



香港國際仲裁中心
Hong Kong International Arbitration Centre

.hk Domain Name Dispute Resolution

ARBITRATION PANEL DECISION

Complainant: Wynn Resorts Holdings, LLC

Respondent: Jun Xian

Case Number: DHK-0700025

Contested Domain Name: wynnhk.hk

Panel Member: Anthony Wu

1. Parties and Contested Domain Name

The Complainant is Wynn Resorts Holdings, LLC at 3145 Las Vegas Boulevard South Las Vegas, Nevada 89109, U.S.A. Its authorised representative is Rosita Li of Messrs Johnson Stokes & Master at 19/F, Prince's Building, 10 Chater Road, Central, Hong Kong.

The Respondent is Jun Xian and no address has been given at WHOIS database.

2. Procedural History

On 6/12/2007, the Hong Kong International Arbitration Centre ("HKIAC") received a hardcopy Complaint form in English filed by the Wynn Resorts Holdings, LLC (the "Complainant") pursuant to the HKDNR Domain Name Dispute Resolution Policy (the "Policy") adopted by the Hong Kong Domain Name Registration Company Limited (HKDNC) on 30 November 2006, the HKDNR Domain Name Dispute

Resolution Policy Rules of Procedure, approved by HKDNR on 30 November, 2004 (the Rules of Procedure) and the HKIAC Supplemental Rules.

The HKDNC was notified of the Complaint on 6/12/07 and on 7/12/07 it provided the name of the domain holder and the contact information for the domain. The domain was also put into Blacklist which means the domain could not be transferred or deleted during the period.

On 30/1/08, HKIAC by email notified the Respondent of the Complaint and provided copy of the Complaint to the Respondent. The Respondent was asked to submit a Response to the Complaint on or before 25/2/08. The Respondent did not file any response.

On 11/4/08, the HKIAC appointed Mr Anthony Wu to serve as Panelist and notified the parties of the appointment. All documents submitted by the parties were sent to the Panelist by letter dated 11/4/2008. The decision was to be rendered by 2 May 2008.

On 2 May 2008, on the request of the Panelist, the date for rendering the decision was extended to 9 May 2008.

3. Factual Background

For the Complainant

The Complaint is based on the Complainant's famous trade name and trade mark "WYNN" (the "Mark"). The Complainant has obtained registrations of the Mark in respect of various goods and services in a number of jurisdictions including Macau and Hong Kong. A list of registrations of the Mark in Hong Kong and Macau together with copy printouts of some of the official trademark records obtained from the website of the relevant government authority in Macau and copies trade mark certificate of some of the Hong Kong trade mark registrations are provided as Annex C to the Complaint. Besides, the Complainant has registered other marks

incorporating the Mark “WYNN” in respect of a wide range of goods and services worldwide. A list of these registrations is provided as Annex D.

Background and history of the Complainant

The Complainant is a famous American-based international gaming entertainment company and hotel resorts developer.

For the Respondent

The Respondent did not respond.

4. Parties’ Contentions

The Complainant

The Complainant’s contentions are as follows:

Identical/Confusingly Similar

The Complaint is based on the Complainant’s registrations for the Mark “WYNN” registered in respect of a variety of goods and services in various jurisdictions and the Complainant’s common law rights generated as a result of use of the Mark by the Complainant.

The Complainant’s Group is a famous American-based international gaming entertainment company and hotel gaming resorts developer. The Complainant’s Group was founded by veteran Las Vegas gaming mogul Mr Steve Wynn, who was the Chairman of the Board, President and Chief Executive Officer of Mirage Resorts Incorporated and its predecessor from 1973 to 2000. In that role, Mr Wynn was responsible for the development of a number of very successful hotel gaming resorts including “The Mirage” and “Treasure Island” at Las Vegas, etc. Mr Wynn is now the Chairman of the Board and Chief Executive Officer of Wynn Resorts, Ltd, the parent company of the Complainant. The Complainant’s Group has been listed on the

Nasdaq Stock Exchange since 2002 and included as part of the NASDAQ-100 Index since 2004.

