

ADMINISTRATIVE PANEL DECISION

Nokia Corporation v. Avionics Australia Pty Ltd and Marilyn Kay Ritson
Case No. DAU2023-0035

1. The Parties

The Complainant is Nokia Corporation, Finland, represented by SafeBrands, France.

The Respondents are Avionics Australia Pty Ltd, Australia (“Former Registrant”) and Marilyn Kay Ritson, Australia (“Current Registrant”).

2. The Domain Name and Registrar

The disputed domain name <nokia.au> is registered with GoDaddy.com, LLC.

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on August 2, 2023, identifying the Former Registrant as the respondent.

On August 4, 2023, the Center transmitted by email to Drop.com.au Pty Ltd, the registrar identified in the Whois record when the Complaint was filed, a request for registrar verification in connection with the disputed domain name.

On August 11, 2023, Drop.com.au Pty Ltd replied to the Center’s email stating:

“Sorry we are not able to assist as the domain nokia.au is not on our Registrar.”

On August 14, 2023, the Center transmitted by email to GoDaddy.com, LLC a request for registrar verification in connection with the disputed domain name. On August 14, 2023, GoDaddy.com, LLC 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 and contact information in the Complaint. The Center sent an email communication to the Complainant on August 16, 2023, providing the registrant and contact information disclosed by GoDaddy.com, LLC, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on August 21, 2023, adding the Current Registrant as a respondent.

The Center verified that the Complaint together with the amended 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 Respondents of the Complaint, and the proceedings commenced on August 28, 2023. In accordance with the Rules, paragraph 5(a), the due date for Response was September 17, 2023. The Current Registrant submitted an email communication to the Center by way of response on September 17, 2023.

On September 18, 2023, the Former Registrant contacted the Center and requested an extension of time in which to file a response. The Center informed the Parties that it would proceed to panel appointment on September 18, 2023.

On September 21, 2023, the Complainant sent an email to the Center pointing out that the disputed domain name appeared to have been transferred to the Current Registrant after the Complaint was filed and alleging the transfer was in bad faith under the Policy.

The Center appointed Warwick A. Rothnie as the sole panelist in this matter on October 2, 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.

On October 6, 2023, the Former Registrant sent an email to the Center requesting clarification of its status in the proceeding and its request for an extension of time.

In light of the Complainant’s allegations that the facts gave rise to “cyberflight”, on October 9, 2023, the Panel issued Administrative Panel Order No. 1 providing the Former Registrant and the Current Registrant with 14 days in which to make a Response or Further Response.

Neither the Former Registrant nor the Current Registrant submitted any further Response by October 23, 2023. On October 25, 2023, however, the Center received a further communication from the Former Registrant stating its Response was delayed by the need to seek legal advice about the status of allegedly “without prejudice” communications disclosed in the Complaint.

In the circumstances, on October 26, 2023, the Panel issued Administrative Panel Order No. 2 extending the time for any Responses to be filed to November 2, 2023, and any Reply from the Complainant to November 9, 2023.

On November 8, 2023, the Former Registrant submitted a Response. On November 15, the Complainant submitted a Reply. On November 16, 2023, the Current Registrant submitted another informal email communication to the Center by way of response.

For completeness, copies of the two Administrative Panel Orders are annexed.

4. Factual Background

The Complainant is a multinational telecommunications, information technology and consumer electronics company founded in Finland in 1865. Amongst other things, the Complainant promotes its products and services from websites at “www.nokia.com” and “www.nokia.com.au”. The Complainant has held the domain name <nokia.com> since 1991.

The Complainant’s products are available in more than 130 countries around the world under and by reference to its name and the trademark, NOKIA. Its global revenue in 2021 was EUR 22.2 billion.

The Complainant holds numerous registered trademarks. In Australia alone, there are registrations for NOKIA in classes, 9, 16, 18, 25, 35, 38, 39, 41, and 42. The earliest Registered Trademark No. 458364 is registered with effect from January 13, 1987 in class 9. Registered Trademark No. 867057 covers a very wide range of goods and services in International Classes 9, 18, 25, 38, 41, and 42 with effect from February 22, 2001. The most recent registration, Trademark No. 1212607 covers retail services and navigation services in, respectively, International Classes 35 and 39 with effect from June 1, 2007.

