

March 11, 2004

RESPONSE TO COMPLAINT

[Dustin N. Diamond v. Max Goldberg]

Complainant Information:

Dustin N. Diamond
c/o Herro & Lamont, LLC
2070 Wisconsin Avenue
Grafton, WI 53024
Tel: 262-377-9500
Fax: 262-377-9700
BHerro@herroandlamont.com

Respondent Information:

Max Goldberg
847A Second Avenue, #302
New York, NY 10017
Tel: 917-359-8463
max@tnug.com

Domain Name in Dispute:

dustindiamond.com

[a.] dustindiamond.com is the domain name that is the subject of this Complaint pursuant to ICANN Rule 3(b)(vii).

[b.] Registrar Information: ICANN Rule 3(b)(vii).

[i.] Registrar's name: CSL Computer Service Langenbach GmbH/joker.com

[ii.] Registrar Address: Rathausufer 16, 40213 Duesseldorf, Germany

[iii.] Telephone number: +49 211 867670

[iv.] E-mail address: info@joker.com

[c.] Trademark/Service Mark information: ICANN Rule 3(b)(viii).

INTRODUCTION

This response is hereby submitted for decision in accordance with the Uniform Domain Name Dispute Resolution Policy.

It is unfortunate that Dustin Diamond's slick, high-priced legal team is refusing to acknowledge the obvious: that dustindiamond.com is clearly a parody site and electronic art installation. Mr. Goldberg has never attempted to use the site for personal gain, either financial or otherwise, and has, in fact, lavished considerable amounts of time and money

on the project without seeking any recompense. Yet Mr. Diamond's legal team are attempting to destroy this widely acclaimed creative project through a campaign of harassment, intimidation and blatant falsehood.

In a desperate attempt to prove that the domain is being used in bad faith, Mr. Diamond's attorneys claim that Mr. Goldberg offered to sell the domain for \$1,800. This is a lie, as is demonstrated by their inability to provide even a scrap of documentation. Mr. Diamond's attorneys claim that Mr. Goldberg has written and posted emails posing as Dustin Diamond. This too is a lie, and this too they assert without being about to offer any evidence.

The complaint is without merit. It is a heavy-handed attempt to use money and celebrity—albeit an exceedingly limited kind of celebrity—to suppress artistic freedom and the well-established First Amendment right to create and disseminate parodies of those who are famous, powerful or otherwise in the public eye. This right has been defended by ICANN itself, which specifies that use of domains for parody purposes is in fact a good faith use.

FACTUAL AND LEGAL GROUNDS

1. Max Goldberg has received notoriety and fame in the United States, internationally, and in cyberspace as a creator of hilarious and provocative parody web sites and electronic art installations. He is internationally known for his site *yourethemannowdog.com* [EXHIBIT A], which has been visited by millions of people, with approximately 50,000 hits a day [EXHIBIT B] and was hailed as "Worst Web Site" by *worstwebsites.com*. Mr. Goldberg has also received extensive recognition for his installation *getyourasstomars.com*, another heavily trafficked site that increased Mr. Goldberg's renown as a parodist-artist [EXHIBIT C]. Mr. Goldberg's work has in turn inspired numerous imitations and parodies of his parody sites.
2. Mr. Goldberg admits that he has never been commonly known by Mr. Diamond's "trademark." Mr. Goldberg created *dustindiamond.com* in 2001 as an insightful parody of the growing social phenomenon of "has-been-itis." The site makes fun of the increasingly common spectacle of minor celebrities clinging to the vestiges of their fame long after their moment in the spotlight has passed. An integral component of his parody installation is the wide array of voices—from the public at large—in the free speech forum provided by the site guest book.
3. Mr. Goldberg is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain. Nor does Mr. Goldberg use the domain name to intentionally attempt to attract, for commercial gain, Internet users to Mr. Goldberg's website, by creating confusion, using Mr. Diamond's mark. Like Mr. Goldberg's other parody art projects, *dustindiamond.com* has no commercial aspect, sells no products, carries no advertising, and yields Mr. Goldberg no

income of any kind. Significantly, all of the cases involving domains and trademark rights cited in Mr. Diamond's complaint involved domains that attempted to financially profit from the trademark name. The issue in these cases is: who has the right to financially profit from the name in question? That it is not at issue with dustindiamond.com. Mr. Goldberg has never sought to use the site for commercial purposes, as Mr. Diamond's attorneys themselves admit on page 5 of their complaint. On the contrary, Mr. Goldberg has devoted extensive time to creating and maintaining the site and pays for the cost of registering and hosting the site without financial recompense. The site exists solely for the sake of its humorous and artistic value. It is truly art for art's sake.

