**WIPO Arbitration and Mediation Center**

**ADMINISTRATIVE PANEL DECISION**

Fall Nummer: D2003-0544

Entscheidung vom 7. September 2003

1. The Parties

The Complainant is Iogen ..., Canada.

The Respondent is IOGEN, C/O B. S. of Virginia, United States of America.

2. The Domain Name and Registrar

The disputed domain name <iogen.com> is registered with Network Solutions, Inc., of United States of America.

3. Procedural History

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The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on July 10, 2003. On July 11, 2003, the Center transmitted by email to Network Solutions, Inc., a request for registrar verification in connection with the domain name at issue. On July 16, 2003, Network Solutions, Inc., transmitted by email to the Center its verification response, confirming that the Respondent is listed as the registrant and providing the contact details for the administrative, billing, and technical contact. On July 17, 2003, the Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy"), 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(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on July 17, 2003. In accordance with the Rules, paragraph 5(a), the due date for Response was August 6, 2003. The Response was filed with the Center on August 6, 2003.

The Center appointed Staniforth Ricketson as the Sole Panelist in this matter on August 12, 2003. 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.

The language of the proceeding is English.

4. Factual Background

According to the Complaint at p 5, the Complainant is a Canadian corporation, that has been involved (both itself and through its predecessors) in technology development for more than 25 years, principally in relation to the processing of plant fibre. The company now owns and operates what is claimed to be the worldâ??s first and only demonstration-scale bioethanol facility, and is described as "an industry-leading specialty enzyme business serving pulp and paper, textile, and animal feed markets." In 1997, the Complainant signed a partnership agreement with Petro-Canada, to build a demonstration scale facility using its novel technology, and in 2002, it entered a partnership with Royal Dutch Shell in relation to the commercialisation of options in biofuels. The Complaint states that the Complainant has more than $80 million in investment, and, in particular, that Shell has now invested $46 million in it with respect to their partnership in biofuels.

The Complainant owns several registered trademarks in Canada and the USA, as well as some pending applications. Two are contained in Annex 3 to the Complaint and are as follows:

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1. Registration No. 2,593,470 for the U.S: this comprises the words "IOGEN CORPORATION" registered on July 16, 2002, in respect of enzymes for modifying natural fibres used in a number of industries and for industrial chemicals derived from ethanol, as well as in respect of "ion detection systems". There is a disclaimer in relation to the word "CORPORATION" apart from the mark as shown.

2. Registration No. 544,235 for Canada for the words IOGEN.CORPORATION together with a device, registered April 30, 2001, with respect to similar goods together with electronic instrumentation and systems, as well as in respect of consulting services in relation to the processing of plant materials.

The Canadian trademark data (Complaint, Annex 3) lists "claims" that the mark has been used in Canada since at least July 1993 in respect of enzymes, since January 1997 in respect of ion detection systems, and since December 1997 in respect of electronic instrumentation and systems. More generally, the Complainant asserts (Complaint, para. 4) that it has been using the IOGEN trademark from at least 1993 in relation to these goods and services, but no evidence of such usage or its extent is provided in the Complaint.

So far as the disputed domain name is concerned, the WHOIS printout from Network Solutions (Complaint, Annex 1) shows the disputed domain name as having been registered in the name of the Respondent on October 16, 2002. However, in its Response, at para. 7, the Respondent asserts that it has been registered for "more than five years." Furthermore, it is clear that the domain name must have been registered in the Respondentâ??s name since at least September 1999, as the Complainant exhibits (Complaint, Annex 5) a series of emails between a representative of the Complainant and Mr. Bradley Smith of the Respondent, in which there were discussions of the use of the domain name and the possibility of selling it to the Complainant. There was a further exchange of emails in July 2001, and a further offer to sell the domain name. Subsequently, the present proceedings have been instituted by the Complainant under the Policy.

5. Partiesâ?? Contentions

A. Complainant

The Complainant argues that the different grounds required under the Policy have been satisfied.

As to the first requirement referred to in para. 4(a)(i), the Complainant points to its registered US and Canadian trade and service marks, as well as referring to its usage of the word IOGEN as a mark dating back to 1993. It then argues that the disputed domain name is identical or confusingly similar to these marks. In support of its argument, it contends that the ".com" suffix should be disregarded, and cites various decisions under the Policy to this effect (Complaint, para. 11). It also cites several instances of actual confusion where

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users searching for Iogen Corporation have ended up at the Respondentâ??s website, and were then redirected to other sites dealing with pornographic material (see Complaint, paras. 11 and 12, Annex 6).

