

ADMINISTRATIVE PANEL DECISION

Mountain Top (Denmark) ApS v. Contact Privacy Inc. Customer 0133416460
/ Name Redacted, Mountaintop Idea Studio
Case No. D2020-1577

1. The Parties

The Complainant is Mountain Top (Denmark) ApS, Denmark, represented by Elmann IPR Law Firm, Denmark.

The Respondents are Contact Privacy Inc. Customer 0133416460, Canada / an individual (Name Redacted) and Mountaintop Idea Studio, United States of America ("United States"), represented by John Berryhill, Ph.d., Esq., United States.

2. The Domain Name and Registrar

The disputed domain name <mountaintop.com> (the "Disputed Domain Name") is registered with Tucows Inc. (the "Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on June 16, 2020. On June 16, 2020, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Disputed Domain Name. On June 17, 2020, 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 June 17, 2020, 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 June 19, 2020.

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 Respondents of the Complaint, and the proceedings commenced on June 22, 2020. In accordance with the Rules, paragraph 5, the due date for Response was July 12, 2020. On July 9, 2020, the Respondents requested an extension of the Response due date. An automatic extension of the Response due date was granted until July 16, 2020, pursuant to paragraph 5(b) of the Rules. The Response was filed with the Center on July 16, 2020.

The Center appointed John Swinson, Andrew D.S. Lothian, and Richard G. Lyon as panelists in this matter on August 19, 2020. The Panel finds that it was properly constituted and has jurisdiction to decide this administrative proceeding. Each member of 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 Mountain Top (Denmark) ApS, a company incorporated in Denmark. According to the Complaint, the Complainant is global leader in providing aluminum roll covers for pickup trucks. The Complainant has offices and factories across Europe, Australia, and Thailand and its products are distributed in many other countries.

According to the Complaint, the Complainant was incorporated on May 1, 1995, under the name BJERG TOP (MOUNTAIN TOP in Danish). On November 28, 2002, the Complainant changed its name to the English spelling MOUNTAIN TOP. On January 9, 2003, the Complainant registered the domain name <mountaintop.dk>.

The Complainant is the owner of European Union registered trade mark number 005617154 for MOUNTAIN TOP, registered on February 14, 2008 (the "Trade Mark").

The Complainant has listed Contact Privacy Inc. and Mountaintop Idea Studio as the Respondents. The Respondents say that the true registrant of the Disputed Domain Name is the individual whose name has been redacted (the "Respondent Individual"). The Panel accepts that Contact Privacy Inc. is a privacy service and does not need to be named as a respondent in the proceedings. The Panel also accepts that the Respondent Individual and his business Mountaintop Idea Studio (the "Respondent Business") are the Respondents in these proceedings. The Complainant says that the Respondent Business is a separate legal entity. The Respondents say that it is an unregistered business name used by the Respondent Individual in his personal capacity, as well as a corporation. For the purpose of this Proceeding, the Panel will treat the Respondent Business as the business name Mountaintop Idea Studio and not as a separate legal entity in the strict legal sense. See Procedural Issues for further discussion on this issue.

According to the Response, the Respondent Individual registered the Disputed Domain Name on April 21, 1995, and has used it for a personal blog and for email addresses belonging to himself and family members. The Respondent Business, to which ownership of the Disputed Domain Name was later transferred, is a business under which the Respondent Individual conducted business of the Respondent Individual.

The Disputed Domain Name previously resolved to a personal blog of the Respondent Individual.

5. Parties' Contentions

A. Complainant

The Complainant makes the following contentions.

Identical or Confusingly Similar

The Disputed Domain Name is identical to the Trade Mark. The Trade Mark was registered in 2008 but was protected as a non-registered (common law) trade mark under Danish law since 2002 as a result of use by the Complainant.

Rights or Legitimate Interests

The Respondents have no rights or legitimate interests in, and are not commonly known under, the Disputed Domain Name. Registration of the Disputed Domain Name does not automatically confer rights or legitimate interests on the Respondents.

To demonstrate rights or legitimate interests in a domain name based on its dictionary meaning (in this case the words “mountain” and “top”), the domain name should be genuinely used in connection with the relied-upon dictionary meaning and not trade off third-party trade mark rights. The Respondents have not made any use or demonstrable preparation to use the Disputed Domain Name in connection with a *bona fide* offering of goods or services and the Disputed Domain Name has resolved to a website displaying a close-down note since 2010.

Registered and Used in Bad Faith

The relevant point in time for deciding whether the Disputed Domain Name was registered in bad faith is sometime between November 27, 2012, and February 6, 2013. During this period, a change in ownership of the Disputed Domain Name occurred from the Respondent Individual to the Respondent Business.

Failure by the Respondents to demonstrate an unbroken chain of registration would support an inference of bad faith registration.