Amongst its various projects, the Complainant's Group has developed and operates the renowned "Wynn Las Vegas", a \$2.7 billion luxury hotel and destination casino resort located on the Las Vegas Strip which features 2,716 luxurious guest rooms and suites; an 111,000 square foot casino; 22 food and beverage outlets; an on-site 18-hole golf course; approximately 223,000 square feet of meeting space; an on-site Ferrari and Maserati dealership; and approximately 76,000 square feet of retail space.

The Complainant's Group has entered the China markets in recent years and successfully obtained a concession to operate one or more casino gaming properties in Macau (which is the only place in China where casinos are legal). As background, the gaming industry in Macau was monopolised by local casino tycoon Stanley Ho's company which obtained an exclusive gaming concession to operate gaming business in the territory for forty years. This monopolisation ended in early 2002 when the Macau government opened the gaming industry market in Macau to new players and granted casino licences to a few players including the Complainant's Group. The new casinos established in Macau attracted big crowd and revenue. Since end of 2006, Macau has replaced Las Vegas to become the world's biggest gaming centre by revenue.

The luxury hotel and destination casino resort developed and operated by the Complainant's Group in Macau is called "Wynn Macau". The resort features 600 deluxe hotel rooms and suites, approximately 220 table games and 380 slot machines in approximately 100,000 square feet of casino gaming space, seven restaurants, approximately 26,000 square feet of retail space, a spa, a salon, entertainment lounges and meeting facilities.

To assist its guests with the planning of their vacations or corporate meetings at Wynn Macau, the Complainant's Group has opened representative offices in major cities in China including Beijing, Shanghai and Guangzhou, as well as in Hong Kong.

The Complainant's Group has also launched heavy promotional campaign in promoting Wynn Macau.

To enable the public to have easy access of information of Wynn Macau, the Complainant has set up a website under the domain name "wynnmacau.com". Copy printouts of said website are provided as **Annex F**. Copy printouts of some of the news reports about the operations of the Complainant's Group in Macau are provided as **Annex G**. Copies of some of the advertising and promotional materials in respect of Wynn Macau of the Complainant's Group and copy receipts showing part of the advertising costs spent by the Complainant's Group are provided as **Annex H**.

As shown in Annexes C and D, the Complainant has registered the Mark and other marks incorporating the Mark "WYNN" in respect of a wide range of goods and services throughout the world. The Complainant has also used and advertised these marks extensively throughout the world. As such, the public will associate these marks exclusively with the Complainant's Group.

The Disputed Domain Name is "wynn.hk" (sic). The identifying part of the Disputed Domain Name is identical to "Wynn" of the Complainant's Mark. "hk" generally represents Hong Kong and is non distinctive.

Rights or Legitimate Interests of the Respondent

The Complainant submits that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name because:-

- (a) The Complainant and its group companies have not authorised, licensed or otherwise permitted the Respondent to the use the "wynn" Mark or any other name/mark of the Complainant's Group.
- (b) There is no evidence that the Disputed Domain Name is the name of the Respondent or the Respondent has been commonly known by the Disputed Domain

Name. According to WHOIS record, the Respondent is called "JUN XIAN". There is no reason why the Respondent might reasonably be said to have any rights or legitimate interests in registering or using the Disputed Domain Name.

Bad Faith

The Complainant submits that the Respondent has registered and used the Disputed Domain Name in bad faith because:-

(a) The Respondent has deliberately registered the Disputed Domain Name which is identical to the Complainant's famous Mark "WYNN", with an intention of causing confusion to the public that the Respondent and/or the Respondent's website is related to or authorised by the Complainant and/or the Complainant's website. The Respondent has also registered the domain name "wynnhk.hk" incorporating the entirety of the Mark.

