

ADMINISTRATIVE PANEL DECISION

VOODOO v. Organization CreoBits LLC

Case No. DIO2023-0005

1. The Parties

The Complainant is VOODOO, France, represented by Jones Day, France.

The Respondent is Organization CreoBits LLC, Russian Federation, represented by Anton Sergo, Russian Federation.

2. The Domain Name and Registrar

The disputed domain name <aquapark.io> (the “Domain Name”) is registered with RU-CENTER-MSK (Regional Network Information Center, JSC dba RU-CENTER) (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on January 19, 2023. On January 19, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On January 20, 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 and contact information in the Complaint (Privacy protection service - whoisproxy.ru). The Center sent an email communication to the Complainant on January 24, 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 January 25, 2023.

On January 26, 2023, the Respondent requested that the proceeding be conducted in Russian. On February 13, 2023, the Center informed the Respondent that based on paragraph 11(a) of the Rules for .IO Domain Name Dispute Resolution Policy (the “Rules”), unless the Complainant has agreed to the Respondent’s request to proceed in Russian, the language of the administrative proceeding will be in English, subject to the Panel’s determination. On February 13, 2023, the Complainant requested that English be maintained as the language of the proceeding.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the .IO Domain Name Dispute Resolution Policy (the “Policy”), the Rules, and the WIPO Supplemental Rules for .IO 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 February 13, 2023. In accordance with the Rules, paragraph 5, the due date for Response was March 5, 2023. On February 27, 2023, the Respondent requested an extension of the due date to file a Response. On March 2, 2023, the Center granted the extension of time until March 15, 2023. The Response was filed with the Center on March 14, 2023.

The Center appointed Piotr Nowaczyk as the sole panelist in this matter on March 27, 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

The Complainant is an interactive game publisher specialized in hyper-casual games available for smartphones and tablets. The Complainant's games are available on such platforms as Apple Store and Google Play Store. As of February 2022, the Complainant's games have been downloaded more than 6 billion times. One of the most successful Complainant's games is a racing game Aquapark.io (the "Game"). It was launched on February 28, 2019 on Apple Store. As of February 2022, the Game has been downloaded more than 270 million times worldwide.

The Complainant is the owner of several AQUAPARK.IO trademark registrations, including:

- the European Union Trade Mark Registration AQUAPARK.IO No. 018407014 registered on June 9, 2021;
- the United States Trademark Registration AQUAPARK.IO No. 6845350 registered on September 13, 2022.

The Domain Name was first registered on May 23, 2019. The current Registrant registered the Domain Name (or acquired this registration) on November 11, 2022.

On December 8, 2022, the Complainant sent a cease-and-desist letter to the addresses provided in the Whois database. The Complainant requested, *i.a.*, that the Domain Name be transferred to the Complainant. On December 12, 2022, the Complainant received a response from the attorney of the "domain name administrator" rejecting the Complainant's request. On January 9, 2023, the Complainant responded to the above-referred response. No further reply was received by the Complainant.

As of the date of this Decision, as well as at the time of submitting the Complaint, the Domain Name has resolved to a website inviting the Internet users to play an online game highly similar to the Complainant's Game and featuring pay-per-click (the "PPC") links (the "Website").

5. Parties' Contentions

A. Complainant

The Complainant requests that the Domain Name be transferred to the Complainant. According to the Complainant, each of the three elements specified in paragraph 4(a) of the Policy are satisfied in the present case.

First, the Complainant submits that the Domain Name is identical or confusingly similar to the AQUAPARK.IO trademark in which the Complainant has rights.

Second, the Complainant argues that the Respondent has neither rights nor legitimate interests in the Domain Name.

Third, the Complainant contends that the Domain Name was registered and is being used in bad faith.

B. Respondent

The Respondent requests that the remedies requested by the Complainant are denied.

First, the Respondent submits that the present proceeding falls beyond the competence of this Panel. In consequence, the Respondent believes that the Complaint should be rejected.

