

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

ENTREPRENEUR MEDIA, INC.,)	
)	
PLAINTIFF,)	
)	
v.)	Civil Action No. 1:11-cv-583-AJT-TCB
)	
B-ENTREPRENEUR.COM & S-)	
ENTREPRENEUR.COM, each an Internet)	
<i>Domain Name,</i>)	
)	
)	
DEFENDANTS.)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF’S MOTION FOR ENTRY OF DEFAULT JUDGMENT**

Plaintiff Entrepreneur Media, Inc. (“EMI” or “Plaintiff”) submits this Memorandum of Law in Support of its Motion for Entry of Default Judgment against the Defendant domain names *b-entrepreneur.com* and *s-entrepreneur.com* (“Defendants” or “Infringing Domain Names”).

I. INTRODUCTION

Defendants have failed to answer or otherwise respond to EMI’s Complaint by the deadline set by the Court. Accordingly, Defendants are in default and, as a result thereof, have admitted the well-pled facts alleged in that Complaint. Since no genuine issues of fact remain in this suit, Plaintiff seeks a default judgment that will end the ongoing trademark infringement being committed by Defendants as cybersquatters, as alleged in the Complaint.

A. BACKGROUND

Plaintiff EMI is a well-known publisher of magazines and business guides, including ENTREPRENEUR MAGAZINE® and other publications incorporating the

ENTREPRENEUR® trademark (the “ENTREPRENEUR® Mark”) in their titles. (Compl. ¶ 11 (Dkt. No. 1).) EMI has since 1978 used the ENTREPRENEUR® Mark to identify such goods and services as its magazines, business guides, and educational seminars. (*Id.* ¶ 12.) EMI has also developed and maintains a number of websites, including the website operated under the domain name *www.entrepreneur.com* (respectively, the “Entrepreneur.com Site” and the “Entrepreneur Domain Name”), through which it disseminates editorial content and other information, as well as offers of products and services related or of interest to small and midsize businesses, business owners, and prospective business owners. (*Id.* ¶ 13.)

Since 1978, EMI has spent millions of dollars and has expended significant effort in promoting its goods and services under the ENTREPRENEUR® Mark through various means, including the Entrepreneur.com Site. (*Id.* ¶¶ 12-13, 16.) As a result of EMI’s substantial investment in developing and promoting the ENTREPRENEUR® Mark, that Mark has come to identify and distinguish EMI’s goods and services and represents enormous goodwill of great value belonging exclusively to EMI. (*Id.* ¶ 16.) EMI owns all rights and interest in and to the ENTREPRENEUR® Mark for various goods and services in a number of International Classes through United States Trademark Registration Nos. 1,453,968; 2,502,032; and 2,263,883. (*Id.* ¶ 14, Ex. B.) These registrations are valid and subsisting and in full force and effect. (*Id.*) Additionally, EMI owns all rights and interest in and to valid United States Trademark Registration Nos. 3,470,064; 3,924,374; 3,519,022; 3,470,063; 3,266,532; 3,374,476; and 3,652,950 and 3,204,899 for marks incorporating the term “ENTREPRENEUR” for use in connection with online and/or Internet services. (*Id.* ¶ 15, Ex. C) (All of the aforementioned EMI-registered marks, including the ENTREPRENEUR® Mark, are hereinafter collectively referred to as the “EMI Marks.”).

The Infringing Domain Names are located at the Internet addresses: <<http://www.b-entrepreneur.com>> and <<http://www.s-entrepreneur.com>>. (*Id.* ¶ 17.) The Infringing Domain Names both encompass the ENTREPRENEUR® Mark in its entirety and are confusingly similar to the EMI Marks and to the Entrepreneur Domain Name. (*Id.* ¶¶ 18, 20.)

The Infringing Domain Name *b-entrepreneur.com* is used to display a website (the “B-entrepreneur Site”) entitled “Entrepreneur Blog. . . Big Business,” that features content related to free enterprise and business news. The B-entrepreneur Site contains a section entitled “Ask Entrepreneur” and “Business Ideas,” as well as articles such as “6 Tips to Tame Technology in Your Mortgage Business” and “Strategy Driver for Global or International Business - Information Technology.” (*Id.* ¶ 19, Ex. D.)

The Infringing Domain Name *s-entrepreneur.com* is also used to display a website (the “S-entrepreneur Site”) entitled “Entrepreneur Blog. . . Small Business,” that features content related to free enterprise and business news. The S-entrepreneur Site contains a section entitled “Ask Entrepreneur” and “Business Ideas,” as well as articles such as “6 Tips to Tame Technology in Your Mortgage Business” and “Strategy Driver for Global or International Business - Information Technology.” (*Id.* ¶ 21, Ex. E.)

