



NATIONAL ARBITRATION FORUM

DECISION

Albert Einstein Healthcare Network v. Domain Magic, LLC
Claim Number: FA0611000846808

PARTIES

Complainant is **Albert Einstein Healthcare Network** ("Complainant"), represented by **Roberta S. Bren**, of **Oblon, Spivak, McClelland, Maier & Neustadt, P.C.**, 1940 Duke Street, Alexandria, VA 22314. Respondent is **Domain Magic, LLC** ("Respondent"), 3959 Van Dyke Rd, Suite 391, Lutz, FL 33549.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**mossrehab.com**>, registered with **Intercosmos Media Group, Inc.** d/b/a **Directnic.com**.

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 November 20, 2006; the National Arbitration Forum received a hard copy of the Complaint on November 21, 2006.

On November 28, 2006, Intercosmos Media Group, Inc. d/b/a Directnic.com confirmed by e-mail to the National Arbitration Forum that the <**mossrehab.com**> domain name is registered with Intercosmos Media Group, Inc. d/b/a Directnic.com and that Respondent is the current registrant of the name. Intercosmos Media Group, Inc. d/b/a Directnic.com has verified that Respondent is bound by the Intercosmos Media Group, Inc. d/b/a Directnic.com 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 November 30, 2006, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of December 20, 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@mossrehab.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 28, 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:

[a.] The Complainant is Albert Einstein Healthcare Network ("AEHN"), a private, not-for-profit organization with six major facilities and many outpatient centers. One of the six major facilities is MossRehab, a nationally recognized medical rehabilitation facility with inpatient and outpatient services.

[b.] AEHN has utilized the designation MOSSREHAB, through its predecessor in interest, as its primary service mark and trade name for its medical rehabilitation facility since at least as early as 1993.

[c.] Complainant is the owner of Federal Trademark Registration No. 2,238,452 for the mark MOSSREHAB for "rehabilitation hospital services, rehabilitation health care services, and medical laboratory and research services in the field of rehabilitation". The mark was registered on April 13, 1999, and first use of the mark is claimed since 1993.

[d.] Complainant's trademark registration has acquired incontestable status pursuant to 15 U.S.C. §1065.

[e.] Complainant offers a wide range of medical rehabilitative services under the mark MOSSREHAB, including treatment programs for traumatic brain injury, spasticity/impaired movement and complex amputation. MossRehab's treatment programs attract patients from around the world.

[f.] The *U.S. News & World Report* recognized MossRehab as one of America's best

hospitals for rehabilitation.

[g.] MossRehab's Stroke Center was one of the first rehabilitation facilities in the nation to receive accreditation by the Commission on Accreditation of Rehabilitation Facilities (CARF) as a Stroke Specialty Program.

[h.] As the result of Complainant's long and extensive use of the MOSSREHAB mark and name, and its high standards and careful quality control, the MOSSREHAB mark and name has become well-known both as an indicator of the source of Complainant's services and as a symbol of Complainant's good reputation. Complainant is particularly noted for its high quality of care for people with physical disabilities.

Respondent and its Domain Name

[i.] The disputed domain name, <mossrehab.com>, is registered to Domain Magic, LLC, of Lutz, Florida.

[j.] Upon information and belief, Respondent registered the domain name sometime after November 8, 2006, as the WHOIS record on that date shows a different registrant.

[k.] Complainant has never licensed its MOSSREHAB mark to Respondent.

[l.] Respondent is using <mossrehab.com> for a webpage containing internal links labeled "Rehab", "Treatment Programs", "Residential Treatment", "Treatment Center" etc. Clicking on these links takes the Internet user to another page within Respondent's website containing sponsored links to various treatment programs unrelated to Complainant. Upon information and belief, Respondent earns revenue through these sponsored links.

Respondent's Domain Name, <mossrehab.com>, Is Confusingly Similar to the MOSSREHAB Mark in which Complainant Has Trademark Rights. ICANN Rule 3(b)(ix)(1); ICANN Policy ¶4(a)(i).

[m.] Complainant has provided evidence demonstrating its rights in the MOSSREHAB mark. Complainant owns a federal trademark registration for MOSSREHAB for "rehabilitation hospital services, rehabilitation health care services, and medical laboratory and research services in the field of rehabilitation." The trademark registration date is April 13, 1999, and Complainant first used MOSSREHAB as a mark, through its predecessor in interest, at least as early as 1993.

[n.] Complainant also provided evidence of its use of the MOSSREHAB mark in connection with its services on its website.

[o.] The domain name <mossrehab.com> is identical and/or confusingly similar to Complainant's MOSSREHAB mark. The addition of the generic top level domain ".com" is irrelevant when comparing a domain name to a mark, and does nothing to overcome the identity or confusing similarity between the domain name and Complainant's mark. *See, e.g., Burnham Corp. v. Domain Research and Sales*, Case No. FA 102741 (NAF Jan. 14, 2002) (stating that generic top-level domains, such as '.com,' are inconsequential when considering Policy ¶4(a)(i)).