4. Although Mr. Diamond's trademark rights may be valid, they are nonetheless limited by Mr. Goldberg's First Amendment rights. See *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir.), cert. denied, 483 U.S. 1013, 107 S.Ct. 3254, 97 L.Ed.2d 753 (1987). Under the First Amendment of the United States Constitution, Respondent has an unfettered right to hold or express his artistic freedom through oral, written or electronic means via the registration of a domain name.
5. Mr. Goldberg did not register the domain name in question, primarily for the purpose of selling, renting or otherwise transferring the domain name to Mr. Diamond or a competitor of Mr. Diamond. Mr. Diamond's expensive legal team libelously claims that Mr. Goldberg offered to sell the domain to a representative of Mr. Diamond for \$1,800. No such offer was ever made, for this or any amount of money, and no such e-mail exchange ever took place. Mr. Goldberg has **never** attempted to sell the domain to anyone and has never used the site for financial gain in any way. It is noteworthy that Mr. Diamond's lengthy legal document, with its 27 pages of exhibits, does not include a copy of this alleged e-mail or any evidence that such e-mail ever existed. The reason is that this claim is without any foundation. Clearly Mr. Diamond's attorneys are desperate to show bad faith where none exists, and so they have fabricated evidence of bad faith out of whole cloth. This charge is not only false, but it also defames Mr. Goldberg's business acumen and attempts to discredit his integrity as an artist.
6. Mr. Goldberg did not register the domain name in question, in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name. Nor did Mr. Goldberg register the domain name primarily for the purpose of disrupting the business of a competitor. Indeed, Mr. Goldberg is not a competitor of Mr. Diamond, since Mr. Goldberg is in the business of artistic parody and has no ambitions to make chess videos or appearances in celebrity wrestling matches.
7. Mr. Diamond's attorneys charge that Mr. Goldberg has "portrayed himself" as Dustin Diamond because the site includes such language as "I'M FAMOUS ACTOR DUSTIN DIMAOND." The attorneys admit that Mr. Diamond's last name is "clearly" misspelled—a mistake Mr. Diamond himself would be highly unlikely to make. Lawyers are notoriously bad at understanding how humor works. Anybody but a lawyer will instantly recognize that the site is a parody.

Why would the real Dustin Diamond misspell his own name? Why would he refer to himself as a “FAMOUS SUPERSTAR AND SEX SYMBOL” when he is clearly neither? Mr. Diamond’s fame ended when the myriad “Saved by the Bell” spin-off shows failed to gain an audience, and his public persona has consistently been the opposite of a sex symbol. [EXHIBIT D] His “Screech” character is a stereotypically asexual geek, and Mr. Diamond’s subsequent attempts to revive his show-business career have portrayed him in a similar light, notwithstanding his recent cultivation of facial stubble. By making such over-the-top claims about Mr. Diamond’s celebrity and sexual charisma, the site clearly signals that it is a humorous work not intended to be taken seriously. The outrageously ugly and low-tech graphics and numerous obvious errors and misspellings send the same clear message.