Given the substantial fame of the Complainant's Group throughout the world, it is most unlikely that the Respondent is unaware of the Complainant's rights in the Mark. It cannot be a mere co-incidence that the Respondent has chosen the Disputed Domain Name and "wynnhk.hk", which is identical to the Complainant's Mark, as his domain names.

The Complainant also points out that the Respondent applied to register the Disputed Domain Name on 15 June 2007 and "wynnhk.hk" on 14 June 2007, which is *after* the date of trademark application of the Mark by the Complainant in Macau on 8 June 2006.

The Respondent's website operating under the Disputed Domain Name and "wynn.hk" are copies of the Complainant's website. Copies of the printouts of the Respondent are provided as **Annex I**. A copy of the source code of the Respondent's website is enclosed as **Annex II**. It is clear from the source code that the Respondent has simply copied the source code of the Complainant's website "wynnmacau.com". The source code even shows the title as "Official Wynn Macau Resort". The

Respondent has merely changed the contact information on the "CONTACT US" page such that its address and phone numbers will appear on its "CONTACT US" page (see page 11 of **Annex II**). The Complainant has arranged for an investigation to be done on the Respondent at the address shown on its website. There are six different companies occupying the different offices on 21st floor of the building. The investigator visited all the companies and none of the people in the six companies whom the investigator met had any knowledge of Jun Xian (i.e. the registrant of the two domain names) or Wynn. The investigator visited the management office of the building on the ground floor. The security staff claimed to have no knowledge of any person under the name Jun Xian or any person/company dealing with hotel or casino business in Macau. The investigator checked the directory board and could find no listing of any company using the name "Wynn" as part of the company name.

The Complainant refers to the WIPO decision, *Telstra Corporation Limited v Nuclear Marshmallows (D2000-0003)*, in which it was held that the registration of a domain name bearing the Complainant's name is in bad faith if (i) it is impossible for the Respondent to have not heard of the Complainant's name and (ii) the Respondent cannot prove any legitimate use of the domain name in dispute. As submitted above, the Respondent of this case clearly has no legitimate or bona fide use of the Disputed Domain Name and he must have been aware of the Complainant's rights in the Mark. Further, since the Respondent has copied the Complainant's website, it is clear that the Respondent attempts to divert traffic to its website operated under the Disputed Domain Name. Both registration and use of the Disputed Domain Name has therefore been made in bad faith.

(b) The public will likely be confused into believing that the Respondent and/or the Respondent's website is related to or authorised by the Complainant and/or the Complainant's website. As mentioned above, due to extensive use and advertisement of the Complainant's Mark by the Complainant's Group, the public will associate the Mark exclusively with the Complainant's Group.

A Google search at www.google.com by the keyword “wynn” returns results that are almost *all* related to the Complainant’s Group. Copy of the Google search results are provided as **Annex J**.

(c) The Complainant further submits that it is very likely the Respondent has registered the Disputed Domain Name primarily for the purpose of selling, renting, or otherwise transferring the registration of the Disputed Domain Name for valuable consideration in excess of his documented out-of-pocket costs directly related to the Disputed Domain Name.

(d) The Respondent adopted an uncooperative attitude in respect of the Disputed Domain Name. The Respondent failed to respond to the cease and desist letter sent to the Respondent on 14 September 2007 by the Complainant’s authorised representative. Copy of the said letter is provided as **Annex K**. This is strong evidence showing that the Respondent blatantly ignores the Complainant’s rights in the Mark in respect of the Disputed Domain Name.

The Respondent

The Respondent did not respond.

5. Findings

According to Paragraph 4(a) of the HKDNR Domain Name Dispute Resolution Policy (the "Policy") which is applicable hereto, the Complainant has the burden of proving that:

(i) the Disputed Domain is identical or confusingly similar to a trade mark or service mark in Hong Kong in which the Complainant has rights; and

- (ii) the Respondent has no rights or legitimate interests in respect of the Disputed Domain; and
- (iii) the Disputed Domain has been registered and is being used in bad faith.

