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X 368656

VISHESHWAR SHRIVASTAV
SOLE ARBITRATOR
IN

ARBITRATION PROCEEDINGS OF DOMAIN NAME
"p90xsales.inf"
Between

BEACHBODY LLC

... COMPLAINANT

AND

YANG YONG

... RESPONDENTS

A W A R Q

1. This Arbitral Tribunal was constituted by nomination of undersigned as the Arbitrator in the aforesaid proceeding vide communication by NIXI. This Tribunal while checking the records of the proceedings, found that there was nothing on record to show that a copy of the complaint has been supplied to the Respondents. Accordingly vide its



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communication dated 08/04/2011 this Tribunal directed the Complainants to send a copy of their complaint with Annexure to the Respondents by Courier. The Respondents were given time of several days after receipt of the complaint to send their Statement of Defense.

2. That the Tribunal in response to its communication received email dated 08/04/2011 from the Complainants stating that they have sent the hard copy of the complaint via FedEx Courier and sent FedEx receipt having Waybill No. 790735091911. This Tribunal again received an email dated 12/04/2011 from the Complainant along with

the tracking record which stated that the Complaint has been duly received by the Respondent.

This Tribunal vide its order dated 13/04/2011 gave 7 days time to the Respondents to file their Response / Statement of Defense i.e. till 19th April, 2011. This Tribunal has not received any response from the side of the respondent till 20/04/2011 and hence this Tribunal was constrained to reserve its award vide order dated 21/04/2011 .

This Tribunal notes that the Respondent despite having been aware of these proceedings through delivery of hard copy / soft copy of the Complaint / orders chose not to send any communication or file any Statement of Defense to the Complaint and maintained silence on the same, hence in view of such peculiar facts, circumstances and in view of INDRP which makes it incumbent upon this Tribunal to decide the controversy within 60 days, this Tribunal accordingly proceeds in the matter as per the material available before it.

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5. This dispute concerns the domain name "p90xsales.in" that is registered with the .IN Registry through the sponsoring Registrar M/s Transecute Solutions Pvt. Ltd.

CLAIM

The complainants claim a right in the said name based on the following assertions as given in their complaint which are as under :

A. P90XSALES.IN Is Identical Or Confusingly Similar To A Trademark Or Service Mark In Which Complainant Has Rights

Complainant claims to be a leader in the field of in-home health, wellness, weight loss, and fitness solutions since 1998. It is asserted that one of the main components of Complainant's business encompasses the development, production, sale and distribution of its BEACHBODY® family of weight loss and fitness products and services, including its P90X®-branded fitness DVDs and kits. It is further averred by the Complainant that its product like P90X®-



branded DVDs, kits, and other products and services have achieved great success since their introduction in 2003 which they attribute to their marketing and promotional efforts which include advertising and promotion through Complainant's websites, print and other internet-based advertising, in-person and televised promotional appearances by its trainers, and its infomercials, among other efforts. It is stated by the complainant that the success of the P90X®-branded fitness DVDs and kits, and other products and services is also furthered by its consumers and the word of mouth those consumers have generated. They claim to have countless individuals who have utilized the P90X®-branded products and services to help achieve their respective fitness goals and this also encompasses success stories from all types of people ranging from almost all age groups, to well-trained professional athletes and celebrities looking to stay fit and in shape.

It is stated that the quality of Complainant's products and services, and the promotion and word of mouth appreciation, the P90X®-branded DVDs, kits, and other products and services have been prominently placed in the minds of the public. Complainant assert

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that its products are Federally-registered and have acquired a valuable reputation and goodwill among the public as consumers, purchasers and members of the public at large who have become familiar with Complainant's P90X®-branded products and services, It is also stated that the Complainant has gained significant common law trademark and other rights in its P90X® marks, through its use, advertising and promotion, and they have also protected their P90X® marks by filing for and obtaining trademark registrations in various jurisdictions throughout the world, and has obtained an International Registration which include:

- U.S. Reg, No. 2,869,491 for the **P90X** word mark for "nutritional and dietary supplements" in International Class 5, registered on August 3, 2004, and used by Complainant in connection with those products at least as early as July 21, 2003 for which they rely on a copy of this registration attached as Annex C of this Complaint.

U.S. Reg. No. 2,869,490 for the **P90X & Design** mark for "meal replacement bars, nutritional and dietary supplements" in International Class 5, registered on August 3, 2004, and used by



Complainant in connection with those products at least as early as July 21, 2003. Reliance is placed on Annex D.

