

## **ADMINISTRATIVE PANEL DECISION**

Open Society Institute v. NGUYEN NGOC TU  
Case No. D2022-4403

### **1. The Parties**

The Complainant is Open Society Institute, United States of America ("United States"), represented by Morrison & Foerster LLP, United States.

The Respondent is NGUYEN NGOC TU, Viet Nam.

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

The disputed domain name <opensocietyfoundations.homes> is registered with Porkbun LLC (the "Registrar").

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on November 18, 2022. On November 18, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On November 19, 2022, 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 (Private By Design, LLC) and contact information in the Complaint. The Center sent an email communication to the Complainant on November 21, 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 amendment to the Complaint on November 21, 2022.

The Center verified that the Complaint together with the amendment to the 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 November 23, 2022. In accordance with the Rules, paragraph 5, the due date for Response was December 13, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on December 19, 2022.

The Center appointed Reyes Campello Estebaran as the sole panelist in this matter on December 21, 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 an organization based in New York, United States. It funds a range of programs around the world and operates under the OPEN SOCIETY marks, including OPEN SOCIETY FOUNDATIONS, OPEN SOCIETY INSTITUTE, and OPEN SOCIETY POLICY CENTER.

The Complainant holds a number of trademark registrations for its OPEN SOCIETY marks, including United States Trademark Registration No. 4,248,358 for OPEN SOCIETY FOUNDATIONS, registered on November 27, 2012, in classes 9, 16, 36, 38, and 41.

The Complainant further owns the domain name <opensocietyfoundations.org> (registered on April 6, 2010), which resolves to its official site ("www.opensocietyfoundations.org"), in which the Complainant promotes its various programs and activities.

The disputed domain name was registered on October 21, 2022, and it resolves to a website that appears to be a template website or an under construction site. It includes various posts about different topics under a heading that includes the terms "X Mag Semi Magazine Theme" and a rectangle space apparently for a banner that includes the terms "banner 728x90". This site includes various generic sections: "Home", "Features", "Documentation", and "Download this Template", each of them displaying various promotional posts for a variety of categories listed as "Android", "Break", "Food", "Gadgets", "Ios", "Ipad", "Mobile", "News", "Slider", "Sport", "Technology", "Video", and "Watch". Although this site displays the titles and corresponding images of various posts (such as "The Best smartphones you can purchase right now in 2016", "Hidden iPad features that could improve your life", etc.), many of these posts are not updated, and all of them include a text in Latin language unrelated to their titles that is repeated for various sections. This site further displays a banner that offers a "Blogger Templates Provider". There is no information in this website about the owner of the site or that of the disputed domain name.

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

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

Key contentions of the Complaint may be summarized as follows:

The disputed domain name is identical to the OPEN SOCIETY FOUNDATIONS mark and the Complainant's domain name associated with that trademark. A domain name is considered identical to a trademark even if the generic Top-Level-Domain ("gTLD") differs.

The Respondent has no rights to or legitimate interest in the disputed domain name. The Respondent is not commonly known by the disputed domain name, and it has not made use of the disputed domain name in connection with a *bona fide* offering of goods or services or a legitimate noncommercial or fair use. The Respondent is not authorized or licensed to use the Complainant's trademark, and it is not a provider of the Complainant's services. The Respondent is passively holding the disputed domain name in connection with what appears to be a template website consisting of disjointed content that appears to exist only to reserve the domain name. The disputed domain name is identical to the Complainant's mark, and therefore cannot be a legitimate fair use.

The disputed domain name was registered and is being used in bad faith. The identical use of the Complainant's trademark in the disputed domain name, as well as the Complainant's long-term prior use of

the OPEN SOCIETY FOUNDATIONS mark, shows that the Respondent had actual knowledge of the Complainant's rights in this mark. Since April 6, 2010, the Complainant has operated a website at "www.opensocietyfoundations.org" to promote its mission. The Respondent's passive use of the disputed domain name amounts to bad faith based on the strong reputation of the Complainant's mark, the Respondent concealing of its identity, and the implausibility of any good faith use of the disputed domain name.

The Complainant has cited previous decisions under the Policy as well as various sections of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ("[WIPO Overview 3.0](#)") that it considers supportive of its position, and requests the transfer of the disputed domain name.

## **B. Respondent**

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

## **6. Discussion and Findings**

The Complainant has made the relevant assertions as required by the Policy and the dispute is properly within the scope of the Policy. The Panel has authority to decide the dispute examining the three elements in paragraph 4(a) of the Policy, taking into consideration all of the relevant evidence, annexed material and allegations, and performing some limited independent research under the general powers of the Panel articulated, *inter alia*, in paragraph 10 of the Rules.

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

The first element functions as a standing requirement under the Policy.

The Complainant indisputably has rights in the registered OPEN SOCIETY FOUNDATIONS mark. The disputed domain name incorporates this trademark in its entirety, and the gTLD ".homes" is a technical requirement, generally disregarded for the purpose of the analysis of the confusing similarity. See sections 1.7, and 1.11 of the [WIPO Overview 3.0](#).

Accordingly, this Panel finds that the disputed domain name is identical to the Complainant's trademark, and the first element of the Policy under paragraph 4(a)(i) has been satisfied.

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

Although the Complainant bears the ultimate burden of establishing all three elements of paragraph 4(a) of the Policy, UDRP panels have recognized that this could result in the often impossible task of proving a negative, requiring information that is primarily if not exclusively within the Respondent's knowledge. Thus, the consensus view is that paragraph 4(c) of the Policy shifts to the Respondent the burden of production to come forward with relevant evidence of rights or legitimate interests in the disputed domain name, once the Complainant has made a *prima facie* case that the Respondent lacks rights or legitimate interests.