Second, the Respondent contends that the Complainant has not sufficiently demonstrated that the Domain Name is identical or confusingly similar to a trademark in which the Complainant has rights. In particular, the Respondent alleges that the Complainant has not sufficiently demonstrated that it has rights in the unregistered trademark AQUAPARK.IO since February 2019.

Third, the Respondent alleges that the Complainant has not proved that the Respondent has neither rights nor legitimate interests in the Domain Name.

Fourth, the Respondent claims that the Domain Name has not been registered in bad faith and is not being used in bad faith.

6. Discussion and Findings

Paragraph 4(a) of the Policy places a burden on the Complainant to prove the presence of three separate elements, which can be summarized as follows:

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

The requested remedy may only be granted if the above criteria are met.

The Panel notes that the Policy is substantially similar to the Uniform Domain Name Dispute Resolution Policy (the "UDRP"). Thus, the Panel will, where appropriate, apply principles that have been established in relation to the UDRP in deciding this dispute. At the outset, the Panel notes that the applicable standard of proof in UDRP cases is the "balance of probabilities" or "preponderance of the evidence". See section 4.2 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)").

A. The Panel's jurisdiction to decide the case

The Respondent submits that that the present proceeding falls beyond the competence of the Panel. According to the Respondent, this proceeding has "at its core a dispute about copyrights to the Complainant's computer program and the computer program of the Respondent (AQUAPARK.IO)". In consequence, the Respondent believes that the Complaint should be rejected.

The Panel considers that it has a jurisdiction to decide the present case.

The Registration Agreement concluded by the Respondent with the Registrar of the Domain Name incorporates by reference the Policy. Thus, while registering the Domain Name the Respondent submitted itself to this Registration Agreement and the Policy.

Pursuant to paragraph 4(a) of the Policy the Respondent is required to submit to a mandatory administrative proceeding in the event that a third party (the Complainant) submits the Complaint to the Center concerning

the Domain Name. In the present case the proceedings has been properly initiated against the Respondent pursuant to the Policy, the Rules and the Supplemental Rules. In consequence, pursuant to paragraph 15 of the Rules, the Panel is now competent to decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.

The Panel brings, however, to the Parties' attention that pursuant to paragraph 4(k) of the Policy the mandatory administrative proceeding requirements set forth in paragraph 4 of the Policy shall not prevent either the Respondent or the Complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If the Panel decides that the Domain Name registration should be canceled or transferred, the Registrar will wait 10 business days (as observed in the location of the Registrar's principal office) after the Registrar is informed by the Center of the Panel's decision before implementing that decision. The Registrar will then implement the decision unless the Registrar has received from the Respondent during that 10 business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that it has commenced a lawsuit against the Complainant in the courts of England. If the Registrar receives such documentation within the 10 business day period, the Registrar will not implement the Panel's decision, and the Registrar will take no further action, until the Registrar receives (i) evidence satisfactory to the Registrar of a resolution between the Parties; (ii) evidence satisfactory to the Registrar that the Respondent's lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing the Respondent's lawsuit or ordering that the Respondent does not have the right to continue to use the Domain Name.

In sum, the Panel concludes that it has jurisdiction to decide the present case and will now proceed to its determination.

B. Language of the Proceeding

Pursuant to paragraph 11(a) of the Rules unless otherwise agreed by the Parties, the language of the administrative proceeding shall be English, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding.

In the present case, on January 26, 2023, the Respondent requested that the proceeding be conducted in Russian. In turn, on February 13, 2023, the Complainant requested that English be maintained as the language of the proceeding. Thus, there was no agreement between the Parties that the language other than English be the language of the proceeding.

The Panel notes that while registering the Domain Name the Respondent submitted to the Registration Agreement. Further to the Terms and Conditions for Domain Names registered with NIC.IO, for the adjudication of disputes concerning or arising from use of the Domain Name, its Registrant has submitted in the Registration Agreement to the jurisdiction of the courts of England.

