

ADMINISTRATIVE PANEL DECISION

Electronic Arts Inc. v. Fomichev Artemy, Fidget
Case No. D2023-5409

1. The Parties

The Complainant is Electronic Arts Inc., United States of America, represented by Norton Rose Fulbright LLP, United States of America.

The Respondent is Fomichev Artemy, Fidget, Russian Federation.

2. The Domain Name and Registrar

The disputed domain name <plantvszombieplush.com> is registered with Alibaba.com Singapore E-Commerce Private Limited (the "Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on December 29, 2023. On January 2, 2024, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On January 3, 2024, the Registrar transmitted by email to the Center its verification response disclosing the registrant and contact information for the disputed domain name which differed from the named Respondent (Plant Vs Zombie Plush) and contact information in the Complaint. The Center sent an email communication to the Complainant on January 8, 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 January 12, 2024.

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 January 19, 2024. In accordance with the Rules, paragraph 5, the due date for Response was February 8, 2024. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on February 20, 2024.

The Center appointed Dr. Clive N.A. Trotman as the sole panelist in this matter on February 26, 2024. 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

“Plants Vs. Zombies” is an on-line video game marketed by the Complainant since 2008, initially through its subsidiary PopCap Games, Inc. The game and associated merchandise are promoted through the website “www.ea.com/games/plants-vs-zombies”.

The Complainant holds some 94 trademarks world-wide for PLANTS VS. ZOMBIES either standing alone or in combination, of which the following are representative for the purposes of this proceeding:

PLANTS VS. ZOMBIES, United States Patent and Trademark Office (USPTO), registration number 4276255, registered on January 15, 2013;

PLANTS VS. ZOMBIES, USPTO, registration number 3851667, registered on September 21, 2010;

PLANTS VS. ZOMBIES, USPTO, registration number 4023131, registered on September 6, 2011.

The Complainant is also represented and well followed on social media including Facebook and Instagram.

The Complainant has owned the domain names <plantsvszombies.com> and <plantvszombie.com> since December 2008.

The Complainant licenses its trademark to various manufacturers and distributors for the sale of plush toys, toy figures, comics, and apparel, pertaining to the Plants Vs. Zombies game and incorporating the Complainant’s trademark.

The Respondent has not provided any background information except for the information provided for the purpose of registration of the disputed domain name on September 27, 2022. The Whois database disclosed only the Registrant State/Province as Pushkino, Russian Federation, and such further contact details as the Respondent had submitted were subsequently disclosed by the Registrar. The disputed domain name resolved on November 8, 2023, to a website headed “Plant Vs Zombie Plush – Official Plants Vs Zombies Stuffed Toy Store”, bearing photographs of toys, clothes and accessories for sale.

The Complainant sent a cease-and-desist letter by email to the Respondent on June 15, 2023. There was no reply.

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 confusingly similar to a trademark in which the Complainant has rights. The Respondent’s omission of the letter “s” thereby varying the words “plants” and “zombies” in the Complainant’s trademark to the singular “plant” and “zombie” respectively in the disputed domain name, does not create a distinction. The addition of the generic word “plush” in the disputed domain name does not

distinguish it from the Complainant's trademark, but adds to confusion because it describes the Complainant's services.

The Complainant further contends that the Respondent has no rights or legitimate interests in respect of the disputed domain name. The Respondent registered the disputed domain name some 14 years after the Complainant first used its trademark. The Complainant is not affiliated with the Respondent and has not authorized the Respondent to use the Complainant's trademark. There is no evidence the Respondent has previously held or applied for any trademark similar to the Complainant's trademark or been commonly known by any similar name. The Respondent is trading off the goodwill created by the Complainant in its trademark.

The Complainant says the disputed domain name was registered and is being used in bad faith.

The Respondent's intention in registering the disputed domain name is to trade off the Complainant's trademark and to sell counterfeit copies of the Complainant's products. The Respondent cannot claim not to have known of the Complainant's trademark, which had been in use for about 14 years. The Respondent is intentionally attempting to attract Internet users to its website by creating a likelihood of confusion between the disputed domain name and the Complainant's trademark.

The Complainant requests the transfer of the disputed domain name.

B. Respondent

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

6. Discussion and Findings

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.

The Complainant has shown rights in respect of a trademark or service mark for the purposes of the Policy ([WIPO Overview 3.0](#), section 1.2.1).

