

ADMINISTRATIVE PANEL DECISION

Play Perfect Ltd. v. xiao lu
Case No. D2023-3967

1. The Parties

The Complainant is Play Perfect Ltd., Israel, represented by BL&Z, Law Offices & Notaries, Israel.

The Respondent is xiao lu, China.

2. The Domain Name and Registrar

The disputed domain name <solitairesmash.club> is registered with GoDaddy.com, LLC (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on September 22, 2023. On September 25, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On September 25, 2023, 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 (Domains By Proxy, LLC) and contact information in the Complaint. The Center sent an email communication to the Complainant on September 29, 2023, 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 October 2, 2023.

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 October 5, 2023. In accordance with the Rules, paragraph 5, the due date for Response was October 25, 2023. The Respondent did not submit any substantive response. Accordingly, the Center notified the Respondent’s default on November 2, 2023.

The Center appointed Antony Gold as the sole panelist in this matter on November 21, 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 is a mobile gaming developer and service provider in the gaming industry. It has launched a number of online and mobile games that have become well known among gamers internationally. One of these games, launched in 2021, is known as Solitaire Smash and operates from a website established by the Complainant at the domain name <solitairesmash.com>. The Complainant owns many other domain names which comprise or include the term “Solitaire Smash” and says it has invested more than USD 5,000,000 in marketing and making available its SOLITAIRE SMASH-branded games on social networks, online platforms, and elsewhere. The Complainant’s Solitaire Smash game has been available on Apple’s App store since October 2021 and has been installed by almost 1,000,000 users worldwide. The Complainant has provided examples of the promotion of its Solitaire Smash game as well as third party reviews of it, which show that it had developed a profile in the online gaming community by late 2022. On June 7, 2023, the Complainant filed an application for a United States trademark for SOLITAIRE SMASH, number 98031882, in classes 9 and 41 which claims a first use in commerce date of August 24, 2021.

The disputed domain name was registered by the Respondent on December 28, 2022. It resolves to a website prominently branded as “Solitaire Smash” which features images of playing cards as well as that of a mobile phone, the screen of which displays an image of playing cards arranged in a solitaire configuration. The accompanying text includes the following: “Love Solitaire? Ready to defeat others using your passion and skills? This is where Classical Solitaire meets Modern Design. Be ready to immerse yourself in the ultimate Solitaire experience. [...] If you enjoy Solitaire Cash, SolitaireClash, Story, Bash, Holiday, Tycoon, Pop, Showdown, or Blitz Solitaire - you can't miss out on Solitaire Smash!”. Lower down the home page are details of the purported operator of the website, namely Bingo Smash LTD, with an address in Hong Kong, China. At the foot of the homepage is a copyright claim: “Copyright ©Solitaire Smash 2022”.

The Respondent has not responded to cease and desist correspondence sent by the Complainant’s representatives.

5. Parties’ Contentions

A. Complainant

The Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the disputed domain name. Notably, the Complainant contends that;

- the disputed domain name is identical to a trademark in which the Complainant has rights. By virtue of its substantial and continuous use of the trade name SOLITAIRE SMASH, it has acquired worldwide common law rights in this term, which it has used for more than 12 months prior to the registration by the Respondent of the disputed domain name;
- the Respondent has no rights or legitimate interests in respect of the disputed domain name. The mark SOLITAIRE SMASH is associated with the Complainant for online and mobile card games and, in this context, is well known worldwide. The Respondent does not own any trademark registrations for this term, nor does it have any common law rights in it. The Complainant has never authorized the Respondent to use the disputed domain name, nor is the Respondent making a *bona fide* offering of goods and services in respect of it. In particular, the Respondent is knowingly and intentionally misleading and diverting consumers to its website for commercial gain, thereby profiting from the Complainant’s repute in its SOLITAIRE SMASH mark by selling and promoting competing online and mobile card games under the same name;
- the disputed domain name was registered and is being used in bad faith. The disputed domain name was registered more than a year after the Complainant started using its SOLITAIRE SMASH mark in commerce and registered its domain names. It is evident that the Respondent registered the disputed domain name with knowledge of the Complainant and its trademark and in order to trade off its value, thereby amounting to bad faith registration.

The Respondent has been using the disputed domain name in order to intentionally to attract for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's SOLITAIRE SMASH mark as to the source, sponsorship, affiliation or endorsement of the Respondent's website. This is a circumstance from which the Panel may infer bad faith use. The Respondent's failure to respond to the Complainant's cease and desist letter is further evidence of its bad faith.

B. Respondent

An automated email response was sent by the Respondent in response to the Center's notification of Complaint dated October 5, 2023. However, the Respondent did not reply substantively to the Complaint.

6. Discussion and Findings

Dealing, first, with the Respondent's failure to file a substantive response to the Complaint, paragraph 14(b) of the Rules provides that if a party, in the absence of exceptional circumstances, does not comply with a provision of, or requirement under, these Rules, the Panel shall be entitled to draw such inferences from this omission as it considers appropriate.

Paragraph 4(a) of the Policy requires that the Complainant proves each of the following three elements in respect of each disputed domain name in order to succeed in its Complaint in relation to it: (i) the disputed domain name is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights; and (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.

A. Identical or Confusingly Similar

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; see the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 1.7.

Whilst the Complainant has provided details of its pending trademark application for SOLITAIRE SMASH, applications (as opposed to granted marks) do not, in themselves, establish trademark rights for the purpose of the first element of the Policy. However, the Complainant additionally claims unregistered trademark rights which, it says, pre-date the date of registration of the disputed domain name in December 2022.

