

**CANADIAN INTERNET REGISTRATION AUTHORITY  
DOMAIN NAME DISPUTE RESOLUTION POLICY**

**DECISION**

Domain Name: ophea.ca

Complainant: Ontario Physical And Health Education Association

Registrant: Jump-Aerobics Inc.

Registrar: Network Solutions Canada ULC

Service Provider: ResolutionCanada Inc.

Panel: Eric Macramalla (Chair), David G. Allsebrook, Hugues Richard

**A. THE PARTIES**

1. The Complainant is Ontario Physical And Health Education Association (the “Complainant”), an Ontario corporation.
2. The Registrant is Jump-Aerobics Inc. (the “Registrant”), located in Ontario.

**B. DISPUTED DOMAIN NAME & REGISTRAR**

3. The disputed domain name is ophea.ca (the “Domain Name”).

**C. PROCEDURAL HISTORY**

4. This is a dispute resolution proceeding initiated pursuant to the *CIRA Domain Name Dispute Resolution Policy* (the “Policy”) and the *CIRA Policies, Rules, and Procedures - CIRA Domain Name Dispute Resolution Rules* (the “Rules”). By registration of the Domain Name with the Registrar, the Registrant agreed to the resolution of this dispute pursuant to the Policy and the Rules.
5. The Complainant filed its complaint (the “Complaint”) on June 13, 2012. The Date of Commencement of the proceeding was June 19, 2012.
6. The Registrant was provided 20 days to respond to the Complaint. On July 9, 2012, the Registrant filed its Response, which was deemed deficient on minor procedural grounds. An amended Response was filed on July 23, 2012.
7. On August 2, 2012, the Panel was appointed. As prescribed by the Policy, the Panel has declared to the Provider that it can act impartially and independently in connection with this matter, and that there are no circumstances known to the Panel which would prevent it from so acting.

**D. CANADIAN PRESENCE REQUIREMENTS: ELIGIBILITY OF THE COMPLAINANT**

8. The Complainant is eligible to initiate these proceedings on the basis that it satisfies Section 2(d) of the CIRA’s Canadian Presence Requirements, namely that it is a corporation under the laws of Ontario.

**E. THE POSITIONS OF THE PARTIES**

The Complainant's Position

9. The Complainant is a well known and well established not for profit entity with substantial goodwill in the area of supporting healthy active children in schools and communities province-wide.
10. The Complainant is the owner of the Canadian trade-mark registrations OPHEA, Registration No. TMA809804 and OPHEA Design, Registration No. TMA809809 (the "OPHEA Trade-marks"). These marks matured to registration on October 21, 2011.
11. The Complainant, and its predecessor in title, have used the OPHEA trade-mark in Canada since as early as March 31, 1975.
12. The Complainant is the owner of the Ophea trade name, which was registered in May 2012 (the "Ophea Trade Name").
13. The Complainant's trade-mark rights precede the Domain Name registration date of February 23, 2009.
14. The Domain Name is confusingly similar with the OPHEA Trade-marks as the Domain Name is identical to the OPHEA Trade-marks.
15. The Registrant does not have a legitimate interest in the Domain Name. The Registrant is in the business of selling fitness products and services. Prior to the issuance of a cease and demand letter on March 2, 2012, the Domain Name hyperlinked to the Registrant's website located at jump-aerobics.com, a fitness-based website. At present, the Domain Name resolves to a website indicated as being "Under Construction".
16. The Registrant's website included the following posting referring to the Complainant: "The Ontario Physical and Health Education Association (OPHEA) has recently listed the program on its Web Site for Teacher Resources".
17. The Registrant registered the Domain Name in bad faith. The Registrant registered the Domain Name to intentionally attempt to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's marks as to the source, sponsorship, affiliation, or endorsement. Further, the Registrant registered the Domain Name primarily for the purpose of selling it to the Complainant for valuable consideration in excess of its actual costs in registering the Domain Name. The Registrant initially offered to sell the Domain Name for \$18,500.00. By way of correspondence dated April 23, 2012, the offer was retracted.
18. The Complainant is seeking the transfer of the Domain Name.

### The Registrant's Position

19. At the time of the registration, the Complainant did not own a trade-mark registration for OPHEA. Accordingly, the Complainant was not qualified to register the Domain Name.
20. The offer to sell the Domain Name was made only after the harassing and threatening actions of the Complainant's law firm. The offer was subsequently revoked.

### **G. DISCUSSION & REASONS**

21. In accordance with paragraph 4.1 of the Policy, to succeed in this proceeding, the Complainant must prove, on a balance of probabilities, that:
  - (a) the Registrant's 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 of the Policy;  
  
and the Complainant must provide some evidence that:
  - (c) the Registrant has no legitimate interest in the Domain Name as described in paragraph 3.4 of the Policy.

### **CONFUSINGLY SIMILAR - PARAGRAPH 3.3**

22. In order to satisfy this branch of the test, the Complainant must demonstrate (i) that it has rights in a mark, (ii) that the rights in its mark predate the registration date of the Domain Name, and (iii) that the Domain Name is confusingly similar with the disputed domain name.

### Rights in the Marks & Rights that Predate the Domain Name Registration Dates

23. Where the Complainant relies upon a trade-mark registered prior to the domain name registration date, the Policy does not require or permit a Panel to go behind the registration to determine whether the mark is valid or invalid based upon lack of distinctiveness or non-use. In cases where a trade-mark registration matured to registration after the domain name registration date, or the Complainant is relying on common law rights, it must establish rights that predate the domain name registration.
24. The Complainant's OPHEA Trade-marks matured to registration after the Domain Name registration date. The Panel is satisfied that the Complainant has provided evidence of common law rights in the OPHEA word mark that predate the Domain Name registration date. However, it has not provided evidence of prior trade-mark rights in connection with the OPHEA Design trade-mark.