Moreover, the Panel notes that the correspondence between the Parties prior to this dispute was exchanged in English.

Finally, the Panel considers that substantial additional expense and further delay would likely be incurred if the Complaint had to be translated into Russian.

Thus, taking these circumstances into account, the Panel finds that the present proceeding be conducted in English.

C. Identical or Confusingly Similar

The first element that the Complainant must establish is that the Domain Name is identical or confusingly similar to the trademark in which the Complainant has rights.

As discussed in section 1.1.3 of the [WIPO Overview 3.0](#), while the UDRP makes no specific reference to the date on which the holder of the trademark or service mark acquired its rights, such rights must be in existence at the time the complaint is filed. In the present case, the Complainant has proved that it has held valid AQUAPARK.IO trademark registrations at the time the Complaint was filed.

The Domain Name was registered before the Complainant has registered the AQUAPARK.IO trademark. However, as concluded in section 1.1.3 of the [WIPO Overview 3.0](#), even the fact that a domain name may have been registered before a complainant has acquired trademark rights does not by itself preclude a panel's finding of identity or confusing similarity under the first element.

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the Domain Name. See section 1.7, [WIPO Overview 3.0](#). Here, the Domain Name incorporates the AQUAPARK.IO trademark in its entirety. As numerous UDRP panels have held, incorporating a trademark in its entirety is sufficient to establish that a domain name is identical or confusingly similar to a registered trademark (see *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](#)).

In addition, noting in particular the global nature of the Internet and Domain Name System, the jurisdictions where the trademark is valid is not considered relevant to panel assessment under the first element. See section 1.1.2, [WIPO Overview 3.0](#). Thus, the fact that the Complainant has not registered the AQUAPARK.IO trademark in the Russian Federation, but in other jurisdictions, is not considered relevant to this Panel's assessment under the first element.

Moreover, the Complainant also relies on the unregistered rights to the AQUAPARK.IO trademark from the release date of the Game, *i.e.*, February 28, 2019. Previous UDRP panel have held that to establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its trademark has become a distinctive identifier which consumers associate with the complainant's goods and/or services. Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (*e.g.*, consumer, industry, media) recognition, and (v) consumer surveys. Particularly with regard to brands acquiring relatively rapid recognition due to a significant Internet presence, panels have also been considering factors such as the type and scope of market activities and the nature of the complainant's goods and/or services. See section 1.3, [WIPO Overview 3.0](#).

The Panel considers that the Complainant demonstrated such acquired distinctiveness. The Panel notes that the Complainant has a wide popularity in the mobile games industry. As noted by the Complainant, every launch of its game is expected and observed widely by the public. The same case was for the Game which became highly successful right after its release. Nearly 4 months after its launch, the Game became second most downloaded hyper-casual game worldwide for July 2019 with more than 43 million installs. Thus, the Complainant has used and advertised the Game using the AQUAPARK.IO trademark since at least February 28, 2019. Since then this trademark has been acquiring rapid recognition and significant media coverage. In sum, the Panel concludes that the Complainant has unregistered trademark rights in the AQUAPARK.IO trademark for purposes of the UDRP.

Given the above, the Panel finds that the Domain Name is identical to the Complainant's AQUAPARK.IO trademark. Thus, the Complainant has proved the requirements under paragraph 4(a)(i) of the Policy.

D. Rights or Legitimate Interests

The second requirement the Complainant must prove is that the Respondent has no rights or legitimate interests in the Domain Name.

The respondent may establish a right or legitimate interest in the disputed domain name by demonstrating in accordance with paragraph 4(c) of the Policy any of the following:

- (i) that it has used or made 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 prior to the notice of the dispute; or
- (ii) that it is commonly known by the domain name, even if it has not acquired any trademark or service mark rights; or
- (iii) that it is 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 finds that the Respondent has failed to prove that any of the circumstances foreseen in paragraph 4(c) of the Policy are present in this case.

