



NATIONAL ARBITRATION FORUM

DECISION

mediaRAIN LLC. v. SMI Resources d/b/a Deer Run Campground
Claim Number: FA0705000976417

PARTIES

Complainant is **mediaRAIN LLC**. ("Complainant"), represented by **Daniel Hatch**, 255 S. Orem Blvd., Orem, UT 84058. Respondent is **SMI Resources d/b/a Deer Run Campground** ("Respondent"), PO Box 528, Forsyth, MO 65653.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**musicrain.com**>, registered with **Network Solutions, Inc.**

PANEL

The undersigned certifies that he has acted independently and impartially and to the best of his 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 May 2, 2007; the National Arbitration Forum received a hard copy of the Complaint on May 4, 2007.

On May 2, 2007, Network Solutions, Inc. confirmed by e-mail to the National Arbitration Forum that the <**musicrain.com**> domain name is registered with Network Solutions, Inc. and that Respondent is the current registrant of the name. Network Solutions, Inc. has verified that Respondent is bound by the Network Solutions, 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 May 9, 2007, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of May 29, 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@musicrain.com by e-mail.

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

On May 31, 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:

Complainant owns the trademark MUSICRAIN. Complainant uses the MUSICRAIN mark in connection with software featuring an interactive sheet music player. musicRAIN is the music industry's leading interactive sheet music viewer software. The product site can be accessed through musicrain.us.

Complainant's trademark MUSICRAIN is registered with the United States Patent and Trademark Office, under Registration No. 3,141,444. Filed: 4-19-2005. First use: 4-8-2000. In commerce: 4-21-2004. The MUSICRAIN mark is well known as an indicator of the source of Complainant's Goods and Services.

Complainant has not licensed Respondent to use its trademark. Respondent does not have any relationship with Complainant that would entitle it to use Complainant's trademark.

According to the Missouri Secretary of State, Respondent had a registered corporation in December 1995 under the name Music Rain, Inc. However, in July of 2004 the business name was administratively dissolved due to the Respondents failure to file a correct and current annual report. The last annual report filed was for 2002. There is no record indicating that the Respondent has re-registered a business corresponding to the disputed domain name since. According to bmi.com the respondent is affiliated with BMI as a music publisher under the name Music Rain Publishing and has one song that has been registered under that name. However, this does not give the Respondent rights to the name, as that would require a trademark. Also, search engines do not provide any evidence of the publisher being commonly known, well known, or widely used.

On November 15, 2005, a press release for the Complainant's musicRAIN product was widely reported.

On December 8, 2005, Respondent re-registered the domain name <musicrain.com> with the registrar, which is exactly identical to the Complainant's mark and only 23 days after the release of the Complainant's second version of the musicRAIN product.

Respondent has verbalized that they have registered the domain name before, previous to the creation date listed in Network Solution's database. According to the Internet Archive known as the Wayback Machine at archive.org, the disputed domain name had been previously registered but has never had an active site.

Archived pages of the disputed domain from the Wayback Machine at archive.org are listed starting from February 11, 2003. Each archived page from <musicrain.com> displays a "Coming Soon" status with no active website, the same status that displays to this day. This provides evidence that since at least 2003 there has never been an active site at the registered domain.

Respondent has not yet used or made any demonstrable preparations to use the domain name or any name corresponding to the domain name in connection with the bona fide offering of goods or services. There is currently no content located at the <musicrain.com> domain. Respondent has no business activity under the domain name <musicrain.com>. This demonstrates the passive holding of the domain name by the Respondent.

Complainant tried to contact Respondent multiple times in an attempt to come to an agreement without having to bring the dispute to Arbitration.

On February 28, 2007, Complainant sent Respondent an email regarding the trademark infringement and an offer on the disputed domain name. Complainant received no response.

On March 15, 2007, Complainant mailed Respondent a letter with the same offer on the disputed domain name in hopes of receiving a response. Complainant again received no response.

On March 23, 2007, Complainant called the Respondents phone number listed as Deer Run Campgrounds in Network Solution's Whois database. Complainant left a voicemail regarding the letter that was sent and requested a response. Complainant still received no response.

On March 27, 2007, Complainant called the Respondent's phone number listed on a site linked at Deerrun-campground.com. Complainant was able to reach Anita, David Storts' wife. She said she was pretty sure the Respondent was not interested, and that she would

have the Respondent reply to the letter via the email address supplied in the Complainant's letter. Complainant did not receive a response.

On March 30, 2007, Complainant mailed Respondent a final letter and offer regarding the disputed domain. Complainant informed the Respondent of the option of Arbitration and their case against the Respondent. It also informed the Respondent that if they did not respond by email or phone by April 14th, the next option would be filing a complaint.