As to the second requirement referred to in para. 4(a)(ii), the Complainant argues that there was no indication, before the notice of any dispute, that the Respondent had made any demonstrable preparations to use the domain name with a bona fide offering of goods and services. It then argues that any such use of the domain name that has occurred has been use in bad faith, noting that the domain name is not linked to any independently active website, but instead is redirected to a site located at "www.gofuckyourself.com" which operates as a portal site providing links to a number of pornographic websites. The Complainant argues that this kind of use of the domain name cannot establish legitimate rights or interests in the domain name, and again cites a number of decisions under the Policy relevant to this question. The Complainant further alleges that there is no evidence that the Respondent is commonly known by the domain name or has acquired any trade or service mark rights in relation to it, and that there is no evidence that the Respondent is intending to make a legitimate noncommercial or fair use of the domain name (Complaint, paras. 15-17).

As to the third requirement referred to in para. 4(a)(iii), the Complainant argues that the Respondentâ??s registration and use of the domain name has been in bad faith by reference to a number of matters: the exchange of correspondence referred to above with respect to the transfer of the name para. 4(b)(i); the disruption that the registration and use of the domain name has had on the Complainantâ??s business para. 4(b)(iii); and the confusion created by the domain name, particularly through its diversion of traffic to inappropriate websites and the suggestion of endorsement or association by the Complainant para. 4(b)(iv).

B. Respondent

The Respondentsâ?? submissions cover a range of matters, some of which are relevant to several of the requirements under para. 4(a)(i) of the Policy.

In relation to the first of these requirements, the Respondent argues that it has been conducting business for some time under the name IOGEN Consulting LLC, a limited liability company organised under the laws of the Commonwealth of Virginia. This is a "project management and information technology consulting group in the electronic, entertainment, legal and information systems industries". It is described as a "small consulting company," with staff and clients of some importance based in Virginia, and does not compete in the same area of business activity as the Complainant.

While conceding that the Complainant holds validly registered trademarks, the Respondent notes that these are for the words IOGEN CORPORATION plus device, while the disputed domain name is <iogen.com>, which it (the Respondent) has held for more than five years, predating the registration of the Complainantâ??s trademark No. 2,593,470. It also notes that any communications with the Complainant about the transfer of the domain name have been initiated by the Complainant, and not by the Respondent.

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The Respondent also argues that the hypertext document that is found at the "wwwâ?? sub-domain of the <iogen.com> domain contains the mark and logo IOGEN Consulting LLC, with an associated logo, which it asserts is not confusing. It argues further that the word IOGEN is used openly by other traders unconnected with the Complainant, pointing to its use by Iogen Ltd of the UK which also uses mark IOGEN and the domain name <iogen.net>. It argues that, if there is any similarity between the domain name in dispute and the Complainantâ??s trademarks, its own uninterrupted use of the domain name for more than five years and the use by Iogen Ltd of the UK show "sufficient dilution of the mark claimed by the Complainant". In this regard, the Respondent also argues that the Complainant has "rescinded" its right to complain because of statements made by its representative in negotiations with the Complainant that occurred in 1999.

Finally, the Respondent disputes that the domain name is confusingly similar, and dismisses the relevance of the claims of the Complainant as to instances of actual confusion. It points here to its long period of use of the domain name without challenge from the Complainant, and argues that the latter needs to submit an "overwhelming amount of proof regarding confusion in the marketplace and a tangible impact upon the Complainantâ??s business due to such confusion."

On the second requirement under para. 4(a)(ii) of the Policy, the Respondent concedes that, for a limited period of time in the second and third quarters of 2003, there was a link on their website that led to "www.gofuckyourself.com". However, it says that this link did not exist before this time and was removed, with an apology, following the institution of the present Complaint. The Respondent says that the Complainant did not communicate its concerns to it (the Respondent) prior to the Complaint. It says that it has now instigated an investigation into why the link was placed on its website and denies that it did so "in a purposeful manner" or that it placed any material on this link that could be construed as negative or derogatory to the Complainant. It points to its removal of the offending link, once notified by the making of the Complaint, as evidence of its good faith, and says this good faith is further confirmed by its continued use of the domain name for more than fiveyears.

