

ADMINISTRATIVE PANEL DECISION

LEADR Case No: auDRP_10_09

Domain Name: webprofit.com.au
Name of Complainant: Web Profits Pty Ltd
Name of Respondent: J Batra t/as Arrow Internet Marketing
Provider: LEADR
Panellist: John A. McGruther
Date:

1. THE PARTIES

- 1.1 The Complainant is Web Profits Pty Ltd (ACN 118 897 886) (“Complainant” – “W”).
- 1.2 The Respondent is J Batra t/as Arrow Internet Marketing (or occasionally referred to as “Arrow Internet Marketing Pty Ltd”) (“Respondent” – “A”).

2. THE DOMAIN NAME REGISTRAR AND PROVIDER

- 2.1 The Domain Name at issue is **www.webprofit.com.au** (‘the Disputed Domain Name’).
- 2.2 The Trade Mark, name or service mark upon which the Complaint is based is “Web Profits” (Trade Marks Registration No 11285958) (later referred to in this Decision).
- 2.3 The provider in relation to this proceeding is LEADR (‘Provider’).

3. PRELIMINARY MATTERS

- 3.1 Schedule A of the *au Dispute Resolution Policy* (“auDRP”) (“Policy”) applies to disputes which meet the requirements set out in Paragraph 4a of Schedule A of the auDRP. This subparagraph 4a 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, trade mark 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’ to this determination.
- 4.2 LEADR has appointed this Panellist as the sole Panellist (“Panel”) in the matter. The Panellist has had no prior knowledge of or association with either party and has no conflict of interest. The Panel received the Complaint delegation from the Provider on Monday, 17 May 2010.
- 4.3 All procedural requirements appear to have been satisfied. The Panel has been properly constituted. So far as the Panel is aware all pertinent written communications by the parties to or with the Provider have been concurrently copied to the other party.
- 4.4 Certain written material has been submitted to the Panel as provided by the parties to the Provider. The observations in this determination arise singularly from the material so submitted and the submissions made. I have read all of the materials. There is no need that I traverse all of it in the reasons here given, but all of it has been noted and analysed.
- 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*".

4.6 The Policy applies to the Disputed Domain Name.

5. FACTUAL BACKGROUND: The Complainant's (W's) case

5.1 In submissions made with its Complaint, the Complainant ("W") essentially raised some of the following matters, namely that:

- (a) Web Profits Pty Ltd was incorporated on 21 March 2006.
- (b) As at the date of this Complaint, the domain name used by the Complainant W is "www.webprofits.com.au" registered in April 2006.
- (c) Since around 2006, W has carried on business actively in Australia including but not exclusively trading under or with the trade name "Web Profits" and under or with the Trade Mark "Web Profits". The latter was registered with the Australian Trademarks Registry as a Trade Mark on 19 February 2009 in classes 35 and 42 and as having an online presence under the Domain Name "www.webprofits.com.au". Some of the active and public business of W since 2006 has included web advertising, web design, search engine optimisation and online marketing for its customers under the name "Web Profits".
- (d) The Respondent A registered on 18 August 2007 and renewed in 2009 the Domain Name "www.webprofit.com.au" (modified on 18 August 2009 per annexure "D" to the Complaint) and carried on business directly in competition with that business of the Complainant described in (c) above.
- (e) W became aware of the existence of the Disputed Domain Name from its clients and prospective clients informing the staff of W that such clients had come across the Disputed Domain Name while searching for the W website, some such

searches mistakenly omitting the “s” in the word “profits” from such search.

- (f) The Registrar for the Disputed Domain Name is “NetRegistry”.
- (g) Arising from the above and generally, W submits its Complaint Grounds (briefly recited) include that the Disputed Domain Name:
 - (i) Is identical or confusingly similar to a name, Trade Mark or service mark in which W has rights.
 - (ii) Is not a domain name in which the Respondent has any rights or legitimate interests.
 - (iii) That the Respondent has registered or subsequently used it in bad faith.
- (b) Arising from these submissions, W submits for the remedies set out within the Complaint.

