

## **ADMINISTRATIVE PANEL DECISION**

Austin Industries, Inc. v. Ajay Kumar, AJ Consultancy  
Case No. D2023-0021

### **1. The Parties**

Complainant is Austin Industries, Inc., United States of America (“United States”), represented by Slates Harwell LLP, United States.

Respondent is Ajay Kumar, AJ Consultancy, United States.

### **2. The Domain Name and Registrar**

The disputed domain name <austin-ind-us.com> is registered with NameCheap, Inc. (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on January 3, 2023. On January 4, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On January 4, 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 initially named Respondent (Redacted for Privacy, Privacy service provided by Withheld for Privacy ehf) and contact information in the Complaint. The Center sent an email communication to Complainant on January 4, 2023, 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 January 4, 2023.

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 January 11, 2023. In accordance with the Rules, paragraph 5, the due date for Response was January 31, 2023. Respondent did not submit any response. Accordingly, the Center notified Respondent’s default on February 1, 2023.

The Center appointed Scott R. Austin as the sole panelist in this matter on February 10, 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 following facts appear from the Complaint (as amended solely to add the Registrar-provided registrant information) and its Annexes, which have not been contested by Respondent.

With a history dating back to 1918 as a bridge-building company when founders Frank and George Austin saw the opportunities presented by the automobile, Complainant has operated in its current corporate form since 1974 as a large, diversified construction company headquartered in Dallas, Texas. As parent to Austin Bridge & Road, Austin Commercial and Austin Industrial, Complainant provides nearly every type of civil, commercial and industrial construction service under a trademark comprised of a unique stylized “A” design above the name Austin Industries (the “AUSTIN Mark”). Complainant has become one of the largest general contractors based in the southern half of the U.S. and the third largest merit shop contractor in America. Complainant has a workforce of over 7,000 employee-owners, and is consistently ranked in the top 50 of Engineering News-Record (ENR) magazine’s Top 400 contractors.

In Forbes 2022 annual listing of the largest privately held companies in America, Complainant ranked 191 out of 246 total companies evaluated, 29 in the nation among privately held construction companies and the second largest in Texas. Forbes also shows Complainant generated revenues of USD 2.8 billion in 2021.

Complainant claims common law rights in the AUSTIN Mark based on evidence of acquired distinctiveness and also has registered with the United States Patent and Trademark Office (“USPTO”) the following marks for its construction and construction management related goods and services:

United States Registration No. 4,829,969, a stylized letter “A” design mark, registered on October 13, 2015, for “Industrial and commercial building construction, road construction, general building contractor services, maintenance and repair of commercial, industrial, and manufacturing facilities and buildings, real estate development, construction project management services, and road paving in International Class 37, claiming a first use date of July 1, 1974; and

United States Registration No. 6,428,742, AUSTIN CARE, registered on July 20, 2021, for “Software for safety, risk and compliance management, namely, inspecting, identifying, auditing and managing of personnel, safety incidents, equipment, machines, vehicles and facilities for safety purposes” in International Class 9 and “Software as a service (SAAS) services featuring software for safety, risk and compliance management, namely, inspecting, identifying, auditing and managing of personnel, safety incidents, equipment, machines, vehicles and facilities for safety purpose in International Class 42, claiming a first use date for each Class of May 1, 2018.

Complainant also shows it incorporates the AUSTIN Mark into its registered domain name <austin-ind.com>, registered to Complainant since May 18, 1996, used to promote the industrial, commercial and road building construction services on its official website at “www.austin-ind.com” (the “Official AUSTIN Mark Website”). The Official AUSTIN Mark Website features the AUSTIN Mark on each page with numerous images of its completed projects for stadiums, airport terminals and interstate highways, as well as its employee owners wearing hard hats with the AUSTIN Mark affixed.

Little is known about Respondent, who appears to be a private individual who along with his affiliated organization, the “AJ Consultancy”, has an address in Laredo, Texas. The disputed domain name was registered on November 29, 2022. According to screenshots produced by Complainant, the corresponding “copycat” website features copyright-protected content copied from the Official AUSTIN Mark Website, including verbatim copies of Complainant’s graphics, text and digital images of employee owners wearing hard hats with the AUSTIN Mark affixed. Respondent’s website also provides a page for prospective job applicants to provide their contact information, and Complainant has been contacted by at least one

prospective job applicant believing Respondent's copycat website to be Complainant's official website. As of the date of this decision, the disputed domain name resolves to an inactive website with a "website not found" message.

