



## ADMINISTRATIVE PANEL DECISION

### InfoMedia Services Limited v. Mr Drew Alexander Weeks

#### LEADR Case No. auDA 03\_06

**Domain Name:** partymob.com.au  
**Name of Complainant:** InfoMedia Services Limited  
**Name of Respondent:** Mr Drew Alexander Weeks  
**Provider:** LEADR  
**Panel:** M J Sophocles

#### 1. THE PARTIES

- 1.1 The complainant is InfoMedia Services Limited of 7 Premier Court, Moulton Park, Northampton NN3 6LF, United Kingdom (**'the Complainant'**).
- 1.2 The respondent is Mr Drew Alexander Weeks of 63 Harman Road, Sorrento, Perth WA 6020 (**'the Respondent'**).

#### 2. THE DOMAIN NAME, REGISTRAR AND PROVIDER

- 2.1 The domain name in dispute is 'partymob.net.au' (**'the Disputed Domain Name'**).
- 2.2 The registrar of the Disputed Domain Name is IntaServe of QBV Chambers, Level 5, 143 York Street, Sydney NSW 2000 (**'the Registrar'**).
- 2.3 The provider in relation to this administrative proceeding is LEADR (**'the Provider'**).

#### 3. PROCEDURAL HISTORY

- 3.1 The complaint was submitted for decision in accordance with the auDRP Policy (**'the Policy'**), the auDRP Rules (**'the Rules'**) and the Provider's Supplementary Rules.
- 3.2 The Complainant lodged the complaint with the Provider on 24 March 2006.
- 3.3 On 24 March 2006, the Complainant sent a copy of the application to the Respondent.
- 3.4 On 27 March 2006, the Provider emailed the Respondent a copy of the application in addition to notification of the complaint. That same day, the Provider sent a dispute notification letter and a copy of the application to the Respondent by Express Post.

- 3.5 A copy of the application and a copy of the dispute notification letter were also sent to the Registrar by Express Post on 24 March 2006.
- 3.6 The Provider advised auDA of the Complaint on 27 March 2006.
- 3.7 The Registrar was advised by the Provider to lock the website [www.party mob.com.au](http://www.party mob.com.au) on 24 March 2006.
- 3.8 The Registrar, by return email on 31 March 2006, advised the Provider that it had locked the website.
- 3.9 On 27 March 2006, the Panel was approached by the Provider. On 29 March 2006, the Panel confirmed that there was no conflict of interest and accepted the appointment in respect of this dispute.
- 3.10 Having regard to the Easter Vacation period, the Provider asked the Respondent to submit his response by 20 April 2006. The Respondent did not provide any response within 20 days after the commencement of this administrative proceeding or by the later date of 20 April 2006.
- 3.11 The Panel was informed on 21 April 2006 that the dispute was being sent to the Panel for adjudication and that no response had been received from the Respondent.
- 3.12 As the Respondent has defaulted under paragraph 5(a) of the Rules, the Panel will proceed to a decision on the complaint in accordance with paragraph 14(a) of the Rules.

#### **4. FACTUAL BACKGROUND**

- 4.1 Given that the Respondent has failed to submit any response the following facts, taken from the complaint submitted by the Complainant, are uncontested.
- 4.2 The names, trade marks and service marks on which the Complaint is based are as follows:
- (a) an Australian registered trade mark for '*PARTYMOB*' (No. 967813) in class 9 which is owned by Infomedia Telecom Ltd;
  - (b) the Complainant's application for an Australian trade mark for '*PARTYMOB*' (No. 1088246) in classes 9, 35 and 38;
  - (c) a Victorian registered business name of '*PARTYMOB*' (No. B1709411J);
  - (d) the Complainant's United Kingdom registered trade mark for '*PARTYMOB.COM*' (No. 2333400) in classes 9, 35 and 38;
  - (e) the Complainant's United Kingdom registered trade mark for '*PARTYMOB*' (No. 2362190) in classes 9, 35 and 38; and
  - (f) the Complainant's international trade mark (No. 867708) for '*PARTYMOB*' in classes 9, 35 and 38 (dated 18 October 2004 in respect of Austria, Benelux, Switzerland, Germany France and Australia – see Australian application no.

1088246 referred to above – based on UK registration no. 2362190 referred to above).

