



NATIONAL ARBITRATION FORUM

DECISION

A.L. Enterprises, Inc. v. Eric Fankhauser
Claim Number: FA0703000948485

PARTIES

Complainant is **A.L. Enterprises, Inc.** ("Complainant"), represented by **Bruce R. Needham, of Kunzler & McKenzie**, 8 East Broadway, Suite 600, Salt Lake City, UT 84111. Respondent is **Eric Fankhauser** ("Respondent"), Vernand-Dessus 3, Romanel-s-Lausanne 1032, CH.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**cb-3000.net**>, registered with **Network Solutions, LLC**.

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 March 28, 2007; the National Arbitration Forum received a hard copy of the Complaint on March 29, 2007.

On March 30, 2007, Network Solutions, LLC confirmed by e-mail to the National Arbitration Forum that the <**cb-3000.net**> domain name is registered with Network Solutions, LLC and Respondent is the current registrant of the name. Network Solutions, LLC has verified Respondent is bound by the Network Solutions, LLC 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 April 5, 2007, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of April 25, 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@cb-3000.net by e-mail.

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

On May 1, 1007, 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 <cb-3000.net> domain name is identical to Complainant's CB-3000 mark.
2. Respondent does not have any rights or legitimate interests in the <cb-3000.net> domain name.
3. Respondent registered and used the <cb-3000.net> domain name in bad faith.

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

FINDINGS

Complainant, A.L. Enterprises, Inc., produces male chastity devices. Specifically, Complainant produces the "CB-3000," a transparent chastity restraint device which represents the natural lines of the male penis. In connection with the production of this device, Complainant registered the CB-3000 mark with the United States Patent and Trademark Office ("USPTO") (Reg. No. 3,150,789 issued October 3, 2006).

Respondent registered the disputed domain name on November 1, 2006. The disputed domain names resolves to a website offering for sale, among other similar male chastity devices, the "CB 3000" (omitting the hyphen) which is a penis restraint whose design and function is similar to that of Complainant's product.

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 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 asserts rights in the CB-3000 mark through registration with the USPTO on October 6, 2006 (in addition to common law rights for the past nine years). The Panel finds Complainant's timely USPTO registration and subsequent use of the CB-3000 mark establishes sufficient rights in the mark pursuant to Policy ¶4(a)(i). *See Innomed Techs., 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."); *see also Vivendi Universal Games v. XBNetVentures Inc.*, FA 198803 (Nat. Arb. Forum Nov. 11, 2003) ("Complainant's federal trademark registrations establish Complainant's rights in the BLIZZARD mark."). Since Complainant's trademark registration was effective before Respondent registered the domain name in question, the Panel does not find it necessary to discuss Complainant's common law rights.

Respondent's <cb-3000.net> domain name contains Complainant's mark in its entirety and adds the generic top-level domain ("gTLD") ".net." The Panel finds the mere addition of a gTLD does not sufficiently distinguish the domain name from the mark pursuant to Policy ¶4(a)(i). *See Rollerblade, Inc. v. McCrady*, D2000-0429 (WIPO June 25, 2000) (finding that the top level of the domain name such as ".net" or ".com" does

not affect the domain name for the purpose of determining whether it is identical or confusingly similar); *see also Daedong-USA, Inc. v. O'Bryan Implement Sales*, FA 210302 (Nat. Arb. Forum Dec. 29, 2003) (“Respondent's domain name, <kioti.com>, is identical to Complainant's KIOTI mark because adding a top-level domain name is irrelevant for purposes of Policy ¶4(a)(i).”).

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

Rights or Legitimate Interests

In instances where Complainant has made a *prima facie* case under Policy ¶4(a)(ii), the burden shifts to Respondent to set forth concrete evidence it possesses rights or legitimate interests in the disputed domain name. *See Compagnie Generale des Matieres Nucleaires v. Greenpeace Int'l*, D2001-0376 (WIPO May 14, 2001) (“Proving that the Respondent has no rights or legitimate interests in respect of the Domain Name requires the Complainant to prove a negative. For the purposes of this sub paragraph, however, it is sufficient for the Complainant to show a *prima facie* case and the burden of proof is then shifted on to the shoulders of Respondent. In those circumstances, the common approach is for respondents to seek to bring themselves within one of the examples of paragraph 4(c) or put forward some other reason why they can fairly be said to have a relevant right or legitimate interests in respect of the domain name in question.”); *see also Woolworths plc. v. Anderson*, D2000-1113 (WIPO Oct. 10, 2000) (finding that, absent evidence of preparation to use the domain name for a legitimate purpose, the burden of proof lies with the respondent to demonstrate that it has rights or legitimate interests).