## **5. Parties' Contentions**

### **A. Complainant**

Complainant contends that the disputed domain name is identical or confusingly similar to Complainant's trademark; that Respondent has no rights or legitimate interests in respect of the disputed domain name; and that the disputed domain name was registered and is being used in bad faith.

### **B. Respondent**

Respondent did not reply to Complainant's contentions.

## **6. Discussion and Findings**

There are no exceptional circumstances within paragraph 5(e) of the Rules to prevent this Panel from determining the present dispute based upon the Complaint (as amended), notwithstanding the failure of any person to lodge a substantive formal Response in compliance with the Rules. Under paragraph 14 of the Rules, where a party does not comply with any provision of the Rules, the Panel shall "draw such inferences therefrom as it considers appropriate".

Where no substantive Response is filed, however, Complainant must still make out its case in all respects under paragraph 4(a) of the Policy. To succeed, Complainant must demonstrate that the requirements for each of the elements listed in paragraph 4(a) of the Policy have been satisfied.

The Panel will address its findings on each of these elements in more detail below.

The standard of proof under the Policy is often expressed as the "balance of the probabilities" or "preponderance of the evidence" standard. Under this standard, an asserting party needs to establish that it is more likely than not that the claimed fact is true. See, WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (["WIPO Overview 3.0"](#)), section 4.2.

### **A. Identical or Confusingly Similar**

The inquiry under the first element is in two parts. The first issue is whether Complainant has UDRP-relevant rights in a trademark and the second is whether any such trademark is identical or confusingly similar to the disputed domain name. Failure on either of the two issues would result in a failure to meet the requirements of paragraph 4(a)(i) of the Policy and ultimately in failure of the Complaint.

For the first part analysis, the Panel first considers the trademark registrations. Complainant submitted only a United States registration for a design mark, described in the registration as "a fanciful representation of the letter 'A'". This mark is referenced in a table in the Complaint as "AUSTIN" but that word form, a surname, does not appear in the Certificate of Registration in the Annex. Given the history of Complainant's business in Texas dating back to 1918 for its bridge building predecessor using the term "Austin", the Panel conducted an independent search of the USPTO records with a view to obtaining a fuller picture of its trademark use to determine the existence and extent of Complainant's trademark rights and has noted the second registration listed in Section 4 above for the word mark "AUSTIN CARES". Although this registration disclaims the term "Austin" it is still useful for purposes of deciding whether Complainant is entitled to standing under the Policy.

As stated in the [WIPO Overview 3.0](#), Sections 1.2.1 and 1.1.2, the consensus of prior UDRP panels is that ownership of a trademark generally satisfies the threshold requirement of having trademark rights, the location of the trademark, its date of registration, and the goods and/or services for which it is registered being irrelevant for the purpose of finding rights in a trademark under the first element of the UDRP.

In this instance however, because the disclaimed term is the predominant term in the disputed domain name that is similar to Complainant's AUSTIN Mark, the Panel must also consider [WIPO Overview 3.0](#), Section 1.2.3, which provides "if the similar elements of the domain name are made up exclusively of disclaimed terms, trademark rights under the Policy may not be found unless the complainant can show sufficient secondary meaning in the disclaimed terms." While the disputed domain name includes reference to not only "Austin", but also the term "ind", which consumers could reasonably find to be an abbreviation for "industries" just as used in Complainant's official domain name, <austin-ind.com> the Panel considers it prudent to look beyond a disclaimed term and the abbreviation of a common term to confirm rights here and to properly use each in its determination of confusing similarity below.

Complainant has claimed common law rights in the AUSTIN Mark and has provided evidence to prove the AUSTIN Mark a "distinctive identifier which consumers associate" with Complainant's construction services. [WIPO Overview 3.0](#), Section 1.3 addresses the question of what needs to be shown for a complainant to successfully assert acquired distinctiveness in unregistered or common law trademark rights and provides the following consensus view:

Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (e.g., consumer, industry, media) recognition, and (v) consumer surveys.

