

ADMINISTRATIVE PANEL DECISION

MMDSmart LTD v. Kateryna Milenska

Case No. D2024-0685

1. The Parties

The Complainant is MMDSmart LTD, Israel, represented by Elbert Nazaretsky Rakov & Co Law Office, Israel.

The Respondent is Kateryna Milenska, Ukraine.

2. The Domain Name and Registrar

The disputed domain name <mmdsmart.info> 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 14, 2024. On February 14, 2024, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On February 14, 2024, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that 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 the Respondent of the Complaint, and the proceedings commenced on February 22, 2024. In accordance with the Rules, paragraph 5, the due date for Response was March 13, 2024. The Response was filed with the Center on March 14, 2024.

The Center appointed Warwick A. Rothnie as the sole panelist in this matter on March 19, 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

In a previous proceeding between the parties, the panelist recorded:¹

“The Complainant states that it is an Israeli company. It is described in the Complaint as ‘active in the area of international telecommunications services, owner of domain <mmdsmart.com> and MMDSmart service mark’. According to the Complaint, the Complainant was founded in 2007 and is ‘a leading global supplier of innovative communications products in more than 100 countries around the world’.”

It is apparent from materials included in the Response that there are a number of similarly named companies in Ukraine – Limited Liability Company MMD Smart Ukraine, Bulgaria – MMDSmart Ltd and the United Kingdom – MMD Smart Ltd. In the Complaint, the Ukraine company is described as an affiliate and subsidiary of the Complainant. The Respondent’s website describes two of the Complainant’s principals as the co-founders and heads of the companies.

The disputed domain name was registered on June 29, 2023.

It resolves to a website headed “Dispute mediation with MMD Smart. Real stories from the life of the company. Testimonials from employees, former and current clients and failed business partners”. There are links to sections headed “Employee Stories”, “Customer Stories”, and “Our Investigations”.

When the Panel visited the website for the purposes of preparing this decision:

- (a) the “Employee Stories” link included two “live” links to “Mobbing Victim #1” and “Mobbing Victim #2” and 10 other inactive links or placeholders.
- (b) the “Customer Stories” link included one active link to “Attempted sale of M.M.D. Smart” and 5 other inactive links or placeholders.
- (c) the “Our Investigations” link transferred to a page or section headed “Conflicts with authorities” which included three active links (“Parsing the organizational structure from a tax evasion perspective. Preliminary calculations”, “Cooperation with the Russian Federation” and “How to f**k things up and not show it?”) and 13 other inactive links or placeholders.

5. Discussion and Findings

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of a disputed domain name, the Complainant must demonstrate each of the following:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) the disputed domain name has been registered and is being used in bad faith.

Paragraph 15(a) of the Rules directs the Panel to decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.

¹ *MMDSmart Ltd. v. Kate Milenskaya*, WIPO Case No. [D2023-4185](#) (the “previous proceeding”).

A. Identical or Confusingly Similar

The first element that the Complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the Complainant's trademark rights.

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.

The Complainant has not claimed ownership of any registered trademarks. Instead, it relies on the reputation it says it has acquired in "MMD SMART" or "MMDSmart" through use and promotion of that sign as an unregistered trademark.

It made the same claim in the previous proceeding. The panelist in the previous proceeding dismissed the complaint on the basis that the Complainant's claim was mere assertion unsupported by any corroborating evidence having apparently filed printouts of only one page of the Complainant's (claimed) website and one page from the Respondent's website. As it was unnecessary to address the merits of the dispute, however, the panelist gave permission to refile the complaint if the Complainant could provide supporting evidence.

The Complaint does not include the usual indicia advanced to establish reputation such as sales revenues, advertising and promotional expenditure or numbers of visitors to its website or downloads of its product. See [WIPO Overview 3.0](#), section 1.3. On the other hand, the Complainant claims it has been using its trademark extensively since 2007 on letterhead and in all its communications. As in the previous proceeding, it has not provided evidence of this.

The Complainant also claims it has been using the domain name <mmdsmart.com> and the trademark on the website to which that domain name resolved since 2007. The Complaint does include evidence that the domain name has been registered since 2007. Apart from the Complainant's claim, however, there is no evidence about who the registrant was as until August 2023 the registration used a privacy service.

