

ADMINISTRATIVE PANEL DECISION

IP86, LLC v. Michael Kempton
Case No. D2022-3678

1. The Parties

The Complainant is IP86, LLC, United States of America (“United States”), represented by Osha Bergman Watanabe & Burton LLP, United States.

The Respondent is Michael Kempton, South Africa.

2. The Domain Name and Registrar

The disputed domain name <epconcommunity.com> (“Domain Name”) is registered with NameCheap, Inc. (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on October 3, 2022. On October 4, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On the same day, 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 (Privacy service provided by Withheld for Privacy ehf, Iceland) and contact information in the Complaint. The Center sent an email communication to the Complainant on October 5, 2022, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on October 6, 2022.

The Center verified that the Complaint together with the amended 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 October 17, 2022. In accordance with the Rules, paragraph 5, the due date for Response was November 6, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on November 7, 2022.

The Center appointed Nicholas Smith as the sole panelist in this matter on November 10, 2022. 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 company that since 2002 has been involved in the provision of residential building construction services and related services such as building inspections and training courses in relation to construction services. The Complainant is a closely-related company to the Epcon Communities Franchising family of companies. The Complainant promotes its services under the EPCON and EPCON COMMUNITIES brands including through its portal at the domain name <epconcommunities.com>.

The Complainant is the owner of trade marks in the United States consisting of the words EPCON COMMUNITIES and EPCON (the "EPCON Mark"), including a United States registration for EPCON (Registration No. 3,564,430 for "residential building construction services" in Class 37, registered January 20, 2009); United States registration for EPCON COMMUNITIES (Registration No. 3,216,379 for "franchising, namely, offering technical assistance in the establishment and/or operation of residential building construction services" in Class 35, registered March 6, 2007).

The Domain Name was registered on August 4, 2022. The Domain Name resolves to a website offering pay-per-click advertisements for services that directly compete with the Complainant's services in connection with residential home building.

5. Parties' Contentions

A. Complainant

The Complainant makes the following contentions:

- (i) that the Domain Name is identical or confusingly similar to the Complainant's EPCON Mark;
- (ii) that the Respondent has no rights nor any legitimate interests in respect of the Domain Name; and
- (iii) that the Domain Name has been registered and is being used in bad faith.

The Complainant is the owner of EPCON Mark, having registered the EPCON Mark in the United States. The Domain Name is confusingly similar to the EPCON mark, wholly incorporating the EPCON mark and adding the descriptive term "community".

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 EPCON Mark nor is the Respondent commonly known by the Domain Name. The Respondent does not use the Domain Name for a *bona fide* purpose or legitimate noncommercial purpose. Instead, the Domain Name resolves to a pay-per-click site that advertises services in competition with the Complainant. Such use of the Domain Name cannot and does not constitute *bona fide* commercial use, sufficient to legitimize any rights and interests the Respondent might have in the Domain Name and therefore the Respondent has no rights or legitimate interests in the Domain Name under paragraph 4(a)(ii) of the Policy.

There is no plausible circumstance under which the Respondent could legitimately use the Domain Name, which combines the EPCON mark and the descriptive term "community", other than in bad faith. By using the Domain Name to resolve to a website that offers links to competing services, the Respondent is using

the Domain Name to divert Internet users searching for the Complainant to the Respondent's website for commercial gain. 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

To prove this element, the Complainant must have trade or service mark rights and the Domain Name must be identical or confusingly similar to the Complainant's trade or service mark.

The Complainant is the owner of the EPCON Mark, having a registration for the EPCON Mark as a trade mark in the United States.

The Domain Name incorporates the EPCON mark in its entirety with the addition of the descriptive term "community". Other UDRP panels have repeatedly held that where the relevant trade mark is recognizable within the disputed domain name, the addition of other terms does not prevent a finding of confusing similarity under the first element; see section 1.8 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)").

The Domain Name also incorporates the EPCON COMMUNITIES mark, merely changing the word "communities" from plural to singular. Such misspelling of the Complainant's EPCON COMMUNITIES mark does not prevent a finding of bad faith as well. See section 1.9 of the [WIPO Overview 3.0](#).

The Panel finds that the Domain Name is confusingly similar to the Complainant's EPCON Mark. Consequently, the requirement of paragraph 4(a)(i) of the Policy is satisfied.

B. Rights or Legitimate Interests

To succeed on this element, a complainant may make out a *prima facie* case that the respondent lacks rights or legitimate interests in the disputed domain name. If such a *prima facie* case is made out, the respondent then has the burden of demonstrating rights or legitimate interests in the domain name.

