



Domain Name: *freetv.com.au*
Name of Complainant: *Free TV Australia Limited*
Name of Respondent: *Domain Services Pty Ltd*
Provider: *LEADR*
Panel: *Anthony Alder*
Philip Argy
Dennis Liner

1. The Parties

- 1.1 The complainant in this proceeding is Free TV Australia Limited of c/- Blake Dawson Waldron, 225 George Street, Sydney NSW, 2000 (the “Complainant”).
- 1.2 The respondent in this proceeding is Domain Services Pty Ltd of Level 40, 140 William Street, Melbourne, VIC, 3000 (the “Respondent”).

2. The Domain Name, Registrar and Provider

- 2.1 The domain name subject to this proceeding is “freetv.com.au” (the “Domain Name”).
- 2.2 The registrar of the Domain Name is Intaserve of Level 5, 143 York Street, Sydney, NSW, 2000 (the “Registrar”).
- 2.3 The provider in this proceeding is LEADR of Level 9, 15 - 17 Young Street, Sydney, NSW, 2000, AUSTRALIA (the “Provider”).

3. Procedural Matters

- 3.1 This proceeding relates to the Complaint submitted by the Complainant in accordance with:
 - i) the .au Dispute Resolution Policy No. 2002-22 (the “auDRP”) published on 25 July 2002 which includes: Schedule A (“Policy”) and Schedule B (“Rules”); and
 - ii) the Provider’s Supplemental Rules for au Domain Name Dispute Policy.
- 3.2 The Provider supplied the Panel with a summary document entitled “Procedural History”. According to this document, the Complaint was lodged with the Provider on 13 October 2006.
- 3.3 The Provider sent copies of the Complaint to Respondent via email and express post on 13 October 2006.

- 3.4 On 17th October 2006, one of the express posted copies of the Complaint addressed to the Respondent at the address of Level 40, 140 William Street, Melbourne VIC 3000 was returned to the Provider. The Provider contacted the Respondent by telephone on 18 October 2006. The Respondent requested that the Complaint be delivered to 20 Dakota Avenue, Maylands, WA, 6051 and the Provider complied with this request on 18 October 2006.
- 3.5 The Registrar was notified, by email, of the Complaint on 13 October 2006.
- 3.6 The Respondent supplied to the Provider a first response on the 2 November 2006.
- 3.7 The Panel was appointed by the Provider on 26th October 2006 and the Complaint was received by the Panel on 3rd November 2006.
- 3.8 The Complainant made a response in answer on 3rd November 2006 and the Respondent made a response in reply on 4th November 2006. Due to the overall complexity of this proceeding, Panel agreed to allow both parties to make these further submissions for reasons of procedural fairness, in accordance with the Panel's discretionary power pursuant to paragraph 12 of the Rules.

4. Factual Background

Facts alleged by the Complainant

- 4.1 The Complainant is a peak industry body representing Australia's commercial free-to-air television licensees.
- 4.2 The Complainant changed its name from Commercial Television Australia Limited to Free TV Australia Ltd on 11 May 2005 and has been using this name since that date.
- 4.3 A trade mark application was lodged with the Australian Trade Marks Office for the FREE TV AUSTRALIA and circle device on 17 May 2006. This application has been accepted for registration by the Trade Marks Office and has not been opposed, at the time of this dispute.
- 4.4 The Complainant has lodged evidence relating to its significant use of the unregistered trade marks FREE TV; FREE TV AUSTRALIA and circle device since 10 June 2004.
- 4.5 The Complainant believes that the Domain Name is confusingly similar to both its company name and its unregistered trade marks.
- 4.6 The Complainant has stated that no business is currently being run or managed at website associated with the Domain Name. The only use at the associated website is a logo and an email address.

- 4.7 The Complainant alleges that the Domain Name does not match the Respondent's Company Name, nor any of its products, names or services used or offered by the Respondent and therefore the Respondent has no legitimate rights or interests in respect of the Domain Name.
- 4.8 The Complainant also submits that the Respondent registered the Domain Name in bad faith and is engaging in a pattern of behaviour within the scope of the bad faith requirements set out within the Policy.

Facts alleged by the Respondent

- 4.9 The Respondent stated that Hanton Pty Ltd applied for the Domain Name on 20th June 2005 acting as an agent for the Respondent.
- 4.10 The Respondent arranged for the Domain Name to be correctly recorded in its name on 4 October 2006.
- 4.11 The Respondent alleges that the unregistered trade mark FREE TV AUSTRALIA is different to the Domain Name.
- 4.12 The Respondent also submitted that its logo displayed on the website associated with the Domain Name is not similar to the Complainant's trade mark which incorporates a circle logo device.
- 4.13 The Respondent stated that the previous recorded licensee of the Domain Name, Hanton Pty Ltd, was an agent acting for the Respondent and was recorded as the licensee by Registrar in error. The Respondent corrected said error prior to this proceeding to reflect the correct licensee prior to this Proceeding.
- 4.14 The Respondent alleged that it did not act in bad faith when registering or using this Domain Name and supplied evidence in support including: an email dated 25 October 2006; Victorian Business Name Registration B1957154K and the logo appearing on the website at the time of this dispute.
- 4.15 The Respondent also submitted that the Domain Name was registered with an intention to set up a website that would act as a portal for online free streamed media sourced from outside Australia.

