



NATIONAL ARBITRATION FORUM

DECISION

Hot Topic, Inc. v. Whois-Privacy.Net Ltd c/o DN Manager
Claim Number: FA1001001301281

PARTIES

Complainant is **Hot Topic, Inc.** ("Complainant"), represented by **CitizenHawk, Inc.**, California, USA. Respondent is **Whois-Privacy.Net Ltd c/o DN Manager** ("Respondent"), Vanuatu.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**hottoopic.com**>, registered with **Fabulous.com Pty Ltd.**

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 January 4, 2010; the National Arbitration Forum received a hard copy of the Complaint on January 5, 2010.

On January 4, 2010, Fabulous.com Pty Ltd. confirmed by e-mail to the National Arbitration Forum that the <**hottoopic.com**> domain name is registered with Fabulous.com Pty Ltd. and that Respondent is the current registrant of the name. Fabulous.com Pty Ltd. has verified that Respondent is bound by the Fabulous.com Pty Ltd. 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 January 7, 2010, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of January 27, 2010 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@hottoopic.com by e-mail.

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

On February 2, 2010, 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:

Trademark/Service Mark Information:

- [i]. HOT TOPIC for doll clothing and doll accessories and stuffed toys and action figures and accessories therefore (U.S. Reg. No. 2,771,871);
- [ii]. HOT TOPIC for cosmetics, namely face, eye and body make-up, lipstick, nail polish, glitter, artificial eyelashes, body lotion; soaps; shower gel; body powder, face powder; perfume, hair dye and gels, cologne and incense (U.S. Reg. No. 2,853,512);
- [iii]. HOT TOPIC for clothing, namely, men's, women's and children's wearing apparel, namely, jeans, shirts; outerwear, namely, jackets, coats, vests, scarves, shells, sports jackets; pants, trousers, sweaters, sweatpants, sweatshirts, sweat suits, jumpsuits, shorts, overalls, shortalls, dresses, skirts, blouses, t-shirts, knit shirts, rainwear, raincoats, tank tops, bathing suits, suits, robes, pajamas, loungewear, belts, briefs, leotards, tights, hosiery, socks, gloves, arm warmers, pantyhose, scarves, shawls, ponchos, slippers, sun visors, blazers, bras, nightgowns, undergarments, panties; performance wear, namely, jerseys, bicycle pants, gymnastic suits; sportswear, namely printed t-shirts, swimwear, beach and swimsuit cover-ups; footwear, namely shoes, sandals, boots, rubber boots, and slippers; and headgear, namely, hats, caps and visors (U.S. Reg. No. 2,853,514);
- [iv]. HOT TOPIC for hair accessories, namely barrettes, hair scrunchies, hairpins, hair clips, hair ribbons, hair bands made of rubber band; hair

sticks, safety pins and clothing belt buckles not made of precious metal (U.S. Reg. No. 2,853,515) and;

- [v]. HOT TOPIC for handbags, pocketbooks, all-purpose carrying bags, tote bags, shoulder bags, cosmetic bags sold empty, toiletry cases sold empty, grooming cases sold empty, vanity cases sold empty, wallets, billfolds, purses, clutch purses, clutch bags, general purpose purses; leather and non-leather draw string pouches to be used as handbags, book bags, belt bags and coin purses; small leather and textile items, namely, wallets (U.S. Reg. No. 2,855,908).

The marks cited above are hereafter referred to as the “Marks.”

FACTUAL AND LEGAL GROUNDS

This Complaint is based on the following factual and legal grounds:

Complainant, Hot Topic, Inc. (Hot Topic) is a corporation with its principal place of business in City of Industry, California. Founded in 1988 as a mall-based specialty retailer, Hot Topic, Inc. operates Hot Topic and Torrid store concepts, as well as an e-space music discovery concept, ShockHound. Hot Topic stores sell music/pop culture-licensed merchandise, including tee shirts, hats, posters, stickers, patches, postcards, books, novelty accessories, CDs, and DVDs; and music/pop culture-influenced merchandise comprising women’s and men’s apparel and accessories, such as woven and knit tops, skirts, pants, shorts, jackets, shoes, costume jewelry, body jewelry, sunglasses, cosmetics, leather accessories, and gift items.

