

## **ADMINISTRATIVE PANEL DECISION**

Dr Mark Fuller v. Host Master, 1337 Services LLC  
Case No. D2024-1114

### **1. The Parties**

The Complainant is Dr Mark Fuller, Australia, represented by Tasman Wylie, Australia.

The Respondent is Host Master, 1337 Services LLC, Saint Kitts and Nevis.

### **2. The Domain Name and Registrar**

The disputed domain name <drmarkfuller.com> is registered with Tucows Inc. (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on March 14, 2024. On March 14, 2024, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On March 14, 2024, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent (Danny Keaton) and contact information in the Complaint. The Center sent an email communication to the Complainant on March 18, 2024, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on March 21, 2024.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on March 26, 2024. In accordance with the Rules, paragraph 5, the due date for Response was April 15, 2024. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on April 22, 2024.

The Center appointed Warwick A. Rothnie as the sole panelist in this matter on April 26, 2024. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

On May 7, 2024, the Panel issued Administrative Panel Order No. 1 (the "Panel Order") pursuant to paragraph 12 of the Rules seeking clarification of the Complainant's claims to have rights in his personal name as a trade identifier in accordance with matters discussed in WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 1.5.2. The Panel Order also provided for the Respondent to have an opportunity to respond to any supplemental filing made by the Complainant.

On May 14, 2024, the Complainant submitted a supplemental filing as invited pursuant to the Panel Order. Although permitted to do so under the Panel Order, the Respondent did not make any further submission.

#### **4. Factual Background**

The Complainant is a medical practitioner in Australia.

He has been registered as a medical practitioner since 1982. In May 2023, the Complainant was re-appointed for a further two year term to the Child Death and Serious Injury Review Committee of the South Australian government. In March 2024, the Complainant was also re-appointed by the Attorney-General of South Australia as a sessional ordinary member of the South Australia Civil and Administrative Tribunal.

The Complainant provides evidence that the Complainant practised in private medical practice from the O'Brien Street Practice (located in Adelaide in South Australia) from February 2011 to March 2024.

According to the Whois report, the disputed domain name was created on May 10, 2022.

When the Complaint was filed, the disputed domain name resolved to a website headed "Dr Mark Fuller" and which contained allegations that the Complainant was involved in covering up allegations of child abuse by a senior political adviser to the South Australian government.

#### **5. Discussion and Findings**

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of a disputed domain name, the Complainant must demonstrate each of the following:

- (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) the disputed domain name has been registered and is being used in bad faith.

Paragraph 15(a) of the Rules directs the Panel to decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.

##### **A. Identical or Confusingly Similar**

The first element that the Complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the Complainant's trademark rights.

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the disputed domain name. [WIPO Overview 3.0](#), section 1.7.

The Complainant does not hold any registered trademarks but, instead, relies on his professional reputation in his own name as an unregistered trademark.

As explained in section 1.5.2 of the [WIPO Overview 3.0](#), the Policy does not expressly provide for personal names to qualify as rights under the Policy. However, panels have recognized that the Policy does protect rights in unregistered trademarks and, where the rights relied on are rights in a personal name, the Complainant must show that he (in this case) has used his name as a trademark-like identifier. It is not sufficient that the Complainant has a famous name (if that be the case), the name must have been used in trade or commerce as an identifier of source.

Section 1.3 of the [WIPO Overview 3.0](#) sets out criteria applied by panels in determination whether a complainant has acquired rights in an unregistered trademark. In particular of most importance, it is not sufficient merely to assert a claim to rights in a sign as an unregistered trademark. It is necessary to support the claim with corroborating evidence sufficient to allow the validity of the claim to be assessed.

In the present case, in addition to his roles on important Government committees and agencies, the Complainant advances evidence that he has practised as private medical practitioner at the O'Brien Street Medical Practice from 2011 to March this year.

The Complaint and supplemental filing do not include evidence of invoices issued in his own name; nor of the amount of revenues generated by the Complainant under his own name. On the other hand, in the Panel's experience even where invoices are issued in the name of the medical practice rather than the individual practitioner who uses the practice's facilities, it is common practice (if not invariably) that the invoices identify the service provider by his or her name. Further, practitioners at such clinics or centers will typically depend on the reputation in their name both for repeat "business" and on word of mouth references and the like for new custom.

The Complainant's filing also includes testimonials from senior persons including the Medical Director at the South Australia Prison Health Service and the Statewide Director of the Drug and Alcohol Services of South Australia, stating their awareness of the Complainant's practice and confirming his recognized name and reputation among both his peers and the public.

In these circumstances, the Panel is prepared to find that the Complainant has sufficient reputation in his name as an identifier of source to qualify as an unregistered trademark for the purposes of the Policy.

The comparison of the disputed domain name to the Complainant's unregistered rights in his own name simply requires a visual and aural comparison of the disputed domain name to the proven trademark. This test is narrower than and thus different to the question of "likelihood of confusion" under trademark law. Therefore, questions such as the scope of the trademark rights, the geographical location of the respective parties, the date they were acquired and other considerations that may be relevant to an assessment of infringement under trademark law are not relevant at this stage. Such matters, if relevant, may fall for consideration under the other elements of the Policy. See e.g., [WIPO Overview 3.0](#), section 1.7.

In undertaking that comparison, it is permissible in the present circumstances to disregard the generic Top-Level Domain ("gTLD") component as a functional aspect of the domain name system. [WIPO Overview 3.0](#), section 1.11.

Disregarding the ".com" gTLD, the disputed domain name consists of the Complainant's trademark or of his name with the prefix "Dr". At least in Australia, it is common practice to refer to medical practitioners like the Complainant by reference to that title as a contraction for "doctor" and, indeed, that is the form in which the

Complainant is registered with the relevant regulators. Consequently, the disputed domain name can be regarded as identical to the Complainant's trademark.

