



WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

Cognigen Networks, Inc. v. Pharmaceutical Outcomes Research a/k/a Cognigen Corporation

Case No. D2001-1094

1. The Parties

The Complainant is Cognigen Networks, Inc., a corporation of the State of Colorado, 7001 Seaview Avenue NW, Suite 210, Seattle, Washington 98117, USA.

The Respondent is Cognigen Corporation, a Corporation of the State of New York, 395 Youngs Road, Buffalo, New York, USA.

2. The Domain Names and Registrar

The Contested Domain Name is <cognigencorp.com>.

The Registrar is Network Solutions, Inc. (NSI), 505 Huntmar Drive, Herndon, Virginia 20170, USA.

3. Procedural History

The Complaint was brought pursuant to the Uniform Domain Name Dispute Resolution Policy ("Policy"), which was adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999 and approved on October 24, 1999 and in accordance with the ICANN Rules for Uniform Domain Name Dispute Resolution Policy ("Rules") as approved on October 24, 1999 and by the World Intellectual Property Organization Supplemental Rules for Uniform Domain Name Dispute Resolution Policy in effect as of December 1, 1999 ("Supplemental Rules").

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") in hard-copy form on September 4, 2001 with Annexes 1-15 and the appropriate payment, and additional copies of the Complaint including annexes were filed on September 13, 2001; and in e-mail form, also with the annexes, on September 8, 2001,

The Complainant's attorney stated that he separately served, on July 20, 2001 and by

first class mail, a copy of the Complaint together with a copy of the cover sheet, on the Respondent and on the Registrar, NSI.

Pursuant to paragraph 4(d) of the Policy, the Complainant selected the Center as the ICANN approved administrative dispute resolution service provider to administer this proceeding. Through the Complaint, the Complainant requested either a single or three member panel.

After receiving the original Complaint, the Center, in accordance with paragraph 5 of the Supplemental Rules, determined whether the Complaint fully complied with the formal requirements of the Rules and the Supplemental Rules. In that regard, on September 5, 2001, the Center requested confirmation from NSI of information set forth in the Complaint relative to the contested domain name; specifically, contact and registrant information for that domain name, as well as whether NSI received a copy of the Complaint from the Complainant. The Center also requested NSI to specify: (a) whether the ICANN Policy applies to the contested domain name, and (b) the current status of that domain name. Furthermore, on September 5, 2001, the Center, via e-mail, requested that the Respondent supply the Center with an electronic copy of the Complaint, four hard-copies of the Complaint, and clarify whether it desired a single or three member panel.

On September 7, 2001, NSI provided its response to the Center through which NSI provided contact information pertinent to the contested domain name from its WHOIS database, confirmed that NSI is the registrar of that name, stated that the Policy is in effect (through Network Solutions' version 5.0 registration agreement) for the domain name, stated that the language of the registration agreement is English, and stated that the domain name was then in an "active" status.

On September 14, 2001, the Center, through e-mail, required the Respondent to amend its Complaint such that the mutual jurisdiction clause (paragraph 15 in the Complaint) referred to the correct jurisdiction in which the Registrar is located, i.e. Virginia rather than Maryland as originally recited. Later the same day, the Complainant submitted by e-mail and hard-copy an appropriately amended version of the Complaint. An appropriate amended Complaint was received in electronic form by the Center on September 19, 2001 and in hard-copy form on September 21, 2001. Though the amended Complaint still did not clearly indicate whether a single or three member panel was requested, the Center inferred, from the fee originally provided, that the Complainant had chosen a single member panel.

On September 24, 2001, the Center notified the Respondent of the filing of the Complaint, including an indication that the Center was forwarding a complete copy of the Complaint, both in e-mail and hard-copy form, to the Respondent (with the latter method forwarding a copy of all the annexes as well). The Complaint, and its accompanying documents, and all subsequent communications associated therewith were provided in the preferred manners and to the addresses as mandated by paragraphs 2(a), 2(b) and 4(a) of the Rules.

Hence, the notification to the Respondent having occurred on September 24, 2001 under paragraph 4(c) of the ICANN Policy, this administrative proceeding is deemed to have commenced on that date.

