

## **ADMINISTRATIVE PANEL DECISION**

EnchantedMob Inc. v. Privacy service provided by Withheld for Privacy ehf /  
Edge Lorde

Case No. DIO2022-0028

### **1. The Parties**

The Complainant is EnchantedMob Inc., United States of America (“United States”), represented Harness, Dickey & Pierce, PLC., United States.

The Respondent is Privacy service provided by Withheld for Privacy ehf, Iceland / Edge Lorde, Viet Nam.

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

The disputed domain name <poppyplaytimegame.io> is registered with NameCheap, Inc. (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on June 28, 2022. On June 29, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On June 29, 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 and contact information in the Complaint. The Center sent an email communication to the Complainant on June 30, 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 amended Complaint on July 5, 2022.

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 July 7, 2022. In accordance with the Rules, paragraph 5, the due date for Response was July 27, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on July 28, 2022.

The Center appointed Andrew D. S. Lothian as the sole panelist in this matter on August 4, 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 a digital media company, having its origins in 2014 as a hobby outlet for animated projects. The Complainant's most popular game is "Poppy Playtime", a survival horror video game. Said game has over 35,000 reviews on gaming platform Steam. The Complainant provides a website at "www.enchantedmob.com/poppy-playtime.html" for users to access information on said game, including links to the official game on the Steam platform. Said game is released in phases or chapters. The first trailer for said game was released on May 9, 2021, followed by the first chapter on October 12, 2021.

The Complainant indicates that the said game was well-received and quickly noticed on popular outlets, including YouTube and Twitch. The YouTube video that advertises chapter one of said game has garnered over 2.3 million views, while a later video on the subject has 50.7 million views, which the Complainant asserts is similar to the view count of a trailer for a major motion picture. The Complainant's Twitch channel for "Poppy Playtime" has 242,000 followers. As a result of this popularity, gained in a relatively short period, the Complainant claims unregistered trademark rights in the mark POPPY PLAYTIME.

The Complainant does not appear to own any registered trademarks for the mark POPPY PLAYTIME, although it filed an application for a United States Trademark on January 13, 2022, on which a corresponding International Trademark application is based.

The disputed domain name was registered on December 21, 2021. The associated website is entitled "POPPY PLAYTIME". The title appears in the distinctive typeface used by the Complainant's game. Beneath the title is artwork from the Complainant's game along with the statement "Poppy Playtime / PLAY NOW". The Complainant notes that said website offers an unauthorized version of its said game.

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

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

In summary, the Complainant contends as follows:

##### *Identical or confusingly similar*

The Complainant has established unregistered trademark rights prior to the registration of the disputed domain name via the Complainant's extensive use of the POPPY PLAYTIME trademark on the game itself, and related advertising, trailers, the Complainant's and third party websites, and licensed merchandise, dating to at least as early as May 2021. The only difference between said mark and the disputed domain name is the addition of the word "game" and the Top-Level Domain. The incorporation of a trademark in its entirety in a domain name is sufficient to establish identity or confusing similarity. The addition of the Top-Level Domain is insufficient to distinguish the disputed domain name from the Complainant's trademark.

##### *Rights or legitimate interests*

The use of the disputed domain name is neither a *bona fide* offering of goods or services nor a legitimate noncommercial or fair use. On June 10, 2022, the disputed domain name resolved to a website claiming to offer the Complainant's game, including a "Play Now" button and user comments section. The Respondent is attempting to pass itself off as the Complainant to offer an unauthorized version of the Complainant's game. Unauthorized or pirated versions of video games have been found by previous panels under the

Policy not to be a *bona fide* offering of goods or services nor legitimate noncommercial or fair use. There is nothing in the Whois record for the disputed domain name to indicate that the Respondent is commonly known thereby. The Complainant has not licensed or otherwise permitted the Respondent to use the POPPY PLAYTIME mark or to apply for the disputed domain name.

*Registered or used in bad faith*

The record supports both registration and use in bad faith. The registration and use of the disputed domain name, being confusingly similar to the Complainant's POPPY PLAYTIME mark, resolving to a pirated version of the game, including the Complainant's copyright protected material, evidences a clear intent to trade upon the goodwill associated with such mark or to pass itself off as the Complainant and violates paragraph 4(b)(iv) of the Policy. The use of a pirated version is itself evidence of bad faith under paragraph 4(b)(iii) of the Policy.

