



NATIONAL ARBITRATION FORUM

DECISION

Rachel Aldana v. net tech
Claim Number: FA0806001202934

PARTIES

Complainant is **Rachel Aldana** ("Complainant"), represented by **Richard C. Balough**, Illinois, USA. Respondent is **net tech** ("Respondent"), Zimbabwe.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is <**rachelaldana.com**>, registered with **Godaddy.com, Inc.**

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.

Honorable Paul A. Dorf (Ret.) as Panelist.

PROCEDURAL HISTORY

Complainant submitted a Complaint to the National Arbitration Forum electronically on June 6, 2008; the National Arbitration Forum received a hard copy of the Complaint on June 9, 2008.

On June 10, 2008, Godaddy.com, Inc. confirmed by e-mail to the National Arbitration Forum that the <**rachelaldana.com**> domain name is registered with Godaddy.com, Inc. and that Respondent is the current registrant of the name. Godaddy.com, Inc. has verified that Respondent is bound by the Godaddy.com, 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 June 16, 2008, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of July 7, 2008 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@rachelaldana.com by e-mail.

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

On July 10, 2008, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the National Arbitration Forum appointed Honorable Paul A. Dorf (Ret.) 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:

1. Respondent's <**rachelaldana.com**> domain name is identical to Complainant's RACHEL ALDANA mark.
2. Respondent does not have any rights or legitimate interests in the <**rachelaldana.com**> domain name.
3. Respondent registered and used the <**rachelaldana.com**> domain name in bad faith.

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

FINDINGS

Complainant, Rachel Aldana, is a model and celebrity. She gained her celebrity status in December 2005, when she won a nationwide contest in the United Kingdom. The contest was sponsored by a newspaper, "The People," which was in search of "The biggest breasts in Britain." Complainant won the contest and was inducted into the Guinness Book of World Records for meeting such criteria. As result of the fame, Complainant has since been engaged in a successful modeling career, appearing on numerous television shows and other media outlets.

Respondent registered the <**rachelaldana.com**> domain name on December 8, 2005. It was registered just days after British tabloids published various articles announcing that Complainant had been entered in the Guinness Book of World Records for having "The biggest breasts in Britain." Respondent has made no use of the disputed domain name. There are no functioning websites associated with the disputed domain name. In

correspondence between Complainant and Respondent's agent, Respondent offered to sell the disputed domain name for UK £ 2,500 or roughly US \$ 5,000.

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 need not have obtained a trademark registration from a governmental authority in order to establish rights in a mark. If Complainant can establish continuous use and secondary meaning, common law rights will suffice for the purposes of Policy ¶ 4(a)(i). *See Artistic Pursuit LLC v. calcuttawebdevelopers.com*, FA 894477 (Nat. Arb. Forum Mar. 8, 2007) (finding that Policy ¶ 4(a)(i) does not require a trademark registration if a complainant can establish common law rights in its mark); *see also Tuxedos By Rose v. Nunez*, FA 95248 (Nat. Arb. Forum Aug. 17, 2000) (finding common law rights in a mark where its use was continuous and ongoing, and secondary meaning was established).

Complainant is seeking to establish common law rights in her name, RACHEL ALDANA. Personal names that acquire secondary meaning are protectable under common law rights. *See McCarthy on Trademarks and Unfair Competition*, § 13:1 (4th ed. 2002) (stating that the basic rules pertaining to the protection of personal names require actual proof of secondary meaning for protection); *see also Winterson v. Hogarth*,

D2000-0235 (WIPO May 22, 2000) (finding that ICANN Policy does not require that the complainant have rights in a registered trademark and that it is sufficient to show common law rights in holding that the complainant has common law rights to her name). Secondary meaning is established when a complainant uses his or her name over a period of years for entertainment and commercial purposes. *See Bayless v. Cayman Trademark Trust*, FA 648245 (Nat. Arb. Forum Apr. 3, 2006) (“The Panel concludes Complainant has proved that the RICK BAYLESS mark has become sufficiently connected to Complainant’s career as a chef and the public associates that career with Richard L. Bayless and the RICK BAYLESS mark.”). Previous panels have consistently held to maintain common law trademark rights under policy ¶ 4(a)(i) for “[u]nregistered celebrity names or marks used in connection with celebrity personalities...” *See Laurenti v. Director*, FA 243460 (Nat. Arb. Forum May 7, 2004).

