

ADMINISTRATIVE PANEL DECISION

Philip Morris Products S.A. v. Contact Privacy Inc. Customer 0163946282 /
Zlamenco Ratatoski, ExclusiveHeets2
Case No. D2022-1137

1. The Parties

The Complainant is Philip Morris Products S.A., Switzerland, represented by D.M. Kisch Inc., South Africa.

The Respondent is Contact Privacy Inc. Customer 0163946282, Canada / Zlamenco Ratatoski, ExclusiveHeets2, United Kingdom.

2. The Domain Name and Registrar

The disputed domain name <heatselite.com> is registered with Tucows Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on April 1, 2022. On April 1, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On April 1, 2022, 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 and contact information in the Complaint. The Center sent an email communication to the Complainant on April 4, 2022, 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 on April 5, 2022.

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 April 5, 2022. In accordance with the Rules, paragraph 5, the due date for Response was April 25, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on April 27, 2022.

The Center appointed Reyes Campello Estebaranz as the sole panelist in this matter on May 3, 2022. 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 part of an international group of companies affiliated to Philip Morris International Inc., which is an international tobacco company, with products sold in approximately 180 countries, and a large brand portfolio including the globally well-known trademark MARLBORO. The Complainant and its group have developed various products to substitute combustible cigarettes, one of them identified by the trademark IQOS, which was launched in Japan in 2014, and now is sold in 71 markets across the world. The product identified by the mark IQOS is a controlled heating device, collectively referred as “IQOS” or “IQOS System”, consisting of a pocket charger specially designed to charge a specific holder, into which specially designed tobacco products identified by the marks HEETS, HEAT STICKS, or TEREA are inserted and heated to generate a flavored nicotine-containing aerosol. There are five versions of this heating device currently available: the IQOS 2.4/IQOS 2.4+ pocket charger and holder, IQOS 3 pocket charger and holder, IQOS 3 Multi device, IQOS 3 DUO/DUOS, and IQOS ILUMA.

The Complainant holds a large portfolio of registered trademark rights in the mark HEETS in many jurisdictions, denominative or with a specific graphic representation, including International Registration No. 1326410, HEETS, word, registered on July 19, 2016; and International Registration No. 1328679, HEETS, figurative, registered on July 20, 2016; (collectively the “HEETS mark”).

Prior UDRP decisions under the Policy have recognized the international well-known character of the HEETS mark.¹

The disputed domain name was registered on March 13, 2022, and it is apparently inactive resolving to an Internet browser error notice in Italian language. According to the evidence provided by the Complainant, the disputed domain name has resolved to an online shop, in Italian language, allegedly offering and selling the Complainant’s IQOS System products. This website displayed the HEETS mark, with identical graphic representation used and registered by the Complainant, together with the word “elite”, at its heading. This website further displayed a number of the Complainant’s official product images without authorization, and provided a copyright notice at the bottom of the site claiming copyright in the material presented on the site. This website did not show any details regarding its provider nor did it acknowledge the Complainant, as the owner of the HEETS mark and the IQOS System, and it did not indicate the lack of relationship between the Parties.

5. Parties’ Contentions

A. Complainant

Key contentions of the Complaint may be summarized as follows:

The disputed domain name is confusingly similar to the HEETS mark. The Complainant’s trademark is recognizable within the disputed domain name, and the applicable generic Top-Level Domain (“gTLD”) is a standard registration requirement and as such is disregarded under the first element confusing similarity test. The disputed domain name reproduces the HEETS mark with an obvious or intentional “misspelling” (using

¹ See, among others, *Philip Morris Products S.A. v. Stepan Malik (S.M.), Heets Store*, WIPO Case No. [D2020-2967](#); *Philip Morris Products S.A. v. Whois Agent, Domain Protection Services, Inc., Heets Delivery / Mohammad Khawaldeh*, WIPO Case No. [D2020-2795](#); *Philip Morris Products S.A. v. Whois Privacy Protection Service / Vitalij Solomin*, WIPO Case No. [D2019-2103](#); and *Philip Morris Products S.A. v. Anatoliy Harin, heets-shop.online*, WIPO Case No. [D2020-2400](#).

