



NATIONAL ARBITRATION FORUM

DECISION

Richard L. Bayless v. Cayman Trademark Trust
Claim Number: FA0602000648245

PARTIES

Complainant is **Richard L. Bayless** ("Complainant"), represented by **Jeffrey Kosc**, of **Wildman, Harrold, Allen & Dixon LLP**, 225 West Wacker Drive, Suite 2800, Chicago, IL 60606. Respondent is **Cayman Trademark Trust** ("Respondent"), Domain Administrator, Generic Search Terms, PO Box 533 WB, West Bay, Georgetown, Grand Caym GT, KY.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**rickbayless.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 February 17, 2006; the National Arbitration Forum received a hard copy of the Complaint on February 21, 2006.

On February 20, 2006, Bulkregister, Llc. confirmed by e-mail to the National Arbitration Forum that the <**rickbayless.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 February 24, 2006, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of March 16, 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@rickbayless.com by e-mail.

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

On March 21, 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.] Pursuant to ICANN Rule 3(b)(ix)(1) and ICANN Policy 4(a)(i), Complainant states that the subject domain name registered by Respondent is identical to Complainant's RICK BAYLESS name and mark, as the domain name incorporates the RICK BAYLESS name and mark in its entirety.

Complainant, Richard L. Bayless, is an award-winning and renowned chef. At least as early as 1978, Complainant began using the RICK BAYLESS name and mark in connection with television programs about cooking. At least as early as 1987, Complainant began using his name and mark in connection with cookbooks. Since use commenced, the RICK BAYLESS name and mark have been prominently featured on packaging or in advertising and promotional materials distributed throughout the United States for, inter alia, food and beverage products, restaurant services, cookbooks, cooking television shows and DVDs, and related goods and services.

In addition to Complainant's own publication of its RICK BAYLESS name and mark on packaging, advertising, and marketing, the RICK BAYLESS name and mark became widely known through news and entertainment articles about the goods and services offered under the name and mark. Such fame is widespread, as exemplified by coverage and contributions in magazines such as "Travel & Leisure," "Eating Well," "Food & Wine," "Martha Stewart Living Magazine," "Vegetarian Times and Fine Cooking," "Kitchen Garden," and "Saveur" (where Richard L. Bayless is a contributing editor), and television coverage and contributions on programs such as "Good Morning America," "Today," "CBS This Morning," "Martha Stewart Living," "Sara Moulton Cooking Live", and "Cooking Live Prime Time," "In Julia's Kitchen with Master Chefs," "Home

Cooking with Amy Coleman,” “Iron Chef America,” and “Great Chefs of America.” Id. Complainant also produces and hosts his own cooking television show titled “Mexico: One Plate at a Time,” which has been broadcast for four seasons on PBS and is shown throughout the United States.

Personal names, such as RICK BAYLESS, are protectable under common law by acquiring secondary meaning, and do not require registration. See *Stevland Morris a/k/a Stevie Wonder v. Lad*, FA0510000584849 (Nat. Arb. Forum Jan. 16, 2006); *George Foreman Ventures, LLC v. zinnia c/o Zinnia Gonzales*, FA0511000599036 (Nat. Arb. Forum Dec. 30, 2005); *Jeanette Winterson v. Mark Hogarth*, WIPO Case No. D2000-0235 (May 22, 2000). Secondary meaning is established where, as in this case, a complainant uses his name and mark continuously over a period of years for entertainment and commercial purposes. *Stevland Morris a/k/a Stevie Wonder v. Lad*, FA0510000584849 (Nat. Arb. Forum Jan. 16, 2006) (finding common law rights in musician’s personal name); *George Foreman Ventures, LLC v. zinnia c/o Zinnia Gonzales*, FA0511000599036 (Nat. Arb. Forum Dec. 30, 2005) (finding common law rights in boxer’s personal name); *Jeanette Winterson v. Mark Hogarth*, WIPO Case No. D2000-0235 (May 22, 2000) (finding common law rights in author’s personal name). In the instant case, Complainant’s strong common law rights in RICK BAYLESS are more than sufficient under the UDRP Policy to impel the Panel to grant a transfer of Respondents’ domain to Complainant.