Having reviewed the Complaint and succeeding correspondence between the Center and NSI, in detail, the Panel agrees with the determination of the Center that the Complaint and its handling met the requirements of the Rules and the Supplemental

Rules.

The Respondent was then provided with a 20-calendar day period, expiring on October 14, 2001 to file its response with the Center and serve a copy of the response on the Complainant.

On September 25, 2001, the Respondent, by e-mail, facsimile and courier letter, filed a request with the Center to dismiss the Complaint in view of what it perceived as a parallel, nearly identical, litigation between the parties and then underway in the United States District Court for the District of Washington (*Cognigen Networks, Inc. v. Cognigen Corp. and Thaddeus Grasela* Docket No. C01-1077). The Center, via an e-mail dated September 28, 2001, responded to the request by stating that the panel, not the Center, has the sole discretion to determine whether to suspend or terminate the administrative proceeding in view of the parallel litigation or to proceed to a decision. As such, the Center informed the Respondent that it would proceed with the proceeding and inform the panel, once it was appointed, of this request.

The Respondent then filed its Response, together with Annexes A-J, with the Center by e-mail on October 12, 2001 and in hard-copy form on October 15, 2001. Through the Response, the Respondent requested a three person panel and remitted to the Center the additional fee due for such a panel.

Through an e-mail dated October 16, 2001 and apparently after reviewing the Response, the Complainant filed a request with the Center to file an additional submission to address various factual issues raised in the Response. Subsequently, via a letter sent October 16, 2001 to the Center, via e-mail, courier and facsimile, the Respondent objected to the Complainant's request for approval to file its additional submission.

In an e-mail letter to the parties dated October 18, 2001, the Center acknowledged the Complainant's request and the Respondent's objection (having labeled them both as "supplemental submissions") and noted that the Supplemental Rules do not expressly provide for such submissions, but nevertheless indicated that these particular submissions will be provided to the panel -- once appointed -- to determine, in its sole discretion, whether to consider these filings or not, as it deems appropriate.

Accordingly, pursuant to the Rules and Supplemental Rules, on November 27, 2001, the Center appointed the Panel consisting of Mr. Mark Van Buren Partridge, Esq. and Mr. Neil Arthur Smith, Esq. as Panelists; and Mr. Peter L. Michaelson, Esq. as Presiding Panelist, each of whom had previously accepted and returned, by facsimile to the Center, a fully executed Statement of Acceptance and Declaration of Impartiality and Independence.

Based on the deadline set forth in paragraph 15 of the Rules, a decision was to be issued by the Panel to the Center on or before December 11, 2001.

Owing to the travel schedule of the Presiding Panelist as well as other time conflicts encountered by the Panel, on December 10, 2001, the Center, at the Panel's request, extended the due date of the Panel's decision to December 18, 2001 so as to afford the Panel with sufficient time to thoroughly consider this matter and properly prepare its reasoned decision.

This dispute concerns one domain name, specifically: <cognigencorp.com>.

The language of this proceeding is English.

4. Factual Background

A copy of the WHOIS registration record for the contested domain name appears in Annex 1 to the Complaint. As indicated on this record, the Respondent registered this name with NSI on March 25, 1999.

The Complainant owns the following United States trademark registration for the mark "COGNIGEN" on which this dispute is based. The Complainant has provided, in Annex 4 to the Complaint, a hard-copy printout of the corresponding registration records listed in the publicly web-accessible Trademark Electronic Search System (TESS) and Trademark Application and Registrations Retrieval (TARR) databases maintained by the United States Patent and Trademark Office (PTO).

COGNIGEN (block letters)

US registration 2,426,794; registered February 6, 2001

This trademark was registered, for use in connection with: "Telecommunications services, namely the electronic transmission of voice, data, video, facsimile and information; the resale of telecommunication services; namely the electronic transmission of voice, data, video, facsimile, and information; providing telecommunications connections to worldwide global computer networks for the transfer and dissemination of a wide range of information; and paging services" all in international class 38. This mark claims first use and first use in inter-state commerce of April 30, 1997.