- 4.3 'Partymob.com' and 'partymob' have been used by the Complainant as trade marks in the United Kingdom, Ireland and Australia since 2001 in relation to various aspects of mobile communication including the delivery of content *via* mobile phones.
- 4.4 Annexed to the Complaint were documents evidencing the existence and registration of the names and trade marks referred to in paragraphs 4.2 and 4.3 of this decision.
- 4.5 The Complainant is the existing owner and user of the [www.partymob.com](http://www.partymob.com) domain name.
- 4.6 Infomedia Telecom Ltd (ABN 54 105 984 021) is a wholly owned subsidiary of the Complainant and is registered as a foreign company under the *Corporations Act 2001* (Cth). Infomedia Telecom Ltd is the owner of the Victorian business name 'PARTYMOB' (No. B1709411J). A copy of the Certificate of Registration of Business Name issued under the *Business Names Act 1962* (Vic) was annexed to the Complaint and shows that the business name was registered on 27 August 2003.
- 4.7 The Disputed Domain Name was registered by the Respondent on 6 February 2006.
- 4.8 On 12 November 2003, the Complainant '*was granted the [Disputed Domain Name] (LEADR Case No 05/2003) and operated the [Disputed Domain Name] since that time, generating extremely high amounts of traffic*'.
- 4.9 The Disputed Domain Name has been '*the main revenue-gathering tool for the Complainant's Australian business and is crucial to its business*'.
- 4.10 On 9 February 2006, the Complainant discovered that the Disputed Domain Name was no longer working. Until that date, the Disputed Domain Name had been active, operational and generating revenue as normal.
- 4.11 It turned out that, due to a clerical error, the Disputed Domain Name had not been renewed by the Complainant.
- 4.12 On 14 February 2006, the Complainant discovered that the Disputed Domain Name had been registered by the Respondent on 6 February 2006 which was within a matter of days of the Disputed Domain Name not being renewed by the Complainant.
- 4.13 The loss of the Disputed Domain Name '*has caused significant loss of revenue to the Complainant*'.
- 4.14 On 15 February 2006, the Complainant wrote to the Respondent explaining the situation and requesting the transfer of the Disputed Domain Name back to the Complainant.
- 4.15 Following receipt of the Complainant's correspondence dated 15 February 2006, the Respondent offered on 24 February 2006 to transfer the Disputed Domain Name to the Complainant for the sum of \$7,500. In that response, the Respondent indicated an awareness of auDA policies and claimed that the sum of \$7,500 included costs of website design but no evidence of the existence of such a website was provided to the Complainant.

- 4.16 The Respondent is registered as a sole trader (ABN 74 953 672 617) but is not registered for GST.

## 5. PARTIES' CONTENTIONS

### A. The Complainant

5.1 In summary, the Complainant contends that:

- (a) the Respondent has registered the Disputed Domain Name which is identical or confusingly similar to names, trade marks or service marks in which the Complainant has rights; and
- (b) the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name; and
- (c) the Disputed Domain Name has been registered or subsequently used in bad faith.

5.2 The Panel was assisted by a detailed complaint from the Complainant.

5.3 In relation to paragraph 4(a)(i) of the Policy (which requires the Complainant to prove that the Disputed Domain Name is identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights), the Complainant contends that the Disputed Domain Name is identical to names, trade marks or service marks in which the Complainant has rights, namely those referred to in paragraph 4.2 of this decision.

5.4 The Complainant relies on the following matters in relation to paragraph 4(a)(ii) of the Policy (which requires the Complainant to establish that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name):

- (a) for the purposes of the Policy and the Rules, the auDA has determined that '*rights or legitimate interests in respect of the domain name*' are not established merely by a registrar's determination that a respondent satisfied the relevant eligibility criteria for the domain name at the time of registration;
- (b) according to searches conducted of IP Australia's database and ASIC's database, the Respondent has not registered or applied for any trade marks, business or company names corresponding to the Disputed Domain Name;
- (c) as at the date of the Complaint, the Disputed Domain Name was inactive and had been inactive since being registered by the Respondent;
- (d) the Respondent has no active business in relation to the Disputed Domain Name and does not use the Disputed Domain Name in connection with an offering of goods and services in connection with it;
- (e) there is no apparent or legitimate connection between the Respondent and the Disputed Domain Name; and

- (f) the Respondent *'has no intention of using the [Disputed Domain Name] for a legitimate or commercial purpose'*.