Paragraph 4(c) of the Policy enumerates several ways in which a respondent may demonstrate rights or legitimate interests in a disputed domain name:

"Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of paragraph 4(a)(ii) of the Policy:

(i) before any notice to you of the dispute, your use of, or 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; or

(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trade mark or service mark rights; or

(iii) you are making legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue."

The Respondent is not affiliated with the Complainant in any way. It has not been authorized by the Complainant to register or use the Domain Name or to seek the registration of any domain name incorporating the EPCON Mark or a mark similar to the EPCON Mark. There is no evidence that the Respondent is commonly known by the Domain Name or any similar name.

There is no evidence that the Respondent has used or made demonstrable preparations to use the Domain Name in connection with a legitimate noncommercial or fair use or a *bona fide* offering of goods or services. The use of the Domain name for a parking page with pay-per-click links unrelated to a dictionary meaning of the Domain Name is not a *bona fide* offering of goods or services nor legitimate noncommercial or fair use. The Panel notes the statements in the [WIPO Overview 3.0](#) on the question of whether “parked” pages comprising pay-per-click links support the respondent’s rights or legitimate interests. Section 2.9 of the [WIPO Overview 3.0](#) notes that:

“Applying UDRP paragraph 4(c), panels have found that the use of a domain name to host a parked page comprising PPC [pay-per-click] links does not represent a *bona fide* offering where such links compete with or capitalize on the reputation and goodwill of the complainant’s mark or otherwise mislead Internet users.

Panels have recognized that the use of a domain name to host a page comprising PPC links would be permissible – and therefore consistent with respondent rights or legitimate interests under the UDRP – where the domain name consists of an actual dictionary word(s) or phrase and is used to host PPC links genuinely related to the dictionary meaning of the word(s) or phrase comprising the domain name, and not to trade off the complainant’s (or its competitor’s) trademark.”

In the present case, the Domain Name has no inherent meaning and hence the Respondent’s use of the confusingly similar Domain Name to host a parking page with pay-per-click links referring to the construction services offered by the Complainant does not, absent any further explanation, provide the Respondent with rights or legitimate interests in the Domain Name.

The Panel finds that the Complainant has established a *prima facie* case that the Respondent lacks rights or legitimate interests in the Domain Name. The Respondent has chosen not to respond to the Complaint and thus has failed to provide any evidence of rights or legitimate interests in the Domain Name. The Panel finds that the Respondent has no rights or legitimate interests in respect of the Domain Name under paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

For the purposes of paragraph 4(a)(iii) of the Policy, the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of the Domain Name in bad faith (paragraph 4(b)(iv) of the Policy):

- (i) circumstances indicating that the Respondent has registered or has acquired the Domain Name primarily for the purpose of selling, renting, or otherwise transferring the Domain Name registrations to the Complainant who is the owner of the trade mark or service mark or to a competitor of the Complainant, for valuable consideration in excess of its documented out-of-pocket costs directly related to the Domain Name; or
- (ii) the Respondent has registered the Domain Name in order to prevent the owner of the trade mark or service mark from reflecting the mark in a corresponding domain name, provided that the Respondent has engaged in a pattern of such conduct; or
- (iii) the Respondent has registered the Domain Name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the Domain Name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its web site or other on-line location, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's web site or location or of a product or service on the Respondent's web site or location.

The Domain Name was registered well after the EPCON Mark was first used and registered. The Panel finds, on the balance of probabilities, that the Respondent would have been aware of the Complainant and its reputation in the EPCON Mark at the time the Respondent registered the Domain Name. There is no obvious reason, nor has the Respondent offered an explanation, for the Respondent to register a domain name confusingly similar to the EPCON Mark and use it for a pay-per-click website that refers to the Complainant's services unless there was an intention to create a likelihood of confusion between the Domain Name and the EPCON Mark.

The Domain Name has been used for a parking page with pay-per-click links for which the Respondent undoubtedly received some commercial gain. In these circumstances where the Respondent has offered no plausible explanation for the registration of the Domain Name, the Panel finds that the Respondent is using the Domain Name to intentionally attempt to attract, for commercial gain, Internet users to its website by creating a likelihood of confusion with the EPCON Mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's website. As such the Panel finds that the Domain Name is being used in bad faith pursuant to 4(b)(iv) of the Policy.

Accordingly, the Panel finds that the Respondent has registered and is using the Domain Name in bad faith under paragraph 4(a)(iii) of the Policy.

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 <epconcommunity.com> be transferred to the Complainant.

/Nicholas Smith/

Nicholas Smith

Sole Panelist

Date: November 18, 2022