The Respondent makes a number of further submissions with respect to para. 4(a)(ii), arguing that it has provided consulting services throughout the Northern Virginia region under the name IOGEN. It argues further that its use of the web page as a "splash page" rather than as a complex or interactive web page is still a bona fide use of the domain name, as the web page displays its corporate trademark and logo; it also maintains that it makes other uses of the web page that are not evidenced through the web page contained on the www sub-domain of the <iogen.com> domain name. It asserts further that its use of the name IOGEN in its business provides sufficient evidence that it is known in a common fashion among its clients, partners and staff through the <iogen.com> domain name. No specific evidence of these matters is exhibited by the Respondent. It then goes on to make a number of counter-accusations of bad faith against the Complainant, based, it seems, on the fact the latter has no knowledge of the Respondentâ??s business and has never attempted to understand this.

So far as para. 4(a)(iii) is concerned, the Respondent begins by asserting that it only registered its domain name with the intention of facilitating its own commercial activities and did so without any knowledge of the Complainant and its business. In particular, it denies that it falls within the circumstances outlined in para. 4(b)(i) in that it did not initiate any negotiations with the Complainant about the transfer of the domain name and that it was the latter that made the initial contacts. The Respondent also denies any bad faith in these negotiations, arguing that it was entitled to seek the inherent value of the domain name, particularly where the domain name had been of value to the Respondent in its own business. It further denies that the

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circumstances referred to para. 4(b)(ii)-(iv) arise.

6. Discussion and Findings

In accordance with paragraph 4(a) of the Policy, the Complainant has the burden of demonstrating three elements. Each of these must be shown in turn.

A. That the complainant has rights in a trade or service mark with which the respondentâ??s domain name is identical or confusingly similar

In this regard, the Complainant has cited two registered trademarks, one US and the other Canadian. These comprise the words IOGEN CORPORATION and, in the case of the Canadian mark, also include a device or logo. The Complainant also refers in general terms to prior use of the IOGEN mark since around 1993, but no evidence of this usage has been provided. Accordingly, the Panel is not prepared to assume that the Complainant has rights in the unregistered trademark IOGEN and can only proceed on the basis of the two registered marks for IOGEN CORPORATION (plus device). These two registrations are sufficient for the purposes of the first part of para. 4(a)(i), although it is noteworthy that both registrations are quite recent and do not appear to predate the registration of the domain name.

The next question is whether the mark IOGEN CORPORATION is identical or confusingly similar to the domain name <iogen.com>. Accepting that the suffix ".com" can be disregarded for the purpose of this comparison, it is clear that this is not a case where the marks are identical. The Complainant has not addressed any arguments to this point, as it appears to have proceeded on the basis that the appropriate comparison is between its unregistered mark IOGEN and the domain name. As the Panel has concluded above that there is no evidence of this unregistered trademark, it can only make the comparison required by para. 4(a)(i) as between the domain name and the registered marks, i.e. as to whether the domain name is confusingly similar. This is a difficult issue to decide, particularly in the absence of relevant submissions from the Complainant, but, on balance, the Panel is prepared to find that there is confusing similarity here for the following reasons:

1. The dominant and first element of the registered trademarks is the word IOGEN. Both visually and orally, this is the element that will resonate immediately with consumers, and points to the likelihood of confusion on their part when they see the domain name <iogen.com>.

2. The word "Corporation" in the trademarks is a generic term, and is actually disclaimed in the US registration except when used in combination with IOGEN.

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3. The evidence of actual confusion provided by the Complainant, although slight, must be given some weight.

Accordingly, the Panel finds that both elements of para. 4(a)(i) of the Policy are satisfied here.

B. That the Respondents must be shown to have no rights or legitimate interests in the Domain Name

Paragraph 4(c) of the Policy sets out certain matters to which a Respondent can point as demonstrating rights or legitimate interests in a disputed domain name for the purposes of paragraph 4(a)(ii). These include:

"(i) before any notice to you [the Respondent] 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; or

(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(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 trademark or service mark at issue."

