



THE CHARTERED INSTITUTE OF ARBITRATORS AUSTRALIAN BRANCH

.au Dispute Resolution Provider

ADMINISTRATIVE PANEL DECISION

**Graphisoft Australia
v.
CAD Australia Pty Limited**

Reference: auDRP 05-01

Date: 23 August 2005

1. The Parties

- 1.1 The Complainant is Graphisoft Australia, L1, 71-73 Chandos Street, St Leonards, NSW, 2065 Tel 9460 9500 Fax 9460 9501 Email andrew@graphisoft.com.au ("Complainant").
- 1.2 The Respondent is CAD Australia Pty Limited. ABN Number 78 056 833 393, Address – Coral Close, Whale Beach NSW 2107. Postal Address – PO Box 796 Avalon, NSW 2117 Tel 9973 4499 Email info@cad.com.au ("Respondent").

2. The Domain Name and Registrar

The domain name at issue is <www.archicad.com.au> ("Domain Name"), currently registered by the Respondent. The Registrar is Melbourne IT.

3. Procedural History

- 3.1 This is an administrative proceeding pursuant to the .au Dispute Resolution Policy ("auDRP") adopted by auDA on 13 August 2001, which commenced operation on 1 August 2002; the auDA Rules for .au Dispute Resolution Policy ("Rules") and the CIArb Supplemental Rules for .au Domain Name Dispute Resolution Policy ("Supplemental Rules").
- 3.2 The Complainant submits the complaint for decision in accordance with au Dispute Resolution Policy (2002 – 22) and the rules there-in.

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- 3.3 The complaint was lodged with The Chartered Institute of Arbitrators electronically, by the Complainant on 14 July 2005. A hard copy of the material and the required fee was received by the Dispute Resolution Provider on 18 July 2005.
- 3.4 A copy of the Complaint was sent by the Dispute Resolution Provider to the Respondent on 18 July 2005 requiring them to submit all materials that it wished to have considered by the Panel.
- 3.5 The Respondent submitted its reply to the Dispute Resolution Provider electronically on 3 August 2005 and a hard copy of the response as required pursuant to Paragraph 5 of Schedule B of the Rules was received by the Dispute Resolution Provider on 8 August 2005.
- 3.6 The Dispute Resolution Provider appointed a single member Panel on 9 August 2005. The Panelist had submitted a Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Dispute Resolution Provider in compliance with paragraph 7 of the Rules.
- 3.7 The Panel finds that the Complaint complies with the requirements of the .au Domain Administration Dispute Resolution Policy, its Rules and the Supplemental Rules of the Dispute Resolution Provider.

4. Factual Background

- 4.1 The Complainant is the registered owner of the business name Graphisoft Australia. The name is registered in New South Wales being number BN98064614. No details of the Complainant's trading status is disclosed on its website, in its application or available from the ASIC National Names Index. It may or may not be associated with companies, Graphisoft Pty Limited ACN 052 832 014, formerly known as Arkitech Pty Ltd, or Arkitech Pty Ltd ACN 075 617 346 formerly known as Graphisoft Pty Limited.
- 4.2 The Complainant claims to be the sole distributor for ArchiCAD software in Australia.
- 4.3 ArchiCAD is a registered Trademark in Australia No. 48778 of Graphisoft R & D, Szamitastechnikai Fejleszto Reszvenytarsasag H-1031 Budapest (Graphisoft Park), Zahony u.7., Hungary.
- 4.4 A letter from Laszlo Drajko, Director International Sales dated July 11, 2005 in the documents provided, identified "ArchiCAD" as a registered trade name owned by Graphisoft, Budapest, Hungary and identified Graphisoft Australia "*as the only company in Australian market duly authorized to use that trade name*".
- 4.5 The Respondent is a software re-seller and an advisory service, providing information and technical advice to users and potential purchasers of all brands of Computer Assisted Design (CAD) software and related products.
- 4.6 The domain name, the subject of this complaint, was last registered by the Respondent on 16 November 2002.

5. Parties' Contentions

Complainant

The Complainant stated that:

- 5.1 ArchiCAD is the world wide registered trade name of a software product sold exclusively in Australia by our company. This has been the case since 1994.
- 5.2 Mr Nigel Varley through his company CAD Australia has been one of our most aggressive competitors for many years. By registering www.archicad.com.au and redirecting it to his CAD Australia website Mr Nigel Varley clearly diverts inquiries of people interested in finding information about our product ArchiCAD to his website where he can attempt to sell a product from different competitors. We have legal advice that this amounts to passing off.
- 5.3 Mr Nigel Varley is not associated in any way to Graphisoft Australia. The redirection registered interest in ArchiCAD creates confusion and mistrust among our clients.
- 5.4 That the advertisement of ArchiCAD in CAD Australia's web site be removed.
- 5.5 The domain name has been used in bad faith and therefore the Complainant requests that the domain name be transferred to the Complainant.

