



## ASIAN DOMAIN NAME DISPUTE RESOLUTION CENTRE (HONG KONG OFFICE)

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### Decision Submission

[English](#)
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Version	
Decision ID	DE-0900241
Case ID	HK-0900262
Disputed Domain Name	www.Bangkoknightlife.com
Case Administrator	Ricky Wong
Submitted By	Lyons Debrett G.
Participated Panelist	

Date of Decision 30-09-2009

Language Version : English

#### The Parties Information

<b>Claimant</b>	Bruno Pingel
<b>Respondent</b>	Hilditch tom

#### Procedural History

The Complaint was filed with the Hong Kong office of the Asian Domain Name Dispute Resolution Center (the “Center” ) on August 21, 2009. On August 26, 2009, the Center transmitted by email to GoDaddy.com Inc. a request for registrar verification in connection with the domain name at issue. On August 27, 2009, GoDaddy.com Inc. transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details. The Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” ), the Rules of Procedure under the Policy (the “Rules” ), and the Center’ s Supplemental Rules.

In accordance with the Rules, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on August 31, 2009. In accordance with the Rules, the due date for Response was September 21, 2009. A Response was submitted on September 17, 2009.

The Center appointed Debrett G. Lyons as the sole panelist in this matter on September 22, 2009. The Panel finds that it was properly constituted and has acted impartially in reaching its conclusion.

#### Factual Background

##### For Claimant

1. The Complainant is a resident of Thailand and does business as a hotelier and real estate entrepreneur.
2. The Complainant registered the disputed domain name on November 6, 1998.
3. The Complainant subsequently lost ownership of the domain name.
4. The Complainant now seeks restitution of its former ownership of the domain name.

##### For Respondent

1. The Respondent is a British journalist and editor who resides in Hong Kong, SAR, China.
2. The Respondent acquired the disputed domain name in a sale transaction from a third party to these proceedings.

## Parties' Contentions

### Claimant

The Complainant alleges use of disputed domain name and of the domain name <pattayahotel.com> since November 6, 1998 in relation to the promotion of Complainant's hotel and real estate business. Complainant asserts that “[B]oth domain names and trade marks are very well-known in Thailand and worldwide” .

The Complainant alleges that through malfeasance the disputed domain name has come to rest in the name of the Respondent.

In particular, Complainant alleges that he engaged a Thai ISP “to register the domain name and trade mark.” The disputed domain name was first registered on November 6, 1998 with Network Solutions Inc. Complainant is also said to have engaged an IT consultant, Robert Hamilton. Complainant alleges that in December 2008, it came to his attention that Mr. Hamilton had falsified certain register information so enabling transfer of the disputed domain name away from the Complainant to a Mr. Kim Ho Chun. It is said that Mr. Chun became registrant of the disputed domain name on December 15, 2008 and that Respondent became the registrant on June 21, 2009.

In February 2009 an employee of the Complainant sought to recover the domain name by approaching Mr. Chun, however Mr. Chun was only prepared to transfer the domain name in exchange for \$4,100.00, allegedly the sum he paid for the domain name.

Through events later described, the disputed domain name came to be registered by the Respondent.

The Complainant petitions the Panel to “cancel such unauthorized domain name transfer made by Robert [Hamilton] and/or related person and simultaneously transferring such domain name back to Mr. Bruno, including cease and desist from transferring such domain name to any third party” .

### Respondent

In the Response, the Respondent describes his legal status as “site owner” . He then describes the Complainant as the “former site owner, allowed site to delete and be resold” .

The Respondent goes on to say:

“Whilst accepting that the complainant created the domain name “BangkokNightlife.com” in 1998, the respondent points out the complainant allowed the name to delete in November 2008. The respondent also points out that he legally bought the name in good faith in May 2009 and has used the name in good faith. The respondent rejects that the domain is the trademark or tradename of the complainant. Moreover, the evidence presented offers no support for the complainant's assertion that the domain BangkokNightlife.com has been used at all for advertising or indeed exploited in any way. In fact, the evidence indicates the complainant is guilty of reverse hi-jacking this domain name.”

Turning to the matters enumerated under paragraph 4(a)(i)-(iii) of the Policy, the Respondent submits that:

(a) Complainant produces no evidence of trademark rights in the term “Bangkok Nightlife” . In particular, there is no evidence of a trademark registration for that term or anything similar. Nor does the Complainant produce any evidence of a common law trademark acquired through widespread use of that term.

(b) he has a legitimate interest in the domain name for the reason that the Respondent is a known HK based writer and editor who has held a number of senior posts. The Respondent directs the Panel to his website at [www.tomhilditch.com](http://www.tomhilditch.com). The Respondent points to his former connections with magazines having travel and lifestyle content, that content commonly available online. He alleges that in May 2009 he bought the disputed domain name with the plan to develop a resource for visitors to Bangkok, having already developed similar online resources.

(c) he did not acquire the domain name in bad faith since he purchased it in a good faith transaction from a seller who identified himself as Alejandro Garcia. A payment was made to Mr. Garcia by PayPal on May 15th 2009. Transfer to GoDaddy.com was completed on June 21 2009. The Respondent submits that the motives or actions of Mr. Hamilton or Mr. Chun, be they malevolent or in breach of this Policy, cannot be ascribed to him.

