DECISION

Apple Inc. v. XuejunWu / Bei Jing Zhi Wang Yi Lian Ke Ji You Xian Gong Si
Claim Number: FA2002001882987

PARTIES

Complainant is **Apple Inc.** (“ Complainant ”), represented by **Georges Nahitchevansky** of **Kilpatrick Townsend & Stockton LLP**, New York, USA. Respondent is **XuejunWu / Bei Jing Zhi Wang Yi Lian Ke Ji You Xian Gong Si** (“ Respondent”), China.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is **<zhicloud.net>**, registered with **Alibaba Cloud Computing (Beijing) Co., Ltd.**

PANEL

The undersigned certifies that he has acted independently and impartially and to the best of his knowledge has no known conflict in serving as Panelist in this proceeding.

David L. Kreider, Chartered Arbitrator, as Panelist.

PROCEDURAL HISTORY

Complainant submitted a Complaint to the FORUM electronically on February 12, 2020; the FORUM received payment on February 12, 2020.

On February 13, 2020, Alibaba Cloud Computing (Beijing) Co., Ltd. confirmed by e-mail to the FORUM that the **<zhicloud.net>** domain name is registered with Alibaba Cloud Computing (Beijing) Co., Ltd. and that Respondent is the current registrant of the name. Alibaba Cloud Computing (Beijing) Co., Ltd. has verified

that Respondent is bound by the Alibaba Cloud Computing (Beijing) Co., Ltd. registration agreement and has thereby agreed to resolve domain disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On February 25, 2020, the FORUM served the Complaint and all Annexes, including a Written Notice of the Complaint, setting a deadline of March 20, 2020 by which Respondent could file a Response to the Complaint, via e-mail to all entities and persons listed on Respondent's registration as technical, administrative, and billing contacts, and to postmaster@zhicloud.net. Also on February 25, 2020, the Written Notice of the Complaint, notifying Respondent of the e-mail addresses served and the deadline for a Response, was transmitted to Respondent via post and fax, to all entities and persons listed on Respondent's registration as technical, administrative and billing contacts.

Having received no response from Respondent, the FORUM transmitted to the parties a Notification of Respondent Default.

On May 12, 2020, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the FORUM appointed David L. Kreider, Chartered Arbitrator, as Panelist.

Having reviewed the communications records, the Administrative Panel (the "Panel") finds that the FORUM has discharged its responsibility under Paragraph 2(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") "to employ reasonably available means calculated to achieve actual notice to Respondent" through submission of Electronic and Written Notices, as defined in Rule 1 and Rule 2. Therefore, the Panel may issue its decision based on the documents submitted and in accordance with the ICANN Policy, ICANN Rules, the FORUM'S Supplemental Rules and any rules and principles of law that

the Panel deems applicable, without the benefit of any response from Respondent.

RELIEF SOUGHT

Complainant requests that the domain name be transferred from Respondent to Complainant.

Preliminary Issue – Language of the Proceeding

Pursuant to UDRP Rule 11(a), the Panel finds that persuasive evidence has been adduced by Complainant to suggest the likely possibility that the Respondent is conversant and proficient in the English language. After considering the circumstances of the present case, the Panel decides that these proceedings should be conducted in English.

PARTIES' CONTENTIONS

A. Complainant

The Domain Name Is Confusingly Similar to the iCLOUD Mark

Complainant owns numerous trademark registrations in the United States and internationally, including in China, for the iCLOUD mark that issued long before Respondent registered or acquired the Domain Name.

The Domain Name is confusingly similar to the iCLOUD mark because it wholly incorporates Complainant's full iCLOUD mark. *Philip Morris USA Inc. v. Doug Nedwin/SRSPlus Private Registration*, WIPO Case No. D2014-0339 (May 1, 2014); *see also PepsiCo, Inc. v. PEPSI, SRL (a/k/a P.E.P.S.I.) and EMS Computer Industry (a/k/a EMS)*, WIPO Case No. D2003-0696 ("incorporating a trademark in its entirety can be sufficient to establish that a domain name is identical or confusingly similar to a registered trademark"). The mere addition of the .net gTLD extension is of no import and has no impact on the confusing similarity of the Domain Name. *Aguas de Cabreiroa, S.A.U. v. Hello Domain*,

WIPO Case No. D2014-2087. Similarly, the addition of "zh" does not reduce the confusing similarity, as the mark iCLOUD is clearly recognizable in the Domain Name, particularly as Respondent uses a logo on its website that emphasizes the iCLOUD portion of the Domain Name. *See Experian Information Solutions, Inc. v. Credit Research, Inc.*, WIPO D2002-0095 ("[I]f a domain name incorporates a complainant's mark in its entirety, it is confusingly similar to that mark despite the addition of other words."); *America Online, Inc. v. Chris Hoffman,* WIPO Case No. D2001-1184 (use of short phrases with a well-known mark was still found confusingly similar to that mark).