Both *b-entrepreneur.com* and *s-entrepreneur.com* are likely to cause confusion or mistake as to whether EMI is the source or sponsor of, is affiliated with, or endorses the Infringing Domain Names. (*Id.* ¶¶ 18, 20, 23.)

Both of the Infringing Domain Names are registered to one or more unknown parties (“Registrant”) using false contact information. (*Id.* ¶ 25.) The Defendant Domain Name *b-entrepreneur.com* is listed in the WHOIS record as registered to a “Pamela Lynn,” who is unknown to Plaintiff, and whose listed contact information is the same as Plaintiff’s physical

address and telephone number. (*Id.* ¶ 9, Ex. A.) The Defendant Domain Name s-entrepreneur.com is listed in the WHOIS record as registered to “Entrepreneur Inc., Verita Powell,” who is unknown to Plaintiff, and whose contact information is the same as Plaintiff’s physical address and telephone. (*Id.* ¶ 10, Ex. A.) This registration information is false and misleading. (*Id.* ¶ 25; Declaration of Tara Lynn Zurawski in Support of Request for an Entry of Default (“Default Decl.”) (Dkt. No. 12) ¶¶ 3-5.) These acts of fraud and deception and other deficiencies were and are intended to mask, and to make it impossible for Plaintiff to determine, the true identities of the registrants of the Defendant Domain Names. (Compl. ¶ 26.) Therefore EMI could not provide postal notice of the Complaint, but did provide e-mail notice. (Default Decl. ¶¶ 6-7.)

On August 26, 2011, EMI filed a Motion for an Order to Publish Notice of Action. (Dkt. No. 7.) The Court granted EMI’s Motion to Publish in an Order of Publication dated August 26, 2011, whereby the Court required EMI to publish the Order providing notice to the Defendants in *The Washington Times* once within fourteen days after the entry of the Order and to file an affidavit, no later than within twenty-eight days after the entry of the Order, describing the steps EMI has taken to comply with the Order. (Dkt. No. 10.) EMI complied with the Order of Publication by having it published in *The Washington Times* on September 9, 2011. (*See* Zurawski Declaration Describing Compliance With the Court’s Order to Publish Notice Of Action (“Compliance Decl.”) (Dkt. 11).) The Order stated that Defendants’ answer must be filed with the Court within twenty-one days from the date of publication of the Order in *The Washington Times*. (Dkt. No. 10.) Further, the Court noted that, if no appearance or pleading was filed as required by the Order, the Court could render judgment against the Infringing Domain Names. (*Id.*)

In accordance with the Order, Defendants' answer or other response was due no later than September 30, 2011. To date, no such answer or other response has been filed or served. On October 19, 2011, EMI filed a Request for Entry of Default against Defendants. (Dkt. No. 12.) On November 15, 2011, the Clerk of this Court entered a default against the Infringing Domain Names. (Dkt. No. 15.)

II. ARGUMENT

A. Standard For Granting Default Judgment

A court may enter default judgment pursuant to Fed. R. Civ. P 55(b)(2). Entry of default judgment is proper where the pleadings and supporting materials establish that a plaintiff is entitled to the requested relief. *See Ryan v. Homecoming Fin. Network.*, 253 F.3d 778, 780 (4th Cir. 2001). Well-pleaded statements of fact in a complaint are deemed admitted when a defendant fails to answer or otherwise respond. *Id.*; *Agri-Supply Co. v. Agrisupply.com*, 457 F. Supp. 2d 660, 662 (E.D. Va. 2006).

Plaintiff asserts a cyberpiracy cause of action in this *in rem* lawsuit. Thus, to establish that it is entitled to a default judgment, Plaintiff must show that jurisdiction is proper and that there is no genuine issue of fact as to whether the Infringing Domain Names have been used to violate the Anticybersquatting Consumer Protection Act ("ACPA"). *See* 15 U.S.C. § 1125. Based upon the admitted statements of fact in the Verified Complaint, and the submitted supporting evidence, Plaintiff is entitled to judgment in this matter.

B. Jurisdiction And Service Are Proper Under The ACPA

This court has original jurisdiction over this action, as Plaintiff's claim in this suit arises under the Lanham Act, 15 U.S.C. §§ 1051, *et seq.* Section 39 of the Lanham Act, 15 U.S.C. § 1121, provides for original jurisdiction in federal courts for violations of the Act.