The Complaint does include a number of screenshots from what appears to be a smartphone showing use of the trademark in connection with various product offerings. As the Respondent points out, these are undated. The Complaint also includes photographs of representatives – said to be of the Complainant – at various trade shows holding up signs or in front of backdrops showing use of the trademark. These also are undated but appear to be from different locations and, possibly, different times. The photographs depict two different forms of a "logo" – one being in lower case in the form shown on the screenshots and the printouts of the website from 2023 included in the Response and the other being in block capitals. In both forms, however, "MMD SMART" is the verbal component. There are also two media release documents showing use of the trademark dated in 2018 and 2019. The 2018 release announced the attendance of MMDSmart at the Dmexco Digital Marketing Expo and Conference in Cologne Germany where it presented its MessageWhiz mobile messaging platform. The 2019 release announced that "MMDSmart" and M800 had announced a new commercial partnership at the Mobile World Conference in Barcelona.

In addition, there are a number of links to what appear to be trade directories such as GSMA, the Mobile Ecosystem Forum, Apollo.io, Owler and Rocket Reach. These are necessarily "current" websites. Much of the information on these websites is in the same terms and appears to have been provided by the Complainant. The Apollo.io website states MMDSmart's annual revenue as USD 1.4 million; Owler as less than USD 1 million.

The Complaint also includes four links described as follows:

- MMD SMART proposal sent to L'Oreal on 2017;
- Money for Nothing-2016 Arie Frenklakh's public presentation on executives forum in Odessa, Ukraine;

- Airline usecase presented in 2017;
- MMDSmart demo for Disney 2019.

The Panel has not been able to view the content of these links.

The Response also includes screenshots from the website at <mmdsmart.com> printed from the Wayback Machine dated on, respectively, February 1, 2023, June 9, 2023 and “currently” (the Panel notes the screenshot in Annex 1 is a partial print-out of the “About Us” section of the capture and not the whole capture). These clearly show the use of “MMDSmart” as a trademark.

The Respondent makes three arguments based on these.

First, pointing out that the Complainant does not hold a registered trademark for its claimed trademark, the Respondent points out that the Complainant began representing its trademark on the website as MMDSmartSM only several months after the Respondent registered the disputed domain name and began using it. The Respondent contends that, as a result, the Complainant was not claiming or using MMDSmart as a trademark until it adopted the MMDSmartSM practice. The Respondent also contends this usage is unauthorised or illegitimate as it is said “SM” is authorised for use in the United States and some other countries to indicate a registered service mark – which MMDSmart is not.

The fact that the Complainant (or whomever) did not identify its trademark with “SM” or “TM”, however, does not mean the sign is not being used as a trademark. Whether a sign is being used as a trademark depends objectively on whether the relevant public would identify the particular usage as a badge of origin. This may depend on numerous considerations – the nature of the sign (whether it is a descriptive term or not), how the sign is presented (whether it is in the same colour and font and size as narrative text or emphasised) and the context in which it appears (such as the presence of obvious other trademarks or presentation as a “brand” or part of narrative text) and all the circumstances. The use of identifiers such as “TM” or, where permitted, ® or “SM” assists in this but is not determinative in itself.

It is plain that MMD SMART is being used as a trademark in the screenshots and photographs included in the evidence.

Secondly, the Respondent contends it is not established that the Complainant was the holder of the domain name throughout the relevant period. This argument is based on the fact that the holder of the domain name was concealed behind a privacy service until August 2023. The Panel notes, however, that the Wayback Machine materials show that the domain name has been captured 120 times between November 2008 and June 2023. The Panel also examined some of the About Us pages captured by the Wayback Machine. At least in 2020, the two people identified on the Respondent’s website as the co-founders of the Complainant and the associated entities were identified as the President and CEO of “MMD Smart”. The business therefore has been operating under the control of the same persons since at least then and that usage is consistent with the nature of the business being promoted in the two media releases from 2018 and 2019.

Thirdly, the Respondent contends it is not clear who was or is operating the website at <mmdsmart.com>. The website screenshots included in the Response include statements that “Copyright © MMDSmart 2023”. Immediately below this notice, however, are two company registration numbers and addresses. One of the addresses is the Complainant’s address. The other address is in Bulgaria and the company registration number is the “EIC/PIC” for the Bulgarian company MMDSmart Ltd.