According to the Former Registrant's Response, the disputed domain name was registered in October 2022 (that is, after the expiry of the Priority Allocation Period for registration directly in the .au country code Top Level Domain ("ccTLD") for persons who already had a registration in either the ".com.au" or ".net.au" second level domains).

On October 27, 2022, the Complainant's representatives sent a cease and desist letter to the Former Registrant. According to that letter, the disputed domain name at that time resolved to a series of randomly alternating parking pages. In addition, at least subsequently the disputed domain name itself was offered for sale on the Above.com Marketplace for USD 1,000.

Some correspondence ensued. There is a dispute between the Parties whether the content of this correspondence is without prejudice communications in a genuine attempt to settle litigation and so should not be referred to by the Panel. Also, at some point the Former Registrant redirected the disputed domain name to point to the Former Registrant's affiliate page with its web hosting provider, Siteground, at "www.siteground.com".

As the date is in contention, it suffices to note at this stage that around the time the Complaint was filed, the Former Registrant transferred the disputed domain name to the Current Registrant. In her informal Responses, the Current Registrant states that she paid the Former Registrant USD 1,000 for the transfer of the disputed domain name.

In her supplemental filing on November 16, 2023, the Current Registrant denies that she attempted to sell the disputed domain name to the Complainant. In her supplemental filing, the Current Registrant states that the Complainant did not contact her. So, the Current Registrant "tried to do the right thing by opening up the lines of communication with them and see if we could reach a compromise." The Current Registrant appended the email correspondence between her and the Complainant to her supplemental filing. In that correspondence, the Current Registrant asked the Complainant if it was willing to reimburse [her for her] "out of pocket expenses in return for [her] transferring the domain to you?" The correspondence identified the "out of pocket expenses" as AUD 1546.96, being the AUD 1500 paid to the Former Registrant and the balance being registration fees paid to Google.

Since the transfer of the disputed domain name to the Current Registrant, it redirects to a webpage on "www.geni.com" for Juho Kustaa Erkinpoika Nokia, who was born in 1870 in Finland and died there in 1916.

The Current Registrant states that she has no relationship with the Former Registrant – other than through the transaction to obtain the transfer of the disputed domain name.

5. Discussion and Findings

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

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. Who is the Respondent and alleged cyberflight

The Complainant submitted the Complaint to the Center on Wednesday, August 2, 2023, at around 4:49 pm (in France). The Complainant then copied the Complaint to the then Registrar, Drop.com.au Pty Ltd, at around 4:54 pm (in France).

Consistently with these timings, the Former Registrant acknowledged receipt of the Complaint by email from the Complainant on August 3, 2023.

On August 4, 2023, the Whois record recorded that the Former Registrant was still the registrant but the registrar had changed from Drop.com.au Pty Ltd to the current registrar, GoDaddy.

It was not until on or about August 10, 2023, that the Current Registrant was recorded as the registrant of the disputed domain name.

Paragraph 8 of the Policy provides:

“8. Transfers During a Dispute.

“a. Transfers of a Domain Name to a New Holder. You may not transfer your domain name registration to another holder (i) during a pending administrative proceeding brought pursuant to Paragraph 4 or for a period of fifteen (15) business days (as observed in the location of our principal place of business) after such proceeding is concluded; or (ii) during a pending court proceeding or arbitration commenced regarding your domain name unless the party to whom the domain name registration is being transferred agrees, in writing, to be bound by the decision of the court or arbitrator. We reserve the right to cancel any transfer of a domain name registration to another holder that is made in violation of this subparagraph.

“b. Changing Registrars. You may not transfer your domain name registration to another registrar during a pending administrative proceeding brought pursuant to Paragraph 4 or for a period of fifteen (15) business days (as observed in the location of our principal place of business) after such proceeding is concluded. You may transfer administration of your domain name registration to another registrar during a pending court action or arbitration, provided that the domain name you have registered with us shall continue to be subject to the proceedings commenced against you in accordance with the terms of this Policy. In the event that you transfer a domain name registration to us during the pendency of a court action or arbitration, such dispute”.

