



WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

Napster, Inc. v. Giovanni Vinsceni

Case No. D2005-0531

1. The Parties

The Complainant is Napster, Inc., Los Angeles, California, United States of America, represented by Quinn Emanuel Urquhart Oliver & Hedges, LLP, United States of America.

The Respondent is Giovanni Vinsceni, New York, United States of America.

2. The Domain Name and Registrar

The disputed domain name <napster-of-porn.com> is registered with Intercosmos Media Group d/b/a directNIC.com.

3. Procedural History

The Complaint was brought pursuant to the Uniform Domain Name Dispute Resolution Policy (the "Policy"), which was adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999, and approved on October 24, 1999, and in accordance with the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") as approved on October 24, 1999, and by the World Intellectual Property Organization Supplemental Rules for Uniform Domain Name Dispute Resolution Policy in effect as of December 1, 1999 (the "Supplemental Rules").

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") in email form on May 18, 2005, and in hard copy form on May 20, 2005, along with Annexes 1-8.

Pursuant to paragraph 4(d) of the Policy, the Complainant selected the Center as the ICANN approved administrative dispute resolution service provider to administer this proceeding. Through the Complaint, the Complainant requested a single member panel.

After receiving the Complaint, the Center, in accordance with paragraph 5 of the Supplemental Rules, determined whether that Complaint fully complied with the formal requirements of the Rules and the Supplemental Rules. In that regard, on May 18, 2005, the Center requested confirmation from the Registrar of information set forth in the Complaint relative to the disputed domain name; specifically, contact and registrant information for that domain name, as well as whether the Registrar received a copy of the Complaint from the Complainant. The Center also requested the Registrar to specify: (a) whether the Policy applies to the disputed domain name, (b) whether the registrant has submitted, in its registration agreement, to the jurisdiction at the location of the principal office of the registrar for court adjudication of disputes concerning or arising from the use of the domain name, (c) the language of the registration agreement, and (d) whether the domain name will remain “locked” during the proceeding.

Subsequently, on May 18, 2005, the Registrar provided its response to the Center through which the Registrar specified name and contact information pertinent to the disputed domain name, to the extent present in its WhoIS database, confirmed that Intercosmos Media Group d/b/a directNIC.com is the registrar of that name and stated that: it had received a copy of the Complaint, the Policy applied to the disputed domain name, the language of the underlying registration agreement for the name is English and the name was then held in an “active” and “locked” status. The Registrar also informed the Center that the Respondent, through the registration agreement, had submitted to the jurisdiction at the location of the principal office of the Registrar for court adjudication of disputes concerning or arising from the use the disputed domain name.

On May 30, 2005, the Center notified the Respondent of the filing of the Complaint, including an indication that the Center was forwarding a complete copy of the Complaint, by courier, facsimile and email (the latter two being without the Exhibits), to the Respondent. Specifically, the Center separately provided its notice along with the Complaint, by email, to the Respondent’s domain name registrant, technical, administrative and zone contacts as set forth in the WhoIS record for the disputed domain name. The Complaint and its accompanying documents, and all subsequent communications associated therewith, were provided in the preferred manners and to the addresses as mandated by paragraphs 2(a), 2(b) and 4(a) of the Rules.

Hence, the notification to the Respondent having occurred on May 30, 2005, under paragraph 4(c) of the Policy, this administrative proceeding is deemed to have commenced on that date.

Having reviewed the Complaint and all preceding and succeeding correspondence between the Center and the Registrar, in detail, the Panel agrees with the determination of the Center that the Complaint and its handling met the requirements of the Rules and the Supplemental Rules.

The Respondent was then provided with a 20 calendar day period, expiring on June 19, 2005, to file its Response with the Center and serve a copy of the Response on the Complainant.

As of June 19, 2005, the Center had not received a Response to the Complaint from the Respondent; hence, the Center, in an email letter June 20, 2005, notified the Complainant and Respondent of the default of the Respondent.

