WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

CBS Radio Inc. v. Ron Bunce

Case No. D2000-0902

1. The Parties

The Complainant is CBS Radio Inc., a corporation organized in the State of Delaware, United States of America (USA), with place of business in New York, New York, USA.

The Respondent is Ron Bunce, with address in El Dorado Hills, California, USA.

2. The Domain Name and Registrar

The disputed domain name is "kzzo.com".

The registrar of the disputed domain name is Network Solutions, Inc., with business address in Herndon, Virginia, USA.

3. Procedural History

The essential procedural history of the administrative proceeding is as follows:

(a) The Complainant initiated the proceeding by the filing of a complaint by courier mail received by the WIPO Arbitration and Mediation Center ("WIPO") on July 31, 2000, and by e-mail received by WIPO on August 7, 2000. Payment by Complainant of the requisite filing fees accompanied the courier mailing. On August 7, 2000, WIPO transmitted a Request for Registrar Verification to the registrar, Network Solutions, Inc. (with the Registrar's Response received by WIPO on August 14, 2000). On August 15, 2000, WIPO completed its formal filing compliance requirements checklist.

(b) On August 18, 2000, WIPO transmitted notification of the complaint and commencement of the proceeding to Respondent via e-mail, telefax and courier mail. WIPO also transmitted such notification to Respondent's Technical Contact by the same methods.

(c) Respondent's response was received by WIPO via e-mail on September 7, 2000, and via courier mail on September 12, 2000. Respondent also transmitted the response to Complainant.

(d) On October 9, 2000, WIPO invited the undersigned to serve as panelist in this administrative proceeding, subject to receipt of an executed Statement of Acceptance and Declaration of Impartiality and Independence ("Statement and Declaration"). On October 9, 2000, the undersigned transmitted by fax the executed Statement and Declaration to WIPO.

(e) On October 10, 2000, Complainant and Respondent were notified by WIPO of the appointment of the undersigned sole panelist as the Administrative Panel (the "Panel") in this matter. WIPO notified the Panel that, absent exceptional circumstances, it would be required to forward its decision to WIPO by October 24, 2000. On October 10, 2000, the Panel received an electronic file in this matter by e-mail from WIPO. The Panel subsequently received a hard copy of the file in this matter by courier mail from WIPO.

(f) The file transmitted to the Panel by WIPO included, in addition to the complaint and response, a supplemental filing by Complainant in the form of a Declaration of Jeff Salgo, received in hard copy and via e-mail by WIPO on September 18, 2000. Said supplemental filing was not accompanied by any request directed to the Panel. On September 20, 2000, Respondent transmitted to WIPO via e-mail and telefax a request that the aforesaid supplemental filing be disregarded by the Panel.

The Panel has not received any further requests from Complainant or Respondent regarding further submissions, waivers or extensions of deadlines, and the Panel has not found it necessary to request any additional information from the parties. The proceedings have been conducted in English.

4. Factual Background

Complainant has registered the letter service mark "KZZO" on the Principal Register of the U.S. Patent and Trademark Office (USPTO) (reg. no. 2,329,689, dated March 14, 2000). Such registration claims a date of first use in commerce of June 1, 1997, is in international class 38, and covers "radio broadcast services." (Complaint, para. 12 and Exhibit C).

Complainant owns and operates a radio station in Sacramento, California that uses the call letters "KZZO" to identify its broadcasts. Complainant also uses the "KZZO" mark to identify its broadcast station on a website with Internet address "www.radiozone.com". (*Id.*, para. 12 and Exhibits D and E).

According to the registrar's verification response to WIPO, dated August 14, 2000, "Bunce, Ron" is the listed registrant of the domain name "KZZO.COM". The Administrative Contact is "Bunce, Ron", whose e-mail address is listed as "ron@kwod.com". The addresses listed for the registrant and the Administrative Contact are identical. (Registrar's Response, *supra*). A Network Solutions' WHOIS database search indicates that the record of registration was created on November 17,

1999, and that the record was last updated on November 17, 1999 (Complaint, Exhibit A).