The facts set out above give rise *prima facie* give rise to a breach of paragraph 8 of the Policy constituting “cyberflight”. In such cases, as the transfer is in breach of the Policy Panels have generally treated it as not having occurred and the Former Registrant remains the respondent. See e.g. *Humana Inc. v. CDN Properties Incorporated* WIPO Case No. [D2008-1688](#), *Fendi S.r.l. v. 王先生 (wang xian sheng) and Super Privacy Service LTD c/o Dynadot / tianyu liu* WIPO Case No. [D2022-1681](#) and *Dasty Italy S.p.A. v. BEATS / Asiagroup* WIPO Case No. [D2022-2295](#).¹ In *Muitas Ltd v. Domain Administrator, Sugarcane Internet Nigeria Limited and Milen Radumilo* WIPO Case No [D2022-4978](#), the Panelist considered the application of the criteria under the Policy against both the former and current registrant as respondents.

¹ The Panel considers it appropriate to have regard to principles developed under the Uniform Domain Name Dispute Resolution Policy (“UDRP”) in view of the similarity between the UDRP and the auDRP, except to the extent that the auDRP diverges from the UDRP.

In its Response, the Former Registrant states “In circumstances where the Complainant had threatened legal action and we were incurring costs in responding to the allegations of trade mark infringement, we were open to resolving the matter on a commercial basis.”

The Former Registrant states that, in July 2023, it received an unsolicited offer from the Current Registrant to purchase the disputed domain name for AUD 1,500. The Former Registrant says that it then listed the disputed domain name on Above.com Marketplace to facilitate the transaction.

Due to certain difficulties related to exchange rates, the transaction did not proceed through Above.com Marketplace but, on or about July 31, 2023, the Current Registrant paid the Former Registrant USD 1,000 in full and the Former Registrant provided the Current Registrant with the EPP code to initiate transfer.

According to the Former Registrant, the Current Registrant initiated the transfer then and, in any event, before August 3, 2023, when the Former Registrant received the Complaint. Administrative delays or errors within GoDaddy, however, meant that the transfer was not completed and the Whois record updated until on or about August 10, 2023.

In her Responses, however, the Current Registrant states that she “purchased” the disputed domain name “in early August this year”. The Current Registrant also says that, at the time, she was unaware of the dispute between the Complainant and the Former Registrant.

Neither the Former Registrant nor the Current Registrant have provided any documentation to verify this history of dealings. That is despite the two Respondents being provided with two extensions of time to present their case or respective cases. The Panel considered whether or not to issue yet another Panel Order under paragraph 12 of the Policy but:

- (a) as both Registrants have been provided with those two extensions of time;
- (b) having regard to the very detailed legal submissions set out in the Former Registrant’s Response;
- (c) the discrepancies between the Former Registrant’s account and the Current Registrant’s account as to the date of “purchase”;
- (d) neither the Former Registrant’s account nor the Current Registrant’s account explains how the Current Registrant ascertained the disputed domain name was available for “purchase” or she arrived (on the Former Registrant’s case) at the offer price; and
- (e) having regard to the nature of these proceedings as intended to be an expeditious and efficient process on the papers (while ensuring that the Parties are treated equally and given a fair opportunity to be heard),

the Panel considers yet further extensions of time and supplemental filings are not warranted.

On the objective materials before the Panel, therefore, the Complaint was initiated on August 2, 2023, the Former Registrant received the Complaint on August 3, 2023 (and was on notice of the dispute since at least October 2022) and the transfer was initiated on or about August 3, 2023, or August 10, 2023.

In these circumstances, the Panel finds that the transfer was effected in breach of the Policy. Consistently with the decisions on “cyberflight”, therefore, the Former Registrant remains a Respondent for the purposes of this proceeding.

B. Identical or Confusingly Similar

The Complainant has proven that it owns registered trade marks for NOKIA. The disputed domain name is identical to the Complainant’s registered trademark (disregarding the “.au” ccTLD as a functional component

of the domain name system). See Overview of Panel Views on Selected auDRP Questions, Second Edition (“auDRP Overview 2.0”), section 1.11, and e.g. *Clarins v. Netlocal Consulting Pty Ltd*, WIPO Case No. [DAU2023-0016](#), by analogy with WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“[WIPO Overview 3.0](#)”), section 1.11.