Accordingly, pursuant to the Rules and Supplemental Rules, by e-mail letter dated June 22, 2005, the Center contacted the undersigned, Mr. Peter L. Michaelson,

requesting his service as a Sole Panelist for this dispute. Subsequently, on the same day, Mr. Michaelson accepted and returned, by facsimile to the Center, a fully executed Statement of Acceptance and Declaration of Impartiality and Independence. The Center, through an e-mail letter dated June 28, 2005, notified the parties of the appointment of Mr. Michaelson as Sole Panelist.

Based on the deadline set forth in paragraph 15 of the Rules, a decision was to be issued by the Panel to the Center on or before July 12, 2005. However, due to time conflicts experienced by the Panel, the Center, upon the Panel's request, extended the due date to July 19, 2005.

This dispute concerns one domain name, specifically: <napster-of-porn.com>.

The language of this proceeding is English.

4. Factual Background

A copy of the WhoIS registration records for the disputed domain name appears in Annex 1 to the Complaint. As indicated on these records, the Respondent registered the disputed domain name on December 13, 2001.

A. Complainant's "NAPSTER" Marks

The Complainant owns various federal trademark registrations for its marks that contain the term "NAPSTER", either by itself, whether in block letters or stylized, and with and without an accompanying logo (collectively the "NAPSTER" Marks) and on which this dispute is based. The Complainant has provided, in Annex 4 to the Complaint, a table providing details of the registrations of each of these marks and, in Annex 5, a copy of the corresponding registration certificates. Those registrations are as follows:

- (a) NAPSTER (block letters)
United States registration 2,575,170; registered: June 4, 2002
filed: June 28, 2000

This mark was registered for use in connection with "computer software to enable peer-to-peer networking and file sharing; search engine software; computer software for conducting and coordinating real-time and asynchronous communications among computer users sharing information and audio data via electronic communications networks" in international class 9; "telecommunications services, namely providing online chat rooms for transmission of messages among computer users concerning general interest topics" in international class 38; and "Internet services, namely, creating indexes of information, sites and other resources available on global computer networks for others; Internet services, namely providing users of electronic communications networks with means of identifying, locating, grouping, distributing, and managing data and links to third-party computer servers, computer processors and computer users; Internet services, namely searching, browsing, and retrieving information, sites, and other resources available on global computer networks for others; Internet services, namely, organizing content of information provided over a global computer network according to user preference" in international class 42. The registration states that first use and first use in commerce of the mark for the goods and services in all three classes commenced as of June 30, 1999.

(b) NAPSTER (block letters)

United States registration 2,841,431; registered May 11, 2004
filed: December 12, 2000

This mark was registered for use in connection with “computer software for the transmission of audio, graphics, text, and data over communications networks; computer software for the streaming transmission of audio, video, graphics, text and data over communications networks; computer software for storage of audio, video, graphics, text and data on communications networks users; computer software for secure, encrypted electronic transfer of audio, video, graphics and data over communications networks; computer software for encryption for communications” in international class 9; “licensing of intellectual property; computer consultation; computer network design service or [sic] others; computer systems design and analysis services for others; computer software design for others; computer software consultation; computer services, namely providing customized webpages featuring user-defined information, which includes search engines and online web links to news, weather, sports, current events, reference materials and customized email messages, all in a wide range of user-defined fields; computer services, namely, providing search engines for obtaining data via electronic communications network” in international class 42. The registration states that first use and first use in commerce of the mark for the services in both classes commenced as of October 29, 2003.

