



NATIONAL ARBITRATION FORUM

DECISION

KBR, Inc. v. Jeffrey L. Raizner / Jeffrey Raizner

Claim Number: FA1110001413439

PARTIES

Complainant is **KBR, Inc.** ("Complainant"), represented by **Pamela B. Huff** of **Cox Smith Matthews Incorporated**, Texas, USA. Respondent is **Jeffrey L. Raizner / Jeffrey Raizner** ("Respondent"), represented by **Adam P. Schiffer** of **Schiffer Odom Hicks & Johnson PLLC**, Texas, USA.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is **<kbrlitigation.com>**, registered with **Ranger Registration (Madeira) LLC**.

PANEL

Each of the undersigned certifies that he has acted independently and impartially and to the best of his knowledge has no known conflict in serving as Panelist in this proceeding.

Professor David E. Sorkin, Panelist

Tyrus R. Atkinson, Jr., Esq., Panelist

Roberto A. Bianchi, Chair

PROCEDURAL HISTORY

Complainant submitted a Complaint to the National Arbitration Forum electronically on October 27, 2011; the National Arbitration Forum received payment on October 31, 2011.

On October 31, 2011, Ranger Registration (Madeira) LLC. confirmed by e-mail to the National Arbitration Forum that the **<kbrlitigation.com>** domain name is registered with Ranger Registration (Madeira) LLC. and that Respondent is the current registrant of the name. Ranger Registration (Madeira) LLC. has verified that Respondent is bound by the Ranger Registration (Madeira) LLC. registration agreement and has thereby agreed to resolve domain disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On November 1, 2011, the Forum served the Complaint and all Annexes, including a Written Notice of the Complaint, setting a deadline of December 5, 2011 by which Respondent could file a Response to the Complaint, via e-mail to all entities and persons listed on Respondent's registration as technical, administrative, and billing contacts, and to postmaster@kbrlitigation.com. Also on November 1, 2011, the Written Notice of the Complaint, notifying Respondent of the e-mail addresses served and the deadline for a Response, was transmitted to Respondent via post and fax, to all entities and persons listed on Respondent's registration as technical, administrative and billing contacts.

On November 17, 2011, the National Arbitration Forum granted Respondent's Motion to Extend the Time to Respond. A timely Response was received and determined to be complete on December 6, 2011.

On December 14, 2011, pursuant to Complainant's request to have the dispute decided by a three-member Panel, the National Arbitration Forum appointed

Professor David E. Sorkin and Tyrus R. Atkinson, Jr., Esq. as Panelists and Roberto A. Bianchi as Chair.

RELIEF SOUGHT

Complainant requests that the domain name be transferred from Respondent to Complainant.

PARTIES' CONTENTIONS

A. Complainant

In its Complaint, Complainant contends as follows:

The disputed domain name is confusingly similar to Complainant's KBR trademark because it incorporates the entirety of this trademark in the domain name with the generic term "litigation" and the generic top level domain.

Respondent is not known by the disputed domain name or any variation thereof. Respondent and Complainant have never had a business relationship of any kind, and Complainant has never granted a license for use of Complainant's trademarks or other intellectual property to Respondent.

Respondent has no right or legitimate interests in the disputed domain name because it is not making fair use of the domain name as part of a legitimate business. When an Internet user enters the disputed domain name he or she is directed to a website purportedly offering "news on KBR chemical exposure litigation". Instead, the website actually promotes the legal services of Respondent's own law firm, Doyle Raizner LLP, which specializes in "providing representation for military families" and provides numerous means for users to contact the law firm regarding potential representation. Respondent thus stands to benefit directly from the misdirection of visitors to the website. Consequently Respondent is not making a legitimate noncommercial use of the disputed

domain name, but instead is misleading and diverting consumers for commercial purposes.

The website at the disputed domain name is not a parody or “gripe” site. A “gripe site” must be a genuine criticism site and must not be a site that is merely used for commercial or financial purposes. Even where a site contains criticisms of the trademark owner, if at least one of the purposes of the site is primarily commercial in nature, it is not considered a fair use. *See Ginn Real Estate Co. LLC v. Wiener*, FA 1211342 (Nat. Arb. Forum Aug. 20, 2008). In the disputed domain name, the term “litigation” does not suggest criticism, denigration, or disparagement of any kind. Respondent uses the disputed domain name for its own commercial purposes and the addition of the term “litigation” does not sufficiently clear that the domain name is a “gripe” site.

Respondent is an adverse party to Complainant in several pending legal actions, and is merely using the KBR trademark to draw attention to its own legal services and to gin up additional plaintiffs for its litigation efforts against Complainant. Respondent was aware of Complainant's rights in the KBR mark before it registered the disputed domain name, and has since been made aware that its use of the domain name is unauthorized and in violation of Complainant's rights. It was only after receiving Complainant's notification letter that Respondent placed a disclaimer on the website. As an attorney, Respondent must be taken to have known of Complainant's legal rights to its trademark. Registering and using the disputed domain name under such circumstances amounts to registering and using it in bad faith.