The Former Registrant contends that the Complainant’s trademark rights do not give the Complainant a monopoly over all uses of “Nokia” but only exclusive rights in respect of the goods and services for which it is registered.

That is not strictly correct under Australian law given the expanded definition of infringement under section 120 of the Trade Marks Act 1995 (Cth) and also rights which arise at common law or against misleading or deceptive conduct contrary to the Australian Consumer Law.

In any event, it misunderstands the nature of the inquiry under the Policy at this stage. 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, trade mark or service mark.

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 trade marks: 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 trade mark 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.

Accordingly, the Complainant has established the first requirement under the Policy.

C. 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 dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services (not being the offering or domain names that the respondent has 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 trade mark or service mark rights; or
- (iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark 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*, WIPO Case No. [DAU2002-0001](#).

Both the Former Registrant and the Current Registrant registered the disputed domain name well after the Complainant began using its name and trademark and also well after the Complainant secured registration of its trademarks.

It is not in dispute between the Parties that neither registrant is related to the Complainant. Nor has either registrant been authorised by the Complainant to register or use the disputed domain name.

The disputed domain name is not derived from either registrant's actual name. Nor is there any evidence before the Panel that either registrant is commonly known by a name from which "nokia" could be derived.

In addition, the occurrence of "cyberflight" does not correspond with a claim to rights or legitimate interests.

These factors are sufficient to raise the required *prima facie* case that the Respondents do not have rights or legitimate interests under the Policy.

In these circumstances, it is unnecessary to consider the Former Registrant's arguments about "without prejudice" correspondence as the Panel does not rely on that correspondence in reaching this decision. The Current Registrant, however, has specifically relied on her correspondence with the Complainant.

The Former Registrant

As noted in section 5B above, the Former Registrant disputes that the Complainant has a monopoly over all uses of the term "Nokia". The Former Registrant points out that Nokia is the name of a town in Finland which lies on the banks of the Nokianvirta River. It also says that "nokia" is a dictionary word in Finnish, citing a Wikipedia entry. This entry, however, describes the word as "an inflected plural, although this form of the word [nokij] is rarely if ever used."

The Former Registrant says that the initial redirection to random parking pages, if it occurred, was done by the Registrar, Drop.com.au Pty Ltd, without the Former Registrant's knowledge or permission. Once it became aware of the issue (through receipt of the Complainant's cease and desist letter), it redirected the disputed domain name to point to its affiliate page on the webhosting service offered at "www.siteground.com".

The Former Registrant says it is entitled to capture some of the traffic for the town and river (whatever portion that may be) and redirect it to its affiliate landing page on the webhosting service.

The Former Registrant also points out that the Complainant had the opportunity to register the disputed domain name during the Priority Registration period and, having failed to do so, has waived its rights.

The mere fact that the Complainant did not register the disputed domain name itself does not, however, constitute a waiver of its rights in its name and trademark.² Apart from anything else, it is quite unrealistic to expect a trademark owner to register its trademark in every possible domain extension.

Next, the fact (if it be a fact) that redirection to a parking page is instituted by the registrar or web host without the involvement of the registrant is not generally a justification or excuse under the Policy. See e.g. auDA Overview 2.0, section 2.9 and [WIPO Overview 3.0](#), section 2.9. In any event, in the present case, there is the further conduct of redirection to the affiliate link at "www.siteground.com".

The Panel cannot exclude the possibility that there may be some Internet traffic which might think the disputed domain name might direct them to the town or river of "Nokia". Given how remote Australia is from

² See e.g. *Firstmac Limited v Zip Co Limited* [2023] FCA 540 at [287] – [298].

Finland and the very substantial reputation the Complainant and its products have had in Australia, however, the Panel considers it far more likely that the bulk of any such traffic would mistakenly associate the disputed domain name with the Complainant. It seems very unlikely that the Former Registrant did not appreciate that and, in any event, it ought reasonably to have done so. See e.g. *Anheuser-Busch Inc v Budejovický Budvar, Národní Podnik* (2002) 56 IPR 182; [2002] FCA 390 at [209] to [219].

