



ADMINISTRATIVE PANEL DECISION

Domain Names: **kellysdistributors.com.au**
Name of Complainant: **Kelly's Distributors Pty Ltd**
Name of Respondent: **Rybu Pty Ltd**
Provider: **LEADR**
Panel: **Anthony P. Alder**

1. THE PARTIES

- 1.1 The Complainant is **Kelly's Distributors Pty Ltd** ("Complainant").
- 1.2 The Respondent is **Rybu Pty Ltd** ("Respondent").

2. THE DOMAIN NAMES AND PROVIDER

- 2.1 The current dispute is regarding the domain name "kellysdistributors.com.au" ("Domain Name").
- 2.2 The provider in relation to this proceeding is LEADR ("Provider").

3. PRELIMINARY MATTERS

- 3.1 Schedule A of the *.au Dispute Resolution Policy* ("auDRP") applies to disputes which meet the requirements set out in Paragraph 4(a) of Schedule A of the auDRP. This subparagraph 4(a) requires that any party holding a domain name licence "...submit to a mandatory administrative proceeding in the event that a third party (a "Complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure that:

- (i) [their] domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights; and
- (ii) [they] have no rights or legitimate interests in respect of the domain name; and
- (iii) [their] domain name has been registered or subsequently used in bad faith.

In an administrative proceeding, the complainant bears the onus of proof.”

4. PROCEDURAL HISTORY

- 4.1 The Procedural History in this matter is set out in Annexure A.
- 4.2 LEADR has appointed this Panellist as the sole panellist in the matter. The Panellist has had no prior knowledge of or association with either party and has no conflict of interest.
- 4.3 The Panel additionally notes that the Respondent did not respond to these Proceedings within the allotted time frame and is in default of these Proceedings.
- 4.4 All procedural requirements appear to have been satisfied. The Panel has been properly constituted.
- 4.5 Paragraph 15(a) of the auDRP Rules states:
“A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy [the auDRP Policy], these Rules and any rules and principles of law that it deems applicable”.

5. FACTUAL BACKGROUND

- 5.1 The Complainant is a wholesale distributor of non-alcoholic beverages and soft drinks in area of northern NSW and south-eastern Queensland.
- 5.2 The Complainant has used the company name “Kelly's Distributors” since 31 October 2001. Kelly's Distributors Pty Ltd was registered by the Complainant on 5 November 2001.
- 5.3 The Complainant currently has an established web presence at <http://www.kellysdistributors.net.au/> and <http://www.kellysdistributors.com/>
- 5.4 The Respondent is a direct competitor to the Complainant operating in a similar region in Australia.
- 5.5 The Respondent appears to be offering similar goods and services as to that be offered by the Complainant.
- 5.6 The Respondent registered and used the Domain Name after filing a separate complaint to Australian Competition and Consumer Commission directed to the Complainant actions.
- 5.7 There are currently no webpages linked to the Domain Name. According to the Complainant's submission, Respondent has removed the webpages in response to a letter sent on behalf of the Complainant prior to the commencement of these proceedings.
- 5.8 The Respondent has not responded to these Proceedings.

6. DISCUSSION AND FINDINGS

Elements of a successful complaint

- 6.1 According to Paragraph 4(a) of the auDRP Policy, 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, trademark 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.*
- 6.2 It is to be noted that the three elements of a complaint under Paragraph 4(a) of the auDRP Policy are cumulative; all of them must be proved if the complaint is to be upheld.
- 6.3 In these administrative proceedings, the Complainant bears the onus of proof regarding each of the separate components required by Paragraph 4(a) of the auDRP Policy.

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

- 6.4 The Panel must determine whether, on the basis of the facts set out in Paragraph 4 above, the Complainant has rights in a relevant name, trade mark or service mark.
- 6.5 The auDRP Policy states:
- “For the purposes of this policy, auDA has determined that a “name...in which the complainant has rights” refers to*
- (a) The complainant's company, business or other legal or trading name, as registered with the relevant Australian government authority;*
 - (b) The complainant's personal name.”*
- 6.6 The Complainant uses the term KELLY'S DISTRIBUTORS to designate their beverage wholesale business and their own company name.
- 6.7 The name KELLY'S DISTRIBUTORS is substantially identical and confusingly similar to the Domain Name.

- 6.8 On the balance of material presented to the Panel, the Panel determined that there is the real potential, and the actuality of, confusion of identity. The Complainant has demonstrated that they are the rightful owners of the name KELLY'S DISTRIBUTORS.
- 6.9 Accordingly, the Panel determines that the Complainant has satisfied the requirement of Paragraph 4(a)(i) of the auDRP Policy.

