



NATIONAL ARBITRATION FORUM

DECISION

Barratt American Inc. v. Nevis Domains LLC
Claim Number: FA0605000701239

PARTIES

Complainant is **Barratt American Inc.** ("Complainant"), represented by **Peter K. Hahn**, of **Luce, Forward, Hamilton & Scripps**, 600 West Broadway, Suite 2600, San Diego, CA 92101. Respondent is **Nevis Domains LLC** ("Respondent"), 222-3 Main Street, Charlestown, Nevis 0000, KN.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**barrettamerican.com**>, registered with **Moniker Online Services, 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 May 4, 2006; the National Arbitration Forum received a hard copy of the Complaint on May 8, 2006.

On May 12, 2006, Moniker Online Services, Inc. confirmed by e-mail to the National Arbitration Forum that the <**barrettamerican.com**> domain name is registered with Moniker Online Services, Inc. and that Respondent is the current registrant of the name. Moniker Online Services, Inc. has verified that Respondent is bound by the Moniker Online Services, 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 May 17, 2006, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of June 6, 2006 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@barrettamerican.com by e-mail.

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

On June 12, 2006, 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 <**barrettamerican.com**> domain name is confusingly similar to Complainant's common law BARRATT mark.
2. Respondent does not have any rights or legitimate interests in the <**barrettamerican.com**> domain name.
3. Respondent registered and used the <**barrettamerican.com**> domain name in bad faith.

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

FINDINGS

Complainant, Barratt American Inc., is a prominent builder of homes and communities in Southern California. In connection with its real estate development services, Complainant has extensively used the BARRATT mark since 1981. Additionally, Complainant has conducted widespread promotion of the mark and has operated its own website with the <barrattamerican.com> domain name for seven years.

Respondent registered the <**barrettamerican.com**> domain name on October 18, 2005. The <**barrettamerican.com**> domain name resolves to a website featuring advertisements and links to real estate development services that compete with Complainant's business.

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

Complainant has continuously and extensively used the BARRATT mark in connection with the promotion of its residential homes and communities since 1981. Complainant is not required to hold a trademark registration to establish rights in the BARRATT mark pursuant to Policy ¶4(a)(i). *See SeekAmerica Networks Inc. v. Masood*, D2000-0131 (WIPO Apr. 13, 2000) (finding that the Rules do not require that the complainant's trademark or service mark be registered by a government authority or agency for such rights to exist); *see also British Broad. Corp. v. Renteria*, D2000-0050 (WIPO Mar. 23, 2000) (noting that the Policy "does not distinguish between registered and unregistered trademarks and service marks in the context of abusive registration of domain names" and applying the Policy to "unregistered trademarks and service marks").

The Panel finds Complainant's promotion and use of the BARRATT mark has resulted in widespread recognition as a source indicator for Complainant's residential homes and communities and has generated substantial goodwill in its business. The Panel therefore concludes Complainant has generated sufficient secondary meaning in the BARRATT mark through continuous and extensive use of the mark in connection with its real estate development services to establish common law rights for the purposes of Policy ¶4(a)(i).

See Keppel TatLee Bank v. Taylor, D2001-0168 (WIPO Mar. 28, 2001) (“[O]n account of long and substantial use of [KEPPEL BANK] in connection with its banking business, it has acquired rights under the common law.”); *see also Fishtech, Inc. v. Rossiter*, FA 92976 (Nat. Arb. Forum Mar. 10, 2000) (finding that the complainant has common law rights in the mark FISHTECH that it has used since 1982).

Respondent’s <**barrettamerican.com**> domain name misspells Complainant’s mark by merely replacing the letter “a” with the letter “e” and adding the geographic term “american” (as does Complainant’s own domain name). The Panel therefore finds the <**barrettamerican.com**> domain name is confusingly similar to Complainant’s BARRATT common law mark. *See Belkin Components v. Gallant*, FA 97075 (Nat. Arb. Forum May 29, 2001) (finding the <belken.com> domain name confusingly similar to the complainant’s BELKIN mark because the name merely replaced the letter “i” in the complainant’s mark with the letter “e”); *see also Hewlett-Packard Co. v. Zuccarini*, FA 94454 (Nat. Arb. Forum May 30, 2000) (finding the domain name <hewlitpackard.com> to be identical or confusingly similar to the complainant’s HEWLETT-PACKARD mark); *Net2phone Inc. v. Netcall SAGL*, D2000-0666 (WIPO Sept. 26, 2000) (finding that the respondent’s domain name <net2phone-europe.com> is confusingly similar to the complainant’s mark because “the combination of a geographic term with the mark does not prevent a domain name from being found confusingly similar”).