Respondent is an employee of radio station "KWOD". Radio station "KWOD" is a direct competitor of Complainant's "KZZO" radio station in the Sacramento, California broadcast market. (Complaint, para. 12) (undisputed by Respondent).

Complainant has submitted a sworn Declaration of its KZZO radio station Vice President and Station Manager, Jeff Salgo, dated July 25, 2000, stating, *inter alia*,

> "5. I recently learned that an individual named Ron Bunce had registered 'KZZO.COM' as a domain name on the Internet. Mr. Bunce is an employee of radio station KWOD, a direct competitor of KZZO in the Sacramento market.
>
> "6. I had several conversations with Mr. Bunce regarding the KZZO.COM domain name. Mr. Bunce advised me that he would not transfer the KZZO.COM domain name to KZZO without compensation. I offered to reimburse Mr. Bunce for his registration fees in connection with the KZZO.COM domain name. Mr. Bunce responded that this amount was not sufficient, and that if I wanted the KZZO.COM domain name, I would have to pay more." (Declaration of Jeff Salgo, July 25, 2000, Complaint, Exhibit E)

Respondent Ron Bunce has submitted a sworn Declaration, dated September 6, 2000. In this Declaration he states that for several years he thought about setting up an on-line business specializing in sports apparel, and that "I wanted to name the business Kazoo." He states that he registered the domain name "kzzo.com" after determining that "kazoo.com", "kazoo.net" and "kazoo.org" had been registered by other persons. He states:

> "2. I began to think of alternative potential domain names for 'KAZOO,' and realized that 'KZZO' was an available domain name, and substantially similar to the name that I originally wanted for the retail clothing site. Therefore, on or about November 1999, I registered the domain name 'KZZO.com' and 'KZZO.net'.
>
> "3. Over the past year, I have been trying to develop a business plan, and have researched feasibility of my idea to start an online retail business. I have been in contact with many apparel providers including Adobe Graphics, Just Call, Capstone and Direct Promotions, as well as local extreme sports merchandise providers.
>
> "4. I have also been working with Ron Winter from California Commerce Insurance Services … to obtain business insurance for KAZOO (kzzo.com). I am currently having the website KZZO.com hosted and am setting up graphics."
> …
>
> "6. When I registered 'KZZO.com', I did not have any malicious intent to sell the domain name to the highest bidder with the sole purpose of financial gain. I did not plan to use this site as a competitor to the radio station, KZZO." (Declaration of Ron Bunce, Sept. 6, 2000, Response, Exhibit A)

Respondent has also submitted a sworn Declaration of Rob Winter, the aforesaid insurance agent, stating, *inter alia*, that "On or about mid summer 2000, Mr. Ron Bunce

contacted me regarding obtaining a professional liability insurance policy for an internet marketing business. Recently, he expressed interest in a general liability policy." (Declaration of Rob Winter, Sept. 6, 2000, Response, Exhibit B)

The Service Agreement in effect between Respondent and Network Solutions subjects Respondent to Network Solutions' dispute settlement policy, the Uniform Domain Name Dispute Resolution Policy, as adopted by ICANN on August 26, 1999, and with implementing documents approved by ICANN on October 24, 1999. The Uniform Domain Name Dispute Resolution Policy (the "Policy") requires that domain name registrants submit to a mandatory administrative proceeding conducted by an approved dispute resolution service provider, of which WIPO is one, regarding allegations of abusive domain name registration (Policy, para. 4(a)).

