



Asian Domain Name Dispute Resolution Centre

hong kong

(Hong Kong Office)

ADMINISTRATIVE PANEL DECISION

Case No.	HK-2301744
Complainant:	Imiracle (Shenzhen) Technology Co., Ltd.
Respondent:	Xiang Chen
Disputed Domain Name(s):	<elfabrl.com>

1. The Parties and Contested Domain Name

The Complainant is Imiracle (Shenzhen) Technology Co., Ltd., of Room 1606, T5 Office Building, Qianhai China Resources Financial Centre, 5035 Menghai Avenue, Nanshan Street, Qianhai Hong Kong-Shenzhen Cooperation Zone, Shenzhen, China.

The Respondent is Xiang Chen, of An Dong Sheng Shen Zhen Shi Long Hua Ou.

The domain name at issue is elfabrl.com, registered by Respondent with GoDaddy.com, LLC, of 14455 North Hayden Rd. Suite 219 Scottsdale, AZ 85260.

2. Procedural History

The Complainant filed the Complaint with the Hong Kong Office of Asian Domain Name Dispute Resolution Centre on 12 April 2023 in accordance with the Uniform Policy for Domain Name Dispute Resolution approved by the Internet Corporation for Assigned Names and Numbers (“ICANN”) on 24 October 1999 (the “Policy”), the Rules for Uniform Domain Name Dispute Resolution Policy approved by the ICANN Board of Directors on 28 September 2013 (the “Rules”) and the ADNDRC Supplemental Rules for Uniform Domain Name Dispute Resolution Policy effective from 31 July 2015 (the “Supplemental Rules”). On 13 April 2023 the Hong Kong Office acknowledged receipt of the Complaint and sent an email to the Registrar requesting verification of information regarding the domain name at issue. On the same day, the Registrar sent an email disclosing registrant and contact information for the disputed domain name that differed from the named respondent and contact information in the Complaint. On 14 April 2023, the Centre sent an email to the Complainant providing the registrant and contact information disclosed by the Registrar and requiring the Complainant to update the information regarding the Respondent in the Complaint. On 19 April 2023 the Complainant filed an amended Complaint.

The Hong Kong Office confirmed that the Complaint, as amended, was in administrative compliance with the Policy and the Rules. On 24 April 2023 the Hong Kong Office sent

the Respondent a written notice of the Complaint, informing it that it was required to submit a Response within 20 days (that is, on or before 14 May 2023). The Hong Kong Office did not receive a Response from the Respondent regarding the Complaint. Accordingly, on 15 May 2023 the Hong Kong Office notified the parties of the Respondent's default.

On 18 May 2023 the Hong Kong Office appointed Prof. Kun FAN as the sole Panelist in this dispute, who confirmed that he was available to act independently and impartially between the Parties in this matter. On the same day, the Hong Kong Office transferred the case file to the Panel. The Decision due date was 1st June 2023.

3. Factual background

A. The Complainant

The Complainant, Imiracle (Shenzhen) Technology Co., Ltd., was established in 2017. The Complainant's affiliated company, Shenzhen iMiracle Technology Co., Ltd, is a Chinese company established in 2007. The Complainant adds that "*Due to the adjustment of the company's business strategy, the Complainant is now taking over the main business and trademark right of "ELF BAR"*".

The "ELF BAR" trademark was created in 2018 to manufacture and sell disposable e-cigarettes.

B. The Respondent

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

4. Parties' Contentions

A. Complainant

The Complainant's contentions may be summarized as follows:

- i. The disputed domain name is confusingly similar to a trademark in which the complainant has rights

The Complainant contends that the disputed domain name elfabrl.com confusingly similar to a trademark, ELF BAR, in which the complainant has rights. The Complainant submits that inversion of the letters "a" and "b" is not sufficient to avoid the disputed domain name being confusingly similar to its trademark. The Complainant adds that the main identifying part of the disputed domain name is elfabrl, which is basically the same as the Complainant's registered trademark "ELF BAR", with two differences in the character composition. Accordingly, the Complainant submits that the disputed domain name contains all or at least one of the main features of the Complainant's "ELF BAR" trademark and are likely to cause confusion.

- ii. The respondent has no rights or legitimate interests in respect of the domain name:

The Complainant assures that it has never directly or indirectly authorized the Respondent to use the "ELF BAR" trademark in any form.

The Complainant adds that the Respondent is not a distributor nor a partner of the Complainant.

The Complainant searched the trademark database in China and confirmed that no trademark applications were found under the name of the Respondent "Xiang Chen".

iii. The disputed domain name has been registered and is being used in bad faith:

The Complaint contends that the registration of the disputed domain name is difficult to explain as a coincidence when the "ELF BAR" trademark is so well known. The Complainant adds that this clearly shows that the Respondent knew or should have known the Complainant's trademark when registering the domain name.

The Complainant argues that the strength of its mark is sufficiently well known that the Respondent's mere registration of the disputed domain name itself gives rise to a presumption of bad faith in its subsequent use of the domain name. The Complainant makes reference to Chapter 3.1.4 of the WIPO Jurisprudential Overview 3.0, stating, according to the Complainant, that "Panels have consistently found that the mere registration of a domain name that is identical or confusingly similar (particularly domain names comprising typos or incorporating the mark plus a descriptive term) to a famous or widely-known trademark by an unaffiliated entity can by itself create a presumption of bad faith".