The subject domain registered by Respondent, RICKBAYLESS.com, is identical to Complainant’s well known RICK BAYLESS name and mark. *The Sportsman’s Guide, Inc. v. Modern Limited*, Cayman Islands, WIPO Case No. D2003-0305, at 7 (June 18, 2003) (addition of generic top-level domain name “com” is without legal significance for determination of identical nature). Consequently, Respondent’s registration and use of the domain RICKBAYLESS.com creates a likelihood of confusion that there is some affiliation, connection, sponsorship, approval or association between Respondent and Complainant, when, in fact no such affiliation exists. Further, there is a likelihood that consumers will utilize Respondent’s domain name in an attempt to locate Complainant’s web site and find themselves misdirected to Respondent’s web site, which is presumably Respondent’s intent. In addition, the likelihood of confusion is exacerbated because Respondent’s website has offered links to goods and services that are similar to or in competition with those offered by Complainant under the RICK BAYLESS name and mark. An Internet user looking for the Complainant’s website and opening the disputed domain name will not find any indication that the user has not reached the intended website, and seeing links to related goods and services, might assume that they are on the Complainant’s website.

[b.] Under ICANN Rule 3(b)(ix)(2) and ICANN Policy 4(a)(ii), the Respondent should be considered to have no rights or legitimate interests in respect of the subject domain name, RICKBAYLESS.com. Respondent registered the domain name on or about November 12, 2001, long subsequent to Complainant’s acquisition of rights in its RICK BAYLESS name and mark. Further, Respondent is not a licensee of Complainant,

nor otherwise authorized by Complainant to use Complainant's RICK BAYLESS name or mark in any manner. Nor has Complainant licensed or otherwise permitted the Respondent to apply for or use any domain name incorporating any simulation of the RICK BAYLESS name or mark.

Respondent does not fall within any of the ICANN Policy 4(c) methods of demonstrating a legitimate interest in the domain RICKBAYLESS.com. Specifically, Respondent has not been commonly known by the name or mark RICK BAYLESS because it is not using such as a name or mark to identify itself or any good or service. See *The Fresh Market, Inc. v. Modern-Limited-Cayman Web Development a/k/a Cayman Trademark Trust*, FA0310000203205, (Nat. Arb. Forum Dec. 4, 2003).

Respondent's website has displayed a number of "sponsored links" which connect to third parties' commercial web sites. Consequently, Complainant believes Respondent earns revenue from the web site displayed in association with the subject domain. See *supra* note 2. See also *The Sportsman's Guide, Inc. v. Modern Limited, Cayman Islands*, WIPO Case No. D2003-0305, at 10, (June 18, 2003) (finding same Respondent earns revenue from a web page similar to the one in the instant case).

Respondent has engaged in a pattern of conduct which evidences bad faith pursuant to ICANN Policy 4(b)(ii). Respondent registers domain names in order to prevent the owner of the related trade identity rights from registering a corresponding domain name. Since 2003, panelists in at least thirty (30) domain dispute proceedings have transferred domains from Respondent in almost identical circumstances as the present case. See *supra* note 2. In *Georgia Boot LLC v. Modern Limited-Cayman Web Development*, FA0303000149173 (Nat. Arb. Forum April 21, 2003), the panelist noted that "Respondent has registered over 2,200 domain names and is in the business of acquiring and selling domain name registrations. Many of the domain names registered to Respondent are identical or confusingly similar to valuable, registered and famous trademarks and personal names (e.g., <toshibalaptop.com>, <yamahadirtbike.com>, <yamahadirtbikes.com>, <nelson-mandela.com> and <theweatherchannel.com>)." Further, Respondent's deliberate use of a simulation of Complainant's name and mark to misleadingly divert consumers to Respondent's own web site is not a fair use of the subject domain name, RICKBAYLESS.com. Consequently, such use by Respondent, which intentionally trades off another's name and mark, cannot constitute a "bona fide" offering of goods or services for purposes of establishing a legitimate interest in the subject domain. See *LA Weight Loss Centers, Inc. v. Cayman Trademark Trust*, FA0504000464493 (Nat. Arb. Forum May 31, 2005) (finding under similar facts that it is "well-established precedent" under the ICANN Policy that the same Respondent's diversionary use is neither a bona fide use nor a legitimate or noncommercial fair use); *The State Bar of California v. Cayman Trademark Trust*, FA041100371470 (Nat. Arb. Forum Jan. 14, 2005) (finding that the instant Respondent attempted to use the Complainant's goodwill through similar "parasitic behavior").

