

ADMINISTRATIVE PANEL DECISION
LEADR Case No. auDRP_10_15

Domain Name:	sportingshooter.com.au
Complainant:	Yaffa Publishing Group Pty Ltd
Respondent:	Sporting Shooters Association of Australia (Victoria)
Provider:	LEADR
Registrar:	Melbourne IT Limited
Panellist:	Natalie Jean Hickey
Date:	4 August 2010

1 Background

The Complainant, Yaffa Publishing Group Pty Ltd, publishes a number of magazines including “Sporting Shooter” or “Australasian Sporting Shooter”. I will return shortly to the question of the identity of this publication.

The Respondent, Sporting Shooters Association of Australia (Victoria), is the registrant of sportingshooter.com.au (Disputed Domain Name).

The procedural history to this dispute is annexed and marked “A”.

The Complainant seeks the transfer to it of the Disputed Domain Name, on the basis 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 Respondent has no rights or legitimate interests in the Disputed Domain Name, and the Domain Name was registered or subsequently used in bad faith. The Complainant must satisfy all three of these grounds for the Complaint to be upheld.

The Complainant has made clear its rationale for seeking the transfer. As was stated in the Complaint: “*The magazine’s website is ready to launch. We require the respondent to relinquish ownership of the domain name www.sportingshooter.com.au and allow transfer of ownership to Yaffa Publishing Group*”.

For the reasons set out below, the Complaint will be dismissed.

2 Whether Disputed Domain Name is identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights

The Complainant must first establish the identity of the name, trade mark or service mark in which it has rights.

As to the identity of the Complainant’s name or trade mark, this is said to be “Sporting Shooter” on the basis that the Complainant is the publisher of a magazine of the same name, and that this magazine has been in continuous publication since 1961 with a total circulation exceeding 26,000 copies. However, there is a discrepancy, not explained by the Complainant, as to whether this is indeed the complete name of the publication.

The Complainant has provided photocopies of the cover of two examples of its publication. An 'early cover' from 1965 is called "Sporting Shooter", whereas 'the current issue' from 2010 is called "Australasian Sporting Shooter" (acknowledging that "Australasian" is positioned above "Sporting Shooter" in much smaller font). Further, the Complainant has observed that "Australasian Sporting Shooter" is a registered trade mark, and conceded that "Sporting Shooter" is not registered at all.

This difference is relevant because if the identity of the name or trade mark in which the Complainant has rights is "Australasian Sporting Shooter", then this can in no way be regarded as identical to "Sporting Shooter". Given the apparent difference in these names, whether or not "Australasian Sporting Shooter" could be regarded as confusingly similar to "Sporting Shooter" would depend, in large part, on extrinsic evidence. Such evidence has not been provided.

It follows that if "Sporting Shooter" is not the complete name of the publication on which the Complainant relies as the source of its rights, this fact needs to be acknowledged, and the onus is on the Complainant to explain why it nonetheless has a common law trade mark in the shorter title. Relevant evidence here might include a range of examples showing use of the shorter title, as well as evidence that this is how the magazine has been commonly known by its readers. However, no such evidence has been provided, nor has the discrepancy in title even been noted by the Complainant.

Accordingly, I cannot be satisfied that the Complainant has trade mark rights in "Sporting Shooter".

Notwithstanding this, the Complainant also relies on a registered business name for "Sporting Shooter". For the reasons stated above, it is unclear whether this is indeed the name of the Complainant's magazine. However, this does not matter, because the Complainant has been able to show rights in such a name through its business name registration. Such a name is identical to the Disputed Domain Name, and so the first ground has been satisfied on this basis.

3 Complainant must show the Respondent has no rights or legitimate interests in the Disputed Domain Name

The Respondent, and registrant of the Disputed Domain Name, is Sporting Shooters Association of Australia (Victoria). Whilst both parties provided evidence about the activities of the Sporting Shooters Association Australia Inc., with which the Respondent is said to be associated, I have only considered those matters directly concerning the Respondent.

The Respondent was established as a not for profit unincorporated association in 1950 and was incorporated as a company limited by guarantee in 1971. There are more than 25,000 members, and it is the premier body representing licensed firearm owners in Victoria. Amongst other things, the aim of the Respondent is to promote and encourage competitive target shooting and practice shooting with a view to developing proficient and safe use of firearms, and to promote and encourage ethical hunting and field shooting and related ancillary activities. The Respondent produces two publications: 'Victoria Shooter' (6 times per year) and 'The Bulletin' (on-line newsletter). The Respondent is also involved in a range of activities including special projects, conservation and pest management, youth development and gun safety education, disciplines and competitions, and so on.

To succeed under this ground, the Complainant must show that the Respondent has **no** rights or legitimate interests in the Disputed Domain Name. This is not a question of establishing who has the "better" claim. In circumstances where "Sporting Shooters" forms part of the corporate name of the Respondent, the Respondent has a history over many decades of supporting the activities of

sporting shooters, and the Respondent has a large membership base, the Complainant has been unable to make out this ground.

4 Complainant must show the Disputed Domain Name has been registered or subsequently used in bad faith

The Respondent contends that the Disputed Domain Name was registered about five years ago, in conjunction with other similar domain names, on the basis that this would add to and improve its online presence. The Disputed Domain Name was inactive for a period after it was renewed, which the Respondent contends is a mistake now since redressed. The Disputed Domain Name currently directs traffic to the Respondent's website.

