

ADMINISTRATIVE PANEL DECISION

Accent Lifestyle Pty Ltd v. Abcdhu Ybcd

Case No. D2022-4556

1. The Parties

The Complainant is Accent Lifestyle Pty Ltd, Australia, represented by Clayton Utz, Australia.

The Respondent is Abcdhu Ybcd, Hong Kong, China.

2. The Domain Name and Registrar

The disputed domain name <shopfirstmse.com> (“Domain Name”) is registered with Name.com, Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on November 29, 2022. On November 30, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On December 1, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name, which differed from the named Respondent (Whois Agent, Domain Protection Services, Inc.) and contact information in the Complaint. The Center sent an email communication to the Complainant on December 1, 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 on December 5, 2022.

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 of the Complaint, and the proceedings commenced on December 8, 2022. In accordance with the Rules, paragraph 5, the due date for Response was December 28, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on December 29, 2022.

The Center appointed Willem J. H. Leppink as the sole panelist in this matter on January 13, 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 are undisputed.

The Complainant is a wholly owned subsidiary of Accent Group Limited (“Accent Group”), which is a digitally integrated retail and distribution business for apparel, clothing, footwear, headgear, bags, and accessory goods in the performance and lifestyle market. Accent Group is listed on the Australian Stock Exchange and generates revenue of over AUD 1 billion per year. Accent Group has over 700 physical retail stores, 33 brands, and over 35 online platforms. Accent Group operates in many different jurisdictions worldwide, including the United States of America, Australia, and New Zealand.

FIRST MSE is one of Accent Group’s key brands. The Complainant provides a broad range of goods, including apparel (clothing, footwear, headgear) under the FIRST MSE brand, including under a stylized logo, which includes the word element FIRST MSE. It does so within the “Glue Store” division of the Accent Group business.

The Complainant is also the owner of the following registered trademarks in Australia and New Zealand for the word mark FIRST MSE:

- Australian Trade Mark Registration No. 2175117 in class 18 and 25, registered on May 17, 2021; and
- New Zealand Trade Mark Registration No. 1188141 in class 18 and 25, registered on March 1, 2022.

(these registrations hereinafter in singular referred to as the “Trademark”)

The Complainant (through its related entity, Accent Brands Pty Ltd) is the registrant of the domain name <gluestore.com.au>, through which the Complainant operates a website at “www.gluestore.com.au/collections/first-mse” (“First Mse Website”).

The Domain Name was registered on July 27, 2022. Currently the Domain Name does not resolve to an active website resulting from a takedown request by the Complainant. Prior to this takedown, the Domain Name resolved to a website including an online retail store for apparel goods, including clothing, footwear, headgear, bags and accessories (“Website”). The Website reproduced the Complainant’s stylized logo and a large number of photographs of the Complainant’s First Mse products.

5. Parties’ Contentions

A. Complainant

Insofar as relevant for deciding this matter, the Complainant contends the following.

The Domain Name is confusingly similar to the Trademark. The word element “firstmse” is the only distinctive part of the Domain Name. The addition of the word “shop” which precedes “firstmse” does not distinguish the Domain Name from the Trademark. In fact, the addition of the word “shop” only increases the likelihood of confusion with the Trademark. That is because “shop” simply refers to the action of purchasing goods, which is the sole premise of the Complainant’s business operations.

The Respondent has no rights or legitimate interests in respect of the Domain Name. The Complainant has never been associated with the Respondent or in any way licensed, granted or otherwise endorsed the use of the Trademark by the Respondent, with respect to the Domain Name or otherwise.

The Respondent has not used or made demonstrable preparations to use the Domain Name in connection

with any *bona fide* offering of goods or services. On the contrary, the Respondent's only use of the Domain Name is to operate a fraud website to divert website traffic from the Complainant's legitimate First Mse Website to the Website. The only "offering" on the Respondent's website has been by reference to the Complainant's own images, which were unlawfully copied from the First Mse Website.

The Respondent is also not commonly known by the Domain Name. As the Domain Name incorporates the entirety of the Trademark there is a risk of implied affiliation between the Respondent and the Complainant. There is also no legitimate noncommercial or fair use of the Domain Name, given the misleading character of the Website reproducing the Complainant's stylized logo and a large number of photographs of the Complainant's First Mse products.

The Respondent has registered the Domain Name and is using the Domain Name in bad faith. It has intentionally attempted to attract, for commercial gain, Internet users to the website operated at the Domain Name by creating a real likelihood of confusion with the Trademark and the Complainant's businesses generally. As the Trademark has no obvious independent meaning, it can be concluded that the Domain Name was chosen with the Complainant's Trademark in mind. It would be fanciful to suggest that the Respondent would have independently selected and registered a domain name that includes the Trademark (together with the descriptor "shop"). From the use of the stylized logo and the Complainant's photographs, it is also clear that the Respondent is fully aware of the Complainant and its activities. The Respondent has clearly engaged in this conduct to divert consumers and/or to confuse them into believing that the Domain Name is operated or authorized by the Complainant for legitimate purposes.

The Respondent has actively provided, and failed to correct, false contact details leading to the illegitimacy of the operations of the Domain Name as a functioning online fashion retailer. Finally, the details provided by the Registrar, record the registrant as "Abcdhu Ybcd", which is obviously not the name of any actual person or an entity. The use of fake details as the recorded registrant of the Domain Name also serves to demonstrate that the Domain Name was registered (and then used) as an instrument of fraud.

B. Respondent

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

6. Discussion and Findings

Pursuant to paragraph 4(a) of the Policy, the Complainant must prove each of the following three elements:

- (i) the 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 Domain Name; and
- (iii) the Domain Name has been registered and is being used in bad faith.