As provided in paragraph 4(b)(iv)) of the Policy, bad faith is demonstrated by Respondent intentionally attempting to attract, for commercial gain, Internet users to Respondent's website through use of the KBR trademark in conjunctions

with the generic term “litigation”. This use of the trademark is proof that Respondent is attempting to profit from Complainant's goodwill.

The primary motivation of Respondent was to disrupt the business of Complainant as a competitor. Respondent is a competitor because Respondent is “one who acts in opposition to another and the context does not imply any restricted meaning such as commercial or business competitor”. *See Gallo v. Hanna Law Firm*, D2000-0615 (WIPO Aug. 3, 2000). Specifically, Respondent is using Complainant's own trademark to encourage litigation against Complainant.

B. Respondent

In its Response, Respondent contends the following:

Complainant has not met its burden of proof with respect to any of the elements of paragraph 4(a) of the UDRP.

The disputed domain name is not identical to or confusingly similar to the letters “kbr” in which Complainant claims it has rights. The specific engineering, construction and related procurement services identified in Complainant's federal registration 2,997,435 are those with respect to which Complainant has any rights in these three letters. Complainant does not possess legal rights in these three letters in any other context. Moreover, there are scores of other uses of the letters “kbr” by third parties in the marketplace. Also, Complainant presented no evidence of any usage of its domain name kbr.com as a service mark or trademark.

Complainant is a contractor offering construction-related services. Respondent is a law firm offering litigation services. It is impossible for any user to confuse Respondent's services with Complainant's services. Also the trade channels in which the “kbr” and “kbrlitigation” expressions are respectively used, are

completely different and dissimilar. Military personnel who served the United States in Iraq and were injured as a result of Complainant's actions, in seeking information about ongoing litigation against KBR, Inc. they may well hit on **<kbrlitigation.com>**. Due to the appearance and content of the website at the disputed domain name, they will not have any misconception that the website is sponsored or endorsed by Complainant. There are scores of third party registrants of "kbr" domain names and users of the letters "kbr" in numerous other contexts than Complainant's trademark.

Complainant is trying to squelch Respondent from effectively communicating information to the public about KBR and the ongoing litigation.

There has long been an accepted practice on the Internet for lawyers handling lawsuits to maintain domain names like the disputed domain name. This abundant use of words and terms that connote litigation against the company referenced in the domain name has led Internet users, who are a sophisticated segment of the marketplace and very savvy in searching the Internet, to recognize that such a domain name which itself references "litigation" is not sponsored by or affiliated with the company. Complainant has not claimed or shown, and Respondent is not aware of any actual confusion between Respondent's legal services and Complainant's construction services as a result of the use of the disputed domain name. Also, Complainant's letters "kbr" and the disputed domain name are dissimilar in appearance, sound, connotation and commercial impression.

Anyone searching for Complainant's services will be quite sophisticated in using the Internet. Individuals injured by Complainant's unlawful actions that are using the Internet to search for lawyers handling lawsuits against KBR, Inc., and publishing information about cases pending against Complainant, will be quite sophisticated in using the Internet. They will not be "fooled" by the disputed

domain name into thinking that KBR, Inc. has gone into the business of practicing law and representing clients in lawsuits. Based on the objective analytics and research, there is no colorable basis for a claim of confusion. Moreover, the Texas State Bar's Advertising Committee approved the disputed domain name. Accordingly, there is no likelihood of confusion.

Respondent has a legitimate interest in the disputed domain name. Respondent used the website at the disputed domain name in the exercise of his right of free speech to disclose publicly available information about KBR, Inc. Respondent uses the letters "kbr" to describe his services of handling litigation against KBR. This is a nominative fair use. Respondent did not register the disputed domain name in an intentional attempt to attract for commercial gain, Internet users to Respondent's website or other on-line location, by creating a likelihood of confusion with KBR, Inc.'s mark as to the source, sponsorship, affiliation, or endorsement of Respondent's website or location or of a product or service on Respondent's website or location. Indeed, there is no likelihood of confusion between the disputed domain name and Complainant's letters "kbr".

The disputed domain name was not registered and used in bad faith. Respondent did not register this domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to Complainant or to a competitor of Complainant, and Complainant does not contend otherwise. Respondent did not register the disputed domain name in order to prevent Complainant from reflecting the KBR mark in a corresponding domain name, and in connection therewith, Respondent has not engaged in a pattern of such conduct. Complainant does not contend otherwise.

Respondent and Complainant are not competitors in commerce. Complainant offers construction services, and Respondent offers litigation services, two wholly different types of services.

Respondent did not register the disputed domain name primarily to disrupt Complainant's business, but to describe that he provides litigation services adverse to an entity that uses the letters "kbr" and to exercise his First Amendment right of free speech and to communicate to the public information concerning the entity. As a matter of public policy, simply filing lawsuits is not and cannot be deemed to constitute "bad faith" under Section 4(a)(3).

FINDINGS

Complainant is a company with main field of business in engineering, procurement and construction.