Complainant was a participant in a contest sponsored by “The People” newspaper in the United Kingdom. She won the contest and was consequently inducted into the Guinness Book of Records for having “The largest breasts in Britain.” This contest and induction lead to immediate fame and notoriety for Complainant. Since December 2005, she has conducted numerous interviews for various media outlets and has likewise jumpstarted a successful modeling career. The Panel finds that the demonstrated fame and career of Complainant marketed on her name establishes that Complainant has sufficient common law rights in her name RACHEL ALDANA for the purposes of Policy ¶ 4(a)(i). *See CMG Worldwide, Inc. v. Lombardi*, FA 95966 (Nat. Arb. Forum Jan. 12, 2001) (finding that the complainant had established enforceable rights in the common-law VINCE LOMBARDI name and mark); *see also 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).

Respondent’s <**rachelaldana.com**> domain name is identical to Complainant’s RACHEL ALDANA mark but for the omission of the space between “RACHEL” and “ALDANA” and the inclusion of the generic top-level domain (“gTLD”) “.com.” It is well-established that the omission of space in a mark and the inclusion of a gTLD are irrelevant for a Policy ¶ 4(a)(i) analysis since spaces are not permitted in domain names and all domain names must include a top-level domain. Therefore, the Panel finds that Respondent’s disputed domain name is identical to Complainant’s mark pursuant to Policy ¶ 4(a)(i). *See Reichert, Inc. v. Leonard*, FA 672010 (Nat. Arb. Forum May 24, 2006) (“The disputed domain names are identical to Complainant’s mark, but for the addition of a generic top-level domain suffix (“.com” or “.net”)...”); *see also 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”).

The Panel concludes that Complainant has sufficiently established Policy ¶ 4(a)(i).

Rights or Legitimate Interests

Complainant must first establish under Policy ¶ 4(a)(i) a *prima facie* case that Respondent has no rights or legitimate interests in the <**rachelaldana.com**> domain name. *See VeriSign Inc. v. VeneSign C.A.*, D2000-0303 (WIPO June 28, 2000) (“Respondent's default, however, does not lead to an automatic ruling for Complainant. Complainant still must establish a *prima facie* case showing that under the Uniform Domain Name Dispute Resolution Policy it is entitled to a transfer of the domain name.”). The Panel finds that Complainant has met this threshold and that the burden is accordingly shifted to Respondent to demonstrate that it does have rights or legitimate interests in the disputed domain name. *See Swedish Match UK Ltd. v. Admin, Domain*, FA 873137 (Nat. Arb. Forum Feb. 13, 2007) (finding that once a *prima facie* case has been established by the complainant under Policy ¶ 4(c), the burden then shifts to the respondent to demonstrate its rights or legitimate interests in the disputed domain name); *see also Towmaster, Inc. v. Hale*, FA 973506 (Nat. Arb. Forum June 4, 2007) (“Complainant must first make a *prima facie* case that Respondent lacks rights and legitimate interests in the disputed domain name under Policy ¶ 4(a)(ii), and then the burden shifts to Respondent to show it does have rights or legitimate interests.”).

No response has been filed in this case. When a Respondent defaults, the Panel is free to draw adverse inferences as it deems appropriate. Previous panels typically have interpreted this to allow for a rebuttable presumption that Respondent has no rights or legitimate interests. *See Am. Express Co. v. Fang Suhendro*, FA 129120 (Nat. Arb. Forum Dec. 30, 2002) (“[B]ased on Respondent's failure to respond, it is presumed that Respondent lacks all rights and legitimate interests in the disputed domain name.”); *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). As a result, the Panel presumes that Respondent has no rights or legitimate interests in the disputed domain name, but will nonetheless examine the record in consideration of the elements listed under Policy ¶ 4(c). *See EK Success, Ltd. v. Yi-Chi*, CPR0314 (CPR June 12, 2003) (“[T]he Respondent's default cannot simply be construed as an admission of the allegations contained in the Complaint.”).

