

## **ADMINISTRATIVE PANEL DECISION**

### **Société civile particulière monégasque “MC 2020” v. Smiljan power solutions Case No. D2023-0316**

#### **1. The Parties**

The Complainant is Société civile particulière monégasque “MC 2020”, Monaco, represented by Brinkhof N.V., Netherlands.

The Respondent is Smiljan power solutions, United States of America (“United States”).

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

The disputed domain name <tibtecag.com> is registered with Google LLC (the “Registrar”).

#### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on January 24, 2023. On January 24, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On January 24, 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 (Contact Privacy Inc. Customer 7151571251) and contact information in the Complaint. The Center sent an email communication to the Complainant on January 26, 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 amendment to the Complaint on January 31, 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 the Respondent of the Complaint, and the proceedings commenced on February 2, 2023. In accordance with the Rules, paragraph 5, the due date for Response was February 22, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on February 23, 2023. The Center received email communications from the Respondent on February 26 and February 28, 2023.

The Center appointed Andrew D. S. Lothian as the sole panelist in this matter on March 3, 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 entity with a place of business in Monaco. It was founded by a Mr. Vechik and a Mr. Koekkoek, who were listed as the inventors in certain patent applications originally held by the Complainant. Said patent applications were later transferred to a Netherlands company named TI-Holdings B.V., which is active in the field of developing new sustainable technologies. The parent company of TI-Holdings B.V. is a Swiss entity named Tib-Tec AG. Said parent company is the holder of the domain name <tib-tec.com>, registered on March 3, 2021. The website associated with that domain name features a background picture consisting of a green landscape with five wind turbines ranged along the edge of a slope, behind which is a distant hill with a partially cloudy sky above. Said website explains that said parent company's vision is to become a leader in energy transition by implementing its *in situ* hydrogen production technology in selected areas to accelerate decarbonizing of the global energy market. The entities comprising the Complainant, the Swiss company Tib-Tec AG, and its Netherlands company subsidiary TI-Holdings B.V., are described in the Complaint as closely connected companies.

The Complainant is the owner of International Registered Trademark No. 1638124 for the word mark TIB-TEC, registered on November 5, 2021 in Classes 7, 12, and 35, and designated in respect of three territories. The base registration for said mark is Monaco Registered Trademark No. 36835, registered on June 8, 2021.

The disputed domain name was registered on November 22, 2022. Little is known about the Respondent, which has not participated directly in the present proceeding. The Whois record and the Respondent's email address suggest that it may be named "Smiljan power solutions" although it signs its emails "Ti Btecg shop". The website associated with the disputed domain name substantially reproduces the background image from the website of the Complainant's affiliate, Tib-Tec AG. Superimposed on this background is the message "TIB-TEC / DO NOT INVEST / Pump and Dump IPO". The Respondent's said website goes on to claim that certain named individuals and companies (including Messrs. Vechik and Koekkoek) do not have rights to the technology in the Vechik/Koekkoek patent, applying epithets such as "fake inventor" and "fraud director" to various persons.

#### **5. Parties' Contentions**

##### **A. Complainant**

In summary, the Complainant's contentions are as follows:

Identical or confusingly similar

The Complainant is the owner of the TIB-TEC trademark. Said mark is incorporated in its entirety in the disputed domain name with the mere deletion of the dash and the addition of the letters "ag". This does not prevent a finding of confusing similarity as the trademark is recognizable within the disputed domain name. The letters "AG" are generally understood to refer to a German, Austrian or Swiss business form. The disputed domain name therefore refers to Tib-Tec AG, which is closely connected to the Complainant. The Respondent intentionally attempts to increase a likelihood of confusion between the disputed domain name and the Complainant's trademark by the reference to said company name and by reproducing the picture used on said company's website.

## Rights and legitimate interests

The Respondent has not used or made demonstrable preparations to use the disputed domain name in connection with a *bona fide* offering of goods or services. The disputed domain name is used to harm the Complainant's reputation and to disrupt its business without credible evidence of the allegations made. There is no evidence to suggest that the Respondent is commonly known by the disputed domain name or the term "tibtecag". The Complainant has never licensed or authorized the Respondent to use its trademark in any way or to register the disputed domain name. There is no relationship between the Parties justifying such registration.

