

Resolution Institute

Administrative Panel Decision (sole panellist)

Matter Number: auDRP_24_04.

Hairydog Group Pty Ltd vs Rudolph Orange

1. The Proceeding

This is a proceeding brought under 2016-01 - .au Dispute Resolution Policy (updated 29/09/2022), Schedule A (“the .au Dispute Resolution Policy”).

2. The Parties

The Complainant is Hairydog Group Pty Ltd, ABN 74 668 149 755, located at Level 1, 163 Eastern Road, South Melbourne, VIC 3205

The Respondent is Rudolph Orange, ABN 24372836944, located at 555 Pennant Hills Road, West Pennant Hills, NSW 2125

3. The Domain Name and Registrar

The disputed domain name is <boozebud.com.au> registered with GoDaddy.com LLC trading as GoDaddy.com

4. Procedural History.

The following is the procedure that has been followed in this matter.

**Domain Name Dispute Complaint - Procedural Case History
auDRP_24_4**

Hairydog Group Pty Ltd v Rudolphe Orange

Boozebud.com.au

Document/ Correspondence	From	To	Mode & Date of Submission
Domain Name Dispute Complaint dated	Complainant	Provider	Email Wednesday, 3 April 2024

3 April 2024 (further information provided 10 April 2024)			
Request for payment of the single panellist to be arranged	Provider	Complainant	Email Monday, 8 April 2024
Invoice for panellist fee issued on request	Provider	Complainant	Email Monday, 8 April 2024
Acknowledgement of receipt of the complete complaint	Provider	Complainant	Email Monday, 15 April 2024
Registrar Notification of Domain Name Dispute Complaint dated 3 April 2024	Provider	Registrar	Email Wednesday, 17 April 2024
Registrar response with registrant details and confirmation of lock on Domain Name	Registrar	Provider	Email Thursday, 18 April 2024
Notification to respondent of Domain Name Dispute Complaint	Provider	Respondent (copied to Complainant, Registrar & auDA)	Email Thursday, 18 April 2024
Response due Thursday, 18 April 2024			
Response received	Respondent	Provider (and copied to complainant, Registrar & auDA)	Email Thursday, 2 May 2024

Document/ Correspondence	From	To	Mode & Date of Submission
Confirmation of receipt of response and advice to parties that provider will proceed to appoint a panellist	Provider	Parties (and copied to auDA & Registrar)	Email Friday, 3 May 2024
Panellist statement of independence & impartiality issued	Provider	Panellist	Email Monday, 6 April 2024
Case File issued	Provider	Panellist	Email Wednesday, 8 April 2024
Notice of nomination of panellist	Provider	Parties (and copied to auDA & Registrar)	Email Wednesday, 8 April 2024
Decision due Wednesday, 22 May 2024			

5. Remedy Sought

The Complainant requests that the disputed domain name be transferred from the Respondent to the Complainant.

6. Factual Background

The Complainant Hairydog Group Pty Ltd is an Australian company that operates an online alcohol retail business and to that end owns a domain name, <boozebud.com> which it uses in its business at www.boozebud.com. That website is named Booze Bud. There are also references on the website to Bud Club where reward points may be earned by members. Its products seem from the website to be alcoholic drinks, although there is one offering that includes drinking glasses. Making a purchase is by way of clicking on the item to be bought and then providing credit card and personal details to finalize the purchase and its delivery. So far as the Panel can tell from the Terms of Service set out on the website, a purchase through the website is a direct transaction between the Complainant as seller and the internet user or consumer as buyer.

