

ADMINISTRATIVE PANEL DECISION

Thor Tech Inc. v. Eric Kline
Case No. D2023-4275

1. The Parties

Complainant is Thor Tech Inc., United States of America (“United States” or “U.S.”), represented by Dinsmore & Shohl LLP, United States.

Respondent is Eric Kline, United States, represented by Lewis & Lin, LLC, United States.

2. The Domain Name and Registrar

The disputed domain name <airstreammarketplace.com> (hereinafter “Disputed Domain Name”) is registered with Squarespace Domains II LLC (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on October 13, 2023. On October 16, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Disputed Domain Name. On October 17, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Disputed Domain Name which differed from the named Respondent (CONTACT PRIVACY INC. CUSTOMER 7151571251) and contact information in the Complaint. The Center sent an email communication to Complainant on October 17, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting Complainant to submit an amendment to the Complaint. Complainant filed an amendment to the Complaint October 26, 2023, and an amended Complaint on November 7, 2023.

The Center verified that the Complaint together with the amendment to the Complaint and amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified Respondent of the Complaint, and the proceedings commenced on November 9, 2023. In accordance with the Rules, paragraph 5, the due date for Response was December 3, 2023. The Response was filed with the Center on December 2, 2023.

The Center initially appointed Richard G. Lyon, W. Scott Blackmer, and Lawrence K. Nodine as panelists in this matter on December 27, 2023. The Panel had found that it was properly constituted. Each member of the Panel submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

With great sadness, the Panel learned that Richard Lyon¹ passed away before the instant decision was rendered. Therefore, on January 22, 2024, the Center appointed Bradley A. Slutsky as the third Panelist to replace Mr. Lyon. Mr. Slutsky has submitted the required Statement of Acceptance and Declaration of Impartiality and Independence, and the Panel finds that it was duly properly constituted.

4. Factual Background

Complainant (with its affiliated operating companies) is the world's largest manufacturer of recreational vehicles ("RV"), including AIRSTREAM vehicles. Complainant uses its AIRSTREAM trademark (hereinafter sometimes the "Mark") on RV travel trailers and a wide variety of related goods and services, including clothing, camping equipment, and accessories. Complainant alleges that it uses the Mark on used vehicle dealership services but offers no evidence about this use.

The AIRSTREAM Mark was first used with travel trailers in 1932 and continues to be used today. Complainant owns many registrations for the Mark, including:

- U.S. Registration No. 607,224 (registered June 14, 1955);
- U.S. Registration No. 1,189,944 (registered February 16, 1982); and
- U.S. Registration No. 4,573,793 (registered July 22, 2014).

Complainant also owns many domain names, including <airstream.com> (registered July 16, 1998), and <airstreamsupplycompany.com> (registered January 18, 2019), both of which resolve to websites through which recreational vehicles, RV accessories and related merchandise are promoted and sold. These sites also contain articles on suppliers of RV equipment as well as other articles of interest to the RV lifestyle.

Respondent describes himself as an AIRSTREAM enthusiast whose family traveled in an AIRSTREAM RV trailer when Respondent was a child. As an adult, Respondent registered the Disputed Domain Name on October 21, 2019, to help people buy and sell used AIRSTREAM vehicles.² Respondent uses the Disputed Domain Name in connection with a website (hereinafter the "Website") that facilitates the advertisement of used AIRSTREAM RV trailers.

The Website allows sellers and buyers to communicate about AIRSTREAM trailers posted for sale. Respondent's sworn statement declares that the Website associated with the Disputed Domain Name facilitates the sale of AIRSTREAM vehicles only. There are no products for purchase other than AIRSTREAM travel trailers on the website. Complainant does not contradict this assertion.

Transactions are not conducted through the Website. Respondent does not facilitate any contracts, meetings, or financial transactions between buyers and sellers. His support is limited to helping users modify their listings or suggesting venues for additional exposure. The Website has had 2.5 million unique visitors out of 3.1 million total visits, and 11.6 million total page views. The Website has more than 18,000 user accounts and almost 22,000 subscribers to the Website's accompanying newsletter. The Website had facilitated the sale of about 4,480 AIRSTREAM trailers as of the date Respondent filed his Response in this proceeding.

¹ Richard Lyon made a significant contribution to UDRP jurisprudence. He served as a WIPO Panelist starting in 2000.

