

ADMINISTRATIVE PANEL DECISION

Derive Power, LLC v. Bully Tune
Case No. D2023-4261

1. The Parties

The Complainant is Derive Power, LLC, United States of America (“United States”), represented by Vedder Price P.C., United States.

The Respondent is Bully Tune, Australia.

2. The Domain Name and Registrar

The disputed domain name <modsct.com> is registered with HOSTINGER operations, UAB (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on October 12, 2023. On October 13, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On October 14, 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, Privacy Protect, LLC) and contact information in the Complaint. The Center sent an email communication to the Complainant on October 16, 2023, 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 October 20, 2023.

The Center verified that 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 October 25, 2023. In accordance with the Rules, paragraph 5, the due date for Response was November 14, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on November 16, 2023.

The Center appointed Assen Alexiev as the sole panelist in this matter on November 17, 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 Complainant is an automotive technology company founded in 2003. It offers various products for the optimization of vehicle performance, the fuel efficiency, safety, and other vehicle characteristics under the brands SCT, Bully Dog, and Derive VQ. The Complainant's performance devices such as tuners, monitors, and throttle boosters are marketed under the brand SCT. The Complainant's website for its SCT products is located at the domain name <sctflash.com>.

The Complainant is the owner of the following trademark registrations for the sign "SCT" (the "SCT trademark"):

- the United States word trademark SCT with registration No. 3497658, registered on September 9, 2008, for goods and services in International Classes 9 and 41;
- the United States combined trademark SCT with registration No. 3497659, registered on September 9, 2008, for goods and services in International Classes 9 and 41; and
- the Australian word trademark SCT with registration No. 1077946, registered on August 4, 2006, for goods in International Class 9; and
- the Australian trademark SCT with registration No. 1315531, registered on February 20, 2012, for goods and services in International Classes 9 and 41.

The disputed domain name was registered on September 28, 2021. It is currently inactive. At the time of filing of the Complaint, it resolved to a website that offered a "World-first Device Unlocker" to "Unlock software for SCT, Bully Dog, Derive and Dreamscience flash tuners / programmers".

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.

The Complainant states that the disputed domain name is confusingly similar to its SCT trademark because it is composed of that trademark and the term "mod", which is a commonly used abbreviation for "modification". The Complainant submits that the SCT trademark is clearly recognizable in the disputed domain name and is the most distinctive part of it. The Complainant adds that the content of the website at the disputed domain name reflects the Respondent's knowledge of the Complainant and its SCT trademark and its intent to confuse the public into believing that there is an association with the Complainant.

According to the Complainant, the Respondent has no rights or legitimate interests in the disputed domain name. The Complainant alleges that the Respondent is using the disputed domain name to offer unauthorized access to the Complainant's services through a "bypass" or "hack" and to offer for download a software product with unknown but potentially malicious consequences. The Complainant states that the Respondent provides customers with unlicensed, unauthorized software designed to undermine the Complainant's products. According to the Complainant, this use of the disputed domain name violates the anti-circumvention provisions of the Digital Millennium Copyright Act and therefore does not qualify as a *bona fide* use or a legitimate noncommercial or fair use under the Policy.

The Complainant adds that the Respondent is not commonly known by the disputed domain name, is not affiliated with the Complainant, and has not acquired any rights to use the Complainant's SCT trademark.

The Complainant points out that the Respondent does not sell the Complainant's goods, but sells unauthorized software to "unlock and unmarry" the Complainant's goods, i.e., software to circumvent protections in the Complainant's goods, rather than the Complainant's goods themselves. Complainant adds that Respondent is not accurately disclosing the relationship between Respondent and Complainant, but is misrepresenting the disputed domain name as if there was a connection between Respondent and Complainant in order to capitalize on Complainant's substantial goodwill in Complainant's SCT trademark.

The Complainant alleges that the disputed domain name was registered and is being used in bad faith. According to the Complainant, the disputed domain name was deliberately selected and registered to intentionally impersonate the Complainant and to attempt, for commercial gain, to attract Internet users to the disputed domain name and to falsely represent itself as associated with the Complainant.