(c) NAPSTER (stylized with logo)

United States registration 2,843,405; registered May 18, 2004
filed: September 27, 2000

This mark was registered for use in connection with “computer software to enable peer-to-peer networking and file sharing; search engine software; computer software for the transmission of audio, graphics, text and data over communications networks; computer software for the streaming transmission of audio, video, graphics, text and data over communications networks; computer storage to enable communications among computer or communications network users; computer software for secure, encrypted electronic transfer of audio, video, graphics and data over communications networks; computer software for encryption of communications” in international class 9; “business consultation; product merchandising; licensing of computer software; dissemination of advertising for others via communications networks; retail store services featuring entertainment products and apparel; retail store services provided via communications networks featuring entertainment products and apparel” in international class 35; and “transmission of audio and video files via communications networks; providing electronic bulletin boards, chat rooms and community fora for the transmission of messages among users concerning music, news, current events, politics, entertainment and arts and leisure; transmission of peer to peer networking and file sharing information via communications networks; telecommunications services, namely, providing online chat rooms for transmission of messages among computer users concerning general interest topics” in international class 38; “providing databases and directories in the fields of music, video, radio, television, news, sports, games, cultural events, entertainment, and arts and leisure via communications networks; providing information, audio, video, graphics, text and other multimedia content in the fields of music, video, radio, television, entertainment, news, sports, games, cultural events, entertainment and arts and leisure via communications networks; music publishing services; publishing of text, graphic, audio and video works via communications networks; matching users for the transfer and sharing of music, video, and audio recordings via communications networks; providing educational symposia via communications networks in the fields of music, video, entertainment, news,

politics, and arts and leisure” in international class 41; and “licensing of intellectual property; providing search engines for obtaining data via communications network; providing databases and directories via communications networks for obtaining data in the field of politics and general news; Internet services, namely, creating indexes of information, sites and other resources available on communications networks for others; Internet services, namely, providing users of communications networks with means of identifying, locating, grouping, distributing, and managing data and links to third-party computer servers, computer processors and computer users; Internet services, namely, searching, browsing and retrieving information, sites, and other resources available on communications networks for others; Internet services, namely, organizing content of information provided over a communications networks according to user preference” in international class 42. The registration states that first use and first use in commerce of the mark for the goods and services in all classes commenced as of October 29, 2003.

(d) NAPSTER (block letters)

United States registration 2,843,786; registered May 18, 2004
filed: June 28, 2000

This mark was registered for use in connection with “business consultation; product merchandising; licensing of computer software and of entertainment products and services; dissemination of advertising for others via communications networks; retail store services featuring entertainment products and apparel; retail store services provided via communications networks featuring entertainment products and apparel” in international class 35; “electronic transmission of audio and video files via communications networks; providing electronic bulletin boards; chat rooms and community for a transmission of messages among users concerning music, news, current events, politics, entertainment and arts and leisure; transmission of peer to peer networking, and file sharing information via communications networks” in international class 38; “providing databases and directories in the fields of music, video, radio, television, news, sports, games, cultural events, entertainment, and arts and leisure via communications networks; providing information, audio, video, graphics, text and other multimedia content in the fields of music, video, radio, television, news, sports, games, cultural events, entertainment, and arts and leisure via communications networks; music publishing services; publishing of text, graphic, audio and video works via communications networks; matching users for the transfer of music, video, and audio recordings via communications networks; providing educational symposia via communications networks in the fields of music, video, entertainment, news, politics, and arts and leisure” in international class 41; and “licensing of intellectual property; providing search engines for obtaining data via communications networks; providing databases and directories via communications networks for obtaining data in the fields of politics and general news” in international class 42. The registration states that first use and first use in commerce of the mark for the services in all four classes commenced as of October 29, 2003.

B. The Parties and their activities

The Complainant offers a subscription service to enable fans to sample and download digital music from a substantial and diverse online collection of music.

The Complainant’s trademarks are among its most valuable corporate assets. The Complainant has not licensed its NAPSTER Marks to the Respondent, including for any use in conjunction with offering pornographic content.

When Internet users visit the Respondent's website located at "www.napster-of-porn.com", they are immediately presented with a webpage containing numerous pornographic images. A true and correct copy of that webpage appears in Annex 6 to the Complaint. The Respondent's site specifically refers to the Complainant and suggests that the Respondent offers similar services but of a pornographic nature. Further, when Internet users visit that site, they are then "mouse-trapped", i.e., citing to the description of mouse-trapping in *Gruner + Jahr Printing & Publ'g Co. v. Peter Carrington a/k/a Party Night Inc.*, No. FA 122207 (Nat. Arb. Forum October 10, 2002) which aptly describes the situation here as well:

"[u]pon entering the domain name into the web browser, the Internet user is routed to a pornographic website and cannot exit without clicking through a succession of webpages," The webpages that pop-up upon attempting to exit the initial pornographic website are all pornography related and contain illicit pictures."