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

Rights or Legitimate Interests

Complainant contends Respondent lacks rights and legitimate interests in the <**barrettamerican.com**> domain name. Pursuant to Policy ¶4(a)(ii), Complainant initially bears the burden of establishing that Respondent lacks rights and legitimate interests in the disputed domain name. Once Complainant sufficiently establishes a *prima facie* case, the burden shifts to Respondent to prove that it has rights or legitimate interests pursuant to Policy ¶4(a)(ii). *See 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 Respondent has not presented any circumstances that would promote its rights or legitimate interests in the subject domain name under Policy ¶4(a)(ii).”); *see also Do The Hustle, LLC v. Tropic Web*, D2000-0624 (WIPO Aug. 21, 2000) (holding that once the complainant asserts that the respondent has no rights or legitimate interests with respect to the domain, the burden shifts to the respondent to provide “concrete evidence that it has rights to or legitimate interests in the domain name at issue”). The Panel finds Complainant has established a *prima facie* case and will evaluate the evidence on record to determine whether Respondent has rights or legitimate interests with regard to the <**barrettamerican.com**> domain name pursuant to Policy ¶4(c).

Complainant presents an uncontested assertion Respondent’s <**barrettamerican.com**> domain name resolves to a website that features advertisements and links to real estate

development services that compete with Complainant's business. The Panel finds the use of a confusingly similar domain name to advertise links to Complainant's competitors does not amount to 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 Compaq Info. Techs. Group v Jones*, FA 99091 (Nat. Arb. Forum Oct. 4, 2001) (finding that the respondent had no rights or legitimate interests in a domain name that it used to redirect Internet users to a commercial website as part of that website's affiliate program, where the resultant website contained banner ads as well as various links to offers for free merchandise, including merchandise from the complainant's competitor); *see also Geoffrey, Inc. v. Toyrus.com*, FA 150406 (Nat. Arb. Forum Apr. 25, 2003) (holding that the respondent's use of the <toyru.com> domain name, a simple misspelling of the complainant's mark, to divert Internet users to a website that featured pop-up advertisements and an Internet directory, was neither a *bona fide* offering of goods or services nor a legitimate noncommercial or fair use of the domain name).

Respondent has failed to come forward with evidence to show it is commonly known by the <barrettamerican.com> domain name. Additionally, there is no evidence to suggest Respondent was authorized to register a domain name that features Complainant's BARRATT mark or any variation thereof. The Panel finds Respondent has not established rights or legitimate interests in the <barrettamerican.com> domain name pursuant to Policy ¶4(c)(ii). *See Compagnie de Saint Gobain v. Com-Union Corp.*, D2000-0020 (WIPO Mar. 14, 2000) (finding no rights or legitimate interest where the respondent was not commonly known by the mark and never applied for a license or permission from the complainant to use the trademarked name); *see also RMO, Inc. v. Burbridge*, FA 96949 (Nat. Arb. Forum May 16, 2001) (interpreting Policy ¶4(c)(ii) "to require a showing that one has been commonly known by the domain name prior to registration of the domain name to prevail").

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

Registration and Use in Bad Faith

Complainant asserts Respondent is using the disputed domain name to redirect Internet users to a website that features advertisements and links to real estate development services that compete with Complainant's business. Complainant also presents an uncontested assertion Respondent receives commercial gain from the redirection of Internet users to third-party competing websites. Furthermore, Complainant asserts the registration and use of the <barrettamerican.com> domain name will cause confusion as to Complainant's sponsorship of or affiliation with the disputed domain name and the resulting website. Therefore, the Panel concludes Respondent's use of the confusingly similar domain name to display advertisement and links to third-party websites that compete with Complainant's business for commercial gain evidences bad faith pursuant to Policy ¶4(b)(iv). *See Bama Rags, Inc. v. Zuccarini*, FA 94381 (Nat. Arb. Forum May 8, 2000) (finding bad faith where the respondent used a misspelling of the complainant's famous mark to attract Internet users to a series of advertisements); *see also H-D*

Michigan, Inc. v. Petersons Auto., FA 135608 (Nat. Arb. Forum Jan. 8, 2003) (finding that the disputed domain name was registered and used in bad faith pursuant to Policy ¶4(b)(iv) through the respondent's registration and use of the infringing domain name to intentionally attempt to attract Internet users to its fraudulent website by using the complainant's famous marks and likeness).

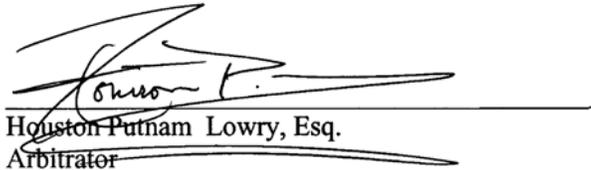
The Panel finds Respondent's registration and use of the confusingly similar domain name constitutes disruption and evidences bad faith pursuant to Policy ¶4(b)(iii). *See S. Exposure v. S. Exposure, Inc.*, FA 94864 (Nat. Arb. Forum July 18, 2000) (finding the respondent acted in bad faith by attracting Internet users to a website that competes with the complainant's business); *see also EBAY, Inc. v. MEODesigns*, D2000-1368 (Dec. 15, 2000) (finding that the respondent registered and used the domain name <eebay.com> in bad faith where the respondent has used the domain name to promote competing auction sites).

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 <**barrettamerican.com**> domain name be **TRANSFERRED** from Respondent to Complainant.



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: Friday, June 21, 2006

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