



WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

Fall Nummer: D2002-0973

Entscheidung vom 4. März 2004

1. The Parties

The Complainant in this proceeding is Ho.. Incorporated, ..., Illinois, United States of America ("Complainant"). The Respondent is Wristb.. Re..., Inc., ..., Wisconsin, United States of America ("Respondent").

2. The Domain Name and Registrar

The domain name in issue is <wristticket.com> ("Domain Name") and is registered with Network Solutions, LLC. ("Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on December 10, 2003, by e-mail with hard copies received by the Center on December 16, 2003. On December 11, 2003, the Center transmitted by e-mail to the Registrar a request for registrar verification in connection with the Domain Name. On December 12, 2003, the Registrar transmitted by e-mail to the Center its verification response confirming that the Respondent is listed as the registrant of the Domain Name and providing the contact details for the administrative and technical contacts for the Domain Name. The Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy"), 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(a) and 4(a), the Center formally notified the Respondent of the Complaint and the proceedings commenced on January 13, 2004. In accordance with the Rules, Paragraph 5(a), the due date for submitting a Response was February 2, 2004. The Respondent's representative requested an extension until February 20, 2004, to file a Response to the Complaint. The Complainant's representative agreed to an extension but only until February 6, 2004, and the Center proceeded to grant such an extension. The Respondent's representative accordingly filed a Response to the Complaint with the Center by the deadline of February 6, 2004.

On February 16, 2004, the Center invited the undersigned Panelist to serve as a single member panel in this proceeding. The Panelist submitted a "Statement of Acceptance and Declaration of Impartiality and Independence" to the Center, as required, to ensure compliance with the Rules, Paragraph 7. The Center sent a "Notification of Appointment of Administrative Panel and Projected Decision Date" by e-mail to the parties on February 19, 2004.

Having reviewed the entire record submitted for this proceeding, the Panelist concurs with the Center's finding that the Complaint is in compliance with the Policy, Rules and Supplemental Rules and finds that the Panel was properly constituted and appointed.

4. Factual Background

The Complainant bases the Complaint on U.S. Registration No. 2,125,521 (first use and first use in commerce February 5, 1974; issued December 30, 1997) for the mark WRISTICKET used in connection with non-metallic access control identification bands. The Complainant provided a copy of the U.S. registration for the mark WRISTICKET as Annex 3 to the Complaint. The Complainant is also the registrant of the domain name <wristicket.com> which was registered on June 22, 2000, and operates a web site accessible at this domain name for its WRISTICKET brand products. A copy of the Whois information for this domain name was attached as Annex 4 to the Complaint. Copies of pages from the web site accessible at the domain name <wristicket.com> were provided by the Respondent as Annex 14 to the Response.

The Domain Name in issue was registered on December 4, 2000, to the Respondent and there is currently a web site accessible at the Domain Name for information concerning the Respondent and its products. A copy of the Whois information for the Domain Name and copies of pages from the corresponding web site were attached as Annex 1 to the Complaint.

5. Parties' Contentions

The Complainant asserts that the Domain Name in issue is identical in sound and differs only in the spelling from the Complainant's Mark, that the Respondent has no legitimate or valid interest in respect of the Domain Name, that the only purpose supporting registration of a visually similar and phonetically identical Domain Name to a registered Mark is to benefit the registrant commercially through misleading consumers and that by using the Domain Name the Respondent intentionally attempted to attract for commercial gain Internet users to the Respondent's web site by creating a likelihood of confusion with the Complainant's Mark as to the source, sponsorship, affiliation or endorsement of the Respondent's web site and location of a product on the Respondent's web site.

The Respondent asserts that the Complainant does not have the claimed rights for use of the Mark in conjunction with the goods, that the Respondent has a legitimate right or interest in the Domain Name based on the Respondent's long-standing presence in the industry, the Complainant's long-standing absence from the market and the Respondent's business operation and that the Complainant has not shown that the Respondent registered and used the Domain Name in bad faith.

6. Discussion and Findings

Paragraph 4(a) of the Policy states that the domain name holder is to submit to a mandatory administrative proceeding in the event that a third party (complainant) asserts to an ICANN approved dispute resolution service provider that:

- (i) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;
- (ii) the domain name holder has no rights or legitimate interests in respect of the domain name;
- and
- (iii) the domain name has been registered and is being used in bad faith.

The Panelist can rule in a complainant's favor only after the complainant has proven that the above-listed elements are present.

