

Complaint Transmittal Cover Sheet

To: Domains by Proxy, Respondent
From: Activision Publishing, Inc., Complainant
Cc: National Arbitration Forum
Date: July 15, 2011
Re: modernwarfare3.com

The attached Complaint is being filed against you with the National Arbitration Forum (the "Forum") pursuant to the Uniform Domain Name Dispute Resolution Policy (the "Policy") adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN") on October 24, 1999 and incorporated in your Registration Agreement with the Registrar of your domain name(s). By submitting this Complaint to the Forum, the Complainant agrees to abide and be bound by the provisions of the Policy, the ICANN Rules, and the Forum's Supplemental Rules.

Until you are notified by the Forum that a proceeding has commenced, you have no duty to act with regard to this Complaint.

- The Forum will examine the Complaint to determine whether it conforms to the ICANN Policy, Rules, and the Supplemental Rules.
- If the Complaint conforms to those standards, the Forum will forward an official copy of the Complaint to you.
- *Once the official Complaint is forwarded to you, you will have **twenty (20)** calendar days to submit a Response to both the Forum and the Complainant in accordance with the Policy, Rules, and Supplemental Rules.*
- You may seek legal assistance to represent you in this administrative proceeding.

The Policy and Rules governing this proceeding can be found at:

ICANN UDRP Policy	http://www.icann.org/udrp/udrp-policy-24oct99.htm
ICANN UDRP Rules	http://www.icann.org/en/dndr/udrp/uniform-rules.htm
Forum Supplemental Rules	http://domains.adrforum.com/resource.aspx?id=1540

Alternatively, you may contact the Forum to obtain any of the above documents.

Telephone: (800) 474-2371 or (952) 516-6400
E-mail: domaindispute@adrforum.com

Please provide the Forum with the email address where the official Complaint and other communications in the administrative proceeding should be sent.

BEFORE THE NATIONAL ARBITRATION FORUM

ACTIVISION PUBLISHING, INC.

(Complainant)

v.

DOMAINS BY PROXY, INC.

(Respondent)

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Domain Name in Dispute:

modernwarfare3.com

COMPLAINT

Activision Publishing, Inc. ("Complainant") hereby submits for decision this Complaint against Domains by Proxy, Inc. ("Respondent"), registrant for the domain name modernwarfare3.com (the "Domain Name"), in accordance with the Uniform Domain Name Dispute Resolution Policy ("the UDRP"), the Rules for Uniform Domain Name Dispute Resolution Policy ("UDRP Rules"), and the National Arbitration Forum's Supplemental Rules ("NAF Rules"). For the reasons set forth below, it is submitted that the panel appointed to review this matter ("the Panel") must direct the transfer of the Domain Name to Complainant.

**I.
COMPLAINANT INFORMATION**

Complainant is a corporation organized and existing under the laws of the state of Delaware. Its contact information is as follows:

Activision Publishing, Inc.
3100 Ocean Park Boulevard
Santa Monica, California 90405
Phone Number: 310-255-2000
Fax Number: 310-255-2152

Complainant's representative in this matter is Scott J. Major of the law firm of Millen, White, Zelano & Branigan, P.C. Counsel's contact information is as follows:

Scott J. Major
Millen, White, Zelano & Branigan, P.C.
2200 Clarendon Boulevard
Suite 1400
Arlington, VA 22201
Telephone: 703-243-6333
Facsimile: 703-243-6410
E-mail: major@mwzb.com

Please send all correspondence pertaining to this matter to Mr. Major. The preferred method of communication is by electronic mail to major@mwzb.com. Where electronic mail is not feasible, the preferred method of communication is by facsimile to 703-243-6410.

