

## **ADMINISTRATIVE PANEL DECISION**

Twilio Inc. v. Timothy John Apps

Case No. DAU2022-0002

### **1. The Parties**

The Complainant is Twilio Inc., United States of America ("United States"), represented by Cobalt LLP, United States.

The Respondent is Timothy John Apps, Australia.

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

The disputed domain name <twilio.com.au> ("Domain Name") is registered with Web Address Registration Pty Ltd.

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on February 9, 2022. On February 9, 2022, the Center transmitted by email to Web Address Registration Pty Ltd (the "Registrar") a request for registrar verification in connection with the Domain Name. On February 10, 2022, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

The Center verified that the Complaint satisfied the formal requirements of the .au Dispute Resolution Policy (the "Policy" or "auDRP"), the Rules for .au Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for .au Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on February 17, 2022. In accordance with the Rules, paragraph 5(a), the due date for Response was March 9, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on March 10, 2022.

The Center appointed Nicholas Smith as the sole panelist in this matter on March 17, 2022. 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 company incorporated in the United States that operates a cloud communications platform. Founded in 2008, the Complainant's services are used for such well-known online platforms as Uber, DoorDash or AirBnb. In the 2020 financial year, the Complainant had USD 1.8 billion in revenue with a share market valuation of USD 40 billion.

The Complainant is the owner of trade marks in various jurisdictions, including an Australian trade mark registration for the word TWILIO (the "TWILIO Mark"). The TWILIO Mark (trade mark no. 1406219) was registered on January 31, 2011 (with a priority date of July 30, 2010) for "computerised telephony systems utilising cloud computing applications". The Complainant is also the owner of the domain name <twilio.com>, which resolves to its website where it promotes its cloud communication products.

The Domain Name was registered on November 17, 2011, and does not resolve to an active website, nor does it appear to have ever resolved to an active website.

#### **5. Parties' Contentions**

##### **A. Complainant**

The Complainant makes the following contentions:

- (i) that the Domain Name is identical or confusingly similar to the Complainant's TWILIO Mark;
- (ii) that the Respondent has no rights nor any legitimate interests in respect of the Domain Name; and
- (iii) that the Domain Name has been registered and is subsequently being used in bad faith.

The Complainant is the owner of the TWILIO Mark, having registered this mark in Australia since 2011. The Domain Name is identical to the TWILIO Mark.

There are no rights or legitimate interests held by the Respondent in respect of the Domain Name. The Complainant has not granted any license or authorization for the Respondent to use the TWILIO Mark. The Respondent is not commonly known as the Domain Name. The Respondent does not use the Domain Name for a *bona fide* purpose or legitimate noncommercial purpose. Rather the Domain Name does not redirect to an active webpage.

The Respondent has registered and used the Domain Name in bad faith. There is no plausible circumstance under which the Respondent could legitimately use the Domain Name, which is identical to the coined TWILIO Mark, other than to falsely create an impression of an association with the Complainant. In such circumstances, the Respondent's passive holding of the Domain Name amounts to registration and use of the Domain Name in bad faith.

##### **B. Respondent**

The Respondent did not reply to the Complainant's contentions.

#### **6. Discussion and Findings**

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

To prove this element, the Complainant must have a name, trade or service mark rights and the Domain Name must be identical or confusingly similar to the Complainant's name, trade or service mark.

The Complainant is the owner of the TWILIO Mark, having registrations for the TWILIO Mark as a trade mark in Australia.

The Domain Name <twilio.com.au> reproduces the TWILIO Mark in its entirety and adds the country code Top-Level Domain (“ccTLD”) “.com.au”. Disregarding the ccTLD as a standard registration requirement, the Panel finds that the Domain Name is identical to the TWILIO Mark. Consequently, the requirement of paragraph 4(a)(i) of the Policy is satisfied.

## **B. Rights or Legitimate Interests**

To succeed on this element, a complainant must make out a *prima facie* case that the respondent lacks rights or legitimate interests in the domain name. If such a *prima facie* case is made out, then the burden of production shifts to the respondent to demonstrate rights or legitimate interests in the domain name.