On April 3, 2007, Respondent called Complainant after receiving the final letter. Respondent asked the Complainant to stop harassing them and informed the Complainant that they were going to send this to their lawyer. Respondent also stated that they had registered this domain name previously.

On April 5, 2007, Complainant received a fax from the Respondents lawyer stating that the Respondent "has an active BMI publishing company and originally incorporated under the "Music Rain" name in 1995. Thus, any notion that he has appropriated your company's name is baseless. He has been actively using the name well over twelve years and is fully entitled to do so."

In the above fax, the Respondent's lawyer has claimed that the Respondent "originally incorporated under the "Music Rain" name in 1995." However, as mentioned earlier, according to the Missouri Secretary of State, it can be seen that the company was administratively dissolved and essentially no use has been made of the name since 2004. Also, extensive searches on the Internet using search engines, such as Google, do not reveal any presence of this company using the name.

Complainant never stated that that Respondent had appropriated their company's name. Complainant has stated that they currently own the MUSICRAIN trademark, have a selling product under the mark, have established MUSICRAIN as a company, and has several patents pending on the MUSICRAIN product.

Because the musicRAIN product is so well known, Internet users expect the website <musicrain.com> to be run by the products company. Respondent's holding of the domain name dilutes the distinctive character of the Complainant's trademark and weakens the association of the MUSICRAIN trademark with the Complainants goods and business.

[a.] *[Specify in the space below the manner in which the domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights.]* ICANN Rule 3(b)(ix)(1); ICANN Policy ¶4(a)(i).

- Leaving aside the first-level generic component ".com", the domain name <musicrain.com> is identical to the Complainant's trademark MUSICRAIN.

[b.] *[Specify in the space below why the Respondent (domain-name holder) should be considered as having no rights or legitimate interests in respect of the domain name(s) that is/are the subject of the complaint.]* ICANN Rule 3(b)(ix)(2); ICANN Policy ¶4(a)(ii).

- The Respondent neither is a licensee of Complainant nor has been authorized by Complainant to use the MUSICRAIN trademark.
- The domain name is not comprised of the Respondent's own mark but instead is identical to the Complainant's distinctive mark.
- According to the Missouri Secretary of State, the Respondent did register a corporation in December of 1995 under the name of Music Rain, Inc. However, they allowed it to dissolve in 2004. The last report they filed was the 2002 Annual Registration Report and the business name was administratively dissolved and revoked as of July 28, 2004.
- There is no evidence that the Respondent has ever used the domain name in connection with a legitimate business offering or noncommercial use.
- The Respondent has held the domain name with the current Registrar for at least fifteen months and has made no use of the domain name or Internet services.
- There is no evidence that before any notice of the dispute there was Respondent's use of, or demonstrable preparations to use, the Domain Name in connection with a bona fide offering of goods or services.

[c.] *[Specify in the space below why the domain name(s) should be considered as having been registered and being used in bad faith.]* ICANN Rule 3(b)(ix)(3); ICANN Policy ¶4(a)(iii).

- The Respondent registered the <musicrain.com> domain name in bad faith in abuse of the Complainant's distinctive trademark.
- According to Network Solutions Whois database, The Respondent re-registered the disputed domain name with the registrar shortly after a press

release for musicRAIN was widely reported on multiple websites, which leaves strong reason to suspect registration in bad faith.

- There is no evidence that the disputed domain has ever had an active website.
- The Respondent has not made legitimate or bona fide use of the disputed domain name since it was registered, which indicates bad faith.
- The passive holding of the domain name by the respondent amounts to the Respondent acting in bad faith. Respondent stated in a phone conversation with the Complainant on April 3rd, 2007 that their intent for the domain was to “lock it up” so that when they did do something they would have it, which is evidence of bad faith.
- The Respondent’s holding of the domain name dilutes the distinctive character of the Complainant’s trademark and weakens the association of the MUSICRAIN trademark with the Complainants goods and business.

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

FINDINGS

Complainant, mediaRAIN LLC, holds rights in the MUSICRAIN mark and uses it in association with interactive sheet music player software. In connection with the provision of these services, Complainant has registered the MUSICRAIN mark with the United States Patent and Trademark Office (“USPTO”) (Reg. No. 3,141,444 issued September 12, 2006 and filed April 19, 2005).

Respondent registered the <musicrain.com> domain name on December 8, 2005. The disputed domain name resolves to a website that is not actively used.