While the Respondent registered the disputed domain name on December 13, 2001, the Complainant started using the mark NAPSTER in June 1999.

On April 21, 2005, the Complainant's counsel sent a cease and desist letter, a copy of which appears in Annex 7 to the Complaint, to the Respondent. Neither the Complainant nor its counsel received any response to that letter from the Respondent.

5. Parties' Contentions

A. Complainant

(i) Identical or Confusingly Similar

The Complainant contends that the disputed domain name is confusingly similar to the Complainant's NAPSTER Marks.

Specifically, the Complaint states that the disputed domain name consists of the Complainant's mark NAPSTER, the phrase "of-porn" and the extension ".com." Given that the Complainant contends that the addition of ".com" to the mark is not sufficient to avoid a finding of confusing similarity, and the phrase "of-porn" is descriptive and generic and also does not serve to distinguish the disputed domain name from the Complainant's mark, the Complainant concludes that the Respondent's use of the mark NAPSTER will likely confuse Internet users into believing that the Respondent's website is somehow sponsored, approved by or affiliated with the Complainant, when, actually, it is not.

Hence, the Complainant believes that it has satisfied the confusing similarity/identity requirement in paragraph 4(a)(i) of the Policy.

(ii) Rights or Legitimate Interests

The Complainant contends that, for several reasons, the Respondent has no rights or legitimate interests in the disputed domain name pursuant to paragraph 4(a)(ii) of the Policy.

First, the Complainant states that it has not licensed its NAPSTER Marks to the Respondent and would not license those marks for use in conjunction with offering

pornographic content.

Second, the Complainant alleges that, inasmuch as the disputed domain name includes the Complainant's mark NAPSTER, the Respondent has not used, is not using and can never use that mark in connection with a bona fide offering of goods or services as defined in paragraph 4(c)(i) of the Policy. In that regard, the Complainant states that the Respondent has not presented any legitimate reason for his use of that mark in the name.

Third, the Complainant alleges that the Respondent has not provided any evidence that he has been "commonly known by the domain name," as an individual, business, or otherwise as described in paragraph 4(c)(ii) of the Policy. The WhoIs information for the domain name did not identify the Respondent as "Napster." The Respondent's website never purports to be owned or operated by any individual or entity named "Napster."

Lastly, the Complainant alleges that the Respondent is not "making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue" according to paragraph 4(c)(iii) of the Policy. In that regard, the Complainant contends that the Respondent's use of the domain name is purely commercial and specifically intended to divert customers and tarnish the Complainant's mark NAPSTER.

(iii) Registered and Used in Bad Faith

The Complainant contends that, for several reasons, the Respondent has registered and is now using the disputed domain name in bad faith under paragraph 4(a)(iii) of the Policy and specifically in contravention of paragraphs 4(b)(iii) and (iv).

Specifically, the Complainant contends that bad faith registration is evidenced inasmuch as the Respondent knew or should have known about the Complainant's NAPSTER mark while the Respondent was choosing the disputed name - which incorporates that mark - but, in spite of that knowledge, he proceeded to register that name.

To support its view, the Complainant notes that it started using its mark NAPSTER in June 1999 - more than two years prior to the date on which the Respondent registered that name - and, through that use, gained world-wide recognition of its mark prior to the registration date. Respondent's prior knowledge of the Complainant's mark is clearly shown by references in his website to the Complainant coupled with suggestions that the Respondent offers services similar to those of the Complainant but of a pornographic nature.