A check in the amount of two thousand six hundred dollars (\$2,600.00) to cover Complainant's fee for having the matter reviewed by three (3) panelists is attached. The names and contact details of three (3) candidates to serve as one of the panelists are as follows:

Jeffrey M. Samuels
Alexandria, Virginia

Hon. Carolyn Marks Johnson
Houston, Texas

Bruce E. Meyerson
Phoenix, Arizona

II. RESPONDENT INFORMATION

The current "whois" record for the Domain Name (copy attached as Exhibit 1) provides the following contact information for Respondent:

Domains by Proxy, Inc.
DomainsByProxy.com
15111 N. Hayden Rd., Ste 160, PMB 353
Scottsdale, Arizona 85260
United States

The whois record also provides the following contact information for the administrative and technical contact:

Private, Registration modernwarfare3.com@domainsbyproxy.com
Domains by Proxy, Inc.
DomainsByProxy.com
15111 N. Hayden Rd., Ste 160, PMB 353
Scottsdale, Arizona 85260
United States
(480) 624-2599 Phone
(480) 624-2598 Fax

III. DISPUTED DOMAIN NAME

The Domain Name at issue is **modernwarfare3.com**. The Domain Name was registered with GoDaddy.com, Inc. on March 26, 2009 ("the Domain Registration Date"). The contact information for the registrar is as follows:

Go Daddy Legal Department
14455 North Hayden Rd.
Suite 219
Scottsdale, AZ 85260
legal@godaddy.com

IV. COMPLAINANT'S TRADEMARK RIGHTS

Complainant is a developer and worldwide distributor of interactive entertainment. Declaration of Rob Kostich, Vice President, Product Marketing, Activision Publishing, Inc. ("the Kostich Dec.") at ¶ 1 (attached as Exhibit 2). Its portfolio of games includes the renowned CALL OF DUTY franchise. Among the titles in the franchise are CALL OF DUTY 4: MODERN WARFARE ("MODERN WARFARE 1"), released in November 2007, and CALL OF DUTY: MODERN WARFARE 2 ("MODERN WARFARE 2"), which was released in November 2009. Another MODERN WARFARE title – namely, CALL OF DUTY: MODERN WARFARE 3 – is slated for release in November 2011. Thus, Complainant has made substantially exclusive and continuous use of the MODERN WARFARE mark ("Complainant's Mark") in commerce for more than three years and eight months, long prior to the registration of the Domain Name by Respondent. *Id.* at ¶ 2.

Complainant's Mark has been famous from the outset. The initial MODERN WARFARE game achieved premier status by selling more than seven million units from its launch date of November 5, 2007 through the end of December 2007, rendering it the top-selling title in that time period. To date, MODERN WARFARE 1 has sold more than 8 million units with gross receipts in excess of \$300 million retail. *Id.* at ¶ 3.

MODERN WARFARE 2 enjoyed even greater success. It set what were then all-time entertainment industry records upon its launch on November 10, 2009, with sales of approximately \$550 million in its first five days. *Id.* at ¶ 4. To date, MODERN WARFARE 2 has sold more than 11 million units with gross receipts in excess of \$600 million retail. It is one of the biggest-selling video games in history, and together Complainant's MODERN WARFARE 1 and MODERN WARFARE 2 games have generated gross receipts in excess of \$1 billion retail. *Id.* at ¶ 4.

Regarding promotional efforts, Complainant has spent in the United States alone in excess of \$24 million in advertising and marketing game programs and other goods bearing Complainant's Mark. Such advertising and promotion has been on the internet, on television, in print, and in movie theaters. Of particular note are featured co-sponsorships with major retailers such as *WALMART* and *BEST BUY*; limited edition MODERN WARFARE 2 Xbox console hardware created in partnership with Microsoft; the use of a soundtrack by the world famous musical entertainer Eminem to advertise the game; presentation of MODERN WARFARE trailers in more than 2,400 movie theatres across the country on more than 7,500 screens representing more than 18 million viewers; television commercials airing in 2007, 2008 and 2009 for programs on networks such as CBS, NBC, FOX and ESPN; advertising, promotion, sponsorship, and execution of multiple MODERN WARFARE on-line tournaments; in-store demonstrations and point of purchase displays prominently bearing the mark; print promotions including advertisements and game reviews found in *PlayStation*, *Men's Health*, *Maxim* and other high profile publications; and static and flashwave "banner ads" exploiting the mark on various game-related websites; and Complainant's continuous interactive support and prominent exposure on the main Activision games website (<http://www.activision.com>), and on the official websites for the various MODERN WARFARE games. *Id.* at ¶ 5.