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 asserts rights in the MUSICRAIN mark through registration of the mark with the USPTO. Although the registration date of the mark postdates Respondent’s disputed domain name registration, the Panel finds Complainant’s common law rights in the mark date back to its first use of the mark as noted in the USPTO registration (April 8, 2000). Even if Complainant only had rights from the time its trademark registration application was filed with the USPTO, April 19, 2005 still predates Respondent’s registration of the domain name. *See Planetary Soc’y v. Rosillo*, D2001-1228 (WIPO Feb. 12, 2002) (holding that the effective date of Complainant’s trademark rights date back to the application’s filing date); *see also Phoenix Mortgage Corp. v. Toggas*, D2001-0101 (WIPO Mar. 30, 2001) (“The effective date of Complainant’s federal rights is . . . the filing date of its issued registration. Although it might be possible to establish rights prior to that date based on use, Complainant has submitted insufficient evidence to prove common law rights before the filing date of its federal registration.”).

Accordingly, the Panel finds Complainant’s timely registration of the MUSICRAIN mark with the USPTO and use of the mark since April 8, 2000 establishes 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 U.S. Office of Pers. Mgmt. v. MS Tech. Inc.*, FA 198898 (Nat. Arb. Forum Dec. 9, 2003) (“[O]nce the USPTO has made a determination that a mark is registrable, by so issuing a registration, as indeed was the case here, an ICANN panel is not empowered to nor should it disturb that determination.”).

Respondent’s <musicrain.com> domain name contains Complainant’s MUSICRAIN mark in its entirety and adds the generic top-level domain (“gTLD”) “.com.” The Panel finds the addition of a gTLD to an otherwise identical mark fails to sufficiently distinguish the disputed domain name from the mark in accordance with Policy ¶4(a)(i). *See Pomellato S.p.A v. Tonetti*, D2000-0493 (WIPO July 7, 2000) (finding <pomellato.com> identical to the complainant’s mark because the generic top-level domain (gTLD) “.com” after the name POMELLATO is not relevant); *see also*

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).

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

Rights or Legitimate Interests

In instances where Complainant has made a *prima facie* case bolstering its allegations, the burden shifts to Respondent to prove it has rights or legitimate interests in accordance with Policy ¶4(a)(ii). 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).

The disputed domain name resolves to a website offering no content. The Panel finds Respondent’s failure to associate content with its disputed domain name registration 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 *Boeing Co. v. Bressi*, D2000-1164 (WIPO Oct. 23, 2000) (finding no rights or legitimate interests where the respondent has advanced no basis on which the panel could conclude that it has a right or legitimate interest in the domain names, and no commercial use of the domain names has been established); see also *Nike, Inc. v. Crystal Int'l*, D2001-0102 (WIPO Mar. 19, 2001) (finding no rights or legitimate interests where the respondent made no use of the infringing domain names).

A review of Respondent’s WHOIS registration information reveals the registrant of the <musicrain.com> domain name is “SMI Resources d/b/a Deer Run Campground.” While Respondent’s attorney’s (Russ Schenewerk) April 5, 2007 correspondence sent outside of this proceeding claims David Storts has been using the “Music Rain” name for the past twelve years, this is not helpful because David Storts didn’t register the <musicrain.com> domain name. The registrant for the <musicrain.com> domain name is “SMI Resources d/b/a Deer Run Campground” not even “SMI Resources d/b/a MusicRain.” Respondent decided how it was going to register the domain name. This is no showing of who or what SMI Resources is.

While a Missouri corporation called “Music Rain, Inc.” might have had rights to the “Music Rain” name which pre-dated Complainant’s rights, it was dissolved on July 28, 2004. That entity was not the registrant of this domain name and Respondent may not assert the rights of third party to protect its domain name registration (absent an assignment or some document of similar import). While David Storts may well have rights to use “Music Rain,” as claimed by Attorney Russ Schenewerk, David Storts didn’t register <musicrain.com>. He isn’t the Respondent and the Respondent cannot assert a third party’s rights to justify Respondent’s actions.

In light of the lack of credible contrary evidence, the Panel finds Respondent is not commonly known by the disputed 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 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.”). If Respondent wanted to protect its rights, it should have appeared in this proceeding and done so. The Panel cannot divine Respondent’s rights unless they are clear from the public record.

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

Registration and Use in Bad Faith

Respondent’s disputed domain name resolves to no content. The Panel finds Respondent’s failure to associate content with its disputed domain name registration evinces registration and use in bad faith pursuant to Policy ¶4(a)(iii). *See Mondich v. Brown*, D2000-0004 (WIPO Feb. 16, 2000) (holding that the respondent’s failure to develop its website in a two year period raises the inference of registration in bad faith); *see also Clerical Med. Inv. Group Ltd. v. Clericalmedical.com*, D2000-1228 (WIPO Nov. 28, 2000) (finding that merely holding an infringing domain name without active use can constitute use in bad faith).

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



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: June 6, 2007

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