In its Response, the Respondent has argued that its use of the domain name satisfies each of these of these guidelines. However, it has provided no evidence to support these arguments, and this is most unsatisfactory. If, indeed, the Respondent had been carrying on business for the last five years or so under the name IOGEN, this evidence should have been easy to produce, e.g. samples of stationery, business cards, brochures, financial statements and the like. In the absence of such evidence, it is difficult for the Panel to find that either of the guidelines in (i) or (ii) have been met. So far as (iii) is concerned, it is also difficult to find that there has been a "legitimate non-commercial use or fair use of the domain name" when faced with the Respondentâ??s assertions that it has been using the domain name in its consulting business, which presumably is a for profit undertaking.

Under para. 15(a) of the Rules, it is provided that:

(a) A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.

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In the present case, the Complainant has adduced some evidence of the Respondentâ??s lack of legitimate rights or interests in the disputed domain name, notably the link to the pornographic website. This contention has been denied by the Respondent, but the latter has adduced no evidence to support its denial. Given that the burden of proof had now shifted to the Respondent, simple denial of the Complainantâ??s contention is insufficient: it was necessary for the Respondent to adduce evidence that demonstrated that its usage of the domain name did indeed satisfy one or more of the elements described in para. 4(c). It has not done this, and accordingly the Panel must conclude that the Complainant has satisfied the requirement under para. 4(a)(ii) of the Policy.

C. That the Respondent registered and is using the Domain Name in bad faith

Paragraph 4(b) of the Policy lists certain factors which, if found by the Panel to be present, shall be evidence of registration and use of a domain name in bad faith. This is not an exclusive list, and includes:

"(i) circumstances indicating that you [the Respondent] have registered or you have acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, 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 the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your website or other on-line location, by creating a likelihood of confusion with the complainantâ??s mark as to the source, sponsorship, affiliation, or endorsement of your website or location or of a product or service on your website or location."

It will be noted that, under paragraph 4(a)(iii) of the Policy, both registration and use of the domain name in bad faith are required. Of the factors listed in paragraph 4(b) above, (i)-(iii) relate specifically to registration (and acquisition) of the name, while (iv) relates to use following registration. However, in view of the fact that these factors are stated to be inclusive, it follows that there can be other factors that can be relied upon to point to bad faith, both in registration and in use. In this regard, it is worth noting an early decision of an Administrative Panel to the effect that registration in bad faith followed by a passive holding of a domain name

can amount to use in bad faith when there it appears that there is no way in which such name could ever be used legitimately in relation to a business or offering of goods or services and the identity of the Respondent remains unknown: Telstra Corporation Ltd v. Nuclear Marshmallows, WIPO Case D2000-0003. In addition, it would be both mistaken and artificial to confine paragraphs (i)-(iii) solely to the time of registration: presumably, it would also be a use of a disputed domain name in bad faith to do so, after registration, with one of the purposes outlined in those paragraphs. Support for this view is to be found in several early Panel decisions: see, for example, Estée Launder Inc v. estelauder.com, estelauder.net and Jeff Hanna, WIPO Case No. D2000-0869 and E & J Gallo Winery v. Hanna Law Firm, WIPO Case D2000-0615.

In the present proceeding, the Complainant labours under the threshold difficulty that it cannot, as a matter of logic, show that the initial registration of the domain name by the Respondent was effected in bad faith. It is asserted by the Respondent that this was done five years ago, and it seems clear that the registration had been effected no later than 1999, when the first negotiations between the parties took place. At that stage, however, the Complainant had no relevant registered trade or service marks and, as held above, no evidence has been provided of its rights in any relevant unregistered trade or service marks that it may have held at this time or earlier. Accordingly, it is impossible for the Complainants to argue that the Respondent had any of the necessary intentions identified in sub-para. 4(b)(i), (ii) or (iii). The Respondent may well have been aware of the unregistered trade or service mark IOGEN at the time of its registration of the domain name (although this is denied), but there is simply no evidence before the Panel of whether such rights existed in 1998 or 1999 and, in the absence of such evidence, it is not open to the Panel to find that the Respondent registered the domain name with any of the intentions referred to in paras. 4(b)(i)-(iii).

