



ADMINISTRATIVE PANEL DECISION

ADHD Australia Incorporated v. ADDults with ADHD (NSW) Incorporated

LEADR Case No. auDA _07

Domain Name: www.adhdaustralia.org.au
Name of Complainant: ADHD Australia Incorporated
Name of Respondent: ADDults with ADHD (NSW) Incorporated
Provider: LEADR
Panel: D S Ellis

THE PARTIES

- 1 The complainant is ADHD Australia Incorporated.
- 2 The respondent is ADDults with ADHD (NSW) Incorporated.

THE DOMAIN NAME, REGISTRAR AND PROVIDER

- 3 The domain name in dispute is www.adhdaustralia.org.au ("the Domain Name").
- 4 The registrar of the Domain Name is Domain Central.
- 5 The provider in relation to this administrative proceeding is LEADR ("the Provider").

OUTCOME

- 6 The complainant has not established bad faith registration or use of the Domain Name within paragraph 4(a)(iii) of the Policy. The complaint must be dismissed.

BACKGROUND

- 7 The complaint was submitted under the auDRP Policy No 2002/22 ("the Policy"), the auDRP Rules ("the Rules") and the Provider's Supplementary Rules.

- 8 The Provider supplied a document entitled “Procedural History” to the Panel. It appears from that document that:
- (a) The completed application was received by LEADR on 7 May 2007.
 - (b) After various attempts were made to contact the respondent by telephone, a dispute notification letter and a copy of the application were posted to the respondent.
 - (c) A copy of the dispute notification and application were posted to Domain Central on 8 May 2007. Domain Central informed the Provider that the website was locked on 10 May 2007.
 - (d) The response was due on 30 May 2007. No response was received.
- 9 It appears from the materials submitted by the complainant that:
- (a) The Domain Name was registered on 12 February 2007.
 - (b) Both the complainant and the respondent are incorporated bodies, with offices in New South Wales. It appears that both are incorporated under the *Associations Incorporation Act 1984* (NSW).
 - (c) The complainant is a charitable organisation, so that persons who donate funds to the complainant are entitled to claim donations as tax deductions.
 - (d) The primary activities of both the complainant and the respondent are the dissemination of information about ADHD and providing support to sufferers of ADHD and their families. The complainant described ADHD as a mental disorder, standing for Attention Deficit Hyperactivity Disorder. ADD is another commonly used acronym for the same condition.

DELIBERATIONS

- 10 The issue in these proceedings is whether the complainant has satisfied the Panel of each of the elements of paragraph 4(a) of the Policy. That paragraph contains three elements:

- “(i) [the respondent’s] domain name is identical or confusingly similar to a name, trademark (sic) or service mark in which the complainant has rights; and
- (ii) [the respondent has] no rights or legitimate interests in respect of the domain name; and
- (iii) [the respondent’s] domain name has been registered or subsequently used in bad faith.

These elements are cumulative. The complainant bears the onus of establishing each element.

- 11 The onus of establishing the relevant circumstances rests on the complainant. In the absence of any response from the respondent, I am entitled to accept the factual assertions made by the complainant. I am entitled to take into account the fact that the respondent has not taken the opportunity to dispute any of the assertions made by the complainant when evaluating probabilities and drawing inferences. I am not obliged, however, to accept the inferences or conclusions which the complainant draws from the factual matters established by the evidence. In addition to the material provided by the complainant, I have viewed the websites of operated by the complainant and the respondent.
- 12 The criteria set down in the Policy are quite specific. These proceedings are not directed towards more general questions of whether it is advisable or appropriate for one party or the other to be registered in respect of the Domain Name, or whether the conduct of the respondent might have given the complainant remedies under the general law of Australia. The conclusion to which I arrive in this determination should not be seen as an endorsement of the conduct of either the complainant or the respondent. The fact that the circumstances do not warrant cancellation under the Policy does not mean that the complainant has no rights in another forum. That is a matter about which I express no view.
- 13 It is convenient to consider each of the elements of paragraph 4(a) of the Policy in turn.

Paragraph 4(a)(i): Similarity between the domain name and a trade mark in which the complainant has rights.

14 Paragraph 4(a)(i) of the Policy is set out above. A footnote to paragraph 4(a)(i) reads:

“For the purposes of this policy, auDA has determined that a “name ... in which the complainant has rights” refers to:

- a) the complainant’s company, business or other legal or trading name, as registered with the relevant Australian government authority; or
- b) the complainant’s personal name.”

15 It is apparent that the Domain Name is similar to a name in which the complainant has rights. The Domain Name substantially reflects the name of the complainant.

Paragraph 4(a)(ii): Respondent’s rights or legitimate interests in respect of the domain name.

16 The second element which the complainant must establish is that the respondent had no rights or legitimate interests in respect of the Domain Name, as stipulated in paragraph 4(a)(ii). This sub paragraph of the Policy is not concerned with whether a complainant has a greater right or interest in respect of the Domain Name than the respondent. This paragraph is directed to a (complete) lack of right or interest in the Domain Name on the part of the respondent.