In rem jurisdiction is also proper. The Lanham Act provides that:

the owner of a mark may file an *in rem* civil action against a domain name in the judicial district in which the domain name registrar, [or] domain name registry . . . is located if-

(i) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c); and

(ii) the court finds that the owner- . . .

(II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by--

(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and

(bb) publishing notice of the action as the court may direct promptly after filing the action.

15 U.S.C. § 1125(d)(2)(A). Thus, to establish that *in rem* jurisdiction is proper, Plaintiff must show that (1) the Infringing Domain Names were registered within the Eastern District of Virginia, (2) Plaintiff through due diligence cannot locate the person who would have been a defendant in a civil action by sending notice to the postal and e-mail address provided by the registrant to the registrar, or by publishing notice of the action, and (3) the Infringing Domain Names violate Plaintiff's trademark rights. Plaintiff has satisfied these requirements.

First, VeriSign, Inc., the registry of all <.com> domain names, is located within the Eastern District of Virginia, with an address at 21355 Ridgetop Circle, Dulles, VA 20166. (Compl. ¶ 6.) As both of the Infringing Domain Names are in the <.com> registry, operated by VeriSign, an *in rem* action can be brought against the Infringing Domain Names in this District. See *Cont'l Airlines, Inc. v. Continentalairlines.com*, 390 F. Supp. 2d 501, 507 (E.D. Va. 2005) (noting that VeriSign is within the Eastern District of Virginia); *Volkswagen v. Volkswagentalk.com*, 584 F. Supp. 2d 879, 883 (E.D. Va. 2008) (same).

Second, EMI through due diligence has been unable to locate the registrants of the Infringing Domain Names, as the registrants of the Infringing Domain Names provided false and misleading contact information to the registry. (Compl. ¶¶ 9, 10, 25; Default Decl. ¶¶ 3-7.) *Dominion Enterprises v. Dominionenterprisesco.com*, 2010 WL 395951, 2 (E.D. Va. 2010) (holding that where plaintiff provided postal and e-mail notice to addresses listed on registry, and published notice of the action, but where registrant had provided false contact information, requirement the court could not obtain jurisdiction over a defendant was satisfied).

Finally, as explained more fully below, the Infringing Domain Names violate EMI's rights in its valuable trademarks. Therefore, *in rem* jurisdiction is proper in this action.

Service in this action is also proper. The ACPA specifically provides that service of process in an *in rem* action is made by “sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and email address provided by the registrant to the registrar” and “publishing notice of the action as the court may direct promptly after filing the action.” 15 U.S.C. § 1125(d)(2)(A)(ii)(II)(aa) & (bb). EMI, on June 30, 2011, sent e-mail notice of the *in rem* action to the Registrant of both Infringing Domain Names, and e-mail and postal notice to the Registrar thereof, Register.com, Inc. (*See* Mem. in Support of Mot. To Pub. (Dkt. No. 7), Exs. A-B.) Pursuant to this Court's August 26, 2011 Order (Dkt. No. 10), EMI published notice of this action in *The Washington Times* on September 9, 2011. (Compliance Decl., Ex. A.) Defendants thus have been properly served with notice of this action under the ACPA.

C. EMI Has Proved Cyberpiracy Under The ACPA.

To prove a violation of the ACPA, a plaintiff must show that: (1) it possesses a valid,

protectable trademark; (2) the defendant registered, trafficked in, or used a domain name that is “identical or confusingly similar” to the plaintiff’s trademark; and (3) the defendant acted “with the bad faith intent to profit from the good will associated with the trademark.” *Retail Servs. Inc. v. Freebies Publ’g*, 364 F.3d 535, 549 (4th Cir. 2004) (internal quotation marks omitted); 15 U.S.C. § 1125(d)(I)(A).

1. EMI Possesses Valid And Protectable Trademarks

EMI owns multiple United States trademark registrations encompassing the mark ENTREPRENEUR. (Compl. ¶¶ 14-15, Exs. B-C.) Those registrations constitute *prima facie* evidence of the validity of the EMI Marks. *See* 15 U.S.C. § 1115(a). Indeed, “because the PTO may not register a generic mark, the fact that a mark is registered is strong evidence that the mark satisfies the statutory requirements for the distinctiveness necessary for trademark protection.” *Retail Services*, 364 F.3d at 542. Thus, EMI has established that the EMI Marks, including the ENTREPRENEUR® Mark, are valid and protectable trademarks.