Complainant's Mark and the games offered thereunder also have received extensive media coverage. In addition, both the MODERN WARFARE 1 and MODERN WARFARE 2 games have received many awards from consumer groups, purveyors, reporters, and other members of the electronic gaming community. These include the following:

MODERN WARFARE 1 Awards:

<u>Academy of Interactive Arts and Sciences:</u>	Action Game of the Year, 2007
<u>GameSpy:</u>	Xbox 360 Game of the Year, 2007
<u>Cheat Code Central:</u>	First Person Shooter: Best Game of the Year, 2007
<u>MSNBC reader's picks:</u>	Best Shooter, 2007
<u>IGameZone.com:</u>	Outstanding Award, 2007

MODERN WARFARE 2 Awards:

<u>Inside Gaming Awards:</u>	Game of the Year; Best Multiplayer; Best Replayability; Best Control; Best Original Score; and, Best Weapon, 2009
<u>IGN Entertainment:</u>	Best Shooter; Best Multiplayer Game; Award for Excellence in Sound; and, Award for Visual Excellence, 2009
<u>X-Play's "Best of" Awards:</u>	Best Multiplayer Game; Best Shooter; and, Best Sound Design, 2009
<u>SPIKE TV Video Game Awards:</u>	Best Multi-Player Game; Best Shooter, 2009
<u>VGChartz Game of the Year awards:</u>	Best First Person Shooter, 2009
<u>CNN.com Best video games of the year:</u>	Best Shooter, 2009
<u>Academy of Interactive Arts and Sciences:</u>	Action Game of the Year, 2009
<u>Official XBOX Magazine:</u>	Game of the Year, 2009
<u>Planet XBOX 360:</u>	Xbox 360 Game of the Year, 2009
<u>TIME magazine:</u>	#1 spot on the "Top 10 video games", 2009
<u>Los Angeles Times:</u>	#1 spot on the "Top 10 video games of 2009"
<u>InsightBits:</u>	#2 spot on the "Top 10 Xbox 360 Games of 2009"
<u>Game Daily:</u>	#3 spot on the "TEN BEST GAMES" of 2000-2009
<u>modern-gamer.com:</u>	#5 spot on the "Top 10 Most Important Games 2000-2009"
<u>Game Daily:</u>	Best Multiplayer Game, 2009
<u>GAMESPY:</u>	Overall Game of the Year, 2009
<u>Cheat Code Central:</u>	First Person Shooter: Best Game of the Year, 2009

Id. at ¶ 6.

To enhance its protectability, Complainant has registered the MODERN WARFARE mark in the United States and elsewhere around the world. Its registration portfolio includes the following registrations in the United States and the European Union:

Jurisdiction:	United States
Registration No.:	3987485
Issue Date:	July 5, 2011
Filing Date:	October 15, 2010

Mark:	MODERN WARFARE
Goods:	Computer game software; computer game software and related instruction manuals sold together as a unit; computer game cartridges; computer game discs; interactive multimedia computer game programs; downloadable computer game software
Jurisdiction:	United States
Registration No.:	3403754
Issue Date:	February 13, 2008
Filing Date:	November 15, 2006
Mark:	MODERN WARFARE
Goods:	Computer game software and related instruction manuals sold together as a unit; computer game software; computer game cartridges; computer game discs; interactive multimedia computer game programs; downloadable software for use in connection with computer games
Jurisdiction:	European Community
Registration No.:	8785347
Issue Date:	June 23, 2010
Filing Date:	December 28, 2009
Mark:	MODERN WARFARE
Goods:	Computer game software and related instruction manual in electronic format sold together as a unit; interactive video game programs; computer game discs; downloadable software for use in connection with computer games; video game controllers; night vision goggles; clothing, hats, caps, t-shirts, jackets, loungewear, boxers, briefs, sleepwear, hoodies, headbands, wristbands, belts; toys, toy wristwatches, hand-held games with liquid crystal displays, action figures and accessories therefor; arcade games; coin-operated video games; electric action toys; handheld unit for playing electronic video games

Copies of the foregoing registrations are attached hereto at Exhibit 3. Also attached as Exhibit 4 is a schedule detailing all of Complainant's filings worldwide for marks consisting in whole or in part of the wording MODERN WARFARE.