The Respondent says that it is engaged in “marketing alcoholic products” and it does this through the disputed domain name, <boozebud.com.au> that is the subject of this proceeding. That domain name resolves to the website www.boozebud.com.au which

introduces the visitor to a website named Booze Buddie with the promotional line “Booze For Less”. Visiting that website reveals that it is indeed selling alcoholic drinks. However, its home page states that “Booze Buddie” has “redefined the way you explore and Discover spirits, wines, beers, and more!” The meaning of “more” in this context becomes instantly apparent from the website, as it offers for sale, as well as the broad range of alcoholic drinks already referred to, “Booze Gifts” which include socks, stubby holders, grill scrapers, hampers, cuff links, Christmas other books, trivia, a BBQ Bible, snacks, drinking glasses, bathroom items and other products.

The Complainant contends that it has an Australian trademark for BOOZEBUD, that the Respondent’s domain name <boozebud.com.au> and its “website “Booze Buddies” “are an infringement of that trademark, that this has confused its customers, that the Respondent has no right to or legitimate interest in the disputed domain name, that it has used the domain name in bad faith and that, therefore, the domain name should be transferred from the Respondent to the Complainant.

The Respondent says that it has not used the Complainant’s trademark BOOZEBUD on its website, it has not infringed the BOOZEBUD trademark, it uses the domain name for an affiliate program, it has a right to and interest in the domain name and that its use of the domain name has at all times been in good faith. Accordingly, the Respondent says that the Complaint should be dismissed and that the domain name should remain with him.

To resolve the dispute, the Complainant filed a Complaint under the auDRP with Resolution Institute on 3 April, 2024 and the Respondent filed a Response to the Complaint on 2 May 2024.

7. CONTENTIONS OF THE PARTIES

The foregoing is only a summary of the parties’ submissions and they have both submitted more detailed contentions. Those contentions are as follows:

A. COMPLAINANT

1. The Complainant is an Australian company that offers alcoholic drinks for sale.
2. It conducts that business under the domain name <boozebud.com>.
3. In June 2023, the Complainant acquired “the website” to which the <boozebud.com> domain name resolved.
4. It appears that the Respondent is the registered owner of the <boozebud.com.au> domain name (“the disputed domain name”).
5. From June 2023 until December 2023 the disputed domain name resolved to the Complainant’s website at www.boozebud.com.
6. In December 2023, the Respondent acquired the <boozebud.com.au> domain name.
7. Since then, the Respondent has created a website at www.boozebud.com.au entitled “Booze Buddies” (*sic*) that has confused the customers of the Complainant. (**Panel note:** the Panel has examined that website and finds that it is not entitled “Booze Buddies”, but “Booze Buddie”).

8. "The new owner of boozebud.com.au created an affiliate website and joined our affiliate program to earn commission on traffic forwarded to boozebud.com."
9. In creating the website, the Respondent "scraped product data" from www.boozebud.com and linked to the matching product on "our" website. Thus, customers entering www.boozebud.com.au in their web browser landed on www.boozebud.com where commission from any sales would be paid to the owner of www.boozebud.com.au, namely the Respondent.
10. The Complainant asked the Respondent to change his domain name and branding to avoid confusion with the Complainant, but the Respondent declined to do so.
11. The Respondent then removed links to the Complainant's website to redirect hits to "another".
12. Despite that, the Respondent's business takes visitors intending to visit www.boozebud.com.
13. The Respondent does not have a business name of "boozebud" or similar and had not been known as "boozebud" before acquiring the disputed domain name in December 2023.
14. The Respondent has used the domain name in bad faith in that:
 - (a) he has refused to change his domain name and brand;
 - (b) he rejected the Complainant's offer to buy the domain name;
 - (c) he has evinced the intention to sell the domain name for a much higher price by listing "Booze Buddie" for auction on Flippa or through "a private Facebook group which has expressed interest in the site (\$5000 reserve)..."; and
 - (d) he, the Respondent, invited the Complainant to take part in the Flippa auction or buy the domain name for \$3900.
15. Accordingly, the Complainant seeks the remedy of an order that the domain name be transferred to the Complainant.

