

## **ADMINISTRATIVE PANEL DECISION**

Heritage Title Co. of Austin, Inc. v. Murphy Wayne  
Case No. D2022-4724

### **1. The Parties**

The Complainant is Heritage Title Co. of Austin, Inc., United States of America (“United States”), represented by Jackson Walker LLP, United States.

The Respondent is Murphy Wayne, United States.

### **2. The Domain Name and Registrar**

The disputed domain name <heritage--title.com> (the “Domain Name”) is registered with NameCheap, Inc. (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on December 9, 2022. On December 9, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On December 9, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name that differed from the named Respondent (Redacted for Privacy, Privacy Service Provided by Withheld for Privacy ehf) and contact information in the Complaint. The Center sent an email communication to the Complainant on December 12, 2022, 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 the same day.

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 this proceeding commenced on December 19, 2022. In accordance with the Rules, paragraph 5, the due date for Response was January 8, 2023. The Respondent did not submit a response. Accordingly, the Center notified the Respondent’s default on January 9, 2023.

The Center appointed A. Justin Ourso III as the sole panelist in this matter on January 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

The Complainant, an American corporation, has provided real property title insurance and escrow services to commercial and residential customers in major markets in Texas, United States, for approximately forty years. The Complainant claims unregistered trademark rights in the phrase HERITAGE TITLE COMPANY.

The Complainant registered the domain name <heritagetitleofaustin.com> on September 24, 2001, which it uses for its public-facing web site at “www.heritagetitleofaustin.com”. The Complainant also owns the domain name <heritage-title.com>, which it registered on April 3, 1998. The Complainant’s employees conduct business using email addresses associated with this second domain name, including sending wiring instructions for escrow and closing transactions.

The Respondent registered the Domain Name on November 5, 2022. At the filing of the Complaint, the Domain Name resolved to a GoDaddy parking site with pay-per-click (“PPC”) advertising, including at least one site offering title-related services. Also at the time of filing, mail exchanger (“MX”)<sup>1</sup> records for the Domain Name had been configured and were active.

#### 5. Parties’ Contentions

##### A. Complainant

In addition to facts set forth in the Factual Background in Part 4 above, the Complainant contends the following.

Regarding the element of confusing similarity with a mark in which it has rights, the Complainant contends that it has unregistered trademark rights in the phrase HERITAGE TITLE COMPANY in Texas, United States; its employees use email addresses at its domain name <heritage-title.com> to send detailed and sensitive instructions for wiring large sums of money to its clients; due to the nature of escrow services, businesses that use them are often the target of Internet scams; the Domain Name is nearly identical to the domain name that the Complainant uses for email, differing only by the addition of a second consecutive hyphen after the hyphen in its domain name, in essence, typosquatting, which by its nature is confusingly similar.

Regarding the element of rights or legitimate interests in the Domain Name, the Complainant contends that the Respondent’s use of the Domain Name to resolve to a site with PPC advertising, including at least one offering services that are identical to the Complainant’s services is not a *bona fide* offering of goods or services; the Respondent is not making a noncommercial or fair use of the Domain Name, but is using the Domain Name to perpetrate a fraudulent email scheme; the Respondent has not consented to the Respondent’s use of its mark and no affiliation exists between them; the Respondent is not known by the Domain Name; the Respondent does not have rights in any registered trademark for the Complainant’s mark or any similar mark; and the Respondent’s bad faith use means that its use is not legitimate or fair.

Regarding the element of bad faith registration and use of the Domain Name, the Complainant contends that the Respondent must have known of the Complainant’s mark before registering the Domain Name, because

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<sup>1</sup> An MX record is a resource in the Domain Name System that specifies the mail server(s) responsible for receiving email messages for a domain name. An active MX record enables the owner of a domain name to use it for email and email addresses. It is not necessary to assign MX records to a domain name if a registrant does not intend to use the domain name for email.

of the Complainant's long use of its mark, the Respondent's typosquatting, and the Respondent's attempt to pass itself off as the Complainant; the Respondent's PPC advertising is an attempt to divert Internet users to generate income; the configuration of MX records was to enable a fraudulent phishing scheme and creates a high risk of fraud; the Respondent chose the Domain Name to trade on the Complainant's goodwill to confuse Internet users for the Respondent's commercial gain and to further fraudulent activity, all showing registration and use in bad faith; and the Respondent used a privacy service to obscure its identity.

The Complainant requested transfer of the Domain Name.

## **B. Respondent**

The Respondent did not submit a response to the Complaint.

## **6. Discussion and Findings**

### **A. The Effect of the Respondent's Default**

If a respondent does not submit a response to a complaint, a panel decides the dispute based upon the complaint. Rules, paragraphs 5(f) and 14(a). Because the Complainant has the burden of proof, Policy, paragraph 4(a), the Complainant must still prove the elements of a claim to obtain the requested relief, notwithstanding the Respondent's default. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.3.