As of January 31, 2009, Hot Topic operates 681 stores in the United States and Puerto Rico, and also sells merchandise on its Web site, hottopic.com, which averages over 1,000,000 visitors throughout the year. Hot Topic, Inc. reported revenue of over \$728 million for their operations in 2008 and is a publicly traded company listed on the NASDAQ under the symbol HOTT.

In short, Hot Topic enjoys wide consumer recognition and acceptance of its brand.

Since its start in 1988 Hot Topic, Inc. has continuously used the mark HOT TOPIC in connection with retail and online store services including but not limited to cosmetics, clothing, hair accessories, and wallets and handbags (U.S. Reg. Nos. 2,771,871; 2,853,512; 2,853,514; 2,853,515; 2,855,908).

Hot Topic owns the Marks cited in Section 4(c) above for which it has obtained federal trademark registrations. The federal mark registrations have not been abandoned, cancelled or revoked.

Furthermore, Hot Topic has spent hundreds of thousands of dollars in advertisement and promotion of the Marks on the Internet through its website located at <hottopic.com>. Based on its federal trademark registrations and extensive use, Hot Topic owns the exclusive right to use the Marks in connection with online retail store services.

- a) By virtue of its federal trademark and/or service mark registrations, Complainant is the owner of the Complainant's Mark(s). *See, e.g., United Way of America v. Alex Zingaus*, NAF Claim No. FA0707001036202 ("Panels have long recognized Complainant's registration of a mark with a trademark authority is sufficient to confer rights in the mark pursuant to Policy ¶4(a)(i)").

When comparing the Disputed Domain Name(s) to the Complainant's Mark(s), the relevant comparison to be made is between only the second-level portion of the Disputed Domain Name(s) and the Complainant's Mark(s). *Rollerblade, Inc. v. McCrady*, WIPO Case No. D2000-0429 (finding that the top-level domain, 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 *Gardline Surveys Ltd. v. Domain Fin. Ltd.*, NAF Claim No. FA0304000153545 ("[t]he addition of a top-level domain is irrelevant when establishing whether or not a mark is identical or confusingly similar, because top-level domains are a required element of every domain name.")

The Disputed Domain Name(s) are confusingly similar to Complainant's Mark(s) because they differ by only a single character from Complainant's Mark(s), or because they differ by only the juxtaposition of two characters when compared to Complainant's Mark(s). For clarification, the Disputed Domain Name(s) contain either:

- [i]. the addition of one extra character, or...
- [ii]. the removal of one character, or...
- [iii]. one character which is incorrect, or...
- [iv]. two juxtaposed characters

as compared to Complainant's Mark(s).

The Disputed Domain Name(s) are, simply put, a classic example of "typosquatting". The practice of typosquatting is designed to take advantage of Internet users' typographical errors, which means the names must be confusingly similar by design. *See Reuters Ltd. v. Global Net 2000, Inc.*, WIPO Case No. D2000-0441 (finding that a domain name which differs by only one letter from a trademark has a greater tendency to be confusingly similar to the trademark where the trademark is highly distinctive); *Caterpillar Inc. v. Center for Ban on Drugs*, NAF Claim No. FA0603000661437 ("the omission of a single letter from Complainant's mark(s) does not adequately distinguish the Disputed Domain Name from the mark"); and *Victoria's Secret v. Zuccarini*, NAF Claim No. FA0010000095762 (finding that, by

misspelling words and adding letters to words, a respondent does not create a distinct mark but nevertheless renders the domain name confusingly similar to the complainant's mark(s)).