8. Further evidence of Mr. Goldberg’s good faith is his prompt addition of a disclaimer—“This site is in no way affiliated with Dustin Diamond”—to the site’s main page. Mr. Goldberg operated throughout on the assumption that all visitors to the site would immediately recognize it as an artwork and parody. When he was told by Mr. Diamond’s lawyers that potential confusion nonetheless existed, he quickly added the clarifying disclaimer. Yet in their complaint, Mr. Diamond’s attorneys portray this obvious evidence of good faith as somehow the opposite.
9. Mr. Diamond’s attorneys complain that the disclaimer has not consistently appeared on dustindiamond.com. As evidence, they present exhibits from archive.org. In fact, the disclaimer has been consistently in place since it was first installed on the site. Although a helpful reference, archive.org is by no means definitive, and because of its methodology it is prone to egregious errors. It is an automated system with no human oversight and therefore no checks and balances are in place to ensure that the information presented is accurate. Therefore, the citations from archive.org are in no way “proof” of Mr. Diamond’s assertion, which is in fact false.
10. Mr. Diamond’s attorneys claim that Mr. Goldberg has assumed the identity of Mr. Diamond on the site message board and has posted e-mail as Mr. Diamond. This charge is also completely false. The message board, as a free speech forum, allows users to post under any name they choose. As a result, many celebrity parodies, both major (e.g., “Eminem” on Complainant’s Exhibit C) and minor (e.g., “Zack” on the same exhibit) appear on the message board. Many respondents post as Mr. Diamond and as other “Saved by the Bell” characters. It is even possible that Mr. Diamond himself has submitted some of these “Dustin Diamond” messages in an attempt to discredit Mr. Goldberg. However, Mr. Goldberg has maintained logs of the IP (Internet Protocol) addresses of all message board posts. These logs conclusively prove that none of the “Dustin Diamond” or “Dustin” messages were sent by Mr. Goldberg. Given that the message board has almost 7,000 entries as of his date, it would not be feasible to attach the entire log here, but it can be provided if it is essential for the decision in this case. Attached [EXHIBIT E] is one example of the IP log that corresponds to

Complainant's Exhibit C, specifically the post under the name "Dustin Diamond." The exhibit shows that none of the postings in Complainant's Exhibit C has an IP address consistent with that of Mr. Goldberg. This demonstrates conclusively that Mr. Goldberg did not post these messages. The complete log shows that he made none of the almost 7,000 posts to the message board, under Mr. Diamond's name or any other name. Here again Mr. Diamond's attorneys have libeled Mr. Goldberg and presented lies in place of evidence.

11. Mr. Diamond's attorneys contend that Mr. Goldberg has represented himself as Mr. Diamond through use of the address screech@dustindiamond.com. Although such an address exists, it exists solely for the purpose of archiving e-mails for a future art project. Mr. Goldberg has never sent an e-mail from the address representing himself to be Mr. Diamond. This is why Mr. Diamond's attorneys have been unable to provide any evidence that such e-mails were ever sent.
12. In February 2003, Mr. Goldberg initiated contact with Mr. Diamond's representative in an attempt to forward the few pieces of legitimate e-mail to Mr. Diamond that had arrived at the dustindiamond.com site to Mr. Diamond. Mr. Goldberg contacted one Jack Koshick, who claims to be Mr. Diamond's manager. Neither Mr. Koshick nor Mr. Diamond expressed any interest in receiving the e-mail. Instead, the response to Mr. Goldberg's good-faith effort was the beginning of a campaign of threats and harassment that lasted more than a month. It was at this time that Mr. Diamond's representative offered to buy the domain from Mr. Goldberg, to which Mr. Goldberg made no response, as he was never interested in selling the domain or using it for financial gain of any kind. [EXHIBIT F1-F5]
13. Mr. Diamond's attorneys claim that their difficulty in getting a letter to Mr. Goldberg is evidence of bad faith on Mr. Goldberg's part. This is also false. The original address listed (1652 Jefferson St., Napa, CA 94559) in the Whois database was correct at the time the site was created. When Mr. Goldberg moved to the East Coast, he updated the Whois database to reflect his new mailbox at Mailboxes Etc. (847A Second Ave., #302, New York, NY 10017). He has maintained that mailbox ever since and continues to receive mail there. Mr. Diamond's attorneys attempted to deliver a registered letter to that address on Sept. 6, 2003. The failure of the mailbox site to accept delivery of the letter is in no way Mr. Goldberg's responsibility. The fact that this complaint was successfully delivered to this address is sufficient proof that the address is valid and current.
14. Mr. Diamond's complaint argues that "Dustin Diamond" has become a significant brand name due to Mr. Diamond's fame—that it is a trademark that has acquired secondary meaning. The fact that dustindiamond.com is clearly a parody artwork renders this point moot. However, Mr. Diamond's attorneys have sadly overstated the extent of their client's renown and the value of his "brand." This becomes embarrassingly clear when they attempt to support their claim by pointing to their