6. FACTUAL BACKGROUND

The Respondent’s (A’s) case

6.1 Some of this appears in Annexure “F” of the Complaint (being an undated email from A to the solicitors for W (McLachlan Thorpe) responding to such solicitors’ letter of 28 January 2010 to A demanding (with reasons) cessation by A of the Disputed Domain Name use). The Panel has noted the full content of this undated (1-page) Annexure “F” email. Further, A provided additional (and again undated) response submissions to the Complaint by submissions received by the Provider on 6 May 2010, equally similarly closely noted as to its full content here. It is not necessary for all of this response A submission material to be traversed here, but all of it has been noted.

6.2 Briefly stated, the A submissions included contentions, all of which are dealt with in brief discussion following, but which briefly stated included (and in no priority order):

- (a) The A Disputed Domain Name Registration was done by them “because it has a substantial connection to our business as a web consultant; the purpose of which is to make web-based businesses profitable..” (with no connection to the W business at all);
- (b) The W Trade Mark Registration of “Web Profits” was in 2009 “..whereas we had registered (*the Disputed Domain Name*) in 2007, two years prior to that..”, and that “AUDA had approved the domain name in 2007 and renewed it in 2009”;
- (c) A has “no advertising/promotional material that exists promoting us as Web PROFITS”; and that,
- (d) A sees “no reason whatsoever for cancelling.. or transferring.. we have full legal rights.. a substantial connection to our business”.

6.3 The undated further response submissions of A to the Provider on 6 May 2010 reiterated much of the above, which will also (where relevant) be dealt with in discussion following.

7. DISCUSSION AND FINDINGS

Elements of a successful complaint

7.1 According to Paragraph 4a of the .auDRP Policy, a person is entitled to complain about the registration or use of a domain name where it is intended that:

- (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.*

7.2 It is to be noted that the three elements of a complaint under Paragraph 4a of the auDRP Policy are cumulative; all of them must be proved if the Complaint is to be upheld.

Is the Disputed Domain name identical or confusingly similar to a name, Trade Mark or service mark in which the Complainant has rights? (auDRP 4a(i))

7.3 The Panel must determine whether the Complainant has rights in a relevant name, Trade Mark or service mark.

7.4 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."*

7.5 The auDRP Policy does not provide guidance as to the intended meaning of "identical" or "confusingly similar". However, "essential or virtual identity" is sufficient. (*BlueChip Info Tech Pty Limited v Roslyn Jan and another* [LEADR case 06/03]).

7.6 Although it may appear that there is no exactitude as to what is contemplated in the term "confusing", the test of "confusing similarity" could have reliable precedent in the trade mark infringement case application of the expression, where the concept of "deception" contemplates consumers who may be deceived or "caused to wonder" about the source or origin of goods or services. (as, for example, noted in *Camper Trailers WA Pty Ltd v Off Road Equipment Pty Ltd* [LEADR 06/04]).

- 7.7 In some respects, this Complaint is similar to the “one letter only” variant cases of *Oxygen Media, LLC v Primary Source* (WIPO Case D2000-0362, June 2000) and *Microsoft Corporation v Charlie Brown* (WIPO Case D2001-0362, August 16, 2001).
- 7.8 The Panel makes the following observations in no priority order.
- (a) On a literary comparison alone, one letter only, namely the letter “s”, separates the Disputed Domain Name (central word, “webprofit”) from the Complainant’s corporate name, its Trade Mark Registration and its own online presence, all since March/April 2006, where respectively the central words are “Web Profits” and “webprofits”.
 - (b) W has had an online presence at least since April 2006 including a fully functioning website using the domain name www.webprofits.com.au and accruing not insignificant reputational business and consequential goodwill value in part generated from such presence and identity.
 - (c) Additionally, W subsequently supplemented that active presence by initiating the successful Trade Mark Registration from 19 February 2009 of “Web Profits” under Registration No 11285958 in Goods and Services Trade Mark active Class categories of 35 (advertising services provided on the internet) and 42 (web design, provision of search engines, search engine feeder services).
 - (d) The latter broad business descriptions reconcile closely with the undisputed competitive or parallel business descriptives conducted by A, namely search engine optimisation, web advertising, web design and online marketing, including by A under the trading name of “Arrow Internet Marketing Pty Ltd” (ABN 33585376951).
 - (e) Notwithstanding the proximity of the competitive business of A to that of W, and the reasonably concluded prior knowledge by A of W’s activity in the same market sector, on 18 August 2007, A chose to seek the Disputed Domain Name