In such circumstances, the use of the disputed domain name to direct traffic to the affiliate page is taking advantage of the resemblance of the disputed domain name to the Complainant's trademark. Such opportunistic behaviour does not qualify as a good faith offering of services under the Policy. Accordingly, the Panel finds that the Former Registrant has not rebutted the *prima facie* established by the Complainant.

The Current Registrant

The Current Registrant states she is not linked to the Former Registrant. The Current Registrant says she is retired and researching family history. According to the Current Registrant, the Nokia family forms part of her wider family history lineage and, having noticed some missing information in the timeline on the page on "www.geni.com" to which the disputed domain name now resolves, purchased the disputed domain name as she had been advised that linking a relevant domain to the webpage could result in people viewing the timeline who are able to provide the missing information. The Current Registrant also points out that the Complainant had the same opportunity as her to purchase the disputed domain name and so it would be unfair for her to be left out of pocket.

While some surprise might be felt about the amount paid for the transfer of the disputed domain name in pursuit of this project, that is not something the Panel can form a view about as that is a matter of the Current Registrant's interest and choice.

Ultimately, the difficulty with the Current Registrant's contentions is that they are unsupported by any objective documentation corroborating her connection with the Nokia family found on the website at "www.geni.com". Objectively, the Panel notes that the Current Registrant's name is "Marilyn Kay Ritson", which bears no similarities whatsoever to the disputed domain name or any of the family members mentioned on the website to which the disputed domain name resolves, which expands beyond solely the surname "Nokia". Accordingly, the Panel is simply not in a position to assess the claim. In these circumstances, the Panel finds that the Current Registrant has not rebutted the *prima facie* case established by the Complainant.

Accordingly, the Panel finds that the Complainant has established the second requirement under the Policy.

D. Registered or Subsequently Used in Bad Faith

Under the third requirement of the Policy, the Complainant must establish that the disputed domain name has been either registered or subsequently used in bad faith by the Respondent. In contrast to the Uniform Domain Name Dispute Resolution Policy, the requirements of registration or use are disjunctive. It is necessary for the Complainant to establish only one or the other.

Given the Complainant's history in Australia, the Panel has little difficulty inferring that both the Former Registrant and the Current Registrant knew about the Complainant and its trademark when registering the disputed domain name. Neither registrant has denied knowledge of the Complainant and its trademark.

The reasons leading to the rejection of the Respondents' respective claims to rights or legitimate interests in the disputed domain name also lead to findings that, at the least, the Respondents have used the disputed domain name in bad faith.

In the case of the Former Registrant, use of the disputed domain name (a) to attract traffic to the Siteground website, (b) offering it for sale on the Above.com Marketplace and (c) the "cyberflight" all constitute use in bad faith. Insofar as the purpose of registering the disputed domain name was to redirect traffic to the

affiliate page on the Siteground website, the Panel also infers registration in bad faith.

Given the “cyberflight”, those findings are sufficient to find the third requirement under the Policy also established as against the Former Registrant.

The failure of the Current Registrant’s claim to rights and legitimate interests, resulting from rejection of her explanation for registration of the disputed domain name, leads to the same conclusion. As the Current Registrant’s explanation for registering the disputed domain name has not been accepted on the evidence before the Panel, the redirection of the disputed domain name to the “www.geni.com” appears to be merely pretextual. At the very least, that involves use in bad faith under the Policy as exemplified in one of the earliest cases involving trademarks and domain names: *Panavision Internation L.P. v Toeppen* 141 F.3d 1316 (9th Cir. 1998).

Accordingly, the Complainant has established all three requirements under the Policy. As a result, there is no basis for a finding of reverse domain name hijacking as contended for by the Former Registrant.

6. 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 domain name, <nokia.au>, be transferred to the Complainant.

/Warwick A. Rothnie/

Warwick A. Rothnie

Sole Panelist

Date: November 24, 2023

ADMINISTRATIVE PANEL ORDER NO. 1

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1. The Parties

The Complainant is Nokia Corporation, Finland, represented by SafeBrands, France.