- b) Respondent has no rights or legitimate interests in respect of the Disputed Domain Name(s) for the following reasons:

Respondent has not been commonly known by the Disputed Domain Name(s). *See* Policy, ¶4(c)(ii). Where, as here, “the WHOIS information suggests Respondent is known as” an entity other than the trademark associated with Complainant, and Complainant has not “licensed, authorized, or permitted Respondent to register domain names incorporating Complainant’s... mark,” a Panel should find that the Respondent is not commonly known by the Disputed Domain Name. *United Way of America v. Alex Zingaus*, NAF Claim No. FA0707001036202.

Respondent is not sponsored by or legitimately affiliated with Complainant in any way.

Complainant has not given Respondent permission to use Complainant’s Mark(s) in a domain name.

Respondent is using (some or all of) the Disputed Domain Name(s) to redirect unsuspecting Internet users to a website featuring generic links to third-party websites, some of which directly compete with Complainant’s business. Presumably, Respondent receives pay-per-click fees from these linked websites. As such, Respondent is not using the domain name to provide a *bona fide* offering of goods or services as allowed under Policy ¶4(c)(i), nor a legitimate noncommercial or fair use as allowed under Policy ¶4(c)(iii). *See 24 Hour Fitness USA, Inc. v. 24HourNames.com-Quality Domains For Sale*, FA 187429 (Nat. Arb. Forum Sep. 26, 2003) (holding that Respondent’s use of the <24hrsfitness.com>, <24-hourfitness.com> and <24hoursfitness.com> domain names to redirect Internet users to a website featuring advertisements and links to Complainant’s competitors could not be considered a *bona fide* offering of goods or services or a legitimate noncommercial or fair use); *see also Computer Doctor Franchise Sys., Inc. v. Computer Doctor*, FA 95396 (Nat. Arb. Forum Sept. 8, 2000) (finding that the respondent’s website, which is blank but for links to other websites, is not a legitimate use of the domain names).

The earliest date on which Respondent registered the Disputed Domain Name(s) was November 9, 2005, which is significantly after Complainant’s registration of HOTTOPIC.COM on March 14, 1995.

The earliest date on which Respondent registered the Disputed Domain Name(s) was November 9, 2005, which is significantly after Complainant’s registration of their relevant Mark(s) with the USPTO.

The earliest date on which Respondent registered the Disputed Domain Name(s) was November 9, 2005, which is significantly after Complainant's first use in commerce as specified in their relevant registration with the USPTO.

- c) The domain names should be considered as having been registered and being used in bad faith for the following reasons:

Respondent has ignored Complainant's attempts to resolve the dispute outside of this administrative proceeding.

Respondent's typosquatting behavior is, in and of itself, evidence of bad faith. *See Canadian Tire Corp. v. domain adm'r no.valid.email@worldnic.net 1111111111*, D2003-0232 (WIPO May 22, 2003) (finding the respondent registered and used the domain name in bad faith because the respondent "created 'a likelihood of confusion with the complainant's mark(s) as to the source, sponsorship, affiliation, or endorsement of the Respondent's web site or location' . . . through Respondent's persistent practice of 'typosquatting'"); see also *Nat'l Ass'n of Prof'l Baseball League, Inc. v. Zuccarini*, D2002-1011 (WIPO Jan. 21, 2003) ("Typosquatting ... is the intentional misspelling of words with [the] intent to intercept and siphon off traffic from its intended destination, by preying on Internauts who make common typing errors. Typosquatting is inherently parasitic and of itself evidence of bad faith.").

Respondent has caused the website(s) reachable by (some or all of) the Disputed Domain Name(s) to display content and/or keywords directly related to the Complainant's business. This serves as further evidence of bad faith intent because it removes any doubt as to whether or not the misspelling was intentionally designed to improperly capitalize on Complainant's famous Mark(s) and its related business.

