

ADMINISTRATIVE PANEL DECISION

Kixell v. Zhou Wen

Case No. D2022-2665

1. The Parties

The Complainant is Kixell, France, represented by MSP Avocats, France.

The Respondent is Zhou Wen, China.

2. The Domain Name and Registrar

The disputed domain name <kixell.com> is registered with Domain International Services Limited (China) (the “Registrar”).

3. Procedural History

The Complaint was filed in English with the WIPO Arbitration and Mediation Center (the “Center”) on July 20, 2022. On the following day, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On July 24, 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 July 25, 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 in English on July 26, 2022.

On July 25, 2022, the Center sent an email in English and Chinese to the Parties regarding the language of the proceeding. On the following day, the Complainant submitted its request that English be the language of the proceeding. The Respondent did not comment on the language of the proceeding.

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 in English and Chinese of the Complaint, and the proceedings commenced on August 2, 2022. In accordance with the Rules, paragraph 5, the due date for Response was August 22, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on August 23, 2022.

The Center appointed Matthew Kennedy as the sole panelist in this matter on Aug 26, 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 a French company founded in 2016 by Mr. Nicolas Jardillier that provides digital marketing services, including online audience measurements and analyses, and online marketing strategies. The Complainant holds French trademark registration number 4819967 for KIXELL, filed and registered on November 24, 2021, specifying services in classes 35, 38, 41, and 42. That trademark registration remains current. Mr. Jardillier registered the domain names <kixell.fr>, <kixell.com>, and <kixell.org> in 2015. The Complainant uses the domain name <kixell.fr> in connection with a website in French where it provides information about itself and its services. The Complainant has a Google business listing and operates several social media accounts under the name "Kixell".

The Complainant's former domain name <kixell.com> redirected to <kixell.fr>, but the Complainant did not renew its registration of <kixell.com> at the end of 2018. After the registration of that domain name lapsed, the Complainant contacted the then-registrar seeking to recover its registration. The then-registrar advised on March 6, 2019 that the lapsed registration could not be recovered but that the same domain name would be available for a new registration on a "first come-first served" basis from about March 8, 2019. The Complainant contacted the current Registrar in October 2021, regarding a possible transfer of the disputed domain name but the Respondent did not reply.

The Respondent is an individual resident in China.

The disputed domain name <kixell.com> was registered by the Respondent on April 6, 2021. It formerly resolved to a website in Chinese displaying pornographic material and multiple hyperlinks to gambling and pornography websites. The website indicated that it was provided by a business named "苦瓜视频" (which may be translated as "Bitter Gourd Video" or "Kugua Video") or "kugua.se". At the time of this Decision, the disputed domain name does not resolve to any active website; rather, it is passively held.

5. Parties' Contentions

A. Complainant

The disputed domain name is identical to the Complainant's KIXELL mark.

The Respondent has no rights or legitimate interests in respect of the disputed domain name. The Respondent's website is in no way associated with the name Kixell and the Respondent is not commonly known as "Kixell". The use of the disputed domain name will tarnish the Complainant's mark.

The disputed domain name has been registered and is being used in bad faith. The Respondent's registration and use of the disputed domain name is abusive and very detrimental to the Complainant's trademark and reputation. The use of the disputed domain name for a pornographic website forbidden by Chinese law constitutes an illegal activity and is evidence of bad faith.

B. Respondent

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

6. Discussion and Findings

6.1. Language of the Proceeding

Paragraph 11(a) of the Rules provides that “unless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding”. The Registrar confirmed that the Registration Agreement for the disputed domain name is in Chinese.

The Complainant requests that the language of the proceeding be English. Its main arguments are that the disputed domain name is in Latin characters, the Complainant does not understand Chinese, and translation would involve significant additional expense and unnecessary delay.

Paragraph 10(b) and (c) of the Rules requires the Panel to ensure that the Parties are treated with equality, that each Party is given a fair opportunity to present its case and that the administrative proceeding take place with due expedition. Prior UDRP panels have decided that the choice of language of the proceeding should not create an undue burden for the parties. See, for example, *Solvay S.A. v. Hyun-Jun Shin*, WIPO Case No. [D2006-0593](#); *Whirlpool Corporation, Whirlpool Properties, Inc. v. Hui'erpu (HK) electrical appliance co. Ltd.*, WIPO Case No. [D2008-0293](#).

The Panel observes that in this proceeding the Complaint and amended Complaint were filed in English. Despite the Center having sent the notification of the Complaint, the written notice of the Complaint, and an email regarding the language of the proceeding in both Chinese and English, the Respondent has not commented on the issue of language nor expressed any interest in otherwise participating in this proceeding. Therefore, the Panel considers that requiring the Complainant to translate the Complaint would create an undue burden and delay, whereas accepting it as filed without translation will not cause unfairness to either Party.

Having considered all the circumstances above, the Panel determines under paragraph 11(a) of the Rules that the language of this proceeding is English. The Panel would have accepted a Response in Chinese, but none was filed.

6.2 Substantive Issues

As a preliminary remark, the Panel notes that the mere fact that the Complainant formerly held an identical domain name does not entitle it to a transfer of the disputed domain name. Paragraph 4(a) of the Policy provides that a complainant must prove the following elements:

- (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.

The burden of proof of each element is borne by the Complainant.