The Respondent is one or both of Avionics Australia Pty Ltd, Australia (“Former Registrant”) and/or Marilyn Kay Ritson, Australia (“Current Registrant”).

2. The Domain Name and Registrar

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3. Procedural History

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“Sorry we are not able to assist as the domain nokia.au is not on our Registrar.”

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The Center verified that the Complaint together with the amended 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”).

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The Center appointed Warwick A. Rothnie as the sole panelist in this matter on October 2, 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.

On October 6, 2023, the Former Registrant emailed the Center requesting clarification of its status in the proceeding and its request for an extension of time.

4. Consideration

The Current Registrant has not stated when she became the registrant or provided evidence supporting the amount paid for the registration.

The Registrar’s verification response does not expressly identify when the disputed domain name became registered with it. It appears from dates of expiry and last modification set out in the Registrar’s (GoDaddy.com LLC’s) verification response, however, that the disputed domain name was registered in the name of the Current Registrant on or about August 10, 2023.

Paragraph 8 of the Policy provides:

“8. Transfers During a Dispute.

“a. Transfers of a Domain Name to a New Holder. You may not transfer your domain name registration to another holder (i) during a pending administrative proceeding brought pursuant to Paragraph 4 or for a period of fifteen (15) business days (as observed in the location of our principal place of business) after such proceeding is concluded; or (ii) during a pending court proceeding or arbitration commenced regarding your domain name unless the party to whom the domain name registration is being transferred agrees, in writing, to be bound by the decision of the court or arbitrator. We reserve the right to cancel any transfer of a domain name registration to another holder that is made in violation of this subparagraph.

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shall remain subject to the domain name dispute policy of the registrar from which the domain name registration was transferred.”

The facts therefore appear to give rise to cyberflight. See *e.g. Humana Inc. v. CDN Properties Incorporated* WIPO Case No. D2008-1688, *Fendi S.r.l. v. 王先生 (wang xian sheng) and Super Privacy Service LTD c/o Dynadot / tianyu liu* WIPO Case No. D2022-1681 and *Dasty Italy S.p.A. v. BEATS / Asiagroup* WIPO Case No. D2022-2295¹.

Of course, at this stage, the Former Registrant has not submitted any Response but has requested a 14 day extension. Accordingly, no concluded view can be formed at this stage until the Former Registrant has been given a fair opportunity to state its case.

In the circumstances and bearing in mind the requirements of paragraph 10(b), therefore, the Panel makes the following orders.

5. Orders

1. By **October 23, 2023**, the Former Registrant and the Current Registrant may submit a Response, or a further Response.
2. By **November 6, 2023**, the Complainant may submit a Reply if either or both the Former Registrant or the Current Registrant submit a Response or further Response.
3. The date for submission of the decision is extended to:
 - a. November 6, if neither the Former Registrant nor the Current Registrant makes a submission pursuant to paragraph 1; or
 - b. November 20, 2023, otherwise.

Warwick A. Rothnie

Sole Panelist

Date: October 9, 2023

¹ Noting the substantial substantive similarities between the Policy and the Uniform Domain Name Dispute Resolution Policy (“UDRP”), the Panel has referred to prior UDRP cases.

ADMINISTRATIVE PANEL ORDER NO. 2

Nokia Corporation v. Avionics Australia Pty Ltd and Marilyn Kay Ritson
Case No. DAU2023-0035

1. The Parties

The Complainant is Nokia Corporation, Finland, represented by SafeBrands, France.

The Respondent is one or both of Avionics Australia Pty Ltd, Australia ("Former Registrant") and/or Marilyn Kay Ritson, Australia ("Current Registrant").

2. The Domain Name and Registrar

The disputed domain name <nokia.au> is now registered with GoDaddy.com, LLC.

3. Procedural History

By Administrative Panel Order dated October 9, 2023, the Panel invited the Former Registrant and the Current Registrant to submit a Response or further Response by October 23, 2023.

Neither the Former Registrant nor the Current Registrant submitted a Response by that date.

On October 25, 2023, however, the Former Registrant submitted an email to the Center apologizing for the lateness of the submission which was said to be due to an important issue coming to the Former Registrant's attention "in the last few days for which we need to seek further advice".