Accordingly, it is unnecessary for the Panel to consider the other matters that have been raised by the Complainant as going to the issue of registration and use in bad faith, in particular the negotiations in 1999 and 2001, and the linking to the pornographic website in or around 2003. The evidence on these matters is far from satisfactory in any event:

1. The emails concerning the 1999 negotiations appear to be incomplete, as the documents exhibited in annex 6 of the Complaint do not include the initial communication from a Representative of the Complainant to Brad Smith of the Respondent. These negotiations appear to have been inconclusive, and, indeed, the last email of October 1, 1999 from the Complainant Representative indicates that the Complainant no longer wished to purchase the transfer of the domain name because it would use other web addresses and thought that the possibility of confusion could be ridden out "with minimal impact on our business." Furthermore, in an earlier email (September 20, 1999), Smith expressly denies any knowledge of the Complainant at the time of registration of the domain name.

2. The later correspondence of 2001, does not take matters any further in relation to the kinds of matters that are relevant for the purposes of sub-paras. 4(b)(i)-(iii) and, moreover, cannot be relevant to the initial act of registration three years earlier.

3. The linking to the pornographic website might well be a potent factor pointing to bad faith registration and use, in the event that it was connected to, or could be connected back to, the initial registration of the domain name. However, there is no evidence of when the link was made, except that it can be inferred that this was not done until some time after the correspondence of 2001, as no reference is made to it in any of the emails

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from 1999 or 2001. Accordingly, it is an isolated circumstance that cannot be taken into account for the purposes of the determination under para. 4(a)(iii).

In the light of the above, the Panel finds that the Complainant has not satisfied the requirements of para. 4(a)(iii) of the Policy.

7. Delay and acquiescence

Although there was no express allegation in the Response that the Complainant was estopped from making its complaint because of its delay (at least four years) in bringing this proceeding, this is a matter alluded to at a number of points in the Response, and the Panel therefore has the following comments to make about the availability of such an argument in Panel proceedings.

There is no reference in the Policy or Rules to the relevance of delay or acquiescence to the granting or refusing of a Complaint. Furthermore, neither the Policy nor Rules contains any limitations period on the bringing of a complaint. However, para. 15(a) of the Rules set out above requires a Panel to make its decision "in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable." This leaves considerable latitude for a Panel to have regard to particular rules or principles of law from the Panelistâ??s own legal system (or any other) that it considers to be relevant to a particular proceeding.

In common law jurisdictions, there is a well developed body of equitable principles dealing with the effect of delay, acquiescence and estoppel on the availability of relief. Approaches to these matters will, of course, vary from one common law system to system to another, but broadly the following matters will be relevant:

1. Some unjustified delay on the part of a person in taking a particular step, e.g. in issuing proceedings or prosecuting a complaint. In some instances, delay alone may be sufficient, e.g. in the seeking of interlocutory injunctive relief or in a defendant seeking security for costs in the running of an action. The most extreme case here is some limitation period that applies to cut off a particular proceeding once the time limit in question has passed. In this regard, as noted above the Policy and Rules do not provide for any specified limitations period for the bringing of a complaint.

2. In other cases, the effect of the delay must be such that it would be unjustifiable for the party now to take the step in question, because the other party has taken some action in reliance upon what appears to have been the acquiescence of the first party in that action.

3. Circumstances other than delay from which it can be inferred that the complainant has consented to or acquiesced in conduct of another person that would otherwise be an infringement of the rights of the complainant. In general, this will require that the other party has relied upon the conduct of the first party and has acted to his or her detriment on the basis of that reliance, e.g. through investing in a particular business or taking steps to pursue a particular course of action.

Although the present Panel has not searched exhaustively through prior panel decisions on the availability of such arguments under the Policy, it notes that there have been at least three decisions in which such matters have been canvassed: The Hebrew University of Jerusalem v. Alberta Hot Rods, WIPO Case No. D2002-0616; Starbucks Corporation and Starbucks U.S. Brands Corporation v. Duncan Freeman Case No. D2003-0262 and Paule Ka v. Paula Korenek Case No. D2003-0453.