Paragraph 4(c) of the Policy enumerates several ways in which a respondent may demonstrate rights or legitimate interests in a domain name:

“Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, is to be taken to demonstrate your rights or legitimate interests to the domain name for purposes of paragraph 4(a)(ii):

- (i) before any notice to you of the subject matter of the dispute, your *bona fide* use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with an offering of goods or services (not being the offering of domain names that you have acquired for the purpose of selling, renting or otherwise transferring); or
- (ii) you (as an individual, business, or other organisation) have been commonly known by the domain name, even if you have acquired no trade mark or service mark rights; or
- (iii) you are making legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the name, trade mark or service mark at issue.”

The Respondent is not affiliated with the Complainant in any way. It has not been authorized by the Complainant to register or use the Domain Name or to seek the registration of any domain name incorporating the TWILIO Mark or a mark similar to the TWILIO Mark. There is no evidence that the Respondent is commonly known by the Domain Name or any similar name. There is no evidence that the Respondent has used or made demonstrable preparations to use the Domain Name in connection with a *bona fide* offering of goods or services or for a legitimate noncommercial use. Indeed, there is no evidence that the Domain Name has ever been used.

The Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the Domain Name. The Respondent has had an opportunity to rebut the *prima facie* case that it lacks rights or legitimate interests but has chosen not to do so. The Panel finds that the Respondent has no rights or legitimate interests in respect of the Domain Name under paragraph 4(a)(ii) of the Policy.

## **C. Registered or Subsequently Used in Bad Faith**

For the purposes of paragraph 4(a)(iii) of the Policy, the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

- (i) circumstances indicating that the Respondent has registered or has acquired the Domain Name primarily for the purpose of selling, renting, or otherwise transferring the domain name registrations to

another person, for valuable consideration in excess of its documented out-of-pocket costs directly related to the Domain Name; or

(ii) the Respondent has registered the Domain Name in order to prevent the owner of the name, trade mark or service mark from reflecting the name or mark in a corresponding domain name; or

(iii) the Respondent has registered the Domain Name primarily for the purpose of disrupting the business or activities of another person; or

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

(v) if any of the Respondent's representations or warranties as to eligibility or third party rights given on application or renewal are, or subsequently become, false or misleading in any manner.

The Panel notes that the Policy only requires that a complainant show that a respondent registered or subsequently used the disputed domain name in bad faith, however in the interest of completeness the Panel has considered both whether the Domain Name has been registered and used in bad faith. Furthermore, the Panel notes that the above examples are not exclusive and other circumstances may exist that demonstrate the registration and use of a domain name in bad faith.

The Panel finds, on the balance of probability, that the Domain Name was registered in bad faith. It is likely that the Respondent was aware of the Complainant and its reputation in the TWILIO Mark at the time the Respondent registered the Domain Name. As the Domain Name is identical to the Complainant's trade mark, save for the addition of ".com.au", and identical to the Complainant's <twilio.com> domain name, save for the addition of ".au"; a simple Google search would have revealed the Complainant's existence at the time. There is no obvious reason, nor has the Respondent offered an explanation, for the Respondent to register a domain name wholly incorporating the coined TWILIO Mark unless there was an intention to create a likelihood of confusion between the Domain Name and the Complainant and its TWILIO Mark.

The Domain Name is currently inactive. *Telstra Corporation Limited v. Nuclear Marshmallows*, [WIPO Case No. D2000-0003](#),<sup>1</sup> established that a UDRP panel must examine all the circumstances of the case to determine whether a respondent is acting in bad faith in circumstances where a domain name is unused. Based on the circumstances of this case, including the distinctiveness and reputation of the Complainant's trade mark, the failure of the Respondent to submit a response, and the implausibility of any good faith use to which the Domain Name may be put (noting that the Domain Name carries a high risk of implied affiliation), the Panel finds that the passive holding of the Domain Name does not prevent a finding of bad faith.

Accordingly, the Panel finds that the Respondent has registered and is using the Domain Name in bad faith under paragraph 4(a)(iii) of the Policy.

## 7. Decision

For all the foregoing reasons, in accordance with Paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Domain Name <twilio.com.au> be transferred to the Complainant.

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<sup>1</sup> Noting the substantial substantive similarities between the Policy and the Uniform Domain Name Dispute Resolution Policy ("UDRP"), the Panel has referred to prior UDRP cases, where appropriate.

*/Nicholas Smith/*

**Nicholas Smith**

Sole Panelist

Date: March 18, 2021