

# EXHIBIT 4



November 10, 2008

**Re: Case No. D2008-1234**  
**<unionsquarepartnership.com**  
**unionsquarepartnership.org>**  
**Notification of Decision**

Please find attached the full text of the decision issued on October 22, 2008 by the Administrative Panel in the above-referenced case.

The Administrative Panel's finding is as follows:

*"For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the domain names <unionsquarepartnership.com> and <unionsquarepartnership.org> be transferred to the Complainant."*

Pursuant to Paragraph 4(k) of the Uniform Domain Name Dispute Resolution Policy, the Registrar identified below shall proceed to implement the above decision on the tenth business day (as observed in the location of that Registrar's principal office) after receiving this notification. The concerned Registrar will not implement the decision if, before the 10-day waiting period has expired, the Respondent submits official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) to the Registrar demonstrating that it has commenced a legal proceeding against the Complainant in a jurisdiction to which the Complainant has submitted under Paragraph 3(b)(xiii) of the Rules for Uniform Domain Name Dispute Resolution Policy (the *Rules*).

Pursuant to Rules, Paragraph 16(a), the Registrar is directed to inform the Complainant, the Respondent, the Internet Corporation for Assigned Names and Numbers (ICANN) and the WIPO Arbitration and Mediation Center as soon as possible of the specific date on which the Administrative Panel's decision will be implemented, absent a notification by the Respondent in accordance with the above.

Yours sincerely,

Sahar Hasan  
Case Manager

## COMMUNICATIONS

This notification is being communicated to the Complainant in accordance with the following contact details:

Union Square Partnership, Inc.  
Union Square Partnership District Management Association, Inc.  
United States of America

Represented by:

Toby M.J. Butterfield  
Cowan, DeBaets, Abrahams & Sheppard, LLP  
41 Madison Avenue, 34th Floor  
New York, New York 10010  
United States of America  
(212)974-7474 (Office telephone)  
(212)974-8474 (Office FAX)  
tbutterfield@cdas.com; mkaplan@cdas.com

By the following methods:

E-mail (with attachment)

This notification is being communicated to the Respondent in accordance with the following contact details:

unionsquarepartnership.com Private Registrant and  
unionsquarepartnership.org Private Registrant  
A Happy DreamHost Customer  
417 Associated Rd #324  
Brea, CA 92821  
United States of America  
Provided by the Complainant:  
Savitri Durkee  
P.O. Box 1556  
New York, NY 10013  
United States of America  
(213)947-1032 / (347) 693-8857 (Office telephone)  
(714)990-2600 (Office fax)  
unionsquarepartnership.org@proxy.dreamhost.com  
savitrid@earthlink.net  
unionsquarepartnership.com@proxy.dreamhost.com

Represented by:

Michael Kwun  
Electronic Frontier Foundation

---

454 Shotwell Street  
San Francisco CA 94110-1914  
United States of America  
1 415 436 9333 ext. 136 (Office telephone)  
1 415 436 9993 (Office FAX)  
Michael@eff.org

By the following methods:

E-mail (with attachment)

A copy has also been communicated to the Registrar listed below:

New Dream Network, LLC dba DreamHost.com

By the following methods:

E-mail (with attachment)



## **WIPO Arbitration and Mediation Center**

### **ADMINISTRATIVE PANEL DECISION**

**Union Square Partnership, Inc., Union Square Partnership District Management Association, Inc. v. unionsquarepartnership.com Private Registrant and unionsquarepartnership.org Private Registrant**

**Case No. D2008-1234**

#### **1. The Parties**

Complainant is Union Square Partnership, Inc., Union Square Partnership District Management Association, Inc., United States of America, represented by the law firm Cowan, DeBaets, Abrahams & Sheppard, LLP, United States of America.

Respondent is <unionsquarepartnership.com> Private Registrant and <unionsquarepartnership.org> Private Registrant, A Happy DreamHost Customer, United States of America.

#### **2. The Domain Names and Registrar**

The disputed domain names <unionsquarepartnership.com> and <unionsquarepartnership.org> are registered with New Dream Network, LLC dba DreamHost.com.

#### **3. Procedural History**

##### **A. The Complaint and Respondent's Default**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on August 12, 2008. On August 14, 2008, the Center transmitted by email to New Dream Network, LLC dba DreamHost.com a request for registrar verification in connection with the domain names at issue. On August 17, 2008, New Dream Network, LLC dba DreamHost.com transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details.

In response to a notification by the Center that the Complaint was administratively deficient, the Complainant filed an amendment to the Complaint on August 27, 2008.