the letters “ea” instead of the letters “ee”), and adds a non-distinctive or descriptive word (“elite”), which is insufficient in itself to avoid a finding of confusing similarity. The use of an obvious or intentional “misspelling” of the Complainant’s trademark clearly signals an intention to confuse users seeking or expecting the Complainant, as the Respondent’s website content corroborates. The Respondent’s website features both the HEETS mark, as well as the IQOS System.

The Respondent has no rights or legitimate interests in respect of the disputed domain name. The Complainant has not licensed or otherwise permitted the Respondent to use any of its trademarks, the Respondent is not making a legitimate noncommercial or fair use of the disputed domain name. The Respondent is not an authorized distributor or reseller of the IQOS System, and the website provided under the disputed domain name does not meet the requirements for a *bona fide* offering of goods set out by *Oki Data Americas, Inc. v. ASD, Inc.*, WIPO Case No. [D2001-0903](#), and numerous decisions. The disputed domain name in itself suggests an affiliation with the Complainant and its trademark, the Complainant’s registered figurative trademark is reproduced at the top of the Respondent’s website, and this site includes official product images without authorization, falsely claiming copyright in this material. The IQOS System is primarily distributed through official/endorsed stores, so Internet users and potential consumers will falsely believe the website under the disputed domain name is an official/endorsed distributor.

The disputed domain name was registered and is being used in bad faith. It is evident from the use of the disputed domain name that the Respondent knew of the HEETS mark when registering the disputed domain name. The term “heets” is purely imaginative and unique to the Complainant, and the Respondent started offering the IQOS System immediately after registering the disputed domain name. The Respondent has registered and used the disputed domain name with the intention to attract, for commercial gain, Internet users by creating a likelihood of confusion with the Complainant and its trademarks. Additionally, the Respondent was involved in the bad faith registration and use of the domain names <exclusiveheets.com> and <123heets.com>, decided by *Philip Morris Products S.A. v. Contact Privacy Inc., Customer 0163300138, Contact Privacy Inc., Customer 0163503231 / Lupo Abate, ExclusiveHeets*, WIPO Case No. [D2022-0240](#), which transferred these domain names to the Complainant. Several factors indicate the similarity of this case and the present case.² This prior case shows a pattern of bad faith conduct in connection with domain names incorporating the Complainant’s trademarks.

The Complainant has cited previous decisions under the Policy as well as various sections of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, (“[WIPO Overview 3.0](#)”) that it considers supportive of its position, and requests the transfer of the disputed domain name.

B. Respondent

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

6. Discussion and Findings

The Complainant has made the relevant assertions as required by the Policy and the dispute is properly within the scope of the Policy. The Panel has authority to decide the dispute examining the three elements in paragraph 4(a) of the Policy, taking into consideration all of the relevant evidence, annexed material and allegations, and performing some limited independent research under the general powers of the Panel articulated, *inter alia*, in paragraph 10 of the Rules.

² The websites linked to the respective domain names in the cited cases and the present case (i) prominently used the HEETS mark at their headings in an identical manner; (ii) made use of a virtually identical copyright notice (*i.e.*, “Copyright © 2022 ExclusiveHeets” and “Copyright © 2022 ExclusiveHeets2”); and (iii) are, in their entirety, substantially identical.

A. Identical or Confusingly Similar

The Complainant indisputably has rights in the registered HEETS mark. The disputed domain name incorporates this trademark in its entirety, introducing an obvious or intentional “misspelling” (using the vowels “ea” instead of “ee”), followed by the term “elite”, which does not avoid the confusing similarity. The HEETS mark is recognizable in the disputed domain name, and the gTLD “.com” is a technical requirement, generally disregarded for the purpose of the analysis of the confusing similarity. See sections 1.7, 1.8, 1.9, and 1.11.1 of the [WIPO Overview 3.0](#).