Accordingly, the Panel finds that the Complainant has established that the disputed domain name is identical with the Complainant's trademark and the requirement under the first limb of the Policy is satisfied.

## **B. Rights or Legitimate Interests**

The second requirement the Complainant must prove is that the Respondent has no rights or legitimate interests in the disputed domain name.

Paragraph 4(c) of the Policy provides that the following circumstances can be situations in which the Respondent has rights or legitimate interests in a disputed domain name:

- (i) before any notice to [the Respondent] of the dispute, [the Respondent's] use of, or demonstrable preparations to use, the [disputed] domain name or a name corresponding to the [disputed] domain name in connection with a bona fide offering of goods or services; or
- (ii) [the Respondent] (as an individual, business, or other organization) has been commonly known by the [disputed] domain name, even if [the Respondent] has acquired no trademark or service mark rights; or
- (iii) [the Respondent] is making a legitimate noncommercial or fair use of the [disputed] domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

These are illustrative only and are not an exhaustive listing of the situations in which a respondent can show rights or legitimate interests in a domain name.

While the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of "proving a negative", requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a prima facie case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1.

In the circumstances of this case, it is apparent from the content of the website that the only possible basis of a claim to rights or legitimate interests in the circumstances of this case is a claim that the Respondent is making a legitimate noncommercial or fair use of the disputed domain name as a form of criticism site or, perhaps, as "whistleblowing".

To sustain such a claim, it is necessary for the criticism or allegations to be genuine and primarily noncommercial. See e.g., [WIPO Overview 3.0](#), section 2.6.

The Complainant denies the allegations strenuously. The Panel, however, is not in a position to determine the truth or otherwise of the allegations and it is no part of the Panel's role to make such a determination. So far as can be assessed from the content of the website (the Respondent not having made any submissions), the allegations appear to be genuinely held and there is no apparent commercial motive.

Even in the case of a genuine and noncommercial criticism site, panels have largely arrived at a consensus around the view that a claim to rights and legitimate interests cannot be sustained where the disputed domain name is identical to the relevant source identifier and thus carries too high a risk of user confusion through impersonation. See e.g., *Dover Downs Gaming & Entertainment, Inc. v. Domains By Proxy, LLC / Harold Carter Jr, Purlin Pal LLC*, WIPO Case No. [D2019-0633](#). Some scope for taking into account other

considerations may still arise in individual cases particularly in disputes between parties located in the United States of America. See e.g., *Everytown for Gun Safety Action Fund, Inc. v. Contact Privacy Inc. Customer 1249561463 / Steve Coffman* WIPO Case No. [D2022-0473](#).

Accepting that someone who arrived at the website to which the disputed domain name resolved would not be likely to consider it was the website of, or authorised by, the Complainant, the Panel nonetheless finds that, as the disputed domain name is identical to the Complainant's unregistered mark, the risk of confusion from the disputed domain name itself is sufficient to establish that the Complainant has established the second requirement under the Policy also.

### **C. Registered and Used in Bad Faith**

Under the third requirement of the Policy, the Complainant must establish that the disputed domain names have been both registered and used in bad faith by the Respondent. These are conjunctive requirements; both must be satisfied for a successful complaint: see e.g., *Group One Holdings Pte Ltd v. Steven Hafto* WIPO Case No. [D2017-0183](#).

The Respondent registered the disputed domain name well after the Complainant began using his trademark and, given the content of the website to which the disputed domain name resolved, plainly did so with knowledge of the Complainant and his name.

The Panel has considerable sympathy for the view expressed in *Dover Downs*, supra, that a finding that the Respondent does not have rights or legitimate interests in the disputed domain name does not necessarily mean that a finding of registration and use in bad faith follows. It could for example be argued that the Respondent registered the disputed domain name in the belief that the criticism purpose justified registration notwithstanding the risk of confusion or impersonation.

On the other hand, many panels have routinely found that a finding that the respondent lacks rights or legitimate interests in a domain name because of the risk of impersonation also leads to a finding of registration and use in bad faith. See e.g., the decisions cited in [WIPO Overview 3.0](#), section 2.6 and more recently *Beyond Protocol, Inc. v. Withheld for Privacy Purposes, Privacy service provided by Withheld for Privacy ehf / Fred Rinstone*, WIPO Case No. [D2021-2828](#), and *Limited Liability Company "Pharmagate" v. Taras Potichnyi*, WIPO Case No. [D2022-4997](#).

Despite sympathy for the position in *Dover Downs*, supra, the Panel considers it is appropriate to find that the disputed domain name has been registered and used in bad faith under the Policy given the high risk of that consumers or Internet users will be misled. Use of a domain name which misrepresents an association to a trademark owner would usually constitute use in bad faith under the Policy. Registration of such a domain name should also count as registration in bad faith for consistency with that and also the reasons leading to the finding that the Respondent does not have rights or legitimate interests in the disputed domain name all the more so as it does not preclude the Respondent from operating a criticism site under a domain name which does not carry the risk of impersonation.

Further, in this case, the Panel draws some confidence in this conclusion as the identity of the actual registrant remains unclear as that person has availed themselves of a privacy service and has not come forward to defend his or her position. The use of a privacy service does not always indicate bad faith and there may be good reasons why the actual registrant has chosen not to come forward. The failure to do so, or at least attempt to justify their position as to the complaint generally, does raise some question about the genuineness of the alleged grievance.

Accordingly, the Panel finds that the Complainant has established the third element of the Policy.

## 6. Decision

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the disputed domain name, <drmarkfuller.com> be transferred to the Complainant.

*/Warwick A. Rothnie/*

**Warwick A. Rothnie**

Sole Panelist

Date: June 14, 2024