Registration with the Registrar, which has given rise to this Complaint.

- (f) The only literal differentiation between the intellectual property designations of W (as described above, including by reference to the central titles of “Web Profits”) and that chosen to be registered by A (“webprofit”) is the singular letter “s” also as briefly described above.
- (g) The Panel observes, to the extent of some element of this history, that respectfully it does not accept the response contention of A, under this heading of confusing similarity, that A has “..no advertising/promotional material that exists promoting us as ‘Web PROFITS’..”. Whether or not A has any “promotional material” under the descriptive of “Web Profits” does not reliably remove the A registration of the Disputed Domain Name from its identity with, or more certainly, a confusing similarity to, the Trade Mark, and online presence since March/April 2006, as well as the corporate identity, of W as the Complainant.
- (h) This latter observation is further underpinned, in the view of the Panel, by reference to the singular literal differential between the antecedent historic presentation of W (“webprofits”) as above from the registration chosen to be initiated by A (“webprofit”), by reference to the letter “s”.
- (i) Further, respectfully, the Panel does not concur with that element of A’s submissions that the justification for its Disputed Domain Name Registration was because of that name having “..a substantial connection to our business as a web consultant”, in particular under this heading of confusing similarity. The “connectedness” of the “web consultant” business of A to its choosing to successfully seek out Domain Name Registration of the Disputed Domain Name does not remove the Disputed Domain Name from its identity with, or at least its confusing similarity to, the Trade Mark and service mark or names in which the Complainant W had already invested traditional usage and used such srights.

- (j) Further, respectfully, the suggestions (put in various ways in the A response submissions) as to its Disputed Domain Name Registration being motivated by “profitability” being the purpose of its business is far removed from the question under this heading as to confusing similarity. In this same context, the Panel does not accept A’s contention that it chooses its domain names “..based on what it does for companies” hence choosing the Disputed Domain Name. Again, this does not address, nor indeed dispute, the integrity of the complaint of W put under this heading, or generally.
- (k) The Panel equally does not accept that element of A’s submissions to the effect that searches of “web profit” on the A website will “..show a large number of results proving the point that the term web profit is closely related to Arrow’s business”. This contention (the fact of which the Panel also does not accept) does not remove the W challenge of the Disputed Domain Name having a relative confusing similarity. In any event, on the balance of reliable written material before the Panel, including illustrations within Annexures “I” and “J” of the Complaint (various website search results), do not evidence any “results” establishing any such contended “close relationship” of “web profit” to A. If anything (and by example only) the prospect of confusing similarity is enhanced by reference to Annexure “J” alone where there the Google “web profit” search includes distinct geographic and identity references to, including of the addresses of, the Complainant W by reference to its designation in that search including under its corporate name and there illustrated as Web Profits Pty Ltd and of the W online presence of “www.webprofits.com.au”. Even if there were any such proximity of “relationship” (as A pleads) to its business of the term “web profit” (and which the Panel does not accept), such relationship in any event does not override the rights and legitimate interests of the Complainant for the reasons inherent in earlier discussion.