Finally, the Complainant provides a screenshot of the webpage to which the disputed domain name resolves. This screenshot shows a webpage similar to the Complainant's webpage "Verify Products" displayed to allow consumers of the Complainant's products to verify that the products they have purchased are genuine. The Complainant believes that *"the continuation of this unreasonable use of the disputed domain name will interfere with the Complainant's normal business activities. This shows that the Respondent by its registration and use of the disputed domain name intentionally creates a likelihood of confusion as to the source, sponsorship, affiliation or endorsement of the disputed domain name with the purpose of attracting Internet users to the website for commercial gain as per paragraph 4(b)(iv) of the Policy"*.

iv. Remedies

The Complainant requests that the disputed domain name elfabrl.com should be transferred to the Complainant.

B. Respondent

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

5. Findings

The ICANN Uniform Domain Name Dispute Resolution Policy provides, at Paragraph 4(a), that each of three findings must be made in order for a Complainant to prevail:

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

A) Identical / Confusingly Similar

The Complainant has provided several certificates of registration of trademark for ELF BAR for the following countries: China (21 February 2021), European Union (19 May 2021) and United Kingdom (24 May 2021).

The Complainant also provides a certificate in Russian language, but was not translated. Therefore, the Panel considers this exhibit inadmissible.

The Respondent has not provided contrary evidence. The Panel is satisfied that the Complainant's ELF BAR trademarks are protected prior to the registration of disputed Domain Name <elfabrl.com> on 31st January 2023.

The domain name reproduces the first element of the ELF BAR trademark, <elfabrl.com>, and imitated the second one, <elfabrl.com>, where the letters "a" and "b" are interchanged. The addition of the letter "l" is not enough to give the domain name a new meaning. Moreover, it is common ground that the rule of principle consists in disregarding the top-level domain.

Therefore, the Panel considers the disputed domain name to be confusingly similar to the Complainant's trademark.

Accordingly, the Panel finds that the Complainant has satisfied the first element.

B) Rights and Legitimate Interests

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.

To demonstrate rights or legitimate interests in a domain name, non-exclusive respondent defenses under paragraph 4(c) of the Policy include the following:

- (i) before any notice of the dispute, the Respondent's 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) the Respondent (as an individual, business, or other organization) has been commonly known by the 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 domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

The Complainant claims to have conducted one or more trademark searches in the Chinese trademark database mentioning the Respondent's name and claims to have found no results. However, the Complainant did not provide any document likely to prove that the Complainant carried out such a search.

The Complainant asserts that it has never authorized the Respondent to register or use the disputed domain name. The Panel considers that this assertion establishes the Complainant's *prima facie* case. Consequently, the burden of proof is switched, so that it is up to the Respondent to demonstrate why he believes he has legitimate rights or interests in the domain name.

The Respondent has not provided any evidence to prove its rights or legitimate interests in the disputed Domain Name. The Panel also could not find any rights or legitimate interests under paragraph 4(c) of the Policy.

Accordingly, the second condition of Paragraph 4(a) of the Policy is satisfied.

C) Bad Faith

Under the third condition of the Policy, the Complainant must establish that the disputed domain name has been both registered and is being used in bad faith by the Respondent.

1. The disputed domain name was registered in bad faith

The Complainant asserts that the ELF BAR trademark is well-known. However, the Complainant does not provide any document likely to demonstrate the notoriety of the mark. Indeed, the photographs taken in trade fairs make it possible to demonstrate the use of the trademark, but it is not sufficient to prove the notoriety. Moreover, the results of a Google query relating to "ELF BAR" do not allow us to confirm with certainty the well-known nature of the "ELF BAR" trademark.

Nevertheless, the Panel accepts the Complainant's argument that the registration of the disputed domain name cannot be a coincidence given the very strong similarity of the domain name <elfabrl.com> and the ELF BAR trademark. Further, the argument that the Respondent was aware of the ELF BAR trademark on the day the disputed domain name was registered is supported by the Respondent's use of the Complainant's logo on the page to which the disputed domain name resolves.

Based on the above, the Panel is of the view that the Respondent knew or could not have been unaware of the Complainant's trademark when registering the disputed domain name. Therefore, the disputed domain name was registered in bad faith.

2. The disputed domain name is used in bad faith

The Complainant demonstrates that the Respondent uses the disputed domain name to display a form intended to allow consumers to verify whether they have purchased genuine e-cigarettes and not counterfeits. The page and form displayed on the Respondent page are almost identical to the Complainant page and form. These facts suggest that the Respondent created such a form in order to collect the identification numbers of genuine e-cigarettes, which raises the suspicion of counterfeit e-cigarette activity. It is well established that counterfeiting activities cannot be considered as activities carried out in good faith. Therefore, the Panel finds that the Respondent is using the domain name in bad faith.

In conclusion, the Panel finds that the Respondent registered and uses the disputed Domain Name in bad faith.

Accordingly, the third condition of Paragraph 4(a) of the Policy is satisfied.

6. Decision

For all 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 <elfabrl.com> be transferred to the Complainant.

Fan Kun

Prof. Kun FAN
Panelist

Dated: 29 May 2023