The Panel notes that a trademark may function as a trademark even if the source indicated by the badge of origin is not specifically identified. In any event, there is sufficient identification here. Given the common control between the companies, the Panel is prepared to accept that rights flowing from the use of the trademark on the websites flow to the Complainant, at least in part and sufficiently for the purposes of the Policy. See also [WIPO Overview 3.0](#), section 1.4.2.

In addition to these materials, the content of the Respondent's website is predicated on the expectation that people will recognise whom MMD SMART identifies. Given the purpose of the Respondent's website, there is an air of considerable unreality in the argument that MMD SMART is not functioning as a trademark or recognised as such. This is an additional factor supporting a conclusion that the trademark has achieved significance as a source identifier. See [WIPO Overview 3.0](#), section 1.3.

On balance therefore and bearing in mind this requirement under the Policy is essentially a standing requirement, the Panel finds there is sufficient evidence to support a finding that MMD SMART is an unregistered trademark and the Complainant is its owner or, at least, has sufficient standing to assert the rights.

The second stage of this inquiry simply requires a visual and aural comparison of the disputed domain name to the proven trademarks. This test is narrower than and thus different to the question of "likelihood of confusion" under trademark law. Therefore, questions such as the scope of the trademark rights, the geographical location of the respective parties, the date they were acquired and other considerations that may be relevant to an assessment of infringement under trademark law are not relevant at this stage. Such matters, if relevant, may fall for consideration under the other elements of the Policy. See e.g., [WIPO Overview 3.0](#), section 1.7.

In undertaking that comparison, it is permissible in the present circumstances to disregard the generic Top Level Domain (gTLD) component as a functional aspect of the domain name system. [WIPO Overview 3.0](#), section 1.11.

Disregarding the ".info" gTLD, the disputed domain name consists of the Complainant's registered trademark only.

Accordingly, the Panel finds that the Complainant has established that the disputed domain name is identical with the Complainant's mark and the requirement under the first limb of the Policy is satisfied.

B. Rights or Legitimate Interests

The second requirement the Complainant must prove is that the Respondent has no rights or legitimate interests in the disputed domain name.

Paragraph 4(c) of the Policy provides that the following circumstances can be situations in which the Respondent has rights or legitimate interests in a disputed domain name:

- (i) before any notice to [the Respondent] of the dispute, [the Respondent's] use of, or demonstrable preparations to use, the [disputed] domain name or a name corresponding to the [disputed] domain name in connection with a bona fide offering of goods or services; or
- (ii) [the Respondent] (as an individual, business, or other organization) has been commonly known by the [disputed] domain name, even if [the Respondent] has acquired no trademark or service mark rights; or
- (iii) [the Respondent] is making a legitimate noncommercial or fair use of the [disputed] domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

These are illustrative only and are not an exhaustive listing of the situations in which a respondent can show rights or legitimate interests in a 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.

The Respondent registered the disputed domain name after the Complainant began using its trademark.

The Complainant states that it has not authorised the Respondent to use the disputed domain name. Nor is the Respondent affiliated with it.

The disputed domain name is not derived from the Respondent's name. Nor is there any suggestion of some other name by which the Respondent is commonly known from which the disputed domain name could be derived. From the available record, the Respondent does not appear to hold any trademarks for the disputed domain name.

Instead, the Respondent points to the registration of the disputed domain name in the ".info" gTLD which, the Respondent says, is for the provision of information in contrast to the ".com" gTLD which is for business. The Respondent argues that, therefore, there is no overlap between the fields of activity of the Complainant and the Respondent.

The Panel does not accept this argument. Whatever may be the "purpose" of the various gTLDs, websites are accessible to essentially anyone with a connection to the Internet whatever TLD the domain name is registered in. It is unrealistic to think that a hypothetical user of the Internet looking for "MMD Smart" for commercial purposes would disregard a website because the TLD was ".info" rather than ".com".

Secondly, the Respondent contends that it has registered and is using the disputed domain name as a form of criticism site. According to the Response, the website was founded on the initiative of former and current employees of the Ukrainian MMD Smart company to discuss the issue of workplace bullying. The Complainant disputes the claims made in the content on the site. The Complainant also argues that the Respondent is not either a current or former employee. While the Response is somewhat confusing on this point, the Respondent appears to accept this.