5. Parties' Contentions

A. Complainant

Complainant states in its own words:

V. "Factual and Legal Grounds

12. "This Complaint is based on the following grounds:

- "Since at least June 1, 1997, Complainant has used the KZZO mark in interstate commerce in connection with its radio broadcasting services; specifically, the broadcasting services of KZZO-FM, a radio station owned and operated by Complainant that broadcasts to the Sacramento, California market.
- "Complainant (a/k/a CBS Radio License Inc.) is the owner of, *inter alia,* the following valid, subsisting and existing federal service mark registration with the United States Patent and Trademark Office for the KZZO mark: United States Registration No. 2,329,689 (for radio broadcasting services), registered on March 14, 2000. (A copy of said registration certificate is annexed to the hard copy of this Complaint as [an] Annex [hereto], and is incorporated herein by reference). Complainant's registration certificate is *prima facie* evidence of the validity of Complainant's trademark and its exclusive right to use this trademark in commerce. Even if this were not the case, Complainant enjoys common law trademark rights in the KZZO mark since it uses the mark as a trademark to promote its radio broadcasting services. *See LIN Television Corporation v. Home In USA*, WIPO Case No. D2000-0257 (recognizing that '[b]roadcasting call letters can serve as trademarks, if they are used in a trademark sense').
- "Complainant is famous for its radio broadcasting and entertainment services. Complainant undertakes broadcasting and entertainment services under the KZZO mark, including use of the KZZO mark as its call letters and business name in the Sacramento market. (A copy of stationery reflecting use of the KZZO mark as a business name is annexed to the hard copy of this Complaint as [an] Annex [hereto]).
- "Complainant has spent a substantial sum of money advertising and promoting its radio broadcasting services under the KZZO mark, which has resulted in the creation of a great deal of goodwill and popularity for the KZZO mark.
- "Complainant also maintains a presence on the Internet, through a website located at www.radiozone.com. This website contains numerous references to Complainant's KZZO trademark. (A printout of Complainant's home page is annexed to the hard copy of this Complaint as [an] Annex [hereto]).

- "As a result of Complainant's use of the KZZO mark, its advertising and promotional efforts and expenditures in connection with the mark, and the wide recognition achieved for the mark, the public has come to associate the KZZO mark with services originating with, emanating from, sponsored by or otherwise associated with or approved by Complainant. In addition, the KZZO mark also has become an extremely valuable symbol of Complainant.
- "On November 17, 1999, Respondent registered the domain name KZZO.COM, which is confusingly similar to the mark KZZO. The addition of the generic top-level domain (gTLD) name '.com' is without legal significance. *See, e.g.*, *Sporty's Farm v. Sportsman's Market*, 202 F.2d 489, 498 (2d Cir. 2000) (citing *Brookfield Comm. Inc. v. West Coast Entertainment Group*, 174 F.3d 1036 (9th Cir. 1999)).
- "Respondent registered the domain name in bad faith. Respondent has no rights or legitimate interests in the domain name. Respondent is not (either as an individual, business or other organization) commonly known by the name KZZO or KZZO.COM.
- "To the contrary, Respondent is an employee of radio station KWOD, a direct competitor of KZZO in the Sacramento market.
- "Jeff Salgo, the General Manager of radio station KZZO has had several conversations with Respondent regarding the domain name. Respondent has indicated that he would not transfer the domain name to Complainant without compensation. While Mr. Salgo offered to reimburse Respondent his registration fees only, Respondent stated that this amount was not sufficient, and that if Complainant wanted to buy the name, it would have to pay more. (*See* Declaration of Jeff Salgo, a copy of which is annexed hereto as [an] Exhibit [hereto]). *See also CBS Broadcasting Inc. v. Saidi*, WIPO Case No. D2000-0243 at ¶¶ 6.7-6.8 (holding that 'an offer to sell the domain name for valuable consideration in excess of the documented out-of-pocket costs directly related to the domain name, is not only evidence of, but conclusively establishes that, the domain name has been registered and is being used in bad faith,' and that such an offer is *not* barred from evidentiary consideration by Rule 408 of the Federal Rules of Evidence).
- "Respondent's bad faith is further confirmed because Respondent has failed to develop a web site at this domain name and has failed to make any other good-faith use of the domain name. *See, e.g., Telstra Corporation Ltd. v Nuclear Marshmallows*, WIPO Case No. D2000-0003; *CBS Broadcasting Inc. v. Edward Enterprises*, WIPO Case No. D2000-0242.
- "After learning of Respondent's registration of the KZZO.COM domain name, counsel for Complainant sent a letter to Respondent, advising it that Complainant was the owner of the KZZO mark, and that Respondent's registration of the domain name KZZO.COM constituted a violation of Complainant's rights in the KZZO mark. Complainant also requested that Respondent transfer the domain name to it. Respondent has refused to comply with Complainant's request." (Complaint)