The disputed domain name and its related website do not qualify as providing permissible criticism under the Policy. Even a general right to legitimate criticism does not necessarily extend to registering or using a domain name identical to a trademark, including typos. Even where such a domain name is used in relation to genuine noncommercial free speech, this creates an impermissible risk of user confusion through impersonation. The disputed domain name, consisting of the Complainant's mark and a non-distinctive business legal form, will be perceived by the public as being affiliated with or authorized by the Complainant. The associated website depicts the Complainant's mark in the browser's tab and website menu, as selected by the domain name holder. A disclaimer available on said website does not remove the implied affiliation. The Respondent has also concealed its identity and the Complainant cannot determine whether or not it is a competitor and therefore that the website associated with the disputed domain name has a commercial aim. The only reason for said website is to harm the Complainant's reputation.

## Registered and used in bad faith

The Respondent uses the disputed domain name to attempt to expand the audience for its criticism by misleading Internet users as to the source, sponsorship or affiliation of its website. Coupled with intentional similarity to the Complainant's trademark, this presupposes bad faith registration and use on the Respondent's part. Given (1) the website content, and (2) the nature of the disputed domain name, consisting of the Complainant's trademark in its entirety, absent the dash and with the addition of the non-distinctive "ag", the Respondent cannot credibly claim to have been unaware of the Complainant's mark. It is reasonable to infer that it knew that the disputed domain name would be identical or confusingly similar to the Complainant's mark. It is inconceivable that its choice of the disputed domain name was accidental, and that it did not have the Complainant in mind when it registered the disputed domain name.

The disputed domain name is being used to disrupt the Complainant's business and that of its affiliates. There is no conceivable good faith use of the disputed domain name by the Respondent and the website accessible via the disputed domain name does not qualify as a legitimate noncommercial criticism website.

## **B. Respondent**

The Respondent did not reply to the Complainant's contentions. However, in an email dated February 26, 2023, in response to the Notification of Respondent Default, the Respondent claimed not to have received any documentation regarding the Complaint at its physical address and stated that it was entitled to appropriate time to prepare a defense and appoint a lawyer. On February 27, 2023, in reply to said email, the Center forwarded a copy of the Notification of Complaint and Commencement of Administrative Proceeding which had been notified to the Respondent on February 2, 2023 (including having been sent to the same email address which was used by the Respondent on February 26, 2023). On February 28, 2023, the Respondent replied indicating that it could not open the attachment and requesting that hard copy be sent.

## **6. Discussion and Findings**

To succeed, the Complainant must demonstrate that all of the elements listed in paragraph 4(a) of the Policy have been satisfied:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
- (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.

#### **A. Preliminary Matter: No Response**

The Panel notes that the only communications received from the Respondent in this case relate to its alleged lack of receipt of the Complaint and written notification. The Written Notice was sent in physical copy by courier to the Registrant's address as disclosed by the Registrar, and to the address of the privacy service selected by the Respondent. Delivery by courier could not be effected to the Respondent's address due to the fact that the said address was incomplete. However, delivery was successful to the address of the Respondent's selected privacy service.

In addition to delivery and attempted delivery of the Written Notice by hard copy, the Center notified the Complainant electronically to the Complainant's email address (as provided by the Registrar) on February 2, 2023. This is the same email address from which the Respondent's communications of February 26, 2023 and February 28, 2023 emanated, although the Respondent contended that it did not receive the February 2, 2023 communication. The Center forwarded the Notification of Complaint and Complaint to the same email address for a second time on February 27, 2023. On this occasion, the Respondent claimed that it was unable to open the attachment and it therefore requested that physical copy be re-sent, although it did not indicate that any particular address should be used.