Given the worldwide renown of the iCLOUD mark and consumers' exclusive association of that mark with Complainant, there is no doubt that relevant consumers, upon seeing the Domain Name, will reasonably believe that it is related to or sponsored by Complainant. For these reasons, there is no doubt that the Domain Name is confusingly similar to Complainant's registered iCLOUD mark.

Respondent Has No *Bona Fide* Right or Legitimate Interest in the Domain Name

Since Complainant's rights in the iCLOUD mark predate Respondent's acquisition of the Domain Name, the burden is on Respondent to establish a right or legitimate interest in the Domain Name incorporating Complainant's mark. *See Apple Inc. v. Algernon Salois, supra; see also PepsiCo, Inc. v. Amilcar Perez Lista d/b/a Cybersor*, WIPO Case No. D2003-0174. Where, however, as here, a complainant's mark is fully incorporated into a respondent's domain name, there can be no rights or legitimate use by a respondent. *Shelton J. Lee (a.k.a. Spike Lee) v. Mercedita Kyamko*, WIPO D2004-0483 ("[U]sing a domain name that incorporates completely the mark of another is not legitimate use. *Prima facie*, it supports the conclusion that a respondent does not have a legitimate interest in the domain name.")

There is no relationship between Complainant and Respondent giving rise to any license, permission, or other right by which Respondent could own or use the Domain Name. *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO D2000-0003 (finding no rights or legitimate interests where "Complainant has not licensed or otherwise permitted the Respondent to use any of its trademarks or to apply for or use any domain name incorporating any of those marks").

In addition, Respondent is neither using the Domain Name in connection with a *bona fide* offering of goods or services nor making a legitimate noncommercial or fair use of the Domain Name. See Policy ¶¶ 4(c)(i), 4(c)(iii).

Respondent is using Complainant's iCLOUD mark to promote cloud-based services that compete with and/or are complementary or highly related to the goods and services Complainant promotes and sells under its iCLOUD mark and to promote various third-party services and services of its affiliates. Such use of the iCLOUD mark cannot constitute a legitimate interest or *bona fide* use. *See Comair Ltd. v. Domain Admin*, WIPO Case No. D2017-0213 ("The Panel concurs with a consensus of prior Policy panels that [provision of competing services] fails to constitute 'a *bona fide* offering of goods or services' sufficient to satisfy the requirements of paragraph 4(a)(i).")

Further, Respondent cannot establish that it is commonly known by the Domain Name. Although Respondent or Respondent's affiliate applied to register the purported trademark ZhiCloud in China, the application was filed by an entity named "Beijing Zhi [Wang] Yi [Lian] Technology Co., Ltd.", the lack of evidence of an actual www.ZhiCloud.net business entity demonstrates that Respondent has no rights or legitimate interests in the Domain Name. *See Koninklijke KPN N.V. v. Jose Castrellon / Cyber Cast Int'l*, WIPO D2015-0157. Nevertheless, even if Respondent had conducted business as "ZhiCloud.net," such activities—particularly where, as here, they occur after the priority date of a complainant's

mark—would not confer any legitimate rights on Respondent to use the iCLOUD mark. To rule otherwise would simply reward Respondent for appropriating Complainant's iCLOUD mark for use with competing goods and services. *See Cummins Inc. v. Dennis Goebel,* WIPO D2015-1064. A respondent simply cannot justify its use of a disputed domain name that fully incorporates a complainant's well-known mark on the basis of registering a company name or filing a pretextual trademark application after the complainant's trademark rights have been established. That is particularly true here, where the iCLOUD mark was well known to consumers and Respondent long before Respondent registered the Domain Name. *See Wollongong City Council v. Viva La Gong*, WIPO Case No. D2003-0113; *Madonna Ciccone v. Dan Parisi and Madonna.com*, WIPO Case No. D2000-0847 ("[I]t would be a mistake to conclude that mere registration of a trademark creates a legitimate interest under the Policy. If an American-based Respondent could establish 'rights' vis a vis an American Complainant through the expedient of securing a trademark registration in Tunisia, then the ICANN procedure would be rendered virtually useless.").