A criticism site may qualify as a legitimate noncommercial or fair use. [WIPO Overview 3.0](#), section 2.6. Without going into the merits of the allegations on the website, the contents do appear objectively to qualify as "criticism" for the purposes of the Policy. As the titles of the three sections indicate, however, the Panel would not describe the allegations as limited to employee claims of workplace bullying. Nonetheless, the contents objectively appear to raise criticisms of the Complainant or "MMD Smart". Whether or not the criticism are true or false is not something the Panel is in a position to determine and it is no part of the Panel's role to determine that.

While it is not clear what is the Respondent's relationship to the employees and ex-employees at whose initiative the website was claimed to be founded, the Panel cannot describe the contents of the website as primarily a pretext for cybersquatting, commercial activity, or tarnishment.

That said, the general right to legitimate criticism does not support an unfettered right to register and use any domain name. Thus, the [WIPO Overview 3.0](#), section 2.6.2 explains:

"2.6.2 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 this creates an impermissible risk of user confusion through impersonation."

As explained in *Palmetto State Armory, LLC v. Privacy service provided by Withheld for Privacy ehf / Joseph Stone*, WIPO Case No. [D2022-1028](#):

“Here, though, Respondent registered a domain name that copied, in its entirety, Complainant’s trademark. As such, the Disputed Domain Name impersonates Complainant, which misleadingly diverts consumers to Respondent’s website on the false premise that the website is run by, sponsored by, associated with, or approved by Complainant. That is not legitimate if ‘the public would perceive the disputed domain name as being affiliated with or authorized by a complainant.’ *Everytown for Gun Safety Action Fund, Inc. v. Contact Privacy Inc. Customer 1249561463 / Steve Coffman*, WIPO Case No. [D2022-0473](#) (citing *Dover Downs Gaming & Entertainment, Inc. v. Domains by Proxy, LLC / Harold Carter Jr., Purlin Pal LLC*, WIPO Case No. [D2019-0633](#) (‘Dover Downs’)). See generally [WIPO Overview 3.0](#), Section 2.6.2.”

Even in the case of a genuine criticism site, therefore, the registration and use of a disputed domain name identical to the Complainant’s trademark does not confer rights or legitimate interests under the Policy. Here, the disputed domain name copies the Complainant’s trademark in its entirety. This impersonation of the Complainant does not qualify as a right or legitimate interest under the Policy.

These matters, taken together, are sufficient to establish a prima facie case under the Policy that the Respondent has no rights or legitimate interests in the disputed domain name. The Respondent, however, has not rebutted that prima facie case. Accordingly, the Panel finds the Complainant has established the second requirement under the Policy also.

C. Registered and Used in Bad Faith

Under the third requirement of the Policy, the Complainant must establish that the disputed domain names have been both registered and used in bad faith by the Respondent. These are conjunctive requirements; both must be satisfied for a successful complaint: see e.g., *Burn World-Wide, Ltd. d/b/a BGT Partners v. Banta Global Turnkey Ltd*, WIPO Case No. [D2010-0470](#).

Generally speaking, a finding that a domain name has been registered and is being used in bad faith requires an inference to be drawn that the respondent in question has registered and is using the disputed domain name to take advantage of its significance as a trademark owned by (usually) the complainant.

The Respondent was admittedly aware that the Complainant or its associated entities were using, or known by, “MMD Smart” when registering the disputed domain name. The whole point of registering the disputed domain name was to have, and convey, a ready link to the Complainant and its associated entities.

The registration and use of a disputed domain name which misleadingly impersonates another’s trademark does not qualify as good faith under the Policy even in the case of (what appears to be) a genuine criticism site. See e.g., *Palmetto State Armory, LLC v. Privacy service provided by Withheld for Privacy ehf / Joseph Stone*, WIPO Case No. [D2022-1028](#).

Accordingly, the Complainant has established all three requirements under the Policy.

6. 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 <mmdsmart.info> be transferred to the Complainant.

/Warwick A. Rothnie/

Warwick A. Rothnie

Sole Panelist

Date: April 7, 2024