Of particular relevance here, Section 1.3 goes on to provide, "The fact that a respondent is shown to have been targeting the complainant's mark (e.g., based on the manner in which the related website is used) may support the complainant's assertion that its mark has achieved significance as a source identifier." [WIPO Overview 3.0](#), Section 1.3.

Applying this guidance, the Panel finds Complainant has successfully proved it has established trademark rights in the AUSTIN Mark based on evidence submitted by Complainant showing: i) use of the term "Austin" as the predominant portion of the AUSTIN Mark for construction services dating back to at least 1918, and in its current form, since 1974; ii) recent sales represented by revenues generated shown in third party publications of almost USD 3 billion, which follows similar amounts developed over previous years based on the projects and materials shown on its website; iii) the nature and extent of Complainant's advertising and use of the Mark shown in trade journals and publications and other promotional materials accessed at its website for which it is reasonable to assume Complainant has incurred considerable expense proportionate to the revenues it has generated; iv) substantial actual public recognition of the AUSTIN Mark in Forbes and other recognized business media to identify Complainant and its services as a leader in its industry nationally, regionally and in Texas where Respondent appears to be located; and iv) Respondent's copycat website clearly targeting Complainant's business and featuring exact replicas of the AUSTIN Mark in photos of Complainant's employee owners at work providing Complainant's construction services.

With Complainant's rights in the AUSTIN Mark established, the remaining part for analysis under the first element of the Policy is whether the disputed domain name is identical or confusingly similar to Complainant's AUSTIN Mark, typically disregarding the Top-Level Domain ("TLD") ".com", which is functionally necessary for the domain name to be registered. See *Research in Motion Limited v. thamer Ahmed Alfarshooti*, WIPO Case No. [D2012-1146](#).

Prior UDRP panels have held the fact that a domain name wholly incorporates a complainant's registered mark is sufficient to establish identity or confusing similarity for purposes of the Policy despite the addition of other terms to such marks, "whether descriptive, geographical, pejorative, meaningless, or otherwise".

[WIPO Overview 3.0](#), section 1.8; see also, *General Electric Company v. Recruiters*, WIPO Case No. [D2007-0584](#).

Respondent incorporates the predominant portion of Complainant's AUSTIN Mark in its entirety as the initial term in the disputed domain name with no change in its appearance or pronunciation. The mark would clearly be recognizable by consumers, and the terms appended that follow, "ind" discussed above as an abbreviation of the term "industries" as well as the identical second term in Complainant's official domain name, and "us" does not prevent a finding of confusing similarity under the Policy. See *Wal-Mart Stores, Inc. v. MacLeod d/b/a/ For Sale*, WIPO Case No. [D2000-0662](#). Nor does Respondent's use of hyphens to attach these additional terms prevent such a finding. See *L'Oréal, Lancôme Parfums et Beauté & Cie v. Jack Yang*, WIPO Case No. [D2011-1627](#).

Based on the above, this Panel finds that these additions do not prevent a finding of confusing similarity between the disputed domain name and Complainant's AUSTIN Mark. Accordingly, the Panel finds the disputed domain name confusingly similar to the AUSTIN Mark in which Complainant has rights and Complainant has satisfied its burden under paragraph 4(a)(i) of the Policy.

## **B. Rights or Legitimate Interests**

Under the second element of the Policy, the complainant is required to make out a *prima facie* case that the respondent does not have rights to or legitimate interests in the disputed domain name, upon which the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights to or legitimate interests in the disputed domain name. If the respondent fails to come forward with such evidence, a complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1. See also, *Virgin Enterprises Limited v. KAP Computer Solutions Pvt. Ltd.*, WIPO Case No. [D2013-0715](#). Respondent has not come forward to show any rights or legitimate interests in the disputed domain name under the Policy at paragraph 4(c).

Complainant has established, *prima facie*, that Respondent lacks rights or legitimate interests in the disputed domain name. First, it is clear from the record submitted that Respondent has no affiliation or connection with Complainant and that Respondent has never received Complainant's consent, license, franchise, or any other form of authorization from Complainant to make use of the AUSTIN Mark in any manner, including the registration of a domain name (much less the registration of a domain name to access a website structured to possibly engage in an illegitimate phishing scheme aimed at Complainant's job applicants or prospective job applicants).

