

# CPR Institute for Dispute Resolution

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## COMPLAINANT

Poker.com, Inc.

#210 - 1166 Alberni Street  
Vancouver, B.C., Canada V6E 3Z3  
(P) (604) 689-5998  
(F) (604) 689-8988  
mglusing@pokercorporation.com

File Number: CPR00301

Date of Commencement: 01/21/03

Domain Name(s): poker.com

Poker.com, Inc. and UniNet Technologies Inc. Registrar: Fabulous.com Pty Ltd.

vs.

Communications Services, Inc. Arbitrator: M. Scott Donahey

## RESPONDENT

Communications Services Inc.  
Vaca Street  
Apia, Western Samoa  
(P) 685-20-411-4024  
(F) 954-630-3552  
Ishep2003@yahoo.com

Before M. SCOTT DONAHEY, Panelist

## PROCEDURAL HISTORY

The Complaint was filed with CPR on January 14, 2003, and, after review for administrative compliance, CPR dismissed Ala Corp. (hereinafter "Ala") as a party Respondent, since Ala was not the registrant of the domain name at the time the Complaint was filed. The Complaint was thereafter served on the remaining named Respondent, Communications Services Inc (hereinafter "Respondent"). The Respondent filed a Response on or before February 3, 2003. I was appointed Panelist pursuant to the Uniform Domain Name Dispute Resolution Policy ("UDRP") and Rules promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN). Upon the written submitted record including the Complaint and Annexes A and B thereto and the Response and Annexes A, B, and C thereto, I find as follows:

## FINDINGS

Respondent's registered domain name, <poker.com>, was registered with Fabulous.com Pty Ltd. on December 6, 2002. In registering the name, Respondent agreed to submit to this forum to resolve any dispute concerning the domain name, pursuant to the UDRP.

The UDRP provides, at Paragraph 4(a), that each of three findings must be made in order for a Complainant to prevail:

- i. Respondent's 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 of the domain name;  
and
- iii. Respondent's domain name has been registered and is being used in bad faith.

The factual background of this domain name dispute is long and tortuous and must be recited prior to an analysis of those facts under the UDRP. There are two named complainants, UniNet Technologies Inc. ("UniNet") and Poker.com, Inc (jointly and separately referred to as "Complainant"). Effective July 9, 1999, UniTech and dismissed Respondent ALA entered into a license agreement, under which ALA purported to exclusively license the domain name at issue to UniNet until June 30, 2098.<sup>1</sup> Respondent Communications Services, Inc. opposed the Complaint and requested a finding of bad faith reverse domain name hijacking.

Complainant contends that the parties agreed to make changes to Paragraph "C" in the preamble and to Section 3.3(c) of the License Agreement, but that Complainant lacks a copy of the License Agreement containing such changes. Therefore, Complainant contends that Annex A to the Complaint is different in immaterial respects from the final amended agreement. In Annex C to the Response, a copy of a Federal Express letter from Ala to UniNet dated December 9, 2002, Ala alleges that it requested and received a copy of the License Agreement from UniNet in October 2002. Upon examination made shortly before December 9, 2002, Ala allegedly discovered that the License Agreement had been materially altered to delete and change the language in Section "c" of the preamble and in "Paragraph 3.3(c)."<sup>2</sup> As a consequence, Ala contends that the License Agreement is null and void.

The License Agreement is to be "construed, interpreted and governed by the laws of the Province of British Columbia and the laws of Canada in force therein . . ." Complaint, Annex A, Section 1.2, at 2. All disputes arising out of or in connection with the License Agreement are first to be referred to senior management for attempted resolution, and, if not resolved, to mediation. Failing any agreed resolution, such disputes are to be "referred to and finally resolved by arbitration under the British Columbia Commercial Arbitration Act and the place of arbitration shall be Vancouver, British Columbia, Canada." Complaint, Annex A, Section 8.1, at 7.

The License Agreement also provides for termination events, including default by UniNet or its subsidiary. Complaint, Annex A, Section 7.1 through 7.5, at 6-7. Complainant alleges that Ala has never put UniNet on notice that it was in default. Complaint, at 5.

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<sup>1</sup> In the License Agreement, Ala purported to "own" the "right, title and interest in and to the URL/Domain Poker.com." Complaint, Annex A, Section 2.1, at 2. As a registrant of a domain name, Ala does not acquire any ownership interests to the domain name, but only secures its use for a period of time, and only so long as it complies with the terms of the registration agreement.

<sup>2</sup> In Section C of the Preamble, UniNet proposes "to launch a Casino Licence [sic] in the Caribbean through a wholly owned subsidiary . . ." Complaint, Annex A, Preamble, Section C, at 1. In Section 3.3, the consideration to be provided to Ala is recited, including the amount of cash due at closing, the royalty rate and adjustment thereto, and the amount and type of shares in the subsidiary to be set up by UniNet which would be transferred to Ala. Complaint, Annex A, Section 3.3, at 3.

Annex B to the Complaint is a Memorandum of Agreement between UniNet and Thermal Ablation Technologies Corporation, a Florida Corporation ("Thermal"), dated July 16, 1999. The Memorandum of Agreement sublicenses the rights and interests under the License Agreement to Thermal. The Complaint alleges that Thermal is the former name of Complainant Poker.com, Inc.

Complainant alleges that [s]ometime prior to December 6, 2002, Ala, acting in bad faith and in violation of the terms of its License Agreement with UniNet, transferred the ownership of the URL/domain name [<poker.com>] to Communications Services Inc." Complaint, at 5.

