

ADMINISTRATIVE PANEL DECISION

Exploding Kittens, Inc. v. Domain Administrator, Fundacion Privacy Services LTD

Case No. D2022-3629

1. The Parties

The Complainant is Exploding Kittens, Inc., United States of America (“United States”), represented by FindFakes, United States.

The Respondent is Domain Administrator, Fundacion Privacy Services LTD, Panama.

2. The Domain Name and Registrar

The disputed domain name <poetryforneanderthals.com> is registered with Media Elite Holdings Limited (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on September 30, 2022. On September 30, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On October 4, 2022, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that the 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 October 11, 2022. In accordance with the Rules, paragraph 5, the due date for Response was October 31, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on November 1, 2022.

The Center appointed Angelica Lodigiani as the sole panelist in this matter on November 7, 2022. 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 United States company and a leading provider of board and card games. The Complainant has proved to be the owner of the following POETRY FOR NEANDERTHALS trademarks:

COUNTRY(IES)	TYPE OF MARK	REGISTRATION NO.	REGISTRATION DATE	CLASSES
United States	National	6155327	September 15, 2020	28
European Union, Australia, and Canada	International	1521543	December 5, 2020	Classes 9, 16, 28, 41 in the European Union and Australia, class 28 for Canada

The Complainant has continuously used its POETRY FOR NEANDERTHALS trademark since at least April 2020, in connection with the following goods and services:

Class 9: Downloadable interactive video game programs for mobile devices, mobile phones, laptops, personal computers, and tablets; downloadable electronic game programs; downloadable electronic game software; computer game software downloadable from a global computer network; downloadable computer game programs.

Class 16: Calendars; adhesive tape dispensers; adhesive tapes for stationery or household purposes; albums, namely, sticker albums; scrapbooks; clips for offices, namely, paper clips; clips for name badge holders; document holders; drawing instruments; drawing pens; fountain pens; marking pens; note books; stationery in the nature of writing pads; passport holders; pencils; pens; stationery; stickers; writing or drawing books; writing materials, namely, pencils and pens; writing instruments; greeting cards.

Class 28: Card games; games and toys, namely, action figures, toy figures, plush toys, and stuffed animals, in each case featuring fantasy creatures;

Class 41: Entertainment services, namely, providing an online computer game, online video games, and temporary use of non-downloadable video games.

The disputed domain name was registered on April 1, 2021, and is used to redirect to different webpages, as explained below.

5. Parties' Contentions

A. Complainant

The Complainant affirms that the disputed domain name is identical to its POETRY FOR NEANDERTHALS trademark.

The Complainant maintains that the Respondent lacks rights or legitimate interests in the disputed domain name. To the Complainant's best knowledge, the Respondent does not own trademark registrations for POETRY FOR NEANDERTHALS, nor has ever registered the name "poetry for Neanderthals" as a company name. The Complainant further notes that the Respondent is not its licensee, nor has been authorized to register and use the Complainant's trademark as part of a domain name.

Furthermore, according to the Complainant, the Respondent has not used the disputed domain name in connection with a *bona fide* offering of goods or services or as a legitimate noncommercial or fair use. In this respect, the Complainant argues that the disputed domain name leads to a website marketing rotating products such as nefarious software and browser extensions, including a browser hijacker that is bundled

with other harmful free software that are available for download. Upon accessing the disputed domain name, Internet users are forwarded to various advertisements on separate domains. Some are nefarious products including the so-called "App Ads.fiancetrack(2).dll" scam (see below).

In respect of the registration and use of the disputed domain name in bad faith, the Complainant argues that the Respondent knew, or at least ought to have known the Complainant's trademark rights as the POETRY FOR NEANDERTHALS trademark is well known, and predates the disputed domain name by one year. Furthermore, the Respondent is using the disputed domain name to deliberately attempt to attract Internet users to its website for commercial gain by creating a likelihood of confusion with the Complainant's mark.

Additionally, at the time of the registration of the disputed domain name, the Respondent used a privacy shield to conceal its identity, which is also evidence of bad faith.

B. Respondent

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

6. Discussion and Findings

A. Identical or Confusingly Similar

The Complainant has successfully proved that it owns earlier registered rights over the trademark POETRY FOR NEANDERTHALS. The disputed domain name is undoubtedly identical to the Complainant's trademark as the addition of the generic Top Level-Domain ".com", is a standard registration requirement that is disregarded under the first element confusing similarity test.