First, it results from the evidence in the record that the Complainant's unregistered rights in the AQUAPARK.IO trademark predate the registration of the Domain Name. There is no evidence in the record that the Complainant has licensed or otherwise permitted the Respondent to use the AQUAPARK.IO trademark or to register the Domain Name incorporating this trademark.

Second, although the Respondent claims that it "was fairly well known by the disputed domain name prior to being notified of the dispute", the Respondent does not provide any evidence in support of this allegation. Thus, there is also no evidence to suggest that the Respondent has been commonly known by the Domain Name.

Third, the Respondent is not making a legitimate, noncommercial or fair use of the Domain Name without intent for commercial gain. While specific case factors have led previous panels to find that fair use need not always be categorically noncommercial in nature, unambiguous evidence that the site is not primarily intended for commercial gain, e.g., the absence of commercial or PPC links, would tend to indicate a lack of intent to unfairly profit from the complainant's reputation. See section 2.5.3, [WIPO Overview 3.0](#). In the present case, the Domain Name resolves to the Website inviting the Internet users to play an online game and hosting PPC sponsored links. These links allow the Respondent to profit from the attracted web traffic and collect click-through revenue from advertising links. Such use demonstrates that the Respondent has used the Domain Name to derive a commercial benefit.

Moreover, as of the date of this Decision, some of the PPC links displayed on the Website appear to redirect users to the websites competing with the Complainant's business focused on games. It is well accepted that a respondent's use of a complainant's mark to redirect users (e.g., to a competing site) would not support a claim to rights or legitimate interests. See section 2.5.3, [WIPO Overview 3.0](#).

Furthermore, the Respondent's use of the Domain Name will fundamentally not be considered "fair" if it falsely suggests affiliation with the trademark owner; the correlation between the Domain Name and the Complainant's mark is often central to this inquiry. Generally speaking, UDRP panels have found that domain names identical to a complainant's trademark, such as in the case at hand, carry a high risk of implied affiliation. See sections 2.5 and 2.5.1, [WIPO Overview 3.0](#).

In addition, the Respondent alleges that the Domain Name consists of a common dictionary word "aquapark" ("waterpark" in English). Previous UDRP Panels have recognized that merely registering a domain name comprised of a dictionary word or phrase does not by itself automatically confer rights or legitimate interests on the respondent. In order to find rights or legitimate interests in a domain name based on its dictionary meaning, the domain name should be genuinely used, or at least demonstrably intended for such use, in connection with the relied-upon dictionary meaning and not to trade off third-party trademark rights. However, this Panel finds that the Domain Name and the corresponding Website is aimed at services that

target the Complainant's AQUAPARK.IO trademark which uses the same term as a trademark in a non-dictionary sense. This finding will be presented in more details in the further part of this Decision.

Fourth, the Respondent has not sufficiently proved that it makes use of the Domain Name in connection with a *bona fide* offering of goods or services. The Respondent alleges that it actively uses the Domain Name to operate the Website offering the Internet users to play a web game developed by the Respondent.

As expressed in UDRP decisions, non-exhaustive examples of prior use, or demonstrable preparations to use the domain name, in connection with a *bona fide* offering of goods or services may include: (i) evidence of business formation-related due diligence/legal advice/correspondence, (ii) evidence of credible investment in website development or promotional materials such as advertising, letterhead, or business cards (iii) proof of a genuine (*i.e.*, not pretextual) business plan utilizing the domain name, and credible signs of pursuit of the business plan, (iv) *bona fide* registration and use of related domain names, and (v) other evidence generally pointing to a lack of indicia of cybersquatting intent. While such indicia are assessed pragmatically in light of the case circumstances, clear contemporaneous evidence of *bona fide* pre-complaint preparations is required. See section 2.2, [WIPO Overview 3.0](#).

