

**IN THE MATTER OF A COMPLAINT PURSUANT TO
THE CANADIAN INTERNET REGISTRATION AUTHORITY
DOMAIN NAME DISPUTE RESOLUTION POLICY**

Dispute Number: CIIDRC File No: 13944-CDRP

Domain Name: fanduel.ca

Complainant: FanDuel Group Inc.

Registrant: Cody Tritter

Registrar: Domain Robot Enterprises Inc.

Panel: Mr. Richard Levy (Chair), Mr. Anton Melnyk, QC and The Honourable Neil Anthony Brown QC

Service Provider: Canadian International Internet Dispute Resolution Centre

DECISION

OVERVIEW

1. This matter concerns a dispute between the Complainant and the Registrant regarding the registration and use of the domain name <fanduel.ca> (“the disputed domain name”).
2. The Canadian International Internet Dispute Resolution Centre (“CIIDRC”) is a recognized service provider to the CIRA Domain Name Dispute Resolution Policy (“the Policy”) of the Canadian Internet Registration Authority (“CIRA”).
3. This is a proceeding under the CIRA Domain Name Dispute Resolution Policy (the “Policy”), in accordance with the CIRA Dispute Resolution Rules (the “Resolution Rules”).
4. The Complainant claims that the Registrant registered the disputed domain name in breach of the Policy. The Registrant has not filed a Response in this proceeding.

THE PARTIES

1. The Complainant in this proceeding is FanDuel Group Inc. of 300 Park Avenue South, 14th Floor, New York, NY, USA 10010, (“the Complainant”) and its Authorised Representative in this proceeding is Jacob Sommer of ZwillGen, PLLC, 1900 M Street NW, Suite 250, Washington, DC 20036, USA .
2. The Registrant in this proceeding is Cody Tritter of (as Administrative contact)

8820 Blackfoot Trail Southeast #115, Calgary AB T2J 3J1, Canada (“the Registrant”).

REGISTRATION OF THE DISPUTED DOMAIN NAME

1. The disputed domain name <fanduel.ca> was registered by the Registrant on December 5, 2017.
2. The Registrar of the disputed domain name is Domain Robot Enterprises Inc. of www.domainrobot.ca.

PROCEDURAL HISTORY

According to the information provided by CIIDRC:

1. The Complainant filed a Complaint with respect to the disputed domain name in accordance with the Policy and the Resolution Rules on October 23, 2020.
2. The Complaint was reviewed by CIIDRC and found to be administratively compliant. By letter to the parties dated October 26, 2020, the CIIDRC confirmed administrative compliance of the Complaint and commencement of the dispute resolution process on that date. As Notice in accordance with Rules 2.1 and 4.3, CIIDRC forwarded a copy of the Complaint to the Registrant together with its Schedules, by email on October 26, 2020 as the Complaint with attachments had been filed exclusively by email. By the same communication CIIDRC informed the parties that any Response had to be filed by November 26, 2020.
3. The Registrant did not file a Response in this proceeding with CIIDRC by November 26, 2020 or at all.
4. Given the absence of a Response, the Complainant was eligible to convert from a three-person tribunal to a single arbitrator but did not avail itself of that opportunity. Accordingly, CIIDRC proceeded to appoint a three-member tribunal. On December 4, 2020, the Complainant deposited the required sum of \$3,150 CAD towards the three-member panel fee.
5. On December 10, 2020, CIIDRC appointed Mr. Richard Levy (Chair), Mr. Anton Melnyk, QC and The Honourable Neil Anthony Brown QC as the three-person panel in this proceeding. Each of the members of the three-person tribunal has signed and forwarded to CIIDRC an Acceptance of Appointment as Arbitrator and Statement of Independence and Impartiality.
6. The Panel has reviewed all of the material submitted by the Complainant and is satisfied on that material that the Complainant is an eligible Complainant under the Policy and the Rules by virtue of its ownership of the trademark registrations referred to hereafter.

