



NATIONAL ARBITRATION FORUM

DECISION

Microsoft Corporation v. Marine Safety Network Weather
Claim Number: FA0603000655480

PARTIES

Complainant is **Microsoft Corporation** ("Complainant"), represented by **Molly Buck Richard**, of **Richard Law Group, Inc.**, 8411 Preston Road, Suite 890, Dallas, TX 75225. Respondent is **Marine Safety Network Weather** ("Respondent"), 19744 Beach Blvd #428, Huntington Beach, CA 92648.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**msnweather.com**>, registered with **Bulkregister, 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 10, 2006; the National Arbitration Forum received a hard copy of the Complaint on March 13, 2006.

On March 10, 2006, Bulkregister, Llc. confirmed by e-mail to the National Arbitration Forum that the <**msnweather.com**> domain name is registered with Bulkregister, Llc. and that Respondent is the current registrant of the name. Bulkregister, Llc. has verified that Respondent is bound by the Bulkregister, 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 March 15, 2006, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of April 4, 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@msnweather.com by e-mail.

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

On April 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:

Since 1975, Microsoft has manufactured, marketed and sold computer software and related products and services. Microsoft's products and services include computer operating systems, client/server applications, business and consumer productivity applications, software programming tools, interactive media programs, Internet platform and development tools, computer input devices, online information and entertainment services, electronic commerce services, and computer publications. Microsoft is the owner of numerous proprietary marks for such computer software and related goods and services.

Microsoft's Internet services include a news and information network known as the Microsoft Network, or "MSN". Microsoft began use of the MSN trademark in 1995, has used the trademark continuously since then, and the trademark MSN now is well-known to the general public and particularly to Internet users. Additionally, Microsoft has registered the MSN trademark with the United States Patent and Trademark Office, as well as around the world. Microsoft is the owner of approximately 40 trademark registrations in the United States on the Principal Register of the United States Patent and Trademark Office for the trademark "MSN" (collectively, the "MSN Mark"). Several of these registrations for the MSN Mark relate to online information services, including U.S. Registration No. 2,600,020 for the word mark "MSN" and U.S. Registration No. 2,808,938 for the mark MSN and Design, both for online use and dissemination of news and weather reporting information. In addition, the MSN mark has been registered throughout the world.

The MSN Mark has been found by panelists of WIPO to be a famous mark. See *Microsoft Corporation v. Cupcake City*, Case No. D2000-0818 (WIPO, 2000); *Microsoft Corporation v. Stop2Shop a/k/a Gene Vozzola*, Case No. D2004-0510 (WIPO, 2004).

Complainant has registered the domain names <msn.com> and <msn.net> at which it operates a website that is among the top three most widely used portal sites in the world. Through its www.msn.com web site, Microsoft offers consumers many online services, including e-mail services, MSN 8 Internet Services, MSN Chat, MSN Messenger instant messaging services, and, significantly, a weather related section called MSN WEATHER found at www.weather.msn.com which is accessed through the famous site, www.msn.com. Microsoft has invested considerable time, effort and money advertising and promoting the MSN Mark throughout the United States and the world. Using the MSN Mark, Microsoft offers localized versions of its MSN services in many different languages to more than thirty countries worldwide. As a result, MSN has become one of the world's most popular Internet destinations, drawing 300 million users per month.

5. FACTUAL AND LEGAL GROUNDS

This Complaint is based on the following factual and legal grounds: ICANN Rule 3(b)(ix).

A. CONFUSINGLY SIMILAR DOMAIN NAME (ICANN Rule 3(b)(ix)(1) and ICANN Policy ¶4(a)(i)):

The domain name <msnweather.com> is confusingly similar to Complainant's famous MSN Mark, which was used and registered as a trademark long before Respondent registered the domain name on May 11, 2002. In fact, Complainant's MSN Mark was in use for approximately 7 years and had become famous for the products manufactured by and services offered by Complainant prior to Respondent's registration of the <msnweather.com> domain name.