5.5 In relation to paragraph 4(a)(iii) of the Policy (which requires the Complainant to establish that the Disputed Domain Name has been registered or subsequently used in bad faith), the following contentions of the Complainant are relevant:

- (a) the Complainant *'spends approximately AU\$3 million dollars in Australia promoting the PARTYMOB brand in major magazines such as TV Week, Dolly, Take 5, NW, AUStar, That's Life and FHM and has developed a substantial reputation in the 'PARTYMOB' brand'*;
- (b) the fact that the Respondent acquired the Disputed Domain Name on 6 February 2006, which was a matter of days after the Disputed Domain Name was not renewed due to a clerical error, shows that *'this was an opportune registration of the commercially valuable domain name used in respect of a very well known brand in Australia'*;
- (c) the Respondent registered the Disputed Domain Name primarily for the purpose of selling or otherwise transferring the Disputed Domain Name to another person (namely the Complainant) for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly related to the Disputed Domain Name;
- (d) alternatively, the Respondent registered the Disputed Domain Name in order to prevent the Complainant from reflecting its names, trade marks or service marks in a corresponding domain name;
- (e) alternatively, the Respondent registered the Disputed Domain Name primarily for the purpose of disrupting the business activities of the Complainant.

## **B. The Respondent**

5.6 The Respondent, having failed to submit a response to the Provider, did not reply to any of the Complainant's contentions.

## **6. DISCUSSION AND FINDINGS**

6.1 Paragraph 2.1 of the Policy states, in part, that:

*'All domain name licences issued in the open 2LDs from 1 August 2002 are subject to a mandatory administrative proceeding under the auDRP. At the time of publication, the open 2LDs are asn.au, com.au, id.au, net.au and org.au.'*

6.2 The Disputed Domain Name is an open 2LD within the meaning of that provision. It was registered with the Registrar on 6 February 2006. It is therefore subject to the mandatory administrative proceedings prescribed by the auDRP.

## Elements of a successful complaint

6.3 In order to succeed, the Complainant will need to establish all of the matters set out in paragraph 4(a) of the Policy, namely that:

- (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.

### Is the Disputed Domain Name identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights?

6.4 Note [1] to the Policy states that, for the purposes of the Policy, auDA has determined that a '*name... in which the complainant has rights*' refers, *inter alia*, to:

*'the complainant's company, business or other legal or trading name, as registered with the relevant Australian government authority'*.

6.5 Documentary evidence submitted with the complaint shows that the trade mark referred to in paragraph 4.2(a) is in fact owned by the Complainant's wholly owned subsidiary, Infomedia Telecom Ltd, which is referred to in paragraph 4.6 of this decision.

6.6 As noted in paragraph 4.6, Infomedia Telecom Ltd is also the owner of the Victorian registered business name referred to in paragraph 4.2(c).

6.7 It is, however, the Complainant which owns the trade marks referred to in paragraphs 4.2(d), (e) and (f) of this decision (**'the Complainant's Trade Marks'**).

6.8 The next question is whether the Disputed Domain Name is '*identical or confusingly similar to*' the Complainant's Trade Marks.

6.9 On the question of what is meant by '*identical or confusingly similar*', previous domain name dispute decisions have established that:

- (a) '*essential or virtual identity*' is sufficient: see *Ink King v CamerasDirect.com.au Pty Ltd*, LEADR Case No. auDRP 01/2005 (6 April 2005) and the decisions cited in paragraph 6.7(a) thereof; and
- (b) the global top level domain ('**gTLD**') components of domain names (such as '.com' and '.net') have no distinguishing capability and must therefore be ignored when considering whether a domain name is identical or confusingly similar to a name or mark: see *Ink King v CamerasDirect.com.au Pty Ltd*, LEADR Case No. auDRP 01/2005 and the decisions cited in paragraph 6.7(b) thereof; and *Migration Solutions Pty Ltd v Han Chung Lee trading as Australasia Migration Solutions*, LEADR Case No. 02/06 (23 March 2006).

- 6.10 The panel considers that, if one compares the Complainant's Trade Marks with the Disputed Domain Name, they are essentially identical.
- 6.11 It is therefore clear that the Disputed Domain Name is identical or confusingly similar to the Complainant's Trade Marks.
- 6.12 The Complainant has therefore satisfied paragraph 4(a)(i) of the Policy.