In short, by virtue of factors such as Complainant's longstanding use of the Complainant's Mark, its extensive marketing and promotional activities, the nearly unrivaled sales volume for the franchise, the unsolicited media attention and awards for the games, and Complainant's strong enforcement and registration program, MODERN WARFARE was extensively and prominently used prior to the Domain

Registration Date, and was as of that date and continues to be a highly distinctive and famous trademark that symbolizes substantial goodwill.

V. FACTUAL AND LEGAL GROUNDS

The UDRP requires the transfer or cancellation of a domain name if the Complainant can establish (1) that the domain name at issue is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; (2) that the Respondent has no rights or legitimate interests with respect to the domain name; and (3) that the Respondent has registered and used the domain name in bad faith. UDRP ¶ 4(a). Each of these factors favors Complainant in this case. Accordingly, transfer of the Domain Name is appropriate.

A. The Domain Name is Identical or Confusingly Similar to Complainant's Trademarks

The Domain Name modernwarfare3.com clearly is at least confusingly similar to Complainant's Mark. Indeed, the second-level domain is identical to the mark MODERN WARFARE 3 that is the title of the next game in the MODERN WARFARE series that is slated for release later this year. The generic, top-level domain .com is not relevant in determining whether a domain name is confusingly similar to a trademark. *See, e.g., Isleworth Land Co. v. Lost in Space, SA, FA 117330* (NAF Sept. 27, 2002) (“[I]t is a well established principle that generic top-level domains are irrelevant when conducting a Policy ¶ 4(a)(i) analysis.”).

Complainant submits that the Panel readily must find in its favor on this element of the UDRP.

B. Respondent has no Right or Legitimate Interest in the Domain Name

The UDRP sets forth a list of circumstances that can demonstrate a right or legitimate interest in a disputed domain name. It appears that none of these circumstances are present in this case. Accordingly, the Panelist must conclude that Respondent has no right or legitimate interest in the Domain Name.

The UDRP provides that a right or legitimate interest in a disputed domain name may be demonstrated where the registrant has been commonly known by the domain name, even if it has acquired no trademark or service mark rights. UDRP ¶ 4(c)(ii). To the best of Complainant's knowledge, Respondent is not known by a name consisting in whole or in part of the wording Modern Warfare 3 or its substantial equivalent; indeed, it could not be without authorization from Complainant. Respondent also is not an agent or licensee of Complainant. Kostich Dec. at ¶ 7.

Otherwise, a respondent may demonstrate a right or legitimate interest in the Domain Name only if it can establish (a) that prior to receiving any notice of the dispute, it used or made demonstrable preparations to use the Domain Name or a name corresponding to the Domain Name in connection with a *bona fide* offering of goods or services (UDRP ¶ 4(c)(i)); or (b) that it is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or tarnish the trademark or service mark at issue (UDRP ¶ 4(c)(iii)). Respondent clearly cannot make such a showing.

It appears that the Respondent supports the game *Battlefield* from the game developer Electronic Arts (“EA”). EA is one of Complainant's principal competitors in the video game industry, and the *Battlefield* game competes in the marketplace with Complainant's MODERN WARFARE games and its

other military-themed shooter games in the CALL OF DUTY series. Kostich Dec. at ¶ 8. Until recently, Respondent's site at the Domain Name featured Complainant's MODERN WARFARE 3 in such a prominent and conspicuous manner as to lead visitors to believe that the site was the official site for Complainant's upcoming new release, but then proceeded in smaller print to openly promote EA's Battlefield game at the expense of the games offered under Complainant's Mark (copies of pages from prior version of website at the Domain Name at Exhibit 5). For example, the home page for the site prominently featured the logo for Complainant's game MODERN WARFARE 3 and included the following:

Pre-Order Call of Duty MW3 Today for Xbox 360, PS3, and PC to secure exclusive bonuses only available online for Modern Warfare 3 fanboys who don't know that Battlefield 3 is the better game.