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

FINDINGS

Complainant, Hot Topic, Inc., is a mall-based specialty retailer with over 681 stores in the United States and Puerto Rico. Complainant owns numerous trademark registrations with the United States Patent and Trademark Office ("USPTO") for the HOT TOPIC mark (*e.g.*, Reg. No. 2,771,871 issued October 7, 2003).

Respondent registered the <**hottopic.com**> domain name on November 9, 2005. Respondent's disputed domain name resolves to a website displaying third-party links to websites offering specialty retail products in competition 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

Complainant has obtained multiple trademark registrations for the HOT TOPIC mark with the USPTO (*e.g.*, Reg. No. 2,771,871 issued October 7, 2003). The Panel finds Complainant has established rights in the HOT TOPIC mark for purposes of Policy ¶4(a)(i) through its trademark registration with the USPTO. *See Lockheed Martin Corp. v. Hoffman*, FA 874152 (Nat. Arb. Forum Jan. 31, 2007) (finding that the complainant had sufficiently established rights in the SKUNK WORKS mark through its registration of the mark with the USPTO); *see also Clear!Blue Holdings, L.L.C. v. NaviSite, Inc.*, FA 888071 (Nat. Arb. Forum Mar. 5, 2007) ("The Panel finds that Complainant has established trademark rights in the CLEAR BLUE marks through introduction of the certificates for its U.S. registration for those trademarks. The U.S. Trademark Act is clear that the certificate of registration on the Principal Register, as here, is *prima facie* evidence of the validity of the registered mark and the registrant's exclusive right to use the mark in commerce in on or in connection with the goods specified in the registration.").

Complainant argues Respondent's <hottoopic.com> domain name is confusingly similar to Complainant's HOT TOPIC mark pursuant to Policy ¶4(a)(i). Respondent's disputed domain name contains a misspelled version of Complainant's mark by adding the letter "o" and adds the generic top-level domain ("gTLD") ".com." The Panel finds the addition of the letter "o" to Complainant's mark fails to create a distinguishable characteristic within the disputed domain name. *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 Reuters Ltd. v. Global Net 2000, Inc.*, D2000-0441 (WIPO July 13, 2000) (finding that a domain name which differs by only one letter from a trademark has a greater tendency to be confusingly similar to the trademark where the trademark is highly distinctive). In addition, the Panel finds that the addition of a gTLD is irrelevant in distinguishing a disputed domain name from an established mark. *See Trip Network Inc. v. Alvieria*, 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); *see also Reese v. Morgan*, FA 917029 (Nat. Arb. Forum Apr. 5, 2007) (finding that the mere addition of the generic top-level domain “.com” is insufficient to differentiate a disputed domain name from a mark). Therefore, the Panel finds Respondent’s <hottoopic.com> domain name is confusingly similar to Complainant’s HOT TOPIC mark pursuant to 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 disputed domain name. Once Complainant makes a *prima facie* case in support of its allegations, the burden shifts to Respondent to prove it has rights or legitimate interests pursuant to Policy ¶4(a)(ii). *See AOL LLC v. Gerberg*, FA 780200 (Nat. Arb. Forum Sept. 25, 2006) (finding that if the complainant satisfies its *prima facie* burden, “then the burden shifts to the respondent to show that it does have rights or legitimate interest in the subject domain names.”). The Panel finds Complainant has made a sufficient *prima facie* case. Due to Respondent’s failure to respond to the Complaint, the Panel may assume Respondent does not have rights or legitimate interests in the disputed domain name. *See Talk City, Inc. v. Robertson*, D2000-0009 (WIPO Feb. 29, 2000) (“[Rule 14(b)] expressly provide[s] that the Panel ‘shall draw such inferences’ from the Respondent’s failure to comply with the rules ‘as it considers appropriate.’”). However, the Panel will examine the record to determine whether Respondent has rights or legitimate interests in the disputed domain name under Policy ¶4(c).

