



NATIONAL ARBITRATION FORUM

DECISION

Developing Hearts Systems, Inc. v. Mihail Rudenko c/o Miru
Claim Number: FA0702000915557

PARTIES

Complainant is **Developing Hearts Systems, Inc.** ("Complainant"), represented by **Jaren D. Wilcoxson**, of **Goodwin Procter LLP**, Exchange Place, Boston, MA 02109. Respondent is **Mihail Rudenko c/o Miru** ("Respondent"), Maksimova 13a, Kazan, Tat 420127, RU.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**bondingwithbaby.org**>, registered with **Register.com 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 February 13, 2007; the National Arbitration Forum received a hard copy of the Complaint on February 14, 2007.

On February 14, 2007, Register.com Inc. confirmed by e-mail to the National Arbitration Forum that the <**bondingwithbaby.org**> domain name is registered with Register.com Inc. and that Respondent is the current registrant of the name. Register.com Inc. has verified that Respondent is bound by the Register.com 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 February 16, 2007, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of March 8, 2007, 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@bondingwithbaby.org by e-mail.

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

On March 13, 2007, 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:

FACTUAL AND LEGAL GROUNDS (ICANN Rule 3(b)(ix))

Complainant Developing Hearts Systems, Inc. (referred to herein as "Complainant" or "Developing Hearts") hereby seeks transfer of the domain name BONDINGWITHBABY.ORG from Respondent Mihail Rudenko c/o Miru (referred to herein as "Respondent" or "Mr. Rudenko") because (a) this domain name is confusingly similar to the Complainant's federally-registered trademarks, (b) Respondent has no legitimate rights in the domain name, and (c) the domain name has been registered and used in bad faith.

Factual Grounds

Developing Hearts is a 501(c)(3) non-profit organization that seeks to create and provide parents with new tools that encourage them to become enthusiastic first teachers for their children, thereby fostering an early love of learning within their children. Towards this end, Developing Hearts has developed the BONDING WITH BABY Infant Development series of books to help parents more effectively interact with and promote learning of their children. Since some families are unable to afford the BONDING WITH BABY Infant Development books, Developing Hearts also sponsors a book donation program whereby for every set of books purchased, a set of books is provided for free to a disadvantaged family. To date, over 8,000 sets of books have been distributed through this program.

Developing Hearts has devoted much of its limited resources, time, money, and effort to develop recognition and trust in its BONDING WITH BABY brand. As a result of these efforts, Developing Hearts has developed goodwill, customer distinctiveness, and customer recognition in the BONDING WITH BABY marks. In addition, Developing Hearts is the owner of two United States Trademark Registrations for the mark BONDING WITH BABY.

To further promote its mission, since October 22, 2001, Developing Hearts has owned and operated a website located at www.bondingwithbaby.org. This website is a critical component in Developing Hearts's outreach program as it has been used to offer the BONDING WITH BABY Infant Development books series, operate the BONDING WITH BABY book donation program, and to provide valuable information for free to new parents. In addition, nearly all of Developing Hearts's promotional materials refer individuals to the www.bondingwithbaby.org site for further information.

On October 22, 2006, Developing Hearts inadvertently allowed its five-year registration of the domain name www.bondingwithbaby.org (referred to herein as the "domain") to lapse. The domain was subsequently registered on the same day by Respondent and the site was populated with a series of advertisements and links to various sites promoting online gaming. None of the sites currently being promoted on the www.bondingwithbaby.org website are related to infant development.

Although it denies that Respondent has any rights in the domain, in early December 2006, Developing Hearts initiated e-mail correspondence with Respondent, explaining its accidental failure to register the domain and, in an effort to avoid having to institute this proceeding, seeking to buy back the domain at a reasonable price. Mr. Rudenko responded that he would not return the domain, but rather would consider hosting Developing Hearts's content with his advertisements still present on the site. Developing Hearts refused this offer and asked the Respondent to reconsider. Respondent did not respond to this request.

Since Developing Hearts's direct contact with Respondent was unsuccessful, it also sought outside assistance in this matter. Developing Hearts retained a representative of Sedo to contact Respondent in an attempt to retrieve the domain. Sedo was unsuccessful in its attempt. Finally, Developing Hearts sent a letter to Respondent on January 18, 2007, informing him that he was infringing Developing Hearts's BONDING WITH BABY trademarks. In a final effort to avoid having to institute this proceeding, Developing Hearts repeated its offer to purchase the domain. Once again, Developing Hearts received no response.

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

FINDINGS

Complainant, Developing Hearts Systems, Inc., is a non-profit organization that developed the BONDING WITH BABY Infant Development Series of books to help parents more effectively interact and promote their children's learning. Complainant holds a registered trademark with the United States Patent and Trademark Office ("USPTO") for the BONDING WITH BABY mark (Reg. No. 2,560,213 issued April 9, 2002).