The Complainant currently uses the domain names <cognigen.com> and <cognigen.net>, for which copies of the WHOIS registration records for these names respectively appear in Annexes 5 and 6 to the Complaint. These records indicate that the Complainant registered <cognigen.com> on August 31, 1995 and <cognigen.net> on August 5, 1998. The Complainant states that it has used its domain name <cognigen.com> since 1997. In contrast, the contested domain name, which the Respondent has registered, is <cognigencorp.com>.

The Complainant and its predecessors in interest have used its trademark and company name "COGNIGEN" since at least as early as 1993 when Mr. Kevin Anderson incorporated his company under that name in California (as indicated from a hard-copy print-out, appearing in Annex 8 to the Complaint, of the salient corporate records filed with the Secretary of State of the State of California). Later, Mr. Anderson incorporated his company in Nevada, as indicated by the hard-copy print-out, appearing in Annex 9 to the Complaint, of the pertinent records of the Secretary of State of the State of Nevada).

The rights in both the California and Nevada corporations, along with the trademark "COGNIGEN", were subsequently assigned to Complainant.

In March 2000, the Complainant became aware that the Respondent had filed a United States trademark application with the PTO to register the mark "COGNIGEN". Such an application was filed on May 17, 1999 as serial number 75/707,819, on an intent-to-use basis, for use in connection with the following services:

"Business marketing consulting services for pharmaceutical and healthcare industries" in international class 35;

"Electronic storage of data" in international class 39; and

"Pharmaceutical research in the fields of pharmacokinetics, pharmacodynamics, pharmaceutical economics, and pharmaceutical outcomes" in international class 42.

This mark was published for opposition on March 14, 2000 by the PTO. The Respondent has filed a Statement of Use alleging use of the mark in all three classes as of September 30, 2000. Copies of the corresponding entries for this application in the TESS and TARR databases appear in Annex 10 of the Complaint and in Annex E of the Response.

The Complainant states, that as a result of the publication, Mr. Darrell Hughes, CEO of the Complainant, contacted Mr. Thaddeus Grasela, President of the Respondent (then called "Pharmaceutical Outcomes Research"), to determine the nature of the services which the Respondent intended to provide under its mark "COGNIGEN" and how the mark was to be used. In addition, Complainant's counsel, on April 7, 2000, filed a request with the PTO for an extension of time to oppose registration of the mark. The Complainant states that as a result of discussions held between these individuals, Mr. Hughes was assured by Mr. Grasela that the Respondent would use the mark only as a trademark for its pharmaceutically related services. Subsequently, counsel for the Respondent sent a letter dated June 28, 2000 to the Complainant's counsel (a copy of which appears in Annex 11 to the Complaint) stating that "Our client is in the health care industry, specifically in the area of drug development and marketing. The service mark will be used in relation to that industry, as more fully described in the identification of services in its service mark application."

Based on the representations made in the June 28th letter, the Complainant apparently concluded that confusion was not likely to arise as a result of concurrent use of the mark "COGNIGEN" by both it and the Respondent on their respective goods and/or services. Accordingly, the Complainant apparently decided not to oppose the Respondent's trademark application and hence refrained from filing an opposition. The Complainant merely permitted the extended opposition period to simply expire. Subsequently, on December 12, 2000 the PTO issued a Notice of Allowance to the Respondent for the 75/707,819 trademark application for the mark "COGNIGEN".

In a news release dated September 25, 2000 (a copy of which appears as page 1 of Annex 12 to the Complaint), the Respondent announced on its web site that it changed its corporate name from "Pharmaceutical Outcomes Research, Inc." to "Cognigen Corporation". The release stated that "Cognigen Corporation, formerly Pharmaceutical Outcomes Research Inc., is a global analytical communication company that combines innovate software and analysis with advanced internet technology and human creativity to transform data and transcend boundaries." In a web-based news article dated September 28, 2000 (a copy of which appears in page 2 of Annex 12 to the Complaint) states: "Cognigen, which employs 65, sells software that allows scientists all over the world to overcome communication barriers *to facilitate approval of drugs in countries throughout the world.* The name Cognigen is derived from the Latin word "cognoscent" which means knowledge and the word generate." [emphasis added]

