 2023) contained no disclaimer. Rather, the web page bore a notice: “© 2023 All Rights Reserved. TEMU APP.” A disclaimer eventually appeared on this website.

Respondent's pre-Complaint website contained a considerable amount of commentary, including praise and criticism, about Complainant's TEMU app. This commentary, however, came after a home page and other pages liberally using the TEMU mark, logo, and color scheme, including the home page header: "Download TEMU App and Shop Like a Billionaire."

Complainant alleges:

"Respondent is using Complainant's TEMU Trademarks in the Disputed Domain Name and throughout the resolving website in an attempt to intentionally create a likelihood of confusion with Complainant and attract consumers searching for Complainant's famous platform. Additionally, not only does Respondent widely use the TEMU Trademarks, Respondent is also using copyrighted images and Complainant's widely recognized orange color scheme that mirrors Complainant's official website and app in an apparent attempt to falsely associate itself with Complainant and the Temu brand in an apparent attempt to drive traffic to the Dispute Domain Name for commercial gain. [...] Respondent's use of Complainant's TEMU Trademarks and intellectual property throughout its website and the Disputed Domain Name, in addition to evidence indicating that Respondent's website is acting as a revenue generating operation through third party advertising, demonstrates Respondent is intentionally using Complainant's marks and likeness to cause confusion and commercially benefit Respondent."

5. Parties' Contentions

A. Complainant

Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the Domain Name.

B. Respondent

Respondent contends as follows:

"There is no evidence supporting Complainant's claim of ownership of these registrations. Complainant claims that I am using the domain name to distribute Complainant's Temu App without authorization from Complainant. However, my use of the domain name is a legitimate noncommercial and fair use in that it provides unbiased information and review of the services provided on the Temu App. Response to Paragraph 4(b)(c): The Respondent contends that the Domain Name is part of the Respondent's larger web presence associated with the website 'TrueGault' which serves as a platform for commentary, criticism, and review of various services and products, including those offered by Temu. The Respondent wishes to assert that the use of the Domain Name is a legitimate, non-commercial use that falls under the protection of fair use, as follows: (a) The Domain Name hosts content that is clearly delineated as a tribute to, criticism of, and review platform for the services provided by Temu. The content on the site is created in a journalistic manner and serves the public interest by offering information and opinion. (b) The site operated at the Domain Name functions as a part of the Respondent's critical review site truegault, which is recognized for offering unbiased reviews and is not affiliated with, nor endorses any single service provider, including Temu. (c) The Respondent does not derive financial gain from the Domain Name, as the site does not sell any products or services, nor does it feature advertising from the Complainant's competitors. The use of the Domain Name is therefore non-commercial. (d) The presence of disclaimers on the website associated with the Domain Name clearly indicates that there is no commercial, official, or otherwise misleading connection to the Complainant that would confuse visitors about the nature of the site or its purposes. The Complainant's mark and the Domain Name, while similar, are used in completely different contexts. The Domain Name's use in connection with a critical review site does not infringe on the Complainant's trademark rights but instead is a protected form of expression. Conclusion: The Respondent requests the Examiner find that the Respondent's use of the Domain Name constitutes fair use as it is a legitimate expression of free speech related to critique and review, and is clearly non-commercial in nature.

Accordingly, the Respondent respectfully requests that the Complaint be denied and that the Domain Name [temuapp.org] remain registered to the Respondent.”

6. Discussion and Findings

Paragraph 4(a) of the Policy lists the three elements which Complainant must satisfy with respect to the Domain Name:

- (i) the Domain Name is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- (ii) 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.

A. Identical or Confusingly Similar

The Panel finds that Complainant holds rights in the trademark TEMU through registration and use demonstrated in the record. The Panel finds further that the Domain Name is confusingly similar to that mark. The Domain Name entirely incorporates the mark TEMU and adds the term “app.” The mark is clearly recognizable within the Domain Name.

Complainant has established Policy paragraph 4(a)(i).

B. Rights or Legitimate Interests

Pursuant to paragraph 4(c) of the Policy, Respondent may establish its rights or legitimate interests in the Domain Name, among other circumstances, by showing any of the following elements:

- (i) before any notice to you [Respondent] of the dispute, your 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) you [Respondent] (as an individual, business, or other organization) have been commonly known by the Domain Name, even if you have acquired no trademark or service mark rights; or
- (iii) you [Respondent] are making a legitimate noncommercial or fair use of the Domain Name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

The Panel concludes that Respondent lacks rights or legitimate interests in respect of the Domain Name. Respondent apparently claims to have a “free speech” right to register and use the Domain Name, but the Panel disagrees in the circumstances of this case.

Section 2.6.1 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”), states:

“To support fair use under UDRP paragraph 4(c)(iii), the respondent’s criticism must be genuine and noncommercial; in a number of UDRP decisions where a respondent argues that a domain name is being used for free speech purposes the panel has found this to be primarily a pretext for cybersquatting, commercial activity, or tarnishing.”

Section 2.6.2 of [WIPO Overview 3.0](#) states in relevant part:

“Panels find that even a general right to legitimate criticism does not necessarily extend to registering or using a domain name identical to a trademark (i.e., <trademark.tld> (including typos)); even where such a domain name is used in relation to genuine noncommercial free speech, panels tend to find that thus creates an impermissible risk of consumer confusion through impersonation. [...]”

