

ADMINISTRATIVE PANEL DECISION

Dymatize Enterprises LLC v. Bailey Ethan Dallinger, Pro Amino
Case No. DAU2023-0010

1. The Parties

The Complainant is Dymatize Enterprises LLC, United States of America ("United States"), represented by HopgoodGanim Lawyers, Australia.

The Respondent is Bailey Ethan Dallinger, Australia.

2. The Domain Name and Registrar

The disputed domain name <dymatize.au> (the "Disputed Domain Name") is registered with Synergy Wholesale Pty Ltd.

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on February 22, 2023. On February 22, 2023, the Center transmitted by email to Synergy Wholesale Pty Ltd a request for registrar verification in connection with the Disputed Domain Name. On February 23, 2023, Synergy Wholesale Pty Ltd transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

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 March 2, 2023. In accordance with the Rules, paragraph 5(a), the due date for Response was March 22, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on March 24, 2023.

The Center appointed Nicholas Weston as the sole panelist in this matter on March 29, 2023. 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 United States incorporated company that operates an online business offering a range of dietary and nutritional supplements. The Complainant holds registrations for the trade mark DYMATIZE and variations of it in several countries, including Australian Registration No. 1450923 for the mark DYMATIZE Registered on August 24, 2011, in class 5.

The Complainant is also the owner of the domain name <dymatize.com> which is the address of its main website.

The Disputed Domain Name was registered on October 4, 2022. The Complainant has provided evidence that the Disputed Domain Name is inactive and that the Respondent has made the Disputed Domain Name available for sale on a third party website for a sum in excess of USD 250,000.

5. Parties' Contentions

A. Complainant

The Complainant cites its registration in Australia of the trade mark DYMATIZE, as *prima facie* evidence of ownership.

The Complainant claims that the Disputed Domain Name was first registered on October 4, 2022.

The Complainant submits that the mark DYMATIZE is distinctive and that its rights in that mark predate the registration of the Disputed Domain Name. It submits that the Disputed Domain Name is confusingly similar to its trade mark, because "there is essential or virtual identity" between the Disputed Domain Name and the DYMATIZE trade mark and that any confusing similarity is not alleviated by the ".au" country code Top-Level Domain ("ccTLD").

The Complainant contends that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name because the Respondent has no trade mark rights in, or license to use, the DYMATIZE mark, which is "coined by the Complainant and not at all common". The Complainant contends that "publicly available searches (including via Google and LinkedIn) do not reveal any close or substantial connection between the Respondent and the [Disputed] Domain Name". Further, the Complainant looked up the ABN details of the Respondent and only found unrelated business names and trade marks registered in connection with that ABN.

Finally, the Complainant alleges that the registration and use of the Disputed Domain Name was, and currently is, in bad faith. On the issue of registration, the Complainant contends that the Respondent must have had the DYMATIZE trade mark in mind when it registered the Disputed Domain Name given "the Respondent appears to be the owner of a nutritional supplements company named 'Pro Amino'."

On the issue of use, the Complainant has supplied evidence that the Disputed Domain Name resolves to an inactive webpage, and claims that "the website to which the [Disputed] Domain Name resolves is not being actively used, and is blank other than to indicate that the [Disputed] Domain Name is for sale. Although visitors are able to make an offer to purchase the [Disputed] Domain Name, an offer of any amount less than USD 250,000 returns an error message stating 'Your offer does not meet the minimum starting offer requirement set by the seller'. It submits that this is evidence "that the Respondent has registered the [Disputed] Domain Name primarily for the purpose of selling, renting, or otherwise transferring the [Disputed] Domain Name registration to the Complainant for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly related to the [Disputed] Domain Name" contrary to paragraph 4(b)(i) of the Policy.

B. Respondent

The Respondent did not reply to the Complainant's contentions.

6. Discussion and Findings

Paragraph 4(a) of the Policy provides that, for the Complainant to succeed, it has the burden of proving the following:

- (i) the disputed domain name is identical or confusingly similar to a name, trade mark 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.

A. Identical or Confusingly Similar

The Complainant must first establish that the Disputed Domain Name is identical with, or confusingly similar to, the Complainant's name, trade mark or service mark by demonstrating that it has rights in a trade mark at the date the Complaint was filed and, if that is the case, the Disputed Domain Name must also be identical or confusingly similar to the trade mark.

This Panel finds that the Complainant has rights in the DYMATIZE trade mark acquired through use and registration.

Turning to whether the Disputed Domain Name is identical or confusingly similar to the DYMATIZE trade mark, the Panel observes that the Disputed Domain Name comprises: (a) an exact reproduction of the Complainant's trade mark DYMATIZE; (b) followed by the ccTLD ".au".