The Respondent states that it is a niche company working in the pharmaceutical and health care industries. The Respondent designs and analyses data obtained from

pharmacokinetic and pharmacodynamic studies. Its clients include Fortune 100 companies, biotechnology companies, hospitals and managed health care organizations. Since its founding in 1992, the Respondent has worked with 16 of the world's leading pharmaceutical companies to develop and test significant new drugs. As noted above, the Respondent was originally known as "Pharmaceutical Outcomes Research" and changed its name to "Cognigen" in September 2000. Copies of representative pages printed from the Respondent's web site, as of the date of the Response, appear in Annex B to the Response.

The Respondent states that it has used the mark "COGNIGEN" in commerce since September 2000. The Respondent states that it registered the contested domain name in March 1999 but did not begin using it until September 2000, when it also adopted the "COGNIGEN" mark as its name. Various examples of marketing and advertising materials describing the Respondent's business and showing the Respondent's use of its mark and domain name appear in Annex C to the Response.

Based on information shown on its web site, the Complainant provides a multi-level telecommunications network marketing using some 137,000 "agents" to sell long distance service, telephone calling cards, cell phones, digital satellite TV service and Internet connections to consumers. According to that information, the Complainant's agents sell these products and services to their friends and family members and, presumably, recruit additional agents to sell the products to others.

The Respondent states that none of its products or services is related in any way whatsoever to the Complainant's business.

The Respondent states that, when it created its mark "COGNIGEN", none of its employees had ever heard of the Complainant or for that matter any other company then using the word "COGNIGEN".

The Respondent further states that at the time it filed its Federal trademark application in May 1999, there were no other Federal trademark applications for the mark "COGNIGEN" filed by the Complainant or any other party—other than an abandoned application filed by Warner-Lambert in 1984 for using the mark as the name of a drug.

The Respondent's federal trademark filing on May 17, 1999 for its mark "COGNIGEN" preceded the Complainant's trademark filing on January 7, 2000 for the same mark by approximately seven months. However, the Respondent's filing was made on an intent-to-use basis, and inasmuch as its first use date of September 30, 2000 is later than its filing date of January 7, 2000, the earliest date that can be accorded the Respondent, under United States law (where the parties reside), is its filing date (constructive use date), which is subsequent to the Complainant's first use date.

The Respondent states that its web site is an electronic version of its brochure and describes its expertise, services and personnel. The Respondent notes that it does not advertise its web site except in an advertisement that it runs in a narrowly distributed technical journal called *Clinical Pharmacology and Therapeutics*, a copy of such an advertisement appears in Annex C to the Response.

The Respondent states that it chose the contested domain name to reflect its new company name, Cognigen, and to suggest the strengths and qualities that it believes its customers are seeking—namely pharmacological studies that are "Not just clinically tested . . . [but also] cognitively engineered," as its company's slogan goes. At the time the Respondent registered its domain name, it learned that the domain name

<www.cognigen.com> was not available, as that domain name was already in use by the Complainant. Therefore, the Respondent stated that it chose the contested domain name to enable customers to distinguish between itself and the Complainant, Cognigen Networks, when addressing e-mail messages or typing a web site address.

The Respondent states that, through its counsel's letter of June 28, 2000, it never made any promises to the Complainant regarding its use of the "COGNIGEN" mark, including not promising not to use the mark as its company name or in its domain name.

After the June 28, 2001 letter, the Respondent heard nothing further from the Complainant for six months. The Respondent states that, based on the Complainant's silence and failure to file an opposition with the PTO, the Respondent had no reason to believe that its use of the mark as part of its web address was either objectionable to the Complainant or somehow in bad faith.

The Respondent states that, in September 2000, it formally changed its corporate name from "Pharmaceutical Outcomes Research" to "Cognigen". In doing so, the Respondent started using its new domain name, i.e. the contested domain name, printed new letterhead and business cards and began using its new corporate name in advertising and marketing materials.

