

ADMINISTRATIVE PANEL DECISION

Playground Productions LLC v. Phu Cuong Ha
Case No. DIO2024-0038

1. The Parties

The Complainant is Playground Productions LLC, United States of America, represented Sheppard, Mullin, Richter & Hampton, LLP, United States of America.

The Respondent is Phu Cuong Ha, Viet Nam.

2. The Domain Name and Registrar

The disputed domain name <backyardbaseball.io> (the “Disputed Domain Name”) is registered with Name.com, Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on November 19, 2024. On November 19, 2024, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Disputed Domain Name. On November 19, 2024, 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 (Unknown/Redacted for Privacy) and contact information in the Complaint. The Center sent an email communication to the Complainant on November 26, 2024, 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 27, 2024.

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 for .IO Domain Name Dispute Resolution 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 November 29, 2024. In accordance with the Rules, paragraph 5, the due date for Response was December 19, 2024. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on December 20, 2024.

The Center appointed Nick J. Gardner as the sole panelist in this matter on January 2, 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

No response has been filed and accordingly the Panel accepts the following facts as true.

The Complainant is the copyright owner of all rights in a range of video games described as “Backyard Sports” (the “BYS Videogames”). The first BYS Videogame released was Backyard Baseball in 1997. Since 1997, BYS Videogames have been developed for a variety of different popular gaming consoles and platforms. Most recently, the Complainant released on the Steam platform on October 10, 2024 a remake of Backyard Baseball '97 and has announced remakes and remasters of other BYS Videogames.

The Disputed Domain Name was registered on July 3, 2024. It does not currently resolve to an active website but has in the past resolved to a website (the “Respondent’s Website”) which promoted and distributed unauthorized, infringing copies of BYS Videogames.

5. Parties’ Contentions

A. Complainant

The Complainant’s contentions are set out in detail and cite a large number of previous Uniform Domain Name Dispute Resolution Policy (“UDRP”) decisions. The Complainant’s case can be summarized as follows.

The Complainant says it has unregistered trademark rights in the term “BACKYARD BASEBALL”. It says that the material part of the Disputed Domain Name is identical to the BACKYARD BASEBALL trademark. It is also well-established that the country-code Top-Level Domain (“ccTLD”), in this case “.io”, may be disregarded when considering whether the Disputed Domain Name is identical or confusingly similar to a trademark in which the Complainant has rights.

The Complainant says that the Respondent has no rights or legitimate interests in the term “BACKYARD BASEBALL” as the Respondent’s Website cannot amount to a legitimate interest.

In consequence the Complainant alleges that the Disputed Domain Name was registered and is being used in bad faith. The Complainant says the nature of the Respondent’s Website is clear evidence of bad faith. It says that the Respondent’s Website injures Complainant, whose valuable rights in the BACKYARD BASEBALL mark are now being used on a domain name and website offering videogames infringing its copyrights and competing with its own goods.

B. Respondent

No Response has been filed.

6. Discussion and Findings

6.1 Preliminary Issue - Nature of the .IO Policy

So far as the .IO Policy is concerned, the Panel notes that it is substantially similar to (though not identical to) the UDRP as adopted by the Internet Corporation for Assigned Names and Numbers (“ICANN”). The Panel

will where appropriate apply principles that have been established in relation to the UDRP in determining this dispute, including those set out in WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)").

6.2 Procedural Matters – No Response

The Panel notes that no communication has been received from the Respondent. However, given the Complaint and Written Notice were sent to the relevant addresses disclosed by the Registrar, then the Panel considers that this satisfies the requirement in paragraph 2(a) of the Rules to “employ reasonably available means calculated to achieve actual notice”. Accordingly, the Panel considers it is able to proceed to determine this Complaint and to draw inferences from the Respondent’s failure to file any Response. While the Respondent’s failure to file a Response does not automatically result in a decision in favor of the Complainant, the Panel may draw appropriate inferences from the Respondent’s default (see, e.g., *Verner Panton Design v. Fontana di Luce Corp*, WIPO Case No. [D2012-1909](#)).

6.3 Substantive Matters

To succeed, in accordance with paragraph 4(a) of the Policy, the Complainant must satisfy the Panel that:

- (i) the Disputed Domain Name is identical with 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;
- (iii) the Disputed Domain Name has been registered or is being used in bad faith.

A. Identical or Confusingly Similar

The Panel finds that the Complainant has rights in the unregistered trademark BACKYARD BASEBALL for the purpose of this proceeding. It is clear that term has been used very extensively by the Complainant in relation to its videogame of that name. The evidence establishes the Complainant has developed a substantial reputation for this videogame.

The Panel agrees with the approach in [WIPO Overview 3.0](#) concerning this issue at paragraph 1.3:

“What does a complainant need to show to successfully assert unregistered or common law trademark rights?

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.

(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.)

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”.