As results from the case record, the Game bearing the AQUAPARK.IO trademark was first released on Apple Store on February 28, 2019. The evidence presented by the Complainant show that the Game was highly successful right from its launch and received significant media attention. The release of the Game was immediately followed by millions of downloads. Only around 3 months after the launch of the Game on Apple Store, on May 23, 2019, the Domain Name was registered. As of the date of submitting the Complaint and date of this Decision, the Domain Name resolved to the Website offering the users to play the online game imitating the concept, look and feel of the Game, together with reproducing the Complainant's AQUAPARK.IO trademark in the Domain Name. Moreover, the description of the game available on the Website as "Aquapark.io 2", as well as description of this game among the Google search results as the second version of the Game, suggests an affiliation with the Complainant and its Game.

In result of these factors together, the Panel concludes that it might not be clear to Internet users visiting the Domain Name and the Respondent's Website that it is not operated by the Complainant. In consequence, the Panel considers that the Respondent intended to capitalize on the Complainant's AQUAPARK.IO trademark. Such use of the Domain Name does not confer rights or legitimate interests on the Respondent.

Given the above, the Panel concludes that the Complainant has also proved the requirement under paragraph 4(a)(ii) of the Policy.

E. Registered or Used in Bad Faith

The third requirement the Complainant must prove is that the Domain Name has been registered or is being used in bad faith.

Bad faith under the UDRP is broadly understood to occur where a respondent takes unfair advantage of or otherwise abuses a complainant's mark. See section 3.1, [WIPO Overview 3.0](#).

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

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

- (iii) circumstances indicating that the domain name was registered primarily for the purpose of disrupting the business of a competitor; or
- (iv) circumstances indicating that the domain name has intentionally been used in an attempt to attract, for commercial gain, Internet users to your web site or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of a website or location or of a product or service on a website or location.

As indicated above, the Complainant's unregistered rights in the AQUAPARK.IO trademark predate the registration of the Domain Name. This Panel finds that the Respondent was or should have been aware of the Complainant's trademark at the time of registration of the Domain Name. This finding is supported by the content of the Website including the AQUAPARK.IO trademark and offering the Internet users to play the game which is similar in concept, look and feel to the Complainant's Game. Moreover, it has been proven to the Panel's satisfaction that the Complainant's AQUAPARK.IO trademark is well known and unique to the Complainant. Thus, the Respondent could not likely reasonably ignore the reputation of the Game under this trademark. In sum, the Respondent in all likelihood registered the Domain Name with the expectation of taking advantage of the reputation of the AQUAPARK.IO trademark and capitalize on the Complainant's nascent (yet unregistered) trademark rights.

Moreover, the Domain Name is used by the Respondent to attract Internet users to the Website inviting to play the game which is highly similar to the Complainant's Game, as well as displaying PPC sponsored links. In the Panel's view, by reproducing the Complainant's AQUAPARK.IO trademark in the Domain Name and offering the users to play the game highly similar to the Complainant's Game, the Respondent intends to profit from the confusion created with Internet users, as it suggests association with the Complainant. In consequence, the Panel finds that the evidence in the record demonstrates that the Respondent uses the Domain Name deliberately in order to take advantage of the Complainant's reputation and to give credibility to its services.

Furthermore, the Respondent's use of a privacy service that concealed registrant information is a further evidence of bad faith.

The Panel notes that the Respondent requests in the Response that the Complainant's claims in this proceeding attempt in fact at Reverse Domain Name hijacking. The Panel disagrees. Given the grounds for the transfer of the Domain Name to the Complainant elaborated in the present Decision, the Panel finds this Respondent's claim to be unfounded.

For the reasons discussed above, the Panel finds that the Complainant has proved the requirements under paragraph 4(a)(iii) of the Policy.

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 Domain Name, <aquapark.io>, be transferred to the Complainant.

/Piotr Nowaczyk/

Piotr Nowaczyk

Sole Panelist

Date: April 10, 2023