Respondent

The Respondent stated that:

- 5.6 The Complainants description of the Recipient is incomplete in their letter dated July 14 2005, paragraph 4.2 and may be misleading. The Complainant states the Respondent is a 'software re-seller'. The Respondent is also an advisory service, providing information and technical advice to users and potential purchasers of all brands of Computer Assisted Design (CAD) software and related products about which the respondent has or can glean knowledge. Some of these software products are not sold by the Respondent. The Respondent is also a (CAD) software developer, creating software applications to fulfil client specifications.
- 5.7 The Complainant asserts in its paragraph 5.1 that the name 'archicad' is a trademark name to which it has exclusive rights by association with the registered owner in Hungary. The Respondent asserts that being a local distributor of a product does not give right of ownership of the trademark registered by the company GRAPHISOFT R & D Szamitastechnikai Fejleszto Reszvenytarsasag, H-1031 Budapest (Graphisoft Park), Zahony u.7., HUNGARY.
- 5.8 The Respondent has been advised that if the Complainant were to discontinue as a distributor for any reason at any time in the future, that any rights granted herein may be deemed nul and void in law.

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- 5.9 The use of the word archicad in the domain name is an acronym/abbreviation for 'architectural CAD' and does not by definition constitute a specific product name. The Respondent sells and advises people about 'architectural CAD' software.
- 5.10 The Complainant states in its paragraph 5.2 that Mr Nigel Varley, through his company CAD Australia, has been one of the most aggressive competitors for many years. This statement maybe misleading as neither Mr Varley nor his company, CAD Australia has sold a 'competing' product to that of the Complainant for many years.
- 5.11 The Complainant's product is not in competition with the Respondent's product as it is typically sought and purchased by a different type of buyer. The Complainants product is sold at from three (3) to twenty (20) times the price of products sold by the Respondent. The Complainants product is clearly more sophisticated and suited to use by professional architects than any product sold by the Respondent whose products are sold to entities on very limited budgets and with more modest requirements.
- 5.12 The Respondent advises clients in need of product sold by the Complainant to contact the Complainant directly and it is the Respondents common practice for staff to provide the telephone contact details of the Complainant should a customer ask for the Complainants product name.
- 5.13 At no time does the Respondent enter into the practise of 'passing off'. Visitors are clearly at the CAD International (CAD Australia) web site and not that of Graphisoft when using the www.archicad.com.au domain name. It is unclear how any visitor would mistake the website as being that of Graphisoft's software product.
- 5.14 When searching for architectural CAD software on the site visitors are provided with a selection of products available in Australia including ArchiCAD and Revit (and formerly also SoftPlan) none of which are sold by the Respondent. Contact details for the distributors of these products are provided for the convenience of visitors to the site.
- 5.15 The Respondent is not engaged in the practice of doing business in bad faith and asserts that it has, in providing a free information service to its clients, unwittingly provided the Complainant with several years of unpaid promotion of the ArchiCAD software product.
- 5.16 In good faith the Respondent is willing to alter the redirection of the archicad.com.au web site to mask the name archicad from the address field of the users web browser.

6. Discussion

- 6.1 Paragraph 15(a) of the Rules requires the Panel to "*decide a complaint on the basis of the statements and documents submitted in accordance with the [auDRP and Rules], and any rules and principles of law that it deems applicable.*"
- 6.2 The auDRP is contained in Schedule A, paragraph 4(a) requires a Complainant to prove that:

- 6.2.1 the Disputed Domain is identical or confusingly similar to a name, trade mark or service mark in which the complainant has rights; and
 - 6.2.2 the Respondent has no rights or legitimate interests in respect of the Disputed Domain; and
 - 6.2.3 the Disputed Domain has been registered or subsequently used in bad faith.
- 6.3 In Section 4(b) the following are deemed, non-exhaustively, to be evidence of registration or use in bad faith:
- 6.3.1 circumstances indicating that the domain name has been registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person for valuable consideration in excess of documented out-of-pocket costs directly related to the domain name, or
 - 6.3.2 the domain name has been registered in order to prevent the owner of a name, trademark or service mark from reflecting that name or mark in a corresponding domain name, or
 - 6.3.3 the domain name has been registered primarily for the purpose of disrupting the business or activities of another person; or
 - 6.3.4 the domain name has been used to intentionally attempt to attract, for commercial gain, Internet users to a website or other online location, by creating a likelihood of confusion with the complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of that website or location or of a product or service on that website or location.
- 6.4 Section 4(c) states that, in responding to a complaint, rights to and legitimate interest in a domain name may be demonstrated by a Respondent evidencing one of the following, non-exhaustive, situations:
- 6.4.1 before any notice of the subject matter of the dispute, bona fide use, or demonstrable preparations were made to use, the domain name or a name corresponding to the domain name in connection with an offering of goods or services (not being the offering of domain names acquired for the purpose of selling, renting or otherwise transferring), or
 - 6.4.2 it (as an individual, business, or other organisation) has been commonly known by the domain name, even if it has acquired no trademark or service mark rights, or
 - 6.4.3 it is 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 name, trademark or service mark at issue.

