

ADMINISTRATIVE PANEL DECISION

Aquarian Foundation, Inc. v. Daryl Wardenaar, Church of Higher Spiritualism
Case No. DAU2022-0003

1. The Parties

The Complainant is Aquarian Foundation, United States of America (“United States”), represented by Fasthoff Law Firm PLLC, United States.

The Respondent is Daryl Wardenaar, Church of Higher Spiritualism, Australia.

2. The Domain Name and Registrar

The disputed domain name <hispirit.org.au> is registered with Synergy Wholesale Pty Ltd (“the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on February 9, 2022. On February 10, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On February 13, 2022, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details. The Complainant filed an amendment to the Complaint on February 17, 2022.

The Center verified that the Complaint satisfied the formal requirements of the .au Dispute Resolution Policy (the “Policy” or “.auDRP”), the Rules for .au Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for .au Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on February 22, 2022. In accordance with the Rules, paragraph 5(a), the due date for Response was March 14, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on March 15, 2022. On the same date, the Center received an email communication from the Respondent.

The Center appointed John Swinson as the sole panelist in this matter on March 23, 2022. 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.

4. Factual Background

The Complainant is a church whose principal place of business is in Seattle, United States.

The Complainant was established in 1955. The Complainant's "golden rule" is "do unto others as you would have them do unto to you."

The Complainant has been using the trademark CHURCH OF HIGHER SPIRITUALISM since the early 1980s.

The Complainant owns United States and Australian registered trademarks for CHURCH OF HIGHER SPIRITUALISM. The Australian trademark is Registration No. 2044020 filed on October 16, 2019. The United States registration was filed on September 16, 2019 and claims a "date of first use in commerce" of November 15, 1980.

The Complaint has little information about the Respondent. The Respondent did not file a formal Response. It appears that the Respondent is associated with two businesses in Tasmania, namely RNS IT and Data Solutions (see <msdata.com.au>) and DPWTech (see <dpwtech.com.au>).

According to the Registrar, the disputed domain name was created on March 24, 1998.

At the present time, the disputed domain name does not resolve to an active website, but it appears to be in use as part of email addresses.

The website at the disputed domain name was recently moved to <hispirit.asn.au>. The website at that domain name appears to contain the content that was previously located on the website at the disputed domain name. This includes:

- The headings "Higher Spiritualism" and "Higher Spiritualism Incorporated"
- Text such as "Sunkara invites you to participate in the Discussion and Commentary concerning the Teachings we Study. This is your opportunity to ask questions of the Founder of Higher Spiritualism. We make no claims other than a sincere transmission of Truth concerning the Spiritual issues which confront the Human Family".
- Use of the disputed domain name as an email address: "Please send comments or questions to SUNKARA [...]@hispirit.org.au" and "Please send comments or questions to Matthew, Spiritual Philosopher Email [...]@hispirit.org.au".
- A legal notice: "© 1998 Higher Spiritualism All Rights Reserved. P.O. BOX [...], Tasmania, Australia".

5. Parties' Contentions

A. Complainant

In summary, the Complainant makes the following submissions:

The Aquarian Foundation is a church that was founded by Reverend Keith Milton Rhinehart in 1955 in Seattle, Washington in the United States.

The Complainant is the registered owner of the trademark registrations listed in Section 4 above.

This proceeding involves a dispute between the Complainant, a church, and one of its former high-ranking members named Bruce Lowndes who was excommunicated from the church in 1996 due to his fraudulent activities. Lowndes is the true and beneficial owner of the disputed domain name, even though his name does not appear in the Whois records.

There is currently a pending dispute between Lowndes and the Complainant in Case No. 2:19-cv-01879-RSM *Aquarian Foundation, Inc. v. Bruce Lowndes*, in the United States District Court for the Western District of Washington, but the disputed domain name is not a subject of that litigation.

(The Complaint includes substantial details regarding Bruce Lowndes, who is the defendant in the action referred to in the previous paragraph. The Panel does not summarise all that information here. Further factual details are set out in *Aquarian Foundation, Inc. v. Domain Privacy / Richard Stewart / Sri Sunkara Sankacharya, aka Rev. Bruce Kimberley Lowndes, aka KIM*, WIPO Case No. D2021-4176. The Complaint uses the term “Respondent” in an inexact way, in some cases referring to the named Respondent and in some cases apparently referring to Lowndes.)

Lowndes moved to Australia in 1994 and established a study group in Australia. He was excommunicated by the Complainant in 1997, and then established his own church under the HIGHER SPIRITUALISM trademark, which the Complaint calls the “infringing mark”. The Complaint appears to allege infringement by Lowndes of the Complainant’s United States trademark registration.

The Complainant has used CHURCH OF HIGHER SPIRITUALISM for over 40 years. The Complainant has spent significant sums of money promoting this brand, including in Australia.