² Respondent submitted a declaration stating that he does not own any other domain names and has never been a party to a UDRP proceeding other than the instant case.

Until recently,³ Respondent's Website included a "Product Page" that displayed links to twelve products and services from third party vendors closely related to the maintenance, customization, and improvement of AIRSTREAM travel trailers, namely: artwork made out of recycled AIRSTREAM sheet metal; a customization service for modifying AIRSTREAM trailers; a Facebook group devoted to AIRSTREAM travel; and, a service for upgrading beds for AIRSTREAM trailers. Other links led to generic services useful to any RV traveler, including: mobile applications for finding camping sites and local attractions; websites for batteries and solar panels; and a website for receiving mail while traveling. These links were displayed on a single page. Respondent represents that the Website comprises five thousand pages.

In addition, Respondent's Website included, until recently,⁴ a selection of articles discussing recreational vehicles generally and AIRSTREAM products in particular. Some of the articles were copied or derived from similar articles found on Complainant's websites. Some of the articles acknowledge Complainant as the author.

In February 2022, before Respondent received any communications from Complainant, Respondent added the statement "[b]uilt by enthusiasts, for enthusiasts" to the first page of the Website.

Complainant first contacted Respondent in November 2022 complaining that Respondent was not authorized to use the Mark or to copy articles found on Complainant's websites. Respondent thereafter removed from the Website the three articles specifically identified in the letter.

In further response to the November 2022 letter, Respondent added the statement "Airstream Marketplace is not endorsed by or affiliated with Airstream, Inc. or Thor Tech, Inc." This statement appeared at the very bottom of the landing page, visible after scrolling to the bottom.

Complainant contacted Respondent again in July 2023, specifically naming another article (the dewinterization article). In his declaration attached to his Response, Respondent declares that this article has been removed from the Website, but he does not say when it was taken down.

After Complainant filed the Complaint in this case, Respondent moved the disclaimer from the bottom to the top of the first page, inserting it as the third sentence of the first paragraph.

5. Parties' Contentions

A. Complainant

Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the Disputed Domain Name.

Notably, Complainant anticipated, correctly, that Respondent would rely on the nominative fair use defense. For several reasons, Complainant contends that Respondent has not satisfied the illustrative fair use criteria as are generally articulated in *Okidata Americas, Inc. v. ASD, Inc.*, WIPO Case No. [D2001-0903](#).

First, Complainant points to Respondent's inclusion of the links to third party vendors and contends that Respondent has not restricted the Website associated with the Disputed Domain Name to sales of only AIRSTREAM products.

Second, Complainant contends that because Respondent included on the Website content copied or derived from Complainant's websites, Respondent is barred from claiming legitimate rights. Complainant acknowledges that questions of copyright infringement are beyond the scope of the UDRP, but nonetheless

³ Respondent removed these links from the Disputed Website after notice of this proceeding.

⁴ Respondent deleted the subject articles. Some were deleted before Complainant filed the instant UDRP complaint. Some were deleted later.

contends that the copying of content from a complainant's website (whether infringement or not) weighs in favor of finding that the respondent did not have any rights to or legitimate interests in the domain name.

Third, Complainant contends that the Disputed Domain Name implies affiliation with Complainant and that Respondent's disclaimers are not sufficient to negate the implied affiliation.

Fourth, Complainant argues that because Complainant offers dealership services in the field of used recreational vehicles, which are covered by its registered mark, Respondent's use of the mark in the Disputed Domain Name for a website advertising used recreational vehicles infringes Complainant's trademark and therefore cannot represent a right or legitimate interest.

B. Respondent

Respondent concedes that Complainant has rights in the Mark and that the Disputed Domain Name is confusingly similar to the Mark.

Respondent claims that he has rights and a legitimate interest in the Disputed Domain Name under nominative fair use principles and that he has satisfied the *Ok! Data* criteria. He argues, first, that the links to third parties do not lead to Complainant's competitors, but rather to vendors that offer AIRSTREAM accessories or services, or generic services to the RV community. He argues, second, that the copying of content derived from Complainant was not significant, and, in any event, was deleted in response to Complainant's protests. Moreover, copyright infringement is beyond the scope of UDRP proceedings. Third, Respondent denies that there is risk of implied affiliation, pointing to the phrase, "[b]uilt by enthusiasts, for enthusiasts" that he added voluntarily before receiving any communications from Complainant. Respondent contends that reasonable Internet visitors would understand that this statement was, in effect, a disclaimer clarifying that the Website was not "built" by Complainant, but rather by independent "enthusiasts." Moreover, Respondent argues that he added a sufficient disclaimer after receiving Complainant's letter in November 2022 and that he improved the positioning of the disclaimer by moving it from the bottom to the top of the landing page, albeit after the Complaint was filed in this proceeding.