The Panel finds the trademark is recognizable within the disputed domain name. The use of the singular words "plant" and "zombie" in the disputed domain name, whereas the Complainant's trademark contains the plurals "plants" and "zombies", is found not to prevent a finding that "at least a dominant feature of the relevant mark" is reproduced in the disputed domain name ([WIPO Overview 3.0](#), section 1.7) and that the omission of the letter "s" also represents "a common, obvious, or intentional misspelling of a trademark" ([WIPO Overview 3.0](#), section 1.9). Accordingly, the disputed domain name is confusingly similar to the trademark for the purposes of the Policy.

Although the addition of other terms (here, "plush") may bear on assessment of the second and third elements, the Panel finds the addition of such term in the present case does not prevent a finding of confusing similarity between the disputed domain name and the trademark for the purposes of the Policy ([WIPO Overview 3.0](#), section 1.8).

The Panel finds 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.

Although the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the difficult 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 (although the burden of proof always remains on the complainant). If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element: [WIPO Overview 3.0](#), section 2.1.

Having reviewed the available 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 such as those enumerated in the Policy or otherwise.

Panels have held that the use of a domain name for illegal activity (here, the sale of counterfeit goods) can never confer rights or legitimate interests on a respondent: [WIPO Overview 3.0](#), section 2.13.1.

The Panel finds the second element of the Policy has been established.

C. Registered and Used in Bad Faith

The Panel notes that, for the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy establishes circumstances, in particular, but 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. Paragraph 4(b)(iv) of the Policy reads:

“(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 website or location or of a product or service on your website or location”.

The Complainant has produced in evidence a screen capture of the website to which the disputed domain resolved on November 8, 2023. The Respondent’s website, running to several pages, was prominently headed with a large pastiche of what appear to be stuffed toys representing imaginary plants and zombie creatures, with the words in banner lettering “PLANTS VS. ZOMBIES PLUSH”; notably the words “plants” and “zombies” were in the plural, as in the Complainant’s trademark. Beneath the picture was the announcement “Plant Vs Zombie Plush – Official Plants Vs Zombies Stuffed Toy Store”. The legend read “Plant Vs Zombie Plush is the Official store selling Plants Vs Zombies Stuffed Toy and more. The Plant Vs Zombie Plush Collection is a must-have for any gamer or fan of the game. This product is available for purchase, and makes it easy to carry your favorite character with you everywhere”. There followed several pages of illustrations of stuffed toys for sale with prices, also items of clothing and a bag emblazoned “PLANTS VS. ZOMBIES”. Later, various further assertions of legitimacy appeared and a purported head office address was stated to be in Dayton, Texas.

The Complainant states that the website of the disputed domain name is not the Complainant’s, and the Complainant provides a screen capture of its own website, which is in the Chinese language, for comparison. The Respondent’s website, apart from being in English, has a broadly similar look and feel to the Complainant’s website. The Complainant has produced side by side comparisons of toys pictured on the

Respondent's website that are similar to the Complainant's own products, namely a sunflower with a smiley face, a pair of cherries with angry faces, a shark head, and something resembling corn on the cob.

On the totality of the evidence, including the similarity of the disputed domain name to the Complainant's distinctive trademark and the Respondent's spurious claim to represent the Complainant's official store, the Panel finds it implausible that the Respondent did not know about the Complainant or had not intended to target specifically the Complainant by selling what appear to be counterfeit copies of the Complainant's products.

On the evidence, the Panel finds the Respondent to have used the disputed domain name intentionally in order to mislead and confuse Internet visitors into believing erroneously that the goods it offered for sale were those of the Complainant or were endorsed by the Complainant, particularly by repeated use of the Complainant's trademark and by displaying the statement, not authorized by the Complainant, "Plant Vs Zombie Plush – Official Plants Vs Zombies Stuffed Toy Store". The items promoted by the Respondent are priced for sale and the website is clearly for commercial gain.

On the evidence and on the balance of probabilities, the Panel finds the Respondent to have registered and used the disputed domain name in bad faith under paragraphs 4(b)(iv) and 4(a)(iii) of the Policy. The Panel finds that the Complainant has established 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 <plantvszombieplush.com> be transferred to the Complainant.

/Dr. Clive N.A. Trotman/

Dr. Clive N.A. Trotman

Sole Panelist

Date: March 8, 2024