**Does the Respondent have any rights or legitimate interests in respect of the Disputed Domain Name?**

- 6.13 A Complainant bears the onus of proving the absence of any rights or legitimate interests of the Respondent in a disputed domain name. However, once a complainant has asserted the absence of such rights or legitimate interests, it is incumbent on the respondent to put forward some evidence to rebut that assertion, because such information may be uniquely within the knowledge and control of the respondent: see paragraph 6.13 of the decision in *Ink King v CamerasDirect.com.au Pty Ltd*, LEADR Case No. auDRP 01/2005 (6 April 2005) and the decisions cited therein.
- 6.14 In the absence of any response from the Respondent, the Panel is entitled to infer that any evidence of the Respondent would not have been in its favour: see *Supre Pty Ltd v Paul King*, WIPO Case No. DAU2004-0006 (22 December 2004) and the *Ink King* decision cited in the foregoing paragraph.
- 6.15 Paragraph 4(c) of the Policy sets out a non-exhaustive list of circumstances any of which, if established, will be taken to demonstrate a respondent's rights to or legitimate interests in a disputed domain name. The circumstances are as follows:
- (i) before any notice to the respondent of the subject matter of the dispute, the respondent's 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 the respondent has acquired for the purpose of selling, renting or otherwise transferring); or
  - (ii) the fact that the respondent has been commonly known by the domain name (even if the respondent has acquired no trade mark or service mark rights); or
  - (iii) the fact that the respondent is 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 name, trade mark or service mark at issue.
- 6.16 There is no evidence before the Panel of the first of these matters. The only available evidence is to the contrary and is referred to in paragraphs 4.16 and 5.4 of this decision.
- 6.17 Turning to paragraph 4(c)(ii) of the Policy, there is no evidence that the Respondent has ever been commonly known by the Disputed Domain Name.
- 6.18 As to paragraph 4(c)(iii) of the Policy, there is no evidence before the Panel that 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 name or trade mark at issue.

6.19 In summary, the evidence before the Panel discloses no basis on which it might be suggested that the Respondent has any rights or legitimate interests in the Disputed Domain Name.

6.20 For these reasons, paragraph 4(a)(ii) of the Policy has been satisfied.

**Has the Disputed Domain Name been registered or subsequently used in bad faith?**

6.21 Paragraph 4(b) of the Policy sets out a non-exhaustive list of circumstances which, if established, shall constitute evidence of the registration and use of a domain name in bad faith. These circumstances are as follows:

- (i) circumstances indicating that the respondent has registered or acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to another person for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the domain name; or
- (ii) where the respondent has registered the domain name in order to prevent the owner of a name, trade mark or service mark from reflecting that name or mark in a corresponding domain name; or
- (iii) where the respondent has registered the domain name primarily for the purpose of disrupting the business or activities of another person; or
- (iv) where, by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to a website or other online location, by creating a likelihood of confusion with the complainant's name or mark as to the source, sponsorship, affiliation or endorsement of that web site or location or of a product or service on that web site or location.

6.22 In relation to paragraph 4(b)(i) of the Policy, there is evidence which suggests that the Respondent registered the Disputed Domain Name primarily for the purpose of selling or otherwise transferring the registration of the Disputed Domain Name to another person, namely the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly related to the Disputed Domain Name. That evidence is referred to in paragraphs 4.12, 4.14 and 4.15 of this decision and is discussed further below.

6.23 As to paragraph 4(b)(ii) of the Policy, the evidence referred to in paragraphs 4.12, 4.14 and 4.15 of this decision also suggests that the Respondent registered the Disputed Domain Name to prevent the owner of a name, trade mark or service mark from reflecting that name or mark in a corresponding domain name.

6.24 In relation to paragraph 4(b)(iii) of the Policy, the Complainant contended that *'the Respondent has registered the Domain Name primarily for the purpose of disrupting the business activities of the Complainant'*.

6.25 The Panel is not satisfied that the circumstances referred to in paragraph 4(b)(iii) of the Policy have been established. Although it was reasonably foreseeable by the Respondent that its registration of the Disputed Domain Name would disrupt the

Complainant's business, there is insufficient evidence to establish that the Respondent registered the Disputed Domain Name primarily for that purpose.

