

**IN THE MATTER OF A COMPLAINT PURSUANT TO THE CANADIAN
INTERNET REGISTRATION AUTHORITY DOMAIN NAME DISPUTE
RESOLUTION POLICY**

Complainant: Electronic Products Recycling Association – 4005 Matte Blvd., Brossard, Quebec J4Y 2P4

Complainant Counsel: Me Douglas Clarke & Me Pierre-Marc Gendron of Therrien Couture Lawyers L.L.P. – 2685 Boul. Casavant O., #215, Saint-Hyacinthe, Quebec J2S 8B8

Registrant: Jean-Francois Rivard – 6696 rue Vezina, Quebec, Quebec G3E 2J3

Disputed Domain Name: arpe.ca

Panelist: Paul W. Donovan

Service Provider: Resolution Canada Inc.

DECISION

The Parties

1. The Complainant is Electronic Products Recycling Association of 4005 Matte Blvd., Brossard, Quebec J4Y 2P4.
2. The Complainant is represented by Me Douglas Clarke & Me Pierre-Marc Gendron of Therrien Couture Lawyers L.L.P., 2685 Boul. Casavant O., #215, Saint-Hyacinthe, Quebec J2S 8B8.
3. The Registrant is Jean-Francois Rivard of 6696 rue Vezina, Quebec, Quebec G3E 2J3

The Domain Name and Registrar

4. The disputed domain name is arpe.ca.
5. The Registrar with which the disputed domain name is registered is Tucows.com Co., 96 Mowat Avenue, Toronto, Ontario, M6K 3M1.

Procedural History and Rules

6. The Complainant commenced this proceeding under the Canadian Internet Registration Authority (“CIRA”) Domain Name Dispute Resolution Policy (Version 1.3) (“the Policy”) and the CIRA Domain Name Dispute Resolution Rules (Version 1.4) (“the Rules”) by a complaint dated August 28, 2013.

7. The service provider Resolution Canada Inc. determined that the complaint was in administrative compliance with the Policy and the Rules and forwarded a copy of the complaint to the Registrant on September 25, 2013.
8. The Registrant did not file any reply to the complaint.
9. The Panel finds that it was properly constituted pursuant to the Policy and the Rules, and that all of the requirements under the Policy and the Rules for the commencement and maintenance of this proceeding have been met.

Canadian Presence Requirements

10. The Panel finds that the Complainant is an Eligible Complainant (see paragraph 1.4 of the Policy) and has met the Canadian Presence Requirements by virtue of the fact that the Complainant is a corporation under the laws of Canada. Specifically, the Complainant is a corporation duly incorporated under the *Canada Not-for-Profit Corporations Act*.

The Complaint

11. Pursuant to paragraph 4.1 of the Policy, to succeed in this proceeding the Complainant must prove, on a balance of probabilities, that:
 - (i) the Registrant's dot-ca domain name is Confusingly Similar to a Mark in which the Complainant had Rights prior to the date of registration of the domain name and continues to have such Rights; and
 - (ii) the Registrant has registered the domain name in bad faith as described in paragraph 3.5 of the Policy.
12. The Complainant must also provide some evidence that the Registrant has no legitimate interest in the domain name as described in paragraph 3.4 of the Policy. Even if the Complainant proves the first two elements of the test as set out in paragraph 11, above, and provides some evidence that the Registrant has no legitimate interest in the domain name, the Registrant will succeed in the proceeding if the Registrant proves, on a balance of probabilities, that the Registrant has a legitimate interest in the domain name.

Is the Registrant's dot-ca domain name Confusingly Similar to a Mark in which the Complainant had rights prior to the date of registration of the disputed domain name and continues to have such rights?

13. The disputed domain name was registered on September 27, 2012.

14. The terms “Confusingly Similar” and “Mark” are both specifically defined in the Policy.
15. The Complainant has asserted rights in the trade-mark ARPE & Design and the trade name ARPE-Quebec based on paragraph 3.2(a) of the Policy which states that a Mark is: “a trade-mark, including the word elements of a design mark, or a trade name that has been used in Canada by a person, or the person’s predecessor in title, for the purpose of distinguishing the wares, services or business of that person or predecessor or a licensor of that person or predecessor from the wares, services or business of another person”.
16. The Panel finds that the Complainant has rights in the trade-mark ARPE & Design and the trade name ARPE-Quebec as per the definition of Mark in paragraph 3.2(a) of the Policy. The Complainant has introduced evidence of a press release dated July 19, 2012. The press release clearly shows use of the trade-mark ARPE & Design and the trade name ARPE-Quebec. The Complainant submits that the unregistered trade-mark ARPE & Design is being used in association with the following services: “environmental services, namely, environmental stewardship in the field of arranging for and coordinating environmentally-responsible reuse and recycling for end-of-life products to assure compliance with environmental regulations”. The Panel is of the view that the July 19, 2012 press release is an advertisement for these services. Further, it appears from the press release itself that the Complainant (through its Quebec division ARPE-Quebec) has been actually providing such services in Quebec since July 14, 2012. The Panel is of the view the trade-mark ARPE & Design and the trade name ARPE-Quebec were both being used as of the date of the press release (July 19, 2012).
17. A disputed domain name will be held to be Confusingly Similar to a Mark if the domain name so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely to be mistaken for the Mark.
18. In the Panel’s view, the disputed domain name is Confusingly Similar to the Complainant’s Mark ARPE & Design. The dominant element of the trade-mark ARPE & Design is the acronym ARPE – which is identical to the disputed domain name. Further, in our view the disputed domain name is Confusingly Similar to the Complainant’s Mark ARPE-Quebec. The disputed domain name replicates the entirety of the distinctive portion of the Complainant’s Mark ARPE-Quebec (the acronym ARPE) and only leaves out the descriptive portion (the word Quebec).
19. The use of the Complainant’s Marks (July 2012) is prior to the registration of the disputed domain name (September 2012). The Complainant evidence suggests that the Complainant continues to have such rights in the Marks.