FACTS ALLEGED BY THE COMPLAINANT

1. The facts set out below are taken from the Complaint, together with related exhibits.
2. The Complainant is a United States company with its headquarters in New York, USA. It is a company with over 8.5 million customers in North America and is one of the leading fantasy sports and sports betting sites in the region. It has approximately 30,000 users and annual revenue of approximately \$4.7 million.
3. It also operates in Canada.
4. The Complainant is a sports betting partner of the National Hockey League and has advertising agreements with multiple National Basketball Association teams. As a result, consumers in North America have come to associate the FANDUEL mark with Complainant's fantasy sports services and products. Complainant has developed considerable goodwill through its FANDUEL trademark and its domain name <fanduel.com> which it also uses for its business.
5. The Complainant owns the Canadian trademark registration for FANDUEL, TMA906336 (application no.1669520) in association with entertainment services in the nature of fantasy sports leagues" and similar services, which it uses in its business. It has used the mark online in Canada and the United States for over 10 years and has heavily promoted it to consumers in both countries.
6. To establish CIRA's Canadian Presence Requirements, the Complainant therefore relies on the fact that it is the owner of a trademark which is the subject of registration in Canada under the Trade-marks Act (Canada) R.S.C. 1985, c.T-13, namely Canadian Trademark Registration number TMA906336 for FANDUEL. (the "Mark" or the "Registration") The mark's current owner is listed as the Complainant, FanDuel Group, Inc.. In that regard the disputed domain name consists of or includes the exact word component of the Complainant's registered FANDUEL trademark.
7. The Complainant also owns the domain name registration for <fanduel.com> which was registered to FanDuel Group, Inc. by Gandi SAS on April 15, 2009. That domain name is used as the Complainant's primary internet presence and as a point of contact with Employees, Users, and the Media. It uses the domain name and the website to which it resolves in its business, including its business in Canada.
8. It came to the notice of the Complainant that the Registrant has registered a domain name in Canada that directly incorporates the entirety of the Complainant's trademark FANDUEL, the

Complainant's own domain name <fanduel.com> and its name and brand. The Complainant has never given the Registrant permission or authority to use its trademark or name in a domain name or in any other way.

9. The Registrant has caused the domain name to resolve to the website of a third party, without any permission whatsoever. That website carries pornographic material.
10. Thus, the Complainant maintains that internet users who use the disputed domain name and arrive at the Registrant's website will be misled into thinking that it is the website of the Complainant and that its contents have in some way been approved or consented to, or are associated with the Complainant, which they have not. Accordingly, the Complainant maintains that the domain name and the use to which it is and maybe put by internet users are misleading and tarnish the Complainant's trademark and its good reputation.
11. The Complainant maintains that it therefore wishes to stop the Registrant's conduct and to have the disputed domain name transferred to the Complainant. It therefore seeks an order to that effect.

CONTENTIONS OF THE COMPLAINANT

In accordance with Paragraph 3 of the Policy, the Complainant contends:

1. That the Domain Name is confusingly similar to the Mark in which the Complainant had rights prior to the date of registration of the Domain Name and continues to have such rights;
2. That the Respondent has no legitimate interests in the Domain Name; and
3. That the Domain Name has been registered in bad faith.

DISCUSSION AND FINDINGS

Relevant Provisions of the Policy

4.1 Onus. To succeed in a Proceeding, the Complainant must prove, on a balance of probabilities, that:

- (a) the Registrant's dot-ca domain name is Confusingly Similar to a mark in which the Complainant had rights prior to the date of registration of the domain name and continues to have such rights; and
- (b) the Registrant has registered the domain name in bad faith as described in paragraph 3.5;

- (c) the Registrant has no legitimate interest in the domain name as described in paragraph 3.4.