There now appears to be no dispute that the primary domain name used to host the Respondent's website is something other than the Disputed Domain Name. In his letter to the Complainant dated 2 June 2010, Mr Cooper for the Respondent claimed that the Disputed Domain Name formed "an integral part" of the Respondent's online presence. I am not satisfied that this is correct, and observe that the Respondent's solicitors did not persist with this point in their formal Response.

The Complainant is of the view that such a subsidiary or incidental purpose is relevant in considering questions of bad faith, as this shows that the Respondent has no "bona fide" use of the Disputed Domain Name. As the Complainant puts it: "*The use of the Sporting Shooter name by the respondent is entirely unnecessary to the success of the SSAA website and its associated activities*". The Complainant also observes that whilst it might have been a suitable premise a few years ago for a domain name to be a means of enabling users to navigate easily to the Respondent's website (suggested by the Respondent), such utility has decreased in light of search engines which include Google, Bing and Yahoo.

However, the test does not require the Respondent to prove it has a bona fide use of the Disputed Domain Name. The test requires the Complainant to demonstrate that the Disputed Domain Name has been registered or used in bad faith. For the most part, such bad faith tends to require an element of malicious motive, which is illustrated by points (ii), (iii) and (iv) under 'Evidence of registration or use in bad faith' (see Schedule A, 4b of auDRP).

In this respect, the Complainant points to:

- the Respondent's awareness of the Complainant's competing magazine and apparent understanding that this would cause confusion in the market;
- an apparent indication by the Respondent that it has sought a commercial interest from the Complainant in the domain name; and
- the likelihood that the Respondent's use of the Disputed Domain Name is "*disruptive to the legitimate business and activities of Yaffa Publishing Group*".

As to the risk of confusion, there are many occasions where competitors will both have a legitimate claim to a domain name. That is why the registration system is "first in, best dressed". True it is, there might be a risk of market confusion, particularly in the current case where "sporting shooter" appears to describe activities in which both parties are interested. However, this likelihood or propensity of confusion is not itself evidence of bad faith.

If the Respondent has evinced a desire to divest the Disputed Domain Name for a commercial fee in excess of the registration costs, this will constitute evidence of bad faith. However, I do not

construe from the correspondence that such an offer was made. In his letter to the Complainant dated 2 June 2010, upon which the Complainant relies in this context, Mr Cooper for the Respondent stated, in response to the Complainant's demand for a transfer of the Disputed Domain Name:

“At this time, the Board of the Association is not minded to accede to your request for the voluntary surrender of the Association domain name. The Association for its part is not in the business of acquiring and selling domain names and the domain name in dispute was not registered for the purpose of on-selling for commercial gain. No offer has been made by Yaffa Publishing to purchase the Association's rights in any event or even to reimburse the Association for any costs and expenses it has incurred in registering and maintaining the domain name.”

I construe this to mean no more than that Mr Cooper was surprised that the Complainant had asserted its entitlement to a voluntary transfer of the Disputed Domain Name, without any suggestion that it compensate the Respondent for its trouble.

Finally, it is acknowledged that the Respondent's refusal to transfer the Disputed Domain Name to the Complainant may well prove disruptive to the Complainant's plans for its new website. However, there is no evidence that such a refusal is **intended** to cause such disruption. The Complainant's plans for a website are relatively recent, whereas the Respondent has held the Disputed Domain Name for a number of years. I fail to see how the prospect of such disruption, without evidence of any malicious motive on the part of the Respondent, is evidence of bad faith, particularly when the Respondent has a legitimate interest in the domain name.

5 Conclusion

From the correspondence and evidence before me, and as does occur in some strongly contested matters, there has been a degree of hyperbole between the parties. To avoid any doubt, there is no evidence at all supporting the Respondent's claim that the Complainant has brought the Complaint to harass the Respondent or to take advantage of the Respondent's own commercial position and goodwill in some way.

Rather, it seems clear that the Complainant was appropriately motivated by a concern that it was unable to use the domain name it considered most suitable for its new website.

However, it seems equally clear that the Complainant proceeded under a misunderstanding about the grounds it needed to satisfy in order to secure a domain name transfer. Even in the Complainant's initial email to the Respondent dated 25 May 2010, it was acknowledged that both parties operated in the same market, and that the Complainant's editor was a member and strong supporter of the Respondent. The request was made on the basis that the Complainant considered it had a “legitimate interest” in the domain name.

As explained above, this is a “first in, best dressed” system. If a person has a legitimate claim to a domain name and registers it first, such a domain name cannot simply be secured by another person on the basis that the domain name is not being optimised, or could be put to better use by someone with an interest which is at least as good, if not better than the registrant.

Perhaps therefore, it was this misunderstanding which led to the Complainant's strong demand for a voluntary transfer. Whether or not this was the case, the tenor of the Complainant's initial approach, which included reference to previously successful domain name, does appear to have fanned the flames of the dispute, and entrenched the Respondent's opposition to such a transfer.

I decide for the Respondent. The Complaint is dismissed.

Natalie Jean Hickey

Sole Panellist

5 August 2010