Respondent's domain name <msnweather.com> contains Complainant's famous MSN Mark along with the generic or descriptive term "weather" and the most common URL suffix ".com." The mere addition of common, descriptive terms and a generic top-level domain name does not negate the confusing similarity between Respondent's domain name and Complainant's mark. See *Microsoft Corporation v. OzGrid Business Applications*, FA 314308 (Nat. Arb. Forum, October 6, 2004) (finding confusing similarity where the domain name only deviates from Complainant's mark by the addition of the descriptive terms "excel training" and the top level domain ".com" to the mark MICROSOFT); *Microsoft Corporation v. extreme*, FA 587423 (Nat. Arb. Forum, December 7, 2005) (finding confusing similarity of the domain name <downloadmsn.net> to Microsoft's MSN mark because the addition of the word "download" does not significantly distinguish the mark and is a term related to Microsoft's goods and services); *Microsoft Corporation v. Cedric Thompson*, Case No. D2004-1097 (WIPO, April 14, 2005) (finding that adding the word "cares" serves merely to modify slightly the dominant word in the domain name, namely, the Complainant's MICROSOFT mark, which is not sufficient to avoid a confusing similarity with the mark); *Microsoft Corporation v. Whois Privacy Protection Service/Lee Xongwei*, WIPO Case No. D2005-0642 (October 12, 2005) ("The addition of the generic top-level domain ".com" is irrelevant when determining whether a disputed domain name is confusingly similar to a protected mark."). Thus, the mere addition of the generic or descriptive term "weather" to the MSN mark in the domain names does nothing to avoid confusing similarity. Nor does the addition of the ".com" generic top-level domain suffix negate the confusing similarity between Respondent's domain name and Complainant's mark. Any

reasonable Internet user is likely to be confused that the website located at www.msnweather.com is somehow sponsored by or affiliated with Complainant.

B. NO RIGHTS OR LEGITIMATE INTERESTS IN DOMAIN NAME (ICANN Rule 3(b)(ix)(2) and ICANN Policy ¶4(a)(ii):

Respondent has no rights or legitimate interests in the <msnweather.com> domain name. Respondent is not commonly known by Complainant's mark MSN, nor has Respondent used the domain name in connection with a bona fide offering of goods and services or for a legitimate noncommercial or fair use. Respondent is simply exploiting the fact that Microsoft's customers and potential customers may assume that a website located at a domain name incorporating the MSN trademark is affiliated with or sponsored by Complainant. As a prior panel has stated, "The Respondent's use is little more than the use of a famous trademark to divert traffic to...itself." *Microsoft Corporation v. Whois Privacy Protection Service/Lee Xongwei*, WIPO Case No. D2005-0642 (October 12, 2005) (finding no rights or legitimate interests in the domain name <msnmoney.com>).

Complainant can find no proof to indicate the Respondent is commonly known by the <msnweather.com> domain name or the name Marine Safety Network Weather. Indeed, Complainant does not permit unaffiliated entities to use the MSN Mark in their company names. Although the WHOIS record lists the Registrant as "Marine Safety Network Weather," it is clear that the domain name <msnweather.com> is not a company name by which Respondent is commonly known. It appears quite clear that the Respondent's name "Marine Safety Network Weather" is not an actual name at all because there are no businesses in California listed under that name, there are no telephone listings in the Huntington Beach, California area for that name, and the only phone number listed in the Whois record appears to be a phone number in Brimfield, Massachusetts. In fact, there is not a single business that can be found anywhere in the United States under the name "Marine Safety Network Weather" and it is believed that this is merely a convenient fiction created by Respondent in the event that Complainant objected to this domain name. See *Microsoft v. My Speedy Net Phone*, WIPO Case No. D2003-0359 (July 15, 2003) (finding that the Respondent's whois name "My Speedy Net Phone" for the domain name <msnphone.com> was a convenient fiction intended to provide some thin evidence for the purposes of paragraph 4(a)(ii) of the Policy).