## Findings

Rule 10(a) states that the “Panel shall conduct the arbitration proceeding in such manner as it considers appropriate in accordance with the Dispute Resolution Policy, the Rules of Procedure and the Provider's Supplemental Rules.”

Rule 10(d) states that the “Panel shall determine the admissibility, relevance, materiality and weight of the evidence

presented to it.”

Paragraph 4(a) of the Policy provides that each of three findings must be made in order for the Complainant to prevail:

- i. Respondent’ s domain name must be identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- ii. Respondent has no rights or legitimate interests in respect of the domain name; and
- iii. Respondent’ s domain name has been registered and is being used in bad faith.

### **Identical / Confusingly Similar**

N/A

### **Rights and Legitimate Interests**

N/A

### **Bad Faith**

N/A

### **Status**

www.Bangkoknightlife.com          Complaint Rejected

### **Decision**

Preliminary Issue : Dispute potentially outside scope of Policy

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The matter which first calls for consideration is whether the Complaint falls outside the scope of the Policy.

Previous panels have found, for example, that disputes between employers and employees are outside the scope of the Policy and should be decided in a court of law. In *Latent Tech. Group, Inc. v. Fritchie*, FA 95285 (Nat. Arb. Forum Sept. 1, 2000), the panel held that a dispute concerning an employee’ s registration of a domain name in his own name and his subsequent refusal to transfer it to his employer raised issues of breach of contract and breach of fiduciary duty that were more appropriately resolved in court, not before a UDRP panel.

Similarly, in *Thread.com, LLC v. Poploff*, D2000-1470 (WIPO Jan. 5, 2001), the panel refused to transfer the domain name, stating that the Policy did not apply because attempting “to shoehorn what is essentially a business dispute between former partners into a proceeding to adjudicate cybersquatting is, at its core, misguided, if not a misuse of the Policy.”

In *Draw-Tite, Inc. v. Plattsburgh Spring Inc.*, D2000-0017 (WIPO Mar. 20, 2000), it was said:

“This Panel well recognizes that its jurisdiction is limited to providing a remedy in cases of ‘the abusive registration of domain names’ , or ‘Cybersquatting’ . . . . Like any other tribunal, however, this Panel can determine whether it has jurisdiction only from the facts and arguments presented to it.”

Based on the assertions of both parties, the Panel is satisfied that this is not a case of cybersquatting, but rather a set of circumstances arising from which there is a question concerning the rightful ownership of the disputed domain name. That in turn may require examination of the legal relationship between the Complainant and Mr. Hamilton, an enquiry into the nature and lawfulness of the actions allegedly taken by Mr. Hamilton in relation to the domain name, and other matters of civil and criminal law going far beyond the scope of the Policy and the mandate given to this Panel.

The Complainant has shown no particular concern for the Policy or for what it requires to be shown. The evidence on material questions to be determined is lacking and the Panel considers that there is ample weight in prior UDRP decisions to justify a ruling that the matter is properly one for another forum with different inquisitorial powers.

Reverse Domain Name Hijacking

Respondent asks the Panel to find Reverse Domain Name Hijacking.

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Generally

Rule 1 defines Reverse Domain Name Hijacking as “using the Dispute Resolution Policy in bad faith to attempt to deprive a registered Domain Name holder of a Domain Name.”

Rule 3(b)(xii) required the Complainant to certify (and the Complainant did so certify) that:

“the information contained in this Complaint is to the best of Complainant's knowledge complete and accurate, that this Complaint is not being presented for any improper purpose, such as to harass, and that the assertions in this Complaint are warranted under the Rules of Procedure and under applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument.”

In *Smart Design LLC v. Carolyn Hughes*, D2000-0993 (WIPO, October 18, 2000) the panel stated that:

“Clearly, the launching of an unjustifiable Complaint with malice aforethought qualifies, as would the pursuit of a Complaint after the Complainant knew it to be insupportable.”

There is nothing in the evidence to indicate anything as high as malice on the part of the Complainant. Accordingly, the evidence must demonstrate that the Complainant brought these Administrative Proceedings in the knowledge that the Respondent has an unassailable right or legitimate interest in the disputed domain name, or that Respondent lacks the requisite bad faith registration and use of the disputed domain name (see, *Koninklijke KPN N.V. v. Telepathy Inc.*, D2001-0217 (WIPO May 7, 2001); *Aspen Grove, Inc. v. Aspen Grove*, D2001-0798 (WIPO Oct. 5, 2001)). Further, the facts must point to harassment or similar conduct by Complainant in the face of that knowledge (see, *Goldline International, Inc. v. Gold Line*, D2000-1151 (WIPO, January 4, 2001); *Sydney Opera House Trust v. Trilynx Pty. Limited*, D2000-1224 (WIPO, October 31, 2000); *Plan Express Inc. v. Plan Express*, D2000-0565 (WIPO, July 17, 2000)).