client's video, "Dustin Diamond Teaches Chess." Their Exhibit H shows an advertisement for the video on a nonexistent web site [EXHIBIT G]. Their Exhibit I shows a listing (not an advertisement, as they claim) for the video on eBay from February 3, 2004, shortly before the complaint was filed. It is very possible that the eBay offer was posted by Mr. Diamond or his representatives. Apparently Mr. Diamond's legal team can find no evidence that "Dustin Diamond Teaches Chess" is anything but a self-published vanity project, one that does not support the claim that the name "Dustin Diamond" has acquired secondary meaning. In fact, the video is listed in none of the standard on-line retail outlets (Amazon.com, bn.com, etc.), casting further doubt on Mr. Diamond's claim that the video was "sold widely nationwide in retail stores and on the Internet."

15. Rights or legitimate interest. The United States of America has a long history of protecting free speech rights, particularly rights to use material for purposes of parody and/or artistic expression. Mr. Goldberg has a history of creating parody web sites that engage in astute cultural commentary and has won considerable renown for his work. [EXHIBIT H] When Mr. Diamond's attorneys assert that Mr. Goldberg did not create the site as a parody, they are denying the obvious, with no evidence or basis in fact. As an artist, Mr. Goldberg has a legitimate interest in using this material to serve his own artistic purposes.
16. Use of the domain as a bona fide offering. While it is certainly true that Mr. Goldberg has never used dustindiamond.com to offer goods or services for sale, the site does offer a bona fide service: its value as a humorous and entertaining parody and art installation. The fan letters and traffic to all of his sites show that this service is widely recognized and appreciated. In fact, his parody site yourethemannowdog.com has spawned a legion of imitators and parodies, some of which are archived at www.yourethemannowdog.com/contrib. [EXHIBIT I]
17. Mr. Goldberg has never attempted to create consumer confusion by misportraying Mr. Diamond and dilution by tarnishment. Mr. Goldberg agrees with Complainant's assertion that his character, Screech, portrayed a "squeaky" clean image. His art installation has never attempted to tarnish this image; rather it is a parody of this "squeaky" clean image. It is an, "obvious and clearly affectionate joke." [EXHIBIT J] It is clear that the public is aware that this site is a parody, as shown by the numerous emails and letters received in support of Mr. Goldberg in this case. [EXHIBIT K1-K3]
18. Mr. Goldberg never used Mr. Diamond's likeness to pass Mr. Goldberg off as Mr. Diamond. Mr. Goldberg clearly stated on the site that he was not affiliated with Mr. Diamond in any way. Moreover, in the rare instance that Mr. Goldberg received an email intended for Mr. Diamond, he directed the sender Mr. Diamond. [EXHIBIT L]

SUMMARY

In summary, Mr. Diamond's attorneys have concocted a case that is based on misrepresentations and blatant falsehoods. They have failed to prove that Mr. Goldberg operated in bad faith in his purchase and use of the domain, dustindiamond.com. They have been unable to show that Mr. Goldberg even considered offering the domain for sale, and have instead submitted an unproven and libelous statement which should be judged most harshly—Mr. Diamond's alleged celebrity should not make him any less culpable for lying before this panel.

Mr. Goldberg clearly has a legitimate interest in the domain name. He has been using it since 2001 for a parody art installation without intent for commercial gain. He has not misleadingly diverted consumers or attempted to tarnish Mr. Diamond's name—to the contrary, he has stated that the site is **in no way** affiliated with Mr. Diamond, and provides a link to Mr. Diamond's official website.

Respondent certifies that the information contained in this Response is to the best of Respondent's knowledge complete and accurate, that this Response is not being presented for any improper purpose, such as to harass, and that the assertions in this Response are warranted under these Rules and under applicable law, as it now exists or as it may be extended by a good faith and reasonable argument.

Respectfully submitted by Respondent,

Max Goldberg

Dated this 11th day of March, 2004