6. Discussion and Findings

A. Identical or Confusingly Similar

Respondent concedes that Complainant has rights in the Mark and that the Disputed Domain Name is confusingly similar to the Mark. Complainant's Mark is included in its entirety in the Disputed Domain Name, and the addition of the dictionary word "marketplace" does not avoid a finding of confusing similarity. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ("[WIPO Overview 3.0](#)"), section 1.8. Based on the available record, and Respondent's concessions, the Panel finds the first element of the Policy has been established.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy provides a list of circumstances in which Respondent may demonstrate rights or legitimate interests in a disputed domain name.

Although the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the difficult task of "proving a negative", requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a prima facie case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name (although the burden of proof always remains on the complainant). If the respondent fails to come forward with such relevant

evidence, the complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1.

Having reviewed the available record, the Panel finds that Complainant has established a prima facie case that Respondent lacks rights or legitimate interests in the Disputed Domain Name. Respondent has responded with evidence supporting nominative fair use.

In the instant proceeding, Respondent has demonstrated that the disputed domain names refer to Complainant's trademark-protected products. Further to accepted UDRP principles and jurisprudence the burden shifts to Complainant to demonstrate that Respondent's use of the disputed domain names creates a likelihood of confusion as to the source or sponsorship of Respondent's website.

Which Test to Apply?

The threshold question is whether the *Oki Data* test should be applied. Complainant contends there is no need to apply the multifactor test because implied sponsorship is obvious here and that Respondent infringes its trademark. The [WIPO Overview 3.0](#) section 2.5.1 observes that "Generally speaking, UDRP panels have found that domain names identical to a complainant's trademark carry a high risk of implied affiliation. Even where a domain name consists of a trademark plus an additional term (at the second- or top-level), UDRP panels have largely held that such composition cannot constitute fair use if it effectively impersonates or suggests sponsorship or endorsement by the trademark owner."

Complainant contends "that the use of a vehicle trademark as part of a domain name to sell genuine used vehicles marked with that brand does not give rise to any rights or legitimate interests. [...] [I]n the field of vehicles, the unauthorized use of a trademark as part of a domain name has specifically and repeatedly been identified as opportunistic bad faith."

The Panel rejects this contention as overly broad. There is no rule uniquely applicable to the trademarks of vehicle manufacturers. Instead, in all cases, the question is whether, based on the totality of the facts, Respondent is explicitly or implicitly creating an affiliation with Complainant. This is a question of fact to be determined on the facts in each case. [WIPO Overview 3.0](#) section 2.8. In terms of the concept articulated in [WIPO Overview](#) section 2.5.1 and *Oki Data*, the Panel understands that the "site" criteria in *Oki Data* can reasonably be understood to encompass the domain name itself, insofar as it communicates affiliation; see also *R.T. Quaipe Engineering, Ltd. and Autotech Sport Tuning Corporation d/b/a Quaipe America v. Bill Luton*, WIPO Case No. [D2000-1201](#).

Complainant relies on *American Honda Motor Co., Inc. v. Mitchell Huddleston*, WIPO Case No. [D2011-0076](#), where the panel held that respondent's use of the disputed domain names were not bona fide because it included links to the complainant's competitors, and then bolstered its ruling with the additional observation that "there is significant law in the United States that indicates even if Respondent had offered cars using the disputed domain names, doing so might constitute trademark infringement." The panel quoted *Toyota Motor Sales, USA, Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010), where the Ninth Circuit panel observed that "[s]ites like trademark-USA.com, trademark-of-glendale.com or etrademark.com will also generally suggest sponsorship or endorsement by the trademark holder [...]". Although *Tabari* supported the rejection of <hondaofgainesville.com> (italics added for emphasis), the facts are not the same in this case, as the Disputed Domain Name does not reflect the <trademark+location> pattern. Complainant also relies on *Audi, AG, Volkswagen Group of America, Inc. v. Sandlot LLC, Jim Gossett*, WIPO Case No. [D2008-1053](#) (transferring the domain names <auditulsa.com> and <tulsaaudi.com>), but that case also presents the <trademark+location> pattern that is not present here. Complainant relies on other cases that also present different facts.⁵