Complainant also shows that Respondent is not commonly known by the disputed domain name because Complainant has submitted evidence showing Respondent's names "Ajay Kumar" and "AJ Consultancy" as respectively, the registrant and registrant organization in the Whois record made available through the concerned Registrar, which names bear no resemblance to the disputed domain name. Since Respondent elected to submit no evidence in these proceedings, there is no evidence from Respondent to the contrary, *i.e.*, that Respondent has been commonly known by the disputed domain name. The Panel finds review of the Whois record combined with Complainant's decades of use of the AUSTIN Mark and the lack of evidence in the record to suggest otherwise, allows the Panel to conclude that Respondent is not commonly known by the AUSTIN Mark, the disputed domain name or any variation thereof pursuant to Policy paragraph 4(c)(ii). See *Six Continents Hotels, Inc. v. Trasporto di Networ and Pro Intel*, WIPO Case No. [D2004-0246](#) ("given the Complainant's established use of its [...] marks, it is unlikely that the Respondents are commonly known by any of these marks").

A respondent not being commonly known by the disputed domain name supports a finding of a lack of rights or legitimate interests. See *World Natural Bodybuilding Federation, Inc. v. Daniel Jones TheDotCafe*, WIPO Case No. [D2008-0642](#). Since there is no evidence here, including the Whois record for the disputed domain name, suggesting that Respondent is commonly known by the disputed domain name, Respondent cannot be regarded as having acquired rights to or legitimate interests in the disputed domain name within the meaning of 4(c)(ii). See *Moncler S.p.A. v. Bestinfo*, WIPO Case No. [D2004-1049](#).

Thus, there is no evidence in this case to suggest that Respondent is commonly known by the disputed domain name, that it is licensed or otherwise authorized to use Complainant's trademark, or that it has acquired any trademark rights relevant thereto. As such, the Panel finds this sub-section of the Policy is of no help to Respondent, and the facts presented here support a lack of rights or legitimate interests in the disputed domain name. See, *Confédération nationale du crédit mutuel v. Yu Ke Rong*, WIPO Case No. [D2018-0948](#); *Expedia, Inc. v. Dot Liban, Hanna El Hinn*, WIPO Case No. [D2002-0433](#).

Since the disputed domain name now resolves to an inactive or "blank" web page, which reports an error, "webpage not found", Respondent is not doing business as "Austin", or any similar variation thereof and has not used the "Austin" name or mark (or any similar name) in connection with the *bona fide* offering of goods or services. Prior UDRP panels have held that use of a disputed domain name to resolve to a blank or inactive web page does not represent a *bona fide* use of the disputed domain name.

More importantly, the annex to the Complaint shows that when Complainant's initially accessed Respondent's website using the disputed domain name it resolved to a copycat or "spoof" of the Official AUSTIN Mark Website, including verbatim copies of digital images of employee owners wearing hard hats with the AUSTIN Mark affixed as well as contact pages configured for prospective job applicants to provide their contact information using Respondent's falsified email and phone number. Combining these facts with the disputed domain name's confusing similarity to the AUSTIN Mark, it is reasonable for the Panel to conclude that Respondent has prepared the disputed domain name to engage in either a fraudulent phishing scheme, or well aware of Complainant's AUSTIN Mark, to register and use of the disputed domain name to create a false association with Complainant to redirect users to a website offering construction jobs that could compete with Complainant's construction services and benefits and would be disruptive of Complainant's business. Use of a domain name for such illegitimate purposes is neither a *bona fide* offering of goods or services pursuant to paragraph 4(c)(i), nor a legitimate noncommercial or fair use pursuant to Policy paragraph 4(c)(iii). [WIPO Overview 3.0](#), section 2.13; see also, *Apple Computer, Inc. v. PrivacyProtect.org / PrivateRegistrations Aktien Gesellschaft*, WIPO Case No. [D2012-0879](#).

In light of the above, and with no Response or other submission in this case to rebut Complainant's assertions and evidence, the Panel finds that the facts of this case demonstrate that Respondent has no rights or legitimate interests in the disputed domain name. Complainant has successfully met its burden under paragraph 4(a)(ii) of the Policy.