[p.] Therefore, Complainant has established that it has rights to the mark MOSSREHAB, and that the domain name is confusingly similar to its mark.

The Respondent Has No Rights or Legitimate Interests in Respect of the <mossrehab.com> Domain Name. ICANN Rule 3(b) (ix) (2); ICANN Policy ¶4(a) (ii).

[q.] Complainant has never licensed its mark MOSSREHAB to Respondent or otherwise authorized Respondent to use the mark.

[r.] Respondent's mere registration of a domain name, by itself, does not create a right or legitimate interest in the domain name for purposes of the Policy. See, e.g., *Gallup, Inc. v. Heejo Kim*, FA96081 (NAF Jan. 4, 2001).

[s.] Before any notice of the Respondent of the dispute, Respondent did not use, or make demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services. ICANN Policy ¶4(c)(i). Rather, Respondent selected and registered <mossrehab.com> because of Complainant's well-known MOSSREHAB mark, to misleadingly attract Internet users to its website and thereby profit from the Internet traffic. Such use is neither *bona fide* nor legitimate. See, e.g., *United Services Automobile Association v. John Walker*, Case No. FA 796309 (October 30, 2006); *United Services Automobile Association v. Jason Cox*, Case No. FA 785541 (October 19, 2006).

[t.] Long prior to Respondent's registration of the domain name, Complainant commenced use of, and registered, MOSSREHAB. As a result of Complainant's federal trademark registration, Respondent had constructive knowledge of Complainant's registered mark pursuant to 15 U.S.C. §1072. Furthermore, Complainant's right to use the mark MOSSREHAB for "rehabilitation hospital services, rehabilitation health care services, and medical laboratory and research services in the field of rehabilitation" is incontestable pursuant to 15 U.S.C. §1065.

[u.] Respondent has not been commonly known by the name mossrehab or mossrehab.com. ICANN Policy ¶4(c)(ii).

[v.] Respondent is not making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue. ICANN Policy ¶4(c)(iii). Respondent's use of the domain name to generate revenue is clearly commercial and is being made with actual and/or constructive notice of Complainant's mark. Respondent's use of a domain name that is confusingly similar to Complainant's MOSSREHAB mark manifests its intent to misleadingly direct Internet users interested in information about MOSSREHAB to Respondent's website. See, e.g., *United Services Automobile Association v. John Walker*, Case No. FA 796309 (October 30, 2006); *United Services Automobile Association v. Jason Cox*, Case No. FA 785541 (October 19, 2006).

[w.] Therefore, Respondent has no rights or legitimate interests in <mossrehab.com> under the factors set forth in the ICANN Policy.

Respondent Registered and Is Using the <mossrehab.com> Domain Name in Bad Faith. ICANN

Rule 3(b)(ix)(3); ICANN Policy ¶4(a)(iii).

[x.] By using <mosshrehab.com>, Respondent has intentionally attempted to attract, for commercial gain, Internet users to its web site by creating a likelihood of confusion with Complainant's marks as to source, sponsorship, affiliation, or endorsement of Respondent's website. At the time Respondent registered and began using the <mosshrehab.com> domain name, Complainant's MOSSHREHAB mark was federally registered, in use since at least as early as 1993, and Complainant's right to the mark had become incontestable by law. Registration and use of <mosshrehab.com> to misleadingly divert Internet traffic looking for Complainant to Respondent's webpage constitutes registration and use of the domain name in bad faith under the Policy. ICANN Policy ¶4(b)(iv). *See, e.g., United Services Automobile Association v. John Walker*, Case No. FA 796309 (October 30, 2006); *United Services Automobile Association v. Jason Cox*, Case No. FA 785541 (October 19, 2006).

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

FINDINGS

Complainant, Albert Einstein Healthcare Network, is a private, non-profit medical organization with six major facilities and many outpatient centers. One of Complainant's six major facilities is MossRehab, a nationally recognized medical rehabilitation facility with inpatient and outpatient services. Complainant and its predecessor in interest has used the MOSSHREHAB mark since at least 1993. Complainant owns a trademark registration with the United States Patent and Trademark Office ("USPTO") for the MOSSHREHAB mark (Reg. No. 2,238,452 issued April 13, 1999).

Spiral Matrix registered the <**mosshrehab.com**> domain name on September 7, 2003. Respondent acquired the domain name sometime after November 8, 2006 by means unknown. Respondent's disputed domain name resolves to a website that displays hyperlinks to various third-party websites, some of which offer services in direct competition with those offered by 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’s trademark registration with the USPTO sufficiently establishes Complainant’s rights in the MOSSREHAB mark. *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 Men’s Wearhouse, Inc. v. Wick*, FA 117861 (Nat. Arb. Forum Sept. 16, 2002) (“Under U.S. trademark law, registered marks hold a presumption that they are inherently distinctive [or] have acquired secondary meaning.”).