Another page on the site urges visitors to "grow up and forget about Modern Warfare 3 (because it looks just like Modern Warfare 2) and buy Battlefield 3 instead." The site also contained, among other things, copyrighted material proprietary to Complainant without its authorization.¹ Such use in connection with a site that attempted to cause confusion with and tarnish Complainant's Mark and otherwise reflected obvious disregard for Complainant's intellectual property rights cannot establish a right or legitimate interest in the Domain Name.

Recently, in what appears to be retaliation for Complainant sending a take down notice with respect to the prior content on the site, Respondent redirected the Domain Name to the official website at battlefield.com for EA's *Battlefield* games (copies of pages from current version of website at the Domain Name at Exhibit 6). Kostich Dec. at ¶ 8. Such use of the Domain Name in connection with a site devoted exclusively to promoting a competitive product is an even more egregious infringement of Complainant's Mark. Thus, it cannot be deemed to demonstrate a right or legitimate interest in the Domain Name.

Moreover, the second-level Domain Name is identical to the mark for the next game in Complainant's MODERN WARFARE series. This prevents Complainant from exercising the rights to its mark and managing its presence on the Internet. *See, e.g., Piolin Productions Inc. v. elcaradeporro*, Case No. 1307430 (NAF April 7, 2010) (because complainant has the right to decide how its mark will be used in the context of the product or products associated with the mark, the unauthorized use of an identical domain name within that very context is not legitimate). Respondent's actions also have prevented Complainant from using the logical choice for a web address for its upcoming MODERN WARFARE game, which only heightens the disruption to its business. Kostich Dec. at ¶ 10. Again, Respondent's actions cannot give rise to a right or legitimate interest in the Domain Name.

Complainant also notes that advertising is prevalent on both the current and prior versions of the site at the Domain Name. On the prior site, there are ads for, among other things, the website only4gamers.com and for retailers such as GameStop and BestBuy (*see* Exhibit 5). The visitor also was strongly encouraged to register to become a video game tester; Complainant suspects that Respondent may have received financial benefits for registering persons for this purpose. The battlefield.com site to which the Domain Name currently points promotes the upcoming *Battlefield 3* release and other EA properties. Thus, neither site can be deemed to satisfy the noncommercial or fair use requirement of UDRP ¶ 4(c)(iii).

¹ The copyright issue led Complainant to send a Take-down notice under the Digital Millennium Copyright Act to the Respondent and its internet service providers, which resulted in the removal of the site. Kostich Dec. at ¶ 9.

In summary, the Respondent is not known by a name consisting in whole or in part of the wording Modern Warfare 3 or its substantial equivalent; the domain Name contains and displays Complainant's Mark in its entirety; and the websites to which the Domain Name has been directed are hostile to Complainant's games and openly supportive of a primary competitor's products, all to the detriment and disruption of Complainant's business. Accordingly, the Panel must find that Respondent has no rights or legitimate interests in the Domain Name. *See Security Travel USA, Inc v. Tony Calhoun*, Case No. FA0709001074538 (NAF Oct. 27, 2007) (respondent found to have no rights or legitimate interests in securitytravelusa.net).

C. Respondent has Registered and Used the Domain Name in Bad Faith

The UDRP lists in the disjunctive several sets of circumstances that constitute evidence of the registration and use of a domain name in bad faith. UDRP ¶ 4(b). Various indicia of bad faith are present in this case.

Respondent registered the Domain Name well after the release of MODERN WARFARE 1 and after announcement of the scheduled release of MODERN WARFARE 2 for late 2009. The circumstances suggest strongly an opportunistic registration of the domain name corresponding to what was certain to be the title of the next game in Complainant's MODERN WARFARE series. This alone is sufficient to support a finding of bad faith.