**B. Respondent**

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

**6. Discussion and Findings**

In terms of paragraph 4(a) of the Policy, for the Complaint to succeed, the Complainant must prove each of the following on the balance of probabilities:

- (i) the disputed domain name is identical 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; and
- (iii) the disputed domain name has been registered or is being used in bad faith.

**A. Identical or Confusingly Similar**

The Complainant has not put forward details of any registered trademark rights in the mark POPPY PLAYTIME. An application for a trademark registration which has not yet proceeded to grant is insufficient to meet the first element threshold. The Complainant has however made a claim to unregistered trademark rights in said mark. Section 1.3 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)")<sup>1</sup> provides examples of the types of evidence that a complainant may put forward in order to assert unregistered trademark rights successfully under the Policy, noting that, to establish such rights, a 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. Specific evidence is required and conclusory allegations, even if undisputed in the case concerned, would not normally suffice to show secondary meaning.

In the present case, the Complainant describes and provides documentary evidence of its activities under the POPPY PLAYTIME mark in the computer gaming space, being a market in which the Panel is aware that brands may achieve very rapid recognition in a short space of time, provided that a game proves popular. It is evident in the present case that the Complainant's "Poppy Playtime" game has been extremely popular. As far as the Panel can tell from the evidence, such popularity most probably commenced from the date of its launch or even potentially before then, based upon the number of views of the related YouTube trailer and

gaming videos, and the number of followers which the Complainant has gained on social media.

Considering the videos in particular, the Panel notes that several of these were published many months ago and have very substantial view counts. Notably, the Complainant's chapter one video featuring the mark POPPY PLAYTIME has received five million views and the relative You Tube channel as a whole has some 878,000 subscribers. Meanwhile, the Complainant's game, as featured on the Steam platform, shows some 35,000 "mostly positive" reviews since the release date of October 12, 2021. This evidence is consistent with the Complainant's eponymous computer game having achieved rapid notoriety.

In this particular case, the Panel also takes the content of the website associated with the disputed domain name into consideration, from which it is evident that the Respondent is intentionally referencing the Complainant's said game and POPPY PLAYTIME mark. Although panels under the Policy generally do not factor such content into the first element assessment, it can be relevant in cases such as the present one, where it affirms the Complainant's assertion of unregistered trademark rights by indicating that the Respondent is targeting the Complainant's mark as a source identifier, based on the manner in which the related website is used (see section 1.3 of the [WIPO Overview 3.0](#)).

The Panel notes that the title of the Respondent's website reproduces the Complainant's stylized word logo for POPPY PLAYTIME, which is in a highly distinctive black and red typeface, together with an image used by the Complainant to promote its game consisting of a blue creature with black eyes, red lips and sharp teeth. The creature image is itself distinctive and features prominently on the Complainant's official website and on the Steam platform. This demonstrates to the Panel's satisfaction that the Respondent is intentionally referencing the Complainant's POPPY PLAYTIME mark via the disputed domain name and associated website, and affirms the Complainant's case regarding its unregistered trademark rights in the said mark. Taking the evidence on record as a whole, the Panel finds that it is more than sufficient, particularly in the absence of any countervailing evidence or challenge from the Respondent, to find that the Complainant has unregistered trademark rights in the POPPY PLAYTIME mark.

Turning to the comparison exercise, the Panel notes that said mark is repeated in its entirety in the disputed domain name, absent a space, which is not permitted in a domain name for technical reasons, coupled with the word "game". The Panel finds that the Complainant's trademark is entirely recognizable in the disputed domain name notwithstanding the presence of the additional word. This is sufficient for the Panel to find identity or confusing similarity within the meaning of the Policy. Section 1.7 of the [WIPO Overview 3.0](#) provides *inter alia* that, while each case is judged on its own merits, in cases where a domain name incorporates the entirety of a trademark, or where at least a dominant feature of the relevant mark is recognizable in the domain name, the domain name will normally be considered confusingly similar to that mark for purposes of UDRP standing.