In *The Sportsman's Guide*, the instant Respondent used the domain contested in that action more extensively than in the instant case. There the contested domain was "reproduced at the top of the web page and ... immediately after the heading "looking for something", [in] a statement starting with "welcome to sportsmenguide.com. We've collected a list of sources sites to help you find exactly what are you looking" Nevertheless, the panel found "neither the statement nor the reproduction of the disputed domain name can be considered to be a description of the Respondents' business in connection with a bona fide offering of goods." *Id.* In the instant case the Respondent does not make even this de minimis use of the subject domain, RICKBAYLESS.com. Respondent merely displays the domain name "rickbayless.com" at the top of the page, which was followed immediately by the sentence "Here are some related websites for: rickbayless.com." The Respondent then changed the sentence to read "What you need, when you need it." Consequently, the Respondent's use is not legitimate.

[c.] Under ICANN Rule 3(b)(ix)(3) and ICANN Policy 4(a)(iii), the subject domain registered by Respondent, RICKBAYLESS.com, should be considered as registered and used in bad faith.

Significantly, per ICANN Policy 4(b)(ii), bad faith is evidenced by Respondent's pattern of offending conduct. As noted above, many UDRP actions have been successfully brought against Respondent. Further, Respondent continues to maintain registrations of domain names which are confusingly similar to other third parties' registered and valuable trademarks. Such domains include YAMAHADIRTBIKE.com and TOSHIBALAPTOP.com.

Complainant believes Respondent has registered the domain name RICKBAYLESS.com both to prevent Complainant, the owner of the RICK BAYLESS name and mark, from using this domain, and to enable Respondent purposefully to funnel confused consumers away from Complainant's web site and to Respondent's web site. See *Chattanooga Lookouts Baseball Club v. Cayman Trademark Trust*, FA 0408000309920 (Nat. Arb. Forum Oct. 11, 2004) (finding that the same Respondent's intent was to divert traffic away from that Complainant to its own site for commercial gain by creating a likelihood of confusion with Complainant's mark); *Anne Geddes v. Cayman Trademark Trust*, FA 0404000257938 (Nat. Arb. Forum June 15, 2004) (finding the instant Respondent's practice of diversion by offering a website with links to third party's commercial websites, motivated presumably by commercial gain, through use of a confusingly similar domain evidences bad faith and use).

The four criteria for bad faith set forth in the ICANN Policy 4(b) are not exclusive. *Michael J. Feinstein v. Paws Video Productions*, WIPO Case No. D2000-0880 (Oct. 21, 2000). At a minimum, Respondent registered the RICKBAYLESS.com domain name to prevent Complainant from utilizing this domain which is identical to Complainant's RICK BAYLESS name and mark. ICANN Policy 4(b)(ii). Given the fame of Complainant's name and mark, and the subject domain's identical nature, there is no reasonable possibility that Respondent's infringing domain was selected by chance. See