B. RESPONDENT

1. The Respondent's use of the disputed domain name does not infringe on the Complainant's BOOZEBUD trademark.
2. The minor difference between a ".com" domain name and a ".com.au" domain name is not substantial enough to constitute trademark infringement, especially because of the parties' distinct services.
3. The Complainant's trademark is BOOZEBUD, but the Respondent's website, content, branding and promotions operate under the name "Booze Buddie", not "Boozebud".
4. The Respondent's website Booze Buddie is an independent platform marketing alcoholic products and related content, and the Respondent has taken all necessary steps to ensure that its business operations do not infringe on the Complainant's trademark rights.

5. The Respondent has not “scraped product data from boozebud.com” as it was provided by the Complainant in compliance with the terms and conditions of the affiliate agreement and used in good faith for the purpose given.
6. The Respondent did not create a website named “Booze Buddies”.
7. Internet users seeking Booze Buddie are presented with the offer of products not only from the Complainant but from other suppliers as well. When they chose products on the Respondent’s site which they then bought, a commission would be generated for the owner of <boozebud.com.au> in accordance with affiliate marketing.
8. The Respondent has a right or legitimate interest in the disputed domain name. That is because it uses the domain name to market products through www.boozebud.com.au and earn affiliate commission which is a common and legitimate practice in online marketing.
9. Moreover, the Respondent has been using the domain name for its business and generating income since acquiring the disputed domain name and before the Complainant’s interest in the Respondent’s ownership of the domain name was aroused.
10. The Respondent has not used the disputed domain name in bad faith as it has removed the affiliate links to the Complainant’s website and offered to sell the domain name to the Complainant. Listing the domain name for sale is not bad faith.
11. Thus, the Respondent is in competition with the Complainant by offering products from several providers including the Complainant.
12. It is notable that the Complainant has offered to buy the domain name from the Respondent for \$1000.
13. The complaint is unreasonable and it would be expensive and disruptive to comply with it.

8. DISCUSSION OF THE ISSUES

The .au Dispute Resolution Policy makes it very clear that a complainant must prove each of the three distinct issues specified. That is because paragraph 4 of the Policy provides that:

“a. Applicable Disputes. You (the Respondent holder of the domain name) are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure that:

- (i) your domain name is identical or confusingly similar to a 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.

In an administrative proceeding, the complainant bears the onus of proof.”

The use of the word “and” shows that all of the three elements must be proved. Thus, a complainant may succeed on one element, but not succeed on the other two, or one of them, and hence fail in the whole proceeding.

The Panel will therefore deal with each of these three elements in turn.

IDENTICAL OR CONFUSINGLY SIMILAR

The first question that arises under this element is whether the Complainant has a trademark on which it may rely. That is so because paragraph 4 (a) of SCHEDULE A - .au DISPUTE RESOLUTION POLICY (auDRP) (“the Policy”) provides as follows and as noted above:

“a. Applicable Disputes. You (the registrant of the domain name) are required to submit to a mandatory administrative proceeding in the event that a third party (a “complainant”) asserts to the applicable Provider, in compliance with the Rules of Procedure that:

(i) your domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has right:...”

The Complainant in this case relies on the fact that it “has” a trademark and therefore it must prove that fact.

The Complainant has adduced evidence that it is the owner of the trademark for BOOZEBUD, Registration number 1730112 and has tendered a certificate to that effect from IP Australia which the Panel has examined and finds to be in order. The certificate shows that the trademark was registered on 23 October 2015. That does not mean of course that the Complainant has owned the trademark from that date, and it appears from the certificate that it was transferred from a company named Pocko Pty Ltd to the Complainant on 16 June 2023. However, the certificate shows that the Complainant is the current owner of the trademark.

The Complainant has therefore shown on the evidence that it “has” a trademark and that it therefore has standing to bring this Complaint.