When comparing the domain name concerned to a complainant's trademark, the Top-Level Domain ("TLD") of said domain name typically does not form part of the comparison. See section 1.11.1 of the [WIPO Overview 3.0](#), which states that the "applicable TLD in a domain name (e.g., ".com", ".club", ".nyc") is viewed as a standard registration requirement and, as such, is disregarded under the first element of the confusing similarity test". In the present case, the Panel accordingly disregards the TLD ".io" in the comparison exercise.

In all of these circumstances, the Panel finds that the disputed domain name is confusingly similar to the Complainant's unregistered trademark and that the Complainant has carried its burden with regard to paragraph 4(a)(i) of the Policy.

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

Paragraph 4(c) of the Policy sets out a non-exhaustive set of circumstances, any of which, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate a respondent's rights or legitimate interests to a domain name for the purposes of paragraph 4(a)(ii) of the Policy, namely:

- “(i) before any notice to you of the dispute, your 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) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
- (iii) you are 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.”

In cases under the Policy, it is usually sufficient for a complainant to make out a *prima facie* case under the second element of the Policy, not rebutted by the respondent, that the respondent has no rights or legitimate interests in the domain name concerned (see, for example, *LinkedIn Corporation v. DNS Admin, Botflip LLC*, WIPO Case No. [DIO2022-0005](#); *Disney Enterprises, Inc. v. Herry Johnson*, WIPO Case No. [DIO2022-0002](#); and the discussion in section 2.1 of the [WIPO Overview 3.0](#)).

The Panel is satisfied that the Complainant has made out the requisite *prima facie* case here, based upon its submissions that the disputed domain name claims to offer the Complainant’s game, which it is not authorized by the Complainant to do, and thereby passes itself off as the Complainant. The Panel accepts the Complainant’s contention that an unauthorized or pirated version of a video game would neither be regarded as a *bona fide* offering of goods and services nor a legitimate noncommercial or fair use under the Policy. Equally, the Panel notes that the Whois record for the disputed domain name does not suggest that the Respondent is commonly known by it.

As the Respondent has not replied to the Complainant’s contentions, there is no rebuttal of the Complainant’s *prima facie* case on this topic. In all of the above circumstances, the Panel finds that the Complainant has carried its burden with regard to paragraph 4(a)(ii) of the Policy.

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

On this topic, the Complainant requires to prove that the disputed domain name was registered or that it was used in bad faith. Paragraph 4(b) of the Policy sets out four non-exhaustive examples of circumstances which, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith, namely:

- (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 online 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.

It is clear from the nature of the disputed domain name (composed of the Complainant’s mark with a term related to the Complainant’s business) that the Respondent registered the disputed domain name in the knowledge of the Complainant’s rights in the POPPY PLAYTIME mark and with intent to target these, given

that it subsequently made available a pirated or unauthorized version of such game using the Complainant's iconography. The said website reproduces the Complainant's mark, distinctive typeface and creature logo, and is evidently designed to pass itself off as the Complainant. Such impersonation and the offering of a pirated version of the Complainant's game under the Complainant's artwork and logos could on no view be regarded as a good faith activity (see, for example, *Take-Two Interactive Software, Inc. v. Jamie Stokes*, WIPO Case No. [D2013-0667](#)).

As noted above, the Respondent chose not to take part in the administrative proceeding and therefore has provided no answer to the Complainant's contentions. The fact that the Respondent has decided not to provide any legitimate explanation or to assert any alleged good faith motivation in respect of the registration or use of the disputed domain name in the face of the Complainant's contentions can be regarded, in itself, as an indicator of registration or use in bad faith (see, for example, *Novartis AG. v. Mathew French*, WIPO Case No. [DIO2020-0011](#)).

In all of these circumstances, the Panel finds that the Complainant has carried its burden of showing bad faith registration or use of the disputed domain name under paragraph 4(a)(iii) 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, <poppyplaytimegame.io> be transferred to the Complainant.

*/Andrew D. S. Lothian/*

**Andrew D. S. Lothian**

Sole Panelist

Date: August 18, 2022

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<sup>1</sup> Noting the substantial substantive similarities between the Policy and the Uniform Domain Name Dispute Resolution Policy ("UDRP"), the Panel has referred to the [WIPO Overview 3.0](#) and prior UDRP cases, where appropriate (see also *Government Employees Insurance Company ("Geico") v. Privacy.cc / Bulent Tekmen*, WIPO Case No. [DIO2020-0003](#)).