Chattanooga Lookouts Baseball Club v. Cayman Trademark Trust, FA0408000309920 (Nat. Arb. Forum Oct. 11, 2004) (finding under similar facts that the instant Respondent had no other connection to that Complainant's field of business other than to provide links to competing third parties' sites). Furthermore, Respondent's website content that specifically relates to cooking, recipes, and restaurant services, is evidence of Respondent's actual knowledge of Complainant's name and mark and, therefore, bad faith. See LA Weight Loss Centers, Inc. v. Cayman Trademark Trust, FA0504000464493 (Nat. Arb. Forum May 31, 2005) (finding the instant Respondent's display of links related to Complainant's field of business evidence of actual knowledge and bad faith). Respondent cannot claim that it had no actual or constructive knowledge of the Complainant because a simple online search via the WHOIS database or a search engine would have quickly revealed that Complainant owns and is using the RICK BAYLESS name and mark. See The Fresh Market, Inc. v. Modern Limited-Cayman Web Development a/k/a Cayman Trademark Trust, FA0310000203205, (Nat. Arb. Forum Dec. 4, 2003). "Such a search is a reasonable expectation for a company whose name is Cayman Trademark Trust and whose business appears to exist solely on the Internet." Id. (finding that the record of UDRP decisions against the instant Respondent clearly demonstrates its knowledge of trademarks registered throughout the world).

Respondent's activities constitute infringement of Complainant's rights in its marks and have caused and will continue to cause substantial and irreparable harm to Complainant in his business reputation and goodwill. Complainant therefore demands that Respondent transfer to it the domain name RICKBAYLESS.com.

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

FINDINGS

Complainant, Richard L. Bayless, is an award-winning and renowned chef. Complainant has used the RICK BAYLESS mark in connection with television programs about cooking since as early as 1978. Complainant has used the RICK BAYLESS mark in connection with cookbooks since as early as 1987. Complainant's mark has been prominently featured on packaging, advertising and promotional materials distributed throughout the United States for food and beverage products, restaurant services, cookbooks, cooking television shows and DVDs.

Complainant has been featured in, and contributed to, articles in magazines such as *Travel & Leisure Magazine*, *Eating Well*, *Food & Wine*, *Martha Stewart Living Magazine*, *Vegetarian Times* and *Fine Cooking*, *Kitchen Garden*, and *Saveur*, where Complainant is a contributing editor. Complainant has appeared on television shows such as "Good Morning America," "Today," "CBS This Morning," "Martha Stewart Living," and many others.

Respondent registered the <**rickbayless.com**> domain name on November 12, 2001. Respondent is using the disputed domain name to redirect Internet users to Respondent's commercial website featuring links to third-party websites unrelated to 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 asserts the RICK BAYLESS mark has acquired sufficient secondary meaning to establish common law rights based on Richard L. Bayless' fame and reputation associated with his career as a chef. Complainant's career as a chef began over twenty years before the registration of the disputed domain name. The Panel concludes Complainant has proved that the RICK BAYLESS mark has become sufficiently connected to Complainant's career as a chef that the public associates that career with Richard L. Bayless and the RICK BAYLESS mark. *See Roberts v. Boyd*, D2000-0210 (WIPO May 29, 2000) (finding that trademark registration was not necessary and that the name "Julia Roberts" has sufficient secondary association with the complainant that common law trademark rights exist); *see also Estate of Shakur v. Shakur Info Page*, AF-0346 (eResolution Sept. 28, 2000) ("A person may acquire such a reputation in his or her own name as to give rise to trademark rights in that name at common law. . .").

Respondent's <**rickbayless.com**> domain name is identical to Complainant's RICK BAYLESS mark, because the domain name features Complainant's mark in its entirety, omits the space between the words "rick" and "bayless," and adds the generic top-level

domain “.com.” The Panel finds such minor alterations to Complainant’s mark are insufficient to negate the identical aspects of Respondent’s domain name pursuant to Policy ¶4(a)(i). See *Hannover Ruckversicherungs-AG v. Ryu*, FA 102724 (Nat. Arb. Forum Jan. 7, 2001) (finding <hannoverre.com> to be identical to HANNOVER RE, “as spaces are impermissible in domain names and a generic top-level domain such as ‘.com’ or ‘.net’ is required in domain names”); see also *Isleworth Land Co. v. Lost in Space, SA*, FA 117330 (Nat. Arb. Forum Sept. 27, 2002) (finding it is a “well established principle that generic top-level domains are irrelevant when conducting a Policy ¶4(a)(i) analysis”).