⁵ *Bayerische Motoren Werke AG v. Aditya Roshni, Web Services Pty*, WIPO Case No. [D2015-1110](#) (<bmwaustin.com> and <fortlauderdalebmw.com>; displayed links to competitors - Mercedes-Benz, Porsche, Mazda, Jaguar, Ford and Lincoln); and *Ford Motor Company v. Above.com Domain Privacy / Host Master, Transure Enterprise Ltd*, WIPO Case No. [D2018-0446](#) (<morrisford.com>; links to competitors-Jeep, Nissan and Chevrolet).

The Panel here acknowledges that in *American Honda* the Panel also identified several cases that rejected nominative fair use even though the facts did not include links to competitors or follow the <trademark+location> pattern. However, those cases were decided on the merits of the facts presented in those cases rather than application of a general rule applicable to all cases involving vehicle trademarks. Insofar as Complainant contends that *American Honda* supports the existence of a categorical rule (in either the UDRP or United States trademark law) that implied affiliation should be found whenever the disputed domain name includes a vehicle trademark, the Panel rejects the contention as overly broad. There is no consensus that such a rule exists. On the contrary, there is general support for the application of all of the *Okidata* factors. For example, the panel in *General Motors LLC v. Flashcraft, Inc DBA Cad Company*, WIPO Case No. [D2011-2117](#), found that the domain name <cadillacperformance.com> was a bona fide nominative fair use, observing:

“Nevertheless, in the circumstances of this case the Panel determines that the *Okidata* principles should be used to consider whether ... Respondent has a right or legitimate interest, for two reasons. First, as ... Respondent notes (and as any United States car owner well knows), parts and service on any brand of automobile are readily available from third parties that have and claim no affiliation with the applicable automobile maker. [. . .] Second, and more importantly, UDRP panels have consistently followed the *Okidata* approach when dealing with unauthorized resellers in the automotive field. [. . .] This Panel believes that these and other cases indicate an emerging consensus for such application in the automotive industry, a business in which an extensive secondary market for parts and service makes a consistently-applied precedent highly desirable.”

Complainant contends that Respondent’s use infringes its trademark and therefore cannot be considered bona fide, stating: “It is well settled under the Policy that a knowingly infringing use of a trademark to offer goods and services is not a *bona fide* offering of goods and services under the Policy.” *U-Haul International, Inc. v. PrivacyProtect.org / Ken Gossett*, WIPO Case No. [D2011-0347](#)). The Panel rejects this contention on the facts presented in this proceeding because the outcome of this dispute in a United States court is right now based on speculation. Consequently, The Panel cannot conclude that Respondent knowingly “infringed” Complainant’s trademark. This case illustrates why panels interpreting the Policy consistently decline to rule on claims of “infringement.” UDRP disputes are abbreviated proceedings that are not meant to resolve disputes that turn on facts that are in dispute or on legal principles that vary by jurisdiction. If this case were litigated in United States federal court, the parties would undoubtedly disagree about fundamental principles of trademark law, including initial interest confusion, nominative fair use, the legal effect (if any) of Respondent’s disclaimers, whether a laches defense is available, etc. The courts of the United States do not evaluate these issues uniformly and the outcome of the case could very well depend on where the case is litigated. The case could be factually complicated as well, given that Respondent’s Website has been in operation for four years and has facilitated several thousand transactions, and has changed its content in reaction to demands of Complainant. Respondent declares that he is not aware of any confusion and Complainant has not offered any evidence on this point in these proceedings, but Complainant would no doubt pursue vigorous discovery in federal court. This Panel is not in a position to evaluate all of the many factors that would be considered to decide whether there is a likelihood of confusion under United States law.

The Panel does have enough information to conclude that Respondent is not “clearly” or “knowingly” infringing Complainant’s trademark rights. This is sufficient to distinguish *U-Haul* and similar cases. The Panel acknowledges that in some cases it is clear and undeniable, both legally and factually, that a respondent knowingly infringes a complainant’s trademark rights. In such cases, the panel may rightly consider these facts when evaluating both a respondent’s rights and allegations of bad faith. But this is not such a case.