- 7.9 Broadly, the submitted chronology on the material before the Panel is accepted substantively as to evidence an active commercial use and exposure by W of its “webprofits” name, corporate name, online presence, and Trade Mark associations, all of which are referred to in earlier chronology and background recitation. Further, there is no agreement or dispute before the Panel as to the integrity or accuracy of that background.
- 7.10 A has registered the Disputed Domain Name. No argument or dispute is put before the Panel as to there being any relevant doubt about or contention upon the similarity of the Disputed Domain Name to the trade name, operating and business names and Trade Marks, the online presence and other designations of A. No relevant dispute is put before the Panel here contesting as to that similarity.
- 7.11 Many of various Annexures to the Complainant W’s submissions attest to the corporate, trade, commercial, Trade Mark, business name, online presence and other representations of its business and conducted as an active and continuing business under and by reference to the primary title “webprofits” (central word or feature). None of that is largely contested here.
- 7.12 Further, no dispute, argument or submission is put by the Respondent A contesting as to the Complainant A having rights in or to all of those “webprofits” designations other than for the issue emerging in this referral as to the Disputed Domain Name itself.
- 7.13 Nor is there any relevant dispute, by reference to entitlements of W to its business and ongoing trade usage of “webprofits” (other than for the Disputed Domain Name issue here) under and by reference to the designations under which, on a continuing and active basis, “webprofits” already operates and as referred to briefly earlier.
- 7.14 There is no dispute evident on the papers before the Panel, or in any submissions from the Respondent A, that W does not have a relevant reputation residing in its various “webprofits” designations (previously referred to, again other than for the discrete Disputed Domain Name issue before this referral).

- 7.15 The onus of establishing the Complaint under this heading rests with W. That onus does not extend to a Complainant needing to establish any consumer association of a word (say, here, “webprofits”) singularly with the Complainant's business or reputation. Any name or term used (and whether ‘generic’ or otherwise) which ‘primarily’ has an association with a Complainant’s business is enough, prima facie, to give rise to confusing similarity under this heading.
- 7.16 There is no relevant evidence before the Panel upon which it could safely conclude that the Complainant has not established the relevant onus here.
- 7.17 The Panel makes the following observations in no priority order.
- 7.18 Broadly, the Panel is satisfied, including on that requisite onus, that there is a position of conviction to the W Complaint, under this heading, and in any event by reference to the undisputed account of matters on the papers before the Panel, that the Disputed Domain Name is identical with or confusingly similar to a name, Trade Mark or service mark in which W as Complainant has rights.
- 7.19 For these reasons, on the balance of material before the Panel, there is in its determination, the real potential for, and the actuality of, identity confusion in the terms which meet the foundation for the Complaint of W under this heading and where W, in the determination of the Panel, has established the requisite onus.
- 7.20 Accordingly, the Panel determines that the Complainant has satisfied the requirement of “*identical or confusingly similar*” in Paragraph 4a(i) of the auDRP Policy.

Does the Respondent have any rights or legitimate interests in respect of the Disputed Domain Name? (auDRP 4a(ii) and 4c(i)-(iii))

- 7.21 This is the second element for establishment within a Complaint under the auDRP. It involves deliberation upon the issue as to, whether or not, a Respondent has, in the circumstances of the

particular presentation, no rights or legitimate interests in the Disputed Domain Name (as contended by W here). This is relative to considerations pursuant to Paragraph 4a(ii) of auDRP Policy and to 4c(i)-iii) of the Policy.

7.22 Firstly, it is imperative to note, including here, that ‘rights or legitimate interests in respect of the Disputed Domain Name’ are not established merely by a Registrar’s determination that the Respondent satisfied any relevant registration criteria for the Disputed Domain Name at the time of its Respondent registration (and refer Note 2 of the Policy). There is accordingly no basis for any Respondent argument singularly put by reference to registration, or necessarily, as to later use since registration, on that basis.