In view of the widespread consumer recognition of the iCLOUD mark as signifying Complainant, and the fact that Respondent has no rights in the mark, there can be no doubt that Respondent registered or acquired the Domain Name not for any legitimate noncommercial or fair use purpose, but rather to confuse web users to profit from the value of the iCLOUD mark. Such use of the Domain Name does not constitute a legitimate, *bona fide* offering of goods or services. *See Ciccone v. Parisi*, WIPO Case No. D2000-0847 ("Use which intentionally trades on the fame of another cannot constitute a '*bona fide*' offering of goods and services.").

Respondent Registered or Acquired and Is Using the Domain Name in Bad Faith

Respondent registered or acquired and is using the Domain Name in bad faith for commercial gain and to benefit from the goodwill and reputation associated with Complainant's iCLOUD mark. Respondent's bad faith registration and use of the Domain Name are established by the fact that the Domain Name wholly incorporates Complainant's exact iCLOUD mark, and was registered or acquired by Respondent many years after Complainant's iCLOUD mark became famous. *Kraft Foods (Norway) v. Fredrik Wide and Japp Fredrik Wide*, WIPO D2000-0911 ("[T]hat Respondent [chose] to register a well-known mark to which he has no connections or rights indicates that he was in bad faith when registering the domain name at issue . . . .").

Respondent's awareness of Complainant's prior rights in the well-known iCLOUD mark underscores Respondent's bad faith in registering the Domain Name. *See PepsiCo, Inc. v. Zhavoronkov*, WIPO D2002-0562 ("[B]latant appropriation of a universally recognized trademark is of itself sufficient to constitute bad faith."); *DHL Operations B.V. v. Karel Salovsky*, WIPO D2006-0520 ("[I]t is reasonable to believe that Respondent was aware of the fact that the domain name registration incorporate[s] Complainant's well-known . . . mark and that he did in fact, if not register himself, at least acquire the domain name, in bad faith."); *see also Veuve Clicquot Ponsardin v. The Polygenix Group Co.*, WIPO D2000-0163 (bad faith and a lack of legitimate interest found where a domain name "is so obviously connected with such a well-known product that its very use by someone with no connection with the product suggests opportunistic bad faith").

Respondent's bad faith registration and use of the Domain Name are also evidenced by the fact that Respondent has intentionally registered a domain name that fully incorporates the iCLOUD mark and then has used the Domain Name to promote Respondent's own cloud-based and related services that

compete with and/or are complementary or highly related to the very goods services Complainant sells under its iCLOUD mark. Respondent has also used the Domain Name in connection with web pages concerning various other services offered by Respondent or its affiliates and to promote various third-party websites.

Moreover, as iCLOUD is the attention-grabbing and dominant feature of the Domain Name, consumers who come across the iCLOUD mark in the Domain Name that is associated with a website promoting cloud-based services will initially be confused as to the site's association with or sponsorship by Complainant. Such "initial confusion is enough to demonstrate bad faith." *National Collegiate Athletic Assn. & March Madness Athletic Assn., LLC v. Mark Halpern, Front & Center Entertainment*, WIPO D2000-0700. *See also David Foox v. Kung Fox & Bill Hicks*, WIPO D2008-0472.

Lastly, the fact that Respondent attempted to shore its rights in the disputed domain name by filing a trademark application in China for ZHICLOUD further confirms Respondent's bad faith in attempting to secure rights in the iCLOUD mark, after the iCLOUD became well-known and associated with Complainant, for Respondent's benefit and profit. To be sure, the fact that Respondent posted a website at the Domain Name that highlighted the iCLOUD mark and promoted Respondent's cloud-based service after losing the opposition action filed by Complainant that refused registration of the Application in July 2019, confirms Respondent's willful and bad faith attempt to opportunistically exploit the goodwill associated with the iCLOUD mark for Respondent's profit.

Based on all of the above, it is evident that Complainant has met the requirements of the Policy by demonstrating not only its own legitimate interest in the iCLOUD mark, as evidenced by Complainant's registration and extensive use of the mark, but also that Respondent's purpose in acquiring and using the

Domain Name is to unlawfully profit from an association with Complainant's goods and services. Accordingly, Complainant believes it is entitled to the remedy requested below.

B. Respondent

Respondent failed to submit a Response in this proceeding.

FINDINGS

Complainant has rights in the ICLOUD mark through its registration with the United States Patent and Trademark Office ("USPTO") (Reg. No. 3,744,821, registered Feb. 2, 2010).

The Domain Name at issue **<zhicloud.net>** was registered by the Respondent, Xuejun Wu 【吴学军】on behalf of Bei Jing Zhi Wang Yi Lian Ke Ji You Xian Gong Si 【北景智网易联科技有限公司】, as the Domain Name "owner", on February 19, 2017.

