



CANADIAN INTERNATIONAL INTERNET DISPUTE RESOLUTION CENTRE

DOMAIN NAME DISPUTE

ADMINISTRATIVE PANEL DECISION

CIIDRC case number:	17880-UDRP	Decision date: July 28, 2022
Domain Name:	d9thccarts.com	
Panel:	James Plotkin	
Complainant:	Delta 9 Bio-Tech Inc.	
Complainant's representative:	Lorraine Pinsent, MLT Aikens LLP	
Registrant:	N trading BV	

1. PROCEDURAL HISTORY

1. This is a dispute conducted pursuant to the Uniform Domain Name Dispute Resolution Policy (the “**UDRP**”) and the Rules for Uniform Domain Name Dispute Resolution Policy (the “**Rules**”) of the Internet Corporation for Assigned Names and Numbers (ICANN).
2. The domain name at issue in this proceeding is <d9thccarts.com> (the “**Domain Name**”).
3. On July 19, 2022, the Canadian International Internet Dispute Resolution Centre (“**CIIDRC**”) transmitted a letter to the Panel setting out the procedural history in this case:
 - a. On June 23, 2022, Delta 9 Bio-Tech Inc. (the “**Complainant**”) filed a Complaint pursuant to the UDRP and the Rules.
 - b. On June 24, 2022, the CIIDRC notified the Domain Name's Registrar of this proceeding.

- c. On June 24, 2022, the Registrar transmitted by email to the CIIDRC its verification response providing CIIDRC with the Registrant's ("**Respondent**") identity and coordinates. The Registrar also confirmed the Domain Name was placed on a Registrar LOCK.
 - d. On June 24, 2022, the CIIDRC, as Service Provider, confirmed the Complaint's compliance with the UDRP and the Rules and commenced this dispute resolution process.
 - e. Pursuant to UDRP Rule 4 and Supplemental Rule 5, the CIIDRC notified the Respondent of this proceeding on June 24, 2022. At that time, the CIIDRC forwarded the Respondent a notice with login information and the link to the Complaint.
 - f. The Respondent's Response was due July 14, 2022. It failed to file its response by the deadline. The CIIDRC wrote the Respondent on the same day advising of its non-compliance and giving notice that the CIIDRC would proceed with the Panel's appointment in accordance with the Rules. To the best of the Panel's knowledge, the Respondent never replied to the CIIDRC's July 14, 2022 email.
 - g. The Complainant has elected for a Panel consisting of a single-member.
4. On July 19, 2022, upon receiving confirmation as to my independence and impartiality in respect of the parties to this dispute, the CIIDRC appointed me as a single-member Panel in this matter.

2. CONTENTIONS OF THE PARTIES

2.1 Complainant

- 5. The Complainant was founded in 2012. It obtained a license to distribute medical cannabis in 2014. The Complainant is a wholly-owned subsidiary of Delta 9 Cannabis Inc. and is its licensed producer of medical and recreational cannabis and cannabis derivatives across Canada.
- 6. The Complainant is the registrant of the <delta9.ca> domain [**Complainant Annex 4**].
- 7. The Complainant owns a number of trademarks registered with the Canadian Intellectual Property Office that include DELTA 9 as part of the mark. These include DELTA 9, DELTA 9 CANNABIS & DESIGN and DELTA 9 GROW PODS & DESIGN [**Complainant Annex 5**].
- 8. The Complainant contends that the Respondent is using the Domain Name to pass itself off as the Complainant. It says the Respondent copied the content of its website. In support, it provides screenshots of the "Overview" pages of its own website (hosted at <delta9.ca>) and the website hosted at the Domain Name [**Complainant Annexes 6 and 7**]. The text and visual content is nearly identical.

