

## **ADMINISTRATIVE PANEL DECISION**

Tidal Music AS v. WhoisGuard Protected, WhoisGuard, Inc. /  
Aubrey Macarious, Cadence Concept  
Case No. D2017-0476

### **1. The Parties**

The Complainant is Tidal Music AS of Oslo, Norway, represented by Pryor Cashman, LLP, United States of America (“United States”).

The Respondent is WhoisGuard Protected, WhoisGuard, Inc. of Panama, Panama / Aubrey Macarious of Accra, Ghana.

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

The disputed domain name <blacktidal.com> is registered with NameCheap, Inc. (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on March 8, 2017. On March 8, 2017, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On March 9, 2017, 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 March 9, 2017, 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 March 9, 2017.

The Center verified that the Complaint 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 March 13, 2017. In accordance with the Rules, paragraph 5, the due date for Response was April 2, 2017. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on April 3, 2017.

The Center appointed Johan Sjöbeck as the sole panelist in this matter on April 10, 2017. 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 provider of Internet music, video and editorial content. The Complainant has provided evidence that it is the owner of the following TIDAL trademarks:

- International Trademark Registration TIDAL with registration number 1243529 and registration date of September 3, 2014. The trademark is registered for goods and services in class 9, 35, 38, 41, 42 and 45. The trademark designates the European Union.
- United States Trademark Registration TIDAL with registration number 4,830,066 and registration date of October 13, 2015. The trademark is registered for goods and services in class 9, 35 and 42.

The disputed domain name <blacktidal.com> was registered on January 30, 2017, and resolves to a website that promotes music artists, music events, music videos and music-related services.

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

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

The Complainant is the provider of the Tidal music service, the first music service with high-fidelity sound quality, high-definition music videos and curated editorial, expertly crafted by music journalists. The Complainant offers a global entertainment platform, Tidal, built for fans, directly from artists around the world. The Complainant's members enjoy exclusively curated content that directly connect artists with their fans in multiple ways. Tidal is an artist-owned coalition and the founding artists are Alicia Keys, Arcade Fire (Win Butler and Regine Chassagne), Beyonce, Calvin Harris, Chris Martin, Daft Punk, Deadmau5, Jack White, Jason Aldean, J. Cole, Kanye West, Madonna, Nicki Minaj, Rihanna, Shawn "Jay Z" Carter and Usher. The Complainant's Tidal music streaming service has been featured in thousands of news articles. Through the Complainant's fame and notoriety in the music industry, including through the solicited and unsolicited publicity it has received, the Tidal brand has become internationally famous and serves to designate the Complainant as the sole source of the products and services featuring the mark.

The Complainant's service is available in 52 countries with over 45 million songs and 140,000 high-quality videos. The Complainant provides seamless listening across mobile, tablet, desktop and network players. Users of Tidal can enjoy lossless music streaming on Apple devices from iPhone, iPad and iPod to Mac, as well as on PC and Android systems. The Complainant also operates a website located at "www.tidal.com", as well as several social media accounts, including Facebook at "facebook.com/tidal", Twitter at "twitter.com/tidalhifi" and Instagram at "instagram.com/tidal".

The Respondent violates the Policy because the disputed domain name wholly incorporates a trademark in which the Complainant has proprietary rights. Furthermore, the Respondent has no rights with respect to the disputed domain name, which has been registered and is being used in bad faith.

The Complainant is the owner of the United States Trademark Registration for TIDAL with registration number 4,830,066 for goods and services in class 9, 35 and 42. The trademark registration date is October 13, 2015, and the Complainant has used the trademark exclusively in connection with these goods and services in the United States since at least as early as October 28, 2014.

Furthermore, the Complainant also owns the International Trademark Registration for TIDAL, registered on September 3, 2014, with registration number 1243529. The trademark is extended into the European Union covering goods and services in class 9, 35, 38, 41, 42 and 45.

The disputed domain name <blacktidal.com> incorporates the TIDAL trademark, giving consumers the false and misleading impression that the disputed domain name is sponsored by, associated with or otherwise authorized by the Complainant. Furthermore, the disputed domain name directs visitors to a commercial website that promotes music artists, music events, music videos and music-related services.

The Respondent registered the disputed domain name <blacktidal.com> without authorization on January 30, 2017. The fact that the disputed domain name includes the generic term "black" does not reduce the confusing similarity between the Complainant's trademark and the disputed domain name.

The Respondent has no rights or legitimate interests in the disputed domain name. The Respondent has never been an authorized representative or agent of the Complainant.

The Respondent has not used the disputed domain name in connection with a good faith, *bona fide* offering of goods and services. The Respondent engages in an obvious attempt to trade upon the goodwill associated with the Complainant and the TIDAL trademark. The disputed domain name directs visitors to a commercial website that promotes music artists, music events, music videos and music-related services. The Respondent's actions are meant to confuse and divert Internet users to an unaffiliated, third-party commercial website.

The Respondent registered the disputed domain name on January 30, 2017, while the Complainant first used its TIDAL trademark in United States commerce earlier, at least as early as October 28, 2014, and registered its international registration for the TIDAL mark in the European Union on September 3, 2014. There is little doubt that the Respondent registered the disputed domain name with full knowledge of the Complainant's rights in the TIDAL trademark because of the fact that the disputed domain name incorporates Complainant's TIDAL trademark and the generic term "black", and the website is related to music services.

