Decision for dispute CAC-UDRP-100498

Case number	CAC-UDRP-100498
Time of filing	2012-09-16 15:37:46
Domain names	acharyainduprakash.net

Case administrator

Name	Tereza Bartošková (Case admin)

Complainant

Name	Acharya Prakash Indu

Respondent

Organization	Fundacion Private Whois

OTHER LEGAL PROCEEDINGS

The Panel is not aware of any court proceedings having been filed in relation to the disputed domain name.

IDENTIFICATION OF RIGHTS

The Complainant is the registered owner of the domain name <www.acharyainduprakash.com>. From this website the Complainant offers his services as an astrologist. The Complainant does not currently own any registered trade marks for ACHARYA INDU PRAKASH. The Complainant asserts common law rights in the trade mark.

The disputed domain name <acharyainduprakash.net> was registered with Internet.bs Corp. of 8619NW 68th St, PTY R 0332, Miami FL 33166-2667, USA by the Respondent on August 11, 2011.

FACTUAL BACKGROUND

The Complainant's personal name is Indu Prakash, but he is also known as Acharya Indu Prakash, as the name "Achraya" is a title used in India for guide or instructor or learned man.
The Complainant is an astrologer and offers his services through appearances on the television station India TV, through his own website at the domain name <acharyainduprakash.com>, and in a monthly magazine about astrology.
The Respondent registered the disputed domain name on August 11, 2011. It operates a website from the disputed domain name which is critical of the Complainant and on which the Respondent has published details of an alleged dispute with the Complainant.

Complainant's Contentions
The Complainant contends that the disputed domain name is identical to a trade mark or service mark in which the Complainant has rights.
The Complainant contends that the Respondent does not have any rights or legitimate interest in the disputed domain name.
The Complainant further contends that the disputed domain name has been used in bad faith. The Complainant asserts that the disputed domain name was not used in connection with the bona fide offering of goods or services and that the Respondent does not make a legitimate non-commercial or fair use of the disputed domain name as the website is operated

with intent for commercial gain to misleadingly divert consumers or to tarnish the trade or service mark. The Complainant asserts that the disputed domain name is being used in bad faith as there is evidence that it was registered primarily for the purpose of disrupting the business of a competitor. This is based on the submission that the website under the disputed domain name describes the Complainant as a “Fake & Blacklisted Astrologer” and asserts that the Complainant’s website was created to divert and mislead clients of a competitor known as Ved Bhawan.
The Complainant requests for the reasons summarised above, and as more particularly set out in the Complaint, that the disputed domain name is cancelled and/or its registration is transferred to Acharya Indu Prakash.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the Domain Name is identical or confusingly similar to a trademark or service mark in which the complainant has rights (within the meaning of paragraph 4(a)(i)of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the Domain Name (within the meaning of paragraph 4(a)(ii)of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the Domain Name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii)of the Policy).

PROCEDURAL FACTORS

The Respondent did not file its Response on time and did not submit a further filing in accordance with the Panel Order of October 16, 2012 by the due date being October 23, 2012. As a result, the Panel will not consider the filing made by the Respondent on 25 October 2012. In addition, the Panel will not consider the late submissions made by the Complainant on 26 October, 2012.

PRINCIPAL REASONS FOR THE DECISION

It is necessary for the Complainant, if he is to succeed in this administrative proceeding, to prove each of the three elements referred to in paragraph 4(a) of the Policy, namely that:
(i) the disputed domain name is identical or confusingly similar to a trade mark in which the Complainant has rights; and
(ii) the Respondent has no rights or legitimate interest in respect of the disputed domain name; and
(iii) the disputed domain name has been registered and is being used in bad faith.
The Panel will proceed to establish whether the Complainant has discharged the burden of proof in respect of the three elements referred to above.

A. Identical or Confusingly Similar
If the Complainant is to succeed, he must demonstrate that he has either registered or unregistered trade mark rights in the name “Acharya Indu Prakash” in order to satisfy paragraph 4(a)(i) of the Policy.
The Complainant has submitted that although he has not registered his personal name as a trade mark, by using his personal name to offer astrological services he has developed unregistered or common law rights in the name on the basis that it has developed a secondary meaning to distinguish the services that he offers.
Previous WIPO UDRP panels have found that in order for an individual to rely on unregistered trade mark rights he or she must be able to demonstrate that the mark has been used in trade or commerce. However, merely having a famous name (such as may be the case with a businessman or religious leader) is not generally considered enough to demonstrate unregistered trade mark rights. For example, in the cases of Chimnoy Kumar Ghose v. ICDSoft.com and Maria Sliwa, WIPO Case No. D2003-0248, and Julia Fiona Roberts v. Russell Boyd, WIPO Case No. D2000-0120, it was found that a complainant