The circumstances indicate that the Respondents acquired the Disputed Domain Name primarily for the purpose of selling, renting or otherwise transferring it to the Complainant or one of the Complainant's competitors. This is supported by:

- the Disputed Domain Name corresponding to the Trade Mark exactly;
- the likelihood that the Respondents had positive knowledge of the Complainant's rights in the Trade Mark when ownership of the Disputed Domain Name was transferred in 2012-2013, based on the Complainant's substantial presence online and in various countries;
- the Respondents' use of a privacy service;
- the transfer of the Disputed Domain Name from the Respondent Individual to the Respondent Business (whose name incorporates “MOUNTAINTOP”) as a means of disguising the Respondents' bad faith intention and lack of legitimate rights and interests; and
- the Respondents' failure to put the Disputed Domain Name to any real use.

B. Respondents

The Respondents make the following contentions.

Identical or Confusingly Similar

The Respondents agree that the Disputed Domain Name is identical or confusingly similar to the Trade Mark.

Rights or Legitimate Interests

The Respondents do not need to demonstrate trade or service mark rights in the Disputed Domain Name, a range of equitable interests will be sufficient, including continued use of the domain name for a *bona fide* purpose.

The Respondent Individual registered the Disputed Domain Name in 1995 to experiment with the Internet and as an homage to the “I've Been to the Mountaintop” speech made by the Rev. Dr. Martin Luther King Jr. Initially, the Respondent Individual used the Disputed Domain Name for personal email through a hosting provider and later as a blog. In 2008, the Respondent Individual ceased blogging but has continued to use

the Disputed Domain Name for email addresses belonging to himself and his family.

In 2011, the Respondent Individual and his wife registered a corporation to conduct consulting services and creative services under the name Mountaintop Idea Studio. They also registered a domain name for this business, being <mountaintopideastudio.com>.

The Disputed Domain Name was moved to an account with the Respondent Individual's other domain name, being <mountaintopideastudio.com>. The Respondent Business does not exist independently of the Respondent Individual. Nonetheless, if the transfer is considered to be a change in beneficial ownership, the Respondent Business would have a legitimate interest because the Disputed Domain Name forms part of the Respondent Business's name.

The Respondents were not aware of the Complainant prior to receiving the Complaint. The Complainant does not appear in the top results of a Google search for the words "mountain top" and the Complainant does not have a strong reputation in the United States.

The Complainant does not have a monopoly on the common terms "mountaintop" or "mountain top". Thousands of businesses around the world have registered a large number of trade marks which incorporate these terms. Many domain names owned by other businesses also incorporate the word or phrase.

Registered and Used in Bad Faith

The Respondents contend that the Disputed Domain Name was not registered or used in bad faith for the following reasons:

- The Respondent Individual could not have registered the Disputed Domain Name in bad faith in 1995 because the Complainant's rights in the Trade Mark did not exist at the time.
- The Complainant makes the *non sequitur* contention that by not responding to attempts by the Complainant to buy the Disputed Domain Name, the Respondents' evidence an intention to sell the Disputed Domain Name. The Respondents do not engage with parties seeking to buy the Disputed Domain Name because the Disputed Domain Name is not for sale.
- The Respondents have used the Disputed Domain Name for blogging and email services, and not for anything related to pickup truck parts.
- If the Complainant had performed basic Google searches, it would have identified the connection between the Respondent Individual and the Respondent Business and realised that there had not been a change in beneficial ownership.

The reputation of the Respondents will be impaired by the Complainant's false accusations.

The Respondents support these contentions with documentary evidence and a declaration from the Respondent Individual.

6. Discussion and Findings

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

- (i) the Disputed Domain Name is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights; and
- (ii) the Respondents have 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 *onus* of proving each of these elements is on the Complainant.

A. Procedural Issues

Multiple Respondents

This Complaint relates to two Respondents. The panel in *Speedo Holdings B.V. v. Programmer, Miss Kathy Beckerson, John Smitt, Matthew Simmons*, WIPO Case No. D2010-0281, comprehensively addresses this issue. To summarize, consolidation of respondents is appropriate where there is common control of various domain names.

In this case, the original registrant (and the owner of the Respondent Business) is the Respondent Individual. The Respondent Individual has control over the Respondent Business. The Panel finds that it is appropriate for the Complaint to be brought against two Respondents.

Redaction of the Respondent Individual's name

In the Response, the Respondents state that the reputation of the Respondents will be impaired by the Complainant's false allegations. The Respondents have not explicitly requested that the Panel redact the Respondent Individual's name, however have made submissions that the Respondent Individual will suffer loss by his name being published. The Respondents state that:

"Even if the Respondent prevails, the posted decision will bear his name and the accusations against him forever. These accusations will be reviewed whenever he is considered for employment, for credit, or for anything else as a 'record of a legal proceeding' against him."