In the absence of exceptional circumstances, a respondent's failure to respond to a complaint requires that a panel draw the inferences from this failure that it considers proper. Rules, paragraph 14(b). The Panel finds that no exceptional circumstances exist for the failure of the Respondent to submit a response. Accordingly, the Panel infers that the Respondent does not deny the facts alleged and the contentions urged by the Complainant based upon these facts, and will draw all reasonable inferences that are proper from the evidence and the facts found by the Panel. *Id.*

Although the Panel may draw negative inferences from the Respondent's default, the Complainant may not rely on conclusory allegations and must support its allegations with evidence to prove the three elements. [WIPO Overview 3.0](#), section 4.3.

### **B. Elements of a Claim**

A complainant must prove three elements to obtain relief: (i) the domain name is identical or confusingly similar to a trademark in which the complainant has rights; (ii) the respondent has no rights or legitimate interests in the domain name; and (iii) the respondent registered and is using the domain name in bad faith. Policy, paragraph 4(a).

#### **(i). Identical or Confusingly Similar**

On the first element, the Complainant must prove that (1) it has rights in a trademark, and (2) the Domain Name is identical or confusingly similar to this trademark. Policy, paragraph 4(a)(i).

To support a claim of unregistered (sometimes referred to as "common law") trademark rights, a complainant must show that its mark has acquired a distinctiveness that consumers associate with the complainant's services. That acquired distinctiveness "may only exist in a particular geographical area or market niche does not preclude the complainant from establishing trademark rights." [WIPO Overview 3.0](#), section 1.3.

"Specific evidence supporting assertions of acquired distinctiveness should be included in the complaint; conclusory allegations of unregistered or common law rights, even if undisputed in the particular UDRP case, would not normally suffice to show secondary meaning." *Id.*

Relevant evidence includes: (1) the duration and nature of use of the mark, (2) the amount of sales under the mark, (3) the nature and extent of advertising using the mark, (4) the degree of actual public (e.g., consumer, industry, media) recognition, and (5) consumer surveys. *Id.*

The Complainant has alleged that it has used the “mark” HERITAGE TITLE COMPANY since its founding approximately forty years ago. In the view of the Panel, “Heritage Title Company” as a trade name encompasses the trademark HERITAGE. The Panel finds that the Complaint has alleged unregistered trademark rights in the mark HERITAGE and that it has used this mark in Texas for forty years.

The Complainant has alleged that it makes extensive use of its mark on the Internet, citing its public-facing web site at “www.heritagetitleofaustin.com”. In fact, the Complainant uses its trade name HERITAGE TITLE COMPANY in a composite trademark that also includes a design mark, in the header on each page of this web site. Elsewhere, throughout the website, the Complainant also uses its trade name, HERITAGE TITLE COMPANY.

The Complainant has alleged that consumers in Texas associate the mark with the Complainant, but has not offered any evidence of this, apart from the Complainant’s long use of the mark HERITAGE and its trade name HERITAGE TITLE COMPANY, and their use on its web site. In the Panel’s view, although the duration and the limited use on its web site might not be sufficient to establish unregistered trademark rights taken by themselves, other evidence of acquired distinctiveness exists.

The Complainant has alleged and proven these other important facts: (1) the Respondent has typosquatted on a second domain name <heritage-title.com>, that the Complainant registered on April 3, 1998, which the Complainant’s employees use for email, including sending wiring instructions for escrow and closing transactions; and (2) the Respondent has targeted a client of the Complainant with a phishing email at least once, after creating an MX record for the Domain Name, which enables the sending and receiving of emails using the Domain Name. These facts, namely, the typosquatting and the targeting, are sufficient evidence that the Complainant’s unregistered trademark has acquired distinctiveness as a source identifier. Together with the Complainant’s long use of its mark and trade name, they establish the Complainant’s unregistered trademark rights. [WIPO Overview 3.0](#), section 1.3; and *NTM Engineering, Inc. v. Registration Private, Domains by Proxy, LLC, DomainsByProxy.com / James Priya NA*, WIPO Case No. [D2019-0434](#).

The Panel finds that the Domain Name is confusingly similar to the Complainant’s HERITAGE trademark. The Domain Name incorporates the entire trademark, and the trademark is easily recognizable within the Domain Name. [WIPO Overview 3.0](#), section 1.7. The addition in the Domain Name of the word “title” after the trademark does not prevent a finding of confusing similarity. [WIPO Overview 3.0](#), section 1.8.

Accordingly, the Panel concludes that the Complainant has proven the first element, namely, that the Domain Name is confusingly similar to a trademark in which it has rights.

#### **(ii). Rights or Legitimate Interests**

The Policy provides a non-exclusive list of circumstances that, if a UDRP panel finds proved, demonstrates that a respondent has rights to, or legitimate interests in, a domain name for the purposes of paragraph 4(a)(ii) of the Policy: (i) before any notice to a respondent of the dispute, its 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) a respondent has been commonly known by the domain name, even if it has acquired no trademark or service mark rights; or (iii) a respondent 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. Policy, paragraph 4(c).

