

ADMINISTRATIVE PANEL DECISION

WIN.ROCKS GmbH v. Walter Fischer, WF International AG
Case No. D2023-4860

1. The Parties

The Complainant is WIN.ROCKS GmbH, Austria, represented by GEISTWERT Kletzer Messner Mosing Schnider Schultes Rechtsanwälte OG, Austria.

The Respondent is Walter Fischer, WF International AG, Switzerland.

2. The Domain Name and Registrar

The disputed domain name <twic.garden> is registered with GoDaddy.com, LLC (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on November 22, 2023. On November 22, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 23, 2023, 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 (GoDaddy.com, LLC) and contact information in the Complaint. The Center sent an email communication to the Complainant on November 28, 2023, 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 November 28, 2023.

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 Respondent of the Complaint, and the proceedings commenced on November 29, 2023. In accordance with the Rules, paragraph 5, the due date for Response was December 19, 2023. The Respondent sent an email communication to the Center on November 29, 2023, claiming to be holding the disputed domain name for a third-party.

The Center appointed Steven A. Maier as the sole panelist in this matter on January 9, 2024. 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 “performance marketing” agency, which is active in the development, implementation, and execution of online marketing projects for websites. It operates particularly in the real estate sector, its services including the provision of domain names, search engine optimization, and AdWord marketing.

The Complainant is the owner of the following trademarks:

- Austria trademark registration number 324541 for the word mark TWIC.GARDEN, registered on September 27, 2023, in International Classes 35, 36, 37, 42 and 44; and
- European Union Trade Mark registration number 018909440 for a figurative mark comprising the text “TWIC.GARDEN.” and a design, registered on January 11, 2024, in International Classes 35, 36, 37, 42 and 44.

The disputed domain name was registered on November 25, 2021.

The disputed domain name appears to have redirected to a webpage at “<https://www.kitzbuehelaps.com/showroom>”, stating that the relevant page has been moved or does not exist.

5. Parties’ Contentions

A. Complainant

The Complainant submits that it was the original registrant of the disputed domain name.

The Complainant states that, in December 2021, it made a presentation to entities named Kitzbüheler Alps Projekt GmbH (“KAP”) and WF International AG (“WFI”). It states that the managing director of KAP is Mr. Michael Staininger and the managing director of WFI is the Respondent. The Complainant states that the presentation included an online marketing concept directed to sustainability known as “twic.garden”, which was offered to KAP and WFI in connection with a real estate development named “SixSenses” in which they were concerned.

The Complainant states that the “twic.garden” concept was also offered to other interested parties.

The Complainant submits that the “twic.garden” concept was used in connection with the SixSenses project between January 2022 and October 2022, but was then abandoned because SixSenses identified a conflict with its own marketing campaign.

The Complainant produces a settlement agreement dated March 9, 2023, between KAP, the Complainant, Mr. Mark Winkler, and Mr. Josef Nothegger (being the principals of the Complainant), Mr. Staininger and WFI. The agreement includes a provision that all digital facilities set out in Annex 1 to the agreement will be transferred to WFI. The Complainant exhibits a spreadsheet which it identifies as that Annex 1, which does not contain any specific reference to the disputed domain name. The Complainant submits that the disputed domain name did not therefore form part of the property agreed to be transferred.

The Complainant states that it did agree to transfer two other domain names to KAP, namely <kitzbueheleraps.com> and <kitzbueheleraps.at>, which it had maintained on behalf of KAP. (The Panel

notes in passing that these domain names are also not referred to in the “Annex 1” produced by the Complainant.)

The Complainant submits that, while the Respondent had no right to the disputed domain name, Mr. Staininger and the Respondent colluded with the original provider, IT Networks Tirol, to have the disputed domain name transferred to the current Registrar, along with the two other domain names referred to above. The Complainant produces an email dated March 6, 2023, which appears to ask Mr. Winkler of the Complainant about authorization codes for (only) the two other domain names. The Complainant also produces emails which appear to suggest that Mr. Staininger of KAP confirmed to IT Networks that the disputed domain name was to be transferred along with the other two domain names, and obtained authorization codes for the transfer of all three domain names accordingly. The Complainant submits that Mr. Staininger had no authority to give any such authorization on behalf of the Complainant and has clearly acted in bad faith.

The Complainant submits that, while it did not have registered trademark rights in the name “twic.garden” on the date when the disputed domain name was registered, this is a case in which the Respondent registered the disputed domain name with knowledge of the Complainant’s interest in the “twic.garden” name and in anticipation of its nascent trademark rights in that regard (see e.g. section 3.8.2 of WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”).

The Complainant requests the transfer of the disputed domain name.

B. Respondent

The Respondent did not file a formal Response to the Complainant’s contentions. However, in the Respondent’s informal email to the Center dated November 29, 2023, the Respondent stated that he was forwarding the Notification of Complaint to Mr. Staininger, who was the owner of the disputed domain name “in the context of his project”, and that the disputed domain name was held on behalf of KAP. The email concluded “All the best and let him and his lawyer communicate directly to you”. No further submissions were received from the Respondent or Mr. Staininger.

6. Discussion and Findings

In order to succeed in the Complaint, the Complainant is required to show that all three of the elements set out under paragraph 4(a) of the Policy are present. Those elements are that:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
- (ii) the Respondent has 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.

A. Identical or Confusingly Similar

The Complainant has established that it is the owner of registered trademark rights in the mark TWIC.GARDEN. The disputed domain name is identical to that trademark. It is immaterial to the analysis under the first element of the Policy (which functions primarily as a “standing” requirement) that the Complainant’s trademark was registered after the date of registration (or other acquisition by the Respondent) of the disputed domain name.

The Panel therefore finds that the disputed domain name is identical to a trademark in which the Complainant has rights.

B. Rights or Legitimate Interests and C. Registered and Used in Bad Faith

It is convenient in this case to consider the second and third elements of the Policy together, since the Panel does not consider this an appropriate case in which to make a determination under either such element.

The Policy is directed primarily to cases of “cybersquatting”, i.e. the third-party targeting of a trademark for financial gain or other improper motives. This case, by contrast, concerns a commercial dispute over the rights of ownership in the disputed domain name, following the breakdown of the business relationship between the parties. It is not clear on the materials available to the Panel whether or not the Respondent was entitled to obtain ownership or possession of the disputed domain name, and the absence of any mention of the disputed domain name in the “Annex 1” document is not conclusive of this matter.

Furthermore, while the Respondent has not filed any substantive Response in the proceeding, that does not automatically entitle the Complainant to prevail and to obtain a transfer of the disputed domain name. In the view of the Panel, this dispute is beyond the remit of the Policy and is suited instead to determination by a court of competent jurisdiction, which is more properly equipped to obtain and assess all of the relevant evidence in the dispute (see e.g. section 4.14.6 of [WIPO Overview 3.0](#)).

The Complainant has therefore failed to establish the second and third elements under the Policy and the Complaint must necessarily fail.

7. Decision

For the foregoing reasons, the Complaint is denied.

/Steven A. Maier/

Steven A. Maier

Sole Panelist

Date: January 24, 2024