The Respondent entity, Bei Jing Zhi Wang Yi Lian Ke Ji You Xian Gong Si 【北景智网易联科技有限公司】, is the same corporate entity identified in the English translation (Complainant's Exhibit DD) as Beijing Zhi Wang Yi Lian Technology Co., Ltd.), as "The Opposed Party" named in Complainant's Application No. 22745289 to the China National Intellectual Property Administration opposing the registration of Respondent's trademark "ZHICLOUD" pursuant to Articles 30 and 35 of the Trademark Law of the People's Republic of China.

Complainant has established all the elements entitling it to relief.

DISCUSSION

Paragraph 15(a) of the Rules instructs this Panel to "decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

Paragraph 4(a) of the Policy requires that Complainant must prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

(1) the domain name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
(2) Respondent has no rights or legitimate interests in respect of the domain name; and
(3) the domain name has been registered and is being used in bad faith.

In view of Respondent's failure to submit a response, the Panel shall decide this administrative proceeding on the basis of Complainant's undisputed representations pursuant to paragraphs 5(f), 14(a) and 15(a) of the Rules and draw such inferences it considers appropriate pursuant to paragraph 14(b) of the Rules. The Panel is entitled to accept all reasonable allegations set forth in a complaint; however, the Panel may deny relief where a complaint contains mere conclusory or unsubstantiated arguments. *See* WIPO Jurisprudential Overview 3.0 at ¶ 4.3; *see also eGalaxy Multimedia Inc. v. ON HOLD By Owner Ready To Expire,* FA 157287 (FORUM June 26, 2003) ("Because Complainant did not produce clear evidence to support its subjective allegations [. . .] the Panel finds it appropriate to dismiss the Complaint").

Identical and/or Confusingly Similar

The disputed Domain Name **<zhicloud.net>** is identical or confusingly similar to a trademark or service mark in which Complainant has rights.

Complainant alleges that the Domain Name is confusingly similar to the iCLOUD mark because it wholly incorporates Complainant's full iCLOUD mark. *Philip Morris USA Inc. v. Doug Nedwin/SRSPlus Private Registration*, WIPO Case No. D2014-0339 (May 1, 2014); *see also PepsiCo, Inc. v. PEPSI, SRL (a/k/a P.E.P.S.I.) and EMS Computer Industry (a/k/a EMS)*, WIPO Case No. D2003-0696 ("incorporating a trademark in its entirety can be sufficient to establish that a domain name is identical or confusingly similar to a registered trademark"). The mere addition of the .net gTLD extension is of no import and has no impact on the confusing similarity of the Domain Name. *Aguas de Cabreiroa, S.A.U. v. Hello Domain*, WIPO Case No. D2014-2087.

Complainant further asserts that the addition of "zh" does not reduce the confusing similarity, as the mark iCLOUD is clearly recognizable in the Domain Name, particularly as Respondent uses a logo on its website that emphasizes the iCLOUD portion of the Domain Name, to wit.

As regards this latter assertion by Complainant, the Panel considers that the correct analysis may be more nuanced and less "black and white" than the Complainant suggests. It may be argued that it is not simply that the letters "zh" have been added to Complainant's iCloud mark, which appears to do nothing to affect the meaning conveyed. Rather, it may be argued that the combinations of letters "Zhi" added to the word "Cloud", better conveys the full meaning of the logo and Domain Name.

It is worth noting that when Chinese characters are phoneticized or Romanized for international consumption, the first letter representing each Chinese character generally appears in upper case. Accordingly, the combination of letters "Zhi" appearing along with the well-understood English word "Cloud", and the use of the upper case "Z" and the upper case "C", will cause the Respondent's logo to

immediately convey to Chinese speakers the understanding that "Zhi" and "Cloud" are a combination of two distinct words.

The Panel further considers that the combination of letters "Zhi" (beginning with a capitalized "Z"), is likely to be understood by a significant number of Chinese speakers as the phonemicization or Romanization of the widely-used Chinese character 【智】, meaning "intelligent", "wise" or "smart". That is, "ZhiCloud" may well impart to a Chinese speaking audience the meaning of "Smart + Cloud" and will be unlikely to be seen merely as a combination of the random letters "zh" with Complainant's iCloud mark, as the Complainant urges. Furthermore, it may be observed that Respondent's corporate name, Bei Jing **Zhi** Wang Yi Lian Ke Ji You Xian Gong Si, includes the character "Zhi" 【智】, in combination with the character "Wang"【网】, meaning "network" (*i.e*, "Smart" + "Network").

At bottom, however, the test for confusing similarity under the first element of the Policy involves a "relatively straightforward", side-by-side comparison between the disputed Domain Name and the (lower case) textual components of the relevant trademark. *See, WIPO Jurisprudential Overview 3.0* at paragraph 1.7 and decisions cited therein.