The evidence

The Complaint form required the Complainant to give reasons why he had named the Respondent in these Administrative Proceedings. The Complainant stated that the Respondent was named since he “illegally bought the domain name ‘Bangkoknightlife.com’ (which is the trademark and tradename of the Complainant) from Mr. Robert Hamilton, the cyber perpetrator” .

The Complainant’s argument that the Respondent lacks rights or a legitimate interest in the domain name rests solely on the premise that neither Mr. Hamilton nor Mr. Chun had authority to transfer the domain name to the Respondent.

The Complainant’s allegation of bad faith against the Respondent is not based on any evidence, but on a simple recitation of paragraph 4(b)(i) of the Policy, which is proof of bad faith in:

“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”

The parties are required by the Rules to indicate whether there are legal proceedings that have been commenced or terminated in connection with or relating to the disputed domain name. The Complaint makes reference to “criminal legal action against Mr. Robert Hamilton” initiated with the Royal Thai Police Office.

It is common ground that a Police Report was made in Thailand on March 19 2009. Although the report appears to have been laid in relation to a claim that Mr. Harrison had illegally transferred ownership of the domain name to a third party there is no evidence from either party that legal proceedings have been commenced in relation to that claim.

Conclusions

Respondent submits that Complainant (1) made no attempt to produce documents or evidence to support his claim of trademark infringement or bad faith; (2) has produced irrelevant documents to support his claim of having exploited the domain name as a trade and service mark; (3) produced irrelevant correspondence with another person to support his claim of bad faith; (4) has used his own report to the police to insinuate that there are legal proceedings in relation to the domain when in fact there is only a report and a writ for more evidence.

Before making its own assessment of these matters, the Panel states that a finding of Reverse Domain Name Hijacking is

not to be made against a party lightly.

Although the Panel has found on an assessment of the evidence that the Complaint lay outside the scope of the Policy, it is not inappropriate for the Panel to consider the substance of the Complainant's case against the Respondent measured against the Policy and the Rules in order to assess whether there was a bad faith to attempt to deprive the Respondent of the domain name.

Having regard paragraph 4(a)(i) of the Policy, the Complainant asserts rights in the trademark "Bangkok Nightlife". Trademark rights come into existence through either registration or extensive use. There is no evidence that Complainant is the owner of a trademark registration in Thailand or elsewhere. Moreover, the only basis for a claim to common law trademark rights rests on evidence which shows usage unconnected with the name "Bangkok Nightlife" or the disputed domain name. In short, the Complaint fails altogether to show the requisite rights on which to base the Administrative Proceedings.

Having regard paragraph 4(a)(ii) of the Policy, the Complaint makes no explicit submissions in relation to the Respondent's rights or legitimate interests in the disputed domain name. It infers a lack thereof because Mr. Hamilton is said to have perpetrated a fraud on the Complainant and on Network Solutions Inc. and so the Respondent can have no good title to the domain name. That is not an interpretation of the Policy which has gained recognition. It is quite possible for the Respondent to have a legitimate interest in the domain name under this Policy which is not inconsistent with a finding by another body that Mr. Hamilton may have acted improperly.

Having regard paragraph 4(a)(iii) of the Policy, the Complaint has made a number of allegations against the Respondent which have no foundation in the evidence before this Panel. The first is that the Respondent illegally bought the domain name from Mr. Hamilton. The Complainant's own evidence is inconsistent with that claim since the Complainant attempted to recover the domain name from Mr. Chun. There is nothing in the evidence to establish any connection between Mr. Chun and the Respondent, nor between Mr. Chun, the Respondent and the intermediate owner/seller, Mr. Garcia.

The second claim of bad faith based on paragraph 4(b)(i) of the Policy implies that the Respondent acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring it back to the Complainant, or one of the Complainant's competitors. The Panel finds that there is not the slightest suggestion in the evidence of anything to support that allegation.

Thirdly, the report to the Thai Police, whether it marks the commencement or not of what might properly be called "legal proceedings" relating to the disputed domain name, is a report against Mr. Hamilton and not the Respondent. There is nothing whatsoever in the material presented to this Panel to suggest that those Police enquiries might implicate the Respondent, however the Complainant has presented the Police Report in a way which attempts somehow to cast a shadow over the bona fides of the Respondent.

In terms of the Policy, the Complaint is an unmeritorious claim against the Respondent. It is a document with fatal defects and identifiable inconsistencies, but which still carries bald claims of illegal and bad faith actions by the Respondent. Even overlooking the deficiencies of the Complaint and making wide concession for its over-zealous claims, the Panel is reminded that it is not just the launch of a malicious complaint that is sanctioned by the Policy, but the pursuit of a complaint after the complainant knew it to be insupportable (*Smart Design LLC v. Carolyn Hughes, op.cit.*). The Complainant has pursued the Respondent, even after the filing of the Response with the information it revealed, in a manner which the Panel regards as tantamount to harassment.

In making its finding, the Panel is also conscious that the Complainant has been legally represented and, presumably, advised. The Panel finds that the Complainant has engaged in Reverse Domain Name Hijacking.

Decision

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For these reasons the Complaint is DENIED.

Debrett G. Lyons  
Sole Panelist  
Date: September 29, 2009