The next question that arises is whether the domain name is identical or confusingly similar to the trademark, as if it is not, the Complainant will not have proved the first of the three elements that it must establish. The disputed domain name is <boozebud.com.au> and the trademark is BOOZEBUD. The question therefore is whether <boozebud.com.au> is identical or confusingly similar to BOOZEBUD. The Panel finds that the domain name is identical to the trademark because the substance of the domain name, “boozebud”, is the same word as the trademark itself and that word is therefore identical to the trademark. As for the inclusion of the Australian country code Top Level Domain “.com.au” in the domain name, that has always been ignored by domain name panellists when making the comparison

between a domain name and a trademark, as all domain names must have an extension of some sort and it therefore does not influence the issue of whether the domain name is identical or confusingly similar to the trademark. Thus, the fact that it is present does not mean that the domain name is no longer identical to the trademark; it merely means that the substance of the domain name, namely “boozebud”, is the same as the substance of the trademark BOOZEBUD and they are therefore identical.

The Complainant has therefore proved that it has a trademark and that the disputed domain name is identical to that trademark.

It has therefore proved the first of the three elements it must establish.

RIGHTS AND LEGITIMATE INTERESTS

The second element that the Complainant must prove is in paragraph 4(a) (ii) of the Policy, which is that:

“(ii) you (the registrant of the domain name) have no rights or legitimate interests in respect of the domain name; ...”

The question immediately arises whether the Respondent, who has registered the domain name, has a right to it or a legitimate interest in it and that turns on what exactly is a right or a legitimate interest in a domain name. In that regard, the Policy sets out some examples in paragraph 4(c) of circumstances that are clearly declared to be rights and legitimate interests in a domain name. These examples are introduced by the Policy stating:

“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 (the registrant’s) 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.

Put into colloquial language, this means that if the registrant of a domain name has used it for a *bona fide* sale of goods or services, or if the domain name consists of its own name, or if it has used the domain name for some non-commercial purpose like a fan or criticism site, then it may well be able to defeat a claim made against it for the domain name and be able to keep it, subject of course to the precise words of the exemption and the current law.

These three declared situations are of course very important, because if one of them can be proved by the Respondent in the present case, he will have a right or legitimate interest in the domain name, the whole claim will fail and the Respondent will be able to retain the domain name.

The other important thing to note about these criteria is that they are not the only grounds a domain name holder may rely on to retain the domain name. That is because they are “without limitation”, meaning that other grounds may be relied on by the Respondent to show that he has a right or legitimate interest in the domain name.

The Panel therefore will look, first of all, at the examples given, to decide if the Respondent comes within any of them, and then to see if there are any other grounds the Respondent may rely on, even if they are not articulated in the examples given.

To make this analysis clearer, the Panel will deal first with two of the given examples which clearly do not give the Respondent a right or legitimate interest in the domain name and then with a further example where the situation is very different.

It is clear, first of all, that the Respondent does not come within sub-paragraph 4 (c) (ii) of the Policy. That is because there is no evidence that the Respondent is commonly known as <boozebud.com.au>. The Respondent is Rudolph Orange, not <boozebud.com.au>, and it can only be assumed that he is commonly known as Rudolph Orange, and not as <boozebud.com.au>. Moreover, there is no evidence at all that he is known as <boozebud.com.au>, commonly or otherwise. Obviously, he uses the domain name in his business and he may be known as the person who owns or runs the business of that name, but that is entirely different. So, the Panel finds that the Respondent is not commonly known by the domain name.

Secondly, it is also clear that the Respondent is not using the domain name for a non-commercial purpose under sub-paragraph 4(c)(iii) of the Policy. The whole point of the use of the domain name in this case is that the Respondent claims he is using it for his business in an affiliate program, which is essentially commercial and not “non-commercial”. So, the Respondent will not be able to rely on this ground.

Thus, the Respondent has not succeeded on either of those two grounds.

It is, however, very different in the case of the first example or criterion given in paragraph 4(c), namely the example given under sub-paragraph 4(c)(i), which is whether the Respondent had used the domain name for a *bona fide* offering of goods or services before he was given notice of the dispute. If he had used the domain name for that purpose, then he holds the domain name legitimately and will be able to retain it.