Given this prior knowledge, the Complainant alleges that the Respondent's sole motivation in registering and then using the name, was simply, by capitalizing on the Complainant's goodwill inherent in its mark NAPSTER, to draw an increased number of Internet users to the Respondent's pornographic website for his own financial gain than would otherwise occur if that mark were not so used. That site offers access to free and paid membership pornographic websites.

Bad faith use is further evidenced inasmuch as Internet users, who reach the Respondent's site, are then "mouse-trapped" by it. Presumably, the Respondent financially profits each time such a user clicks on any of the windows that pop-up on the user's browser during the mouse-trap.

Furthermore, the Complainant contends that while it does not offer or participate in the creation of pornographic content, the Respondent's use of Complainant's mark NAPSTER may cause the public to believe that the Complainant sponsors, approves or is affiliated with Respondent, when it does not.

Thus, such use, based on diversion caused through exploiting intentionally caused user confusion, tarnishes the Complainant's marks and disrupts its business, as set forth in paragraphs 4(b)(iii) and (iv) of the Policy.

Lastly, the Complainant alleges that the Respondent's continued use of the name will further tarnish the Complainant's NAPSTER Marks. In that regard, the Complainant offers digital music to the public, including children. The Complainant has parental options on its own website to limit access by children to songs with explicit lyrics. The Respondent's use of the Complainant's marks to directly link to its pornographic website will tarnish the image which the Complainant has created for its services, furnished under those marks, as appealing to users of all ages.

Hence, the Complainant inferentially alleges that the Respondent's actions also violate the general strictures against bad faith use and registration set forth in paragraph 4(b).

B. Respondent

The Respondent failed to file any Response to the allegations raised in the Complaint.

6. Discussion and Findings

In view of the lack of a Response filed by the Respondent as required under paragraph 5 of the Rules, this proceeding has proceeded by way of default. Hence, under paragraphs 5(e), 14(a) and 15(a) of the Rules, the Panel is directed to decide this administrative proceeding on the basis of the Complainant's undisputed representations. In that regard and apart from judging this proceeding through mere default of the Respondent, the Panel makes the following specific findings.

A. Identical or Confusingly Similar

The Panel finds that confusion is likely to arise as a result of the Respondent's use of the disputed domain name.

The disputed domain name is formed by having appended a generic term, specifically "of porn", to the Complainant's mark "NAPSTER".

It is now very well-established in UDRP precedent, including numerous decisions previously rendered by this Panel, that minor variations, such as adding short letter or number groups or even generic words to a mark, are each insufficient in and of itself, when used in forming a domain name that results from modifying the mark, to confer requisite and sufficient distinctiveness to that name to avoid user confusion. "Of Porn" are certainly two such generic words. See, e.g., *Caesars Entertainment, Inc. v. Nova Internet Inc.* WIPO Case No. D2005-0411 (June 22, 2005); *Lockheed Martin Corporation v. The Skunkworx Custom Cycle*, WIPO Case No. D2004-0824 (January 18, 2005); *Lockheed Martin Corporation v. Deborah Teramani*, WIPO Case No. D2004-0836 (December 1, 2004) and *National Collegiate Athletic Association v. Dusty Brown*, WIPO Case No. D2004-0491 (August 30, 2004). This result follows

from a simple comparison of the disputed domain name against the Complainant's marks.