7.23 The relevant burden of proof is to the extent that the Complainant need only make out a prima facie case that the Respondent has no legitimate interest, whereupon that burden then shifts to the Respondent to produce evidence of any relevant interest in the name in issue, as to satisfy the Panel (*Document Technologies, Inc v International Elec Communications Inc* (WIPO Case D2000-0270) (June 6, 2000).

7.24 The auDRP does not attempt to define forensically what is meant by a right or legitimate interest in a Domain Name. Paragraph 4c of auDRP lists three (3) (and importantly, non-exclusive) examples of what may comprise any contended ‘right or legitimate interest’, namely (briefly stated):

- (i) Use, or demonstrable preparations to use, the Domain Name in connection with a bona fide offering of goods or services; or
- (ii) The Respondent being commonly known by that Domain Name; or,
- (iii) Making a legitimate non-commercial or fair use of the Domain Name, without intent for commercial gain to misleadingly divert consumers.

7.25 It is not necessary for the Panel to traverse in fullness the respective submissions content of the parties under this heading.

The following observations are made on the material before the Panel, and in no priority order.

7.26 The Panel notes the following and in no priority order:

- (a) W has had a significant presence in the market since its incorporation in 2006 and being a significant operative in a market (common to both parties) inclusive of Search Engine Optimisation in Australia and where the parties are competitors.
- (b) A has had ownership of the domain name “www.searchenginerankings.com.au” since August 2006 being the search engine used for its optimisation business long prior to the registration of the Disputed Domain Name.
- (c) W submits that, at the time when A registered the Disputed Domain Name, A had an active awareness of W due to the prominence of W’s presence in the market common to them both. This submission is accepted by the Panel and it is noted is not refuted, as to accuracy of history, in any submissions from A. Further, the Panel reasonably concludes as to the high probability of A having such market knowledge of the prior presence of W, including under “webprofits” (variously described) from either conducting due diligence pre-registration search and inquiry, or having otherwise a sharp awareness of the presence of W in the market common to them both, and prior to the registration initiative (notwithstanding this) then taken by A to register the Disputed Domain Name.
- (d) A does not deny the W contention that A set up an iframe demonstrating the content of the other A website namely, “www.searchenginerankings.com.au” at the static Disputed Domain Name (Annexure “G” of the Complaint is one illustration only of the website of A to which a direction can be made from the Disputed Domain Name and when also directed from the other A website of “www.searchenginerankings.com.au”).

- (e) There appears reliably to the Panel to be some integrity and foundation to the W argument that the Disputed Domain Name, in the circumstances described above and generally, is a passive website, or at least one used primarily, perhaps solely, for the direction of email inquiry traffic to the A primary or prior website of “www.searchengine rankings.com.au”.
- (f) It is noted that A has no business name, Trade Mark or service mark that is similar to or suggestive of the Disputed Domain Name (other than for having chosen its registration). Whereas comparatively, the W domain name “www.webprofits.com.au” has been actively designed (and with an active online presence since about April 2006) to inform and to direct consumers and enquirers of and to the trading name and operations of W including (amongst other) to the search engine optimisation business of W. On the reliable balance of the written material before the Panel, the Panel accepts the substance of this W contention under this heading.
- (g) A is commonly known as “Arrow Internet Marketing” (or that corporate title) with the parallel Google search under that name directing inquiry towards a website at “www.searchengine rankings.com.au” (Annexure “H” to the Complaint amongst other material verifies).
- (h) When searched, the expression “web profit” at the A website does not show a reference of a connectedness of A to the expression “web profit” (Annexure “I” of the Complaint amongst other material illustrates). The Panel has already observed (under the “confusingly similar” discussion earlier) that, respectfully, it does not accept the A contentions that its website shows “..a large number of results proving the point” of a close relationship with the term “web profit” (paragraph 7.8(k) above). That conclusion is not reliably verified on the material and information before the Panel (including, but not exclusively, Annexures “H” to “J” of the Complaint).