The Panel considers that the actions taken by the Center to issue the Written Notice by courier to the Complainant's address and to its privacy service provider's address, together with the sending of the Complaint in electronic form by email to the address which the Registrar provided for the Respondent (and which is evidently in active use by the Respondent based on the communications emanating therefrom) are sufficient to satisfy the requirement in paragraph 2(a) of the UDRP Rules to "employ reasonably available means calculated to achieve actual notice". The Panel considers that the Respondent has been given a fair opportunity to present its case in accordance with paragraph 10(b) of the Rules. The Panel must balance paragraph 10(b) of the Rules against paragraph 10(c), which requires the Panel to ensure that the administrative proceeding takes place with due expedition. As the requirement in paragraph 2(a) of the Rules has been satisfied, the Panel sees no reason to delay matters further, for example, by ordering that an additional physical copy of the Complaint be sent to the Respondent's (incomplete) address.

#### **B. Identical or Confusingly Similar**

The first element inquiry under the Policy is usually undertaken in two stages. First, the Complainant must demonstrate that it possesses UDRP-relevant rights in a trademark, whether registered or unregistered. Secondly, such trademark is compared to the disputed domain name, typically on a straightforward side-by-side basis, usually disregarding the Top-Level-Domain (in this case ".com"), to assess identity or confusing similarity. If, on the basis of such comparison, the disputed domain name is seen to be identical to the Complainant's trademark, identity will generally be found, while if the Complainant's mark is otherwise recognizable in the disputed domain name, confusing similarity will usually be found.

In the present case, the Panel is satisfied that the Complainant has demonstrated UDRP-relevant rights in its TIB-TEC registered trademark, as described in the factual background section above. Turning to the comparison exercise, it may be seen that the Complainant's trademark is included in its entirety in the disputed domain name (the absence of the hyphen being of no particular significance) and is fully recognizable notwithstanding the fact that it is suffixed by the additional letters "ag" (on the topic of additional terms in a domain name, see section 1.8 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)").

On the basis of the above analysis, the Panel finds that the disputed domain name is confusingly similar to the Complainant's trademark and accordingly that the Complainant has carried its burden with regard to paragraph 4(a)(i) of the Policy.

### **C. Rights or Legitimate Interests**

Paragraph 4(c) of the Policy lists several ways in which the Respondent may demonstrate rights or legitimate interests in the disputed domain name:

"Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of paragraph 4(a)(ii):

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

In the present case, it may be seen that the disputed domain name is being used in connection with a website that is critical of the Complainant and affiliated entities. The nature of the criticism appears to revolve around how the Complainant came by its technology and whether it, or those behind it, have "stolen" this. The Panel cannot be certain in this case as to whether such criticism is commercial or noncommercial in nature. If such criticism was found to be commercial, and not merely incidentally so (such as fundraising to offset the costs of registration), it would not confer rights and legitimate interests upon the Respondent in terms of paragraph 4(c)(iii) of the Policy.

In any event, whether the criticism is commercial or not, the Panel must examine the disputed domain name in the context of the "impersonation test" (see *Dover Downs Gaming & Entertainment, Inc. v. Domains By Proxy, LLC / Harold Carter Jr, Purlin Pal LLC*, WIPO Case No. [D2019-0633](#)). Panels applying this particular test take the view that, for a Respondent to be able to claim fair use for the purposes of noncommercial criticism under the Policy, the domain name that is used for this alleged purpose must not impersonate the trademark owner and should signal to potential visitors that the associated website is likely to contain content critical of the trademark owner (the example often cited of such a signal is a domain name containing the trademark together with the word "sucks"). A domain name that is identical to a complainant's trademark (*i.e.*, <trademark.tld>) is generally regarded as falling foul of the impersonation test whereby panels typically find that it creates "an impermissible risk of user confusion" (see section 2.6.2 of the [WIPO Overview 3.0](#)).

In the present case, the disputed domain name does not consist exclusively of the Complainant's mark but removes the hyphen and adds the letters "ag" to it. In such circumstances, a panel will typically look at the broader facts and circumstances to determine whether impersonation is taking place. The Panel is aware that the letters "AG" are used as a corporate identifier in multiple countries. Given that fact, the composition of the disputed domain name most probably suggests that it refers to a corporate entity associated with the trademark owner, namely the Complainant. In addition, it must not be overlooked that there is an actual entity in Switzerland by the name of Tib-Tec AG, which has a close connection to the Complainant.

