

## **ADMINISTRATIVE PANEL DECISION**

Vitalen Auto Performance Inc. v. TORQIT PTY LTD  
Case No. DAU2023-0039

### **1. The Parties**

The Complainant is Vitalen Auto Performance Inc., United States of America (“United States”), represented by Juris Attorney Partnership, Türkiye.

The Respondent is TORQIT PTY LTD, Australia.

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

The disputed domain name <pedalcommander.com.au> is registered with Web Address Registration Pty Ltd.

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on August 29, 2023. On August 29, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On September 5, 2023, 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 (Jeremy Mcalpin) and contact information in the Complaint. The Center sent an email communication to the Complainant on September 5, 2023, 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 September 8, 2023.

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 Respondent of the Complaint, and the proceeding commenced on September 13, 2023. In accordance with the Rules, paragraph 5(a), the due date for Response was October 3, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on October 4, 2023.

The Center appointed Sebastian M.W. Hughes as the sole panelist in this matter on October 6, 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**

##### **A. Complainant**

The Complainant is a manufacturer of throttle response controllers for internal combustion engine automobiles, founded in 2011, headquartered in the United States, and offering its products to customers worldwide, including customers in Australia, under the trade mark PEDAL COMMANDER (the "Trade Mark"). The Complainant is the owner of Australian registration No. 2278373 for the Trade Mark, with a registration date of January 31, 2023, and also the United States registration No. 5086095 with a registration date of November 22, 2016.

##### **B. Respondent**

The Respondent is apparently a company incorporated in Australia.

##### **C. The Disputed Domain Names**

The disputed domain name was registered on March 2, 2017.

##### **D. Use of the Disputed Domain Name**

The disputed domain name has not been used in respect of an active website.

#### **5. Parties' Contentions**

##### **A. Complainant**

The Complainant contends that the disputed domain name is identical to the Trade Mark, the Respondent has no rights or legitimate interests in respect of the disputed domain name, and the disputed domain name has been registered or subsequently used in bad faith.

##### **B. Respondent**

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

#### **6. Discussion and Findings**

##### **6.1 Eligibility**

Schedule A to the .auDA Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (the "Eligibility Rules") provides relevantly as follows:

ELIGIBILITY AND ALLOCATION RULES FOR ALL OPEN 2LDS

First come, first served

1. Domain name licences are allocated on a 'first come, first served' basis. It is not possible to pre-register or otherwise reserve a domain name.

Registrants must be Australian

2. Domain name licences may only be allocated to a registrant who is Australian, as defined under the eligibility and allocation rules for each 2LD.

Schedule C to the Eligibility Rules provides relevantly as follows:

#### ELIGIBILITY AND ALLOCATION RULES FOR COM.AU

The com.au 2LD is for commercial purposes.

The following rules are to be read in conjunction with the Eligibility and Allocation Rules for All Open 2LDs, contained in Schedule A of this document.

1. To be eligible for a domain name in the com.au 2LD, registrants must be:

- a) an Australian registered company; or
- b) trading under a registered business name in any Australian State or Territory; or
- c) an Australian partnership or sole trader; or
- d) a foreign company licensed to trade in Australia; or
- e) an owner of an Australian Registered Trade Mark; or
- f) an applicant for an Australian Registered Trade Mark; or
- g) an association incorporated in any Australian State or Territory; or
- h) an Australian commercial statutory body.

The Panel finds that the Complainant, as the owner of an Australian Registered Trade Mark, meets the alternative eligibility requirements set out in paragraph 1(e) of Schedule C to the Eligibility Rules.

### **6.2 Substantive Elements of the Policy**

The Complainant must prove each of the three elements in paragraph 4(a) of the Policy in order to prevail.

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

The Panel finds that the Complainant has rights in the Trade Mark.

Disregarding the country code Top-Level Domain, the disputed domain name is identical to the Trade Mark.

The Panel therefore finds that the disputed domain name is identical to the Trade Mark.

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

Paragraph 4(c) of the Policy provides a list of non-exhaustive circumstances any of which is sufficient to demonstrate that a 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 trade mark or service mark rights; or
- (iii) the respondent is making a legitimate non-commercial 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 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.

The Respondent has failed to show that it has acquired any trade mark rights in respect of the disputed domain name or that the disputed domain name has been used in connection with a *bona fide* offering of goods or services. To the contrary, the disputed domain name has not been used.

Furthermore, the Respondent is a competitor of the Complainant in the throttle controller industry, offering its competing throttle controllers to customers in Australia under the trade mark TORQIT, including via the Respondent's website at "www.torqit.com.au".<sup>1</sup>

There has been no evidence adduced to show that the Respondent has been commonly known by the disputed domain name; and there has been no evidence adduced to show that the Respondent is making a legitimate noncommercial or fair use of the disputed domain name.

In addition, the nature of the disputed domain name (which is identical to the Complainant's Trade Mark) carries a high risk of implied affiliation with the Complainant (see Overview of Panel Views on Selected auDRP Questions, Second Edition, section 2.5).

In light of the above uncontested matters, the Panel finds that the Respondent has failed to produce any evidence to establish genuine rights or legitimate interests in the disputed domain name.

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

Given (i) the reputation of the Complainant and of its Trade Mark in the throttle controller industry; (ii) the distinctiveness of the Trade Mark; (iii) the fact the disputed domain name is identical to the Trade Mark; (iv) the fact the Complainant and the Respondent are competitors in the throttle controller industry; and (v) the lack of any substantiated credible explanation from the Respondent, the Panel finds, in all the circumstances, that the requisite element of bad faith has been made out.

The evidence suggests that the Respondent has targeted the Complainant in registering the disputed domain name; and that there cannot be any actual or contemplated good faith use of the inherently misleading disputed domain name by the Respondent.

Furthermore, in all the circumstances, the Respondent's non-use or passive holding of the disputed domain name does not prevent a finding of bad faith under the Policy (see Overview of Panel Views on Selected auDRP Questions, Second Edition, section 3.3).

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<sup>1</sup> Such information is readily available as a matter of public record (see Overview of Panel Views on Selected auDRP Questions, Second Edition, section 4.8 – panels may undertake limited factual research into matters of public record).

For all the foregoing reasons, the Panel concludes that the disputed domain name has been registered in bad faith.

## **7. 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, <pedalcommander.com.au>, be transferred to the Complainant.

*/Sebastian M.W. Hughes/*

**Sebastian M.W. Hughes**

Sole Panelist

Dated: October 20, 2023