On November 20, 2000, the Respondent filed its second federal trademark application—for a stylized mark that combined the word "COGNIGEN" with the Respondent's corporate logo of a stylized flying dart or paper airplane with a dotted trail representing "data points." This application (a copy of its TESS and TARR entries appears in Annex G to the Response) was filed for use in conjunction with the same services as listed in the Respondent's earlier-filed 75/707,819 application but carried a first use date of September 30, 2000.

On December 1, 2000, the Complainant's counsel sent a letter (a copy of which appears in Annex H to the Response) to the Respondent's counsel objecting to the Respondent's use of its "COGNIGEN" mark.

The Respondent's counsel responded by letter dated January 26, 2001 to the December 1, 2000 letter; with a copy of the responding letter appearing in Annex I to the Response. In this response, Respondent's counsel pointed out that the Respondent is in the business of designing and analyzing clinical tests for pharmaceutical companies, while the Complainant is in the business of selling long distance and cell phones through a network-marketing scheme. Counsel was of the opinion that these two businesses are completely dissimilar, unrelated and in no danger whatsoever of being confused with each other.

The Respondent's counsel also pointed to what she believed to be misstatements in the December 1, 2000 letter, as follows:

First, the Complainant's counsel claimed that the Respondent is somehow involved in the telecommunications business because the Respondent uses the words "global analytical communications tool" in its web site. Respondent's counsel noted that this claim, however, is based on lifting the words "global analytical communications tool" out of their context in order to mischaracterize their meaning. Respondent's counsel stated that when the words are read in context, it is perfectly obvious that the Respondent's business is (and has always been) designing and analyzing pharmacological tests.

Second, the Respondent's counsel stated there was never any agreement regarding as to how the Respondent would or would not use its "COGNIGEN" mark. Indeed, she stated that the Complainant knew about the Respondent's business and use of the mark as early as April 2000, when the Complainant filed with the PTO a request for extension of time to oppose the Respondent's trademark application but thereafter did not file an opposition. Nor, as counsel stated, was there any evidence of a written promise or undertaking between the two companies—and both companies were represented by counsel throughout their dealings with each other.

After sending the January 26, 2001 letter, the Respondent did not receive any further correspondence from the Complainant until six months later, when, in July 2001, the Complainant Networks filed its lawsuit against the Respondent in the United States District Court for the Western District of Washington.

Further, the Complainant states that it has received hundreds of misdirected e-mails (a number disputed by the Respondent as excessive) since the Respondent began using the contested domain name, though it has offered, as proof of its assertion, only a single such e-mail (a copy of which appears in Annex 13 to the Complaint), and which was the subject of an e-mail reply from the Complainant's founder to the writer of the misdirected e-mail and a subsequent letter dated July 3, 2001 from the Respondent's counsel to the Complainant's counsel regarding that e-mail exchange.

5. Parties' Contentions

A. Complainant

i. Similarity

The Complainant apparently takes the position that the contested domain name is nearly identical and hence confusingly similar to its registered mark "COGNIGEN", by virtue of its inclusion of the term "COGNIGEN", as to likely confuse Internet users as to source, sponsorship, affiliation or endorsement of the services advertised on the Respondent's web site; hence, satisfying the confusing similarity requirement in paragraph 4(a)(i) of the Policy.

ii. Legitimacy

The Complainant contends that the Respondent has no rights or legitimate interests in the contested domain name pursuant to paragraph 4(a)(ii) of the Policy.

Specifically, as best understood, the Complainant appears to contend that the Respondent lacks rights and legitimate interests in the contested domain name inasmuch as its actual use of the name, in conjunction with its present web site, extends beyond the use indicated in the June 28, 2000 letter from the Respondent's counsel and to which the Complainant previously assented.

iii. Bad Faith

The Complainant contends that the Respondent has registered and is now using the contested domain name in bad faith.

Specifically, the Complainant contends that the Respondent, by intentionally changing

its domain name to the contested domain name which includes the term "COGNIGEN" and which the Complainant uses as its mark and corporate name, attempted to attract Internet users to the Respondent's web site who were seeking the services of the Complainant. The Complainant then contends that, as a consequence of this change, the Respondent created a likelihood of confusion with the Complainant's web site as to the source, sponsorship, affiliation or endorsement of its services advertised thereon.