The disputed domain name is used to promote and advertise goods and/or services related to music that are not affiliated with or authorized by the Complainant. By virtue of the unauthorized diversion of Internet traffic, the valuable goodwill engendered in the TIDAL mark was and continues to be harmed, constituting a disruption to the Complainant. Under the circumstances, it is reasonable to infer that the Respondent not only knew this diversion would be disruptive, but also intended it to be so. The Respondent also registered the disputed domain name for the purpose of intentionally attracting Internet users for commercial gain to the website linked to the disputed domain name by creating confusion as to the source, sponsorship, affiliation, or endorsement by the Complainant.

Furthermore, the Respondent registered the disputed domain name by using a privacy service, not to disclose its identity. This is a factor that indicates bad faith registration and use of the disputed domain name. On March 9, 2017, WIPO provided the Respondent's underlying registration information and the Complainant noted that the Respondent had provided false and incomplete contact information, which is further evidence of bad faith.

## **B. Respondent**

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

## **6. Discussion and Findings**

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

- (i) that the disputed domain name is identical or confusingly similar to a trademark or service mark in

which the Complainant has rights; and

- (ii) that the Respondent has no rights or legitimate interests in the disputed domain name; and
- (iii) that the disputed domain name has been registered and is being used in bad faith.

#### **A. Identical or Confusingly Similar**

The Complainant is, according to the submitted evidence, the owner of the registered trademark TIDAL. The disputed domain name <blacktidal.com> incorporates the TIDAL trademark in its entirety with the addition of the descriptive term “black”. The addition of a descriptive term, such as “black”, to a complainant’s trademark, is typically considered to be insufficient to avoid a finding of confusing similarity under the first element of the Policy. In the present case, the Complainant’s trademark is readily recognizable in the disputed domain name.

Having the above in mind, the Panel concludes that the disputed domain name <blacktidal.com> is confusingly similar to the Complainant’s trademark TIDAL and that the Complainant has proven the requirement under paragraph 4(a)(i) of the Policy.

#### **B. Rights or Legitimate Interests**

The Complainant must show that the Respondent has no rights or legitimate interests with respect to the disputed domain name. The Respondent may establish rights or legitimate interests in the disputed domain name by demonstrating in accordance with paragraph 4(c) of the Policy any of the following:

- (i) that it has made 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 prior to the dispute; or
- (ii) that it is commonly known by the disputed domain name, even if it has not acquired any trademark rights; or
- (iii) that it intends to make 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.

The Complainant has not licensed or otherwise consented to the Respondent’s use of the TIDAL trademark in connection with the disputed domain name <blacktidal.com>, which is confusingly similar to the Complainant’s trademark. There is no evidence indicating that the Respondent has made preparations to use the disputed domain name in connection with a *bona fide* offering of goods or services prior to the dispute. Rather, the Respondent has made unauthorized use of the Complainant’s trademark for its own commercial advantage by offering a competing internet-based music service.

Although given the opportunity, the Respondent has not rebutted the Complainant’s *prima facie* case. The Respondent has not submitted any evidence indicating that it is the owner of any trademark rights or that the Respondent is commonly known by the disputed domain name. Furthermore, there is no evidence indicating that the Respondent intends to make a legitimate noncommercial or fair use of the disputed domain name without intent for commercial gain to misleadingly divert consumers or to tarnish the Complainant’s trademark.

The Respondent has failed to invoke any circumstances which could demonstrate, pursuant to paragraph 4(c) of the Policy or otherwise, any rights or legitimate interests in respect of the disputed domain name. Thus, there is no evidence in the case that refutes the Complainant’s submissions, and the Panel concludes that the Complainant has also satisfied the requirement under paragraph 4(a)(ii) of the Policy.

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

Under paragraph 4(b) of the Policy, evidence of bad faith registration and use include without limitation:

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

The Complainant's trademark TIDAL predates the registration of the disputed domain name <blacktidal.com>. The Respondent is using the disputed domain name for a commercial website that promotes music artists, music events, music videos and music-related services. It has been argued by the Complainant that the content on the Respondent's website is misleading and confusing to consumers who are seeking information related to the Complainant's services. Considering that the Respondent is using the disputed domain name, which is confusingly similar to the Complainant's trademark, for the same type of services for which the trademark is registered, the Panel finds that the Respondent must have had knowledge of the Complainant's trademark when the Respondent registered the disputed domain name and that the Respondent sought to take advantage of the goodwill associated with the Complainant's mark.

Furthermore, the evidence submitted indicates that the Respondent, initially using a privacy service not to disclose its identity, also provided false or incomplete contact information to the Registrar.

Thus, the evidence in the case before the Panel indicates that the disputed domain name <blacktidal.com> has intentionally been registered and used in an attempt to attract, for commercial gain, Internet users to the Respondent's website by creating a likelihood of confusion with the Complainant's trademark TIDAL as to the source, sponsorship, affiliation, or endorsement of the website or of a product or service on the website.

There is no evidence in the case file that refutes the Complainant's submissions. The Panel concludes that the Complainant has proven the requirements under paragraph 4(a)(iii) of the Policy and that the disputed domain name <blacktidal.com> has been registered and used in bad faith.

## **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 <blacktidal.com> be transferred to the Complainant.

**Johan Sjöbeck**  
Sole Panelist  
Date: April 20, 2017