20. The Panel is of the view that the Complainant has met its burden in establishing that the disputed domain name is Confusingly Similar to a Mark in which the Complainant had rights prior to the date of registration of the disputed domain name and continues to have such rights.

Did the Registrant register the domain name in bad faith?

21. Under paragraph 3.5 of the Policy, any of the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence that a Registrant has registered a domain name in bad faith:
- (i) the Registrant registered the domain name, or acquired the Registration, primarily for the purpose of selling, renting, licensing or otherwise transferring the Registration to the Complainant, or the Complainant's licensor or licensee of the Mark, or to a competitor of the Complainant or the licensee or licensor for valuable consideration in excess of the Registrant's actual costs of registering the domain name, or acquiring the Registration;
 - (ii) the Registrant registered the domain name or acquired the Registration in order to prevent the Complainant, or the Complainant's licensor or licensee of the Mark, from registering the Mark as a domain name, provided that the Registrant, alone or in concert with one or more additional persons has engaged in a pattern of registering domain names in order to prevent persons who have Rights in Marks from registering the Marks as domain names;
 - (iii) the Registrant registered the domain name or acquired the Registration primarily for the purpose of disrupting the business of the Complainant, or the Complainant's licensor or licensee of the Mark, who is a competitor of the Registrant; or
 - (iv) the Registrant has intentionally attempted to attract, for commercial gain, Internet users to the Registrant's website or other on-line location, by creating a likelihood of confusion with the Complainant's Mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.
22. The Complainant has only alleged bad faith pursuant to (ii) and (iii), above, which correspond to paragraphs 3.5(b) and (c) of the Policy respectively. Each of these subparagraphs will be analyzed in turn.

Paragraph 3.5(b) Bad Faith

23. As noted above, paragraph 3.5(b) of the Policy states that the Registrant will be considered to have registered the domain name in bad faith if the Registrant registered the domain name or acquired the Registration in order to prevent the Complainant, or the Complainant's licensor or licensee of the Mark, from registering the Mark as a domain name, provided that the Registrant, alone or in concert with one or more additional persons has engaged in a pattern of registering domain names in order to prevent persons who have Rights in Marks from registering the Marks as domain names.
24. The Complainant has suggested that the Registrant acted in concert with Martin Chenier, the owner of www.arpe-quebec.com. The evidence shows that both the disputed domain name and the arpe-quebec.com domain name were registered on September 27, 2012, and that both domain names resolved to virtually identical websites. Both websites also contained links to a pornographic website (www.jalf.com) which also listed Mr. Chenier as a technical contact.
25. The Panel finds that the Registrant has registered the domain name in bad faith as per paragraph 3.5(b) of the Policy. The Panel finds that the Complainant has supplied it with enough evidence that it finds on a balance of probabilities that the Registrant registered the domain name in order to prevent the Complainant from registering the Mark as a domain name. The Panel also finds on a balance of probabilities that the Registrant has acted in concert with Mr. Chenier. The Panel finds that both websites were registered on the same day, through the same Registrar, and contain virtually identical content and identical links to a pornographic website. These circumstances cannot be ascribed to chance or coincidence and the Panel is of the view that the only reasonable conclusion to be drawn from the facts is that the Registrant acted in concert with Mr. Chenier.

Paragraph 3.5(c) Bad Faith

26. The Complainant has also raised an allegation of bad faith pursuant to paragraph 3.5(c) of the Policy. As noted above, paragraph 3.5(c) of the Policy states that bad faith will be found where the Registrant registered the domain name or acquired the Registration primarily for the purpose of disrupting the business of the Complainant, or the Complainant's licensor or licensee of the Mark, who is a competitor of the Registrant.
27. The Panel finds that the Registrant registered the domain name primarily for the purpose of disrupting the business of the Complainant. As noted by the Complainant, the disputed domain name resolves to a website which contains various accusations that certain environmental handling fees are caused by the Complainant. The Complainant characterizes these accusations as false. The website featured the comment "Since you're going to be screwed, you may as well decide by whom by clicking here" and this comment linked to a

pornographic website. The website at the disputed domain name also contained a false copyright notice. In our view, all of the above, when viewed in their totality, suggests that the Registrant registered the domain name primarily for the purpose of disrupting the business of the Complainant.

