

ADMINISTRATIVE PANEL DECISION

Spouting Rock Financial Partners, LLC v. Henry Vermont Case No. D2023-2270

1. The Parties

The Complainant is Spouting Rock Financial Partners, LLC, United States of America (“United States” or “US”), represented by Boyle Fredrickson, S.C., United States.

The Respondent is Henry Vermont, Switzerland.

2. The Domain Name and Registrar

The disputed domain name <spoutingrockassetmanagement.com> (the “Domain Name”) is registered with Web Commerce Communications Limited dba WebNic.cc (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 24, 2023. On May 25, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On May 26, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name which differed from the named Respondent (Domain Admin) and contact information in the Complaint. The Center sent an email communication to the Complainant on May 31, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant did not file an amendment to the Complaint or amended Complaint.

The Center verified that the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on June 16, 2023. In accordance with the Rules, paragraph 5, the due date for Response was July 6, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on July 11, 2023.

The Center appointed Nicholas Smith as the sole panelist in this matter on July 20, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

4. Factual Background

The Complainant is a United States provider of financial services, including asset management and private equity services, which has offered its services (directly and through various related entities) under the mark SPOUTING ROCK (the “SPOUTING ROCK Mark”) since at least 2006. The Complainant promotes its products through various means including from its website at “www.spoutingrock.us” (the “Complainant’s Website”). The Complainant has over USD 100 million in assets under management and has recently applied to register the SPOUTING ROCK Mark as a trade mark with the United States Patent and Trademark Office.

The Domain Name was registered on October 14, 2022. The Domain Name resolves to a website (the “Respondent’s Website”) that prominently reproduces the SPOUTING ROCK Mark and purports to make noncommercial criticism of the conduct of the Complainant and in particular the management of certain former entities now acquired by the Complainant. The Complainant submits that the Respondent’s name is a pseudonym for a United States-based individual who has repeatedly been sanctioned by the courts for making false and defamatory statements about the Complainant and individuals engaged by the Complainant and its related entities.

5. Parties’ Contentions

A. Complainant

The Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the Domain Name.

Notably, the Complainant contends that:

- a) It is the owner of the SPOUTING ROCK Mark, having acquired trademark rights to the SPOUTING ROCK Mark in the United States from 16 years of use and the development of a considerable reputation in the mark in the United States of America. The Domain Name is confusingly similar to the SPOUTING ROCK Mark as it reproduces the SPOUTING ROCK Mark in its entirety and adds the terms “asset”, and “management”.
- b) There are no rights or legitimate interests held by the Respondent in respect of the Domain Name. The Complainant has not granted any license or authorization for the Respondent to use the SPOUTING ROCK Mark. The Respondent is not commonly known by the SPOUTING ROCK Mark, nor does it use the Domain Name for a *bona fide* purpose or legitimate noncommercial purpose. Rather the Respondent is using the Domain Name to pass off as the Complainant for the purpose of spreading false and defamatory material about the Complainant in breach of a court order. Such use is not a legitimate use of the Domain Name.
- c) The Domain Name was registered and is being used in bad faith. The Respondent is using the Domain Name to divert Internet users searching for the Complainant to the Respondent’s Website to disrupt the Complainant’s business and spread false and defamatory material in breach of a court order. Such conduct amounts to registration and use of the Domain Name in bad faith.

B. Respondent

The Respondent did not reply to the Complainant’s contentions.

6. Discussion and Findings

A. Identical or Confusingly Similar

It is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the Complainant's trademark and the disputed domain name. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ("[WIPO Overview 3.0](#)"), section 1.7.

The Complainant asserts that it has common law rights in the SPOUTING ROCK Mark. The [WIPO Overview 3.0](#), section 1.3 states, in response to the question: "What does a complainant need to show to successfully assert unregistered or common law trademark rights?"

To establish unregistered or common law trademark rights for purposes of the UDRP, the complainant must show that its mark has become a distinctive identifier which consumers associate with the complainant's goods and/or services.

Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (e.g., consumer, industry, media) recognition, and (v) consumer surveys.

(Particularly with regard to brands acquiring relatively rapid recognition due to a significant Internet presence, panels have also been considering factors such as the type and scope of market activities and the nature of the complainant's goods and/or services.)

Specific evidence supporting assertions of acquired distinctiveness should be included in the complaint; conclusory allegations of unregistered or common law rights, even if undisputed in the particular UDRP case, would not normally suffice to show secondary meaning. In cases involving unregistered or common law marks that are comprised solely of descriptive terms which are not inherently distinctive, there is a greater onus on the complainant to present evidence of acquired distinctiveness/secondary meaning.

As noted in section 1.1.2, for a number of reasons, including the global nature of the Internet and Domain Name System, the fact that secondary meaning may only exist in a particular geographical area or market niche does not preclude the complainant from establishing trademark rights (and as a result, standing) under the UDRP.

Also noting the availability of trademark-like protection under certain national legal doctrines (e.g., unfair competition or passing-off) and considerations of parity, where acquired distinctiveness/secondary meaning is demonstrated in a particular UDRP case, unregistered rights have been found to support standing to proceed with a UDRP case including where the complainant is based in a civil law jurisdiction.

The fact that a respondent is shown to have been targeting the complainant's mark (e.g., based on the manner in which the related website is used) may support the complainant's assertion that its mark has achieved significance as a source identifier.

Even where a panel finds that a complainant has UDRP standing based on unregistered or common law trademark rights, the strength of the complainant's mark may be considered relevant in evaluating the second and third elements."

In the present case the Complainant and its related entities has used the SPOUTING ROCK Mark for over 16 years as a distinctive identifier of the Complainant's financial services, including on the Complainant's Website. The Complainant is recognised as a financial service provider of significant size, with over USD100 million of assets under its management.

An additional relevant factor in determining whether the Complainant has rights in the SPOUTING ROCK Mark is that the Respondent, in acquiring the Domain Name and using it to mislead visitors as to the source of the Respondent's Website, has clearly targeted the Complainant's SPOUTING ROCK Mark, which supports the assertion by the Complainant that the SPOUTING ROCK Mark has acquired a relevant reputation. While the evidence in the Complaint is somewhat limited, on balance the Panel finds that the Complainant does have sufficient common law or unregistered trade mark rights in the SPOUTING ROCK Mark arising from its 16 years use to satisfy the requirements under the Policy.

Based on the available record as summarized above, the Panel finds the Complainant has established unregistered trademark or service mark rights for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.3.

The Panel finds the entirety of the mark is reproduced within the Domain Name. Accordingly, the Domain Name is identical or confusingly similar to the mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.7.

While the addition of other terms here, "asset", and "management", may bear on assessment of the second and third elements, the Panel finds the addition of such terms do not prevent a finding of confusing similarity between the Domain Name and the mark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.8.

Based on the available record, the Panel finds the first element of the Policy has been established.

B. Rights or Legitimate Interests

Paragraph 4(c) of the Policy provides a list of circumstances in which the respondent may demonstrate rights or legitimate interests in a disputed domain name.

While the overall burden of proof in UDRP proceedings is on the complainant, panels have recognized that proving a respondent lacks rights or legitimate interests in a domain name may result in the often impossible task of "proving a negative", requiring information that is often primarily within the knowledge or control of the respondent. As such, where a complainant makes out a *prima facie* case that the respondent lacks rights or legitimate interests, the burden of production on this element shifts to the respondent to come forward with relevant evidence demonstrating rights or legitimate interests in the domain name. If the respondent fails to come forward with such relevant evidence, the complainant is deemed to have satisfied the second element. [WIPO Overview 3.0](#), section 2.1.

Having reviewed the record, the Panel finds the Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the Domain Name. The Respondent has not rebutted the Complainant's *prima facie* showing and has not come forward with any relevant evidence demonstrating rights or legitimate interests in the Domain Name.