- (i) For these reasons, the Panel concludes and determines that the Respondent A (as an individual and as a business) is not commonly known by the Disputed Domain Name. Respectfully, that A may have chosen to initiate the Disputed Domain Name registration because of an asserted “substantial connection to our business as a web consultant”, or for reasons of web-based business profitability, avoid the central issue under this heading, and under the other headings of the Policy.
- (j) Further, the chronology of Disputed Domain Name Registration (2007) or its renewal (2009) by A is also not the central question. To reiterate, for the purposes of Policy interpretation, auDA has determined that “rights or legitimate interests in respect of the domain name” are not established merely by a Registrar’s determination that the “respondent satisfied the relevant criteria for the domain name at the time of registration”. Thus, neither the fact of Registrar Domain Name Registration, or the timing of it is, in some presentations as here, the central or critical feature. Respectfully, the Panel rejects a number of the various A submissions which appear to be related to an asserted position arising from the disputed Domain Name Registration itself, or from a contention of such registration having some form of priority over the rights and legitimate interests of the Complainant W. Respectfully, the Panel does not accept the A submission that “webprofit” was the “natural choice” for its Domain Name including by any suggested content of its homepage “www.searchenginerankings.com.au”. The Panel rejects the assertion that the content of this homepage, and some of the other submissions of A in this regard, relative to its own, or consumer or enquirer, business profitability, have any significant or material relevance to appropriate considerations in this Complaint. The Panel, respectfully, does not accept the A submission that its selection of “webprofit” as its “natural choice” of domain name was done for reasons in some way independent of its consciousness of W in the market or independent of a primary purpose of a

redirection of internet inquiry to the A website or to other designations of A.

7.27 The Panel observes that the potential for confusion as to the source of the Disputed Domain Name is a relevant and appropriate consideration in analysis of any claim for legitimacy of interest under this heading. Some of the Panel's commentary following is in that context, additional to other commentary made.

7.28 The Panel has already indicated the principles as to the relative evidentiary burdens, but here immediately notes, and determines, that A as Complainant has made out a prima facie case that A, as registrant of the Disputed Domain Name, has no legitimate interest in it (including as arising from observations which further follow). It is for A then, to satisfy the Panel, the onus resting upon A, that it has a relevant interest in that Name.

7.29 As already stated, the mere fact of Disputed Domain Name registration by A as Respondent does not connote a legitimacy of interest or right in it. Equally, by reference to matters recited within Paragraph 4c of auDRP (abbreviated references above), mere assertions of preparations to use the Disputed Domain Name, or "natural choice" or "profitability" or "commercial choice" arguments, without further reliable evidence from a Respondent, are insufficient.

7.30 In particular, and specifically in part pertinent to this presentation in the view of the Panel, an offering of goods or services is not bona fide if use of the Disputed Domain Name is likely to cause consumer confusion including, such as and by one illustration only, that it may infringe a Complainant's trade name rights or acquired reputation (*Universal City Studios Inc v GAB Enterprises* (WIPO Case D2000-0416)).

7.31 Here, several matters are noteworthy. Firstly, including in terms of paragraph 4c(i) of auDRP, it is apparent on the material before the Panel that A has not used the Disputed Domain Name in any real connection with a bona fide offering of goods or services. If anything, the use by A of the Disputed Domain Name has,

respectfully, been in the limited context of such matters as diverting email traffic away from W to other websites controlled by A (for example). In terms of the illustrated example within paragraph 4c(i) of auDRP this does not amount to a qualifying 'bona fide' use of the Disputed Domain Name.

7.32 The Respondent A, further, is not commonly known (nor is that argued here) by any reference, actively or otherwise, to the Disputed Domain Name, including by reference to paragraph 4c(ii) of auDRP.

7.33 Further, there is no reliable evidence before this referral that any use by the Respondent A of the Disputed Domain Name is a legitimate non-commercial or fair use of it. Further, specifically, that use thus far by the Respondent A, on the material before the Panel, is illustrative of such usage being retained for purposes of a contended registration ownership only, and not as to use, and that any use has substantively been in part for ultimate diversionary purposes, as stated briefly above.

