



NATIONAL ARBITRATION FORUM

DECISION

Aeropostale, Inc. v. Private Registration (name) c/o Private Registration (name)
Claim Number: FA0912001296979

PARTIES

Complainant is **Aeropostale, Inc.** ("Complainant"), represented by **CitizenHawk, Inc.**, California, USA. Respondent is **Private Registration (name) c/o Private Registration (name)** ("Respondent"), Cayman Islands.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**aeropostsale.com**>, registered with **Bargin Register, Inc.**

PANEL

The undersigned certifies that he or she has acted independently and impartially and to the best of his or her knowledge has no known conflict in serving as Panelist in this proceeding.

Houston Putnam Lowry, Chartered Arbitrator, as Panelist.

PROCEDURAL HISTORY

Complainant submitted a Complaint to the National Arbitration Forum electronically on December 1, 2009; the National Arbitration Forum received a hard copy of the Complaint on December 2, 2009.

On December 2, 2009, Bargin Register, Inc. confirmed by e-mail to the National Arbitration Forum that the <**aeropostsale.com**> domain name is registered with Bargin Register, Inc. and that Respondent is the current registrant of the name. Bargin Register, Inc. has verified that Respondent is bound by the Bargin Register, Inc. registration agreement and has thereby agreed to resolve domain-name disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On December 2, 2009, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of December 22, 2009 by which Respondent could file a response to the Complaint, was transmitted to Respondent via e-mail, post and fax, to all entities and persons listed on Respondent's registration as technical, administrative and billing contacts, and to postmaster@aeropostsale.com by e-mail.

Having received no response from Respondent, the National Arbitration Forum transmitted to the parties a Notification of Respondent Default.

On December 30, 2009, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the National Arbitration Forum appointed Houston Putnam Lowry, Chartered Arbitrator, as Panelist.

Having reviewed the communications records, the Administrative Panel (the "Panel") finds that the National Arbitration Forum has discharged its responsibility under Paragraph 2(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") "to employ reasonably available means calculated to achieve actual notice to Respondent." Therefore, the Panel may issue its decision based on the documents submitted and in accordance with the ICANN Policy, ICANN Rules, the National Arbitration Forum's Supplemental Rules and any rules and principles of law that the Panel deems applicable, without the benefit of any response from Respondent.

RELIEF SOUGHT

Complainant requests that the domain name be transferred from Respondent to Complainant.

PARTIES' CONTENTIONS

A. Complainant makes the following assertions:

1. Respondent's <**aeropostsale.com**> domain name is confusingly similar to Complainant's AEROPOSTALE mark.
2. Respondent does not have any rights or legitimate interests in the <**aeropostsale.com**> domain name.
3. Respondent registered and used the <**aeropostsale.com**> domain name in bad faith.

B. Respondent failed to submit a Response in this proceeding.

FINDINGS

Complainant, Aeropostale, Inc., is a mall-based specialty retailer of casual apparel and accessories. Complainant has continuously used the AEROPOSTALE mark in connection with its retail store business. Complainant holds numerous registrations for this mark with the United States Patent and Trademark Office ("USPTO") (*e.g.*, Reg. No. 1,354,292 issued August 13, 1985).

Respondent, Private Registration (name) c/o Private Registration (name), registered the <**aeropostsale.com**> domain name on June 20, 2007. The disputed domain name resolves to a website that displays hyperlinks to third-party websites, some of which directly compete with Complainant.

DISCUSSION

Paragraph 15(a) of the Rules instructs this Panel to "decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

In view of Respondent's failure to submit a response, the Panel shall decide this administrative proceeding on the basis of Complainant's undisputed representations pursuant to paragraphs 5(e), 14(a) and 15(a) of the Rules and draw such inferences it considers appropriate pursuant to paragraph 14(b) of the Rules. The Panel is entitled to accept all reasonable allegations and inferences set forth in the Complaint as true unless the evidence is clearly contradictory. *See Vertical Solutions Mgmt., Inc. v. webnet-marketing, inc.*, FA 95095 (Nat. Arb. Forum July 31, 2000) (holding that the respondent's failure to respond allows all reasonable inferences of fact in the allegations of the complaint to be deemed true); *see also Talk City, Inc. v. Robertson*, D2000-0009 (WIPO Feb. 29, 2000) ("In the absence of a response, it is appropriate to accept as true all allegations of the Complaint.").

Paragraph 4(a) of the Policy requires that Complainant must prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

- (1) the domain name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- (2) Respondent has no rights or legitimate interests in respect of the domain name; and
- (3) the domain name has been registered and is being used in bad faith.