Furthermore, the disputed domain name is used on a web site that offers links to various weather related sites which would compete with Complainant's own MSN WEATHER site. It is clear from the url routing information that when the user types in the domain name, it redirects the user to a sponsored domain link through Domain Sponsor that generates revenues for Respondent from visitors to the site. Domain Sponsor offers services to domain holders to generate income for each visit to the site. Thus, Respondent is clearly using the domain name <msnweather.com> for its own commercial gain. The use of a domain name that is confusingly similar to Complainant's famous MSN Mark to attract computer users to Respondent's commercial website is not 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 of the domain name pursuant to Policy ¶4(c)(iii). See *Microsoft Corporation v. OzGrid Business Applications*, FA

314308 (Nat. Arb. Forum, October 6, 2004); *See also, U.S. Franchise Sys. Inc. v. Howell*, FA 152457 (Nat. Arb. Forum, May 6, 2003) (holding that Respondent's use of Complainant's mark and the goodwill surrounding the mark as a means of attracting Internet users to an unrelated business was not a bona fide offering of goods or services) and *Nike, Inc. v. Dias*, FA 135016 (Nat. Arb. Forum, January 7, 2002) (finding no bona fide offering of goods or services where Respondent used Complainant's mark without authorization to attract Internet users to its website). Here, Respondent's use cannot be viewed as a bona fide offering of goods or services since Respondent has clearly taken Complainant's mark without authorization in order to misleadingly divert Internet users to its website for commercial gain.

Finally, Complainant has not authorized Respondent to use the MSN Mark for any purpose; therefore, Respondent is not using the MSN mark under license, express or implied. For the above reasons, the Respondent has no rights or legitimate interests in the domain name.

C. REGISTRATION AND USE IN BAD FAITH (ICANN Rule 3(b)(ix)(3) and ICANN Policy 4(a)(iii)):

Respondent registered the <msnweather.com> domain name in bad faith. At the time that Respondent registered the domain name, Complainant's MSN trademark was unquestionably internationally famous and familiar to most Internet users. Here, it is clear that Respondent was not only familiar with Complainant's MSN Mark at the time of registration of the domain name in dispute, but intentionally adopted a name including the MSN mark for its own commercial purposes. Internet users seeing the <msnweather.com> domain name are likely to assume that any website that might be affiliated with this domain name is sponsored by or affiliated with Complainant. Respondent has intentionally created this situation by use of the MSN Mark in its domain name.

In addition, due to the fame of the MSN Mark, and Complainant's registrations for the MSN Mark, Respondent was on notice of the Complainants' rights in the MSN Mark. *See Microsoft Corporation v. Cedric Thompson*, Case No. D2004-1097 (WIPO, April 14, 2005) (finding that it is inconceivable that Respondent was not aware of Complainant's rights in the MICROSOFT mark when he registered the domain name). Respondent's registration of a domain name confusingly similar to a famous trademark, despite knowledge of Complainants' rights in the mark, indicates bad faith registration under Policy ¶4(a)(iii). *See Europecar Int'l SA v. New Media Research in Romania SRL*, FA 123906 (Nat. Arb. Forum Nov. 4, 2002) (finding bad faith where Respondent was undoubtedly aware of Complainant's rights in the EUROPECAR mark); *Exxon Mobil Corp. v. Fisher*, D2000-1412 (WIPO Dec. 18, 2000) (finding that Respondent had actual and constructive knowledge of Complainant's EXXON mark given the worldwide prominence of the mark and thus Respondent registered the domain name in bad faith).

Based on the foregoing, Respondent has registered the domain name <msnweather.com> in bad faith.

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

FINDINGS

Complainant, Microsoft Corporation, manufactures, markets, and sells computer software products and related services, which include computer operating systems, client/server applications, business and consumer productivity applications, and Internet platform and development tools. In addition, Complainant operates <msn.com>, one of the most widely used portal sites in the world, offering e-mail services, instant messaging services, and weather reporting services. In connection with these various online services, Complainant has registered numerous marks with the United States Patent and Trademark Office ("USPTO") including the famous MSN mark (Reg. No. 2,191,997 issued January 9, 2001).

Respondent registered the <msnweather.com> domain name on May 11, 2002. Respondent's domain name resolves to a website featuring links to various competing and non-competing commercial 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 has established rights in MSN mark through registration with the USPTO. *See 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”); *see also 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.”).