Continentalairlines.com, 390 F. Supp. 2d at 507 (holding that plaintiff’s registration for CONTINENTAL AIRLINES satisfied the first element of its cyberpiracy claim);

Volkswagentalk.com, 584 F. Supp. 2d at 883 (same). Further, the Ninth Circuit has already determined that EMI’s registrations of the ENTREPRENEUR® Mark in classes 9 and 16 are valid and protectable. *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1142 (9th Cir. 2002).

In addition, Defendants, by failing to respond to the Complaint, have admitted that the EMI Marks, including the ENTREPRENEUR® Mark, are valid, distinctive, and protectable.

Accordingly, EMI has proven that it possesses a valid, protectable trademark.

2. The Infringing Domain Names Are Confusingly Similar To EMI's Famous Trademarks

EMI has used the world-famous ENTREPRENEUR® Mark for over thirty years, in connection with goods and services distributed throughout the United States and in over 100 foreign countries. (Compl. ¶¶ 2, 11,12.) EMI features the ENTREPRENEUR® Mark on the Entrepreneur.com Site, through which it disseminates editorial content and other information, as well as offers products and services related or of interest to small and midsize businesses, business owners, and prospective business owners. (*Id.* ¶ 13.)

The Infringing Domain Names *b-entrepreneur.com* and *s-entrepreneur.com* fully encompass, and are confusingly similar to, the ENTREPRENEUR® Mark. The only difference between the Infringing Domain Names and the ENTREPRENEUR® Mark is the addition of a single letter. Adding a letter to the start of a registered mark is not sufficient to avoid a likelihood of confusion. *Atlas Copco AB v. Atlascopcoiran.com*, 533 F. Supp. 2d 610, 614 (E.D. Va. 2008) (holding that the similarity of two marks is determined by examining the dominant portion of the marks, not any added generic modifiers). The Infringing Domain Names are therefore “identical or confusingly similar” to the ENTREPRENEUR® Mark. *TracFone Wireless, Inc. v. Itracfone.com*, No. 1:09cv1031, 2010 WL 1229340, at *6 (E.D. Va. 2010) (holding that mark was infringed where domain name was composed of mark preceded by the letter “i”); *Atlas Copco*, 533 F. Supp. 2d at 614 (holding that a URL comprised of plaintiff’s mark plus a generic term was confusingly similar); *Harrods Ltd. v. Sixty Internet Domain Names*, 157 F. Supp. 2d 658,664-65 (E.D. Va. 2001); 15 U.S.C. § 1125(d)(1)(A).

3. The Registrant Used The Infringing Domain Names With A Bad Faith Intent To Profit From Such Use

The Infringing Domain Names were used by the Registrant with a bad faith intent to trade off of, and thereby profit from, the EMI Marks. The ACPA lays out a non-inclusive list of nine factors that are intended to guide a court in determining if a domain name was used in bad faith. 15 U.S.C. § 1125(d)(1)(B)(i)(I)-(IX).¹ In instructing courts on how to consider these factors, the Fourth Circuit has held, “there is no simple formula for evaluating and weighing

¹ 15 U.S.C. § 1125(d)(1)(B)(i) - In determining whether a person has a bad faith intent described under subparagraph (A), a court may consider factors such as, but not limited to--

(I) the trademark or other intellectual property rights of the person, if any, in the domain name;

(II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

(III) the person’s prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(IV) the person’s bona fide noncommercial or fair use of the mark in a site accessible under the domain name;

(V) the person’s intent to divert consumers from the mark owner’s online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(VI) the person’s offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person’s prior conduct indicating a pattern of such conduct;

(VII) the person’s provision of material and misleading false contact information when applying for the registration of the domain name, the person’s intentional failure to maintain accurate contact information, or the person’s prior conduct indicating a pattern of such conduct;

(VIII) the person’s registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and

(IX) the extent to which the mark incorporated in the person’s domain name registration is or is not distinctive and famous within the meaning of subsection (c) of this section.

these factors. For example, courts do not simply count up which party has more factors in its favor . . . because use of these listed factors is permissive, we need not . . . march through them all in every case. The factors are given to courts as a guide, not as a substitute for careful thinking . . .” *Lamparello v. Falwell*, 420 F.3d 309, 319-20 (4th Cir. 2005) (citations omitted). Based on the factors set forth in the ACPA and the circumstances laid out in the Complaint, EMI has established the necessary bad faith intent on the part of Defendants.