Identical and/or Confusingly Similar

The Panel finds Complainant has established rights in the AEROPOSTALE mark under Policy ¶4(a)(i) through its numerous registrations of the mark with the USPTO (*e.g.*, Reg. No. 1,354,292 issued August 13, 1985). *See Miller Brewing Co. v. Miller Family*, FA 104177 (Nat. Arb. Forum Apr. 15, 2002) (finding that the complainant had established rights to the MILLER TIME mark through its federal trademark registrations); *see also Janus Int'l Holding Co. v. Rademacher*, D2002-0201 (WIPO Mar. 5, 2002) ("Panel decisions have held that registration of a mark is *prima facie* evidence of validity, which creates a rebuttable presumption that the mark is inherently distinctive.").

Respondent's <aeropostsale.com> domain name contains a misspelling of Complainant's AEROPOSTALE mark, i.e., the letter "s" is added, and adds the generic top-level domain ("gTLD") ".com" to Complainant's mark. The Panel finds <aeropostsale.com> domain name is confusingly similar to Complainant's AEROPOSTALE mark under Policy ¶4(a)(i) because none of these alterations to Complainant's mark sufficiently distinguish the disputed domain name from Complainant's mark. *See Google, Inc. v. DktBot.org*, FA 286993 (Nat. Arb. Forum Aug. 4, 2004) ("The mere addition of a single letter to the complainant's mark does not remove

the respondent's domain names from the realm of confusing similarity in relation to the complainant's mark pursuant to Policy ¶4(a)(i)."); *see also Trip Network Inc. v. Alviera*, FA 914943 (Nat. Arb. Forum Mar. 27, 2007) (concluding that the affixation of a gTLD to a domain name is irrelevant to a Policy ¶4(a)(i) analysis).

The Panel finds Policy ¶4(a)(i) satisfied.

Rights or Legitimate Interests

Initially, Complainant must make a *prima facie* showing Respondent lacks rights and legitimate interests in the disputed domain name. Once Complainant makes this showing, the burden then shifts to Respondent and Respondent must establish that it has rights or legitimate interests in the disputed domain name. The Panel finds Complainant has sufficiently made its *prima facie* showing under Policy ¶4(a)(ii). The burden now shifts to Respondent, from whom no response was received. *See Document Techs., Inc. v. Int'l Elec. Comm'ns Inc.*, D2000-0270 (WIPO June 6, 2000) ("Although Paragraph 4(a) of the Policy requires that the Complainant prove the presence of this element (along with the other two), once a Complainant makes out a *prima facie* showing, the burden of production on this factor shifts to the Respondent to rebut the showing by providing concrete evidence that it has rights to or legitimate interests in the Domain Name."); *see also G.D. Searle v. Martin Mktg.*, FA 118277 (Nat. Arb. Forum Oct. 1, 2002) ("Because Complainant's Submission constitutes a *prima facie* case under the Policy, the burden effectively shifts to Respondent. Respondent's failure to respond means that Respondent has not presented any circumstances that would promote its rights or legitimate interests in the subject domain name under Policy ¶4(a)(ii)."). Although Respondent has not alleged it has rights or legitimate interests in the disputed domain name, the Panel chooses to examine the record under Policy ¶4(c).

The WHOIS information for the <aeropostsale.com> domain name lists "Private Registration (name) c/o Private Registration (name)" as the registrant, which does not indicate that Respondent is commonly known by the disputed domain name. Respondent has not offered any evidence to suggest that Policy ¶4(c)(ii) applies in this case. Therefore, the Panel finds Respondent is not commonly known by the disputed domain name under Policy ¶4(c)(ii). *See Educ. Broad. Corp. v. DomainWorks Inc.*, FA 882172 (Nat. Arb. Forum Apr. 18, 2007) (concluding that the respondent was not commonly known by the <thirteen.com> domain name based on all evidence in the record, and the respondent did not counter this argument in its response); *see also Instron Corp. v. Kaner*, FA 768859 (Nat. Arb. Forum Sept. 21, 2006) (finding that the respondent was not commonly known by the <shoredurometer.com> and <shoredurometers.com> domain names because the WHOIS information listed Andrew Kaner c/o Electromatic a/k/a Electromatic Equip't as the registrant of the disputed domain names and there was no other evidence in the record to suggest that the respondent was commonly known by the domain names in dispute).