9. The Complainant also provided screenshots showing the Respondent's use of the Complainant's trademark on the website hosted at the Domain Name, and also its marketing of what appear to be identical products to those the Complainant sells on its website (vape pens and cartridges) **[Complainant Annexes 8-12]**.
10. Finally, with respect to the Respondent's website content, the Complainant says the terms of service on the Respondent's website are identical to the Complainant's, including the statement on the Respondent's webpage that the website hosted at the Domain Name is "operated by Delta 9 Cannabis" **[Complainant Annexes 13 and 14]**.
11. The Panel sets out the Complainant's submissions on each of the UDRP elements verbatim.
12. With respect to the first element of the UDRP analysis—whether the Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights—the Complainant submits:
 11. Please see above for more information about the Complainant and its registered trademarks. The Disputed Domain is using a number of registered trademarks owned by the Complainant without permission.
 12. The Disputed Name is not identical to delta9.ca, however, it is clearly designed to be confusingly similar to the Complainant's legitimate domain name and nature of the products sold. d9 for delta 9, THC is in reference to an ingredient in the cannabis content and carts is short for cartridges.
13. With respect to the second element of the UDRP analysis—whether the Respondent has —the Complainant submits:
 13. It would appear that the Disputed Domain was created to pass off on the Complainant and their business. There is no evidence of any legitimate rights in the Disputed Domain. Most of the content on the Disputed Domain website was copied from the Complainant's website as shown in *Annexes 6-10*.
 14. As such, there is a prima facie case that this element has been met in this case.
 15. CIIDRC case number 16308-UDRP **[hyperlink omitted]** confirms that a prima facie case is all that is required for this element:

Even though the Policy requires the complainant to prove that the respondent has no rights or legitimate interests in the disputed domain name, it is the consensus view among UDRP panels that a complainant has to make only a prima facie case to fulfill the requirements of Paragraph 4(a)(ii) of the Policy. As a result, once a prima facie case is made, the burden of coming forward with evidence of the respondent's rights or legitimate interests in the disputed domain name will then shift to the respondent (cf. section 2.1 of the WIPO Overview 3.0). **[italics in original]**

16. The copying of the Complainant's website content suggests that the Respondent has no legitimate rights or legitimate interests in the Disputed Name, except to create confusion in the marketplace.

14. With respect to the third element of the UDRP analysis—whether the Domain Name has been registered and is being used in bad faith—the Complainant submits:

17. On the home page of the Respondent's website the claim "Delta-9 THC Vapes are more famous for its capability to get a person instantaneously, outrageously high For regular THC Vape users, they love the high that comes from Delta-9 THC Vape carts" is made. In Canada, the Cannabis Act forbids a producer and/or retailer from using any hyperbolic language to promote the potential effects of any cannabis product. The Complainant has never use (sic) this language on their website or in-store. The use of this type of language could potentially result in a hefty fine or even imprisonment for the Complainant.

18. The Respondent appears to be intentionally using the Disputed Domain name to attract internet users to the Respondent's website for commercial gain. The Complainant has developed good will and a reputation in the marketplace through use of its trademarks in association with its cannabis business. As shown in the evidence in the attached Annexes, the Respondent is clearly copying the Complainant's website and using the Complainant's trademark as a means to create confusion in the marketplace.

19. Internet users upon seeing the Respondent's website would likely assume that the Respondent was sponsored or affiliated by the Complainant, therefore, creating a likelihood of confusion with the Complainant's trademark as to the source of the products on the Respondent's website.

20. The copied content from the Complainant's website provides clear evidence that the Disputed Domain was registered and is being used in bad faith.

2.2 Registrant

15. As noted in paragraph 3(f) above, the Respondent did not file a Response in the time allotted under the Rules.

2.3 Remedy Sought

16. The Complainant requests that the Domain Name be transferred.

3. DISCUSSION AND FINDINGS

3.1 UDRP Requirements

17. In accordance with UDRP Paragraph 4, the Complainant must prove that:

1. the Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights (UDRP paragraph 4(a)(i));

2. the Registrant has no rights or legitimate interests in the Domain Name (UDRP paragraph 4(a)(ii)); and
3. the Domain Name has been registered and is being used in bad faith (UDRP paragraph 4(a)(iii)).

18. Although the Respondent failed to file a response, the Complainant must still demonstrate each of the three UDRP prongs are met. With respect to the first and third prongs, the Complainant must make its case on a balance of probabilities. With respect to the second prong—the Respondent’s lack of legitimate interest—the Complainant need only mount a *prima facie* case, at which point the burden shifts to the Respondent to demonstrate a legitimate interest on a balance of probabilities. Since the Respondent did not file a response, a *prima facie* showing by the Complainant is sufficient to dispose of the legitimate interest prong.

3.2 Analysis

19. The Panel dismisses the Complaint for the following reasons.

20. The Complainant has met its burden in demonstrating both the Respondent’s lack of right/legitimate interest in the Domain Name and its bad faith use and registration. The Panel is nonetheless unable to conclude, based on the evidence and submissions provided, that the Domain Name is identical or confusingly similar to any of the marks upon which the Complainant based this Complaint.