Without any arguments or evidence from Respondent, the Panel only has the WHOIS record for the disputed domain name to consider Policy ¶ 4(c)(ii). The WHOIS record lists “marc kranat.” The Panel finds this insufficient to establish any connection between Respondent and the disputed domain name. Consequently, the Panel finds that Respondent is not nor ever was 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 Braun Corp. v. Loney*, FA 699652 (Nat. Arb. Forum July 7, 2006) (concluding that the respondent was not commonly known by the disputed domain names where the WHOIS information, as well as all other information

in the record, gave no indication that the respondent was commonly known by the disputed domain names).

“Merely registering [a] domain name is not sufficient to establish rights or legitimate interests for [the] purposes of paragraph 4(a)(ii) of the Policy.” *Vestel Elektronik Sanayi ve Ticaret AS v. Kahveci*, D2000-1244 (WIPO Nov. 11, 2000). Absent any actual use or demonstrable preparations to use a disputed domain name, previous panels consistently fail to find an owner of a disputed domain name to have rights or legitimate interests in that domain name. *See Chanel, Inc. v. Heyward*, D2000-1802 (WIPO Feb. 23, 2001) (finding no rights or legitimate interests where “Respondent registered the domain name and did nothing with it”); *see also Pharmacia & Upjohn AB v. Romero*, D2000-1273 (WIPO Nov. 13, 2000) (finding no rights or legitimate interests where the respondent failed to submit a response to the complaint and had made no use of the domain name in question). The Panel finds that Respondent’s lack of utilization of the disputed domain name over the past two plus years is itself sufficient evidence of Respondent’s lack of rights or legitimate interests in the disputed domain name pursuant generally to Policy ¶ 4(a)(ii).

However in particular, Respondent’s failure to make an active use of the <rachelaldana.com> domain name does not constitute either 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 Hewlett-Packard Co. & Hewlett-Packard Dev. Co., L.P. v. Shemesh*, FA 434145 (Nat. Arb. Forum Apr. 20, 2005) (“The Panel finds that the [inactive use] of a domain name that is identical to Complainant’s mark is not a bona fide offering of goods or services pursuant to Policy ¶ 4(c)(i) and it is not a legitimate noncommercial or fair use of the domain name pursuant to Policy ¶ 4(c)(iii).”); *see also Bloomberg L.P. v. SC Media Servs. & Info. SRL*, FA 296583 (Nat. Arb. Forum Sept. 2, 2004) (“Respondent is wholly appropriating Complainant’s mark and is not using the <bloomberg.ro> domain name in connection with an active website. The Panel finds that the [inactive use] of a domain name that is identical to Complainant’s mark is not a bona fide offering of goods or services pursuant to Policy ¶ 4(c)(i) and it is not a legitimate noncommercial or fair use of the domain name pursuant to Policy ¶ 4(c)(iii).”).

Complainant states that Respondent offered to sell the disputed domain name for roughly US \$ 5,000. This is considerably more than it costs to register and maintain the disputed domain name. The Panel finds this to be additional evidence that Respondent does not have any rights or legitimate interests in the disputed domain name pursuant to Policy ¶ 4(a)(ii). *See Reese v. Morgan*, FA 917029 (Nat. Arb. Forum Apr. 5, 2007) (finding that the respondent’s willingness to sell a contested domain name for more than its out-of-pocket costs provided additional evidence that Respondent had no rights or legitimate interests in the contested domain name); *see also Wal-Mart Stores, Inc. v. Stork*, D2000-0628 (WIPO Aug. 11, 2000) (finding the respondent’s conduct purporting to sell the domain name suggests it has no legitimate use).

The Panel concludes that Complainant has sufficiently established Policy ¶ 4(a)(ii).