On October 22, 2001, Complainant registered the <bondingwithbaby.org> domain name to promote its series of books and provide more information about its objectives. However, Complainant inadvertently allowed its five-year registration to lapse on October 22, 2006.

Respondent, Mihail Rudenko, registered the <bondingwithbaby.org> domain name on October 22, 2006, the same day that Complainant's registration in the disputed domain name lapsed. Respondent is using the disputed domain name to display hyperlinks promoting various online gambling websites.

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's registration of the BONDING WITH BABY mark with the USPTO on April 9, 2002 and May 13, 2003 preceded Respondent's registration of the <bondingwithbaby.org> domain name on October 22, 2006. Under the Policy, registration of a mark with an appropriate governmental authority confers rights in that mark to Complainant. The Panel finds Complainant has established rights in the BONDING WITH BABY mark pursuant to Policy ¶4(a)(i). *See Am. Online, Inc. v. Thomas P. Culver Enters.*, D2001-0564 (WIPO June 18, 2000) (finding that successful trademark registration with the USPTO creates a presumption of rights in a mark); *see also Innomed Tech., Inc. v. DRP Servs.*, FA 221171 (Nat. Arb. Forum Feb. 18, 2004) ("Registration of the NASAL-AIRE mark with the USPTO establishes Complainant's rights in the mark.").

Respondent's <bondingwithbaby.org> domain name contains Complainant's BONDING WITH BABY mark in its entirety without the spaces, and with the addition of the generic top-level domain ("gTLD") ".org." The omission of spaces and addition of a gTLD fails to properly distinguish Respondent's domain name from Complainant's mark under an analysis of Policy ¶4(a)(i). Therefore, the Panel finds Respondent's <bondingwithbaby.org> domain name is identical to Complainant's BONDING WITH BABY mark pursuant to Policy ¶4(a)(i). *See Hannover Ruckversicherungs-AG v. Ryu*, FA 102724 (Nat. Arb. Forum Jan. 7, 2001) (finding <hannoverre.com> to be identical to HANNOVER RE, "as spaces are impermissible in domain names and a generic top-level domain such as '.com' or '.net' is required in domain names"); *see also Sea World, Inc. v. JMXTRADE.com*, FA 872052 (Nat. Arb. Forum Feb. 12, 2007) ("[Since] [t]he top-level gTLD is merely a functional element required of every domain name, the <shamu.org> domain name is identical to the SHAMU mark under a Policy ¶4(a)(i)").

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

Rights or Legitimate Interests

Complainant has alleged Respondent does not have rights or legitimate interests in the <bondingwithbaby.org> domain name. Once Complainant makes a *prima facie* case in support of its allegations, the burden then shifts to Respondent to show it has rights or legitimate interests pursuant to Policy ¶4(a)(ii). Because of Respondent's failure to respond to the Complaint, the Panel assumes Respondent does not have rights or legitimate interests in the disputed domain name. *See G.D. Searle v. Martin Mktg.*, FA 118277 (Nat. Arb. Forum Oct. 1, 2002) (holding that, where the complainant has asserted that respondent does not have rights or legitimate interests with respect to the domain name, it is incumbent on respondent to come forward with concrete evidence rebutting this assertion because this information is "uniquely within the knowledge and control of the respondent"); *see also Clerical Med. Inv. Group Ltd. v. Clericalmedical.com*, D2000-1228 (WIPO Nov. 28, 2000) (finding that, under certain circumstances, the mere assertion by the complainant that the respondent does not have rights or legitimate

interests is sufficient to shift the burden of proof to the respondent to demonstrate that such a right or legitimate interest does exist). However, the Panel will now examine the record to determine if Respondent has rights or legitimate interests pursuant to Policy ¶4(c).

Complainant has alleged Respondent is not commonly known by the <**bondingwithbaby.org**> domain name. The WHOIS information identifies Respondent as “Mihail Rudenko.” Respondent is not a licensee or assignee of any rights in the BONDING WITH BABY mark, and the Panel can find no other evidence in the record indicating Respondent is commonly known by the disputed domain name. Therefore, the Panel concludes Respondent is not commonly known by the <**bondingwithbaby.org**> domain name pursuant to Policy ¶4(c)(ii). *See Tercent Inc. v. Lee Yi*, FA 139720 (Nat. Arb. Forum Feb. 10, 2003) (stating “nothing in Respondent’s WHOIS information implies that Respondent is ‘commonly known by’ the disputed domain name” as one factor in determining that Policy ¶4(c)(ii) does not apply); *see also Ian Schrager Hotels, L.L.C. v. Taylor*, FA 173369 (Nat. Arb. Forum Sept. 25, 2003) (finding that without demonstrable evidence to support the assertion that a respondent is commonly known by a domain name, the assertion must be rejected).