Such confusion, should it occur, would undoubtedly cause Internet users intending to access the Complainant's website, but who reach the Respondent's pornographic site through the disputed domain name, to think that an affiliation of some sort exists between the Complainant and the Respondent or its third-party transferee, when, in fact, no such relationship would exist at all. See, also, *e.g.*, *Caesars Entertainment, cited supra*; *Lockheed v. Skunkworx, cited supra*; *Lockheed v. Teramani, cited supra*; *Register.com, Inc. v. Wolfgang Reile a/k/a RWG Internet et al*, FA208576 (National Arbitration Forum, January 27, 2004); *Caesars World, Inc. and Park Place Entertainment Corporation v. Japan Nippon*, WIPO Case No. D2003-0615 (September 30, 2003); *Leiner Health Services Corp. v. ESJ Nutritional Products*, FA 173362 (National Arbitration Forum, September 16, 2003); *American Family Life Assurance Company of Columbus v. defaultdata.com aka Brian Wick*, FA 123896 (National Arbitration Forum, October 14, 2002); *AT&T Corp. v. Roman Abreu d/b/a Smartalk Wireless*, WIPO Case No. D2002-0605 (September 11, 2002); *L.F.P., Inc. v. B and J Properties*, FA 109697 (National Arbitration Forum, May 30, 2002); *Peter Frampton v. Frampton Enterprises, Inc.*, WIPO Case No. D2002-0141 (April 17, 2002); *Spence-Chapin Services to Families and Children v. Stanley Wynman*, FA 100492 (National Arbitration Forum, December 10, 2001); *Meijer, Inc. v. Porksandwich Web Services*, FA 97186 (National Arbitration Forum, July 6, 2001); *MPL Communications, Limited et al v. IWebAddress.com*, FA 97092 (National Arbitration Forum, June 4, 2001); *American Home Products Corporation v. Ben Malgioglio*, WIPO Case No. D2000-1602 (February 19, 2001); *Surface Protection Industries, Inc. v. The Webposters a/k/a Mark's Paint Store, Inc.*, WIPO Case No. D2000-1613 (February 5, 2001); *Dollar Financial Group, Inc. v. VQM NET*, FA 96101 (National Arbitration Forum, January 25, 2001); *eBAY Inc. v. G L Liadis Computing, Ltd. and John L. Liadis d/b/a G L Liadis Computing Ltd.*, WIPO Case No. D2000-1463 (January 10, 2001); *Treeforms, Inc. v. Cayne Industrial Sales Corp.*, FA 95856 (National Arbitration Forum, December 18, 2000); See also *Pep Boys Manny, Moe and Jack of CA v. E-Commerce Today, Ltd.*, AF-0145 (eResolution, May 3, 2000).

Therefore, the Panel finds that the disputed domain name sufficiently resembles the Complainant's "NAPSTER" Marks as to cause confusion; hence, the Complainant has shown sufficient similarity between its marks and the disputed domain name under paragraph 4(a)(i) of the Policy.

B. Rights or Legitimate Interests

The Panel believes that not only has the Respondent not provided any basis that would legitimize any claim it has to the disputed domain name, but also it is extremely unlikely that the Respondent could ever make such a claim.

The simple reason is that the disputed domain name contains the Complainant's mark "NAPSTER" under which the Complainant provides its services and has continuously so provided its services for approximately 2 1/2 years (specifically since June 30, 1999) prior to the date (December 13, 2001) on which the Respondent has registered the name. Moreover, the widespread recognition which the Complainant developed in its NAPSTER Marks prior to December 2001 - let alone the inclusion of the Complainant's marks in the Respondent's website, further supports this Panel's view that the Respondent was well aware of the Complainant's services and its marks prior to having registered the disputed domain name.

Furthermore, the Complainant has never authorized the Respondent to utilize any of its NAPSTER Marks or a mark confusingly similar thereto in conjunction with the specific services which the Complainant provides under its Marks, nor does the Complainant have any relationship or association whatsoever with the Respondent.

Hence, any use to which the Respondent were to put the mark "NAPSTER" or one confusingly similar thereto, in connection with the services provided by the Complainant or services similar thereto, as the Respondent appears to be doing through its website, would directly violate the exclusive trademark rights now residing in the Complainant. See, e.g., *Caesars Entertainment, cited supra*; *Pelmorex Communications Inc. v. weathernetwork*, WIPO Case No. D2004-0898 (December 18, 2004); *Sybase, Inc. v. Analytical Systems*, WIPO Case No. D2004-0360 (June 24, 2004); *Caesars World, Inc. and Park Place Entertainment Corporation v. Japan Nippon*, WIPO Case No. D2003-0615 (September 30, 2003); *Leiner Health Services Corp., AT&T Corp., and MPL Communications* FA 97086 and FA 97092, all cited *supra*; *Am. Online, Inc. v. Fu*, WIPO Case No. D2000-1374 (December 11, 2000); and *Treeforms, Inc.*, cited *supra*. Consequently, the Respondent could not legally acquire any public association between it and the mark "NAPSTER" and hence could never be commonly known or recognized by that mark and thus could never fall within paragraph 4(c)(ii) of the Policy.

