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ADMINISTRATIVE PANEL DECISION

In the matter of:

Jasham Pty Ltd (ACN 065 058 988)

v.

Perfume Empire Pty Ltd (ACN 108 883 325)

Provider: LEADR

The Parties

The Complainant is Jasham Pty. Ltd. of 20 Werrington Street, Burradoo, NSW, 2576 and represented in these proceedings by Mr Steven Lewis of Denes Ebner, The Connaught Offices, Level 3, 185 Liverpool Street, Sydney, NSW, 2000.

The Respondent is Perfume Empire Pty. Ltd. of Level 9, 92 Pitt Street, Sydney, NSW, 2000 and represented in these proceedings by Mr David Hand of, 30 The Avenue, Hurstville, NSW, 2220.

Subject of Complaint

The disputed domain name license is 'jasham.com.au' and was created on 2 June 2005 by the Respondent.

Procedural History

The Complaint was lodged with LEADR on 9 January 2006. This Complaint was submitted in accordance with the auDRP Policy, which was approved by auDA in 2001 and was implemented on 1 August 2002, and LEADR's Supplementary Rules.

On 10 January 2006, LEADR mailed a dispute notification letter to the Respondent and a copy of the Complaint. A copy of the Complaint and the dispute notification letter were also mailed to the Registrar (Net Registry). The Registrar was also advised by LEADR to lock the website and record relating to 'jasham.com.au'. LEADR informed also auDA of the Complaint by email.

On 12 January 2006, the Respondent received a copy of the Complaint via registered post.

On 13 January 2006, the Registrar locked the website and record relating to 'jasham.com.au'.

LEADR then formally nominated the panellist who accepted on 27 January 2006 and he verbally confirmed that he had no conflict issues with the parties nor the Domain Name License 'jasham.com.au'. The Panellist accepted the matter on 27 January 2006 and received a copy of this Complaint, a procedural history and a compliance memo on 6 February 2006.

The Respondent has made no submission in relation to this Complaint and is therefore in default.

Factual Background

The Complaint is a large wholesale distributor of perfumes in Australia and also exports perfumes to New Zealand and Papua New Guinea. The Complaint has been using the company name 'Jasham Pty Ltd' for 11 years and has spent considerable efforts and money to promote the sale of its products.

The Respondent is a direct competitor to the Complainant in the industry of selling perfume products in Australia.

It is additionally noted that neither the Complaint nor the Respondent have applied for or registered a trade mark pursuant to the Trade Marks Act 1995 (Cth.) in Australia.

The Respondent does not use the domain name 'jasham.com.au' and this is supported by a letter from Mr David Hand to Mr Steven Lewis. The Respondent does not sell any product using the 'Jasham' trade mark and this is evidenced by searches completed and submitted by the Complainant of the Respondent's primary trading website at <http://www.perfumeempire.com.au/>.

The Respondent failed to respond to these proceedings and is therefore in default as per rule 14 of the auDA Rules.

Discussion

According to auDRP paragraph 4(a), the Complainant is required to demonstrate the following:

- i) the domain name 'Jasham.com.au' is identical and confusing similar to the Australian company name, Jasham Pty. Ltd.;
- ii) the Respondent has no legitimate rights or legitimate interests in respect of the domain name 'jasham.com.au'; and
- iii) the domain name 'jasham.com.au' was registered or subsequently used in bad faith by the Respondent.

The Complainant has successfully demonstrated that Jasham Pty Ltd is substantially identical to the domain name 'jasham.com.au' and has therefore satisfied the first prerequisite. However, it is noted that the Complainant failed to satisfy the requirement of paragraph 4(a(i)) as it relates to trade marks or service marks because the Complainant failed to provide any evidence relating to actual use of the trade mark aside from basic assertions in their submission.

However, the Panel agrees with the Complainant's assertions that "the addition of '.com.au' at the end of the Respondent's domain name offers no substantive,

meaningful or material change to the usage or meaning of the Complainant's registered company name.”

In relation to the second criteria, the panel also agrees with the Complainant's statements that “the Respondent does not meet the eligibility criteria required by the Domain Name Eligibility and Allocation Policy Rules for Open 2LDS (2005-01) published auDA. The Respondent's company or trading name does not exactly match, nor is an acronym or abbreviation of the Respondent's domain name”. The Panel therefore accepts that this Complaint satisfies the second above-mentioned requirement.

The Complainant demonstrated that the Respondent neither legitimately uses the term “jasham” nor is authorised by the Complainant to use the name. The Complainant submits that the Respondent registered the domain name registration to prevent the Complainant from legitimately registering this domain name for themselves. Additionally, the term “jasham” is distinguishable in the field of perfumes and is unlikely that the Respondent could legitimately use the term without adversely affecting the Complainant's rights. The Panel finds the Complainant to satisfactorily fulfil the third above mentioned requirement relating to bad faith.

The Panel notes that the Respondent's failure to make any submission in relation to this Complaint does not automatically result in a decision in favour of the Complainant. The Complaint is still required to establish each of the three basic elements as required by paragraph 4 of the auDRP. However, the Panel is satisfied that the Complainant to have successfully demonstrated the required elements of paragraph 4 of auDRP.

Decision

Pursuant to the auDRP, the Panel finds that this Complaint is within the scope of paragraph 4 and accordingly awards the transfer of the domain name license ‘jasham.com.au’ from the Respondent to the Complainant. The transfer of the domain name is to occur in accordance with auDA policies.

Anthony P. Alder
Panellist
Date: 20 February 2006