Bearing this wider case context in mind, the Panel considers that the disputed domain name creates an impermissible risk of user confusion even though it is not an exact match for the Complainant's mark. Its principal element is the Complainant's mark and the additional letters suggest that the disputed domain name belongs to a corporate entity that would be closely related to that mark. In no way could it be described as signaling to potential visitors that the website associated with the disputed domain name

contains content critical of the trademark owner. On the contrary, the Panel's analysis suggests that the Respondent is using the disputed domain name in an attempt to expand the audience for its criticism by misleading Internet users as to the source, sponsorship or affiliation of its website. In the Panel's opinion, such deliberate deception cannot confer rights and legitimate interests upon the Respondent.

Registrants such as the Respondent remain free to select domain names for the purposes of genuine noncommercial criticism, as far as the provisions of the Policy are concerned, so long as such domain names make clear that the registrant is not affiliated with or authorized by the trademark holder concerned. However, as this Panel has previously observed (see *SwissCare Europe v. michael click, Active OutDoors LLC*, WIPO Case No. [D2022-1496](#)) it cannot be regarded as fair within the meaning of the Policy for a respondent to incorporate a trademark into a domain name with a view to deceiving Internet users intending to visit an official website of the trademark owner into viewing critical material which they are not looking for. This is not the equivalent of standing outside the trademark owner's premises with a placard containing an expression of criticism and exercising one's right of free speech; rather, it amounts to constructing a confusingly similar entrance to the trademark owner's premises and lying in wait for an audience of visitors who do not necessarily wish to be there and who are simply looking for the correct way into the Complainant's office.

In all of these circumstances, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name, and that the Complainant has carried its burden in respect of the requirements of paragraph 4(a)(ii) of the Policy.

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

Paragraph 4(b) of the Policy provides four, non-exclusive, circumstances that, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

- “(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out of pocket costs directly related to the domain name; or
- (ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or
- (iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- (iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your website or location or of a product or service on your website or location.”

The analysis on this element of the Policy mirrors the consideration of the topic of rights and legitimate interests as noted above. The composition of the disputed domain name represents the Complainant's trademark with a corporate identifier. It is also an exact match for the Complainant's affiliate's corporate name. The related website content refers to and makes certain allegations regarding the founders of the Complainant. In light of this, there can be no doubt that the Respondent registered the disputed domain name with an awareness of the Complainant and its rights, and with intent to target these.

As noted in the preceding section, while not identical to the Complainant's trademark, the disputed domain name wholly incorporates this with the only differences being the absence of the hyphen (punctuation being of no significance) and the addition of the letters “ag”. Given that these letters are typically used as a corporate identifier in certain countries, the Panel is of the view that the disputed domain name creates a

high risk of implied affiliation with the Complainant. That risk is exacerbated by the fact that the disputed domain name is also an exact match for the corporate name of an entity with which the Complainant has a close connection.

In these circumstances, the Panel finds that the disputed domain name is being used to divert confused Internet users to the Respondent's website. Such users are not expecting to arrive at the Respondent's website but rather are seeking an official website relating to the Complainant's business, whether or not that happens to be the website of the Complainant or of its closely connected and similarly named (to the disputed domain name) affiliate. The Panel notes that the purpose of the Respondent's website is to criticize the Complainant and its affiliates and takes no issue with the use of websites for the purposes of noncommercial criticism in general. However, the adoption of an inherently deceptive domain name that impersonates the Complainant for use in connection with such a website "constitutes registration and use in bad faith, which cannot be cured by the content of the Respondent's website (if it is accepted that the content is noncommercial and indeed represents legitimate criticisms, for which latter aspect the Panel makes no findings, as this is generally seen as not being a matter falling within the scope of the Policy)" (see *Netblocks Group v. Collin Anderson*, WIPO Case No. [D2020-2240](#)).

In all of the above circumstances, the Panel finds that the disputed domain name has been registered and is being used in bad faith, and accordingly that the Complainant has carried its burden in terms of 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 <tibtecag.com> be transferred to the Complainant.

*/Andrew D. S. Lothian/*

**Andrew D. S. Lothian**

Sole Panelist

Date: March 17, 2023