

ADMINISTRATIVE PANEL DECISION

Brain Dead Amusements, LLC v. Battle Wear Pty Ltd
Case No. DAU2024-0014

1. The Parties

The Complainant is Brain Dead Amusements, LLC, United States of America (“United States”), represented by Stubbs Alderton & Markiles, LLP, United States.

The Respondent is Battle Wear Pty Ltd, Australia.

2. The Domain Name and Registrar

The disputed domain name <wearebraindead.com.au> is registered with Domain Directors Pty Ltd.

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 13, 2024. On May 14, 2024, the Center transmitted by email to Domain Directors Pty Ltd. a request for registrar verification in connection with the disputed domain name. On May 16, 2024, Domain Directors Pty Ltd. 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 and contact information in the Complaint. The Center sent an email communication to the Complainant on May 16, 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 May 21, 2024.

The Center verified that the Complaint together with the amended 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 proceeding commenced on May 27, 2024. In accordance with the Rules, paragraph 5(a), the due date for Response was June 16, 2024. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on June 21, 2024.

The Center appointed Sebastian M.W. Hughes as the sole panelist in this matter on June 27, 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

A. Complainant

The Complainant is a clothing, accessories and home goods company founded in 2014 and headquartered in California in the United States, providing its goods under the trade mark BRAIN DEAD (the "Trade Mark") and via its website at "www.wearebraindead.com" (the "Complainant's Website"), including to customers in Australia. In addition to several registrations for the Trade Mark in the United States, the Complainant is the owner of Australian registration No. 1882233 for the Trade Mark, with a registration date of May 23, 2018.

B. Respondent

The Respondent is a company incorporated in Australia.

C. The Disputed Domain Name

The disputed domain name was registered on December 12, 2023.

D. Use of the Disputed Domain Name

The disputed domain name is resolved to an English language website that impersonates the Complainant's Website, featuring prominently the Trade Mark and the Complainant's logo trade mark, including photographs of the Complainant's products copied from the Complainant's Website, and apparently offering for sale the Complainant's products, at discounted prices.

5. Parties' Contentions

A. Complainant

The Complainant contends that the disputed domain name is identical or confusingly similar to the Trade Mark, the Respondent has no rights or legitimate interests in respect of the disputed domain name, and the disputed domain name has been registered or subsequently used in bad faith.

B. Respondent

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

6. Discussion and Findings

A. Identical or Confusingly Similar

The Panel finds that the Complainant has rights in the Trade Mark.

The entirety of the Trade Mark is reproduced within the disputed domain name. Accordingly, the Panel finds that the disputed domain name is confusingly similar to the Trade Mark for the purposes of the Policy.

Although the addition of other terms (here, the prefix "we are") may bear on assessment of the second and third elements, the Panel finds the addition of such term does not prevent a finding of confusing similarity between the disputed domain name and the Trade Mark for the purposes of the Policy.

Accordingly, the Complainant has fulfilled the first condition of paragraph 4(a) of the Policy.

B. Rights or Legitimate Interests

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

- (i) before any notice to the respondent of the dispute, the respondent's use of, or 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; or
- (ii) the respondent (as an individual, business, or other organization) has been commonly known by the disputed domain name even if the respondent has acquired no trade mark or service mark rights; or
- (iii) the respondent is making a legitimate non-commercial 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.

The Complainant has not authorised, licensed, or permitted the Respondent to register or use the disputed domain name or to use the Trade Mark. The Panel finds on the record that there is therefore a prima facie case that the Respondent has no rights or legitimate interests in the disputed domain name, and the burden is thus on the Respondent to produce evidence to rebut this presumption.

The Respondent has failed to show that it has acquired any trade mark rights in respect of the disputed domain name or that the disputed domain name has been used in connection with a bona fide offering of goods or services. To the contrary, the disputed domain name has been resolved to the Website in order to impersonate the Complainant's Website.

There has been no evidence adduced to show that the Respondent has been commonly known by the disputed domain name.

In light of the above uncontested matters, the Panel finds that the Respondent has failed to produce any evidence to establish genuine rights or legitimate interests in the disputed domain name.

Accordingly, the Complainant has fulfilled the second condition of paragraph 4(a) of the Policy.

C. Registered or Subsequently Used in Bad Faith

In light of the manner of use of the Website, the Panel finds that the requisite element of bad faith has been made out pursuant to paragraph 4(b)(iv) of the Policy.

Accordingly, the Complainant has fulfilled the third condition of paragraph 4(a) 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 <wearebraindead.com.au> be transferred to the Complainant.

/Sebastian M.W. Hughes/

Sebastian M.W. Hughes

Sole Panelist

Date: July 11, 2024