Therefore, the Complainant concludes that the Respondent's conduct in registering and using the contested domain name constitute bad faith registration and use under paragraph 4(a)(iii) of the Policy.

B. Respondent

i. Similarity

The Respondent does not contest the similarity between the Complainant's mark "COGNIGEN" and the contested domain name.

ii. Legitimacy

The Respondent contends that it has legitimate rights and interests in its mark "COGNIGEN" under paragraph 4(a)(ii) of the Policy.

Specifically, the Respondent points to its two United States trademark applications, one filed on May 17, 1999 and the other November 20, 2000 — neither of which the Complainant has opposed. The Respondent contends that it registered its domain name in March 1999 without bad intent and for use in eventually changing its corporate identity. In that regard, the Respondent contends that, by changing its name to "COGNIGEN CORPORATION" it has done nothing to cause confusion, divert customers, disparage the Complainant or otherwise act in an illegal manner under the United States trademark laws.

Furthermore, the Respondent contends that it is using its mark and the contested domain name in connection with a substantial business, with substantial customers and in no way harmful or derogatory to the Complainant, and in a manner that accords with that stated in its June 28, 2001 letter to the Complainant and to which the Complainant previously assented.

Given this assent as early as late June 2000, the Respondent then went forward with its plans to adopt the "COGNIGEN" mark for its business and, in September 2000, began using the mark on all its materials and also began using the contested domain name as an address to its web site.

iii. Bad Faith

The Respondent, not surprising, contends that its conduct does not amount to bad faith use and registration.

Specifically, it contends that it registered the contested domain name in good faith. In that regard, it chose the mark "COGNIGEN", which forms the basis of the contested domain name, devoid of any prior knowledge of the Complainant's mark. In that regard, it points to its application to federally register its mark filed approximately seven months prior to the filing date of the Complainant's trademark application. Moreover, the Complainant contends that its use of its mark and the contested domain

name is limited to the areas in which it conducts its business—research, consulting and data storage services in the pharmaceutical and health care industry.

Furthermore, the Respondent contends that it never offered to sell or transfer its mark or domain name to the Complainant. In addition, the Respondent contends that it has no intention and has taken no steps to divert customers of the Complainant, and that it did not register its domain name in order to deprive the Complainant of use of its mark as its domain name.

Moreover, the Respondent contends that it has never taken any steps to create or encourage confusion, deception or mistake over the differences between its business and that of the Complainant -- as evidenced by the fact that, even to a casual observer, the web sites of these two businesses are completely unrelated.

Lastly, the Respondent contends that it did not register its mark for the purpose of disrupting or harming the Complainant in any way.

6. Discussion and Findings

A. Respondent's request to terminate the proceeding

The Panel has considered the Respondent's request to dismiss (terminate) this administrative proceeding given the parallel proceeding involving the present parties then underway before the United States District Court for the District of Washington. It does not appear that Respondent ever asked the court where that lawsuit is pending to either stay or terminate the Complainant's pursuit of this UDRP arbitration.

There is no provision in the Policy that divests an ICANN panel of its discretion to continue an administrative proceeding in view of another proceeding between the same parties concurrently occurring in a different forum, as here.

In that regard, paragraph 4(k) of the Policy states in pertinent part: "The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded." Hence, while the Panel views this administrative proceeding as mandatory on the Respondent by virtue of the dispute resolution provision in its registration agreement, nevertheless either party has the option, at its sole discretion, of instituting litigation in a court of law before this proceeding is commenced or after it has been concluded. The Complainant, by instituting a lawsuit in the United States District Court for the District of Washington during July 2001 and prior to the filing of the Complaint here (on September 4, 2001), has simply done just that.

Moreover, as the Panel reads the Complaint, the relief which the Complainant seeks, which is predicated on allegations of federal trademark infringement and unfair competition under federal and state law, does not specifically include the relief sought through this proceeding; namely, cancellation of the contested domain name. The allegations raised and the relief sought by the Complainant through its parallel proceeding extend well beyond those issues which this Panel can consider and the relief it can provide through the present administrative proceeding.

