

ADMINISTRATIVE PANEL DECISION

InfoMedia Services Ltd v Bugel Pty Ltd

LEADR Case No. 04/2003

Panel Member: S F Stretton
Name of complainant: InfoMedia Services Ltd
Name of respondent: Bugel Pty Ltd
Domain name at issue: partymob.com.au
Date of Decision: 12 November 2003

Complaint

1. On 5 November 2003 the Panel received a copy of a five page complaint from InfoMedia Services Ltd, UK annexing supplementary materials. The complaint concerns the domain name partymob.com.au registered by the respondent on 21 July 2003.

Procedural History

2. I have been advised by LEADR and in the absence of evidence to the contrary I accept that:
 - 2.1 This complaint was submitted for decision in accordance with the policy (auDRP) which was approved by auDA in 2001 and commenced operation on 1 August 2002 and LEADR's supplementary rules (LEADR is the Provider).
 - 2.2 The complaint was lodged with the Provider on 9 October 2003.
 - 2.3 The Provider acknowledged receipt of the complaint to the complainant. The respondent was sent the complaint and the explanatory covering letter on 10 October 2003 by post. The respondent was advised that they had until 30 October to submit all materials they wished to have considered by the adjudicator.
 - 2.4 The Provider advised auDA of the complaint on 10 October 2003.
 - 2.5 The Provider advised Net Registry Pty Ltd the Registrar for the respondent, on 10 October 2003. A copy of the complaint was posted on 10 October 2003. Whilst the Registrar was asked to confirm acceptance of notification and that they had taken action to lock the domain for the period of the determination, no such confirmation was received by 3 November 2003.

- 2.6 No response has been received from the respondent as at 3 November 2003.
- 2.7 On 10 October 2003 I was approached by the Provider and accepted the appointment that same day providing a statement of acceptance and of impartiality.
3. I reiterate that so far as I am aware I do not know and have no connection with either the complainant or the respondent in this matter.

Natural Justice

4. I note the materials before me indicate that the respondent has been provided with a notification of the complaint and a copy of the complaint. I note that LEADR has informed me that no response has been received on behalf of the respondent. In the absence of other evidence I find that the respondent has been given an opportunity to comment and respond to the complaint and that accordingly the requirements of natural justice have been satisfied.

Dispute Resolution Policy

5. I have been asked to and I apply .au Dispute Resolution Policy no. 2002/22 (auDRP). Such policy applies to disputes as set out in paragraph 4a of the auDRP of Schedule A which provides as follows:

“Where a complainant asserts to the provider in compliance with the rules of procedure that:

- (i) Your domain name is identical or confusingly similar to name, trademark or service mark in which the complainant has rights; and*
- (ii) You have no rights or legitimate interests in respect of the domain name; and*
- (iii) Your domain name has been registered or subsequently used in bad faith.”*

6. Paragraph 4b of Schedule A provides that the following circumstances in particular but without limitation if found by the 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 another person 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 a name, trade mark or service mark from reflecting that name or mark in a corresponding domain name; or

(iii) You have registered the domain name primarily for the purpose of disrupting the business or activities of another person; or

(iv) By using the domain name you 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."