HIGHER SPIRITUALISM is the distinguishing feature of the Complainant’s trademark. The disputed domain name is a contraction of HIGHER SPIRITUALISM. The confusing similarities between the Complainant’s trademark and the disputed domain name are especially noticeable when the phrase “CHURCH OF” is filtered out of the Complainant’s trademark.

The Respondent has never lawfully been commonly known by the disputed domain name; and is not making a legitimate non-commercial or fair use of the disputed domain name without intent for commercial gain. The Complainant has not licensed to the Respondent the right to use the CHURCH OF HIGHER SPIRITUALISM trademark, and the Respondent is not otherwise authorized to act on the Complainant’s behalf.

Upon his excommunication from the Church, Lowndes began using the HIGHER SPIRITUALISM trademark in an effort to capitalize on the goodwill associated with the CHURCH OF HIGHER SPIRITUALISM trademark in order to siphon away Church members to his newly formed church, and deceive them into believing that his was the “true” Church of Higher Spiritualism.

(The Complaint included details about other domain names, such as <higherspiritualism.com>, which were the subject of separate proceedings under the UDRP that were unsuccessful.)

The Respondent’s offering of goods and services is not *bona fide*.

Notwithstanding the Respondent’s knowledge of the goodwill associated with the CHURCH OF HIGHER SPIRITUALISM trademark, the Respondent intentionally registered, for commercial and noncommercial gain, and for the purpose of disrupting the Complainant’s activities, a domain name that consists of a contraction of the distinctive features of the Complainant’s trademark.

The Respondent has provided false contact information to the registrar in an attempt to conceal his true identity, both of which constitute bad faith under the UDRP.

On February 17, 2022, the Complainant emailed the Center to clarify that the remedy requested is transfer of the disputed domain name to the Complainant.

B. Respondent

The Respondent submitted a short vernacular Response. In substance, the Respondent states that the Respondent has moved the website that was at the disputed domain name to <hispirit.asn.au>.

6. Discussion and Findings

Paragraph 4(a) of the auDRP provides that a complainant must prove each of the following elements:

- (i) the disputed domain name is identical or confusingly similar to a name, 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 or subsequently used in bad faith.

The burden of proof of each element is borne by the Complainant.

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 the Panel 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 name, trademark or service mark.

There are two parts to this inquiry: the Complainant must demonstrate that it has rights in a trademark at the date the Complaint was filed and, if so, the disputed domain name must be identical or confusingly similar to the trademark.

For present purposes, the Complainant has proven that it owns a registered trademark for CHURCH OF HIGHER SPIRITUALISM as discussed in section 4 above.

On the question of identity or confusing similarity, what is required is simply a visual and aural comparison and assessment of the disputed domain name itself to the Complainant's trademarks: see, for example, *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd.*, WIPO Case No. DAU2002-0001. This test is narrower than and thus different to the question of "likelihood of confusion" under Australian trademark law which can require an assessment of the nature of the goods or services protected and those for which any impugned use is involved, geographical location, or timing. Such matters, if relevant however, may fall for consideration under the other elements of the Policy. *Argyle Diamonds Limited v. Domain Manager / Argyle Diamond Investments Pty Ltd*, WIPO Case No. DAU2021-0028.

Typically and as is appropriate in this case, it is permissible to disregard respectively the Top and Second Level Domains, ".org.au", as a functional component of the domain naming system.

The Complainant's trademark CHURCH OF HIGHER SPIRITUALISM is not identical to disputed domain name.

It is not readily apparent that CHURCH OF HIGHER SPIRITUALISM is confusingly similar to the disputed domain name. The word SPIRITUALISM may be regarded as similar to the word "spirit" in the disputed domain name. The term "hi" in the disputed domain name potentially may be regarded as an abbreviation of HIGHER, although "hi" is not a common abbreviation of "higher".

In view of the findings below, the Panel does not need to decide this issue.

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 may be situations in which a respondent has rights or legitimate interests in a disputed domain name:

(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 organization) 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 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.

The onus of proving this requirement, like each element, falls on the Complainant. Previous panels have recognized the difficulties inherent in proving a negative, however, especially in circumstances where much of the relevant information is in, or likely to be in, the possession of the respondent. Accordingly, it is usually sufficient for a complainant to raise a *prima facie* case against the respondent under this head and an evidential burden will shift to the respondent to rebut that *prima facie* case. The ultimate burden of proof, however, remains with the Complainant. See, e.g., *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd, supra*.

The Complainant asserts that the Respondent has never lawfully been commonly known by the disputed domain name; and is not making a legitimate non-commercial or fair use of the disputed domain name without intent for commercial gain. The Complainant also asserts that the Complainant has not licensed to the Respondent the right to use the CHURCH OF HIGHER SPIRITUALISM trademark, and the Respondent is not otherwise authorized to act on Complainant's behalf.