Respondent uses the disputed domain name to resolve to a page where competing male chastity devices are sold. Upon entering Respondent's website, unwary Internet users may become confused as to the source and sponsorship of the resulting male chastity products. The Panel finds such use is neither a *bona fide* offering of goods or services pursuant to Policy ¶4(c)(i) nor a legitimate noncommercial or fair use pursuant to Policy ¶4(c)(iii). *See Crow v. LOVEARTH.net*, FA 203208 (Nat. Arb. Forum Nov. 28, 2003) (“It is neither a *bona fide* offerings [sic] of goods or services, nor an example of a legitimate noncommercial or fair use under Policy ¶4(c)(i) & (iii) when the holder of a domain name, confusingly similar to a registered mark, attempts to profit by passing itself off as Complainant”); *see also Am. Int'l Group, Inc. v. Busby*, FA 156251 (Nat. Arb. Forum May 30, 2003) (finding that the respondent attempts to pass itself off as the complainant online, which is blatant unauthorized use of the complainant's mark and is evidence that the respondent has no rights or legitimate interests in the disputed domain name).

Complainant contends, absent any countervailing evidence to suggest Respondent is commonly known by the mark, Respondent's WHOIS information can be used to determine Respondent is not commonly known by the Complainant's trademark. A review of Respondent's WHOIS information reveals that the registrant of the disputed

domain name is “Eric Fankhauser.” The Panel finds, absent evidence from Respondent that would lead to an alternative conclusion, Respondent is not commonly known by the mark 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 G.D. Searle & Co. v. Cimock*, FA 126829 (Nat. Arb. Forum Nov. 13, 2003) (“Due to the fame of Complainant’s mark there must be strong evidence that Respondent is commonly known by the disputed domain name in order to find that Respondent has rights or legitimate interests in the disputed domain name pursuant to Policy ¶4(c)(ii). However, there is no evidence on record, and Respondent has not come forward with any proof to establish that it is commonly known as CELEBREXRX or <celebrexrx.com>.”).

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

Registration and Use in Bad Faith

Given the similarity of the products sold on both Respondent’s and Complainant’s website, it is likely Respondent has attempted to capitalize on the apparent notoriety and goodwill associated with Complainant’s products by selling counterfeit male chastity devices. Such use has the presumed impact of confusing unsuspecting Internet users into believing Complainant is somehow affiliated with Respondent’s products, thereby disrupting Complainant’s business. Further, the disputed domain name website was registered the same day Complainant registered the CB-3000.com domain name. The Panel finds Respondent’s use amounts to a disruption of Complainant’s business, which evidences registration and use in bad faith pursuant to Policy ¶4(b)(iii). *See Lambros v. Brown*, FA 198963 (Nat. Arb. Forum Nov. 19, 2003) (finding that the respondent registered a domain name primarily to disrupt its competitor when it sold similar goods as those offered by the complainant and “even included Complainant’s personal name on the website, leaving Internet users with the assumption that it was Complainant’s business they were doing business with”); *see also Disney Enters., Inc. v. Noel*, FA 198805 (Nat. Arb. Forum Nov. 11, 2003) (“Respondent registered a domain name confusingly similar to Complainant’s mark to divert Internet users to a competitor’s website. It is a reasonable inference that Respondent’s purpose of registration and use was to either disrupt or create confusion for Complainant’s business in bad faith pursuant to Policy ¶4(b)(iii) [and] (iv).”).

Respondent presumably receives financial gain from its diversionary use of the disputed domain name. The Panel finds Respondent’s use also constitutes an attraction for commercial gain, which evinces registration and use in bad faith pursuant to Policy ¶4(b)(iv). *See Utensilerie Assoc. S.p.A. v. C & M*, D2003-0159 (WIPO Apr. 22, 2003) (“The contents of the website, offering Usag products, together with the domain name may create the (incorrect) impression that Respondent is either the exclusive distributor or a subsidiary of Complainant, or at the very least that Complainant has approved its use of the domain name.”); *see also Hewlett-Packard Co. v. Ali*, FA 353151 (Nat. Arb.

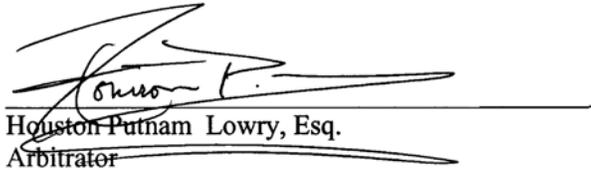
Forum Dec. 13, 2004) (“Respondent [used “HP” in its domain name] to benefit from the goodwill associated with Complainant’s HP marks and us[ed] the <hpdubai.com> domain name, in part, to provide products similar to those of Complainant. Respondent’s practice of diversion, motivated by commercial gain, constitutes bad faith registration and use pursuant to 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 <**cb-3000.net**> domain name be **TRANSFERRED** from Respondent to Complainant.



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: May 14, 2007

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