The Panel also notes that the Respondent clearly thought it worthwhile to adopt an immaterial variation of the BACKYARD BASEBALL trademark to attract Internet users to the Respondent's Website. As the Panel noted in *NEOVIA, Hi-Nutrients International Ltd. v. WhoisGuard Protected, WhoisGuard, Inc. / Deniz Hus* WIPO Case No. [D2019-0600](#): "The Respondent did not provide arguments to the contrary; rather, in the Panel's view, the Respondent cannot dispute that, given it deliberately targeted the source identifier in an apparent fraud attempt. Such targeting of the Complainants is sufficient to establish limited trademark rights in the HI-NUTRIENTS trademark for the purposes of the Policy. See *PEMF Supply, LLC v. Domain Administrator, See PrivacyGuardian.org / Gregory Lewis, American Healthcare Foundation*, WIPO Case No. [D2019-0235](#) ('in light of the use of the PEMF SUPPLY mark that was submitted in this proceeding, the targeting of Complainant by Respondent is sufficient to establish Complainant has limited unregistered trademark rights in the PEMF SUPPLY mark for the purposes of the Policy')". See also *Greenspring Associates, Inc. v. Lisa Knowles, Victoria capital pty* WIPO Case No. [D2019-0265](#): "To that extent, Complainant has in fact used the domain name <gspring.com> as a source identifier for its services. One person who cannot dispute that fact is Respondent, who (as is discussed below) deliberately targeted that source identifier (<gspring.com>) to attempt to perpetrate a fraud via confusion. The Domain Name differs from the GSPRING mark only to the extent that the Domain Name replaces the 'i' with an 'l'. The visual similarity between the 'i' and the 'l' – especially when the font is small – is obvious".

The Panel refers below to the Complainant's unregistered rights as the "BACKYARD BASEBALL trademark".

The Panel considers the Disputed Domain Name to be confusingly similar to the BACKYARD BASEBALL trademark. The only difference is the omission of the space between the words "Backyard" and "Baseball" which the Panel considers immaterial – particularly given spaces cannot form part of a domain name for technical reasons

It is also well established that the ccTLD, in this case ".io", is not generally taken into account for the purpose of determining whether a domain name is identical or confusingly similar – see [WIPO Overview 3.0](#), section 1.11.1.

Accordingly the Panel finds that the Disputed Domain Name is confusingly similar to the Complainant's trademark and hence the first condition of paragraph 4(a) of the Policy has been fulfilled.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy provides a list of circumstances any of which is sufficient to demonstrate that a respondent has rights or legitimate interests in a domain name:

- (i) before any notice to the respondent of the dispute, 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) the respondent has been commonly known by the domain name, even if the respondent has acquired no trade mark or service mark rights; or
- (iii) the 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.

None of these apply in the present circumstances. The Complainant has not authorised, licensed, or permitted the Respondent to register or use the Disputed Domain Name or to use the BACKYARD BASEBALL trademark. The Complainant has prior rights in the BACKYARD BASEBALL trademark which precede the Respondent's registration of the Disputed Domain Name. The Complainant has therefore established a prima facie case that the Respondent does not have any rights or legitimate interests in the Disputed Domain Name and thereby the burden of production shifts to the Respondent to produce evidence demonstrating rights or legitimate interests in respect of the Disputed Domain Name (see for example *Do The Hustle, LLC v. Tropic Web*, WIPO Case No. [D2000-0624](#); *Croatia Airlines d.d. v. Modern Empire Internet Ltd.*, WIPO Case No. [D2003-0455](#)).

The Panel finds that the Respondent has failed to produce any evidence to establish his rights or legitimate interests in the Disputed Domain Name.

The Panel therefore finds that the Respondent has no rights or legitimate interests in the Disputed Domain Name and the second condition of paragraph 4(a) of the Policy has been fulfilled.

C. Registered or Used in Bad Faith

In the present circumstances the fact that the Disputed Domain Name was linked to the Respondent's Website which offers unauthorized copies of the Complainant's own videogames leads the Panel to conclude the registration and use of the Disputed Domain Name is in bad faith comprises:

Under paragraph 4(b) of the Policy a non-exhaustive list of factors evidencing registration and use in bad faith comprises:

“(i) circumstances indicating that you have registered or you have acquired the domain name 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 your documented out-of-pocket costs directly related to the domain name; or
(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or
(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or
(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.”

The Panel is not entirely sure which if any of these factors applies. The evidence is not clear as to whether the Respondent's Website is operated for commercial gain.

However the Panel notes that in any event the list set out in paragraph 4(b) of the Policy is non exhaustive and takes the view that the registration of the Disputed Domain Name with knowledge of the Complainant's well known trademark (which the Respondent must have had) is itself evidence of bad faith – see *The Channel Tunnel Group Ltd. v. John Powell*, WIPO Case No. [D2000-0038](#). This is particularly so given that the Respondent's activity is manifestly taking unfair advantage of the Complainant's own videogames and is harmful to the Complainant and its business.

Accordingly the Panel finds that the Disputed Domain Name has been registered and is being used in bad faith. Accordingly, the third condition of paragraph 4(a) of the Policy has been fulfilled.

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 Disputed Domain Name <backyardbaseball.io> be transferred to the Complainant.

/Nick J. Gardner/

Nick J. Gardner

Sole Panelist

Date: January 16, 2025