A. Identical or Confusingly Similar

Based on the evidence presented of a trademark registration, the Panel finds that the Complainant has rights in the KIXELL mark. Given that the first element of paragraph 4(a) of the Policy is in the present tense, the Panel considers it sufficient for this element that the Complainant had trademark rights at the time when it filed the Complaint, as is the case here. The Panel will consider the timing of the accrual of the Complainant's trademark rights in its assessment of bad faith in section 6.2.C below.

The disputed domain name wholly incorporates the KIXELL mark. Its only additional element is a generic Top-Level Domain ("gTLD") extension ".com" but, as a standard requirement of domain name registration, the Panel will disregard that element in the comparison between the disputed domain name and the KIXELL mark for the purposes of the first element in paragraph 4(a) of the Policy. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 1.11.1.

Therefore, the Panel finds that the disputed domain name is identical to a trademark in which the Complainant has rights. The Complainant has satisfied the first element in paragraph 4(a) of the Policy.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy sets out the following circumstances which, without limitation, if found by the panel, shall demonstrate that the respondent has rights to, or legitimate interests in, a disputed domain name, for the purposes of paragraph 4(a)(ii) of the Policy:

- (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.

As regards the first and third circumstances set out above, the disputed domain name formerly resolved to a website displaying pornographic material and displaying hyperlinks to gambling and pornography websites. This use was for the commercial gain of the Respondent, if he was paid to direct traffic to the linked websites, or the commercial gain of the operators of the linked websites, or both. Although the disputed domain name wholly incorporates the Complainant's KIXELL mark, it is clear from the Complainant that the Respondent and his website have no relationship with the Complainant. Nothing in the content of the website had any apparent connection to the operational element of the disputed domain name ("kixell"). The disputed domain name is now passively held. In view of these circumstances, the Panel considers that the Complainant has made a *prima facie* case that the Respondent is not using the disputed domain name in connection with a *bona fide* offering of goods or services, nor is he making a legitimate noncommercial or fair use of the disputed domain name.

As regards the second circumstance set out above, the Respondent is identified in the Registrar's Whois database as "Zhou Wen", not the disputed domain name. The associated website identifies the operator as "苦瓜视频" or "kugua.se", not the disputed domain name. There is no evidence that the Respondent has been commonly known by the disputed domain name.

In summary, the Panel considers that the Complainant has made a *prima facie* case that the Respondent has no rights or legitimate interests in respect of the disputed domain name. The Respondent failed to rebut that *prima facie* case because he did not respond to the Complaint.

Therefore, based on the record of this proceeding, the Panel finds that the Complainant has satisfied the second element in paragraph 4(a) of the Policy.

C. Registered and Used in Bad Faith

Paragraph 4(b) of the Policy provides that certain circumstances, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith. The fourth circumstance is as follows:

(iv) by using the [disputed] domain name, [the respondent has] intentionally attempted to attract, for commercial gain, Internet users to [the respondent's] website or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of [the respondent's] website or location or of a product or service on [the respondent's] website or location.

As regards registration, the disputed domain name was registered in April 2021, seven months before the filing and registration of the Complainant's KIXELL mark. The Panel recalls that, where a respondent registers a domain name before the complainant's trademark rights accrue, UDRP panels will not normally find bad faith on the part of the respondent. However, as an exception to that general proposition, bad faith may be found where the respondent registered the domain name in anticipation of the complainant's trademark rights. See [WIPO Overview 3.0](#), section 3.8.

In the present case, the Complainant provides evidence of its website, which the Panel notes has prominently displayed the KIXELL mark since at least May 2020.¹ The Complainant also provides evidence of online customers reviews of its services using the name "Kixell" since December 2019, its social media accounts, its presentation of a webinar, and the results of an Internet search for "Kixell" that all relate to the Complainant. "Kixell" is a coined term and highly distinctive. On the other hand, the registrations of the Complainant's company name and its domain names, in themselves, do not demonstrate that the relevant public would associate KIXELL with the Complainant. Overall, the Panel finds that the Complainant acquired a certain reputation in the name "Kixell" in relation to its digital marketing services prior to 2021. The disputed domain name wholly incorporates the KIXELL mark with no additional element besides a gTLD extension. The Respondent provides no explanation for its registration of the disputed domain name, and its website contains nothing related to "kixell" either. Based on the record of this proceeding, the Panel considers that, on balance, the Respondent's intent in registering the disputed domain name was to unfairly capitalize on the Complainant's nascent trademark rights in bad faith. See [WIPO Overview 3.0](#), section 3.8.2.

As regards use, the disputed domain name formerly resolved to a website displaying pornographic material and displaying hyperlinks to gambling and pornography websites. This use was for the commercial gain of the Respondent, or the operators of the linked websites, or both. Given the findings in section 6.2.B above, the Panel considers that by using the disputed domain name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to his website, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of his website within the terms of paragraph 4(b)(iv) of the Policy.

The Panel takes note that the use of the disputed domain name has recently changed and that it is now passively held. This change in use does not alter the Panel's conclusion; if anything, it may be a further indication of bad faith.

¹ The Panel notes its general powers articulated *inter alia* in paragraphs 10 and 12 of the Rules and has searched the Internet Archive (which is publicly available at "www.archive.org") in order to verify the duration of use of the KIXELL mark on the Complainant's website. The Panel considers this process of verification useful in assessing the merits of this case. See [WIPO Overview 3.0](#), section 4.8.

Therefore, the Panel finds that the disputed domain name has been registered and is being used in bad faith. The Complainant has satisfied the third element in paragraph 4(a) 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 <kixell.com> be transferred to the Complainant.

/Matthew Kennedy/

Matthew Kennedy

Sole Panelist

Date: August 31, 2022