The Center verified that the Complaint together with the amendment to the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on August 29, 2008. In accordance with the Rules, paragraph 5(a), the due date for Response was September 18, 2008. The Respondent did not submit any response by that date, and the Center thus notified the Respondent’s default on September 19, 2008.

#### **B. The Out-of-Time Response**

By email to the Center dated September 21, 2008, Respondent, citing text from an earlier email from the Center regarding the Complaint, stated that “I was under the distinct impression that I would receive a notice of administrative review from which the 20 day response period would begin.” Respondent requested a clarification of a later due date for the Response or, in the alternative, a twenty-day extension of time. After confirming that the Complaint, as amended, had been duly transmitted on August 29, 2008, the Center replied by email on September 22, 2008, stating that fact and advising that the deadline for a Response had passed.

On September 24, 2008, Respondent’s newly-engaged representative, Michael Kwan of Electronic Frontier Foundation, wrote to the Center requesting that the Panel, when appointed, “exercise its discretion under the [Rules] to consider our Response, which will be filed shortly.” The Center replied by stating that it would refer this request to the Panel upon appointment.

Mr. Kwan filed a Response on September 30, 2008, by electronic transmission simultaneously to the Center, the Panel,<sup>1</sup> and Complainant.

#### **C. Appointment of the Panel and Jurisdiction.**

The Center appointed Richard G. Lyon as the sole panelist in this matter on September 29, 2008. The Panel finds that it was properly constituted and has jurisdiction over this proceeding. The Panel has submitted his Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

#### **D. Leave to File the Response Out of Time is Denied.**

The Panel’s first order of business is whether to consider the untimely Response. Under reasonably well-settled Policy precedent the answer is “no.”

Proceeding in the ordinary course, the Center notified the Complaint only after receiving the amendment that brought the Complaint into compliance with the Rules and the Supplemental Rules. Respondent, however, had been aware of the Complaint for some time prior to official notification by reason of Complainant’s service of it<sup>2</sup> as

---

<sup>1</sup> As noted by the Center in its acknowledgment of the late Response, paragraph 8 of the Rules prohibits direct communication between a party and the Panel.

<sup>2</sup> While Respondent had registered the disputed domain names anonymously, Complainant was aware of her name and contact information from the counter-notification referred to in section 4, and as required by paragraph 2(a) of the Rules furnished a copy of the original Complaint to her.

required by paragraph 12 of the Supplemental Rules, and by receiving copies of the Center's emails regarding the amendment. Respondent received no communication from the Center following notification of the Complaint until the notice of default. None of the earlier communications between the Center and Complainant regarding the amendment can reasonably be read as providing or suggesting anything more than the twenty days prescribed in paragraph 5(a) of the Rules for her Response, Respondent's self-serving statement to the contrary notwithstanding.

Neither Respondent nor her authorized representative offers any reason – beyond allegedly misreading the Center's communications – for failure to file a Response within the twenty days following notice of the Complaint prescribed in the Rules. Each of these individuals similarly offers no excuse for not reading the Rules, whose time limits are clear. The Policy and the Rules are intended to facilitate expeditious consideration of a limited class of cases, and strict adherence to their deadlines is a necessary corollary of this objective. *The Knot, Inc. v. Julia Bitton, The Nest*, WIPO Case No. D2006-0377. Both this objective and this rule of decision are or should be well known after almost a decade of reported Policy decisions. *Mobile Communication Service Inc. v. WebReg, RN*, WIPO Case No. D2005-1304.<sup>3</sup>

Rather than any misunderstanding or genuine need the record strongly suggests Respondent's post-default communication to the Center was intended intentionally to delay these proceedings. The Panel in the *WebReg* case noted that many if not most of the excuses advanced to justify late responses are based more on the schedule or convenience of respondents or their representatives than on extra time necessary to develop evidence or other legitimate basis, and that some seasoned Policy practitioners apparently consider the Rules mere suggestions or guidelines rather than deadlines. That certainly seems to be the case in this proceeding. Respondent first learned of the Complaint<sup>4</sup> shortly after receiving a copy from Complainant a few days after August 12, and knew of Complainant's intention to take action regarding the content of her website no later than July 13, 2008, the date of her counter-notification to the Registrar discussed in section 4. The same lawyer and law firm represent Complainant in this proceeding and the lawsuit, and Respondent's counter-notification refers to this lawyer by name. If for any reason Respondent believed that she needed more time in this proceeding, she could easily have requested it from Complainant's counsel well before the September 19 date for her Response.