Noting the burden of proof on the Complainant, the Respondent's default (*i.e.*, failure to submit a formal response) would not by itself mean that the Complainant is deemed to have prevailed. The Respondent's default is not necessarily an admission that the Complainant's claims are true. See in this regard WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.3 "In cases involving wholly unsupported and conclusory allegations advanced by the complainant, or where a good faith defense is apparent (*e.g.*, from the content of the website to which a disputed domain name resolves), panels may find that – despite a respondent's default – a complainant has failed to prove its case. Further to paragraph 14(b) of the UDRP Rules however, panels have been prepared to draw certain inferences in light of the particular facts and circumstances of the case *e.g.*, where a particular conclusion is *prima facie* obvious, where an explanation by the respondent is called for but is not forthcoming, or where no other plausible conclusion is apparent".

A. Identical or Confusingly Similar

The Complainant must demonstrate that it has rights in a trademark or service mark and, if so, the Domain Name must be shown to be identical or confusingly similar to that mark.

The Complainant has shown that it has rights in the Trademark.

As set out in the [WIPO Overview 3.0](#), section 1.7, the first element functions primarily as a standing requirement. The threshold test for confusing similarity between the Domain Name and the Trademark involves a relatively straightforward comparison.

In light of the foregoing, the Panel finds that the Domain Name is confusingly similar to the Trademark. The Domain Name consists of the Trademark in its entirety, preceded by the word “shop”. This additional term does not prevent a finding of confusing similarity.

Therefore, the Panel is satisfied that the first element of the Policy is met.

B. Rights or Legitimate Interests

The Panel has carefully considered the factual allegations that have been made by the Complainant and are supported by the submitted evidence.

In particular, the Respondent has failed to offer the Panel any of the types of evidence set forth in paragraph 4(c) of the Policy from which the Panel might conclude that the Respondent has rights or legitimate interests in the Domain Name, such as:

- (i) use or preparation to use the Domain Name or a name corresponding to the Domain Name in connection with a *bona fide* offering of goods or services prior to notice of the dispute; or
- (ii) being commonly known by the Domain Name (as an individual, business or other organization) even if the Respondent has not acquired any trademark or service mark rights; or
- (iii) making 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.

The Respondent does not seem to be affiliated with the Complainant in any way. There is no evidence that “shopfirstmse” is the Respondent’s name or that the Respondent is commonly known under this name. There is also no evidence that the Respondent is, or has ever been, a licensee of the Complainant or that the Respondent has ever asked, or has ever been permitted in any way by the Complainant to register or use the Trademark, or to apply for or use any domain name incorporating the Trademark.

Further, the Complainant’s assertions have not been rebutted by the Respondent to indicate whether it has any rights or legitimate interests in the Domain Name. There was also no evidence put forward by the Respondent to indicate that the Respondent was licensed or authorized by the Complainant to use the Trademark.

The Respondent used the Domain Name to operate a website offering the Complainant’s products.

Assuming that this offer is genuine, which *prima facie* seems to be doubtful, panels have found that domain names identical to a complainant’s trademark carry a high risk of implied affiliation. Even where a domain name consists of a trademark plus an additional term (at the second- or top-level), panels have largely held that such composition cannot constitute fair use if it effectively impersonates or suggests sponsorship or endorsement by the trademark owner. In between, certain additional terms within the trademark owner’s field of commerce or indicating services related to the brand, may or may not by themselves trigger an inference of affiliation, and would normally require a further examination by the panel of the broader facts

and circumstances of the case – particularly including the associated website content – to assess potential respondent rights or legitimate interests. (See [WIPO Overview 3.0](#), section 2.5.1).

The Panel finds that the Website effectively impersonates or suggests endorsement by the Complainant given the prominent use on the Website of the Complainant's stylized logo and Trademark, the use of product images. Based on the evidence before the Panel, also an adequate disclosure of the identity of the provider of the Website is lacking.

Such impersonation and suggested endorsement is sufficient to conclude that the Respondent lacks rights or legitimate interest in the Domain Name.

Even if the so-called Oki Data test (*Oki Data Americas, Inc. v. ASD, Inc.*, WIPO Case No. [D2001-0903](#)) would have to be applied, the Respondent clearly fails this test anyway as, in this case, the Website does not accurately or prominently disclose the Respondent's relationship with the Complainant, in particular that it has no connection with the Complainant.

Therefore, the Panel is satisfied that the second element of the Policy is met.

C. Registered and Used in Bad Faith

The Panel finds that the Domain Name was registered and is being used in bad faith.

The Panel refers to its considerations under section 6.B and adds the following.

Taking into account the Website which appears to be offering the Complainant's First Mse products, and which features *inter alia* the Complainant's stylized logo and product images that also appear on the Complainant's website, the Respondent must have been aware of the existence of the Complainant's activities and rights at the time the Respondent registered the Domain Name. In the Panel's view, there is no plausible explanation why the Respondent registered and used the Domain Name other than the Respondent intending to trade off the goodwill and reputation associated with the Complainant. The Panel finds that the Respondent has intentionally attempted to attract Internet users to the Website by creating a likelihood of confusion with the Trademark and the Complainant.

Last, the Respondent seem to have provided a false contact details, including a false name, and did not avail itself of the opportunity to respond to the claims made by the Complainant, which are also additional factors supporting bad faith (see [WIPO Overview 3.0](#), section 3.6).

Therefore, the Panel is satisfied that the third element of the Policy is met.

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 Domain Name, <shopfirstmse.com>, be transferred to the Complainant.

/Willem J. H. Leppink/

Willem J. H. Leppink

Sole Panelist

Date: January 24, 2023