Defendants, acting through the Registrant, have no intellectual property rights in the Infringing Domain Names. (Compl. ¶¶ 27, Exs. B-C.) *See* 15 U.S.C. § 1125(d)(1)(B)(i)(I). Neither of the Infringing Domain Names is the legal name of the Registrant. (Compl. ¶¶ 9-10, Ex. A.) *See* 15 U.S.C. § 1125(d)(1)(B)(i)(II). Both the B-entrepreneur and S-entrepreneur Sites do not offer bona-fide goods and services, but apparently only exist for the purpose of generating pay-per-click revenue. (Compl. ¶ 24, Exs. D-E.) *See* 15 U.S.C. § 1125(d)(1)(B)(i)(III). By registering the Infringing Domain Names using EMI’s employee and address information, the Registrant of those Names has shown an intent to confuse consumers as to the source, sponsorship, and/or affiliation of the Infringing Domain Names. (Compl. ¶¶ 24-26); 15 U.S.C. § 1125(d)(1)(B)(i)(V). In addition, the fact the Registrant of the Infringing Domain Names registered those names using false and misleading contact information is further evidence of a bad faith intent. (Compl. ¶¶ 25-26.) 15 U.S.C. § 1125(d)(1)(B)(i)(VII).

The Infringing Domain Names are also being used with the “bad faith” intent to trade off of, and thereby profit from, the EMI Marks, including the highly-acclaimed and widely-recognized ENTREPRENEUR® Mark. (*See* Compl. ¶ 24.) *See* 15 U.S.C. § 1125(d)(1)(B)(i)(V). The Infringing Domain Names *b-entrepreneur.com* and *s-entrepreneur.com* encompass in their entirety the ENTREPRENEUR® Mark. (Compl. ¶¶ 18,

20.) In addition, the related websites of the Infringing Domain Names feature content similar to the content posted on the Entrepreneur.com Site, namely, articles and features related to starting a business and free enterprise, and which is likely to cause confusion as to the source or sponsorship of (i) the Infringing Domain Names and (ii) the content offered on the related websites. (*Id.* ¶¶ 19, 21, Exs. D, E.) As a result of such confusion, the Infringing Domain Names are likely to divert consumers from the Entrepreneur.com Site to the related websites of the Infringing Domain Names.

The facts set forth above are sufficient to establish Defendants' bad faith intent. *See International Bancorp, L.L. C. v. Societe Des Baines De Mer Et Du Cercle Des Etrangers A Monaco*, 192 F. Supp 2d 467, 486 (E.D. Va. 2002) ("As intent is rarely discernable directly, it must typically be inferred from pertinent facts and circumstances."). Furthermore, Defendants have admitted through default that they acted in bad faith with the intent to unlawfully trade off of, and thereby profit from, an unauthorized association with the EMI Marks, including the ENTREPRENEUR® Mark. *Breaking the Chain Found., Inc. v. Capitol Educ. Support, Inc.*, 589 F. Supp. 2d 25, 29 (D.D.C. 2008) (failure to answer complaint alleging bad faith intent to profit establishes element of ACPA claim).

D. The Infringing Domain Names Should Be Transferred To EMI

Under 15 U.S.C. § 1125(d)(1)(D)(i), the available remedies for an *in rem* action include forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. EMI has established that Defendants acted with the bad faith intent to trade off of, and thereby profit from, the EMI Marks, and are therefore liable for a violation of the ACPA. Accordingly, this Court should order the transfer of the Infringing Domain Names to EMI. *See,*

e.g., Atlas Copco, 533 F. Supp. 2d at 615 (ordering transfer of infringing domain name to plaintiff upon finding defendant had violated ACPA).

III. CONCLUSION

For the foregoing reasons, the entry of default judgment is proper. Accordingly, Plaintiff EMI respectfully requests that the Court grant this Motion for Default Judgment in its favor, and grant Plaintiff's request that the Court issue the Proposed Order directing VeriSign, Inc. to transfer registration and control of the Infringing Domain Names to Plaintiff.

Dated: January 5, 2012

Respectfully submitted,

/s/ Tara Lynn R. Zurawski

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2012, I electronically filed the foregoing Memorandum of Law in Support of Plaintiff's Motion for Entry of Default Judgment with the Clerk of the Court using the EC/ECF system and that a true and correct copy of the foregoing and a copy of the Notification of Electronic Filing (NEF) were sent to the following non-filing users by electronic mail:

B-ENTREPRENEUR.COM & S-ENTREPRENEUR.COM, *each an Internet Domain Name,*

Registrants:

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