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 <**rickbayless.com**> domain name. Once Complainant makes a *prima facie* case in support of its allegations, the burden shifts to Respondent to prove that it does have rights or legitimate interests pursuant to Policy ¶4(a)(ii). 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).

The <**rickbayless.com**> domain name is identical to Complainant’s RICK BAYLESS mark and is used to redirect Internet users to Respondent’s commercial website featuring links to a wide variety of third-party services and products unrelated to Complainant. The Panel finds Respondent’s use of a domain name that includes Complainant’s entire mark to divert Internet users to a website that links to third-party websites unrelated to Complainant, and for which Respondent presumably receives click-through fees, is not 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). See *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); see also *Black & Decker Corp. v. Clinical Evaluations*, FA 112629 (Nat. Arb. Forum June 24, 2002) (holding that the respondent’s use of the disputed domain name to redirect Internet users to commercial websites, unrelated to the complainant and presumably with the purpose of earning a commission or pay-per-click referral fee did not evidence rights or legitimate interests in the domain name).

Respondent has offered no evidence and there is no evidence in the record suggesting Respondent is commonly known by the <rickbayless.com> domain name. Respondent has not established rights or legitimate interests in the <rickbayless.com> domain name pursuant to Policy ¶4(c)(ii). *See Compagnie de Saint Gobain v. Com-Union Corp.*, D2000-0020 (WIPO Mar. 14, 2000) (finding no rights or legitimate interests where the respondent was not commonly known by the mark and never applied for a license or permission from the complainant to use the trademarked name); *see also Gallup Inc. v. Amish Country Store*, FA 96209 (Nat. Arb. Forum Jan. 23, 2001) (finding that the respondent does not have rights in a domain name when the respondent is not known by the mark); *see also Broadcom Corp. v. Intellifone Corp.*, FA 96356 (Nat. Arb. Forum Feb. 5, 2001) (finding no rights or legitimate interests because the respondent was not commonly known by the disputed domain name nor was the respondent using the domain name in connection with a legitimate or fair use).

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

Registration and Use in Bad Faith

The <rickbayless.com> domain name resolves to a website that features links to a wide variety of third-party websites unrelated to Complainant (originally the links were to Complainant's competitors; now they are to unrelated web sites). The Panel presumes Respondent receives commissions for diverting Internet users to third-party websites via the search engine and links located at Respondent's website. Respondent's use of Complainant's distinctive RICK BAYLESS mark in the domain name creates a likelihood of confusion and suggests an attempt to attract Internet users to Respondent's website for Respondent's commercial gain. The Panel finds this is evidence of Respondent's bad faith registration and use 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."); *see also G.D. Searle & Co. v. Celebrex Drugstore*, FA 123933 (Nat. Arb. Forum Nov. 21, 2002) (finding that the respondent registered and used the domain name in bad faith pursuant to Policy ¶4(b)(iv) because the respondent was using the confusingly similar domain name to attract Internet users to its commercial website).

Respondent has been a party to more than 20 UDRP proceedings under a number of names and aliases. Respondent appears to have lost all of these cases and has engaged in a consistent pattern of conduct; namely taking famous marks belonging to others and using them as domain names. According to the allegations in the complaint, Respondent has done this over 2,200 times. This Panel believes that certainly constitutes a rather consistent pattern of bad faith, which this Panel will not condone.

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



Houston Putnam Lowry, Esq.
Arbitrator

Houston Putnam Lowry, Chartered Arbitrator, Panelist
Dated: April 3, 2006

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