(1). Identical/confusing similarity

The Panel notes that under the Policy the relevant trademarks of a complainant should be trademark or service mark, as the case may be, in Hong Kong in which the complainant has rights. According to the list of trademarks provided by the Complainant, the trademarks registered in Hong Kong are: WYNN MACAU, WYNNRESORTS, WYNN LAS VAGAS, WYNN RESORTS, WYNN & COMPANY JEWELRY, WYNN & COMPANY WATCHES, WYNN CLUB, WYNN CLUB DEVICE, WYNN DEVICE (in series), WYNN.DEVICE, WYNN.MACAU AND WYNN.THE SIGNATURE SHOP (the “Trademarks in Hong Kong of the Complainant”). There is no registration of the “Wynn” mark per se in Hong Kong. The Panel appreciates that rights referred to Para 4(a)(i) of the Policy is not limited to rights in registered trademarks. However, on the evidence, the Panel can not be certain that it has been shown that the Complainant has acquired common law right in “Wynn” as a trademark in Hong Kong. The Panel notes that the Complainant referred to “has also launched heavy promotional campaign in promoting Wynn Macau” in major cities in China, including Hong Kong. There was no reference to promoting “Wynn” as a trademark. That being the case, even accepting that the identifying in the Disputed Domain Name “wynnhk.hk” is “wynn”, the Panel has doubts that it could be said it is identical to a trademark of “Wynn” of the Complainant in Hong Kong. Neither could it be said to be identical to any of the Trademarks in Hong Kong of the Complainant.

However, “Confusingly similar turns on the inherent distinctiveness of the trademark, the extent of use of the trademark, the extent of time the trademark has been in use, the nature of the wares, services and business, the similarity in sound, appearance and idea suggested by the trademark and the domain name, among other factors.” See *AltaVista Company v. Geoffrey Fairbairn*, Case No. D2000-0849.

As referred to in the case of *Nandos International Limited v. M. Fareed Farukhi* Case No. D2000-0225, the New Zealand case of *Polaroid Corporation v. Hannaford and Burton* [1975] 1 NZLR 566 at p. 571 is authority for the statement that allowances must be made for imperfect recollections on the part of members of the public and the effect of careless speech. The overall test is one of impression of confusion in the mind of the person making the decision: *General Electric Co. v. General Electric Co. Ltd* [1972] 1 WLR 729.

For the following reasons, the Panel finds that the Disputed Domain Name is confusingly similar to the Trademarks in Hong Kong of the Complainant, in particular the trademark of “WYNN MACAU”:

1. “Wynn” is a renowned name worldwide, and in Macau in particular, in the gaming casino and resort industry and it is a registered mark of the Complainant in Macau, which is next door to and closely associated with Hong Kong;
 2. “Wynn” is the distinguishing part of all the Trademarks in Hong Kong of the Complainant;
 3. Likewise, “Wynn” is the distinguishing part of the Disputed Domain Name “wynnhk”. hk is generally accepted to represent Hong Kong and is not distinguishing; and
1. hk being accepted generally to represent Hong Kong, the similarity of the Disputed Domain Name “wynnhk” with, in particular, the Complainant’s mark of Wynn Macau, would suggest a association between the two.

The Panel is satisfied that the requirements of Paragraph 4(a)(i) are met with.

(2). Rights or Legitimate Interests of Respondent

Paragraph 4(c) of the Policy requires the Complainant to prove that the Respondent has no right or legitimate interest in the disputed domain name. However, it is consensus view among Panelists that if the Complainant makes out a prima facie case that the Respondent has no rights or legitimate interests, and the Respondent fails to show one of the three circumstances under Paragraph 4(c) of the Policy, then the

Respondent may lack a legitimate interest in the domain name. See *Société pour l’Oeuvre et la Mémoire d’Antoine de Saint Exupéry – Succession Saint Exupéry – D’Agay v. Perlegos Properties*, Case No. D2005-1085.