Even if the Complainant proves (a) and (b) and provides some evidence of

- (c) the Registrant will succeed in the Proceeding if the Registrant proves, on a balance of probabilities, that the Registrant has a legitimate interest in the domain name as described in paragraph 3.4.

3.2 Mark. A "Mark" is

- (a) a trademark, including the word elements of a design mark, or a tradename that has been used in Canada by a person, or the person's predecessor in title, for the purpose of distinguishing the wares, services or business of that person or predecessor or a licensor of that person or predecessor from the wares, services or business of another person;
- (b) a certification mark, including the word elements of a design mark that has been used in Canada by a person or that person's predecessor in title, for the purpose of distinguishing the wares or services that are of a defined standard;
- (c) a trademark, including the word elements of a design mark, that is registered in CIPO; or
- (d) the alphanumeric and punctuation elements of any badge, crest, emblem or mark in respect of which the Registrar of Trademarks has given public notice of adoption and use pursuant to paragraph 9(1)(n) of the *Trademarks Act Canada*.

3.3 Confusingly Similar: In determining whether a domain name is "Confusingly Similar" to a Mark, the Panel shall only consider whether the domain name so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely to be mistaken for the Mark.

3.4 Legitimate Interest: For the purposes of paragraphs 3.1(b) and 4.1(c), any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all the evidence presented, shall demonstrate that the Registrant has a legitimate interest in the domain name;

- (a) the domain name was a mark, the Registrant used the mark in good faith and the Registrant had Rights in the mark;

- (b) the Registrant registered the domain name in Canada in good faith in association with wares, services or business and the domain name was clearly descriptive in Canada in the English or French language of: (i) the character or quality of the wares, services or business; (ii) the conditions of, or the persons employed in, production of the wares, performance of the services or operation of the business; or (iii) the place of origin of the wares, services or business;
- (c) the Registrant registered the domain name in Canada in good faith in association with any wares, services or business and the domain name was understood in Canada to be the generic name thereof in any language;
- (d) the Registrant used the domain name in Canada in good faith in association with a non-commercial activity including, without limitation, criticism, review or news reporting;
- (e) the domain name comprised the legal name of the Registrant or was a name, surname or other reference by which the Registrant was commonly identified; or
- (f) the domain name was the geographical name of the location of the Registrant's non-commercial activity or place of business.

In paragraph 3.4(d) "use" by the Registrant includes, but is not limited to, use to identify a website.

3.5 Registration in Bad Faith. For the purposes of paragraph 3.1(c) and 4.1(b), any of the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence that a Registrant has registered a domain name in bad faith:

- (a) the Registrant registered the domain name, or acquired the Registration, primarily for the purpose of selling, renting, licensing or otherwise transferring the Registration to the Complainant, or the Complainant's licensor or licensee of the Mark, or to a competitor of the Complainant, or the licensor or licensee for valuable consideration in excess of the Registrant's actual costs in registering the domain name or acquiring the Registration;
- (b) the Registrant registered the domain name or acquired the Registration in order to prevent the Complainant, or the Complainant's licensor or licensee of the Mark, from registering the Mark as a domain name, provided that the Registrant, alone or in concert with one or more additional persons has engaged in a pattern of registering domain names in order to prevent persons who have Rights in Marks from registering the Marks as domain names;
- (c) the Registrant registered the domain name or acquired the Registration primarily for the purpose of disrupting the business of the Complainant, or the Complainant's licensor or licensee of the Mark, who is a competitor of the Registrant; or
- (d) the Registrant has intentionally attempted to attract, for commercial gain, internet users to the Registrant's website or other location, by creating a likelihood of confusion with the Complainant's Mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.

In summary, to succeed in proceeding, the Complainant must prove on a balance of probabilities that:

1. The dot-ca domain name is confusingly similar to a mark in which the Complainant had Rights prior to the registration of the Disputed Domain Name and continues to have such Rights;
2. The Registrant has registered the Disputed Domain Name in bad faith; and
3. The Complainant must provide some evidence that the Registrant has no legitimate interest in the Disputed Domain Name.
4. Notwithstanding the evidence presented that the registrant has no legitimate in the Disputed Domain Name, the Registrant will succeed if the Registrant proves on a balance of probabilities that he has a legitimate interest in the Disputed Domain Name.