5. Discussion

Jurisdiction

- 5.1 Paragraph 2.1 of the auDRP states:
"All domain name licences issued in the open 2LDs from 1 August 2002 are subject to a mandatory administrative proceeding under the auDRP."
- 5.2 The Domain Name is an open 2LD within the scope of the aforementioned Paragraph. It was registered with the Registrar on June 2004. It is therefore subject to the mandatory administrative proceeding prescribed by the auDRP.

5.3 The Panel did not consider nor make any determination relating to possible trade mark infringement or possible common law actions such as passing off by the parties mentioned in this Proceeding.

Basis of Decision

5.4 Paragraph 15(a) of the Rules state:

“A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy (auDRP Policy), these Rules and any rules and principles of law that it deems applicable.”

5.5 Paragraph 4(a) of the Policy provides that a person is entitled to complain about the registration or use of a domain name where:

- i) the 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 to the complaint has no rights or legitimate interests in respect of the domain name; and*
- iii) the respondent’s domain name has been registered or subsequently used in bad faith.*

The Panel notes that all three components of Paragraph 4(a) are required to be proven for any Complaint to be upheld.

i) Domain Name is identical and confusingly similar to names or trade marks

5.6 The Panel has compared the Domain Name with: the name of the Complainant, Free TV Australia Ltd; unregistered trade mark FREE TV; and unregistered trade mark FREE TV AUSTRALIA and circle device. The Panel believes the Domain Name to be confusingly similar to the Complainant’s name and found that it was unnecessary to apply further comparisons in relation to the unregistered trade marks.

5.7 The Panel finds that the Domain Name is sufficiently similar to Complainant’s Name that Paragraph 4(a)(i) of the Policy must be regarded as being satisfied.

ii) Respondent has no rights or legitimate interests in respect of the Domain Name

5.8 The Respondent has never substantially used the website for commercial trade, business or for any other activity. The Respondent neither currently uses the trade mark FREE TV nor uses a name that may be associated or derived from the domain name.

5.9 The website of Respondent associated with the Domain Name only includes a logo and email address and no other use.

- 5.10 All of the Respondent's evidence purporting to demonstrate legitimate use of "Free TV" is dated after the Complainant had contacted the Respondent. Therefore the Panel has placed little or no reliance on this evidence in accordance with the Panel's General Powers set out in Paragraph 10(d) of the Policy.
- 5.11 Specifically, the registration of Victorian Business Name Free TV Online was registered on 28 September 2006, which was after the Complainant's first letter to Hanton Pty Ltd, and the email from "Main Identity" of mail@ukdatacentre.net to "craig@proweb.com" was dated 25 October 2006, being after the Complaint had been lodged with the Provider and copies being provided to Hanton Pty Ltd and the Respondent.
- 5.12 The Panel is of the opinion that the Respondent has no rights or legitimate interests in respect of the Domain Name and Paragraphs 4(a)(ii) and 4(c) of the Policy are satisfied by the Complainant.

iii) Domain Name was registered or is being used in Bad Faith

- 5.13 The Panel does not find the arguments of the Complainant persuasive in relation to its assertions that the actions of the Respondent were to attract Internet users away from its website.
- 5.14 However on the balance of probabilities, the Panel does believe that the pattern of conduct evidenced and displayed by the Respondent's actions in this matter are indicative that the Domain Name was registered or is now being used in bad faith as described in a non-exclusive manner by Paragraph 4(a)(iii) of the Policy.
- 5.15 The Panel also finds that the Respondent's actions in relation to the registration of the Domain Name are disruptive to the legitimate business and activities of the Complainant, which is also indicative of bad faith as described within Paragraph 4(b)(iii) of the Policy.
- 5.16 The Panel finds that the Complainant has satisfied Paragraphs 4(a)(iii) and 4(b) of the Policy and that the Domain Name has been registered in bad faith by the Respondent. The Panel in particular finds Paragraph 4(b)(iii) proven, on the basis that the Respondent's actions in registering the Domain Name were intended to disrupt legitimate business activities.

6. Decision

- 6.1 The Complainant is a potential eligible registrant for the Domain Name and satisfies the eligibility requirements in accordance with the rules set out in auDA's Domain Name Eligibility and Allocation Rules for Open 2LDs (2002-07).
- 6.2 The Complainant has satisfied all of the requirements for the Complaint to be upheld and it has requested that the Domain Name be transferred to it.

6.3 For the abovementioned reasons, the Panel directs and orders that the Domain Name be immediately transferred to the Complainant.

6.4 The Decision of this Panel is unanimous..

Dated this 20 November 2006

Anthony Alder
Panellist

Dennis Liner
Panellist

Philip Argy
Panellist