Complainant contends Respondent’s <msnweather.com> domain name is confusingly similar to Complainant’s registered mark. Respondent’s domain name features Complainant’s entire MSN mark and adds the generic term “weather.” The Panel finds the addition of generic terms to marks fails to sufficiently distinguish domain names pursuant to Policy ¶4(a)(i). *See Christie’s Inc. v. Tiffany’s Jewelry Auction, Inc.*, D2001-0075 (WIPO Mar. 6, 2001) (finding that the domain name <christiesauction.com> is confusingly similar to the complainant's mark since it merely adds the word “auction” used in its generic sense); *see also L.L. Bean, Inc. v. ShopStarNetwork*, FA 95404 (Nat. Arb. Forum Sept. 14, 2000) (finding that combining the generic word “shop” with the complainant’s registered mark “llbean” does not circumvent the complainant’s rights in the mark nor avoid the confusing similarity aspect of the ICANN Policy).

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 <msnweather.com> domain name. Once Complainant makes a *prima facie* case in support of its allegations, a rebuttable presumption exists that Respondent lacks rights or legitimate interests pursuant to Policy ¶4(a)(ii). The burden shifts to Respondent to show otherwise. Due to Respondent’s failure to respond to the Complaint and the extensive research done by Molly Buck Richard, the Panel infers 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); *see also Desotec N.V. v. Jacobi Carbons AB*, D2000-1398 (WIPO Dec. 21, 2000) (finding that failing to respond allows a presumption that the complainant’s allegations are true unless clearly contradicted by the evidence). Out of an abundance of caution, the Panel chooses to analyze whether the evidence supports rights or legitimate interests.

Complainant contends Respondent is neither commonly known by the disputed domain name nor licensed to register domain names featuring Complainant’s MSN mark. There are no businesses telephone listings in California beginning with the words “Marine Safety Network.” There are no businesses telephone listings in the United States

beginning with the words “Marine Safety Network.” The telephone number given in the WHOIS information is answered by voicemail only. The telephone number exists in Massachusetts even though the business is supposedly in California. There are no California business entities (either corporations or limited liability companies) containing the phrase “Marine Safety Network Weather.” In light of all of this information, the Panel finds Respondent is not commonly known by the <msnweather.com> domain name pursuant to Policy ¶4(c)(ii). See *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>.”); 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”).

Complainant contends Respondent is using the disputed domain name to operate a website featuring links to various competing and non-competing commercial websites from which Respondent presumably receives referral fees. The Panel finds Respondent’s use of the confusingly similar domain name 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 *TM Acquisition Corp. v. Sign Guards*, FA 132439 (Nat. Arb. Forum Dec. 31, 2002) (finding that the respondent’s diversionary use of the complainant’s marks to send Internet users to a website which displayed a series of links, some of which linked to the complainant’s competitors, was not a *bona fide* offering of goods or services); 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

Complainant contends Respondent’s use of the <msnweather.com> domain name to operate a website linking Internet users to Complainant’s competitors will likely cause confusion as to Complainant’s sponsorship of and affiliation with the resulting website. As such the Panel finds that Respondent registered and used the disputed domain name in bad faith pursuant to Policy ¶4(b)(iv). See *Am. Univ. v. Cook*, FA 208629 (Nat. Arb. Forum Dec. 22, 2003) (“Registration and use of a domain name that incorporates another’s mark with the intent to deceive Internet users in regard to the source or affiliation of the domain name is evidence of bad faith.”). What is more, Respondent is presumably generating revenue in the form of “click-through” fees as a result of this

confusion. Such use for commercial gain is further evidence of bad faith registration and use pursuant to Policy ¶4(b)(iv). *See 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.’”).

The Panel also suspects the WHOIS contact information is false, giving rise to the presumption the registration and use of the domain name is in bad faith. *See Agent Host v. Host Dot Com Investments*, AF-0343 (October 16, 2000), *The Procter & Gamble Company v. Hong Gil Dong*, FA0510000572962 (November 10, 2005), *Mattel, Inc. v. RanComp Ltd.*, FA0510000579563 (11/17/2005), *Delta Corporate Identity, Inc. and Delta Air Lines, Inc. v. Yong Li*, FA0510000576550 (11/21/2005) and *Ulysses Learning Corporation v. G. Sone and Associates, Inc.* FA0602000645878 (3/27/2006).

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



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: April 26, 2006

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