In many circumstances where a Panel has decided to redact a respondent's name, there is a clear case of fraud and an innocent party is unaware that their name has been used to register a domain name.

Section 4(j) of the Policy states that all decisions under this Policy will be published in full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision. In this instance, the Panel has determined that this is an exceptional case and it is fair and equitable to redact the Respondent Individual's name. Rule 10(a) allows the Panel to conduct the administrative proceeding in such manner as it considers appropriate in accordance with the Policy and these Rules.

Here, the Panel agrees with the Respondents that many of the Complainant's allegations are demonstrably false and that the Respondents will be harmed by them if the Respondent Individual's name is included in this Decision.

The Panel has decided to redact the Respondent Individual's name from the caption and body of this Decision.

B. Identical or Confusingly Similar

Paragraph 4(a)(i) of the Policy provides that the Complainant must establish that the Disputed Domain Name is identical or confusingly similar to the Trade Mark. This issue is not in contest between the parties.

Where a domain name incorporates the entirety of a trade mark, or where at least a dominant feature of the relevant mark is recognizable in the domain name, the domain name will normally be considered confusingly similar to that mark (see section 1.7 of WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("WIPO Overview 3.0")).

In this case, the Disputed Domain Name incorporates the entirety of the Trade Mark with no additional terms.

The Panel finds that the Disputed Domain Name is identical to the Trade Mark. The Complainant succeeds on the first element of the Policy.

C. Rights or Legitimate Interests

Paragraph 4(a)(ii) of the Policy provides that the Complainant must establish that the Respondents have no rights or legitimate interests in respect of the Disputed Domain Name. The Complainant is required to make out a *prima facie* case showing that the Respondents lack rights or legitimate interests.

Merely registering a domain name comprised of a dictionary word or phrase does not by itself automatically confer rights or legitimate interests on the respondent, and, without more, unsupported assertions that a domain name corresponds to a dictionary term/phrase also will not necessarily suffice.

In order to find rights or legitimate interests in a domain name based on its dictionary meaning, the domain name should be genuinely used, or at least demonstrably intended for such use, in connection with the relied-upon dictionary meaning and not to trade off third-party trademark rights (see section 2.10 of the WIPO Overview 3.0).

In this case, there is no evidence that the Respondents registered the Disputed Domain Name to trade off the Complainant's rights, or that the Respondents' website at the Disputed Domain Name was not *bona fide*.

The Respondent Individual registered the Disputed Domain Name in 1995, well before the Complainant existed. There are no indications that the Disputed Domain Name was registered in anticipation of the Complainant or its rights coming into being. Based on the evidence before the Panel, the Respondents have genuinely used the Disputed Domain Name for a legitimate reason, being a personal blog and memorable email addresses for family members.

The Panel considers that the Respondent Individual, when using the Disputed Domain Name for a personal blog and family email addresses, was making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue.

At a later point in time, Disputed Domain Name was used for the Respondents' business and/or may have been held in the name of such business. This was a design studio that incorporates the term "MOUNTAINTOP" in its name. There is no evidence that name of this design studio was selected to trade off the Complainant's reputation.

In light of the above, the Complainant does not succeed on the second element of the Policy.

D. Registered and Used in Bad Faith

Paragraph 4(a)(iii) of the Policy provides that the Complainant must establish that the Respondents registered and subsequently used the Disputed Domain Name in bad faith.

The Complainant contends that the Panel should assess registration and use of the Disputed Domain Name upon and from its transfer to the Respondent Business between November 2012 and February 2013. The Complainant submits that at this time the Respondents were or should have been aware of the Trade Mark.

Even though the registration details for the Disputed Domain Name were updated to Mountaintop Idea Studio, this is not a separate legal entity but merely the trading name for the Respondent Individual. As such, there was no change of registrant.

If this is not correct, and to the extent that the holder of the Disputed Domain Name was ever one or other of the Respondent Individual's corporations, such corporations were controlled by the Respondent Individual, and so the Panel considers that if there was a transfer of the Disputed Domain Name at this time, the transfer was from an individual to a business controlled by that same individual, and as such, the transfer did not sever the continuous chain of ownership that began when the Disputed Domain Name was registered by the Respondent Individual on April 21, 1995.

Registration in bad faith

To succeed in a complaint under the Policy, it is well established that under the third element of the Policy, a complainant must prove on the preponderance of the evidence is that the domain name in issue was registered in bad faith, *i.e.*, was registered with the complainant and/or its trade mark in mind.

The Trade Mark is a common phrase in English. Although "MOUNTAIN TOP" may be distinctive in the market for pickup trucks and automotive parts market, the Complainant has provided no evidence to demonstrate that the phrase is uniquely or specially associated with the Complainant or its products. The Respondents provided substantial evidence to the contrary.