A. Identical or Confusingly Similar

In the present proceeding, the Complainant has provided sufficient documentation showing that it is the owner of U.S. Trademark Registration No. 2,125,521 for the mark WRISTICKET and has rights therein. A review of the second-level domain of the domain name <wristicket.com> shows that the domain differs from the mark WRISTICKET by the addition of the letter "t". Such addition does not prevent the Domain Name from being considered confusingly similar, if not virtually identical, to the Complainant's Mark. The Panelist thus finds that Paragraph 4(a)(i) has been satisfied based upon the Domain Name being confusingly similar, if not

virtually identical, to the mark WRISTICKET.

It is noted that this finding is based solely on a comparison between the registered Mark and the Domain Name in issue and that, based on the findings below, accordingly does not necessitate a determination of how the Complainant is actually using its Mark.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy sets out circumstances, in particular but without limitation, which, if found by the Panelist to be proven based on her evaluation of all of the evidence presented, can demonstrate the holder's rights to or legitimate interests in the Domain Name. These circumstances include:

- (i) before any notice to the holder of the dispute, the holder's 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) the holder (as an individual, business, or other organization) has been commonly known by the domain name, even if the holder has acquired no trademark or service mark rights; or
- (iii) the domain name holder is 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.

The Complainant asserts, upon information and belief, that the Respondent intentionally chose the Domain Name due to its confusing similarity to the Complainant's Mark and its own domain name and as a way to increase traffic to the Respondent's website and to effect an increase of sales of its product which is directly competitive to the Complainant's product sold under its Mark. The Complainant further asserts, that through the Respondent's use of its web site, the Respondent is unfairly benefiting from the fame and goodwill of the Complainant's Mark.

However, the evidence submitted in this proceeding by the Respondent concerning its registration and use of the Domain Name and the words "wrist ticket", prior to notice from the Complainant of a dispute concerning the Domain Name, appears to support its claim that it was using the Domain Name legitimately in connection with its business. Additionally, the Respondent's evidence of affidavits from its competitors, news articles, web pages and search engine results also appears to support its claim that it is using the words "wrist ticket" in a domain name as the words are commonly used and understood in the industry and by the public to refer to an identifying band placed on an individual's wrist as a form of ticketing and not as a means of benefiting from association with the Complainant's Mark.

The Panelist therefore finds that, based upon the evidence submitted in this proceeding, the Complainant has failed to satisfy Paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

Paragraph 4(b) of the Policy states that evidence of registration and use in bad faith by the holder includes, but is not limited to:

- (i) circumstances indicating that the holder has registered or has 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 the holder's documented out-of-pocket costs directly related to the domain name; or
- (ii) the holder has 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 the

holder has engaged in a pattern of such conduct; or
(iii) the holder has registered the domain name primarily for the purpose of disrupting the business of a competitor; or
(iv) by using the domain name, the holder has intentionally attempted to attract, for commercial gain, Internet users to the holder's 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 the holder's web site or location.

With respect to this proceeding, the Complainant has failed in its burden to show that the Domain Name was registered and is being used in bad faith by the Respondent. Particularly, the Complainant has failed to provide evidence that the Respondent: (i) registered the Domain Name primarily for the purpose of selling, renting or otherwise transferring the Domain Name to the Complainant for valuable consideration; (ii) registered the Domain Name to prevent the Complainant from reflecting its mark in a corresponding domain name and has engaged in a pattern of conduct of registering domain names incorporating the trademarks of third parties; (iii) registered the Domain Name primarily for the purpose of disrupting the business of a competitor; or (iv) by using the Domain Name, has intentionally attempted to attract, for commercial gain, Internet users to its site by creating a likelihood of confusion with the Complainant's Mark as to the source, sponsorship, affiliation or endorsement of its site or of a product or service on its site.

Rather the Complainant merely asserts that the Respondent "intentionally attempted to attract for commercial gain Internet users to the Respondent's web site by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation or endorsement of the Respondent's web site and location of a product on the Respondent's web site," that the "only purpose supporting registration of a visually similar and phonetically identical domain name to a registered mark is to benefit the registrant commercially, through misleading consumers" and "sales of competitive product from the respondent's website can not be considered *bona fide* as sales from such a website are made in bad faith." The Panelist finds that such assertions, without supporting evidence from the Complainant, are not enough to satisfy the burden that Complainant must meet under the Policy.

Further, in view of the Respondent's evidence concerning its registration and use of the Domain Name and the Respondent's evidence to support its claim that it is using the words "wrist ticket" in a domain name as the words are commonly used and understood in the industry and by the public, the Panelist does not find that the Respondent has intentionally attempted to attract for commercial gain Internet users to its web site by creating a likelihood of confusion with the Complainant's Mark. Based upon the above, the Panelist finds that Paragraph 4(a)(iii) of the Policy has not been satisfied.

7. Decision

The Panelist finds that the Complainant has not proven all three elements in Paragraph 4(a) of the Policy and decides that its request to transfer the Domain Name is denied.

(sole panlist)