It is well established that the ccTLD used as technical part of a domain name may be disregarded (see: *BT Financial Group Pty Limited v. Basketball Times Pty Ltd*, WIPO Case No. [DAU2004-0001](#)). The comparison to be made is with the Second-Level portion of the Disputed Domain Name, specifically: "dymatize".

This Panel observes that the Australian Registered trade mark in which the Complainant has rights is wholly incorporated into and exactly the same as the Disputed Domain Name.

Accordingly, the Panel finds that the Disputed Domain Name is identical to the Complainant's trademark and the Complainant has established the first element of paragraph 4(a) of the Policy.

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 a list of non-exhaustive circumstances any of which is sufficient to demonstrate that the Respondent has rights or legitimate interests in the 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 organisation) has been commonly known by the disputed domain name even if the Respondent has acquired no trade mark 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 trade mark or service mark at issue.

The Complainant has not authorised, licensed, or permitted the Respondent to register or use the Disputed Domain Name or to use the DYMATIZE trade mark. The Panel finds on the record that there is therefore a *prima facie* case that the Respondent has no rights or legitimate interests in the Disputed Domain Name, and the burden is thus on the Respondent to produce evidence to rebut this presumption, see: *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd*, WIPO Case No. [DAU2002-0001](#).

The Respondent has failed to submit a Response and so has not shown that it has acquired any trade mark rights in respect of the Disputed Domain Name or that the Disputed Domain Name is used in connection with a *bona fide* offering of goods or services. In the absence of a Response, the Panel finds that the Complainant has prior rights in the DYMATIZE trade mark which precede the Respondent's registration of the Disputed Domain Name by approximately 11 years.

There has been no evidence adduced to show that the Respondent has been commonly known by the Disputed Domain Name, nor does any of the evidence demonstrate that the Respondent is making legitimate noncommercial or fair use of the Disputed Domain Name.

The evidence is that the Disputed Domain Name resolves to an inactive webpage. In the circumstances, such use does not amount to a *bona fide* offering of goods or services under the Policy.

The Panel therefore finds that the Complaint fulfils the second condition in paragraph 4(a)(ii) of the Policy.

C. Registered or Subsequently Used in Bad Faith

The third element of the Policy that the Complainant must also demonstrate is that the Disputed Domain Name has been registered or subsequently used in bad faith. Paragraph 4(b) of the Policy sets out certain circumstances to be construed as evidence of both.

It is uncontroversial that a domain name investor, or anyone else, can register a commonly used word as a domain name and hold it provided that the circumstances do not indicate illegitimate conduct or bad faith.

However, the available evidence supports a finding that the Respondent has registered or used the Disputed Domain Name in bad faith. The *onus* is on the Respondent to make the appropriate enquiries when registering a domain name. Paragraph 2 of the Policy clearly states: "It is your [domain-name holder's] responsibility to determine whether your domain name registration infringes or violates someone else's rights." A simple Internet search would have alerted the Respondent to the Complainant's prior rights, the Respondent's registration of the Disputed Domain Name incorporating the Complainant's trade mark could not be attributable to pure coincidence and creates a presumption of bad faith. The Panel finds that the Respondent must have been aware of the relevant trade mark and has targeted the Complainant. The Panel's finding is reinforced given the Complainant's use of the domain name <dymatize.com> and the evidence that the Respondent also operates a nutritional supplements business, in competition, it would seem, with the Complainant.

The Respondent's non-use or passive holding of the Disputed Domain Name would not prevent a finding of bad faith registration or use under the Policy.

Further, registration of a domain name which consists solely of a complainant's trade mark has been recognised by numerous Panels of having the effect of preventing a complainant from reflecting its trade mark in that domain name and evidence of bad faith (see section 3.1B of the auDA Overview of Panel Views on Selected auDRP Questions First Edition ("auDA auDRP Overview 1.0")).

This Panel also accepts the Complainant's evidence that the Disputed Domain Name has been made available for sale for a sum in excess of AUD 250,000. While the website soliciting offers was not apparently owned by the Respondent, it has long been held that a general offer of sale combined with no legitimate use of a disputed domain name can constitute registration and use in bad faith (see *Educational Testing Service v. TOEFL*, WIPO Case No. [D2000-0044](#))¹.

Accordingly, the Panel finds that the Complainant has satisfied the requirements of paragraph 4(a)(iii) of the Policy.

7. Decision

For all 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, <dymatize.au>, be transferred to the Complainant.

/Nicholas Weston/

Nicholas Weston

Sole Panelist

Date: April 12, 2023

¹ Noting the substantial substantive similarities between the Policy and the Uniform Domain Name Dispute Resolution Policy, the Panel has referred to prior UDRP cases and the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), where appropriate.