In light of the above, the Panel finds that the first Policy requirement has been met.

B. Rights or Legitimate Interests

While the overall burden of proof rests with the complainant, UDRP panels have recognized that this could result in the often impossible task of proving a negative, requiring information that is often primarily within the knowledge of the respondent. As such, where a complainant makes a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the disputed domain name.

In the instant case, the Respondent is not a Complainant's licensee and is not linked to the Complainant through any other kind of relationship. The Complainant affirms that it never authorized the Respondent to register a domain name reproducing its POETRY FOR NEANDERTHALS mark and to make use of it. Furthermore, there is no evidence in the record, including the Whois information, suggesting that the Respondent is commonly known by the disputed domain name. The Complainant's trademark and company name searches using the keywords "poetry for Neanderthals" did not reveal any right on the trademark or company name POETRY FOR NEANDERTHALS in the Respondent's name.

Also the use that the Respondent is making of the disputed domain name does not appear to be a use in connection with a *bona fide* offering of goods or services, or a legitimate noncommercial or fair use of the disputed domain name without intent, for commercial gain, to misleadingly divert consumers or to tarnish the POETRY FOR NEANDERTHALS mark. Noting in particular the general powers of a panel articulated, *inter alia*, in paragraphs 10 and 12 of the UDRP Rules, the Panel has visited the website associated with the disputed domain name to gather a better understanding of its extent of use. The Panel has so ascertained that at each attempt, the disputed domain name redirects to a website having a different content. In some instances, it redirects to pages proposing the download and installation of various kinds of software, including browser-hijacking software. In other instances, it leads to third parties' webpages promoting the sale of their goods and services, or to pages containing promotional banners and associated links. In one

instance, the relevant webpage displayed the Apple Security Warning App called “Ads.fiancetrack(2).dll” alert, which is a fake error message that pretends to be from Apple to trick the Internet users into thinking that their devices have crashed or that a virus has been detected. The aim is to induce Internet users to call an alleged support number. When one calls this number, scammers ask to install a program that gives them remote access to the Internet users’ computer for some illegitimate purpose. All these uses do not appear to confer to the Respondent any rights or legitimate interests in the disputed domain name.

In light of the above, the Panel concludes that the Complainant has successfully established a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name. As the Respondent failed to file a Response, the Panel is satisfied that also the second condition under the Policy is met.

C. Registered and Used in Bad Faith

Paragraph 4(a)(iii) of the Policy requires the complainant to prove both registration and use of the disputed domain name in bad faith. Accordingly, for the Complainant to succeed, the Panel must be satisfied that the disputed domain name has been registered and is being used in bad faith.

As far as registration in bad faith is concerned, the Panel finds that the Complainant’s trademark is highly distinctive and uniquely associated to the Complainant. As such, it is not credible that the Respondent registered a domain name identical to the Complainant’s trademark by accident. It is instead very likely that the Respondent was perfectly aware of the Complainant and its POETRY FOR NEANDERTHALS mark when it registered the disputed domain name. In the Panel’s view, the mere registration of a domain name that is identical to an inherently highly distinctive trademark such as the one at issue by an unaffiliated entity can by itself create a presumption of bad faith.

With respect to use in bad faith, the Panel is persuaded that the Respondent is deriving some economic advantage from the different kinds of use it is making of the disputed domain name. Moreover, the use of a domain name identical to the Complainant’s highly distinctive trademark in connection with a scam attempt and a browser-hijacking software amounts to use in bad faith as it takes unfair advantage from the Complainant’s reputation and of its highly distinctive trademark POETRY FOR NEANDERTHALS.

Lastly, the use of a privacy service at the time of the registration of the disputed domain name shows that the Respondent has taken deliberate steps to conceal its identity most likely to delay the Complainant’s right of defense, which is also evidence of bad faith.

In light of the above, the Panel concludes that the Respondent registered and used the disputed domain name in bad faith. Thus, also the third and last condition under the Policy has been 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 disputed domain name <poetryforneanderthals.com> be transferred to the Complainant.

/Angelica Lodigiani/

Angelica Lodigiani

Sole Panelist

Date: November 24, 2022