7.34 In all of these respects, and generally, and again it is largely undisputed here, A is, and has at all relevant times been, aware or reasonably aware of the reputational interest maintained by W in the Disputed Domain Name, including as part of its "webprofits" overall corporate, trade name and Trade Mark designations equivalently.

7.35 None of the above is illustrative, in the view and determination of the Panel, of the Respondent A maintaining a foundation for rights or legitimate interests in the Disputed Domain Name, or to be acting reasonably or bona fide in adhering to a position of maintaining to itself such registration.

7.36 For these reasons, accordingly, the Panel is not of the view that A has discharged the onus as to establishing, in the circumstances of this presentation, a right or legitimate interest in respect of the Disputed Domain Name in issue here.

7.37 Accordingly, the Panel finds that the Respondent A has no right or legitimate interest in the Disputed Domain Name. Paragraph 4a(ii) of the auDRP Policy has been satisfied by the Complainant.

8. Has the Disputed Domain Name been registered or subsequently used in bad faith? (paragraphs 4a(iii) and 4b of auDRP Policy)

8.1 The Panel has noted and studied the full context and content of all requisite material under this heading.

8.2 Paragraph 4b 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 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. In other words, the circumstances illustrated in paragraph 4b are not an exclusive or limited listing.

8.3 The essence of each of the subparagraph illustrations in Paragraph 4b of the Policy as non-exclusive examples of evidence of bad faith are (briefly stated):

- (i) Circumstances indicating that the subject registration is primarily for the purpose of selling, renting or otherwise transferring it including for valuable consideration in excess of documented out-of-pocket costs directly related to it; or,
- (ii) A registration to prevent the owner of a name, trademark or service mark from reflecting those same names or marks in a corresponding domain name; or,
- (iii) Registration primarily to disrupt business; or,

- (iv) Use of the domain name as to intentionally attempt to attract, for commercial gain, Internet users to a website by creating a likelihood of confusion.

8.4 As indicated, these are non-exclusive illustrations. Also, as previously stated, the establishment of any one of them can be enough as to a finding of relevant bad faith. Other factors may also demonstrate bad faith.

8.5 Relevantly, in the view of the Panel, the Complainant W submits under this heading (and in no priority order) some of the following:

- (a) Reiterates much of its earlier submissions content under the two (2) previous primary headings.
- (b) Submits that the Disputed Domain Name is “virtually identical” to W’s domain name, company name and registered Trade Mark (as discussed also above) as to create confusing similarity in particular to the customers or enquirers of W.
- (c) The circumstances above are exacerbated as to detrimental effect where the parties are competitors and where, at the time of registration, A would have been aware of the significant, including prior, market presence of W and of the W reputation in that market.
- (d) Notwithstanding all of the above antecedent background, in A choosing to initiate a registration of the Disputed Domain Name, connotes bad faith.
- (e) That such bad faith is underpinned further by the resultant fact of, beyond the likelihood of, confusion by clients or potential clients of W, including when attempting to access the W website, resultantly being trafficked or directed to the website or other designations of A.

8.6 Respectfully, the Panel does not concur with the submission of A that its selection of the Disputed Domain Name, the central word and feature of which is “webprofit” (removed only by description

from the online identity of W by one letter, namely the letter “s”) was a “natural choice” by A for its own commercial reasons. This does not satisfy the Panel as to the removal of “bad faith” from the exercises undertaken here by A.