Pursuant to the Policy, the Panel finds that the disputed Domain Name **<zhicloud.net>** is identical or confusingly similar to Complainant's iCLOUD mark because it wholly incorporates Complainant's famous iCLOUD mark.

The Complainant has satisfied the first element at Policy ¶ 4(a)(i).

Rights or Legitimate Interests

Respondent has no rights or legitimate interests in respect of the Disputed Domain Name.

Complainant argues that where, as here, a complainant's mark is fully incorporated into a respondent's domain name, there can be no rights or legitimate use by a respondent and that this, *prima facie*, supports the conclusion that Respondent does not have a legitimate interest in the Domain Name. The Panel agrees, and notes that Respondent has defaulted and has failed to submit a response or allege the contrary.

Complainant's evidence demonstrates that Respondent is using the disputed Domain Name, incorporating Complainant's iCLOUD mark, to promote cloud-based services that compete with or are complementary or highly related to the goods and services Complainant promotes and sells under its iCLOUD mark. Further, the Panel accepts that there is no relationship between Complainant and Respondent giving rise to any license, permission, or other right by which Respondent could own or use the Domain Name.

Complainant asserts that Respondent cannot establish that it is commonly known by the Domain Name. The Complainant provides evidence in the form of a July 9, 2019 Decision of the China National Intellectual Property Administration to demonstrate that Complainant successfully opposed the Respondent's application to register the purported trademark "ZhiCloud" in the People's Republic of China.

The findings of China's trademark authority in this regard are worthy of note. The English language translation of the July 9, 2019, Decision reads:

"Based on the arguments and fact stated by the parties, following by an examination, this Office believes that:

The designed services covered by the opposed mark "ZHICLOUD" in class 42 (namely, computer programming; rental of computer software, etc.) are similar to

the services covered by the opposing party's [Complainant's] prior trademark registrations for ICLOUD in class 42 under IR [International Registration] No. 970388 and Reg. No. 9535604. The differences between the two parties' marks in terms of alphabet composition and overall appearance are minimal. Therefore, the two parties' marks will lead to consumer confusion. Co-existence of the two parties' marks will lead to consumer confusion.[i]

Pursuant to Article 30 and 35 of Trademark Law, this Office has concluded as follows: The opposed mark "ZHICLOUD" under App. No. 22745289 should be refused for registration."

The Panel accepts the Complainant's argument and evidence that the Respondent registered or acquired the Domain Name not for any legitimate noncommercial or fair use purpose, but rather to confuse web users to profit from the value of the iCLOUD mark.

The Complainant has satisfied the second element at Policy ¶ 4(a)(ii).

<u>**Registration and Use in Bad Faith**</u>

The Disputed Domain Name has been registered and is being used in bad faith.

The Panel finds that Respondent registered or acquired and is using the disputed Domain Name in bad faith for commercial gain and to benefit from the goodwill and reputation associated with Complainant's iCLOUD mark. Respondent's bad faith registration and use of the Domain Name are established by the fact that the Domain Name wholly incorporates Complainant's iCLOUD mark and was registered or acquired by Respondent many years after Complainant's iCLOUD mark became famous.

Respondent’s attempt to bolster its rights in the disputed domain name by filing a trademark application in China for ZHICLOUD further confirms Respondent’s bad faith in attempting to secure rights in the iCLOUD mark, after the iCLOUD became well-known and associated with Complainant, for Respondent’s benefit and profit.

The Complainant has satisfied the third element at Policy ¶ 4(a)(iii).

DECISION

Having established all three elements required under the ICANN Policy, the Panel concludes that relief shall be **GRANTED.**

Accordingly, it is Ordered that the **<zhicloud.net>** domain name be **TRANSFERRED** from Respondent to Complainant.

David L. Kreider, Esq.
Panelist

David L. Kreider, Chartered Arbitrator, Panelist
Dated: May 16, 2020

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[i] The Panel notes that Apple’s otherwise full and complete English translation of the July 9, 2019, Decision of the China National Intellectual Property Administration omits a single key sentence from the Decision [Complainant’s Annexure DD]. The missing sentence reads: “异议人称被异议人违反诚实信用原则申请注册被异议商标证据不足”. The Panel translates the omitted sentence as follows: “The evidence is insufficient to sustain The Opposing Party’s [Apple’s]

claim that The Opposed Party's [Respondent's] application for registration of the objected trademark [ZHICLOUD] violates the principle of good faith." The Panel considers that the omission, while unfortunate, is not material to this UDRP administrative proceeding.