Section 2.5.1 of [WIPO Overview 3.0](#) also states:

"[...] certain geographic terms (e.g., <trademark-usa.com>, or <trademark.nyc>), or terms with an 'inherent Internet connotation' (e.g., <e-trademark.com>, <buy-trademark.com>, or <trademark.online>) are seen as tending to suggest sponsorship or endorsement by the trademark owner."

In this case, the Panel finds, on the record provided and a balance of probabilities, that Respondent's purported claim to be exercising speech rights is pretextual, not genuine, and does not override the plain implication of sponsorship or endorsement created by the composition of the Disputed Domain Name: the well-known mark plus the term "app". The Panel accepts that Respondent has free speech rights, but on this record, the Panel is not convinced that Respondent's free speech rights extend to his registration of a Domain Name virtually identical to Complainant's registered trademark TEMU. The Domain Name contains the TEMU mark and adds the word "app" – which is not only a term with "inherent Internet connotation", but precisely the platform on which Complainant offers its services.

The Panel notes that in *Everytown for Gun Safety Action Fund, Inc. v. Contact Privacy Inc. Customer 1249561463 / Steve Coffman*, WIPO Case No. [D2022-0473](#), the panel outlined a holistic assessment of factors in claimed fair use cases following on from an initial assessment under an "impersonation test". As noted above, Respondent's website, while eventually providing some criticism (favorable and unfavorable) of Complainant's TEMU app, leads off with content, some allegedly copyrighted images of Complainant, and a color-scheme suggesting that Respondent's website is somehow affiliated with Complainant. The Domain Name itself does not offer any indication that it is the address for a criticism site. The website at the Domain Name moreover includes what appear to be some click-through revenue links, affiliate marketing links or at least links embedded in ads leading to third parties' websites. These factors lead the Panel to conclude that Respondent, while obviously well acquainted with Complainant and the TEMU app, was seeking primarily to impersonate or associate itself with Complainant, and thereby generate additional Internet traffic to his website.

To be clear, Respondent can express whatever praise or criticism or information he wishes about the TEMU app, but not via a Domain Name that gives the impression it is affiliated with Complainant's.

The Panel also notes that Respondent's website now includes a disclaimer indicating that "[t]he website temuapp.org operates independently and is not associated, endorsed, or affiliated with any entity, organization, or individual operating under the name 'temu' or any variations thereof. Any resemblance or similarity in name or operations is purely coincidental and does not imply any form of partnership, sponsorship, or endorsement between temuapp.org and 'temu'. This disclaimer is meant to provide clear information to all visitors and users of temuapp.org, ensuring an understanding that there is no relationship or connection between this website and 'temu'. We encourage all visitors to verify the authenticity and identity of all organizations and websites they interact with online."

Putting aside that this disclaimer was a later addition (which arguably on its own find sufficient to undermine Respondent's bona fides), the Panel considers that Respondent's disclaimer cannot override the inherent risk of confusion arising from the factors described above, also noting that a disclaimer would remain under Respondent's control who can change it at any point.

Complainant has established Policy paragraph 4(a)(ii).

C. Registered and Used in Bad Faith

Paragraph 4(b) of the Policy provides that the following circumstances, "in particular but without limitation," are evidence of the registration and use of the Domain Name in "bad faith":

(i) circumstances indicating that Respondent has registered or has acquired the Domain Name primarily for the purpose of selling, renting, or otherwise transferring the Domain Name registration to Complainant

who is the owner of the trademark or service mark or to a competitor of that Complainant, for valuable consideration in excess of its documented out of pocket costs directly related to the Domain Name; or
(ii) that Respondent has 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 Respondent has engaged in a pattern of conduct; or
(iii) that Respondent has registered the Domain Name primarily for the purpose of disrupting the business of a competitor; or
(iv) that by using the Domain Name, Respondent has intentionally attempted to attract, for commercial gain, Internet users to Respondent's website or other online location, by creating a likelihood of confusion with Complainant's mark as to the source, sponsorship, affiliation, or endorsement of Respondent's website or location or of a product or service on Respondent's website or location.

The Panel concludes that Respondent has registered and used the Domain Name in bad faith. The Panel incorporates here its discussion above in the "Rights or Legitimate Interests" section. The Panel finds that Respondent obviously had Complainant and its TEMU mark in mind when registering the Domain Name. His extensive discussion of the TEMU app makes it clear that he is aware of Complainant's mark.

The Panel also notes that putting aside any claim to merely provide (even potentially critical) information, that the Disputed Domain Name redirects to Respondent's True Gault website; this use of Complainant's mark to draw users to Respondent's site is not supportive of a claim to good faith.

The Panel notes that in the present proceeding, the circumstances discussed under the second element of the Decision are relevant for the purposes of the discussion of the registration and use of the Domain Name in bad faith (section 2.15 of the [WIPO Overview 3.0](#)). In the instant case the Panel also concludes bad faith registration and use of the Domain Name for the reasons set forth in the previous section.

Complainant has established Policy paragraph 4(a)(iii).

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 <temuapp.org> be transferred to Complainant.

/Robert A. Badgley/

Robert A. Badgley

Sole Panelist

Date: April 10, 2024