In any event, Respondent offers nothing "exceptional" (see Rules, paragraphs 5(d) and 10(c)) for her failure to engage counsel only after her time to respond had expired instead of upon receipt of the Complaint, or herself to consult the Rules to ascertain the applicable time limits for a Response.

As in *WebReg*, and consistently with other decisions that follow its reasoning,<sup>5</sup> the Panel notes that he has read the proposed Response and that nothing in it would have altered the decision in this proceeding. Even if outcome-determinative, however, the

---

<sup>3</sup> The *Mobile Communication* case was decided in 2005. The panel in that case cited six years' experience under the Policy as sufficient for parties and their representatives to familiarize themselves with Policy procedures. That another three years of active Policy practice have passed since that decision makes Respondent's request for extension all the more unsustainable.

<sup>4</sup> The original Complaint was in substance identical to the amended Complaint, and unquestionably put Respondent on notice of the merits of Complainant's charges.

<sup>5</sup> *E.g., 1099 Pro, Inc. v. Convey Compliance Systems, Inc.*, WIPO Case No. D2003-0033; see also *Align Technology, Inc v. Web Reg/Renames/Aligntechnology.Com*, WIPO Case No. D2008-0103 (applying similar reasoning in disallowing complainant's proposed supplemental filing).

Panel would in the circumstances have refused to consider the untimely Response.

#### **E Procedural Order No. 1.**

In correspondence with the Center both parties referred to litigation pending between the parties. On October 9, 2008, the Panel issued Procedural Order No. 1, requesting submission of the pleadings and docket sheet in that litigation. Complainant duly submitted these documents, which are discussed in the following section.

#### **F. Complainant's Supplemental Filing.**

On October 16, 2008, Complainant submitted to the Center a proposed supplemental filing and a request that the Panel consider this document should it consider the untimely Response. As the Panel has disallowed the Response, the predicate has not been met and thus Complainant's request is moot.<sup>6</sup> The Panel has not considered the supplemental filing in its decision.

### **4. Factual Background**

Complainant<sup>7</sup> is a non-profit organization that is successor to a local development corporation, established in 2003, that successfully assisted with the development and economic revival of the Union Square area in New York City. Since 2003 Complainant has operated under the Union Square Partnership name and has used that name with and without a logo as a mark on postcards, promotional material, banner advertisements, and a monthly newspaper. In August 2008, Complainant applied to register its marks with the United States Patent and Trademark Office. Complainant's principal website is <[www.unionsquarenyc.org](http://www.unionsquarenyc.org)>; this website prominently displays the Union Square Partnership name and logo.

Respondent registered the disputed domain names in early 2008 and shortly thereafter established a web page to which these domain names resolved. Copies of this web page attached to the Complaint demonstrate that it copies very closely the style, type fonts, layout, artwork, and other features of Complainant's official website.

In July 2008 Complainant wrote to the hosting service for Respondent's website demanding under Section 5.12 of the Digital Millennium Copyright Act, 17 U.S.C. §512 (DMCA), that this hosting company remove or disable access to these websites because their content was said to infringe Complainant's copyrights. Respondent filed a counter-notification under the DMCA, asserting that Complainant's claim of copyright infringement was based on "mistaken information, misidentification of some material in questions, or deliberate misreading of the law." The basis for these counter-assertions was that the material was legally protected within the "fair use" provision of the United States of America copyright law.

On July 30, 2008, Complainant filed a lawsuit against Respondent in the United States

---

<sup>6</sup> As with the untimely Response, the Panel has read the contents of the supplemental filing. It contains nothing that could not have been included in the Complaint; furthermore nothing in the Response, had it been considered, could not reasonably have been anticipated by Complainant. There is no independent basis for allowing it.

<sup>7</sup> There are two Complainants, Union Square Partnership, Inc. and Union Square Partnership District Management Association, Inc. The exact relationship between them is not clear from the Complaint. As the analysis under the Policy would be identical for either Complainant, for convenience the Panel refers to "Complainant," in the singular.



District Court for the Eastern District of New York, the district in which Respondent resides. While this action is based upon the content of Respondent's website at the disputed domain names, Complainant asserts only claims for copyright infringement, seeking money damages and an injunction, among other things; it does not seek transfer of the disputed domain names. There is thus no reason for the Panel to defer to the court or to exercise his discretion to stay these proceedings, see Rules, paragraph 18(a).

## 5. Parties' Contentions

### A. Complainant

Complainant contends as follows:

The disputed domain names are identical to Complainant's name and trademarks except for the generic top-level identifier. Complainant has rights in its marks by reason of five years' prominent and continuous use in various media.