- U.S. Reg. No. 2,843,063 for the **P90X** word mark for "educational services, namely physical fitness instruction" in International Class 41 and for "dietary instruction, namely nutritional counseling services" in International Class 44, registered on May 18, 2004, and used by Complainant in connection with those services at least as early as February 18, 2003. Reliance is placed on Annex E.
- U.S. Reg. No. 2,973,356 for the **P90X & Design** mark for "educational services, namely instruction in the use of exercise equipment and diet programs" in International Class 41, registered on July 19, 2005, and used by Complainant in connection with those services at least as early as July 2003. Reliance is placed on Annex F.

U.S. Reg. No. 3,669,400 for the **P90X & Design** mark for "pre-recorded video tapes, cassettes, DVDs and CDs featuring exercise, fitness and dietary information and instruction" in International Class



9, registered on August 18, 2009, and used by Complainant in connection with those products at least as early as July 21, 2003. Reliance is placed on Annex G.

- U.S. Reg. No. 3,444,723 for the **P90x** word mark for "pre-recorded video tapes, cassettes, DVDs, and CDs, featuring exercise, fitness and dietary information and instruction" in International Class 9, registered on June 10, 2008, and used by Complainant in connection with those products at least as early as February 18, 2003. Reliance is placed on Annex H.
- International Reg. No. 974040 for the **P90X** word mark for "pre-recorded video tapes, cassettes, DVDs, and CDs, featuring exercise, fitness and dietary information and instruction" in International Class 9, registered on July 25, 2008, and used by Complainant in connection with those products at least as early as 2003. Reliance is placed on Annex I.

With the above facts and documents it is claimed that Complainant used its P90X® marks, sold its P90X®-branded DVDs, kits, and other

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products and services in **commerce**, and obtained the above-referenced trademark registrations long before Respondent registered P90XSALES.IN on June 5, 2010. It is alleged that the domain name registered by the Respondent is confusingly similar to Complainant's marks P90X® and the Complainant has rights in the P90X® mark, which is the only mark utilized in P90XSALES.IN. It is alleged that P90XSALES.IN incorporates the entirety of Complainant's P90X® mark and displays the identical characters in the exact same chronological order, in combination with the descriptive term "sales." The addition of this descriptive term does not distinguish the domain name from Complainant's marks, but rather increases the likely consumer confusion and clearly infringes Complainant's marks.

**B. The Respondent Has No Legitimate Interests
In Respect Of The Domain Name**

It is alleged that Respondent is not affiliated with Complainant, and there is no evidence to suggest that Respondent has registered

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P90XSALES.IN to advance legitimate interests or for the bona fide offering of legitimate goods or services. It is also alleged that the Respondent was and is in actuality advertising, offering and selling counterfeit copies of Complainant's products at P90XSALES.IN, including counterfeit versions of Complainant's P90X®-branded DVDs and workout kits. It is also pointed out that Respondent cannot provide any legitimate basis for its registration of a domain name that incorporates Complainant's P90X® mark, and since Respondent used and is using P90XSALES.IN to directly infringe Complainant's marks, create initial interest confusion, and promote, distribute, and sell counterfeit copies of P90X®-branded DVDs, the entirety of the evidence clearly demonstrates Respondent's wholly illegitimate purpose.

2. The Domain Name Has Been Registered And Is Being Used In Bad Faith

It is alleged that Respondent has used and uses the website located at P90XSALES.IN to advertise, offer for sale and sell counterfeit

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copies Complainant's products, including P90X®-branded DVDs, and the domain has been registered in bad faith. It is also claimed that Respondent has attempted to take commercial advantage of Complainant's trademark and commercial reputation and trade off Complainant's goodwill and his registering the domain name in question and using the domain name to advertise, offer for sale and sell counterfeit versions of Complainant's products and is thus attempting to attract, for commercial gain, internet users by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation or endorsement of the website, and of the goods being sold on the website, and also for the purpose of disrupting the business of a competitor, both of which are circumstances of bad faith registration pursuant to Policy paragraph 4(b)(iii)-(iv).

ORDER

This Tribunal has given an anxious consideration to the allegations of the complainants and has seen that the Respondent despite being aware of the present proceedings and despite being called upon by this

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Tribunal to give its Statement of Defense chose not to give any and hence the allegations of the complainants remain un rebutted.

In view of the undisputed weighty evidence of the Complainants this Tribunal holds that the respondents did not have any claim on the domain name "P90xsales.in" hence this Tribunal directs the Registry to transfer the domain name "P90xsales.in" to the complainants. The Complainants too are free to approach the Registry and get the same transferred in their name,

The original copy of the Award is being sent along with the records of this proceedings to National Internet Exchange of India (NIXI) for their record and a copy of the Award is being sent to both the parties for their records.

Signed this 4th day of May, 2011.

NEW DELHI
04/05/2011



V. SHRIVASTAV
ARBITRATOR