Moreover, since both the Complaint and Response have been filed in this proceeding,

hence providing the Panel with the documents necessary for it to proceed, the Panel has decided, in accordance with the discretion granted it under paragraph 18(a) of the Rules, to: (a) deny the Respondent's request to dismiss this proceeding, and, as such, (b) consider these filings and proceed to decision in this matter.

B. Complainant's request to file an additional submission

The Panel has reviewed the Complainant's offer of proof set forth in its October 16, 2001 e-mail to the Center that formed the basis of its request to file an additional submission.

For the reasons set forth below, the Panel finds that the Complainant has not met its burden of proof sufficient to warrant the relief it seeks. Now, in assessing this request in the light most favorable to the Complainant, the Panel believes that even if the Complainant were able to show all the additional facts it intends, it is unlikely that these facts will cure its failure of proof.

Accordingly, the Panel also now denies, as moot, the Complainant's request to file an additional submission.

C. Required elements under paragraph 4(a) of the Policy

i. Similarity

No doubt exists whatsoever that the contested domain name is nearly identical to the Complainant's "COGNIGEN" mark. The differences between the domain name and the registered mark are simply the concatenation of a generic abbreviation "corp" onto the latter coupled with the addition of the generic top level domain ".com".

Various ICANN panels have assessed similarity based on a likelihood of confusion test, while other panels have limited their inquiry to comparing the contested domain name to the Complainant's trademark. To simplify our analysis, we base our view on the latter approach.

Merely from comparing the mark and the domain name, the Panel believes that these differences, in and of themselves, are simply insufficient to dispel confusion.

Therefore, the Panel also finds that sufficient similarity exists under paragraph 4(a)(i) of the Policy for the contested domain name.

ii. Illegitimacy

Under paragraph 4(c)(i) of the Policy, rights and legitimate interests can be shown through proof by a respondent of any of a variety of factors, one of which being that: "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".

There is no doubt here that the Respondent registered the contested domain name (in March 25, 1999) and began making preparations for its use (prior to September 2000) well before it had notice of this dispute (in early September 2001) in a legitimate effort to change its corporate identity from "Pharmaceutical Outcomes Research" to "Cognigen" in September 2000.

There can be no question that the Respondent, since the September 2000 date when it started using the contested domain name, has done so and is continuing to do so in connection with bona fide service offerings specifically in the pharmaceutical field. Its registration of its mark "COGNIGEN", coupled with its printing of new letterhead, business cards, and advertising and marketing materials and development of its current web site that bears this mark are all consistent with demonstrable preparations to use its domain name in connection with its new corporate identity -- preparations which, in fact, it carried out prior to September 2000. Its federal application to register its second "COGNIGEN" based mark, as that mark is also used in connection with the Respondent's service offerings, further illustrates the Respondent's use of its mark "COGNIGEN" and the contested domain name, which includes this mark, in connection with its bona fide service offerings.

The Complainant has simply proven no facts that would persuade this Panel to conclude otherwise and view the Respondent as lacking rights and legitimate interests in the contested domain name.

Thus, the Complainant has failed to prove a lack of rights and legitimate interests as required under paragraph 4(a)(ii) of the Policy. For this reason, its Complaint fails.

iii. Bad Faith

Inasmuch as the Panel views the Respondent's actions in registering and subsequently using the contested domain name as a consistent exercise of its rights and legitimate interests in changing its corporate identity and particularly in a manner to which the Complainant acquiesced, the Panel does not view any of these actions as evidencing bad faith use or registration of that name under paragraph 4(b) of the Policy.

Accordingly, the Complainant has also failed to provide bad faith use and registration under paragraph 4(a)(iii) of the Policy.

7. Decision

In accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the relief sought by the Complainant, namely cancellation of the contested domain name, is hereby DENIED.

Peter L. Michaelson, Esq.
Presiding Panelist

Mark Van Buren Partridge, Esq.
Panelist

Neil Arthur Smith, Esq.
Panelist

Dated: December 18, 2001