Respondent has never been known by the disputed domain name, and Complainant has never authorized Respondent to use its marks or its name. Complainant has also never granted Respondent authority to use its copyrighted materials in any manner, and their parroted use on the websites of the disputed domain names is not *bona fide*.

Respondent registered and has used the disputed domain names in bad faith by mimicking the design, layout, artwork, text, and photography of Complainant's official site to cause an Internet user seeking Complainant and finding Respondent's websites into believing that Respondent sites were actually operated or sanctioned by Complainant, thus disrupting Complainant's activities. This conduct, termed a "masquerade" by Complainant, is neither protest nor criticism. Even if it were, under Policy precedent registration of domain names corresponding to registered marks even for non-commercial criticism is not legitimate and does not prevent a finding of bad faith.

### B. Respondent

Respondent did not submit a timely Response.

## 6. Discussion and Findings

Complainant must prove the elements set out in paragraph 4(a) of the Policy:

- (i) The disputed domain name is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- (ii) Respondent has no rights or legitimate interests in respect to the disputed domain name; and
- (iii) The disputed domain name was registered and is being used in bad faith.

Complainant bears the burden of proof on each of these elements. Unlike civil litigation in the United States of America, Respondent's default does not automatically result in judgment for the Complainant and does not constitute an admission of any

pleaded matter. *Kellwood Company v. Onesies Corporation*, WIPO Case No. D2008-1172; WIPO Overview of WIPO Panel Views on Selected UDRP Questions (WIPO Overview), paragraph 4.6, Consensus View.

#### **A. Identical or Confusingly Similar**

This Policy element is clearly satisfied. Complainant has provided ample evidence of prominent use of its name, Union Square Partnership, as an identifier of its programs and services continuously for the past five years, and the disputed domain names differ only in their addition of the applicable gTLD. The record further demonstrates that Respondent was well aware of Complainant and its marks when she registered the disputed domain names.

#### **B. Rights or Legitimate Interests.**

Complainant has not authorized Respondent to use its name and marks, and Respondent has not been commonly known by the disputed domain names, thus making a *prima facie* case that Respondent lacks a right or legitimate interest in the disputed domain names.

Does the evidence in the record demonstrate a right or legitimate interest? Whether a criticism site constitutes a “a legitimate noncommercial 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,” Policy, paragraph 4(c)(iii), continues to divide panels. WIPO Overview, paragraph 2.4; compare majority opinion and D. Bernstein, dissenting, in *Joseph Dello Russo M.D. v. Michelle Guillaumi*, WIPO Case No. D2006-1627. Respondent’s sites contain no criticism or complaints about Complainant. The “fair use” claimed in Respondent’s counter-declaration might however be a claim that her site is parody, which if established might be “fair use” under United States trademark law.

Given the limited nature of Policy proceedings this Panel is incapable of judging whether the site’s content is true parody, just as he is usually incapable in a criticism site case of determining whether the site’s content is libelous, obscene, or pornographic (as is often alleged in such cases). Such issues are matters for the national courts, which can make such determinations based upon a fully-developed record and legal briefing. It is likely that parody will be at issue in Complainant’s pending lawsuit.<sup>8</sup>

In one respect very well illustrated by the facts of this case, however, certain parodies (or attempts at parody) present a stronger case than criticism under the Policy for transfer. Panels that have ordered transfers in criticism cases have done so under the “initial interest confusion” doctrine,<sup>9</sup> see, e.g., *Aspis Liv Försäkrings AB v. Neon Network, LLC*, WIPO Case No. D2008-0387; *Justice for Children v. R neetso / Robert W. O’Steen*, WIPO Case No. D2004-0175; *Triodos Bank NV v. Ashley Dobbs*, WIPO Case No. D2002-0776. Oversimplifying greatly, these panels reason that use of a domain name identical to a mark for a criticism site directed against the mark owner lures Internet users seeking the mark owner to the criticism site by false pretenses. Intentionally misleading identity to attract, not the criticism, is what makes this illegitimate. As the panel in *Escada AG v. Phil Mitchell*, WIPO Case No. D2008-0274, succinctly stated, “What is being curtailed is not free speech, but impersonation.”

<sup>8</sup> Needless to say, nothing in the Panel’s decision here is binding or of any force or effect in that lawsuit. For the avoidance of doubt the Panel expressly declares that he intends nothing in this decision to suggest that Respondent’s site’s content is or is not parody.