25. In light of the foregoing, the Complainant has established that it has the requisite prior rights in the OPHEA trade-mark.

#### Confusingly Similar

26. As per paragraph 3.3 of the Policy, a domain name will be found to be confusingly similar with a mark if the domain name so nearly resembles the mark in appearance, sound or in the ideas suggested by the mark so as to be likely to be mistaken for the mark.
27. Pursuant to paragraph 1.2 of the Policy, a domain name is defined as the second level domain (the portion that immediately precedes the dot-ca suffix).
28. The test to be applied when considering “confusingly similar” is one of first impression and imperfect recollection. The Complainant must prove, on a balance of probabilities, that a person, as a matter of first impression, knowing the Complainant’s corresponding marks only, and having an imperfect recollection of the marks, would likely confuse the Domain Name for the Complainant’s marks based upon the appearance, sound or the ideas suggested by the mark.
29. It should be noted that the test for confusion under the Policy is not the same test for confusion set out under the Canadian *Trade-marks Act*. Under the Section 6(5) of the *Trade-mark Act*, when assessing the likelihood of confusion between marks, the factors to consider are as follows: (a) the inherent distinctiveness of the marks and the extent to which they have become known; (b) the length of time the marks have been in use; (c) the nature of the wares, services, or businesses; (d) the nature of the trade; (e) the degree of resemblance between the marks in appearance or sound or in the ideas suggested by them; and (f) the surrounding circumstances.
30. In contrast, the Policy provides that confusion is established if a domain name so nearly resembles a mark in appearance, sound or in the ideas suggested. This is similar to the test set out under Section 6(5)(e) of the *Trade-marks Act*. However, the remaining factors as set out under the *Trade-marks Act* do not apply to the assessment of confusion under the Policy. The Policy’s summary proceedings are ill-suited for the in-depth and traditional confusion analysis contemplated by the *Trade-marks Act*.
31. The Domain Name is comprised exclusively of the OPHEA trade-mark. Under the circumstances, the Panel is of the view that the Domain Name is confusingly similar with the OPHEA trade-mark.

#### Conclusion - Confusion

32. The Panel finds that the Domain Name is confusingly similar with the OPHEA trade-mark in which the Complainant had rights prior to the registration date of the Domain Name, and continues to have such rights.

### **BAD FAITH REGISTRATION**

33. The Complainant has alleged that the Domain Name was registered in bad faith pursuant to paragraph 3.5(d) of the Policy, namely that the Registrant registered the Domain Name to intentionally attempt to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's marks as to the source, sponsorship, affiliation, or endorsement.
34. The Domain Name contains the whole of the OPHEA trade-mark. The Domain Name suggests a connection to the Complainant. As well, the Domain Name was made to hyperlink to the Registrant's website, suggesting that it was piggybacking on the goodwill of the Complainant's trade-mark with a view to diverting Internet traffic to its website. It is also noteworthy that the Registrant had actual knowledge of the Complainant, referring to the organization on its website.
35. Under the circumstances, the Panel is of the view that the Domain Name is likely to confuse potential consumers into believing that the Registrant is somehow affiliated with, or endorsed by, the Complainant. Further, hyperlinking the Domain Name to the Registrant's website, which offers services that rival those offered by the Complainant, put the Registrant in a position to reap a commercial or financial benefit.
36. In light of the foregoing, the Panel finds that the Complainant has established bad faith as per paragraph 3.5(d). In light of this finding, the Panel is of the view that it is not necessary to consider bad faith as per paragraph 3.5(a).

### **LEGITIMATE INTEREST**

37. The final element to determine is whether the Registrant has a legitimate interest in the Domain Name.
38. As per paragraph 4.1 of the Policy, the Complainant must provide "some evidence that the Registrant has no legitimate interest in the domain name as described in paragraph 3.6".
39. Once this onus has been discharged by the Complainant, the Registrant may still succeed if it can show, on a balance of probabilities, that it has a legitimate interest in the Domain Name pursuant to paragraph 3.4.
40. The Panel finds that the Complainant has provided sufficient evidence that the Registrant does not have a legitimate interest in the Domain Name. The Complainant did not authorize the registration and the Domain Name is likely to mislead the public into believing that the Registrant is affiliated with, or endorsed by, the Complainant.
41. The Registrant has alleged that the Domain Name registration is legitimate on the basis that the OPHEA Trade-marks matured to registration after the Domain Name registration date. However, a complainant may rely on common law trade-mark rights.

42. OPHEA is an acronym derived from the Complainant's name, Ontario Physical and Health Education Association. OPHEA has no meaning as an English language word (the operating language of the Registrant) and is seemingly unique. The Registrant knew of the Complainant and was in the same field of endeavour. These facts are sufficient to compel the Registrant to offer an explanation of its adoption of OPHEA.CA as a domain name. It has not offered an explanation. Accordingly, the Panel finds that the Registrant does not have a legitimate interest in the Domain Name.

**DECISION & ORDER**

43. For the reasons set out herein, the Panel decides this dispute in favour of the Complainant.
44. Pursuant to paragraph 4.3 of the Policy, the Panel orders the transfer of the domain name ophea.ca.

Dated at Ottawa, Ontario, Canada, this 23<sup>rd</sup> day of August, 2012.



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Eric Macramalla  
Chair

Hugues Richard

David G. Allsebrook