Complainant requests that the Panel ask the registrar to transfer the domain name "kzzo.com" from Respondent to it (*id.*, para. 13).

B. Respondent

Respondent states in its own words:

B. "<u>Response to Statements and Allegations Made in Complaint</u>
(Policy, paras. 4(a),(b), (c); Rules, para. 5)
"1. <u>Background of Respondent's Company</u>.
"In the spring of 1999, Respondent began a new business venture in which he planned to market and sell extreme sports apparel and merchandise over the Internet. Respondent

named his company 'KAZOO.' Immediately thereafter, Respondent went to 'networksolutions.com' in order to secure the domain name for this new Internet-based company. To his dismay, the domain name 'KAZOO.COM' was unavailable. Consequently, Respondent proceeded to enter variations of the word 'KAZOO' and ultimately decided upon 'KZZO.COM,' as an acceptable derivative of KAZOO. In the course of developing KAZOO, Respondent has sought financial backers and operations managers to facilitate the growth of his endeavor. *See* Declaration of Ron Bunce, a copy of which is attached hereto as [an] Exhibit [hereto]. In addition, Respondent has received quotes from an insurance broker as to the costs of obtaining liability coverage for KAZOO. *See* Declaration of Rob Winters, a copy of which is attached hereto as [an] Exhibit…

"2. Respondent Does Have Legitimate Interests in the Domain Name. Paragraph 4(c) of the Policy presents a non-inclusive list of particular types of evidence used to determine if a respondent has rights or legitimate interests to a domain name: …

"In its Complaint, the Complainant states that 'Respondent is not (either an as [sic] individual, business, or other organization) commonly known by the name KZZO or KZZO.COM' (Complaint, p. 6). However, prior to receiving any notice of this dispute, Respondent conceptualized and began to develop a business plan for KAZOO, as outlined above, in order to market and sell extreme sports apparel and merchandise. Thus, while Respondent is not personally known as KZZO or KZZO.COM, his company, KAZOO, uses KZZO.COM as its website address. Thus, under paragraph 4(c) of the Policy, Complainant's Complaint should fail, so long as the Respondent's business is commonly known by the domain name KZZO or KZZO.COM.

"As outlined above, and verified by [the] Exhibits [hereto], Respondent has undertaken demonstrable preparations in connection with the establishment of KAZOO. First and foremost in importance to a fledgling Internet company is the acquisition of an acceptable domain name, a step which Respondent has taken. Additional preparations include various meetings with prospective customers, teleconferences with suppliers, discussions with investors, and meetings with insurance carriers. While these initial meetings, discussions and teleconferences have not yet resulted in actual sales, these activities, just like registering a domain name, are all critical to establishing a new Internet company.

"3. There is No Evidence of Registration and Use of the Domain Name in Bad Faith. Respondent is not using the domain name in bad faith or as an attempt to collect a large sum of money for the transfer of the domain name. Nor is Respondent in the practice of registering domain names and selling them to the highest bidder. Instead, Respondent conceptualized an Internet business to engage in the marketing and selling of extreme sports apparel and merchandise. Respondent did not act in bad faith in registering his domain name because there is no likelihood of confusion between Complainant's services and Respondent's goods. The applicable legal standard is that establishing a likelihood of confusion is a primary indicator for determining bad faith. In fact, Paragraph 4(b)(iv) of the Policy states the following factor in determining whether Respondent acted in bad faith:

> By using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your 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 your web site or location or a product or service on your web site or location (*emphasis added*).

