

## **ADMINISTRATIVE PANEL DECISION**

Davis Companies Inc. v. Mitchell Embrey  
Case No. D2025-2083

### **1. The Parties**

The Complainant is Davis Companies Inc., United States of America ("United States"), represented internally.

The Respondent is Mitchell Embrey, United Kingdom, represented by John Berryhill, Ph.d. Esq., United States.

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

The disputed domain name <divebuddyapp.com> is registered with Squarespace Domains II LLC (the "Registrar").

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on May 27, 2025. On May 27, 2025, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On May 28, 2025, 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 (Dive Buddy Limited, Mitchell Embrey) and contact information in the Complaint. The Center sent an email communication to the Complainant on May 28, 2025, 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 May 28, 2025.

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 May 30, 2025. In accordance with the Rules, paragraph 5, the due date for Response was June 19, 2025. The Response was filed with the Center on June 3, 2025.

On June 4, 2025, the Complainant submitted an unsolicited supplemental filing.

The Center appointed Warwick A. Rothnie as the sole panelist in this matter on June 10, 2025. 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-based corporation. It is the owner of United States Registered Trademark No 3,566,208 , DIVE BUDDY, which has been registered in the Supplemental Register since January 20, 2009 in respect of Internet based social networking, introduction and dating services in International Class 45.

According to details included in the Complaint, the Complainant's application was filed on July 14, 2008 and claims a first use in commerce on March 4, 2006.

On May 23, 2023, the Respondent incorporated a company in the United Kingdom under the name Dive Buddy Limited. According to information included in the Companies House record, the nature of the business is "other software publishing".

The disputed domain name was registered on July 29, 2024.

It resolves to a website promoting the "Dive Buddy App". The screenshot of the website included in the Complaint displays a logo:



Underneath the logo appears the text:

"Where will Dive Buddy take you? Discover new dive sites, log your underwater adventures, **connect** with fellow divers, and book unforgettable experiences with trusted dive centres across the planet!"

The left-most panel or link underneath that is "Connect with a Global Diving Community. Easily find dive buddies, connect with dive centres, and join a network of passionate divers worldwide."

The website promotes the features of a downloadable "Dive Buddy" app. According to the Response, the Respondent has hired developers who are working on this yet to be released app. The website also appears to have functionality for divers and dive centres to register and is offering for sale some goods such as goggles' straps and merchandise.

On April 8, 2025, the Complainant sent a cease and desist letter to the Respondent. The Respondent did not accept the Complainant's demands.

The Respondent has applied to register its trademark in the United Kingdom. The registration of that application has been opposed by the Complainant.

#### 5. Discussion and Findings

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of a disputed domain name, the Complainant must demonstrate each of the following:

- (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.

Paragraph 15(a) of the Rules directs the Panel 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.

As noted above, the Complainant has submitted an unsolicited supplemental filing. The burden of this submission is that the Respondent is not using the term “dive buddy” descriptively but as the Respondent’s brand identity and trade name. The Panel takes this material into account in reaching this decision.

#### **A. Identical or Confusingly Similar**

The first element that the Complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the Complainant’s trademark rights.

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 disputed domain name. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ([“WIPO Overview 3.0”](#)), section 1.7.

The Complainant has proven ownership of the registration in the United States of Registered Trademark No. 3,566,208, DIVE BUDDY. However, the trademark is registered in the Supplemental Register, not the Principal Register.

Panels have consistently recognised that mere registration in the Supplemental Register in the United States does not confer trademark rights for the purposes of the Policy. It is necessary to show that such marks have acquired secondary meaning or distinctiveness in fact. [WIPO Overview 3.0](#), section 1.2.1. For example, in *Integrated Print Solutions, Inc. v. Kelly Davidson and Integrated Print Solutions*, WIPO Case No. [D2013-0219](#), the panel explained:

“It is well accepted that fanciful, arbitrary, and suggestive marks (or inherently distinctive marks) are registrable on the Principal Register. Conversely, marks that are merely descriptive and lacking a showing of acquired distinctiveness may only be registered on the Supplemental Register. USPTO, Trademark Manual of Examining Procedure (TMEP) § 1209.01. Unlike registration on the Principal Register, registration on the Supplemental Register creates neither a presumption of the registrant’s exclusive right to use the mark, nor a presumption of validity. McCarthy on Trademarks, 4th Edition, §19: 36. Supplemental Registration is evidence of nothing except that the registration actually issued. *Copperweld Corp. v. Arcair Co.*, 200 U.S.P.Q. 470 (T.T.A.B. 1978). Registration of an application on the Supplemental Register is an implied admission that the term is descriptive. McCarthy on Trademarks, 4th Edition, §19: 43.”