Respondent's <**aeropostsale.com**> domain name resolves to website that features hyperlinks to third-party websites, some of which directly compete with Complainant. The Panel presumes Respondent receives click-through fees for these hyperlinks. Therefore, the Panel finds Respondent's use of the disputed domain name is not a *bona fide* offering of goods or services under Policy ¶4(c)(i) or a legitimate noncommercial or fair use under Policy ¶4(c)(iii). See *Skyhawk Techns., LLC v. Tidewinds Group, Inc.*, FA 949608 (Nat. Arb. Forum May 18, 2007) ("Respondent is using the <skycaddy.com> domain name to display a list of hyperlinks, some of which advertise Complainant and its competitors' products. The Panel finds that this use of the disputed domain name does not constitute a *bona fide* offering of goods or services under Policy ¶4(c)(i), or a legitimate noncommercial or fair use under Policy ¶4(c)(iii)."); see also *Disney Enters., Inc. v. Kamble*, FA 918556 (Nat. Arb. Forum Mar. 27, 2007) (holding that the operation of a pay-per-click website at a confusingly similar domain name was not a *bona fide* offering of goods or services under Policy ¶4(c)(i) or a legitimate noncommercial or fair use under Policy ¶4(c)(iii)).

The Panel finds Policy ¶4(a)(ii) satisfied.

Registration and Use in Bad Faith

This registration will be closely examined because it is a "private" nominee registration for an apparently commercial site. This Panel cannot find a good faith reason for doing that and Respondent has suggested no good faith reason for this type of registration. Under the circumstances of this case, a "private" nominee registration raises a rebuttable presumption of bad faith.

Respondent registered the <**aeropostsale.com**> domain name on June 20, 2007 and the disputed domain name resolves to a website featuring competing hyperlinks. The Panel finds Respondent's use of the disputed domain name in this competitive manner disrupts Complainant's business. The Panel further finds such a disruption constitutes bad faith registration and use under Policy ¶4(b)(iii). See *Tesco Pers. Fin. Ltd. v. Domain Mgmt. Servs.*, FA 877982 (Nat. Arb. Forum Feb. 13, 2007) (concluding that the use of a confusingly similar domain name to attract Internet users to a directory website containing commercial links to the websites of a complainant's competitors represents bad faith registration and use under Policy ¶4(b)(iii)); see also *David Hall Rare Coins v. Tex. Int'l Prop. Assocs.*, FA 915206 (Nat. Arb. Forum Apr. 9, 2007) (finding that the respondent registered and used the disputed domain name in bad faith pursuant to Policy ¶4(b)(iii) because respondent used the disputed domain name to advertise goods and services of complainant's competitors, thereby disrupting the complainant's business).

The Panel finds Respondent's use of the confusingly similar <**aeropostsale.com**> domain name creates a likelihood of confusion as to Complainant's affiliation with the disputed domain name. The Panel finds Respondent is commercially gaining from this likelihood of confusion through Respondent's presumed receipt of click-through fees, which constitutes bad faith registration and use under Policy ¶4(b)(iv). See *Univ. of*

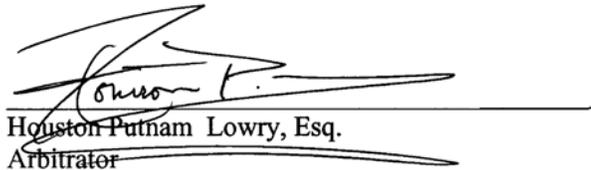
Houston Sys. v. Salvia Corp., FA 637920 (Nat. Arb. Forum Mar. 21, 2006) (“Respondent is using the disputed domain name to operate a website which features links to competing and non-competing commercial websites from which Respondent presumably receives referral fees. Such use for Respondent’s own commercial gain is evidence of bad faith registration and use pursuant to Policy ¶4(b)(iv).”); *see also T-Mobile USA, Inc. v. utahhealth*, FA 697821 (Nat. Arb. Forum June 7, 2006) (holding that the registration and use of a domain name confusingly similar to a complainant’s mark to direct Internet traffic to a commercial “links page” in order to profit from click-through fees or other revenue sources constitutes bad faith under Policy ¶4(b)(iv)).

The Panel finds Policy ¶4(a)(iii) satisfied.

DECISION

Having established all three elements required under the ICANN Policy, the Panel concludes that relief shall be **GRANTED**.

Accordingly, it is Ordered that the <**aeropostsale.com**> domain name be **TRANSFERRED** from Respondent to Complainant.



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: January 27, 2010

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