In the Hebrew University case, the respondent argued that the complaint was barred under the doctrine of laches, in view of the delay in bringing the proceedings. Laches is a particular doctrine that has been developed by courts exercising equitable jurisdiction in common law countries, notably in the UK, Canada and Australia. It has a particular meaning and context, as noted by the distinguished panelist (A. L. Limbury) in the Hebrew University case. Mr. Limbury noted that it had developed as a kind of equitable analogue to a statutory limitations period (the latter did not apply to an equitable claim). After referring to such older cases as Lindsay Petroleum Co v. Hurd (1874) LR 5 PC 221 at 239f; and Erlanger v. New Sombrero Phosphate Co (1878) 3 App. Cas. 1218, Mr. Limbury summarised the equitable defence of laches as being established when two conditions were fulfilled:

"There must first be unreasonable delay in the commencement of proceedings; second, in all the circumstances, the consequences of delay must render the grant of relief unjust. In respect of the first limb, the point of time as from which the reasonableness of delay is determined is, prima facie, the time at which the plaintiff came to know of the facts that had given rise to the ground of equitable intervention in question. In respect of the second limb, it is necessary that the defendant be prejudiced by the delay."

Mr. Limbury then found that the defence of laches had no application to proceedings under the Policy on the basis that the latter were not equitable in character, but were brought pursuant to the domain registration agreement of which the Policy was a part. He went on to find that, in any event, the circumstances necessary for the application of the defence of laches were not applicable in the case before him.

Mr. Limburyâ??s comments were cited by the subsequent panel (D. Gervais) in Paule Ka v. Paula Korenek Case No. D2003-0453. Mr. Gervais appeared to adopt Mr. Limburyâ??s comment that the doctrine of laches did not apply under the Policy as the latter was not an equitable claim in the sense understood by common law jurisdictions. At the same time, he held that it would not have applied to the proceeding before him on the basis that there had been no unreasonable delay or acquiescence.

In the third case, Starbucks Corporation and Starbucks U.S. Brands Corporation v. Duncan Freeman Case No. D2003-0262, the panel appeared readier to accept the possible availability of such a defence under the Policy, referring here to the availability of such a defence under US trademarks law. In that case, the

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respondent argued that the complainant was barred because it had taken no action under the Policy for nearly three years after an earlier suspension of the respondentâ??s registration under the predecessor dispute policy had been lifted. The three member panel did not decide, one way or the other, whether such a defence was available under the Policy, but noted that an equitable defence based on laches, acquiescence and estoppel were allowed in trademark infringement claims under US law (both parties in that case were in the US). The elements of such a defence generally involve the following elements: (1) inexcusable delay in taking action; (2) a reasonable conclusion that the delay implies consent; and (3) detrimental reliance in response to the delay. The panel then went on to find that:

"Even assuming for the sake of argument that the defense is applicable here, Respondent has failed to demonstrate any detrimental reliance on the three-year period of delay. Moreover, given the action already taken by Complainant, it would not have been reasonable for Respondent to conclude that Complainant no longer objected to the Respondentâ??s use and registration of the domain names. Accordingly, we find that Complainantâ??s objections are not barred by its alleged delay in taking action."

It will therefore be clear from this, admittedly, incomplete review of previous panel decisions on the effect of delay and acquiescence that it is unsettled as to what weight, if any, panels may accord to such matters in making their determinations. On the one hand, sub-para. 15(a) of the Rules appears to countenance the application of such principles where a panel considers it appropriate. On the other hand, there is much to be said for the view of Mr. Limbury that, at least in common law jurisdictions, these doctrines are not available in proceedings, such as those under the Policy, that occur pursuant to a contractual arrangement between domain name registrants and their registrars. Ultimately, these are matters that probably should be expressly addressed in any future revisions of the Policy and Rules so that the scope of a panelâ??s discretion is clearly indicated.

The above comments are in no way necessary for the purposes of making the present determination, where the Complainant has failed to make out the third requirement of para. 4(a) of the Policy. However, if this were not the case and had the issue of estoppel by way of delay and acquiescence been raised by the Respondent in a form similar to that of laches under Anglo-Australian law, this Panel would still not have been inclined to find that it applied, in the absence of evidence from the Respondent as to the detriment it would now suffer if a transfer were to be ordered. Such evidence, however, would have been of the same kind as that required for the purposes of para. 4(a)(ii) of the Policy, and it is likely that the complaint would have been decided on that basis and without any need to refer to arguments based on delay and estoppel.

8. Decision

For all the foregoing reasons, the Complaint is denied.

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Sole Panelist