Complainant contends Respondent is neither commonly known by nor licensed to register the disputed domain name. The Panel finds registrant’s WHOIS information demonstrates Respondent is not commonly known by the disputed domain name. Therefore, pursuant to Policy ¶4(c)(ii), Respondent lacks rights and legitimate interests in the disputed domain name. *See 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); *see*

also Am. W. Airlines, Inc. v. Paik, FA 206396 (Nat. Arb. Forum Dec. 22, 2003) (“Respondent has registered the domain name under the name ‘Ilyoup Paik a/k/a David Sanders.’ Given the WHOIS domain name registration information, Respondent is not commonly known by the [<awvacations.com>] domain name.”).

Respondent’s disputed domain name resolves to a website featuring advertisements and links relating to Complainant’s competitors in the specialty retail industry. The Panel may (and does) infer Respondent profits through the generation of click-through fees from the links to Complainant’s competitors. Therefore, the Panel finds Respondent’s use of the disputed domain name is not in connection with a *bona fide* offering of goods or services under Policy ¶4(c)(i) or a legitimate noncommercial or fair use of the disputed domain name under Policy ¶4(c)(iii). *See 24 Hour Fitness USA, Inc. v. 24HourNames.com-Quality Domains For Sale*, FA 187429 (Nat. Arb. Forum Sep. 26, 2003) (holding that Respondent’s use of the domain names to redirect Internet users to a website featuring advertisements and links to Complainant’s competitors could not be considered a *bona fide* offering of goods or services or a legitimate noncommercial or fair use); *see also ALPITOUR S.p.A. v. Albloushi*, FA 888651 (Nat. Arb. Forum Feb. 26, 2007) (rejecting the respondent’s contention of rights and legitimate interests in the <bravoclub.com> domain name because the respondent was merely using the domain name to operate a website containing links to various competing commercial websites, which the panel did not find to be a use in connection with a *bona fide* offering of goods or services pursuant to Policy ¶4(c)(i) or a legitimate noncommercial or fair use pursuant to Policy ¶4(c)(iii)).

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

Registration and Use in Bad Faith

Respondent’s disputed domain name resolves to a website that promotes Complainant’s competitors in the specialty retail industry through click-through links. Such an activity clearly disrupts Complainant’s business because Internet users seeking Complainant’s products will be redirected to Complainant’s competitors. This qualifies as bad faith registration and use under Policy ¶4(b)(iii). *See 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); *see also Am. Airlines, Inc. v. Tex. Int’l Prop. Assoc.*, FA 914854 (Nat. Arb. Forum Apr. 10, 2007) (holding that where the respondent’s website featured hyperlinks to competing websites and included a link to the complainant’s website, the respondent’s use of the <redeemaamiles.com> domain name constituted disruption under Policy ¶4(b)(iii)).

The Panel infers Respondent receives click-through fees from the use of the aforementioned hyperlinks. Respondent is attempting to profit by creating a likelihood of confusion about Complainant’s affiliation with the disputed domain name and the

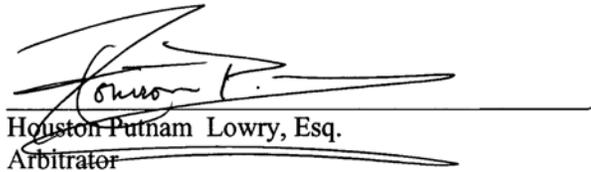
resolving website. Therefore, the Panel finds Respondent's use of the disputed domain name constitutes bad faith registration and use under Policy ¶4(b)(iv). *See Zee TV USA, Inc. v. Siddiqi*, FA 721969 (Nat. Arb. Forum July 18, 2006) (finding that the respondent engaged in bad faith registration and use by using a domain name that was confusingly similar to the complainant's mark to offer links to third-party websites that offered services similar to those offered by the complainant); *see also 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).").

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



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: February 22, 2010

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