The named Respondent is "Church of Higher Spiritualism" and this is the name in the Whois records, which suggests that this is the name of the Respondent.

The Complainant appears to accept that the Respondent is known by the disputed domain name, but asserts that such use by the Respondent is unlawful.

The Panel has reviewed what appears to be the Respondent's website that is currently located at <hispirit.asn.au>. The Respondent is using "High Spiritualism" as its name on this website. This appears to confirm that the Respondent is commonly known by "High Spiritualism" and potentially by "hispirit".

The Panel considers that it is possible that the Respondent meets paragraph 4(c)(ii) of the Policy, namely that the Respondent, as an individual, business, or other organization, has been commonly known by the disputed domain name, even if the Respondent has not acquired trademark or service mark rights in respect of that name. It appears, although this is not clear, that the Respondent has been using the disputed domain in Australia well prior to the Complainant registering the Australian trademark for CHURCH OF HIGHER SPIRITUALISM.

The crux of the Complainant's submission on the second element is that the use by the Respondent of "Higher Spiritualism" is not lawful or legitimate. In the circumstances of this dispute, this is an issue that is unsuitable for the Panel to decide.

This is not a typical cybersquatting case of the type which the Policy was designed to address.

The Complaint includes a volume of material regarding allegedly bad actions by a person called Bruce Lowndes.

According to the Complaint, Lowndes was a former high-ranking member of the Complainant, who was excommunicated in 1996 due to his allegedly fraudulent activities. The Complaint also asserts, without providing sufficient evidence to support this allegation, that Lowndes is the true and beneficial owner of the disputed domain name, even though his name does not appear in the Whois records. The Complaint associates the allegedly bad conduct of Lowndes with the Respondent, but provides insufficient evidence to support such association (other than a screen shot of one page of the website at the disputed domain name that does not refer to Lowndes or the Respondent).

The Complainant and Lowndes have had a long and complicated relationship extending over many decades, and it appears to the Panel that the dispute regarding the disputed domain name is part of a much wider series of disputes. The Complainant and Lowndes are currently parties in a court case in the United States, in a Federal Court in the Western District of Washington. The present auDRP dispute before the Panel appears to be much more than a clear case of abusive cybersquatting of a domain name. Among the multi-faceted aspects to this dispute which give rise to difficulty for a determination within the scope of the Policy include the relationship between the Complainant and Lowndes. The Panel is not able to rule upon the issues surrounding Lowndes' alleged excommunication from the Complainant's church and how this impacts the Respondent's legitimacy in respect of the Respondent's use of the term "Higher Spiritualism". Greater exploration and clarification of these detailed factual matters would inform the question of rights and legitimate interests in the disputed domain name (as well as the question of registration and use in bad faith, discussed below). However, the written submissions procedure available under the Policy is not suited to this.

The Panel notes that a similar conclusion was reached in the recent case of *Aquarian Foundation, Inc. v. Domain Privacy / Richard Stewart / Sri Sunkara Sankacharya, aka Rev. Bruce Kimberley Lowndes, aka KIM*, WIPO Case No. D2021-4176. Although the parties in that case are different to the parties here, the factual matrix and issues to be decided are very similar.

C. Registered or Subsequently Used in Bad Faith

Unlike the UDRP, the requirements that the disputed domain name be registered or used in bad faith are disjunctive in the auDRP. That is, it is sufficient for the Complainant to show either that the disputed domain name was registered in bad faith or has been used in bad faith.

On the evidence before the Panel, the Complainant does not have a good case in respect of registration in bad faith by the Respondent. The disputed domain name was registered over 20 years prior to the Complainant obtaining any registered trademark rights. Moreover, there is no evidence of use by or reputation of the Complainant in Australia or in respect to the CHURCH OF HIGHER SPIRITUALISM trademark. There is little evidence of reputation that the Complainant may have in CHURCH OF HIGHER SPIRITUALISM prior to 2019 (in Australia or elsewhere) when the Complainant filed for trademark registrations. There is no evidence of reputation that the Complainant may have in "hispirit. There is insufficient evidence in the case file to associate the Respondent or the disputed domain name with Lowndes.

The Complainant's case in respect of use in bad faith also fails for similar reasons - there is insufficient evidence in the case file to associate the Respondent or the disputed domain name with Lowndes. If there was such evidence, for the reasons set out above, this is not an appropriate forum to decide issues regarding whether or not Lowndes' conduct was in bad faith.

7. Closing Remarks

The Panel takes no position on the merits of the various disputes that exist and are ongoing involving the Complainant regarding the Complainant's trademark and materials, whether in an online or offline medium. This decision should not be taken as a specific endorsement of the case adopted by any person in any other forum. Furthermore, this decision is not addressed to any particular forum that may ultimately be seized of the matter.

8. Decision

For all the foregoing reasons, the Complaint is denied.

/John Swinson/

John Swinson

Sole Panelist

Date: April 6, 2022