- 8.7 Not insignificantly, in the view of the Panel, indeed as A’s own submissions to this Complaint acknowledge, A “..is presently redirecting the domain name webprofit.com.au to searchengine rankings.com.au”. Here, it appears that A asserts only that “..there are striking dissimilarities between webprofits.com.au and searchengine rankings.com.au” but with no attempt asserted by A for avoidance of confusing “visitor” interest. The Panel does not accept the conclusions A seeks to have drawn from this “redirection” of online inquiry traffic, in particular, in the circumstance of the almost parallel nexus of the W identity of “webprofits.com.au” to the Disputed Domain Name “webprofit.com.au” where third party inquiry to the latter directs that traffic to the “searchengine rankings.com.au” domain name squarely of A. In this regard the Panel cannot safely take up the contention before this Complaint raised by A that “..it is only a matter of chance that one of its domains has similar words as webprofits”.
- 8.8 Further, there is no material before the Panel indicative of any initiative of D towards any clear website disclaimer as to attempt to diffuse or remove any potential confusion or to identify that A is a qualified registrant only of the Disputed Domain Name (*AGDEST v Blogger Pty Ltd*, IAMA-3058 (2007)).
- 8.9 Further, using a confusingly similar domain name in a way which dilutes the value of a complainant’s Trade Mark is likely to amount to bad faith, including in particular by reference to Paragraph 4b(ii) to (iv) of the Policy (*Universal Studios* – paragraph 7.30 above). This, in the view of the Panel, is such a presentation.
- 8.10 To the extent of these matters, the Panel has given the closest deliberation to the requisite elements of bad faith as exhibited within paragraph 4b of the Policy. It is reiterated that the paragraph 4b circumstances in paragraphs (i) to (iv) thereof are not exclusive,

are illustrative only, but that one only of any of them can connote a reliable finding of bad faith. Other circumstances, other than those illustrated at Paragraph 4b, can equally do so.

8.11 In the Panel's view and determination, each of these considerations, and all such matters taken together, reliably establish that the registration by A of the Disputed Domain Name has been and become evidenced by registration and continuing use in bad faith.

8.12 For the reasons outlined, the Panel determines that W as Complainant has satisfied the requirements of Paragraph 4a(iii) of the auDRP Policy as to Disputed Domain Name registration in bad faith.

9. **DECISION**

9.1 The Panel concludes for the reasons stated:

- (a) That the Disputed Domain Name is confusingly similar to a name, trade mark, or service mark in which the Complainant W has rights; and,
- (b) That the Respondent A has no rights or legitimate interests in the Disputed Domain Name; and,
- (c) That the Respondent A registered and used the Disputed Domain Name in bad faith; and that,
- (d) Complainant W complies with auDA's Policy, *Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (2008-05)*, in respect of the Disputed Domain Name.

9.2 For the reasons outlined, the Complainant has satisfied the elements of Paragraph 4a of the auDRP Policy.

10. **RELIEF**

10.1 The Panel orders that the Disputed Domain Name
“www.webprofit.com.au” be transferred to the Complainant W.

10.2 The Panel notes that the Complainant W is eligible to hold the
Disputed Domain Name under Schedule A, Paragraph 4a(i) of the
auDA Policy as the owner of a ‘name, trademark or service mark’ in
which the Complainant W has rights.

Dated this 26th day of May 2010

.....
JOHN A. McGRUTHER
SOLE PANELLIST

ANNEXURE 'A'

Procedural History

[webprofit.com.au]

[auDRP_1 0_09]

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 **12/04/2010**.
3. On the **15/04/2010** LEADR sent the Respondent (**J Batra t/as Arrow Internet Marketing**) 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 **NetRegistry** on **15/04/2010**
5. The Registrar was also sent an email on **15/04/2010** requesting to lock the domain name in dispute.
6. LEADR advised auDA of the complaint on **15/04/2010** via e-mail.
7. On the **15/04/2010** LEADR sent a notification letter to the Complainant (**Web Profits Pty Ltd**) by email along with a copy of the notification letter sent to the Respondent.
8. On the **6/05/2010**, the Respondent (J Batra t/as **Arrow Internet Marketing**) submitted a response to the domain name complaint.
9. On **14/05/2010** 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 **14/05/2010**.
10. The Panellist was informed on **14/05/2010** that the package was being sent for Adjudication