In the opinion of the Panel there is strong evidence to show that the Respondent has used the domain name for a *bona fide* offering of goods or services and that he did so before he was given notice of the dispute. The Panel will now describe what that evidence is.

The evidence of the parties on whether the Respondent had used the domain name for a *bona fide* offering of goods or services before he was given notice of the dispute.

The evidence of the Complainant on this issue, that is, the evidence it relies on to show that the Respondent does not have a right or legitimate interest in the domain name, is that:

- (a) it, the Complainant, acquired “the BoozeBud website in June 2023” and that from then until December 2023, the domain name <boozebud.com.au> was redirecting to <boozebud.com>;
- (b) the Respondent acquired the domain name in December 2023;
- (c) from December 2023, the domain name was being used in an affiliate program because the Respondent created an affiliate site “and joined our affiliate program to earn commission on traffic forwarded to <boozebud.com>”;
- (d) under that arrangement, “customers who entered boozebud.com.au in their web browser landed on the new website (of the Respondent) and then to our site boozebud.com where commission from any sales would be paid to the owner of boozebud.com.au”.

The evidence of the Respondent, that is, the evidence he relies on to show that he does have a right or legitimate interest in the domain name, is that:

- (a) he uses and has used the domain name for “an independent platform marketing alcoholic products and related content;”
- (b) he does not use the domain name in any manner that infringes on the Complainant’s rights as the owner of the BOOZBUD trademark;
- (c) he has marketed on his website products from various business leaders, but not exclusively from the Complainant;
- (d) under his affiliate agreement with the Complainant, customers who clicked on products on his website and subsequently made a purchase via <boozebud.com>,

- would generate commission for him, in his capacity as the owner of <boozebud.com.au>;
- (e) deriving commission in this way is a common and legitimate practice in online marketing;
 - (f) the Complainant's position is invalid as it made an initial and ongoing request to change the Respondent's name domain name and brand "whilst continuing to remain a contributor to their affiliate marketing network...";
 - (g) the Complainant has made an unsolicited offer to buy the <boozebud.com.au" domain name.

It is notable that the Complainant has not replied to the Respondent's evidence.

The Panel also notes that there is no independent evidence of when the Respondent acquired the domain name. The WHOIS record of the Registrar that has been provided to the Panel states that the registration of the domain name was "last modified" on 19 January 2024, although that of course does not mean that the Respondent acquired the domain name on that date. The only evidence on when the Respondent acquired the domain name comes from the Complainant, who says that the Respondent acquired it "in December 2023" and the Complainant has certified that the information in the Complainant is "complete and accurate". The Panel notes that the Respondent does not deny in his Response that he acquired the domain name "in December 2023". Accordingly, the Panel can only proceed on the assumption that the Respondent acquired the domain name "in December 2023".

Nor is there any evidence of a precise date on which it can be said that the Respondent was given notice of the dispute. In so far as that date becomes pivotal, that issue will be discussed subsequently.

Bearing in mind the precise words of paragraph 4(c (i)) of the Policy, the question then is whether there is evidence that the Respondent made a "*bona fide* use of, or demonstrable preparations to use, the domain name ... in connection with an offering of goods or services;..." and, is, whether he did so before notice of the subject of the dispute.

The Panel finds, first, that there is such evidence. The evidence comes from both the Complainant and the Respondent. The Complainant says that the Respondent acquired the disputed domain name and that it created an affiliate site "*and joined our affiliate program to earn commission on traffic forwarded to boozebud.com.*" (emphasis added). Those words have only one meaning and it is that the Respondent owned the domain name and actually used it in the affiliate program.