In its email, the Former Registrant contends that certain documents included in Annex 9 to the Amended Complaint are without prejudice communications in a genuine attempt to settle a dispute between the parties. Page 8 of the Amended Complaint apparently discloses the substance of at least one of the allegedly without prejudice communications.

The Former Registrant contends that the without prejudice communications should be excluded from the record in the case. It therefore seeks a preliminary ruling on the admissibility of the allegedly without prejudice communications and a further seven days following that ruling in which to submit a substantive response.

4. Consideration

The Panel has not read Annexure 9 to the Complaint at this stage.

In support of its position, the Former Registrant has cited the decision in *Adjudicate Today Pty Limited v. The Institute of Arbitrators and Mediators* Case No. DAU2012-0033 and several decisions under the Uniform Domain Name Dispute Resolution Policy (UDRP).

Apart from one decision (*Project Blue Limited v. Mark Brooks* Case No. D2015-1326), the decisions under the UDRP were reached in 2002 or earlier. The WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("WIPO Overview 3.0"), however, fairly records at section 3.10 that, generally, panels now tend to treat settlement discussions between parties as admissible.

The Overview of Panel Views on Selected auDRP Questions, Second Edition, section 3.10 records that the position under the Policy is generally the same.

Under Australian law, public policy encourages parties to settle their disputes without recourse to litigation and, to facilitate that outcome, seeks to encourage parties to deal with each other frankly secure in the knowledge that disclosures made in the course of genuine settlement discussions cannot be used against them as admissions, if the negotiations are unsuccessful. As noted by the panelist in *GM Holden Ltd. v. Bradley John Lawless* WIPO Case No. DAU2010-0010 (a case in which evidence of a genuine without prejudice statement was excluded), there are numerous exceptions to the rule.

The privilege attaching to without prejudice communications under Australian law is a rule of evidence. See *e.g. Evidence Act 1995* (Cth) s 131. It applies to proceedings in Courts. Proceedings under the Policy, however, are not bound by the rules of evidence in the same way as are the Courts. Paragraph 10 of the Rules outlines the requirements the Panel must adhere to:

"10. General Powers of the Panel

- (a) The Panel shall conduct the administrative proceeding in such manner as it considers appropriate in accordance with the Policy and these Rules.
- (b) In all cases, the Panel shall ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case.
- (c) The Panel shall ensure that the administrative proceeding takes place with due expedition. It may, at the request of a Party or on its own motion, extend, in exceptional cases, a period of time fixed by these Rules or by the Panel.
- (d) The Panel shall determine the admissibility, relevance, materiality and weight of the evidence.
- (e) A Panel shall decide a request by a Party to consolidate multiple domain name disputes in accordance with the Policy and these Rules."

At this stage, therefore, the Panel does not see any reason to depart from the general approach under both the Policy and the UDRP.

Further, as the panelist in the *Adjudicate Today* decision, *supra*, noted, it would be necessary in any event to review the Contested Material properly to form a view whether or not it fell within a "without prejudice" exclusion. In these circumstances, the Panel proposes to follow an approach modeled on that taken by the panelist in the *Adjudicate Today* decision, *supra*:

- (1) The Panel will review the record in the proceeding without regard to Annexure 9 or the paragraph on page 8 of the Amended Complaint (the **Contentious Materials**).
- (2) Having reached a view on those materials, only then will the Panel consider the Contentious Materials to ascertain if the view formed in the first stage needs to be reconsidered or altered.

Accordingly, the Panel makes the following Orders:

5. Orders

1. By **November 6, 2023**, the Former Registrant and the Current Registrant may submit a Response, or a further Response.
2. By **November 13, 2023**, the Complainant may submit a Reply if either or both the Former Registrant or the Current Registrant submit a Response or further Response.
3. The date for submission of the decision is extended to:
 - a. November 13, 2023, if neither the Former Registrant nor the Current Registrant makes a submission pursuant to paragraph 1; or
 - b. November 24, 2023, otherwise.

Warwick A. Rothnie

Sole Panelist

Date: October 30, 2023