The Panel also finds Respondent’s <**mossrehab.com**> domain name is identical to Complainant’s MOSSREHAB mark as the disputed domain name contains Complainant’s mark in its entirety with the addition of the generic top-level domain (“gTLD”) “.com.” Previous panels have found, and this Panel finds, the addition of a generic top-level domain is irrelevant when conducting a Policy ¶4(a)(i) analysis as a generic top-level domain is a required part of all Internet domain names. *See Blue Sky Software Corp. v. Digital Sierra, Inc.*, D2000-0165 (WIPO Apr. 27, 2000) (holding that the domain name <robohelp.com> is identical to the complainant’s registered ROBOHELP trademark, and that the "addition of .com is not a distinguishing difference"); *see also Gardline Surveys Ltd. v. Domain Fin. Ltd.*, FA 153545 (Nat. Arb. Forum May 27, 2003) (“The 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 Panel finds Policy ¶4(a)(i) satisfied.

Rights or Legitimate Interests

Complainant initially must establish Respondent lacks rights or legitimate interests with respect to the <**mossrehab.com**> domain name. Once Complainant makes a *prima facie* case, the burden of proof shifts, and Respondent must prove that it has rights or legitimate interests in the disputed domain name. *See 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”); *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).”).

Respondent’s WHOIS information does not indicate Respondent is commonly known by the <**mossrehab.com**> domain name, and there is no other evidence in the record to suggest Respondent is commonly known by the disputed domain name. Additionally, Complainant asserts Respondent is not authorized to use Complainant’s MOSSREHAB mark and Respondent is not associated with Complainant in any way. In *Compagnie de Saint Gobain v. Com-Union Corp.*, D2000-0020 (WIPO Mar. 14, 2000), the panel found no rights or legitimate interests where the respondent was not commonly known by the mark and had never applied for a license or permission from the complainant to use the trademarked name. *See RMO, Inc. v. Burbidge*, 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”).

Respondent is using the disputed domain name to operate a website that displays hyperlinks to various third-party websites, some of which offer services in direct competition with Complainant. Such use is neither a *bona fide* offering of goods or services under Policy ¶4(c)(i) nor a legitimate noncommercial or fair use under Policy ¶4(c)(iii). *See WeddingChannel.com Inc. v. Vasiliev*, FA 156716 (Nat. Arb. Forum June 12, 2003) (finding that the respondent’s use of the disputed domain name to redirect Internet users to websites unrelated to the complainant’s mark, websites where the respondent presumably receives a referral fee for each misdirected Internet user, was not a *bona fide* offering of goods or services as contemplated by the Policy); *see also 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).

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

Registration and Use in Bad Faith

The Panel finds, based on the uncontested evidence presented by Complainant, Respondent receives click-through fees for the hyperlinks displayed on the website that resolves from the <**mossrehab.com**> domain name. The Panel also finds Respondent’s disputed domain name is capable of creating a likelihood of confusion as to the source and affiliation of Complainant with the disputed domain name and corresponding

website. In *Drs. Foster & Smith, Inc. v. Lalli*, FA 95284 (Nat. Arb. Forum Aug. 21, 2000), the panel found bad faith where the respondent directed Internet users seeking the complainant's site to its own website for commercial gain. *See also Associated Newspapers Ltd. v. Domain Manager*, FA 201976 (Nat. Arb. Forum Nov. 19, 2003) ("Respondent's prior use of the <mailonsunday.com> domain name is evidence of bad faith pursuant to Policy ¶4(b)(iv) because the domain name provided links to Complainant's competitors and Respondent presumably commercially benefited from the misleading domain name by receiving 'click-through-fees.'"). Accordingly, the Panel finds such commercial benefit constitutes bad faith registration and use under Policy ¶4(b)(iv).

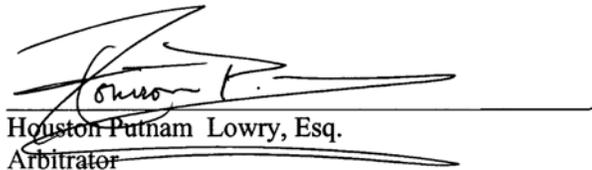
Respondent is using the disputed domain name to operate a website that displays links to websites that offer services in competition with those offered by Complainant. Such use constitutes a disruption of Complainant's business and is evidence of bad faith registration and use under Policy ¶4(b)(iii). *See EBAY, Inc. v. MEODesigns*, D2000-1368 (WIPO Dec. 15, 2000) (finding that the respondent registered and used the domain name <ebay.com> in bad faith where the respondent has used the domain name to promote competing auction sites); *see also Puckett, Individually v. Miller*, D2000-0297 (WIPO June 12, 2000) (finding that the respondent has diverted business from the complainant to a competitor's website in violation of Policy ¶4(b)(iii)).

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



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: January 11, 2007

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