7. I note that the complainant bears the onus of proof.

Evidence before the Panel

8. The complainant per its representative solicitors Tress Cocks & Maddox submitted a factual framework by way of their signed complaint.
9. The complainant states that it owns the trademark partymob.com, a trademark registered in the UK in 2001. They state the trademark has been in constant use in UK, Ireland and Australia since 2001. The complainant is in the final stages of being granted an international trademark under three classes covering all aspects of mobile communication including the delivery of content. They anticipate full registration on 15 November 2003.
10. The complainant annexed to the complaint a copy of their application for an Australian trademark filed on 27 August 2003 for the word partymob. The complainant further states it is the existing owner of www.partymob.com and www.partymob.net.au.
11. They go on to state that their wholly owned subsidiary InfoMedia Telecom Ltd registered in Australia as a foreign company under the *Corporations Act 2001* (ABN 54 105 984 021) is the owner of a Victorian business name "Partymob". They provided a copy of that Certificate of Business Registration dated 27 August 2003. The complainant further observes that another of its wholly owned subsidiaries is a UK company named Partymob Limited (UK Registration No. 04277052).
12. The complainant goes on to claim that the domain name at issue partymob.com.au comes within Clause 4a of the auDRP rules sub-clauses (i), (ii) and (iii). In support of this claim it states that the domain name partymob.com.au is identical or confusingly similar to the names and trademarks which the complainant uses and points to its Australian trademark application and business name, and its own historical connection with the name partymob.
13. It goes on to assert that the respondent has no rights or legitimate interests in the domain name and that the respondent registered the domain name in bad faith and subsequently used the domain name in bad faith.
14. In support of this proposition the complainant puts the following:
 - (a) The complainant's Partymob brand and trademark partymob.com is well known to the respondent. Advertisements for the complainant's Partymob brand occur regularly alongside the respondent's brand advertisements;
 - (b) The complainant spends over £19 million a year promoting this brand of which approximately AU\$3 million is spent in Australia with all the major magazines such as TV Week, Dolly and Girlfriend;

- (c) That the respondent has registered the domain name in order to prevent the complainant from reflecting that name, trademark or service mark in a corresponding domain name; and/or
 - (d) The respondent has registered the domain name primarily for the purpose of disrupting the business activities of the complainant. The complainant draws in aid WIPO Case D 2000-0003 *Telstra v Nuclear Marshmallows* where it was recognized that inaction (eg. passive holding) in relation a domain name can, in some circumstances, constitute a domain name being used in bad faith. The complainant has annexed evidence that the creation date of the disputed domain name is 21 July 2003.
15. The respondent has not complied with Rule 5 of Schedule B to the auDRP Rules in that it has not submitted a response to the Provider and in particular has made no response to the matters raised in the complaint nor provided any basis upon which asserts that it should retain registration and use of the disputed domain name as required by Rule 5(b)(i).
16. Rule 14(b) provides that where a party in the absence of exceptional circumstances does not comply with a requirement of the Rules the panel shall draw such inferences therefrom as it considers appropriate.
17. Whilst Rule 4a to Schedule A of the auDRP Rules provides that at all stages the complainant bears the onus of proof, Rule 14(b) of Schedule B is relevant to the inferences the panel may draw from facts led by the complainant where the respondent fails to dispute those facts.

Findings

18. I accept the facts as stated by the complainant.
19. I find that the disputed domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights in that it is virtually identical to the complainant's trademark application and business name both registered in Australia which reflect the use of "partymob.com". The trademark has itself been in use in Australia since 2001 and used in advertisements in Australian publications.
20. I find that the facts put by the complainant clearly raise the inference that the respondent has no legitimate interest or right in the domain name.
21. I find that in the absence of any answer to the claims of the complainant and in light of no evidence being led by the respondent that on the facts put by the complainant it has any right or legitimate interest in respect of the domain name that the respondent has no right or legitimate interest in respect of the domain name.
22. I further find that the domain name has been registered or subsequently used in bad faith in the sense that phrase is used within Rule 4A(iii) in that it is likely that the domain name has been registered for the purposes of preventing the complainant from reflecting that name in a corresponding domain name or with the purpose of disrupting the business activities of the complainant. I arrive at this conclusion on the basis of the factual framework led by the complainant and the absence of any response thereto.

Remedy

23. The complainant has requested a transfer of the disputed domain name to itself. Pursuant to paragraph 6.1 of the auDRP the complainant is eligible to have the domain name licence transferred to itself only if the Registrar determines that they are eligible to hold the domain name under the relevant policy rules.

Decision

1. That the complainant has established its complaint and is accordingly entitled to a transfer of the disputed domain name if the Registrar determines that it is eligible to hold the domain name under the relevant policy rules.

Dated 12 November 2003

Simon Stretton

Panelist - LEADR