Complainant owns a U.S. registration for the standard character mark KBR, Reg. No. 2,997,435, Reg. Date September 20, 2005, covering services of procurement, construction and engineering of International Classes 25, 37 and 42. The trademark application was filed on April 15, 2004, and states January 1, 1999 as date of first use and first use in commerce.

The Parties are opponents in ongoing lawsuits. Respondent is a trial lawyer in a law firm representing plaintiffs alleging they have been injured by toxic exposure to chemical products due to Complainant's actions in Iraq while they were serving the United States of America as military.

Respondent registered the disputed domain name on August 6, 2009.

The disputed domain name resolves to a website that relates to Respondent's litigation against Complainant.

DISCUSSION

Paragraph 15(a) of the Rules instructs this Panel to "decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

Paragraph 4(a) of the Policy requires that Complainant must prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

- (1) the domain name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- (2) Respondent has no rights or legitimate interests in respect of the domain name; and
- (3) the domain name has been registered and is being used in bad faith.

Identical and/or Confusingly Similar

Complainant has shown that it has trademark rights in the KBR trademark. *See* "Findings" above.

The disputed domain name incorporates the KBR mark in its entirety, only adding the generic term "litigation" and the gTLD ".com". Adding a generic term and a gTLD to a complainant's mark is insufficient to distinguish the domain name at issue from the incorporated mark. *See Am. Express Co. v. MustNeed.com*, FA 257901 (Nat. Arb. Forum June 7, 2004) (finding the respondent's <amextravel.com> domain name confusingly similar to Complainant's AMEX mark because the "mere addition of a generic or descriptive word to a registered mark does not negate" a finding of confusing similarity under Policy ¶ 4(a)(i)); *see also Isleworth Land Co. v. Lost in Space, SA*, FA 117330 (Nat. Arb. Forum 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.”).

Accordingly, the Panel finds that the disputed domain name is confusingly similar to Complainant's KBR mark.

Rights or Legitimate Interests

The Parties are opponents in ongoing lawsuits. Respondent's law firm represents plaintiffs who served the United States of America as military in Iraq, alleging they have been injured by toxic exposure to chemical products due to Complainant's actions in Iraq. Respondent contends that in order to inform the public, including plaintiffs and their families, about ongoing developments in such litigations, it created a website at the disputed domain name containing information of interest to these issues, in an exercise of free speech under the First Amendment to the Constitution of the United States of America.

Complainant characterizes Respondent's actions slightly differently: "Respondent is merely using the KBR trademark to draw attention to its own legal services and to gin up additional plaintiffs for its litigation efforts against Complainant."

During an independent visit to the kbrlitigation.com website conducted on December 20, 2011 the Panel confirmed that the website at the disputed domain name contains news published by media, videos showing partners of Respondent's law firm reporting on current developments of the litigation against Complainant, press articles on recent judicial decisions, blogs and other content related to such litigations. Thus, Respondent's actions, in the Panel's view, clearly represent a nominative fair use of Complainant's mark. Such use is protected both under paragraph 4(c)(iii) of the Policy and under the trademark laws of the United States of America, the country of residence of both Parties. Nominative use is present where the respondent needs to use the mark to

describe its goods or services, uses no more of the mark than necessary, and does not falsely suggest sponsorship or endorsement by the mark owner. *See Pacific-10 Conference v. Lee*, D2011-0200 (WIPO May 17, 2011) (citing *Toyota Motor Sales USA v. Tabari*, 610 F.2d 1171 (9th Cir. 2010)). Respondent's use of the disputed domain name in this case satisfies the nominative use test. Accordingly, the Panel finds that Complainant has not proved the second element set forth in paragraph 4(a) of the Policy.

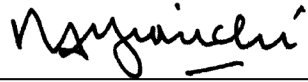
Registration and Use in Bad Faith

Given the Panel finding with regard to rights and legitimate interests, the Panel need not address the issue of bad faith. *See I4 Solutions, Inc. v. Miani*, FA 1153871 (Nat. Arb. Forum April 24, 2008) (finding it unnecessary to examine Policy ¶¶ 4(a)(i) and (ii), as the complainant must succeed under all three portions in order to grant the requested relief; thus, a denial under Policy ¶ 4(a)(iii) leads the Panel to decline to analyze the other portions of the Policy); *see also Creative Curb v. Edgetec Int'l Pty. Ltd.*, FA 116765 (Nat. Arb. Forum Sept. 20, 2002) (finding that because the complainant must prove all three elements under the Policy, the complainant's failure to prove one of the elements makes further inquiry into the remaining elements unnecessary).

DECISION

Since Complainant failed to establish Respondent's lack of rights or legitimate interests in the disputed domain name, as required under the ICANN Policy, the Panel concludes that relief shall be **DENIED**.

Accordingly, it is Ordered that the **<kbrlitigation.com>** domain name **REMAIN WITH** Respondent.



ROBERTO AMÉRICO BIANCHI, ESQ.

Roberto A. Bianchi, Chair

Professor David E. Sorkin, Panelist

Tyrus R. Atkinson, Jr., Esq., Panelist

Dated: December 27, 2011