Thus, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name within paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

The Panel believes that the Respondent's actions constitute bad faith registration and use of the disputed domain name.

Clearly, the Panel views the Respondent's acts as amounting to nothing more than opportunistic exploitation of inevitable Internet user confusion for the Respondent's own pecuniary benefit and the Complainants' detriment. These acts constitute, by their very illegality, bad faith under the general requirement of paragraph 4(a)(iii) of the Policy as well disruption of the Complainant's business under paragraph 4(b)(iii) of the Policy. See, *Caesars Entertainment, Pelmorex and Lockheed v. Teramani*, all cited *supra*; *True Blue Productions, Inc. v. Chris Hoffman*, WIPO Case No. D2004-0930 (December 22, 2004); *Caesars World, Inc.; and Park Place Entertainment Corporation v. Japan Nippon*, WIPO Case No. D2003-0615 (September 30, 2003); and *Infospace.com, Inc. v. Tenenbaum Ofer*, WIPO Case No. D2000-0075 (April 27, 2000).

Further, mouse-trapping serves no legitimate purpose whatsoever. It evidences bad faith use in and of itself for the simple reason that, in this Panel's mind, it is simply an artifice through which an Internet browser is intentionally held, against the clear, express desire of its user, by a website and through which the user is exposed to an unwanted stream of content, in the form of a series of successive windows with typically click-through content - as here, for the mouse-trapper's own benefit. Obviously, the longer a user is compelled to remain at a site and exposed to an increasing number of such windows, the more likely it is that the user will click on some of those windows, if only as increasingly desperate acts to exit the site. That effort, while unquestionably and increasingly frustrating, is futile - and is intended to be so by the mouse-trapper. It is so futile in fact that the only likely remedy for the user to escape the trap and continue on to a desired webpage is to simply terminate execution of his(her) browser, and then re-start its execution so as clear the browser cache and

point the browser to its start page, and from there navigate to the desired page. Though the user's actions, while being mouse-trapped and short of halting the browser, are utterly futile, the mouse-trapper gains revenue from each click-through. The more the user clicks in an effort to escape the mouse-trap and leave the site, the more money the mouse-trapper gains. Such exploitative use can never constitute legitimate commercial conduct and thus constitutes bad faith under paragraph 4(a)(iii) of the Policy. See, e.g., *Disney Enterprises, Inc. v. John Zuccarini, Cupcake City and Cupcake Patrol*, WIPO Case No. D2001-0489 (June 19, 2001).

Clearly, and as discussed above, the Respondent most likely had ample prior knowledge of the Complainant's activities conducted under its NAPSTER Marks at the time the Respondent registered the disputed domain name. Hence, if the Respondent had no intention of benefiting from opportunistically exploiting any of those marks - let alone to the detriment of the Complainant, then why did the Respondent register a name that incorporated the mark NAPSTER? The Panel can think of no credible reason. Moreover, since the Respondent failed to file a response, the Panel simply infers that no such reason exists.

Hence, the Panel views the Respondent's actions as constituting bad faith registration and use in violation of paragraph 4(a)(iii) as well as paragraphs 4(b)(iii) and 4(b)(iv) of the Policy.

Thus, the Panel concludes that the Complainant has provided sufficient proof of its allegations to establish a case under paragraph 4(a) of the Policy upon which the relief it now seeks can be granted.

7. Decision

Accordingly, under paragraphs 4(i) of the Policy and 15 of the Rules, the Panel now grants the relief sought by the Complainant.

The disputed domain name, <napster-of-porn.com>, is ordered transferred to the Complainant.

Peter L. Michaelson
Sole Panelist

Dated: July 19, 2005