Registration and Use in Bad Faith

Complainant alleges that Respondent has attempted to sell the <rachelaldana.com> domain name for almost US\$ 5,000. Generally, there is “nothing inherently wrongful in the offer or sale of domain names.” However, registrants of domain names who obtain infringing domain names and for the purpose of selling them for considerable profit in excess of their out-of-pocket costs are considered to have done so in bad faith. *See CBS Broad. Inc. v. Worldwide Webs, Inc.*, D2000-0834 (WIPO Sept. 4, 2000) (“There is nothing inherently wrongful in the offer or sale of domain names, without more, such as to justify a finding of bad faith under the Policy. However, the fact that domain name registrants may legitimately and in good faith sell domain names does not imply a right in such registrants to sell domain names that are identical or confusingly similar to trademarks or service marks of others without their consent”); *see also Pocatello Idaho Auditorium Dist. v. CES Mktg. Group, Inc.*, FA 103186 (Nat. Arb. Forum Feb. 21, 2002) (“[w]hat makes an offer to sell a domain [name] bad faith is some accompanying evidence that the domain name was registered because of its value that is in some way dependent on the trademark of another, and then an offer to sell it to the trademark owner or a competitor of the trademark owner”). The Panel finds Respondent’s registration of a domain name identical to Complainant’s RACHEL ALDANA mark and then offer to sell the disputed domain name to Complainant at a significantly higher cost than the minimal capital that would have been required to register and maintain the disputed domain name is sufficient evidence to establish Respondent’s bad faith registration and use pursuant to Policy ¶ 4(b)(i). *See George Weston Bakeries Inc. v. McBroom*, FA 933276 (Nat. Arb. Forum Apr. 25, 2007) (concluding that the respondent registered and was using the <gwbakeries.mobi> domain name in bad faith according to Policy ¶ 4(b)(i) where it offered it for sale for far more than its estimated out-of-pocket costs it incurred in initially registering the disputed domain name).

In the absence of any additional evidence, the Panel takes the opportunity to consider the totality of the circumstances in this case. It is not required to consider only the examples listed under Policy ¶ 4(b). *See Twentieth Century Fox Film Corp. v. Risser*, FA 93761 (Nat. Arb. Forum May 18, 2000) (“The requirement in the ICANN Policy that a complainant prove that domain names are being used in bad faith does not require that it prove in every instance that a respondent is taking positive action. Use in bad faith can be inferred from the totality of the circumstances even when the registrant has done nothing more than register the names.”); *see also Do The Hustle, LLC v. Tropic Web*, D2000-0624 (WIPO Aug. 21, 2000) (“[T]he examples [of bad faith] in Paragraph 4(b) are intended to be illustrative, rather than exclusive.”).

Failure to make an active use of a domain name is a lack of affirmative action which previous panels have found to reinforce a presumption that a particular respondent had registered and was using a disputed domain name in bad faith. *See Cruzeiro Licenciamentos Ltda. v. Sallen*, D2000-0715 (WIPO Sept. 6, 2000) (“Mere [failure to make an active use] of a domain name can qualify as bad faith if the domain name

owner's conduct creates the impression that the name is for sale."); *see also 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). Respondent has likewise made no use or demonstrable preparations to use the disputed domain name in at least two years. The Panel finds this failure to make an active use establishes additional evidence that Respondent registered and is using the <rachelaldana.com> domain name in bad faith pursuant to Policy ¶ 4(a)(iii). *See Disney Enters. Inc. v. Meyers*, FA 697818 (Nat. Arb. Forum June 26, 2006) (holding that the non-use of a disputed domain name for several years constitutes bad faith registration and use under Policy ¶ 4(a)(iii)).


And finally, the Panel takes note of the timing in which Respondent choose to register the disputed domain name. It was registered within just a few days of the announcement within British tabloids that Complainant was going to be inducted into the Guinness Book of World Records for having "the largest breasts in Britain." In *Thermo Electron Corp. v. Xu*, FA 713851 (Nat. Arb. Forum July 12, 2006), the respondent registered the domain name the same day that news had leaked about a merger the complainant was to enter. The panel in that proceeding found such evidence to be "a compelling indication of bad faith" on the part of the then respondent, drawing a "negative inference from [it]." Likewise, in *3M Co. v. Jeong*, FA 505494 (Nat. Arb. Forum Aug. 11, 2005), a domain name was registered just shortly after a press release was issued regarding the complainant's acquisition of a company related to its mark. This was held to be an example of "opportunistic bad faith." The Panel finds this precedent highly persuasive and concludes that Respondent's registration of an identical domain name just after an announcement in the British press regarding Complainant is a prime example of opportunistic bad faith and additional evidence of Respondent's bad faith registration and use of the <rachelaldana.com> domain name pursuant to Policy ¶ 4(a)(iii).

The Panel concludes that Complainant has sufficiently established Policy ¶ 4(a)(iii).

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


Paul Dorf, Esq.
Arbitrator

Honorable Paul A. Dorf (Ret.), Panelist
Dated: July 24, 2008

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