



ADMINISTRATIVE PANEL DECISION

Colbridge Pty Ltd

v.

Foxwell Magic Toys / Lyndon Wayne Sanders

auDRP_19_07

<foxwellmagic.com.au>

1. The Parties

The Complainant is Colbridge Pty Ltd, of Loganholme, Queensland, represented by ClarkeKann Lawyers of Brisbane, Queensland.

The Respondent is Foxwell Magic Toys / Lyndon Wayne Sanders, of Mount Gravatt, Queensland.

2. The Disputed Domain Name and Registrar

The disputed domain name is <foxwellmagic.com.au> ("the Domain Name"). The Registrar of the Domain Name is Web Address Registration Pty Ltd (Crazy Domains).

3. Procedural History

This is an administrative proceeding pursuant to the 2016-01.au Dispute Resolution Policy published by auDA on April 15, 2016 ("auDRP" or "Policy"); the auDA Rules for .au Dispute Resolution Policy ("Rules") and the Resolution Institute Supplemental Rules for .au Domain Name Dispute Resolution Policy ("RI Supplemental Rules").

The Complaint was received by Resolution Institute ("RI") via email on Monday, 15 July 2019 and acknowledged on Friday, 19 July 2019. On Tuesday, 23 July 2019 a copy of the Complaint was emailed to the Registrar with a request to clarify the Respondent's details and to lock the Domain Name pending the final decision in this proceeding. On Tuesday, 23 July 2019 the Registrar confirmed via email that the Domain Name has been locked. Next day RI advised auDA of the Complaint via email and, by email and express post, notified the Respondent of the Complaint lodged against him. These notifications were copied to the Complainant. The due date for a Response was Tuesday, 13 August 2019. No Response has been received. On Thursday, 15 August 2019, RI approached the Panellist, who that day confirmed his availability, informed RI that he has no conflict issues with the parties and accepted the matter. The case file and relevant correspondence was forwarded to the Panellist on Thursday, 15 August 2019.

2. Factual Background

Since December 2015 the Complainant has operated the Foxwell Magic Coomera Childcare Centre in Coomera, Queensland under the business name Foxwell Magic, which it registered on August 17, 2013. Shortly thereafter the Complainant registered the domain name <foxwellmagic.com>, which it uses for its website and for email at the address "info@foxwellmagic.com".

The Respondent Lyndon Wayne Sanders is the sole director and shareholder of Okeedokee Kids Pty Ltd ACN 141 043 156, registered in December 2009, which operates a competing childcare centre called Okeedokee Kids Coomera, located about one kilometer from the Complainant's centre. The website "www.okeedokeecoomerarivers.com.au" is used to promote the Respondent's childcare centre.

In late February 2019 the Complainant became aware that the Domain Name <foxwellmagic.com.au> had been registered by auDA and was being used to direct Internet traffic to the "www.okeedokeecoomerarivers.com.au" website.

The Domain Name is currently registered in the name Foxwell Magic Toys, a business name which Mr. Sanders registered on March 7, 2019, following a cease and desist letter of March 5, 2019 from the Complainant's lawyers. The Domain Name currently resolves to an inactive webpage entitled "Foxwell Magic Toys – website coming soon" and is being used for email at the address "info@foxwellmagic.com.au".

Parties' Contentions

Complainant

The Complainant says the Domain Name is identical or confusingly similar to its business name Foxwell Magic and the Respondent has no rights or legitimate interests in the Domain Name, which has been registered or subsequently used in bad faith.

Respondent

As mentioned, the Respondent did not respond to the Complaint.

3. Discussion and Findings

The Panellist has jurisdiction to determine this dispute pursuant to Paragraph 2.1 of the auDRP:

"All domain name licences issued or renewed in the open 2LDs from 1 August 2002 are subject to a mandatory administrative proceeding under the auDRP. At the time of publication, the open 2LDs are as.au, com.au, id.au, net.au and org.au."

Further, RI is an approved Provider under Paragraph 3 of the auDRP and the Panellist has been duly appointed by RI.

Paragraph 15(a) of the Rules instructs the Panel as to the principles it is to use in determining this dispute:

“A Panel shall decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules, and any rules and principles of law that it deems applicable.”

Paragraph 4(a) of the auDRP requires the Complainant to prove each of the following three elements:

- (i) the Domain Name is identical or confusingly similar to a name (Note 1), trademark 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 (Note 2); and
- (iii) the Domain Name has been registered *or* subsequently used in bad faith.

Note 1

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.

Note 2

For the purposes of this policy, auDA has determined that “rights or legitimate interests in respect of the domain name” are not established merely by a registrar’s determination that the respondent satisfied the relevant eligibility criteria for the domain name at the time of registration.

Identity

The Complainant relies on its business name Foxwell Magic, which it registered with ASIC on August 17, 2013. The Complainant clearly has rights in that business name in accordance with Paragraph 4(a)(i) and Note 1 of the auDRP.

The Domain Name is identical to the Complainant’s business name, save for the inconsequential ccTLD “.com.au”, which may be ignored.

The Complainant has established this element.

Legitimacy

Paragraph 4c of the auDRP provides:

“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.

There is no evidence to suggest that the Respondent Mr. Sanders has been commonly known by the Domain Name, which was registered and in use before he registered the business name Foxwell Magic Toys, the name in which the Domain Name is presently registered. The registration of the Domain Name in the name Foxwell Magic Toys as registrant does not establish entitlement to the Domain Name as shown in Note 2 to Paragraph 4(a)(ii) of the auDRP.

For the reasons set out below in relation to the element of bad faith, the Panel finds that the Respondent's use of the Domain Name has not been *bona fide* and that the Respondent's use has been intended, for commercial gain, misleadingly to divert consumers.

The Complainant has established this element.

Bad faith

The Complainant invokes Paragraphs 4b(iii) and (iv) of the auDRP which provide:

"...the following circumstances, in particular but without limitation...shall be evidence of the registration and [sic] use of a domain name in bad faith:

- (iv) you have registered the domain name primarily for the purpose of disrupting the business or activities of another person; or
- (v) 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.

The parties provide competing childcare services in Coomera in Queensland. The Respondent Mr. Sanders could not have been unaware of the Complainant, its business name and its domain name <foxwellmagic.com> when registering the Domain Name <foxwellmagic.com.au> and using it to promote the Respondent's business to Internet users seeking the Complainant's website.

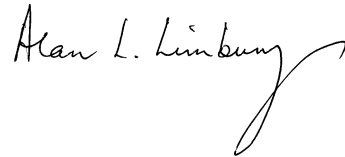
On the uncontradicted evidence presented by the Complainant, the conclusion is inescapable that the Respondent (whether this be Foxwell Magic Toys or Mr. Sanders) has used the Domain Name to resolve to the "www.okeedokeecoomerarivers.com.au" website primarily for the purpose of disrupting the business of the Complainant and in order intentionally to attract, for commercial gain, Internet users to that website by creating a likelihood of confusion with the Complainant's name as to the source, sponsorship, affiliation, or endorsement of that website or of the services on that website.

The Complainant has established this element.

4. Decision

The Complainant having established all three elements required to entitle it to relief and being eligible to register the Domain Name, the Panel orders that the Domain Name **<foxwellmagic.com.au>** be transferred to the Complainant.

Dated this 22nd day of August 2019.

A handwritten signature in black ink that reads "Alan L. Limbury". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Alan L. Limbury, Panellist