Accordingly, the Panel finds that it is appropriate to apply the *Okidata* principles to evaluate whether, under UDRP jurisprudence, Respondent has rights or legitimate interests in the Disputed Domain Name.

Oki Data Factors

Oki Data Americas, Inc. v. ASD, Inc., supra, requires that (i) Respondent must actually be offering the goods at issue; (ii) Respondent must use the site to sell only the trademarked goods; (iii) the site itself must accurately disclose Respondent's relationship with the Mark owner; and (iv) Respondent must not try to "corner the market." *Id.*

Respondent satisfies many, but not all of the *Oki Data* requirements.

There is nothing pretextual about Respondent's Website, which, according to Respondent's uncontradicted evidence, has had 2.5 million unique visitors out of 3.1 million total visits, and 11.6 million total page views. Respondent's Website has more than 18,000 user accounts and almost 22,000 subscribers to the Website's newsletter. To date, the Website has facilitated the sale of about 4,480 used AIRSTREAM travel trailers.

Most importantly, Respondent's sworn statement declares that the Website facilitates the sale of AIRSTREAM travel trailers only. There are no products for purchase on the Website other than AIRSTREAM travel trailers. Complainant does not contradict this key fact.

The Panel rejects Complainant's contention that Respondent's links to third party websites bars reliance on *Oki Data*. None of the challenged links lead to Complainant's competitors. Some of the links lead to vendors offering accessories (or art) relating to AIRSTREAM trailers and others lead to general services useful to all RV travelers. Incidental links to third parties like these who do not compete with Complainant do not violate the *Oki Data* requirement that the "the Respondent must use the site to sell only trademarked goods [...]" *Sourcis, INC. v. Name Redacted*, WIPO Case No. [D2023-3581](#); *Dr. Ing. h.c.F. Porsche AG v. Del Fabbro Laurent*, WIPO Case No. [D2004-0481](#); *National Association for Stock Car Auto Racing, Inc. v. Racing Connection/The Racin' Connection, Inc.*, WIPO Case No. [D2007-1524](#).⁶

The Panel also rejects Complainant's contention that Respondent's inclusion on the website of some material copied or derived from Complainant's site disqualifies reliance on the nominative fair use defense in the context of a UDRP proceeding. Respondent conceded the impropriety of copying Complainant's copyrighted works and, in response to Complainant's letters, removed most of the challenged material. The Panel finds that Complainant has not carried its burden to prove that the inclusion of the copied material was significant enough to confuse Internet visitors into believing that Complainant sponsored the Website. Moreover, accusations of copyright infringement are themselves outside the scope of UDRP proceedings.

The Panel finds, however, that Respondent's has not complied with *Oki Data*'s requirement that "the site itself must accurately disclose Respondent's relationship with the Mark owner." The threshold question is whether the relationship between Complainant and Respondent needed any clarification. The Panel finds that the answer is "yes." The addition of "marketplace" to Complainant's Mark is ambiguous. On one hand, "marketplace" is a neutral term that connotes a free market that is not controlled by the participants. Merriam-Webster defines "marketplace" as "an open square or place in a town where markets or public sales are held."

On the other hand, the conjunction of "marketplace" with the trademark AIRSTREAM does not inherently (and clearly) communicate that the "marketplace" is not affiliated with or sponsored by the trademark owner.

Oki Data rightly requires that respondents invoking nominative fair use "accurately disclose Respondent's relationship with the Mark owner." Where the trademark signals are ambiguous, the proponent of nominative fair use must clarify the relationship to avoid implied sponsorship or affiliation.

⁶ Complainant concedes that: "While perhaps not a traditional bait and switch scenario (under which the website would be used to sell other brands of recreational vehicles), the site does provide links to a number of third-party products and services which could create the false impression that Complainant endorses or approves these goods and services." The Panel finds no support for the assertion that these links "could create a false impression that Complainant endorses or approves these goods and services."

See also WIPO Overview section 2.5.1.

To meet this obligation, Respondent relies heavily on his inclusion of the phrase “[b]uilt by enthusiasts, for enthusiasts.” The Panel finds that this statement, which was not added until February 2022 (nearly two and a half years after the creation of the website), does not clearly negate affiliation. There is no inherent basis for assuming that Internet visitors would assume that Complainant would not be affiliated with “enthusiasts.” The Panel finds that there is a risk that Internet visitors would mistakenly believe the website was affiliated with Complainant.

