

ADMINISTRATIVE PANEL DECISION

Playhouse International Pty Ltd v. Stephen Marshall, Stephen Marshall
Case No. D2023-3884

1. The Parties

Complainant is Playhouse International Pty Ltd, Australia, represented by Hayden O'Halloran, Australia.

Respondent is Stephen Marshall, Stephen Marshall, Canada.

2. The Domain Name and Registrar

The disputed domain name <playhouse.com> (the "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 September 17, 2023. On September 18, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On September 18, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name which differed from the named Respondent (Contact Privacy Inc. Customer 0162779993) and contact information in the Complaint. The Center sent an email to Complainant on September 20, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting Complainant to submit an amendment to the Complaint. Complainant filed an amendment to the Complaint on the same day.

The Center verified that the Complaint together with the amendment to 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 Respondent of the Complaint, and the proceedings commenced on September 21, 2023. In accordance with the Rules, paragraph 5, the due date for Response was October 15, 2023. The Response was filed with the Center on October 3, 2023.

The Center appointed Robert A. Badgley as the sole panelist in this matter on October 12, 2023. 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

Complainant is an Australian company incorporated in July 2022. Complainant operates an online subscription service where subscribers can post content and view the content posted by other subscribers. It appears, from the unsolicited media coverage annexed to the Complaint, that the lion's share of the content posted is adult in nature.

According to Complainant's Instagram page (a screenshot of which is annexed to the Complaint), Complainant is "a subscription social platform free of overbearing censors that puts creators first." Complainant also bills itself as "an "OnlyFans Alternative...With Fewer Restrictions." According to this screenshot, Complainant has 1,104 Instagram followers.

Complainant holds three domain names for its online business: <playhouse.net.au> (registration date not known from the record); <playhouse.fans> (registered on October 5, 2021); and <theplayhouse.fans> (registered on October 6, 2021).

According to Complainant:

"Since the inception of its operations in 2020, the Complainant has continuously and exclusively utilized the trade name "PlayHouse", thereby fostering a brand that has come to be well-entrenched and highly regarded in the relevant market sectors. Through strategic and sustained efforts, the Complainant has embarked on a comprehensive campaign to elevate the "PlayHouse" brand to a position of prominence, leveraging a multifaceted approach that encompasses extensive media engagement and the astute deployment of a variety of domain names, inclusive of "PlayHouse.fans" and its cognate variations. The fruits of these laborious endeavors are manifest in the substantial recognition and goodwill that the "PlayHouse" brand has garnered, both on domestic and international fronts, a narrative vividly illustrated through a plethora of media mentions and features in preeminent media outlets spanning continents from Australia to Asia, and traversing countries including but not limited to the USA, the UK, Canada, and Mexico. This rich tapestry of media engagement, meticulously documented in Annex 5, stands as irrefutable testimony to the potent reputation and significant consumer brand recognition intricately associated with the Complainant's name, thereby establishing a formidable foundation for the Complainant's claim to the disputed domain name."

According to Complainant, its unregistered mark PLAYHOUSE has been "actively and exclusively utilized since 2020 to delineate the Complainant's services."

As noted above, Complainant alleges that its "operations" began in 2020, but the record lacks evidence that it conducted any business under the alleged mark PLAYHOUSE in 2020. According to one online article annexed to the Complaint (an August 15, 2022 Spanish-language article, for which Respondent provided a translation, in *Indigo Live*), Complainant conceived of the idea of a platform to compete with Only Fans in October 2021.

The earliest article annexed to the Complaint is a June 16, 2022, article in *Vice.com*, which describes complainant as a "start-up" business that was "recently launched." According to this article, Complainant's PlayHouse business is "a way better, way more pro-sex-worker version of onlyFans."

An August 18, 2022, Daily Star online article, also annexed to the Complaint, describes Complainant's PlayHouse business, as a "new sexual content platform that's even raunchier than OnlyFans."

A February 17, 2023, XBIZ article states: "PlayHouse has launched its new adult premium social media platform."

The Domain Name was first registered on August 2, 1995. Of relevance to the disposition of this case, Respondent acquired the Domain Name on October 11, 2021.

Complainant asserts that Respondent is "a significant competitor to the Complainant," but offers no evidence at all about Respondent or its business activities, if any.

The Domain Name has never resolved to a fully developed website. Rather, as of September 21, 2023, it resolved to a parking page with hyperlinks including “Pool Becken,” “Spielgeräto Öffentlicher Bereich,” and “An Android App.” According to Wayback Machine (www.archive.org) screenshots annexed to the Complaint, on June 14, 2019, and January 1, 2020, the Domain Name resolved to a landing page announcing that the Domain Name was available for sale. (Annexed to the Complaint is a screenshot indicating that Respondent has sought as much as USD 250,000 to sell the Domain Name.)

Respondent states in a sworn declaration annexed to the Response:

“I am a domain name investor and website business developer. I have been investing in domain names and building website business for about 20 years. I have never before been the subject of a UDRP proceeding. I generally only invest in descriptive one-word and two-word generic and descriptive terms. I currently have about fifty high quality and high value descriptive domain names that are comparable to the disputed Domain Name. I purchased the Domain Name as an investment or to develop into a website business, for a substantial sum. I was attracted to the Domain Name because it was a premium dictionary word domain name that I could lawfully use for a future business or possibly sell one day to a new entrant to the market looking for a suitable domain name.”

“At no time prior to the commencement of this UDRP proceeding had I ever been aware of the Complainant, its domain names, or its business. Even when DomainAgents contacted me out of the blue, DomainAgents never revealed to me who it was acting for. The anonymous offer of USD 250,000 which I received from DomainAgents was of no interest to me because of the substantial sum that I had paid for this premium Domain Name and also because I purchased it with the intention of developing it one day for a business.”