must demonstrate that their name has been used in connection with the carrying-out of a business activity and had acquired a sufficient secondary association in order to establish the existence of a common law trade mark.
The Complainant asserts that he has used his name in trade in relation to the provision of astrological services for remuneration. The Complainant has submitted evidence of an agreement with India TV to appear on television for the purposes of providing astrological and religious services and conducting anchoring, voicing, compering, interviewing and presenting in return for payment. In addition, the Complainant has provided evidence of press releases indicating his appearance in the media under his personal name and offering astrological services. The Complainant has also stated that he is the author of a monthly magazine about astrology. Finally, the Complainant's own website advertises the provision of astrological services by the Complainant under the name "Acharya Indu Prakash".
In Monty and Pat Roberts, Inc. v. J. Bartell Case No. D2000-0300 the Panel found that factors such as the maintenance of a website in the name of the Complainant, the publication of a number of successful books and appearances on television and in film by the Complainant were sufficient to show the requisite use and recognition of the Complainant's name. Similarly, in the subsequent case of Steven Rattner v. BuyThisDomainName (John Pepin) Case No. D2000-0402 the Panel found that the Complainant's use of his personal name in connection with the provision of investment banking and corporate advisory services was sufficient to establish the creation of a common law right.
In this case the Complainant has demonstrated that he has a business and reputation on commercial television as a professional astrologer. The Panel finds that in the circumstances this is adequate to support a finding of common law rights or secondary meaning in his name for the purposes of the Policy and notes that the disputed substantive element of the domain name is identical to his name.
The Complainant has made out his case under paragraph 4(a)(i) of the Policy.

B. Rights or Legitimate Interests
The Respondent has not submitted any evidence claiming or showing that it has used the disputed domain name in connection with a bona fide offering of services, or that it is commonly known by the disputed domain name. Nor has the Complainant authorised the Respondent's use of the disputed domain name.
The Complainant asserts that the Respondent is also not using the disputed domain name for legitimate non-commercial purposes or making a fair use, for example, for the purposes of a legitimate criticism site.
The disputed domain name resolves to a website headed up "Fake & Blacklisted Astrologer "Acharya Induprakash Mishra". It continues by including a partial screenshot of the complainant's site and then says the following:
"Induprakash Mishra has created a website called - www.acharyainduprakash.com on 16.6.2009 to duplicate Ved Bhawan's website - www.bhavishyavani.com and to mislead the clients of original website. Despite of the fact that neither the website nor Induprakash is associated with Bhavishyavani.com, the keyword Bhavishyavani is being used in website headers without such consent."
The Respondent goes on to cite various legal notices, represent that a fine has been levied against the Complainant and to then include copies of various legal letters sent by the Respondent's lawyers to the Complainant.
This Panel has previously supported the view (see Covance, Inc. and Covance Laboratories Ltd. v. The Covance Campaign, WIPO Case No. D2004-0206) that the use of an identical disputed domain name to the Complainant's name or mark should not qualify as a "legitimate noncommercial or fair use" under paragraph 4(c)(iii) regardless of website content because there is an immediate potential for false association with the trade mark owner and this is the case in the current circumstances. Even if the website content was to be taken into account in this case it appears that the Respondent is making bald assertions that the Complainant in misleading its customers and is using its marks as "keywords" and then includes a link to its own website which potentially diverts Internet users to the Respondent's own site. In the Panel's view this does not amount to legitimate non commercial or fair use as could be expected from a bona fide criticism site.
In these circumstances the Panel finds that the Complainant has made out a prima facie case that the Respondent has no rights or legitimate interests in the disputed domain name for the purposes of the second element of the Policy. There is nothing to rebut this case and accordingly the Complaint succeeds under this element of the Policy.

C. Registered and Used in Bad Faith
It is apparent that the Respondent purposefully registered the disputed domain name, the substantive part of which is identical to the Complainant's name and domain name, for the purpose of airing its grievances concerning the Complainant's alleged use of the Respondent's name or mark in a keyword for the Complainant's website and that the Complainant had copied its website. However it did not do so in a measured or objective fashion that could be expected of a

legitimate criticism site, but rather chose to head the site with the legend “Fake and Blacklisted” and continued to make bald complaints of duplication and deception in a blatant attempt to discredit the Complainant and then to include a link to the Respondent’s own website.
In the Panel’s view the registration of an identical domain name to the Complainant’s name or mark for this purpose is not legitimate and only serves to divert Internet users without affording them any initial notion that this site is not connected with the Complainant, but rather is a criticism site. Had the Respondent wanted to present a bona fide criticism site then it would have been well advised to have included some negative modifier in its domain name and to have restricted itself to objective and reasoned criticism on its website.
The inflammatory heading and allegations and the lack of objectivity in the website, coupled with the link to the Respondent’s website, supports an inference that the Respondent’s real intention in registering the disputed domain name and the manner in which it subsequently used it was to discredit the Complainant for the purpose of diverting Internet users and potential customers to its own website.
Paragraph 4(b)(iii) of the Policy states that registration of a domain name primarily for the purpose of disrupting the business of a competitor shall be evidence of the registration and use of a domain name in bad faith. It appears to the Panel that the Respondent is through its website attempting to compete with the Complainant and consequently seeks to divert internet users to its site. As noted above the very strong inference is that the Respondent has used the disputed domain name in an attempt to discredit the Complainant and to divert potential customers. Consequently, the Panel finds that on the balance of probabilities the Respondent has under paragraph 4 (b) (iii) of the Policy used the disputed domain name primarily for the purpose of disrupting the business of a competitor, namely the Complainant.
Accordingly the Panel finds that the disputed domain name was both registered and used in bad faith and that the Complaint succeeds under the third element of the Policy.

Decision
The Panel concludes that:
(i) the disputed domain name is identical to the Complainant’s name in which it owns trade mark rights for the purposes of the Policy;
(ii) the Respondent has no rights or legitimate interest in the domain name; and
(iii) the Respondent registered and used the disputed domain name in bad faith.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

1. **ACHARYAINDUPRAKASH.NET**: Transferred

PANELLISTS

Name	**Alistair Payne**

DATE OF PANEL DECISION 2012-10-30

Publish the Decision