7. Findings

- 7.1 The Domain Name, <archicad.com.au>, is substantially similar to the name, ArchiCAD, to which the Complainant has proprietary rights.**
- 7.1.1 By an arrangement between GRAPHISOFT R & D, Budapest and Graphisoft Australia, (not in evidence, but confirmed by a letter dated July 11, 2005 and signed by Laszlo Drajko, Director, International Sales for GRAPHISOFT R & D, Budapest) described as an "Exclusive Senior Distributor Agreement", GRAPHISOFT R & D Budapest, appointed the Complainant "*exclusive distributor for the software product ArchiCAD in Australia*" and authorized the Complainant to use the ArchiCAD "*trade name*" in Australia.

- 7.1.2 I note that although GRAPHISOFT R & D, Budapest is the registered owner of the “trade mark” ArchiCAD in Australia, what it has authorized is the use of the “trade name”. A “trade name” generally refers to the business name, company name or other trading style under which a business is carried on. It may function as a trade mark within the meaning of the Trade Marks Act 1995, but is regarded as different from the registered trade mark.
 - 7.1.3 Further, the letter evidencing the Exclusive Senior Distributor Agreement, also granted a personal proxy to Maurizio Nannetti, identified as the Managing Director of Graphisoft Australia to:
“take up and conduct all actions allowed by law in order to protect the interests of Graphisoft as the owner of the copyrights and registered trademark of ArchiCAD in Australia”.
 - 7.1.4 I note that Graphisoft Australia is not a company or legal entity that can sue or be sued, but a business name. It is possibly for that reason that the proxy to stand in the interests of GRAPHISOFT R & D, Budapest is provided to an individual, Maurizio Nannetti, who can bring an action to protect the registered trade mark. However, no one of that name is involved in this application. The application has been lodged by an Andrew Lopez, described as the General Manager of Graphisoft Australia. I am of the view, on the material before me, that there is no right in the entity Graphisoft Australia, the Complainant in these proceedings, to bring an action in the name of the owner of the trade mark, “ArchiCAD” in Australia, nor in my view could there be.
 - 7.1.5 Though the Domain Name, <archicad.com.au>, is substantially similar to the name, ArchiCAD, in which GRAPHISOFT R & D, Budapest has proprietary rights, I find that the Disputed Domain name is not identical or confusingly similar to a name, trade mark or service mark **in which the Complainant has rights**.
- 7.2 The Respondent has no rights or legitimate interests in respect of the disputed domain name.**
- 7.2.1 The Respondent employs the use of the disputed domain name in connection with some offerings of goods or services that can be said to be described by the use of the word “ArchiCAD”. I note in this connection that the registration of the trade mark “ArchiCAD” specifically excludes the use of the letters “CAD”. These letters, employed as an acronym, are generally understood to mean “computer assisted design” a generic term for an area of activity for which software has been developed for use on computers. I note that there are many participants in this industry producing different products for different uses (2-dimension modelling versus 3-dimension modelling) or users (residential architects versus large scale engineering design companies). The Respondent asserts and the offerings on its web site appear to confirm, that it operates in the business of supplying both products and expertise in the area of CAD.
 - 7.2.2 The Respondent is known by its company’s name “CAD Australia” and its domain name <cad.com.au>. I accept the submission of the Respondent that the word “archicad” has a generic meaning of “architectural CAD” and does not of itself signify the Complainant’s business of designing and

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developing software for particular types of design applications. I also accept that the Respondent operates a legitimate business in the same industry but with a different operational imperative.

- 7.2.3 I therefore find that the Respondent has a legitimate interest in respect of the disputed domain name.

7.3 The Disputed Domain has been registered or subsequently used in bad faith.

- 7.3.1 The Respondent's use of the domain name has been for a legitimate commercial purpose, of identifying for users of architectural CAD software a site that caters for their needs.
- 7.3.2 I do not infer from the fact that the word "ArchiCAD" has been registered as a trade mark, that the Respondent by use of the disputed Domain Name has misleadingly diverted consumers to its website by offering a link that the consumer would immediately associate with a well known and trusted brand name thereby ensuring a flow of customers who could be enticed to purchase the Respondent's own products which were unconnected with the Complainant's software. The web site of the Respondent is clearly identified as that of CAD International (CAD Australia), which one might think, is a more descriptive term and one more easily associated with the type of product sold or service provided, than the name Graphisoft.
- 7.3.3 The use by the Respondent of the disputed Domain Name, does not I find, constitute an intentional attempt to attract, for commercial gain, Internet users to a website or other online location, by creating a likelihood of confusion with the complainant's name and mark but rather a legitimate use of a generic term associated with CAD software in which the Respondent claims special expertise. Any confusion that may occur is, I find, alleviated by the Respondent clearly identifying, in its listings, the identity of the developer and local distributor of the ArchiCAD software.
- 7.3.4 I therefore do not find that the use of the disputed Domain Name by the Respondent has been in "bad faith".

8. Decision

The Panel having found that the Complainant has not made out any of the three elements required by the abovementioned Section 4(a) of Schedule A of the Rules, it is the decision of the Panel that the Complaint be denied.



Derek Minus

Chartered Arbitrator and Sole Panelist