Accordingly, this Panel finds that the disputed domain name is confusingly similar to the Complainant’s trademark, and the first element of the Policy under paragraph 4(a)(i) has been satisfied.

B. Rights or Legitimate Interests

Although the Complainant bears the ultimate burden of establishing all three elements of paragraph 4(a) of the Policy, UDRP panels have recognized that this could result in the often impossible task of proving a negative, requiring information that is primarily if not exclusively within the Respondent’s knowledge. Thus, the consensus view is that paragraph 4(c) of the Policy shifts to the Respondent the burden of production to come forward with relevant evidence of rights or legitimate interests in the disputed domain name, once the Complainant has made a *prima facie* case that the Respondent lacks rights or legitimate interests.

The Complainant’s assertions and evidence effectively shift the burden to the Respondent of producing evidence of rights or legitimate interests in the disputed domain name, providing the circumstances of paragraph 4(c) of the Policy, without limitation, that may establish rights or legitimate interests in the disputed domain name in order to rebut the Complainant’s *prima facie* case. However, the Respondent has not replied to the Complainant’s contentions, not providing any explanation and evidence of rights or legitimate interests in the disputed domain name.

It is to be noted that resellers or distributors, using a domain name containing the complainant’s trademark to undertake sales related to the complainant’s goods or services, may be making a *bona fide* offering of goods and services and thus have a right or legitimate interest in such domain name, if the following cumulative requirements are met:

- (i) the respondent must actually be offering the goods or services at issue;
- (ii) the respondent must use the site to sell only the trademarked goods or services;
- (iii) the site must accurately and prominently disclose the registrant’s relationship with the trademark holder; and
- (iv) the respondent must not try to “corner the market” in domain names that reflect the trademark.

The analysis of these requirements is commonly known as the “Oki Data test” (referring to *Oki Data Americas, Inc. v. ASD, Inc.*, *supra*). See section 2.8, [WIPO Overview 3.0](#).

The evidence in the file shows the disputed domain name has been linked to a website, which commercialized alleged HEETS and other IQOS System products not disclosing the lack of relationship with the Complainant and its trademarks. The content of that website further led to create an affiliation with the Complainant and its trademarks: i) including the HEETS mark, with the same graphic representation used and registered by the Complainant, at its heading, common location of the indication related to the website provider or the origin of the website; and ii) including various official images of the Complainant’s products, claiming copyright in this material. The Panel considers that these circumstances contribute to a risk of affiliation and confusion.

Furthermore, the disputed domain name incorporates the HEETS mark introducing an obvious or intentional “misspelling” (using the vowels “ea” instead of “ee”) and adding the term “elite”, which also may point to the Complainant and its notorious trademarks, as an indication of a new line of products of top quality or exclusive nature. The Panel, under its general powers articulated *inter alia* in paragraph 10 of the Rules, has analyzed various captures of the Respondent’s website obtained through the Internet archive WayBackMachine, noting that this site included repeatedly references to the “exclusive nature” of the offered products, with indications such as “HEETS exclusive”, “ExclusiveHeets Menu”, “Gusti Esclusivi” (which means exclusive flavor), etc. This circumstance may contribute to generate a risk of confusion and association, giving the impression that the products included in this site are a new line of the Complainant’s products of top quality or exclusive nature.

The Panel notes that for the registration of the disputed domain name the name “ExclusiveHeets2” was provided. The Panel is not aware, and no evidence has been brought forward, of the existence of an entity with such a name. Even if such entity exists, noting the well-known character of the HEETS trademark and the reproduction on the website at the disputed domain name of the Complainant’s logo, the Panel finds that it would not be sufficient to give rise to rights or legitimate interests of the Respondent in the disputed domain name.