### **C. Registered and Used in Bad Faith**

Finally, Complainant must prove, by a preponderance of the evidence, that the disputed domain name has been registered and used in bad faith under paragraph 4(a)(iii) of the Policy. See, *e.g.*, *Hallmark Licensing, LLC v. EWebMall, Inc.*, WIPO Case No. [D2015-2202](#).

Paragraph 4(b) of the Policy sets out a non-exhaustive list of circumstances that point to bad faith conduct on the part of a respondent. The panel may, however, consider the totality of the circumstances when analyzing bad faith under Policy, paragraph 4(a)(iii) and may make a finding of bad faith that is not limited to the enumerated factors in Policy, paragraph 4(b). See *Do the Hustle, LLC v. Tropic Web*, WIPO Case No. [D2000-0624](#).

First the Panel finds that there can be no other explanation for Respondent to register the disputed domain name other than to target Complainant. Given the copycat configuration and content of Respondent's website, that the AUSTIN Mark is nationally well-known in Complainant's industry as noted in the Forbes and other trade media recognition provided by Complainant and the disputed domain name incorporates Complainant's official domain name in its entirety as well as the predominant portion of the AUSTIN Mark, the Panel finds bad faith registration based on Respondent's actual knowledge and targeting of the AUSTIN Mark. Prior UDRP panels have found that where it would be implausible to believe that respondent selected and was using the disputed domain name for any purpose other than to trade on complainant's trademark rights and reputation establishes a fact pattern that repeatedly has been held to constitute bad faith registration.

See *Alstom v. Domain Investments LLC*, WIPO Case No. [D2008-0287](#); see also *Houghton Mifflin Co. v. Weathermen, Inc.*, WIPO Case No. [D2001-0211](#).

Further, given the widespread recognition of Complainant's AUSTIN Mark in Texas where Respondent says they are located, the job applicant phishing scheme in Respondent's website, and decades of use regionally of the AUSTIN Mark at common law prior to Respondent's registration of the disputed domain name on November 29, 2022, the Panel finds Respondent's selection, configuration and use of the disputed domain name has been to intentionally cause confusion with Complainant's AUSTIN Mark and to create a false association with Complainant primarily for the purpose of disrupting Complainants' business. The use and registration of the disputed domain name, therefore, must be considered to be in bad faith under paragraph 4(b)(iii) of the Policy. See *Empresa Brasileira de Telecomunicações S.A. Embratel v. Kevin McCarthy*, WIPO Case No. [D2000-0164](#). See also *Canva Pty Ltd v. Varinder Rajoria, KnotSync Ltd*, WIPO Case No. [D2021-2577](#).

Finally, Complainant also contends that Respondent's acts in creating the disputed domain name show misconduct by Respondent to foist a fraudulent phishing scheme upon unsuspecting job applicants of Complainant who have been solicited by Respondent using its copycat website to defraud the prospective job applicants of personal information. Complainant has already received evidence of actual confusion by prospective job applicants who have contacted Respondent's website thinking it belonged to Complainant.

As found by prior UDRP panels, use of the disputed domain name for a web page competing with or capitalizing on Complainant's trademark demonstrates an indication that Respondent intentionally attempted to attract, for commercial gain, Internet users to its disputed domain name, by creating a likelihood of confusion with Complainant's AUSTIN Mark as to the source, sponsorship, affiliation or endorsement of Respondent, and, therefore is evidence of registration and use of the disputed domain name in bad faith under paragraph 4(b)(iv) of the Policy. See *Association des Centres Distributeurs E. Leclerc - A.C.D Lec v. Milen Radumilo*, WIPO Case No. [D2017-2003](#). The current inactivity of the website does not prevent a finding of bad faith under the passive holding doctrine. [WIPO Overview 3.0](#), Section 3.3.

The Panel finds Complainant's arguments and evidence persuasive and has received no formal Response or arguments or evidence from Respondent to the contrary. Considering all the circumstances, the Panel concludes that Respondent has registered and used the disputed domain name in bad faith and Complainant has satisfied paragraph 4(a)(iii) 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 <austin-ind-us.com> be transferred to Complainant.

*/Scott R. Austin/*

**Scott R. Austin**

Sole Panelist

Date: February 24, 2023