The Complainant also failed to demonstrate why the Respondents, located in the United States, would have any reason to be aware of the Trade Mark and thereby seek to target the Complainant. The Respondents provided evidence to demonstrate that the Disputed Domain Name is in fact a reference to the Rev. Dr. Martin Luther King Jr.'s famous "I've Been to the Mountaintop" speech.

On a more fundamental level, the earliest date for accrual of the Complainant's rights in the Trade Mark is November 28, 2002, when the Complainant changed its name to include the English spelling of "MOUNTAIN TOP". Given that the Respondent Individual registered the Disputed Domain Name more than seven years prior in 1995, and also prior to the Complainant being incorporated, it is obviously not possible that the registration of the Disputed Domain Name could have been targeting the Complainant or its Trade Mark.

The Complainant has therefore failed to demonstrate that the Respondents registered the Disputed Domain Name in bad faith to target the Complainant.

Use in bad faith

As outlined above, the Respondents have used the Disputed Domain Name as a blog and continue to use it for family email addresses. The Respondents have evidenced no intention to sell, rent or otherwise transfer the Disputed Domain Name to the Complainant or any other third party.

The Panel considers that the Respondents did not register, and are not using, the Disputed Domain Name in bad faith.

The Complainant does not succeed on the third element of the Policy.

E. Reverse Domain Name Hijacking

In considering the Complaint and making its decision, the Panel must have regard to paragraph 15(e) of the Rules. In particular, that paragraph states:

"If after considering the submissions the Panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the Panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding."

Reverse domain name hijacking ("RDNH") is defined in paragraph 1 of the Rules as meaning "using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain name."

The Respondents have not specifically sought a finding of RDNH in this case. However, it is open to the Panel to make such a finding without a request from the Respondents. In fact, the Panel in *Dumankaya Yapi Malzemeleri San. VE Tic. A.S v. Domain Administrator, Name Administration Inc. (BVI)*, WIPO Case No. D2015-1757, stated that "[i]f abuse is apparent on the face of the case papers, the Panel is under an obligation to declare it".

The Complainant may have had a basis for the original Complaint, when a privacy service shielded the names of the true Respondents. However, once the Complainant was made aware of the real Respondents, it was obliged to demonstrate the lack of a legitimate interest and bad faith on the part of the Respondent Individual and the Respondent Business (see *Wall-Street.com, LLC v. Marcus Kocak / Internet Opportunity Entertainment (Sports) Limited, Sportingbet PLC*, WIPO Case No. D2012-1193).

This Complaint was dead on arrival and likely would have been denied had there been no Response. The Complainant's entire case on bad faith is that the Respondents registered the Disputed Domain Name intending to sell it to the Complainant. Not only is this allegation supported by no evidence at all, the charge is grounded on a theory of constructive notice that has long been held to be inadequate for Policy purposes (see WIPO Overview 3.0, section 3.2.2) and the obviously spurious statement that "mountaintop" is not a common term. The Complainant, which bears the burden of proof on each Policy element, did at best minimal due diligence once it learned the identity of the Respondents – enough to find that the Respondent Business used the term in its business name, something that normally constitutes *bona fide* use. "Ordinarily if the face of the complaint itself demonstrates a settled reason why the complaint must be denied, a panel may make a finding of RDNH." *Tarheel Take-Out, LLC v. Versimedia, Inc.*, WIPO Case No. D2012-1668, quoting from *Liquid Nutrition Inc. v. liquidnutrition.com/Vertical Axis Inc.*, WIPO Case No. D2007-1598.

The Complainant's allegation that the Respondents acquired the Disputed Domain Name to sell it to the Complainant has no evidentiary support. It is wholly inconsistent with the fact, documented in the Response, that the Respondents have never offered or invited offers to sell the Disputed Domain Name and did not respond to the Complainant's offer to purchase the Disputed Domain Name for that reason.

The Complainant also failed to demonstrate that it had been targeted by the Respondents or provide any evidence to support a conclusion that an individual or organization in the United States was likely to be aware of the use of the Trade Mark (a common English word mark) by a Danish automotive parts supplier.

The Panel considers the Complainant likely launched the proceeding either in anticipation of a default or, more likely, to encourage the Respondents to engage in negotiations with the Complainant to sell the Disputed Domain Name. Either such motive belies the Complainant's undertaking, required by paragraph 3(b)(xiii) of the Rules, "that this Complaint is not being presented for any improper purpose".

The Panel finds that the Complaint was brought in bad faith and constitutes an abuse of the Administrative Proceeding.

7. Decision

For the foregoing reasons, the Complaint is denied.

/John Swinson/
John Swinson
Presiding Panelist

/Andrew D.S. Lothian /
Andrew D.S. Lothian
Panelist

/Richard G. Lyon/
Richard G. Lyon
Panelist
Date: September 1, 2020