17 In considering whether a respondent has rights or a legitimate interest in the Domain Name, the matters stipulated in paragraph 4(c) of the Policy must be taken into account. Paragraph 4(c) of the Policy reads

“Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, is to be taken to demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):

- (i) before any notice to you of the subject matter of the dispute, your bona fide use of, or demonstrable preparations 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 that you have acquired for the purpose of selling, renting or otherwise transferring); or

- (ii) you (as an individual, business, or other organisation) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; 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 name, trademark or service mark at issue.”

18 The respondent does not satisfy paragraphs 4(c) because:

- (a) The Domain Name was not actively used in connection with an offering of goods or services;
- (b) The respondent was not commonly known by the Domain Name prior to registration; and
- (c) The respondent is not making legitimate non-commercial or fair use of the Domain Name. Prior to these proceedings being commenced, the primary “use” to which the Domain Name was put was that of preventing other entities using it. It was not actively using the Domain Name to advance its interests.

Paragraph 4(a)(iii): “bad faith” registration or use.

19 The complainant must also establish that the Domain Name has been registered or subsequently used in “bad faith” within paragraph 4(a)(iii) of the Policy. Paragraph 4(b) provides a list of matters which provide evidence of bad faith registration or use of a domain name. It reads:

- “(i) circumstances indicating that [the respondent has] registered or [the respondent has] acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person for valuable consideration in excess of [the respondent’s] documented out-of-pocket costs directly related to the domain name; or
- (ii) [the respondent has] registered the domain name 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
- (iii) [the respondent has] registered the domain name primarily for the purpose of disrupting the business or activities of another person; or

- (iv) by using the domain name, [the respondent has] have intentionally attempted 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.”

Bad faith use may be established by other matters as well.

- 20 I am not satisfied that bad faith use has been established. I shall deal with each of the limbs of paragraph 4(b) in turn.
- 21 Sub-paragraph 4(b)(i) requires that the Domain Name be acquired for the purpose of commercial gain through selling or leasing the Domain Name. The complainant conceded this sub-paragraph did not apply.
- 22 Sub-paragraph 4(b)(ii) requires that the registration be directed towards preventing the owner of a mark or trade name etc from reflecting that name in a corresponding domain name. On 15 April 2007, the secretary of the respondent sent an email to the secretary of the complainant describing the circumstances in which registration of the Domain Name came about. The complainant included it in the complaint. The email includes the following:

“Early this year the adult group [ie the respondent] was concerned that when anyone googled in ‘adult adhd’, our organisation didn’t even come up on the first page. It was full of private enterprise and assorted others. Our webmaster found ‘www.adultadhd.org.au’ was available and our committee agreed to take it.

She was also amazed to find ‘adhdaustralia’ was available, and suggested we park it so that people like DORE or scientology or those out there in private enterprise couldn’t take it. We were also thinking at that time, that if adults were successful with submissions for national funding, we would need a national website for adults. The committee agreed, and at that meeting I just didn’t even think about confusion with anyone else. We have been told that some private practitioners are buying up adhd sites and parking them, prior to selling them on at exorbitant prices. At least our site leads people to reputable sites and contains legitimate info. That’s all there was to it.

I can still picture the blue business cards you handed me at our seminar with ‘www.adhdnsw.org.au’ on it, and was later puzzled when you told me the organisation was called ‘ADHD Australia Inc’. I wasn’t even aware you had another side www.adhd.org.au, which I now realize is so

similar to 'www.add.org.au'. Why on earth didn't you use the 'adhdaustralia' website or at least 'park it' as they say."

The respondent's expressed motive for registration appears to be two fold:

- (a) to prevent "the scientologists" or "DORE" from getting hold of the Domain Name; and
- (b) to use the name for a national website, if it obtained "national funding".

I express no opinion about the substantive merits of the respondent's views aboutscientologists or DORE, but the expressed motive does not fall within subparagraph 4(b)(ii). DORE and scientologists are not capable of reflecting their names or trade marks in the Domain Name.

23 The complainant contended that this explanation showed that the respondent had the intention of excluding not only "people like DORE or scientology", but also of excluding the complainant. Excluding the complainant would fall within paragraph 4(b)(ii). The following factors support the complainant's contention:

- (a) The respondent said that its primary motive was to prevent DORE and scientologist getting control of the site. The complainant contended that that objective would be achieved if it was registered in respect of the Domain Name. The complainant offered to meet the costs associated with transferring the Domain Name to it. The respondent refused to transfer the Domain Name to the complainant.
- (b) The respondent was aware of the existence of the complainant, and its name, at the time the Domain Name was registered. It should be noted that the respondent was also told of the website operated by the complainant, www.adhd.org.au. If the respondent registered the Domain Name, that would have the effect that the complainant could not do so. It is clear that the respondent was aware of this consequence.

The complainant referred to the comments in the email of 15 April 2007 about the need for a national website. The complainant suggested that the Domain Name was not needed in order to perform the foreshadowed national role.