21. Although the Complainant’s failure to meet the first prong of the UDRP analysis is dispositive, the Panel will assess all three UDRP elements.

4.2.1 The Domain Name is Identical or Confusingly Similar to a Mark in which the Complainant has Rights

22. The marks forming the basis of the Complaint, all of which predate the Domain Name’s registration, are the following:

- a. DELTA9 (word mark)



- b. (Delta9 Grow Pods design mark)



23. Where the complainant holds a nationally or regionally registered trademark or service mark, this *prima facie* satisfies the threshold requirement of having trademark rights needed to establish standing under the UDRP [WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“WIPO Jurisprudential Overview 3.0”), s. 1.2.1]
24. When assessing identity or confusing similarity under UDRP paragraph 4(a)(i) based on design marks, the Panel considers only the alphanumeric elements of the design mark [***American Public University System, Inc. v. Toby Schwarzkopf / Kyle Kupher / Domains by Proxy, LLC / DreamHost, LLC, WIPO Case No. D2017-0070***].
25. The Complainant concedes none of its marks are identical to the Domain Name (d9thccarts.com). The Complainant adduced no evidence suggesting it is commonly known as “D9”, or that it has any registered or unregistered rights in “D9”.
26. The Complainant urges the Panel to have regard to the content of the Respondent website to buttress a finding that the Domain Name is confusingly similar. The Panel declines to do so here.
27. Although Panels have occasionally considered the content of a website hosted at an impugned domain name under the first UDRP prong, the weight of authority holds this is generally inappropriate. As one Panel put it: “The test of confusing similarity under the Policy is confined to a comparison of the disputed domain name and the trademark alone, independent of the other marketing and use factors usually considered in trademark infringement or unfair competition cases. Thus, the content of the Respondents web site is irrelevant to this issue” [***Fondation Le Corbusier v. Monsieur Bernard Weber, Madame Heidi Weber, Case No. D2003-0251***, citing ***BWT Brands, Inc. and British Am. Tobacco (Brands), Inc v. NABR, WIPO Case No.D2001-1480***; ***Britannia Building Society v. Britannia Fraud Prevention, WIPO Case No. D2001-0505***; ***Wal-Mart Stores, Inc. v. Richard MacLeod d/b/a For Sale, WIPO Case No. D2000-0662***; ***Koninklijke Philips Elecs. N.V. v. In Seo Kim, WIPO Case No.D2001-1195***; ***Energy Source Inc. v. Your Energy Source, NAF Case No. FA 96364***; ***Vivendi Universal v. Mr. Jay David Sallen and GO247.COM, Inc., WIPO Case No.D2001-1121***].
28. Similarly, the WIPO Jurisprudential Overview 3.0 provides that “[t]he content of the website associated with the domain name is usually disregarded by panels when assessing confusing similarity under the first element” [WIPO Jurisprudential Overview 3.0, s. 1.15]. While website

content has been considered in “specific limited circumstances”, and “where a panel would benefit from affirmation as to confusing similarity”, such evidence is “not a replacement as such for the typical side-by-side comparison” [**WIPO Jurisprudential Overview 3.0, s. 1.7**].

29. The Panel agrees with these authorities. Although the Respondent’s website’s content is relevant in assessing the second and third prongs, the Panel will disregard that content for the purpose of assessing identity/confusing similarity under the first prong.

30. The Panel notes this was a difficult decision. Had the analysis under UDRP paragraph 4(a)(i) entailed considering other elements common to trademark infringement confusion analyses, such as similarity between the nature of the goods or services and channels of trade, the outcome might well have been different. However, undertaking a side-by-side, alphanumeric comparison of the Complainant’s marks and the Domain Name, the Panel concludes they are not confusingly similar. The following factors informed this decision:

- a. None of the Domain Name’s constituent components (i.e., “d9”, “THC” and “carts”) contain any of the Complainant’s marks or any alphanumeric component of them. This case is therefore distinguishable from the decision in ***F. Hoffmann-La Roche AG v. nithya devi, Case No. D2013-1102***, wherein the disputed domain name contained the complainant’s complete registered word mark plus descriptive terms.
- b. The Panel accepts the Complainant’s submission that THC is “an ingredient in the cannabis content”. Although THC is a descriptive term that does not weigh heavily in the confusion analysis, so too is “cannabis” (a word in the Complainant’s mark that most closely approximates the Domain Name). The word cannabis does little to add distinctiveness to the Complainant’s mark. Although THC is an ingredient in cannabis, the confusion analysis does not include the idea suggested by the words, only the words themselves. In that regard, the Complainant provided no authority that anything other than alphanumeric similarity (e.g., idea suggested by the mark or domain name) is relevant to assessing confusion under UDRP paragraph 4(a)(i).
- c. The evidence before the Panel does not establish that “carts” is short for cartridges as the Complainant asserts. As a matter of first impression, the Panel did not draw that inference. In any event, the word cartridge does not appear in any of the Complainant’s marks, nor does it figure among the statement of goods contained in any of the Complainant’s trademark registrations. Although the Complainant might sell cartridges for vape pens, that does not affect the purely alphanumeric, side-by-side confusion analysis under the UDRP.

31. The Panel reiterates that it did not consider the content of the Respondent's website in assessing confusion between the Complainant's marks and the Domain Name. With great respect to those Panels who concluded otherwise, the Panel is of the view that this falls outside the scope of the UDRP paragraph 4(a)(i) confusion analysis.
32. Finally, the constraints on the Panel under the UDRP requiring it to conduct only an alphanumeric comparison should not be taken as an opinion on the Complainant's prospects of success in suing for trademark infringement or passing off, which implicates a different and more detailed analysis.
33. In light of the foregoing, the Complainant has failed to establish that the Domain Name is identical or confusingly similar to a mark in which the Complainant has rights.

4.2.2 The Respondent has No Rights or Legitimate Interest in the Domain Name

34. The Panel finds this prong of the analysis is met.
35. Given the inherent difficulty in proving a negative, and given the evidence of a Respondent's legitimate interest in a domain name is often beyond the Complainant's grasp, authorities consistently hold that a Complainant need only lead "some evidence" to demonstrate a *prima facie* case that the Respondent lacks a legitimate interest. When this threshold is met, the burden shifts to the Respondent to demonstrate a legitimate interest on a balance of probabilities [e.g., **WIPO Jurisprudential Overview 3.0, para. 2.1; Document Technologies, Inc. v. International Electronic Communications Inc., WIPO Case No. D2000-0270; Belupo d.d. v. WACHEM d.o.o., WIPO Case No. D2004-0110; OSRAM GmbH. v. Mohammed Rafi/Domain Admin, Privacy Protection Service INC d/b/a PrivacyProtect.org, Case No. D2015-1149**].
36. The Complainant has led enough evidence to demonstrate, *prima facie*, that the Respondent has no legitimate interest in the Domain Name. Specifically, the Panel has reviewed the Annexes attached to the Complaint showing the content of the Complainant's website, on one hand, and the content of the website hosted at the Domain Name, on the other hand. They are materially identical.
37. The Panel notes that none of the three examples of legitimate interests set out in UDRP paragraph 4(c) are apparent on the face of the record. Although these are non-exhaustive, the Complainant has more than met its burden of showing some evidence that the Respondent lacks a legitimate interest. In the absence of any submissions or evidence from the Respondent, the Panel cannot identify the Respondent's legitimate interest in the Domain Name.

4.2.3 That the Respondent has Registered and Used the Domain Name in Bad Faith

38. The Panel finds this prong of the analysis is met.

39. UDRP paragraph 4(b) sets out a non-exhaustive list of indications that a respondent has registered and used a domain name in bad faith. Paragraph 4(b)(iv) reads:

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site 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 your web site or location or of a product or service on your web site or location.

40. Importantly, UDRP paragraph 4(b)(iv) does not require the Domain Name itself to be confusingly similar to the Complainant's mark(s); it only requires the use of the Domain Name as part of an attempt to attract, for commercial gain, Internet users to the Respondent's *website*. The confusion as to the "source, sponsorship, affiliation, or endorsement" of the website may arise from the content of the website itself.

41. In the present case, there is no doubt that the Respondent's website content is aimed at attracting users for the purpose of selling products under the guise of an affiliation with or sponsorship by the Complainant.

42. In light of the foregoing, the Panel concludes the Domain Name was registered and is being used in bad faith.

4 DECISION and ORDER

43. For the above reasons, in accordance with Paragraph 4 of the Policy, Paragraph 15 of the Rules, and Rule 10 of the Supplemental Rules, the Complaint is dismissed.

Made as of August 2, 2022 at Ottawa, Ontario, Canada

SIGNATURE OF PANEL


James Plotkin, Q.Arb