It is further remarkable that the Respondent has not replied to the Complaint not providing any explanation connected to any of the circumstances included in paragraph 4(c) of the Policy or any other circumstance that may be considered as a right or legitimate interest in the disputed domain name.

All the above-mentioned circumstances lead the Panel to conclude that the Respondent has not produced evidence to rebut the Complainant’s *prima facie* case, and all these case cumulative facts and circumstances point to consider that the Respondent lacks of any rights or legitimate interests in the disputed domain name. Therefore, the second element of the Policy under paragraph 4(a)(ii) has been established.

C. Registered and Used in Bad Faith

The Policy, paragraph 4(a)(iii), requires that the Complainant establish that the disputed domain name has been registered and is being used in bad faith.

The applicable standard of proof in UDRP cases is the “balance of probabilities” or “preponderance of the evidence”, being the Panel prepared to draw certain inferences in light of the particular facts and circumstances of the case. See section 4.2, [WIPO Overview 3.0](#).

The Panel considers that all cumulative circumstances of this case point to bad faith registration and use of the disputed domain name:

- (i) the HEETS mark is well-known and internationally used, including in the United Kingdom where the Respondent is located according to the Registrar verification;
- (ii) the disputed domain name incorporates the HEETS mark with an obvious or intentional “misspelling” (using the vowels “ea” instead of “ee”) and adding the term “elite”, which may contribute to generate a risk of confusion or implied association, creating the impression that the disputed domain name refers to a new line of top quality or exclusive products of the reputed trademark;
- (iii) the website linked to the disputed domain name includes prominently the HEETS mark (with the same graphic representation used and registered by the Complainant) in its heading, as well as various official product images of the Complainant’s HEETS and IQOS System products, claiming copyright on this material;
- (iv) the Respondent has not offered any explanation of any rights or legitimate interests in the disputed domain name and has not come forward to deny the Complainant’s assertions of bad faith, choosing not to reply to the Complaint; and

(v) the Respondent's reaction to this proceeding seems to be taken down the website that was linked to the disputed domain name.

It is further to be noted that the website linked to the disputed domain name is similar to the website that was linked to other domain names that were transferred to the Complainant in a prior case under the Policy (namely *Philip Morris Products S.A. v. Contact Privacy Inc.*, Customer 0163300138, *Contact Privacy Inc.*, Customer 0163503231 / *Lupo Abate*, *ExclusiveHeets*, *supra*, in relation to the domain names <exclusiveheets.com> and <123heets.com>), including an almost identical copyright notice. The website that was linked to the domain names <exclusiveheets.com> and <123heets.com>, included the copyright notice "Copyright © 2022 ExclusiveHeets", and the website that was linked to the disputed domain name included the copyright notice "Copyright © 2022 ExclusiveHeets2", which indicates, in the view of the Panel, the subsequent character to the site that was linked to the disputed domain name. The common circumstances point to a same control of the disputed domain name and the domain names <exclusiveheets.com> and <123heets.com>, corroborating a bad faith registration and use of the disputed domain name and a possible pattern of bad faith conduct in targeting the HEETS mark preventing the Complainant from reflecting this mark in a domain name. See section 3.1.2, [WIPO Overview 3.0](#).

Therefore, on the balance of probabilities, taking into consideration all cumulative circumstances of this case, the Panel considers that the disputed domain name was very likely registered targeting the Complainant's HEETS mark with the intention of obtaining a free ride on their established reputation, seeking to mislead Internet users to believe that there is a connection between the disputed domain name and the Complainant, which constitutes bad faith.

All of the above-mentioned circumstances lead the Panel to conclude that the disputed domain name was registered and is being used in bad faith. Accordingly, the Panel concludes that the Complainant has met its burden of establishing that the Respondent registered and is using the disputed domain name in bad faith under 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 <heatselite.com> be transferred to the Complainant.

/Reyes Campello Estebaranz/

Reyes Campello Estebaranz

Sole Panelist

Date: May 17, 2022