“At no time have I ever used the Domain Name in a manner to target or to otherwise infringe upon the rights of the Complainant.”

In further correspondence between the Parties following the initiation of this proceeding, Complainant contended that the fact that the Domain Name was registered five days after Complainant’s registration of <playhouse.fans> and four days after Complainant’s registration of <theplayhouse.fans> “underscores the nature of the respondent’s bad faith actions.”

According to Wayback Machine screenshots annexed to the Response, the first time a website appeared at Complainant’s <theplayhouse.fans> address was December 25, 2021, and the first time any site appeared at <playhouse.fans> was October 7, 2022.

5. Parties’ Contentions

A. Complainant

Complainant contends that it has established all three elements required under the Policy for a transfer of the Domain Name.

B. Respondent

Respondent’s main contention is that it acquired the Domain Name before Complainant began to use the alleged PLAYHOUSE mark, and certainly before that mark achieved any notoriety (if it has achieved same at all).

Respondent also asks the Panel to make a finding of Reverse Domain Name Hijacking (“RDNH”) against Complainant, arguing, among other things, that Complainant should have known that its UDRP Complaint was doomed to fail.

6. Discussion and Findings

Paragraph 4(a) of the Policy lists the three elements which Complainant must satisfy with respect to the Domain Name:

- (i) the 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) the Domain Name has been registered and is being used in bad faith.

A. Identical or Confusingly Similar

Contrary to Complainant's statement that its alleged trademark PLAYHOUSE enjoys a "potent reputation and significant consumer brand recognition intricately associated with the Complainant's name," the Panel does not accept that bald and unsupported allegation. The Panel concludes, however, that Complainant has proven, through evidence of use and some unsolicited media recognition demonstrated in the record, that it has established, since 2022, common law rights in the trademark PLAYHOUSE. The Panel also concludes that the Domain Name is identical to that mark.

Complainant has established Policy paragraph 4(a)(i).

B. Rights or Legitimate Interests

Pursuant to paragraph 4(c) of the Policy, Respondent may establish its rights or legitimate interests in the Domain Name, among other circumstances, by showing any of the following elements:

- (i) before any notice to you [Respondent] of the dispute, your 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) you [Respondent] (as an individual, business, or other organization) have been commonly known by the Domain Name, even if you have acquired no trademark or service mark rights; or
- (iii) you [Respondent] are 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 Panel need not consider this element, given its conclusion below in the "Bad Faith" section.

C. Registered and Used in Bad Faith

Paragraph 4(b) of the Policy provides that the following circumstances, "in particular but without limitation," are evidence of the registration and use of the Domain Name in "bad faith":

- (i) circumstances indicating that Respondent has registered or has acquired the Domain Name primarily for the purpose of selling, renting, or otherwise transferring the Domain Name registration to Complainant who is the owner of the trademark or service mark or to a competitor of that Complainant, for valuable consideration in excess of its documented out of pocket costs directly related to the Domain Name; or
- (ii) that Respondent has registered the Domain Name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that Respondent has engaged in a pattern of such conduct; or

(iii) that Respondent has registered the Domain Name primarily for the purpose of disrupting the business of a competitor; or

(iv) that by using the Domain Name, Respondent has intentionally attempted to attract, for commercial gain, Internet users to Respondent's website or other online location, by creating a likelihood of confusion with Complainant's mark as to the source, sponsorship, affiliation, or endorsement of Respondent's website or location or of a product or service on Respondent's website or location.

The Panel concludes that Complainant has not come close to establishing that Respondent has registered and used the Domain Name in bad faith. First, the evidence presented here tends to suggest that Respondent acquired the Domain Name before Complainant had made any use (and almost certainly any meaningful use) of the PLAYHOUSE mark. Respondent's explanation for his motives and plans *vis-à-vis* the Domain Name are plausible, and are essentially uncontradicted in this record, and his denial of any knowledge of Complainant or the PLAYHOUSE mark is equally plausible. The word "playhouse" is a common word, and, as Respondent points out with search results, the term is widely used in its ordinary sense and having nothing to do with Complainant's relatively new business.

Respondent's expressed desire to sell this valuable Domain Name for profit does not constitute bad faith here, given the lack of evidence of targeting Complainant's mark and, again, the fact that "playhouse" is a common word.

If Respondent is a competitor of Complainant and registered the Domain Name with a bad faith motivation, it has not been shown on the record here.

Given the foregoing, there can be no bad faith registration and use, and the Complaint must fail.

D. Reverse Domain Name Hijacking ("RDNH")

The Panel finds that Complainant has committed RDNH. The Complaint, while eloquently composed, is replete with hyperbole and unsupported claims.

First, Complainant misstates (at best) the timing of its first use of the PLAYHOUSE mark as a source identifier for its online subscription services. All the evidence presented in this case suggests that there was no such use of the mark in 2020, which is Complainant's repeated claim. Complainant should have known perfectly well when it first launched a website using its PLAYHOUSE mark, which appears to have been after the Domain Name was registered.

Second, Complainant makes spurious allegations against Respondent, without even trying to support them. For instance, Complainant asserts that Respondent is its "significant competitor," but offers not a shred of evidence to support this claim.

7. Decision

For the foregoing reasons, the Complaint is denied. Complainant has engaged in Reverse Domain Name Hijacking.

/Robert A. Badgley/

Robert A. Badgley

Sole Panelist

Date: October 17, 2023