Respondent attaches as Annex B to the Response an Assignment Agreement between Poker.com Inc., a Florida Corporation, and Ala, dated November 25, 2002. The Assignment Agreement assigns from Poker.com, Inc. to Ala all rights to the marks POKER.COM, registered with the United States Patent and Trademark Office (USPTO) and the rights under the application pending with the USPTO for the mark POKER.COM THE ULTIMATE GAMING CONNECTION. Response, Annex B, Sections 1 and 2, and Exhibit A. In turn Ala grants to Poker.com, Inc. an exclusive worldwide license to use the marks during the life of the License Agreement and the Memorandum of Agreement, referenced *supra*. Response, Annex B, Section 3. The Assignment Agreement was notarized in Vancouver, British Columbia. It is to be governed by the laws of the State of Florida, and the parties consented to the jurisdiction and venue of the courts located in Broward or Dade County in Florida. Response, Annex B.

On December 6, 2002, Respondent registered the domain name at issue.

On December 9, 2002, Laura Mouck, for N.D. Holdings Ltd., Director – Ala Corp sent a letter by Federal Express to Michael Jackson, as CEO and Director of UniNet, at #2210-1055 West Georgia Street, Vancouver, BC.<sup>3</sup> Response, Annex C. The Federal Express tracking record attached as part of Annex 3 shows that C. Looken, at #210 -1166 Alberni Street, the address given in the Complaint for Poker.com, Inc, signed for a Federal Express shipment on December 12, 2002.<sup>4</sup> The Tracking record indicates that the designated recipient was Michael Jackson, Uni Net [sic] Technologies, Inc. and the designated shipper was Laura Mouck, N D Holdings Ltd. The letter claims that the License Agreement was void for the reasons stated *supra*, and if not void, then the License Agreement was terminated due to a violation of law under the termination provisions of the License Agreement (Complaint, Annex A, Section 7.1, at 6). It demands that UniNet notify its licensees that UniNet no longer has any rights to the licensed "Property."

On December 12, 2002, Ala entered into a Trademark License Agreement with Respondent. In the Trademark License Agreement, Ala purported to assign to Respondent all worldwide right, title and interest to the trademarks covered by the Assignment Agreement between Ala and Poker.com, Inc., discussed *supra*. The Trademark License Agreement was signed on behalf of Ala by Laura Mouck, Director.

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<sup>3</sup> This is the notice address for UniNet given in the License Agreement. Complaint, Annex A, Section 8.7, at 8.

<sup>4</sup> The Complaint gives UniNet's address as #1001 – 1166 Alberni Street. The record of the USPTO registration of the trademark POKER.COM shows the registrant as Poker.com, Inc., a Florida corporation, giving an address at #1502 – 1166 Alberni Street.

On January 14, 2003, Complainant filed the Complaint in this matter.

**IDENTITY/CONFUSING SIMILARITY:**

Complainant fails to allege any trademark in which it has rights. However, Respondent has produced as Annex B to the Response an Assignment Agreement in which Complainant Poker.com, Inc. assigns registered trademark rights to Ala, and in which Ala grants an exclusive worldwide license to the trademarks to Complainant Poker.com, Inc. *Assuming arguendo* the license to be a valid license, Complainant Poker.com, Inc. would have rights in a trademark (POKER.COM) which is identical to the domain name at issue (<poker.com>).<sup>5</sup> *See, e.g., Lycos Europe N.V. v. RegionCo*, WIPO Case No. D2000-1102. However, given the other facts presented, that fact would avail complainant little.

Complainant makes no specific allegations that Respondent has no rights or legitimate interests in respect of the domain name at issue, nor that the domain name at issue has been registered and is being used in bad faith. This is not surprising, since the gravamen of Complainant's action is that Ala breached its License Agreement with Complainant by transferring the domain name to Respondent. In every material respect, the matter in dispute is the compliance by Ala, a third party who is not the current registrant of the domain name, with the terms of an agreement governed by the laws of British Columbia and Canada. The determination of such disputes is wholly inconsistent with an expedited administrative proceeding such as the UDRP. "[The alleged breaches of a license agreement] are issues for which this administrative procedure is ill-equipped to deal. The Policy is designed to deal with cybersquatting and not the resolution of factually complex and legally complex contractual and/or trade mark [sic] disputes." *Rudolf Hensel GmbH v. Hensotherm AB*, WIPO Case No. D2002-0634.

Even if the Panel were inclined to attempt to undertake the application of unfamiliar laws to this complicated set of facts, the parties have agreed to submit all such disputes to arbitration in Vancouver, British Columbia under the British Columbia Commercial Arbitration Act. The submission of disputes arising out of or in connection with the License Agreement is a broad submission to arbitration, the scope of which is to be determined by the arbitrator(s) to which the matter has been submitted. *PaineWebber Incorporated v. Bybyk, et al.*, 81 F. 3d 1193 (2d Cir. 1996); British Columbia Commercial Arbitration Act, Art. 22(1) and British Columbia International Commercial Arbitration Centre Domestic Commercial Arbitration Rules of Procedure, Rule 20,1. The arbitration provision and the applicable laws and rules divest this panel of jurisdiction to determine disputes arising out of or in connection with the License Agreement.

Complainant is of course free to pursue relief in arbitration.

The Panel does not believe that the present matter is appropriate for a finding of bad faith reverse domain name hijacking and declines to make such a finding.

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<sup>5</sup> It is difficult to see how Complainant UniNet has or ever had any interest in the trademarks at issue.

**CONCLUSION AND REMEDY**

Because this matter is not capable of determination under the UDRP and because the parties have divested the Panel of jurisdiction to determine disputes under the License Agreement that are at issue, the Complaint is hereby dismissed.

\_\_\_\_\_  
Signature of Arbitrator

\_\_\_\_\_  
Date