The requisite bad faith also is present where a respondent uses the pertinent domain name to intentionally attempt to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of respondent's web site. UDRP ¶ 4(b)(iv). As indicated above, the Domain Name is confusingly similar or identical to Complainant's Mark, and both versions of the site to which the Domain Name has been directed are commercial in nature. The first site used the MODERN WARFARE 3 mark in such a manner as to appear to a visitor to be the official site for Complainant's upcoming new game. The site included third-party advertising and possibly also derived income for the Respondent through the recruiting of beta testers for new video games. Thus, the Respondent used the Domain Name to intentionally attempt to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the Complainant's Mark as to the source, sponsorship, affiliation, or endorsement of the site. This is another, independent basis for finding the requisite bad faith.

In addition, Respondent's prior website at the Domain Name contained reproductions of Complainant's copyrighted works, including materials from its MODERN WARFARE games. Respondent did not have the permission to use the Complainant's copyrighted works, and did not seek permission from Complainant to incorporate Complainant's copyrighted works into the website. Such unauthorized use of Complainant's intellectual property on the website to which the Domain Name had been pointed constitutes further evidence of Respondent's bad faith.

The site to which the Domain Name now points is the official site for another company's competing game. It is difficult to imagine a more obvious, bad-faith usage of the Domain Name. Again, this alone is sufficient to support a finding of bad faith.

Finally, a finding of bad faith is required where there is no plausible explanation for the registration of a domain name other than to trade on the goodwill of the complainant. *See Yahoo! Inc. and GeoCities v. Cupcakes, Cupcake City, Cupcake Confidential, Cupcake-Party, Cupcake Parade, and John Zuccarini*, Case No. D2000-0777 (WIPO Oct. 2, 2000). In the case at bar, Complainant's Mark is highly distinctive and famous. In consideration of this, the manner in which the Domain Name is used,

and the circumstances surrounding its registration, Complainant submits that it is apparent that Respondent intended that the Domain Name be confusingly similar to Complainant's Mark, and that it is attempting to deprive Complainant of the use of the most relevant and valuable domain name corresponding to the mark for its upcoming new game in the MODERN WARFARE series. This is yet another, independent basis for the Panel to rule in favor of Complainant on the issue of Respondent's bad faith. *See Nintendo of America Inc v. Pokemon*, Case No. D2000-1230 at pp. 5-6 (WIPO Nov. 23, 2000)(bad faith found readily where, among other things, the complainant's trademarks were unique and the possibility that respondent devised the domain names independently was remote).

In short, there are multiple bases for finding that Respondent registered and used the Domain Name in bad faith. Accordingly, this prong of the test under the UDRP also favors Complainant.

VI. REMEDY SOUGHT

Complainant submits that it has established each of the elements necessary to prove a violation of the UDRP. Accordingly, it requests that this matter be resolved in its favor and that the Panel transfer the registration for the Domain Name to Complainant.

VII. COMPLAINT TRANSMISSION

In accordance with UDRP Rule 2(b), a copy of this Complaint, together with the "Complaint Transmittal Cover Sheet," has been sent to Respondent by electronic mail (with attachments) to the address provided in the WHOIS record.

Complainant also certifies that a copy of this Complaint was sent to the above-identified Registrar by electronic mail in accordance with NAF Supp. Rule 4(d)(i).

VIII. MUTUAL JURISDICTION

The Complainant will submit, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain name, to the jurisdiction of the courts in the location of the Registrar at the time the complaint is submitted to the National Arbitration Forum.

IX. OTHER LEGAL PROCEEDINGS

There are no other legal proceedings in connection with or relating to the Domain Name.

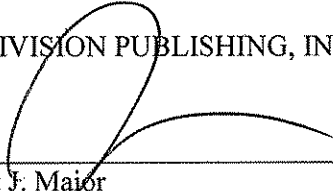
X. CERTIFICATION

Complainant agrees that its claims and remedies concerning the registration of the Domain Name, the dispute, or the dispute's resolution shall be solely against the domain-name holder and waives all such claims and remedies against (a) the National Arbitration Forum and panelists, except in the case of deliberate wrongdoing, (b) the registrar, (c) the registry administrator, and (d) the Internet Corporation for Assigned Names and Numbers, as well as their directors, officers, employees, and agents.

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

Respectfully submitted,

ACTIVISION PUBLISHING, INC.

By: 

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Attorneys for Complainant

Dated: July 15, 2011