

ADMINISTRATIVE PANEL DECISION

Rocky Point Pty Ltd. v. Alexander Avery
Case No. DAU2022-0029

1. The Parties

The Complainant is Rocky Point Pty Ltd., Australia.

The Respondent is Alexander Avery.

2. The Domain Name and Registrar

The disputed domain name <rockypoint.au> is registered with Domain Shield Pty Ltd (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on October 20, 2022. On October 20, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On October 26, 2022, the Registrar transmitted by email to the Center its verification response:

- a) confirming the disputed domain name is registered with it;
- b) confirming the language of the registration agreement is English; and
- c) that the Respondent is listed as the registrant and providing the contact details.

The Center verified that the Complaint satisfied the formal requirements of the .au Dispute Resolution Policy (the “Policy” or “.auDRP”), the Rules for .au Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for .au Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on October 28, 2022. In accordance with the Rules, paragraph 5(a), the due date for Response was November 17, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on November 21, 2022.

The Center appointed Warwick A. Rothnie as the sole panelist in this matter on November 28, 2022. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and

Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is the registered owner of Australian Registered Trade Mark No. 2010429, ROCKY POINT and “R” device. The trade mark is registered in respect of a range agricultural and horticultural chemicals and products. It was filed on, and is registered from, May 20, 2019.

The Complainant appears to offer a range of organic and other gardening products from a website to which the domain name <rockypoint.com.au> resolves. The website claims the business has been operating since 1949.

According to the Complaint, the disputed domain name was registered on October 4, 2022.

At present, it does not resolve to an active website.

The Panel notes that it has been only in the course of this year that it has been possible to register a domain name directly in the “.au” Top-Level Domain and, further, the Priority Application Period for existing registrants of domain names to apply to register their domain name directly in the “.au” domain space expired on September 20, 2022.¹

5. Discussion and Findings

No response has been filed. The Complaint and Written Notice have been sent, however, to the Respondent at the electronic and physical coordinates confirmed as correct by the Registrar in accordance with paragraph 2(a) of the Rules. Bearing in mind the duty of the holder of a domain name to provide and keep up to date correct Whois details, therefore, the Panel finds that the Respondent has been given a fair opportunity to present his or her case.

When a respondent has defaulted, paragraph 14(a) of the Rules requires the Panel to proceed to a decision on the Complaint in the absence of exceptional circumstances. Accordingly, paragraph 15(a) of the Rules requires the Panel to decide the dispute on the basis of the statements and documents that have been submitted and any rules and principles of law deemed applicable.

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of the disputed domain name, the Complainant must demonstrate each of the following:

- (i) the disputed 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 has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) the disputed domain name has been registered or subsequently used in bad faith.

A. Identical or Confusingly Similar

The first element that the Complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the Complainant’s name, trade mark or service mark.

¹ See e.g. .au direct Priority Allocation: contested .au direct domain names, available at <https://www.auda.org.au/blog/au-direct-priority-allocation-contested-au-direct-domain-names>.

There are two parts to this inquiry: the Complainant must demonstrate that it has rights in a trade mark or a name² at the date the Complaint was filed and, if so, the disputed domain name must be identical or confusingly similar to the trade mark.

The Complainant has proven that it owns Australian Registered Trade Mark No 2010429.

The Complaint also claims that the Complainant's trading name, "Rocky Point", is well known as the Complainant uses it to sell products across Australia. That may well be the case. The Complainant, however has not offered any evidence in support of that claim such as information about when the Complainant's use commenced, sales revenues or advertising expenditure. In those circumstances, it is not appropriate for the Panel to proceed on the basis of the Complainant's claim. See e.g. auDA Overview of Panel Views on Selected auDRP Questions First Edition ("auDRP Overview 1.0"), section 1.7.

On the question of identity or confusing similarity, what is required is simply a visual and aural comparison and assessment of the disputed domain name itself to the Complainant's trade mark: see for example, *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd.*, WIPO Case No. [DAU2002-0001](#). This test is narrower than and thus different to the question of "likelihood of confusion" under trade mark law which can require an assessment of the nature of the goods or services protected and those for which any impugned use is involved, geographical location or timing. Such matters, if relevant however, may fall for consideration under the other elements of the Policy.

Typically and as is appropriate in this case, it is permissible to disregard the Top-Level Domain ".au", as a functional component of the domain naming system. See for example auDRP Overview 1.0, section 1.2. It is also usual to disregard the design elements of a trade mark under the first element as such elements are generally incapable of representation in a domain name. See for example, auDRP Overview 1.0, section 1.11.

Arguably, the design element in the Complainant's trade mark, the letter "R" presented in a slightly stylised script", could be included in a domain name. Nonetheless, the verbal element of the Complainant's trade mark is clearly recognisable in, and as, the disputed domain name.

Accordingly, the Panel finds that the disputed domain name is at least confusingly similar to the Complainant's trade mark and arguably identical. Therefore, the Complainant has established the first requirement under the Policy.

B. Rights or Legitimate Interests

The second requirement the Complainant must prove is that the Respondent has no rights or legitimate interests in the disputed domain name.