- 24 On balance, however, I am not satisfied that the respondent had the intention required by paragraph 4(b)(ii) of the Policy. The respondent did not file a response and, more specifically, did not affirm the truthfulness of the account given in the email of 15 April 2007. However, there is no requirement in the Policy that parties provide the panel with statutory declarations, or the like, affirming the truthfulness of allegations made by them. A factor which influences me in this context is the interest which the respondent has in affairs concerning ADHD, apart from these proceedings. The account given in the email of 15 April 2007 is not inherently implausible, and, in broad terms, I accept it, so far as it goes.
- 25 It appears from the email of 15 April 2007 that the respondent was focused on DORE, the scientologists and national funding. The complainant had established its website using a different Domain Name. There is nothing to suggest that the complainant had any plans to expand its web presence to include the Domain Name. If the complainant had these plans, there is nothing to suggest that the respondent was aware of them and sought to thwart them. The material provided does not allow me to conclude that the respondent acted to *in order to* prevent the complainant registering using its name as a Domain Name, even if the respondent's conduct had this effect.
- 26 The conduct does not fall within paragraph 4(b)(iii). This sub-paragraph is concerned with the purpose, indeed the primary purpose, of the respondent in procuring registration. The primary purpose of registration must be disruption of the business or activities of another person. As indicated above, the respondent does not appear to have considered the complainant when it was registering the Domain Name. There is no evidence that disrupting the business or activities of the complainant was a purpose, let alone the primary purpose of the respondent's conduct. The complainant contends that registration of the Domain Name in the name of the respondent will have the effect of causing disruption to the activities of the complainant. I accept that disruption will occur because of the similarity between the name of the complainant and the Domain Name. The respondent may also have been aware that disruption would result from its registration of the

Domain Name. It does not follow, however, that this disruption was the primary purpose of registration, as required by paragraph 4(b)(iii) of the Policy.

27 The material provided by the complainant does show that the respondent wished to prevent DORE and the scientologists taking up the Domain Name, and using it to provide information or materials sourced by them. It might be argued that this was an intention to disrupt the business or activities of those organisations. However, there is no evidence that either DORE or the scientologists had a particular link to the Domain Name. Registration of the Domain Name leaves those institutions free to continue to promote any views they may have about ADHD using the avenues presently available to them. Registration of the Domain Name would not *disrupt* their activities in the sense contemplated by paragraph 4(b)(iii). Paragraph 4(b)(iii) is not satisfied.

28 Sub-paragraph 4(b)(iv) is a complex provision. It involves:

- (a) an intentional attraction of users to a website;
- (b) for commercial gain;
- (c) by the creation of confusion with the complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of that website.

While it may be accepted that confusion will result from the registration of the Domain Name in the name of the respondent, I do not accept that the respondent acted for commercial gain in registering the Domain Name. There are "commercial" aspects associated with the activities of the respondent. The respondent sells publications through its website. The complainant provided a copy of part of one page of the respondent's website devoted to the sale of publications. I assume that some seminars or conferences organised by the respondent charge participants for attending. Activities carried out for reward do not, however, appear to be a principal feature of the respondent's activities or even a significant one. The bulk of the pages on the website are devoted to the dissemination of information about ADHD. I consider the conduct of the respondent does not fall within paragraph 4(b)(iv) of the Policy.

- 29 I note that members of the public can become members of the respondent by applying and paying a fee. Parts of its website were devoted to membership issues. Some websites may use the “membership” or subscription model in a commercial way as a primary source of revenue in a business intended to make a profit. In the context of the limitations on the activities and objects of associations incorporated under the *Associations Incorporation Act 1984*, I do not regard charging membership fees as an activity carried on for commercial gain.
- 30 The complainant sought to undermine the bona fides of the respondent’s explanation for registration by pointing out that the secretary of the respondent had been involved in similar organisations for a number of years and was alert to the impact of Domain Names. The respondent’s secretary’s assertion that she “just didn’t even think about confusion with anyone else” was said by the complainant to be implausible for this reason. However, an awareness of and a carelessness about confusion between the complainant and the respondent does not mean that the respondent acted for the purposes of commercial gain.
- 31 Paragraph 4(b) is not a comprehensive definition of “bad faith” use for the purposes of the Policy. Conduct may be bad faith use even though it does not fall within paragraph 4(b). The material does not satisfy me that the conduct of the respondent may be categorized as bad faith use. I accept that the respondent’s registration in respect of the Domain Name may have adverse consequences for the complainant. It does not follow, however, that the actions of the respondent were not in furtherance of its own interests and were in bad faith generally. The respondent is an organisation concerned with ADHD. ADHD is a significant feature of the Domain Name.

DECISION

32 The Panel is satisfied as to the elements of paragraphs 4(a)(i) and 4(a)(ii) of the Policy. The Panel is not satisfied that there was bad faith registration or use within paragraph 4(a)(iii) of the Policy. The complaint must be dismissed.

Date: 12 June 2007

DS Ellis
Sole Panelist