Respondent is using the <**bondingwithbaby.org**> domain name to display hyperlinks promoting various online gambling websites. Respondent actually knew of Complainant’s claims to the domain name on December 4, 2006, (if not before). These gambling sites are completely unrelated to Complainant’s business, and Respondent presumably receives click-through referral fees for each redirected Internet user. Therefore, the Panel finds Respondent’s use of the <**bondingwithbaby.org**> domain name does not constitute a *bona fide* offering of goods and services under Policy ¶4(c)(i), or a legitimate noncommercial or fair use under Policy ¶4(c)(iii). *See Disney Enters., Inc. v. Dot Stop*, FA 145227 (Nat. Arb. Forum Mar. 17, 2003) (finding that the respondent’s diversionary use of the complainant’s mark to attract Internet users to its own website, which contained a series of hyperlinks to unrelated websites, was neither a *bona fide* offering of goods or services nor a legitimate noncommercial or fair use of the disputed domain names); *see also Black & Decker Corp. v. Clinical Evaluations*, FA 112629 (Nat. Arb. Forum June 24, 2002) (holding that the respondent’s use of the disputed domain name to redirect Internet users to commercial websites, unrelated to the complainant and presumably with the purpose of earning a commission or pay-per-click referral fee did not evidence rights or legitimate interests in the domain name).

Respondent registered the <**bondingwithbaby.org**> domain name on the same day in which Complainant’s registration to the domain name inadvertently lapsed after its five year initial registration. In *Tercent Inc. v. Yi*, FA 139720 (Nat. Arb. Forum Feb. 10, 2003), the panel found the “Respondent’s opportunistic registration of the Complainant’s domain name, within 24 hours of its lapse, weighs strongly in favor of a finding that Respondent has no rights or legitimate interests in the disputed domain name.” In *RH-Interactive Jobfinance v. Mooburi Servs.*, FA 137041 (Nat. Arb. Forum Jan. 16, 2003), the panel found that the “Complainant’s prior registration of the domain name, coupled

with Respondent's failure to respond to this dispute, is evidence that Respondent has no rights or legitimate interests in the domain name pursuant to Policy 4(a)(ii)."). In this case, Complainant previously registered the <bondingwithbaby.org> domain name in 2001, but Respondent registered this domain name in 2006 on the same day Complainant's registration inadvertently lapsed. Therefore, the Panel finds Respondent does not have rights or legitimate interests in the <bondingwithbaby.org> domain name pursuant to Policy ¶4(a)(ii).

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

Registration and Use in Bad Faith

Respondent is using the <bondingwithbaby.org> domain name to display hyperlinks promoting various online gambling websites. This registration and use of the disputed domain name constitutes bad faith pursuant to Policy ¶4(b)(iv). *See Mars, Inc. v. Double Down Magazine*, D2000-1644 (WIPO Jan. 24, 2001) (finding bad faith under Policy ¶4(b)(iv) where the respondent linked the domain name <marssmusic.com>, which is identical to the complainant's mark, to a gambling website); *see also Kmart v. Khan*, FA 127708 (Nat. Arb. Forum Nov. 22, 2002) (finding that if the respondent profits from its diversionary use of the complainant's mark when the domain name resolves to commercial websites and the respondent fails to contest the complaint, it may be concluded that the respondent is using the domain name in bad faith pursuant to Policy ¶4(b)(iv)).

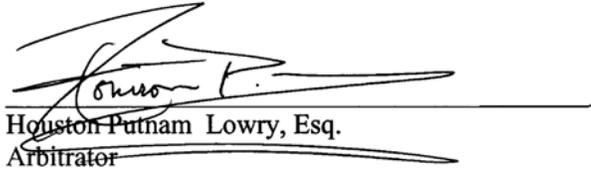
Complainant previously registered the <bondingwithbaby.org> domain name, but Respondent registered this domain name on the same day Complainant failed to timely renew its initial five year registration. Respondent's subsequent registration and use constitutes bad faith pursuant to Policy ¶4(a)(iii). *See RH-Interactive Jobfinance v. Mooburi Servs.*, FA 137041 (Nat. Arb. Forum Jan. 16, 2003) (finding that the respondent's registration of the <jobfinance.com> domain name "immediately after Complainant failed to timely renew the domain name registration" was evidence of bad faith); *see also InTest Corp. v. Servicepoint*, FA 95291 (Nat. Arb. Forum Aug. 30, 2000) ("Where the domain name has been previously used by the Complainant, subsequent registration of the domain name by anyone else indicates bad faith, absent evidence to the contrary.").

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 <bondingwithbaby.org> domain name be **TRANSFERRED** from Respondent to Complainant.



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: March 23, 2007

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