After Complainant’s November 2022 letter, Complainant added the disclaimer “AIRSTREAM Marketplace is not endorsed by or affiliated with AIRSTREAM, Inc. or Thor Tech, Inc.,” but this disclaimer was not prominently displayed. Respondent placed it at the very bottom of the landing page. It was visible only if the visitor scrolled down past prominently emphasized links to “Browse Inventory” and “Sell Your AIRSTREAM” and many rows of attention-seeking photos of used AIRSTREAM trailers for sale. The disclaimer appears in the most remote location on the page as the very last text in the bottom right of the page, in the smallest font size used on the page and without any emphasis that would draw it to the attention of a visitor.

After the Complaint was filed, Respondent moved this disclaimer to the top of the landing page, but still failed to emphasize the disclaimer, instead blending it into other text—it now appears in the third (last) sentence in the opening paragraph, which itself appears beneath introductory headlines which appear in larger bolded font.

It is apparent to the Panel that Respondent intended to offer a bona fide service in good faith, but that he failed to implement safeguards sufficient to prevent the potential for Internet users mistakenly to perceive affiliation with Complainant. For these reasons, the Panel finds that while it has come close and made apparent corrective efforts, Respondent has not fully satisfied *Okidata*. The Panel emphasizes that this is a close call. Although the term “marketplace” does not, in the Panel’s view, explicitly suggest affiliation, neither does it negate affiliation, and the landing page disclaimer is not prominent enough. This is not sufficient to satisfy *Okidata*’s requirement that Respondent “accurately disclose Respondent’s relationship with the Mark owner.” See WIPO Overview section 2.5.1 and *Everytown for Gun Safety Action Fund, Inc. v. Contact Privacy Inc. Customer 1249561463 / Steve Coffman*, WIPO Case No. [D2022-0473](#) (referring to a holistic assessment of the impersonation test).

Accordingly, based on the available record, the Panel finds the second element of the Policy has been established.

C. Registered and Used in Bad Faith

The Panel finds that Complainant has not proved that it was more likely than not that Respondent registered the Disputed Domain Name in bad faith.

Even though Respondent failed to clarify its relationship with Complainant as required by *Okidata*, the Panel is not persuaded that Respondent registered the Disputed Domain Name in bad faith. Panelists frequently observe that the UDRP is meant to address intentional bad faith conduct and not “ordinary” trademark infringement. This case illustrates the distinction. Although Complainant may have a credible claim of trademark infringement,⁷ it has not proved that Respondent registered the Disputed Domain Name in bad faith within the meaning of the Policy.

Complainant contends that Respondent “intentionally attempted to attract, for commercial gain, Internet users by creating a likelihood of confusion with the complainant’s mark.” Policy paragraph 4(b). Complainant asserts that “[t]he use of Complainant’s Mark as part of the <airstreammarketplace.com> domain name is

⁷ The Panel expressly disclaims any intention to opine on the merits of a trademark infringement claim in the context of United States law as applied to vehicle manufacturers who also register their marks for trade in used vehicles.

clearly calculated to draw in Internet users searching for Complainant's mark or products and/or to divert traffic away from legitimate websites offering AIRSTREAM trailers for sale. The domain name appears intended to convey the impression that the site is associated with Complainant, either being a site directly operated by Complainant or one authorized or endorsed by Complainant." The Panel rejects these contentions as overly broad. Given the totality of the evidence, it is at least equally likely that Respondent intended to make fair use of Complainant's AIRSTREAM trademark to truthfully refer to the used trailers for sale on the Website. Complainant has not carried its burden that Respondent did or intended when he registered the Disputed Domain Name to exceed his fair use rights.

The Panel acknowledges its finding above that Respondent arguably did not take sufficient care to negate implied affiliation (e.g., in its update of the disclaimer), but the question is whether Respondent registered the Disputed Domain Name with the bad faith intention of ignoring the limits of fair use. The Panel finds it more likely that Respondent began in good faith but without a thorough understanding of his obligations to stay on the right side of a fair use assessment. Although the Panel has found that Respondent's inclusion of the phrase "[b]uilt by enthusiasts for enthusiasts" was not by itself sufficient to negate implied affiliation, it is evidence of good faith. The Panel also notes with approval that Respondent responded to Complainant's complaint letters by making adjustments intended to address Complainant's concerns. See *Freni Brembo S.p.A. v. Webs We Weave*, WIPO Case No. [D2000-1717](#).