The Complainant also seems to go further, for it says that customers entered at <boozebud.com.au> and were sent to <boozebud.com>, "where commission from any

sales would be paid to the owner of <boozebud.com.au>.” Those words can only mean that the program was in operation and that the Respondent was using his domain name in the program and actually being paid commission for referrals to the Complainant at <boozebud.com>.

There seems to be no dispute as to whether the affiliate program was legitimate, as it clearly was. The only evidence on that issue is that it is a regular and not infrequent way of doing business. The Panel therefore finds that the affiliate program was legitimate, the Respondent’s part in it was *bona fide* and that the Complainant’s evidence therefore shows that the Respondent was making a “*bona fide* use of ..., the domain name ... in connection with an offering of goods or services;...”.

Even if that were not so, the Respondent was clearly making *bona fide* “demonstrable preparations” to use the domain name for an offering of goods or services, and doing so clearly brought him within the terms of sub-paragraph 4 (c)(i) of the Policy.

Thus, the Complainant’s own evidence makes it very difficult for it to rebut the Respondent’s claim that he was making a legitimate use of the domain name.

The Respondent’s evidence on this issue is really to the same effect. He says that “In accordance with our affiliate agreement with Hairydog Group Pty Ltd, customers who clicked on product links from our website and subsequently made a purchase on <boozebud.com> would generate commission for the owner of <boozebud.com.au>.” This shows that the affiliate program was in operation and that the Respondent was using the domain name for that purpose. The purpose was clearly legitimate and the Respondent’s role in it was *bona fide*.

The evidence of the Complainant and the evidence of the Respondent therefore both show that the Respondent has used the domain name in a *bona fide* manner and in connection with the offering of goods and services by means of the affiliate program.

The totality of the foregoing evidence actually goes further, because it shows that the Respondent has also used the domain name as part of an affiliate marketing business with respect to suppliers other than the Complainant as well as with the Complainant itself; in other words, the Respondent is not obliged to show that he was using the domain name for an affiliate program with the Complainant, exclusively or even predominantly. It is enough for him to show that he has used the domain name in any business activity, provided it was *bona fide* and provided that he did so before he had notice of the dispute.

In that regard, it is clear from the Respondent’s website that its domain name has been used for its customers to order particular drinks which are then supplied by a variety of other companies and suppliers, which is also the case with respect to the

range of non- drink items such as the books and gifts advertised on the Respondent's website.

Taking the whole of the evidence on this issue, the panel therefore finds that the Respondent has made a "*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 ..." within the meaning of paragraph 4(c)(i) of the .au Dispute Resolution Policy.

It was also noted above that there is no evidence of a precise date on which it can be said that the Respondent was given notice of the dispute. However, on the totality of the evidence and the sequence of events, the Panel is satisfied on the balance of probabilities that the Respondent commenced to use the domain name in the manner described before it had notice of the subject matter of the dispute.

The evidence therefore gives the Respondent a right or legitimate interest in the domain name within the meaning of Policy ¶4(c)(i).

One final point remains on the issue of rights and legitimate interests to which the Panel will now turn.

Licensing of the domain name.

The Panel adds that, as the question here is whether the Respondent has a right or legitimate interest in the domain name, the Panel would have to be satisfied that he is eligible to hold the licence to the domain name before it could be said that he has a right to it. It would appear therefore that the Respondent must comply with the .au Domain Administration Rules: Licensing, published by .au Domain Administration Limited (auDA)¹ ("the Licensing Rules").

The Licensing Rules are mandatory and provide, variously, that the registrant of a ".com.au" domain name as in the present case, "must comply with" them and "must" meet the specified requirements. It is therefore difficult to see how a Respondent can be said to have a right or legitimate interest in a domain name if it is not eligible to register and hold it under the Licensing Rules.