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

- 6.10 Paragraph 4(c) of the auDRP Policy sets out particular circumstances (without limitation), which can demonstrate a Respondent's "*rights or legitimate interests to the domain name for purposes of Paragraph 4(a) (ii).*"
- 6.11 The Complainant has asserted that there is a "lack of any connection between Rybu (name of the Respondent) and the name "Kelly's Distributors" or the Domain Name". The Respondent in registering and using the Domain Name has provided no demonstrable legitimate reason to use or register the Domain Name. The Respondent has not offered any explanation regarding the lack of similarity between its name and the Domain Name.
- 6.12 Prior to the commencement of these Proceedings, the Complainant asserted that the Respondent was fully aware of the Complainant's rights and company name. This is a result of the Respondent action in submitting a separate complaint to the Australian Competition and Consumer Commission.
- 6.13 The Respondent has failed to demonstrate their activities fall within the scope of the specified activities enumerated in Paragraph 4(c) of the auDA Policy for providing a basis for bona fide intention to use of the domain name.
- 6.14 The Panel believes that the Respondent lacks the requisite rights or interests in the Domain Name.
- 6.15 Accordingly, the Panel finds that the Respondent has no legitimate interest in regard to the domain name, and so Paragraph 4(a)(ii) of the auDRP Policy has been satisfied by the Complainant.

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

- 6.16 Paragraph 4(b) of the auDRP Policy sets out circumstances of “*evidence of the registration and use of a domain name in bad faith*”. This Paragraph contains four sets of example circumstances, any one of which, if established, can constitute evidence of registration in bad faith. It is important to note also that it is a non-exhaustive list of circumstances such that, for example, the Panel is not necessarily constrained from a finding of bad faith should it arise (also by example) from not only any one or other of them, but from a combination of them, or indeed, upon the basis of other reliable material before the Panel inclusive of the illustrated list.
- 6.17 The Panel determination of whether “bad faith” occurred in this case is focused on the actions of the Respondent presiding the filing of the Complaint as reported by the Complainant.
- 6.18 The Respondent registered and used the Domain Name primarily for the purpose of disrupting the business or activities of the Complainant. The Respondent knew of the Complainant's business and used the Domain Name in manner to disrupt the Complainant's business. This constitutes “Bad Faith” pursuant to Schedule A of the .au Dispute Resolution Policy Paragraph 4(b)(iii).
- 6.19 Further, the Respondent is currently redirecting web traffic from the Domain Name to its primary business website and is intentionally attracting internet users by creating a likelihood of confusion with the Complainant’s name and trade mark. This constitutes “bad faith” under Schedule A of the .au Dispute Resolution Policy Paragraph 4(b)(iv)
- 6.20 The Panel is satisfied that there is sufficient evidence for a finding with respect to Paragraph 4(b)(iii) and 4(b)(iv)of the auDRP Policy. In the Panel’s view, the onus of proof of this requirement rests with the Complainant and the Complainant has established this requirement under the auDRP Policy.

7 DECISION

- 7.1 The Panel concludes for the reasons stated that:
- (a) the Domain Name are identical with and confusingly similar to a name, or trade mark of the Complainant;
 - (b) the Respondent does not have a legitimate interest in the Domain Name; and,
 - (c) the Complainant successfully demonstrated that the Respondent acted in bad faith by registering and using the Domain Name.
- 7.2 For the reasons outlined, the Complainant has satisfied the elements of Paragraph 4(a) of the auDRP Policy.

8. RELIEF

Transfer of the Domain Name

8.1 The Panel orders that the Domain Name be transferred to the Complainant.

Dated this 29 June 2010

Anthony P. Alder

Sole Panellist

Annexure A

Procedural History

[kellysdistributors.com.au]
[auDRP_10_11]

1. The complaint was submitted for decision in accordance with the (auDRP) Policy and Rules, which was approved by auDA in 2008-01 and commenced operation on 1 August 2002 and LEADR's Supplementary Rules (LEADR is the Provider).
2. The complete application was received from the Complainant by LEADR on **12/05/2010**
3. On the **19/05/2010** LEADR sent the Respondent (**Rybu Pty Ltd**) by **Post + Email** a dispute notification letter and a copy of the complaint submitted.
4. A copy of the complaint submitted and the dispute notification letter sent to the Respondent were also posted to the registrar **MD Web Hosting** on **19/05/2010**.
5. The Registrar was also sent an email on **19/05/2010** requesting to lock the domain name in dispute.
6. LEADR advised auDA of the complaint on **19/05/2010** via e-mail.
7. On the **19/05/2010** LEADR sent a notification letter to the Complainant (**Kelly's Distributors Pty Ltd**) by email along with a copy of the notification letter sent to the Respondent.
8. No response has been received by the Respondent.
9. On **22/06/2010** the provider approached the Panellist. The panellist confirmed their availability, informed LEADR that they had no conflict issues with the parties and accepted the matter on **23/06/2010**.
10. The Panellist was informed on **23/06/2010** that the package was being sent for Adjudication.