Was the Disputed Domain Name Confusingly Similar to the Mark?

1. Evidence shows that the Complainant is the owner of the Mark registered as # TMA906336 for FANDUEL.
2. In accordance with paragraph 3.3 of the Policy, a domain name is confusingly similar to a Mark if the domain name so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely mistaken for the Mark. In assessing the domain name, the dot-ca suffix is ignored. It is the narrow resemblance that is applied.
3. The Disputed Domain Name incorporates the Complainant's Mark in its entirety.
4. Accordingly, for the reason stated above, we hold that the Disputed Domain Name is confusingly similar to the Complainant's Mark.

Was the Disputed Domain Name registered in Bad Faith?

1. The Domain Name was registered subsequent to the granting of the Mark.
2. The Registrant adduced no evidence.
3. We must assume it was registered for the purpose of confusing Internet users for the Registrant's commercial benefit.
4. Thus, we hold that the Domain Name was registered in bad faith.

Did the Registrant have a Legitimate Interest in the Domain Name?

1. The Complaint alleges that the Registrant has no legitimate interest in the Domain Name, as that term is described in the CIRA Policy and Rules. In accordance with paragraph 3 of the Policy, the onus is on the Complainant to prove this contention by providing "some evidence". Although "some evidence" is not defined, it imposes, in the Panel's view, a

lower threshold than would "a balance of probabilities." Accordingly, the onus on Complainant is to provide "some evidence" of a negative.

2. Even if the Complainant proves confusion and registration in bad faith, and the Complainant provides "some evidence" that the Registrant has no legitimate interest in the Domain Name, the Registrant will succeed in the Proceeding if the Registrant proves, on a balance of probabilities, that it has a legitimate interest in the Domain Name, as described in paragraph 3.4 of the Policy.
3. The Complainant cites the CIRA decision in Queen's University at Kingston v. Oliver Twist Domains Inc. (queensuniversity.ca) #353, 2017, ("Queen's") in support of its contention that the Registrant has no legitimate interest in the Domain Name. As in the Queen's case, the Complainant alleges that it conducted trademark searches without finding any trademark owned by the Registrant that contains the mark in issue, namely FANDUEL. As in the Queen's case, the Registrant chose not to participate in these proceedings. Accordingly, this allegation is uncontested.
4. As in the Queen's case as well, the Complainant alleges that it has not licensed or otherwise authorized, directly or indirectly, the Registrant to use the trademark in issue, in this case, namely FANDUEL. This allegation is also uncontested.
5. In the CIRA decision in Vivendi v. Microscience Corporation, (vivendi.ca) #414, 2020, the Panel found that the complainant has provided evidence that the registrant's interest in the domain name vivendi.ca was for an improper use. In that case the registrant had "parked" the domain name for sale.
6. In the case at hand, the Complainant has provided evidence that the Registrant arranged for the Domain Name to resolve to a website that makes available pornographic videos, which is an improper use.
7. Finally, there is no evidence that the Domain Name was the geographical name of a location of the Registrant's non-commercial activity or place of business.
8. The Panel is of the opinion that the Complainant has satisfied its burden of proving, on a balance of probabilities, that the Registrant has no legitimate interest in the Domain Name.

DECISION and ORDER

For the above reasons, in accordance with Paragraph 4 of the Policy, Paragraph 15 of the Rules, and Rule 10 of the Supplemental Rules, the Panel orders that the Domain Name in issue be transferred to the Complainant.

Dated: December 24, 2020

Signed:

Mr. Richard Levy (Chair),

Mr. Anton Melnyk, QC and

The Honourable Neil Anthony Brown QC