The applicable standard of proof in UDRP cases is the "balance of probabilities" or "preponderance of the evidence", being the Panel prepared to draw certain inferences in light of the particular facts and circumstances of the case. See section 4.2, [WIPO Overview 3.0](#).

The Complainant's assertions and evidence effectively shift the burden to the Respondent of producing evidence of rights or legitimate interests in the disputed domain name, providing the circumstances of paragraph 4(c) of the Policy, without limitation, that may establish rights or legitimate interests in the disputed domain name in order to rebut the Complainant's *prima facie* case.

The Respondent, however, has not replied to the Complainant's contentions, not providing any explanation and evidence of rights or legitimate interests in the disputed domain name.

The Panels notes that the disputed domain name is used in connection to a website that appears to be a template. It indicates offering the possibility of downloading "this template" under one of its sections (the "Download this Temple" section). The Panel further notes that this site contains already a promotional banner that offers a "Blogger Templates Provider", and it further appears to offer space for additional banners, one that could be prominently displayed at its heading although currently in blank (an outlined rectangle that includes the term "banner" and a code number). The Panel considers that this content indicates that this site, although currently unfinished, appears to be conceived as a site of a commercial nature that includes promotional banners.

The Panel further notes that the heading of this template site and the current content of the site does not seem to have any connection to the terms included in the disputed domain name, displaying, at its heading, terms that do not coincide with any of the terms "open", "society", "foundations", or "homes". Its heading includes the terms "X Mag Semi Magazine Theme".

Additionally, the Panel notes that this site does not contain any information related to the owner of the site or that of the disputed domain name.

The Panel further notes that the disputed domain name is identical to the Complainant's trademark, generating a high risk of implied affiliation, particularly given the Complainant's operation of its website at the nearly identical domain name <opensocietyfoundations.org> that differs from the disputed domain name only by the applicable gTLD.

All the above-mentioned circumstances lead the Panel to conclude that the disputed domain name generates confusion or affiliation with the Complainant and its trademark, and the Respondent uses the terms "open society foundation" without any rights or legitimate interests for a commercial or promotional purpose, which cannot be considered as a *bona fide* offering or a legitimate noncommercial fair use under the Policy.

These cumulative facts and circumstances, unrebutted by the Respondent, support a finding that the Respondent lacks rights or legitimate interests in the disputed domain name. Therefore, the second element of the Policy under paragraph 4(a)(ii) has been established.

### **C. Registered and Used in Bad Faith**

The Policy, paragraph 4(a)(iii), requires that the Complainant establishes that the disputed domain name has been registered and is being used in bad faith.

The applicable standard of proof is, likewise, the "balance of probabilities" or "preponderance of the evidence", being the Panel prepared to draw certain inferences in light of the particular facts and circumstances of the case. See section 4.2, [WIPO Overview 3.0](#).

The Panel considers that all cumulative circumstances of this case point to bad faith registration and use of the disputed domain name.

The OPEN SOCIETY FOUNDATIONS mark is used internationally and over the Internet since, at least 2011. In this respect, the Panel, under its general powers articulated, *inter alia*, in paragraph 10 of the Rules, has corroborated the use of the Complainant's domain name <opensocietyfoundations.org> in the public Internet archive WayBackMachine, which contains numerous captures of the Complainant's website over the years, since February 4, 2011, until today. The Panel, under its general powers, has further consulted the Complainant's website, and notes that according to this site, the Complainant's operations span more than 120 countries.

The disputed domain name incorporates the Complainant's trademark in its entirety being identical to the OPEN SOCIETY FOUNDATIONS mark, and given the continued international use of the Complainant's trademark for more than a decade before the disputed domain name's registration and the near instantaneous and global reach of the Internet and search engines, the Panel finds that it stretches credulity that the Respondent happened upon the identical disputed domain name registration coincidentally.

The website that is linked to the disputed domain name has no connection to the Complainant or its trademark, and has no connection to the terms included in the disputed domain name ("open society foundations" or to the term "homes"). Additionally, this site is of promotional or commercial nature, indicating that the Respondent has intentionally sought to attract, for commercial gain, Internet users to its web site, by creating a likelihood of confusion with the Complainant's trademark as to the source, sponsorship, affiliation, or endorsement of the Respondent's web site. Furthermore, the Respondent has not come forward to deny the Complainant's assertions of bad faith, choosing not to reply to the Complaint.

Therefore, on the balance of probabilities, taking into consideration all cumulative circumstances of this case, the Panel considers that the disputed domain name was registered targeting the Complainant's trademark with the intention of obtaining a free ride on its established reputation, seeking to mislead Internet users to believe that there is a connection between the disputed domain name and the Complainant, to increase the traffic to the Respondent's site for a commercial gain, which constitutes bad faith.

All of the above-mentioned circumstances lead the Panel to conclude that the disputed domain name was registered and is being used in bad faith.

Accordingly, the Panel concludes that the Complainant has met its burden of establishing that the Respondent registered and is using the disputed domain name in bad faith under the third element 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 disputed domain name, <opensocietyfoundations.homes>, be transferred to the Complainant.

*/Reyes Campello Estebarez/*

**Reyes Campello Estebarez**

Sole Panelist

Date: December 28, 2022