The Respondent has not claimed the existence of any of these circumstances. The Complainant, to the contrary, has made a *prima facie* showing that the Respondent lacks any rights or legitimate interests in the Domain Name. Where a complainant shows *prima facie* that a respondent lacks rights or legitimate interests, the burden of production on this second element shifts to the respondent to come forward with

relevant evidence proving rights or legitimate interests in the domain name. [WIPO Overview 3.0](#), section 2.1. The Respondent here has not submitted any evidence to rebut the *prima facie* showing.

Additionally, the Panel finds that the Domain Name does not, at the time of this Decision, resolve to a functioning web site on which the Respondent is conducting a business, thereby providing no evidence of a *bona fide* commercial, noncommercial, or fair use of the Domain Name; the Registrar identified the Respondent as “Murphy Wayne,” a name that does not resemble the Domain Name; and the email address that the Registrar provided for the Respondent has no apparent relation to the Domain Name, all of which corroborate that the Respondent is not known by the Domain Name and is not using the Domain Name for a legitimate commercial, noncommercial, or fair use.

The Panel also finds that the Complainant’s trademark rights precede the registration of the Domain Name.

Accordingly, the Panel concludes that the Complainant has proven the second element, namely, that the Respondent lacks rights or legitimate interests in the Domain Name.

### **(iii). Registered and Used in Bad Faith**

The Policy expressly provides that the four particular circumstances that it specifies as “evidence of the registration and use of a domain name in bad faith” are “without limitation.” Policy, paragraph 4(b).

Panels have consistently found that “given that the use of a domain name for *per se* illegitimate activity such as [...] phishing can never confer rights or legitimate interests on a respondent, such behavior is manifestly considered evidence of bad faith.” [WIPO Overview 3.0](#), section 3.1.4. See also [WIPO Overview 3.0](#), section 3.4. In the view of this Panel, deceptive conduct is also evidence of registration and use of a domain name in bad faith.

The Complainant has shown that the Respondent has engaged in an email phishing scheme impersonating the Complainant and targeting one of the Complainant’s clients,<sup>2</sup> which is *per se* illegitimate activity and a bad faith use of the Domain Name. [WIPO Overview 3.0](#), sections 3.1.4 and 3.4.

These findings support the Panel’s conclusion that the Respondent (1) intentionally registered the Domain Name in bad faith to impersonate the Complainant and (2) used it in bad faith to impersonate, taking unfair advantage of the Complainant’s trademark. [WIPO Overview 3.0](#), sections 3.1, 3.1.4, and 3.4.

Additionally, it is common knowledge that owners of websites customarily use email addresses containing the domain name of a web site in electronic mail communications. The use of a domain name that presents a likelihood of confusion with a trademark in emails that do not originate with the trademark owner presents a risk to the reputation of a trademark and its owner. *Applied Materials, Inc. v. Proxy Protection LLC / John Smith*, WIPO Case No. [D2022-0026](#). Even if the Complainant had not provided any evidence of impersonation, the Respondent has not rebutted that it engages in this practice, which is noteworthy given the configuration of MX records for the Domain Name. Moreover, with evidence of an impersonating email, the risk of other deceptive or abusive emails is real. *Id.*

The Panel finds that the risk of future deceptive emails associated with the Domain Name is another reasonable basis, given the evidence of impersonation and the failure to rebut, from which to infer bad faith use and that the Respondent’s bad faith existed at the time of its registration of the Domain Name.

Panels have not only found that typosquatting on a trademark, coupled with an absence of rights or legitimate interests, supports an inference of bad faith, [WIPO Overview 3.0](#), section 3.2.1, but also “other indicia generally suggesting that the respondent [...] targeted the complainant.” *Id.* Here, the Domain Name

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<sup>2</sup> The Complainant’s redaction obscures the information to some extent, but the email exchanges that the Complainant has annexed show emails to an email address[es] at the Domain Name <heritage--title.com>, but no emails from the Domain Name, so any impersonation is not obvious from the annexed emails.

differs—not from the trademark, but from a domain name that the Complainant uses for its email—by adding a second consecutive hyphen, so that the Domain Name is nearly identical visually to the email domain name of the Complainant. The Panel finds that this “other indicia” of targeting supports an inference of bad faith. The Respondent has not explained the selection of this unusual typography or the Domain Name. For these reasons also, the Panel finds that the Respondent (1) was aware of the Complainant’s trademark when it registered the Domain Name, and (2) chose and used the Domain Name deliberately.

Accordingly, the Panel concludes that the Complainant has proven the third element, namely, that the Respondent registered and has used the Domain Name in bad faith.

## **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, <heritage--title.com>, be transferred to the Complainant.

*/A. Justin Ourso III/*

**A. Justin Ourso III**

Sole Panelist

Date: January 26, 2023