- 6.26 For reasons given later in this decision, the Panel finds that the Respondent's registration of the Disputed Domain Name had as its primary purpose the achievement of the objects referred to in paragraphs 6.27 and 6.28, rather than the disruption of the business or activities of another person.
- 6.27 For these reasons, the Panel is not satisfied that the circumstances referred to in paragraph 4(b)(iii) of the Policy have been established in this case.
- 6.28 Nevertheless, the Panel considers that both paragraphs 4(b)(i) and 4(b)(ii) of the Policy have been satisfied for the reasons set out in paragraphs 6.27 and 6.28 and for the following reasons:
- (a) in the absence of any response by the Respondent, the Panel accepts the Complainant's contention that the Respondent would have been aware of the Complainant's Trade Marks;
  - (b) the fact that the Respondent registered the Disputed Domain Name on 6 February 2006, within a matter of days of the Disputed Domain Name not being renewed by the Complainant, justifies the drawing of an inference that (as the Complainant put it) *'this was an opportune registration of a commercially valuable domain name used in respect of a very well known brand in Australia'*;
  - (c) it is significant that the Respondent offered to transfer the Disputed Domain Name to the Complainant for \$7,500 (an amount exceeding the Respondent's documented out-of-pocket costs directly related to the Disputed Domain Name);
  - (d) also significant is the proximity between the registration of the Disputed Domain Name (on 6 February 2006) and the Respondent's offer to sell the Disputed Domain Name to the Complainant (on 24 February 2006). In the absence of any evidence to the contrary from the Respondent, this constitutes *prima facie* evidence that the Respondent registered the Disputed Domain Name with the intention of offering it for sale to the Complainant: cf. *Quizno's Australia Pty Ltd v Paul Rodgerson trading as Liquid Lan*, LEADR Case No. 05/04 (24 August 2004). The fact that the Respondent did not make an offer until after contact by the Complainant is immaterial: see *Advanced Book Exchange Inc v Argyle Emporium*, WIPO Case No. DAU2003-0004 (13 November 2003) and the decisions referred to therein; and
  - (e) as a general matter, the Respondent failed to respond to the Complainant's contentions and paragraph 14(b) of the Rules provides that the Panel *'shall draw such inferences'* from the Respondent's failure to comply with the Rules *'as it considers appropriate'*. In this case the Complainant set out in detail the reasons for its contention that the Respondent's registration of the Disputed Domain Name was in bad faith. If the Respondent had been in a position to rebut the Complainant's contentions, it is reasonable to assume that it would have done so. The Respondent's failure to respond in any way to the Complainant's contentions justifies the drawing of inferences such as those

referred to above which amply support the conclusion that the Respondent has registered the Disputed Domain Name in bad faith.

6.29 These matters are sufficient to establish that the Respondent's registration of the Disputed Domain Name was in bad faith.

6.30 The Panel therefore considers that paragraph 4(a)(iii) of the Policy has been satisfied.

## 7. RELIEF

7.1 The remedy sought by the Complainant is to have the Disputed Domain Name transferred to the Complainant.

7.2 Pursuant to paragraph 4(i) of the Rules, a complainant is only entitled to the transfer of a disputed domain name if the complainant is otherwise eligible to hold that domain name.

7.3 Eligibility for a domain name in the open 2LDs is governed by auDA's *'Domain Name Eligibility and Allocation Policy Rules for Open Second Level Domains (2LDs)'* (Policy No. 2002–07) (**'the Eligibility Rules'**).

7.4 Schedule C of the Eligibility Rules relates to *'com.au'* domain names and provides, *inter alia*, that in order to be eligible for a domain name in the *'com.au'* 2LD, a registrant 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'*.

7.5 The Complainant is entitled to the relief it has sought because it meets the criterion in paragraph 7.4(f) above (being the applicant for the Australian registered trade mark referred to in paragraph 4.2(b) of this decision).

7.6 The Panel considers that the Disputed Domain Name should therefore be transferred to the Complainant.

8. **DECISION**

8.1 The Panel considers that all of the elements of paragraph 4(a) of the Policy have been satisfied.

8.2 The Panel directs that the Disputed Domain Name be transferred to the Complainant.

Dated this 8th day of May 2006

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Michael J Sophocles

Sole Panellist