The Complainant points out that its trademark is registered in relation to social networking services rather than the person who might be described as a diver’s dive buddy and, as noted above, that type of networking is at least a component of the Respondent’s services. It is noteworthy, however, that the Complainant’s application to register its trademark in the Principal Register was refused on grounds that it was descriptive. The application proceeded to registration only after the Complainant amended it to seek registration in the Supplemental Register. Further, as noted in the *Integrated Print Solutions* decision, above, “Registration of an application on the Supplemental Register is an implied admission that the term is descriptive. McCarthy on Trademarks, 4th Edition, §19: 43.”

The Complainant does state, as claimed in the application, that it has been using its trademark in commerce since 2006. That claim is mere assertion, however, and unsupported by evidence. As explained in section 1.3 of [WIPO Overview 3.0](#):

“To establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its mark 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.”

*“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.* In cases involving unregistered or common law marks that are comprised solely of descriptive terms which are not inherently distinctive, there is a greater onus on the complainant to present evidence of acquired distinctiveness/secondary meaning.” (emphasis supplied.)

The onus is on the Complainant to provide suitable evidence. As highlighted in the emphasized sentence, the evidence supporting a claim to acquired distinctiveness should be filed in the Complaint. It was not in this case. Further, the Complainant has chosen to file an unsolicited supplemental filing in reply to the Response and, notwithstanding the direct challenge in the Response in reliance on these propositions, has not provided that evidence.

In these circumstances, the Panel accepts the Respondent’s submission that the Complainant has failed at the threshold to establish the required trademark rights.

Accordingly, the Panel finds the first element of the Policy has not been established.

## **B. Other grounds**

As the Response notes, in these circumstances it is unnecessary to make findings on the other requirements under the Policy as the Complaint must fail.

The Panel should record, however, that on the state of the evidence in this proceeding that the Complainant would also have failed to prove at least the third requirement – that the disputed domain name had been registered and used in bad faith.

The Respondent denies any knowledge of the Complainant and its trademark prior to receiving the cease and desist letter in April this year – almost two years after the incorporation of the Respondent’s company and around nine months after registration of the disputed domain name.

The Panel is not in a position to reject that denial on the evidence in this case. In the state of the evidence, the denial is not implausible. First, the term “Dive Buddy App” is an apt description of the subject matter of the services being offered by the Respondent’s website and to be offered by the proposed mobile application.

Secondly, in the absence of any evidence about the scale of the Complainant’s activities under its trademark it is simply not legitimate to deny the Respondent’s claim that he knew nothing about the Complainant and its trademark. It is of course possible that some sort of search by the Respondent might have disclosed the existence of the Complainant and its trademark. However, material included in the Response shows that a descriptive term like “dive buddy” throws up many results for many different people, activities and things.

#### **D. Reverse Domain Name Hijacking**

Paragraph 15(e) of the Rules provides that, if after considering the submissions, the Panel finds that the Complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or to harass the domain-name holder, the Panel shall declare in its decision that the Complaint was brought in bad faith and constitutes an abuse of the administrative proceeding. The mere lack of success of the complaint is not, on its own, sufficient to constitute reverse domain name hijacking. [WIPO Overview 3.0](#), section 4.16.

In this case, the Panel notes that the Complainant claims to have been using its trademark since 2006. It is also noteworthy that a substantial part of the Respondent's activities directly overlap with the services for which the Complainant has obtained its registration. The Respondent has also not requested a finding of reverse domain name hijacking. In those circumstances, while the Complaint has failed, the Panel declines to find reverse domain name hijacking.

#### **6. Decision**

For the foregoing reasons, the Complaint is denied.

*/Warwick A. Rothnie/*

**Warwick A. Rothnie**

Sole Panelist

Date: June 24, 2025