28. However, the Panel notes that for paragraph 3.5(c) of the Policy also requires that the Complainant be a “competitor” of the Registrant. The term “competitor” is not defined in the Policy or the Rules. The Complainant has submitted that the notion of competitor must receive a liberal interpretation to include competing for online traffic, and the Complainant relies on a number of previous dot-ca domain name decisions in support of this conclusion.
29. With respect, the Panel cannot agree with the proposed interpretation of “competitor” as submitted by the Registrant. If “competing for online traffic” made one a competitor, the Panel cannot think of a circumstance in which the owner of a disputed domain name who acquired the domain name for the purpose of disrupting the business of a complainant would not be a competitor with a complainant – as all such domain names would be competing for online traffic with the complainant in such a proceeding. Such an interpretation would, in the Panel’s view, render redundant the requirement that the Complainant be a competitor of the Registrant. In the Panel’s view, something more than “competing for online traffic” is required for a finding that the Complainant is a competitor of the Registrant. It is not necessary for the Panel to provide its further thoughts on the definition of “competitor” under the Policy since the Complainant has focused its proposed interpretation on “competing for online traffic” which as noted above the Panel does not endorse such an interpretation. To the extent that the cases referred to by the Complainant endorse such a liberal interpretation of “competitor”, this Panel can only state does it does not agree with such an interpretation and that it does not feel bound by the decisions of previous panels on the definition of “competitor”.
30. The Panel therefore finds that the Registrant has **not** registered the domain name in bad faith as per paragraph 3.5(c) of the Policy.

Does the Registrant have a legitimate interest in the disputed domain name?

31. Paragraph 3.4 of the Policy provides a non-exhaustive list of various criteria that a panel is to consider in assessing legitimate interest. The Policy requires that the Complainant must provide some evidence that the Registrant has no legitimate interest in the domain name as described in paragraph 3.4. If the Complainant meets this burden, the Registrant will still succeed in the proceeding if it proves on a balance of probabilities that it has a legitimate interest in the disputed domain name.

32. Based on a review of the evidence and submissions, the Panel is of the view that the Complainant has met its initial burden of providing *some* evidence that the Registrant has no legitimate interest in the domain name as described in paragraph 3.4. In particular, the Complainant has provided some evidence that the disputed domain name was not a Mark that the Registrant used in good faith and that the Registrant had rights in the Mark. The Complainant has also met its burden in showing that the domain name is not a clearly descriptive or generic name associated with the wares or services offered on the website, and that the Registrant did not use the domain name in good faith in association with a non-commercial activity. Finally, the Complainant has met its burden in showing that the domain name is not the legal name of the Registrant or some other name by which it was commonly identified, nor was the domain name the geographic name or the location of the Registrant's non-commercial activity or business.
33. As a result, the Panel finds that the Complainant has met its burden of showing *some* evidence that the Registrant had no legitimate interest in the disputed domain name under this subparagraph. The Panel is of the opinion that this finding is sufficient for the Complainant to meet its burden pursuant to paragraph 4.1(c) of the Policy.

Burden shifts to Registrant to prove Legitimate Interest on a balance of probabilities

34. Since the Complainant has met its burden pursuant to paragraph 4.1(c) of the Policy, the Registrant can only succeed in this proceeding if the Registrant proves, on a balance of probabilities, that the Registrant has a legitimate interest in the domain name. Since the Registrant has not filed a reply to the complaint, the Panel is of the opinion that it is unable to find, on a balance of probabilities, that the Registrant has a legitimate interest in the disputed domain name pursuant to paragraph 3.4 of the Policy.

Summary of Findings

35. The Panel has found that the Complainant has proven, on a balance of probabilities, that the disputed domain name is Confusingly Similar to a Mark in which the Complainant had rights prior to the date of registration of the domain name and continues to have such rights, and that the Registrant has registered the disputed domain name in bad faith as such term is described in paragraph 3.5(b) of the Policy. Further, the Panel finds that the Complainant has provided some evidence that the Registrant has no legitimate interest in the disputed domain name, as that term is defined in paragraph 3.4 of the Policy, and that the Registrant has failed to meet its burden of proving, on a balance of probabilities, that it has a legitimate interest in the disputed domain name.

36. As a result of the above findings, the Panel orders that the disputed domain name www.arpe.ca be transferred from the Registrant to the Complainant.

DATE: November 11, 2013

A handwritten signature in cursive script, appearing to read "Paul W. Donovan", is written over a horizontal line.

Paul W. Donovan
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Barrister & Solicitor
Trade-mark Agent