The Complainant has informed that the Respondent has not been authorised, licensed or otherwise permitted to use the name/mark of the Complainant’s Group. The Panel is of the view that a prima facie case is established and it is for the Respondent to prove that he has rights or legitimate interests to the Disputed Domain Name, by proving the following circumstances set out in Para 4.c of the Policy, or otherwise:

- “(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 in Hong Kong; or
- (ii) you (as an individual, business, or other organisation) have been commonly known by the Domain Name, even if you have acquired no trade mark or service mark rights in Hong Kong; or
- (iii) you are making a legitimate non-commercial or fair use of the Domain Name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue

The Respondent did not respond to establish the above circumstances or other circumstances. The Panel finds that the Complainant has satisfied the requirement of Para 4(a)(ii) of the Policy that the Respondent did not have rights or legitimate interest in the Disputed Domain Name.

(3). Bad faith

It is provided under Paragraph 4 (b) of the Policy that:

“Evidence of Registration and Use in Bad Faith. For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by an Arbitration Panel to be present, shall be evidence of the registration and use of a Domain Name in bad faith:

(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 on-line 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.”

The onus of proof is on the Complainant to satisfy the Panel that one of the circumstances exists or otherwise there is bad faith in the registration and use of the domain name in dispute.

The Complainant contends primarily that the circumstances fall to be considered under sub-paragraph (iv).

The Panel accepts the Complainant's contention. As noted above, the Panel finds that the name of “Wynn” is renowned worldwide and Macau and is the distinguishing part of the Complainant's Trademarks in Hong Kong and that the Respondent must have known of the name “Wynn” and the Trademarks of the Complainant in Hong Kong which were registered before the Disputed Domain Name was registered, in particular “WYNN MACAU”. The registration of “WYNN MACAU” was made on 29/12/03.

In fact the Panel would go a step further to find that the evidence shows that the Respondent knew of the name “Wynn” and the Complainant’s “Wynn Macau” Trademark in Hong Kong. The Panel notes that the welcoming page (with a photo of Mr Wynn and welcoming message) of the website at the Disputed Domain Name is the same as the welcoming page at the website at “wynnmacau.com ” save and except that in the logo appearing at the former it reads Wynn (stylised) Hong Kong instead of Wynn (stylized) Macau as in the latter.

Apart from slight difference in the logo, the Respondent’s website had completely reproduced the webpages of the Complainant’s website in almost its entirety except for the contact details such as the telephone number and the address. This was clearly intentionally done “to attract ... Internet users to your web site or other on-line 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.” The Complainant’s website is for commercial purpose. The same must therefore be true for the Respondent’s website. The fact that the Respondent has chosen not to submit a response is particularly relevant to the issue of whether the Respondent has registered and is using the domain name in bad faith. Paragraph 14(b) of the Rules of Procedure provides that, in the absence of exceptional circumstances, a Panel shall draw such inferences as it considers appropriate from the failure of a party to comply with a provision or requirement of the Rules of Procedure. The Panel finds no exceptional circumstances for the Respondent’s failure to submit a response. The Complainant had previously actually sent a cease and desist letter and met with no response. In the circumstances, the Panel draws the inference that the Respondent was using the Disputed Domain Name for commercial gain.

Having regard to the above, the Panel is satisfied that Sub-paragraph (iv) is proved by the Complainant. Therefore, the domain name has been registered and is being used in bad faith. The requirements under Paragraph 4(a)(iii) are with.

Having come to this finding, it is unnecessary for the Panel to deal with the other contentions of the Complainant.

6. Conclusions

It is the finding of the Panel that all requirements of paragraph 4(a) are proved by the Complainant. In paragraph 8 of the Complaint, Complainant sought to have the domain name in question transferred to it. Having regard to circumstances of the case, the Panel believes that it is appropriate to transfer the domain name wynnkhk.hk to Complainant and so orders.

Dated 12/5/08

(Anthony Wu)