Paragraph 4(c) of the Policy provides that the following circumstances may be situations in which a respondent has rights or legitimate interests in a disputed domain name:

- (i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services (not being the offering of domain names that the respondent has acquired for the purpose of selling, renting or otherwise transferring); or
- (ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trade mark or service mark rights; or

² Footnote 1 to the Policy defines a "name" for this purpose as a reference to:

"a) the complainant's company, business or other legal or trading name, as registered with the relevant Australian government authority; or

"b) the complainant's personal name."

(iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue.

These are illustrative only and are not an exhaustive listing of the situations in which a respondent can show rights or legitimate interests in a domain name.

The onus of proving this requirement, like each element, falls on the Complainant. Previous panels have recognized the difficulties inherent in proving a negative, however, especially in circumstances where much of the relevant information is in, or likely to be in, the possession of the respondent. Accordingly, it is usually sufficient for a complainant to raise a *prima facie* case against the respondent under this head and an evidential burden will shift to the respondent to rebut that *prima facie* case. The ultimate burden of proof, however, remains with the Complainant. See e.g., *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd*, WIPO Case No. [DAU2002-0001](#).

In the present case, the disputed domain name was registered after the Complainant registered its trade mark.

The Complainant states that it has not authorised the Respondent to use the Complainant's trade mark or register the disputed domain name. The Complainant also states that the Respondent is not in any way associated with the Complainant or its business.

The Complainant further points out that the disputed domain name is not derived from the Respondent's name. In addition, the Complainant states it is not aware of any other name by which the Respondent is commonly known.

The term "Rocky Point" could in a number of contexts be a geographical expression. Indeed, a Google search discloses at least two places called "Rocky Point" in Victoria, Australia alone. However, neither is anywhere near the Respondent's address. However, there is no evidence before the Panel that the Respondent registered the disputed domain name for use in connection with some geographical significance.

The Complaint was filed very soon after the disputed domain name was registered. However, not only is there no evidence before the Panel about how, if at all, the Respondent is using the disputed domain name, but there is also no evidence that the Respondent has taken any steps in preparation for some use. Accordingly, there is no evidence before the Panel from which the circumstances outlined in paragraph 4(c)(i) and (iii) of the Policy could be inferred.

These circumstances would typically be sufficient to raise the required *prima facie* case against the Respondent.

In these circumstances and bearing in mind that the Respondent has not claimed he registered the disputed domain name for its geographical significance or for some other purpose that did not conflict with the Complainant's rights or otherwise to rebut the allegation that he has no rights or legitimate interests in the disputed domain name, the Panel finds that the Complainant has established the required *prima facie* case under this limb of the Policy.

As the evidential burden has shifted to the Respondent and the Respondent has not made any attempt to rebut the allegation that he has no rights or legitimate interests in the disputed domain name, therefore, the Panel finds that the Complainant has established this requirement under the Policy.

C. Registered or Subsequently Used in Bad Faith

In contrast to the Uniform Domain Name Dispute Resolution Policy, the Complainant must establish that the disputed domain name has been either registered or subsequently used in bad faith by the Respondent under the third requirement of the Policy.

Paragraph 4(b) of the Policy provides that:

For the purposes of paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

- (i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or
- (ii) you have registered the domain name in order to prevent the owner of a name, trademark or service mark from reflecting that name or mark in a corresponding domain name; or
- (iii) you have registered the domain name primarily for the purpose of disrupting the business or activities of another person; or
- (iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to a website or other online location, by creating a likelihood of confusion with the complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of that website or location or of a product or service on that website or location; or
- (v) if any of your representations or warranties as to eligibility or third party rights given on application or renewal are, or subsequently become, false or misleading in any manner.

As the terms of paragraph 4(b) make clear, the instances of bad faith set out in paragraph 4(b) of the Policy are examples only, intended to illustrate types of conduct which is caught by the Policy. They are provided as particular types of bad faith but without limitation to other conduct which may reveal bad faith.

The Complainant alleges that the Respondent registered the disputed domain name to prevent the Complainant from reflecting its trade mark in a corresponding domain name. The Complainant also alleges that the Respondent was aware of the Complainant's claimed reputation when registering the disputed domain name.

While the Complainant has not provided evidence of its claimed reputation, it has proven its registered trade mark. On the other hand, the Respondent has not taken the opportunity to deny knowledge of the Complainant and its trade mark, the allegations of bad faith or otherwise defend the registration.

Generally, registration of a domain name in circumstances where the registrant has been found not to have rights or legitimate interests in the domain name would not qualify as registration in good faith under the Policy, at least where a respondent has made no attempt to deny knowledge of the complainant's trade mark nor to rebut the inferences that it has no rights or legitimate interests or bad faith.

In this case, the disputed domain name does block the Complainant from reflecting its name in a domain name directly in the ".au" Top-Level Domain. In this respect, the Panel notes that the Complainant offers its products from a website at the domain name <rockypoint.com.au>, which is identical to the disputed domain name. Accordingly, as the Panel has found that the Respondent does not have rights or legitimate interests in the disputed domain name and the registration of the disputed domain name blocks the Complainant from registering its trade mark directly in the ".au" Top-Level Domain, it follows that the disputed domain name has been registered in bad faith.

Accordingly, the Complainant has established all three requirements under the Policy.

6. Decision

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the domain name, <rockypoint.au>, be transferred to the Complainant.

/Warwick A. Rothnie/

Warwick A. Rothnie

Sole Panelist

Date: December 12, 2022