<sup>9</sup> View 1 in WIPO Overview, paragraph 2.4.

If in addition to using a third party's marks without modification the erstwhile parodist intentionally imitates the look and feel of the mark owner's site and provides text apparently related to Complainant's programs and content, as Respondent did here, the diverted Internet user's confusion extends beyond initial interest. Absent a prominent disclaimer someone diverted to the parody site may not know for some time that he has reached the wrong address and is reviewing unauthorized or inaccurate information. One of the reasons given by panels that deem criticism sites legitimate<sup>10</sup> is the unlikelihood of confusion or the correction of any initial interest confusion immediately after reaching the criticism site, see, e.g. *Fundación Calvin Ayre Foundation v. Erik Deutsch*, WIPO Case No. D2007-1947 (One criterion of evaluating legitimacy of criticism site is "it is *immediately* apparent to Internet users visiting the website at the domain name that it is not a website of the owner of the mark."); *Ryanair Limited v. Michael Coulston*, WIPO Case No. D2006-1194 ("Any consumers who mistakenly stumble on this site while looking for Complainant's website will no doubt immediately realize their error, and need only click on the "back" button to return to their search results.") (Emphasis supplied in both quotations). That rationale is considerably undercut by conduct such as Respondent's here. To a certain extent it is undercut in any attempt at parody, as an element of parody is to imitate the genuine article.

In a recent parody case another panel denied the complaint following analogous reasoning. In *Harry Winston Inc. and Harry Winston S.A. v. Jennifer Katherman*, WIPO Case No. D2008-1267, the difference between the disputed domain name ('hairywinston' for a dog product boutique) and the complainant's famous mark ('harrywinston' for jewelry) was part of the parody, and thus alerted Internet users at the outset that the site was not affiliated with the mark owner. Here, in contrast, both the disputed domain names and the site's content were chosen to confuse.

The Panel adheres to his view<sup>11</sup> that a critic may not consistently with the Policy appropriate her target's mark verbatim and holds that its rationale applies with at least equal force to a parody (or claimed parody). For the reasons set out in the cases in the margin, Respondent's use of the disputed domain names, even if proven to be parody under United States trademark law, is not legitimate under paragraph 4(a)(ii) of the Policy.<sup>12</sup>

It bears repeating that this approach abridges or stifles Respondent's free speech rights not one whit. Respondent may criticize, complain, parody, or otherwise express her views about Complainant or anyone else, on the Internet or in any other medium she chooses – but not from Complainant's soapbox, billboard, or broadcast frequency.

### C. Registered and Used in Bad Faith.

---

<sup>10</sup> *Ibid*, View 2, and cases cited.

<sup>11</sup> E.g., *Joseph Dello Russo M.D. v. Michelle Guillaumi*, WIPO Case No. D2006-1627; *InMed Diagnostic Services, LLC, InMed Diagnostic Services of S.C., LLC, InMed Diagnostic Services of MA, LLC and InMed Diagnostic Services of IL, LLC v. James Harrison*, WIPO Case No. D2006-1230; *Texans For Lawsuit Reform, Inc. v. Kelly Fero*, WIPO Case No. D2004-0778; *Justice for Children v. R neetso / Robert W. O'Steen*, WIPO Case No. D2004-0175.

<sup>12</sup> Other panels have rejected parody defenses for other reasons. See, e.g., *Cyveillance, Inc. v. Mr. Kumar Patel*, WIPO Case No. D2006-0346; *Qwest Communications International, Inc. v. DefaultData.com a/k/a Brian Wick*, WIPO Case No. D2003-0002; *A & F Trademark, Inc. and Abercrombie & Fitch Stores, Inc. v. Justin Jorgensen*, WIPO Case No. D2001-0900. The first of these cases distinguished between copying the target's mark verbatim into the parodist's domain name as opposed to adding a word (such as *sucks*) that might alert an Internet user that the site is not sponsored by the mark owner.

For similar reasons Complainant has established that Respondent registered and used the disputed domain names in bad faith. Respondent self-evidently knew of Complainant and its mark, and her registration and use were undertaken intentionally and expressly to disrupt Complainant's activities, to prevent Complainant from making use of its own mark, and to expand the audience for criticism by misleading internet users into the "source, sponsorship, affiliation, or endorsement" of Respondent's website, by means of the initial confusion caused by selecting Complainant's mark for her web address.

**7. Decision**

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the domain names <unionsquarepartnership.com> and <unionsquarepartnership.org> be transferred to the Complainant.

---

Richard G. Lyon  
Sole Panelist

Dated: October 22, 2008