Section 1.3 of the [WIPO Overview 3.0](#) explains that: "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".

Details of the Complainant's promotion of its "Solitaire Smash" game are set out in the Factual Background section above, from which it is evident that the Complainant commenced use of its SOLITAIRE SMASH trade name from August 2021, that is approximately 16 months prior to the registration of the disputed domain name. Although this period is relatively short, the "Solitaire Smash" game appears to have been extensively marketed during this period. It is unclear to what precise extent the Complainant's promotion of, and advertising spent on, the "Solitaire Smash" game pre-dated the registration of the disputed domain name but it is apparent that at least a proportion of it did so. Moreover, the fact that the Respondent has used the disputed domain name in order to provide identical gaming services using an identical mark indicates its awareness of the Complainant and its services as at the date of registration of the disputed domain name and provides sufficient affirmation of the repute of the Complainant's SOLITAIRE SMASH mark as at that

date. See section 1.3 of the [WIPO Overview 3.0](#): “The fact that a respondent is shown to have been targeting the complainant’s mark (e.g., based on the manner in which the related website is used) may support the complainant’s assertion that its mark has achieved significance as a source identifier”. Furthermore, the Complainant’s claim to unregistered rights in this term has not been challenged by the Respondent.

In the light of the above considerations, the Panel accepts that, as at the date of registration of the disputed domain name in December 2022, the term “Solitaire Smash” had become a distinctive identifier in respect of the Complainant’s provision of card-playing gaming software for online and mobile use and that the Complainant had thereby acquired unregistered trademark rights in SOLITAIRE SMASH by this date for the purpose of the first element of the Policy.

As a technical requirement of registration, the generic Top-Level Domain (“gTLD”), that is “.club” in the case of the disputed domain name, is usually disregarded when assessing confusing similarity. The Complainant’s SOLITAIRE SMASH mark is reproduced in its entirety within the disputed domain name with no additional characters. It is accordingly identical to the Complainant’s mark.

For the above reasons, based on the available record, the Panel finds that the first element of the Policy has been established.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy provides a list of circumstances in which the Respondent may demonstrate rights or legitimate interests in a disputed domain name.

While the overall burden of proof in proceedings under the Policy is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of “proving a negative”, requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element; see the [WIPO Overview 3.0](#), section 2.1.

Having reviewed the record, the Panel finds the Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the disputed domain name. The Respondent has not rebutted the Complainant’s *prima facie* showing and has not come forward with any relevant evidence demonstrating rights or legitimate interests in the disputed domain name. In particular, the Panel considers that the record of this case reflects that:

- before any notice to the Respondent of the dispute, the Respondent did not use, nor has it made demonstrable preparations to use, the disputed domain name or a name corresponding to the disputed domain name in connection with a *bona fide* offering of goods or services. The disputed domain name resolves to a website which provides card playing games in direct competition with the Complainant and the Respondent is using the repute of the Complainant’s mark in order to attract Internet users to its website ; see paragraph 4(c)(i) of the Policy, the [WIPO Overview 3.0](#), section 2.2, and *Flutter Entertainment plc and Rational Intellectual Holdings Limited v. Global Domain Privacy Services Inc / Anikeev Pavel*, WIPO Case No. [D2022-1312](#);
 - there is no evidence in the record that the Respondent has been commonly known by the disputed domain name; see paragraph 4(c)(ii) of the Policy and the [WIPO Overview 3.0](#), section 2.3;
 - the Respondent is not making a legitimate noncommercial or fair use of the disputed domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue; see paragraph 4(c)(iii) of the Policy and the [WIPO Overview 3.0](#), section 2.4;
- and

- the record contains no other factors demonstrating rights or legitimate interests of the Respondent in the disputed domain name.

For the above reasons, based on the available record, the Panel finds the second element of the Policy has been established.

C. Registered and Used in Bad Faith

The use which has been made of the disputed domain name, as described above, coupled with the identity between the Complainant's SOLITAIRE SMASH mark and the disputed domain name suggests, on at least a balance of probabilities, that the Respondent was aware of the Complainant and its SOLITAIRE SMASH mark as at the date of registration in December 2022 and that the Respondent registered the disputed domain name in order to take unfair advantage of the Complainant's rights. The Panel therefore finds the Respondent's registration of the disputed domain name to have been in bad faith.

In addition to the inherently misleading nature of the Respondent's website, Internet users aware of the Complainant's SOLITAIRE SMASH mark who visit it will be apt to assume from the misleading nature of the disputed domain name that the Respondent's website is owned by the Complainant or that it is operated with its authority. The Respondent is using the identity of the disputed domain name with the Complainant's mark to attract Internet visitors to its website and gain the opportunity to earn money from their visits.

For the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy establishes circumstances, without limitation, that if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith. The Respondent's use is in bad faith in that it has intentionally attempted to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of its website; see paragraph 4(b)(iv) of the Policy, the [WIPO Overview 3.0](#), section 3.1.4. and also *Cards Against Humanity, LLC v. Cards, Wangming*, WIPO Case No. [D2015-0078](#), and *Flutter Entertainment plc and Rational Intellectual Holdings Limited v. Global Domain Privacy Services Inc / Anikeev Pavel* (*supra*).

For the above reasons, the Panel finds the Respondent's registration and use of the disputed domain name is in bad faith and that the third element of the Policy has been established.

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 <solitairesmash.club> be transferred to the Complainant.

/Antony Gold/

Antony Gold

Sole Panelist

Date: December 5, 2023