The Respondent's Website contains a series of noncommercial criticisms of the Complainant, its management and related entities. It is not necessary to make a determination as to whether the Respondent's criticisms are valid and/or whether the Respondent is the individual the subject of court orders (and hence is breaching court orders) preventing the repetition of his ongoing complaints about the Complainant and its related entities. The [WIPO Overview 3.0](#) states the consensus view of panels, in response to the question: "Does a criticism site support respondent rights or legitimate interests?"

2.6.2 Panels find that even a general right to legitimate criticism does not necessarily extend to registering or using a domain name identical to a trademark (*i.e.*, <trademark.tld> (including typos)); even where such a domain name is used in relation to genuine noncommercial free speech, panels tend to find that this creates an impermissible risk of user confusion through impersonation.

2.6.3 Where the domain name is not identical to the complainant's trademark, but it comprises the mark plus a derogatory term (*e.g.*, <trademarksucks.tld>), panels tend to find that the respondent has a legitimate

interest in using the trademark as part of the domain name of a criticism site if such use is *prima facie* noncommercial, genuinely fair, and not misleading or false.”

In the present case the Domain Name consists of the SPROUTING ROCK Mark, and two words that imply (unlike “sucks” or other derogatory terms), that the website at the Domain Name is an official website of the Complainant, since the Complainant offers financial services and in particular asset management services. The Panel finds that, regardless of the veracity of the content of the Respondent’s Website, the Domain Name creates an impermissible risk of user confusion through impersonation and hence the Respondent’s use of the Domain Name for the Respondent’s Website does not give rise to rights or legitimate interests.

Based on the available record, the Panel finds the second element of the Policy has been established.

C. Registered and Used in Bad Faith

The Panel notes that for the purposes of paragraph 4(a)(iii) of the Policy, paragraph 4(b) of the Policy establishes circumstances, in particular but without limitation, that if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith. However, other circumstances may be relevant in assessing whether a respondent’s registration and use of a domain name is in bad faith. [WIPO Overview 3.0](#), section 3.2.1.

In the present case, the analysis under the third element of the Policy is closely connected to the consideration of the topic of rights and legitimate interests. As noted above, the fact that the Respondent has chosen to register a domain name that consists of the SPROUTING ROCK Mark and two words describing the Complainant’s services signals an affiliation with the Complainant that is likely to lead to “an impermissible risk of user confusion” (see section 2.6.2 of the [WIPO Overview 3.0](#)). Given the nature of the content on the Respondent’s Website, there is no doubt in the Panel’s mind that the Respondent registered the Domain Name with an awareness of the Complainant and its rights in the SPROUTING ROCK Mark and with intent to target these. The registration of the Domain Name in awareness of the Complainant and its rights in the SPROUTING ROCK and in the absence of rights or legitimate interests amounts to registration in bad faith.

The Domain Name is likely to divert confused Internet users, who are seeking the Complainant’s official website, to the Respondent’s Website. The use of such a domain name which makes this kind of *prima facie* misrepresentation “constitutes registration and use in bad faith, which cannot be cured by the content of the Respondent’s website (if it is accepted that the content is noncommercial and indeed represents legitimate criticisms, for which latter aspect the Panel makes no findings, as this is generally seen as not being a matter falling within the scope of the Policy)” (see *Netblocks Group v. Collin Anderson*, WIPO Case No. [D2020-2240](#)). Considering all of the above circumstances, the Panel finds that the Domain Name has been registered and is being used in bad faith, and accordingly that the Complainant has carried its burden in terms of paragraph 4(a)(iii) of the Policy.

Based on the available record, the Panel finds the third element of the Policy has been established.

7. Decision

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Domain Name, <spoutingrockassetmanagement.com>, be transferred to the Complainant.

/Nicholas Smith/

Nicholas Smith

Sole Panelist

Date: August 3, 2023