The Panel also finds insufficient Complainant's reliance on Respondent's use of material copied or derived from Complainant's copyright works. These infractions, most of which Respondent corrected in response to Complainant's protests, are not quantitatively enough to support a finding that Respondent "intentionally attempted to attract, for commercial gain, Internet users by creating a likelihood of confusion with the complainant's mark." It is equally likely that Respondent only sought to offer Internet visitors the information in the articles without any intention to exploit any suggestion of affiliation.

The Panel also rejects, as explained above, Respondent's contention that a different analysis applies in cases involving the resale of vehicles. The Panel recognizes that in all nominative fair use cases, including cases involving a domain name comprising a prominent vehicle trademark and an additional term(s), there is a risk of implied affiliation, but this simply highlights the need to closely examine the merits of a respondent's claims under the second element, for which the *Oki Data* test is helpful, and under the third element, in light of the totality of the circumstances.

"The Policy is only designed to deal with clear cases of cybersquatting. This procedure is not a convenient forum for resolving borderline disputes and/or cases involving material conflicts of fact." *Centennial Communications Corporation and Centennial de Puerto Rico v. Centennial*, WIPO Case No. [D2000-1385](#).

This is a case where more information, as well as the interpretation of the Lanham Act in the particular jurisdiction where any dispute would be resolved, could be determinative.

On the abbreviated record available in a UDRP proceeding and with no discovery, the Panel can only determine that the information available at this point neither rises to the level necessary under the Policy to show rights or legitimate interests, nor rises to the level necessary under the Policy to show bad faith.⁸

⁸ The "Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy" notes three "fundamental observations" in connection with the approval of the UDRP implementation documents. One such observation relates to the "minimalist" nature of proceedings under the Policy, and notes that the UDRP "calls for administrative resolution for only a small, special class of disputes. Except in cases involving 'abusive registrations' made with bad-faith intent to profit commercially from others' trademarks (e.g., cybersquatting and cyberpiracy), the Policy leaves the resolution of disputes to the courts (or arbitrators where agreed by the parties) and calls for registrars not to disturb a registration until those courts decide. The Policy establishes a streamlined, inexpensive administrative dispute-resolution procedure intended only for the relatively narrow class of cases of 'abusive registrations.' Thus, the fact that the Policy's administrative dispute-resolution procedure does not extend to cases where a registered domain name is subject to a legitimate dispute (and may ultimately be found to violate the challenger's trademark) is a feature of the policy, not a flaw. The Policy relegates all 'legitimate' disputes--such as those where both disputants had longstanding trademark rights in the name when it was registered as a domain name--to the courts; only cases of abusive registrations are intended to be subject to the streamlined

Based on the available record, the Panel finds the third element of the Policy has not been established.

7. Decision

For the foregoing reasons, the Complaint is denied.

/Lawrence K. Nodine/
Lawrence K. Nodine
Presiding Panelist

/Bradley A. Slutsky/
Bradley A. Slutsky
Panelist (Concurring)

/W. Scott Blackmer/
W. Scott Blackmer
Panelist
Date: February 5, 2024

OPINION CONCURRING IN PART AND CONCURRING IN THE DECISION

I concur with the Panel's conclusions that the Disputed Domain Name is confusingly similar to a trademark in which Complainant has rights, that Respondent has not met his burden of production with respect to rights and legitimate interests because Respondent has not sufficiently demonstrated a bona fide offering of goods or services, and that in the context of an abbreviated proceeding such as this there is insufficient evidence to show that Respondent registered and is using the Disputed Domain Name in bad faith. In this case, the "likelihood of confusion" specified in Section 4(b)(iv) of the Policy could turn on factors such as nominative fair use and the effectiveness (if any) of Respondent's disclaimers, as well as facts such as whether there may be any detrimental reliance on the part of Respondent flowing from the action of Complaint, and whether there is any evidence of actual confusion. As the Panel's decision notes, UDRP proceedings are designed to deal with clear cases of cybersquatting and are not well suited for resolving "cases where a registered domain name is subject to a legitimate dispute (and may ultimately be found to violate the challenger's trademark)". For these reasons, I concur that the Complaint should be denied.

/Bradley A. Slutsky/
Bradley A. Slutsky
Panelist (Concurring)