The Panel has examined those Rules and finds that the Respondent is eligible to hold the licence relating to the domain name in question. That is so because on the evidence, he is a "natural person", he has "an Australian Presence", he is a "Commercial Entity", (being a ... natural Person issued with an Australian Business Number under the A New Tax System (Australian Business Number) Act 1999 (Cth) ;...:" and the domain name is "a Match of the Person's ... business... name;" or, alternatively "a Match or Synonym of the name of:

¹ <https://www.ada.org.au/policy/au-domain-administration-rules-licensing>

- (i) a Service that the Person provides; (or)
- (ii) Goods that the Person sells (whether retail or wholesale);...”.².

The Panel therefore finds that the Respondent has a right or legitimate interest in the domain name, including the right that comes from his eligibility to register and retain it.

As noted above, to succeed in this proceeding, the Complainant must establish all three of the elements required to be proved under the Policy, including that the Respondent does not have a right or legitimate interest in the domain name. It has thus failed to establish the second of those three elements, namely that the Respondent does not have a right or legitimate interest in the domain name.

REGISTRATION OR USE IN BAD FAITH

It is not necessary to deal with this issue in any detail as the Complainant has failed on the second element and cannot succeed in this proceeding as a whole. Moreover, the issues under this heading cover the same facts and contentions as already dealt with. However, for completeness, the Panel will give its conclusion on this, the third element.

Paragraph 4(a) of the Policy provides in effect that the Complainant must prove that the disputed domain name “has been registered or subsequently used in bad faith”.

Paragraph 4(b) of the Policy provides that:

“b. Evidence of Registration or Use in Bad Faith. For the purposes of Paragraph 4(a)(iii), 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, trademark or service mark from reflecting that name or mark in a corresponding domain name; or

² See, variously, the provisions of .au Domain Administration Rules: Licensing.

- (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; or
- (v) if any of your representations or warranties as to eligibility or third party rights given on application or renewal are, or subsequently become, false or misleading in any manner."

As with rights and legitimate interests, these criteria are not exclusive, and a complainant may rely on other facts as well.

Having regard to the evidence of both parties, the Panel finds with respect to each of the criteria that:

- (i) there is no evidence showing that the Respondent registered or 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 his documented out-of-pocket costs directly related to the domain name; the Respondent clearly acquired the domain name primarily to use it in an affiliate program and for his business and therefore the likelihood is that he wanted to retain the domain name, not sell it; there have subsequently been some negotiations between the parties on a possible sale of the domain name and the Complainant has relied on these dealings as evidence of bad faith; but the Panel is satisfied that those negotiations have arisen out of the commercial realities facing both parties, rather than an indication that the Respondent only acquired the domain name to force the Complainant to buy it or otherwise that they amount to bad faith in any way;
- (ii) there is no evidence that the Respondent registered the domain name to prevent the owner of a name, trademark or service mark from reflecting that name or mark in a corresponding domain name; the Respondent registered the domain name on the basis that the Complainant would continue in the affiliate program while retaining and using its own domain name, <boozebud.com>.
- (iii) there is no evidence that the Respondent registered the domain name primarily for the purpose of disrupting the business or activities of another person; the Respondent must have wanted the business of the Complainant to continue so that the affiliate program would continue and prosper;

(iv) there is no evidence that by using the domain name, the Respondent 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; the Panel does not accept that the Respondent set out intentionally to cause confusion between its own website and the Complainant's website ;

(v) there is no evidence that any of the Respondent's representations or warranties as to eligibility or third party rights given on application or renewal of the domain name were, or subsequently became, false or misleading in any manner; there is no evidence to that effect.

Nor are there any other circumstances showing that the Respondent registered or used the disputed domain name in bad faith.

The Complainant has thus failed to show that it has made out the third of the three elements that it must establish, and the Respondent has therefore prevailed on that issue as well.

9. DECISION

Because it fails on 2 of the 3 elements required to be proved under the Policy, the Complaint is denied. The Respondent is entitled to retain ownership and continue its legitimate use of the Disputed Domain Name.

DATED the 20th day of May 2024

Signed.....

The Honourable Neil Anthony Brown KC

Sole Panelist