Complainant notes that Respondent offers consumers the ability to unlock supported SCT devices manufactured by Complainant. The Complainant notes that the disputed domain name contains no disclaimer that the services offered by the Respondent are not affiliated with the Complainant. On the contrary, the Respondent represents itself as an arm of the Complainant offering a service sanctioned by the Complainant.

B. Respondent

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

6. Discussion and Findings

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 the SCT trademark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.2.1.

The Panel finds the SCT trademark is recognizable within the disputed domain name. Accordingly, the disputed domain name is confusingly similar to the SCT trademark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.7.

While the addition of other elements (here, "mod") may bear on assessment of the second and third elements, the Panel finds the addition of such element does not prevent a finding of confusing similarity between the disputed domain name and the SCT trademark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.8.

Based on the available record, the Panel therefore finds that 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 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. 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 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.

Panels have held that the use of a domain name for illegal activity (e.g., the sale of counterfeit goods or illegal pharmaceuticals, phishing, distributing malware, unauthorized account access/hacking, impersonation/passing off, or other types of fraud) can never confer rights or legitimate interests on a respondent. [WIPO Overview 3.0](#), section 2.13.1.

The disputed domain name is confusingly similar to the SCT trademark, which was first registered fifteen years earlier in Australia, where the Respondent is based. The evidence in the case shows that it refers to a website offering what are described as software tools to “unlock and unmarry” the Complainant’s SCT products and software, which are marketed in the United States, the United Kingdom, and Australia, and the inclusion of the term “mod”, an abbreviation for “modification”, in the disputed domain name only reinforces the impression that the related website may contain such content. The Complainant alleges that the Respondent’s products bypass the protections of the Complainant’s products, are not authorized by the Complainant, and may be unsafe or even malicious. The Respondent’s website did not contain a disclaimer regarding the lack of a relationship between the parties and the Complainant’s lack of authorization of the Respondent’s products. According to the Complainant, the Respondent’s actions therefore violate the anti-circumvention provisions of the United States Digital Millennium Copyright Act. Without making a finding in this respect, the Panel notes that the Respondent has not disputed any of the foregoing and has not provided any plausible explanation as to why its registration and use of the disputed domain name should be considered as giving rise to rights or legitimate interests in the disputed domain name.

In light of all of the foregoing, the Panel finds it more likely than not that the Respondent has registered and used the disputed domain name to target the Complainant and its SCT trademark in an attempt to confuse and attract Internet users to the disputed domain name and the related website in order to offer them, for financial gain, tools for circumventing the protection of the Complainant’s products. The Panel does not consider such activity as giving rise to rights or legitimate interests in the disputed domain name.

Therefore, based on the record before it, the Panel finds that 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.

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.

Panels have held that the use of a domain name for illegal activity (e.g., the sale of counterfeit goods or illegal pharmaceuticals, phishing, distributing malware, unauthorized account access/hacking, impersonation/passing off, or other types of fraud) constitutes bad faith. [WIPO Overview 3.0](#), section 3.4.

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

As discussed earlier in this Decision, the disputed domain name is confusingly similar to Complainant's SCT trademark, and the evidence shows that it has been used for a website using the same trademark and offering software tools advertised as unlocking and unmarrying the Complainant's SCT products. The Complainant alleges that the Respondent's products are not authorized by the Complainant and illegally circumvent the protection of the Complainant's own products, and the Respondent's website does not disclose the lack of relationship between the Parties and the lack of authorization of the Respondent's products by the Complainant. The Respondent has not denied the Complainant's allegations and the evidence in the case, and has not provided any plausible explanation as to why its actions should be considered as being carried out in good faith.

In light of all of the foregoing, the Panel considers it more likely than not that the Respondent has targeted the Complainant by registering and using the disputed domain name in an attempt to attract Internet users to the associated website, where they will be offered software tools that circumvent the protection of the Complainant's products by misleading them into believing that such tools were somehow authorized or endorsed by the Complainant. This supports a finding that the disputed domain name was registered and is being used in bad faith. The fact that the disputed domain name does not currently resolve to an active website does not prevent a finding of bad faith.

Therefore, based on the record before it, the Panel finds that 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 <modsct.com> be transferred to the Complainant.

/Assen Alexiev/

Assen Alexiev

Sole Panelist

Date: November 27, 2023