"In accordance with the above factor, a likelihood of confusion between Complainant's and Respondent's lines of business would evidence Respondent's bad faith use of the domain name. Conversely, the lack of confusion demonstrates Respondent's good faith use of the domain name. The Ninth Circuit has held that:

> When the goods produced by the alleged infringer compete for sales with those of the trademark owner, infringement usually will be found if the marks are sufficiently similar that confusion can be expected. When the goods are [possibly] related, but not competitive, several other factors are added to the calculus. If the goods are totally unrelated, there can be no infringement because confusion is unlikely. AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 204 U.S.P.Q. 808 (9th Cir. 1979).

As such, when goods and services are totally unrelated, as they are here, there can be no bad faith because confusion is unlikely. Here, the marketing and sale of extreme sports apparel and merchandise is totally unrelated to radio services. There is no nexus which might establish a likelihood of confusion and thus, according to Paragraph 4(b)(iv) of the Policy, there is no bad faith.

"Furthermore, the mere fact that Complainant may give away and sell T-shirts or other articles of clothing which display or advertise the radio station's call letters (KZZO-FM) does not create a likelihood of confusion. *See* Michael Caruso & Co., v. Estefan Enterprises, Inc., 994 F. Supp. 1454, 1461 (S.D. Fla. 1998), *affirmed by* 166 F.3d 353 (11th Cir. (Fla.) 1998)(The mere fact that both clothing manufacturer's and restaurant's marks incorporated form of common word 'bongo' did not render marks similar, in determining likelihood of confusion, where parties' marks clearly conveyed different commercial impressions.) *See also*, Lanham Trademark Act, §§ 1-45, 15 U.S.C.A. §§ 1051-1127. In Caruso, the court held that a restaurant that supplementally sold T-shirts did not create a likelihood of confusion with a clothing manufacturer. In our situation, the Complainant radio station may sell or give away T-shirts or other articles of clothing bearing the KZZO call sign. However, according to case law, that does not restrict the right of Respondent to market and sell extreme sports apparel and merchandise.

"In response to Complainant's assertion that Respondent would not transfer the domain name to Complainant without compensation beyond the cost of registration fees (*see* p. 6 of Complaint), Respondent hereby introduces California Evidence Code Section 1152(a) which provides, in part, the following: '[A]ny conduct or statements made in negotiation [to compromise are] inadmissible to prove his liability . . . .' Thus, all evidence introduced in the course of an offer to compromise is inadmissible under California law. Here, California law applies because the negotiations occurred in California. The dispute cited by Complainant, CBS Broadcasting Inc. v. Saidi, WIPO Case No. D2000-0243, flies directly in the face of this established California law." (Response)

6. Discussion and Findings

The Uniform Domain Name Dispute Resolution Policy (the "Policy") adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999 (with implementing documents approved on October 24, 1999), is addressed to resolving disputes concerning allegations of abusive domain name registration. This sole panelist has in an earlier decision discussed the background of the administrative panel procedure, and the legal characteristics of domain names, and refers to this earlier decision for such discussion.[1] The Panel will confine itself to making determinations necessary to resolve this administrative proceeding.

It is essential to dispute resolution proceedings that fundamental due process requirements be met. Such requirements include that a respondent has notice of proceedings that may substantially affect its rights. The Policy, and the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), establish procedures intended to assure that respondents are given adequate notice of proceedings commenced against them, and a reasonable opportunity to respond (see, *e.g.,* para. 2(a), Rules).

[1] *See* Educational Testing Service v. TOEFL, Case No. D2000-0044, decided March 16, 2000.

In this proceeding, Respondent has furnished a detailed Response to the Complaint in a timely manner. There is no issue as to whether Respondent received adequate notice of these proceedings.

As a procedural matter, the Panel does not accept or consider Complainant's supplemental filing. Although a panel has broad discretion to accept supplemental submissions by parties (Rules 10(a)-(b) and 12), Complainant in this proceeding presented no request to the Panel to file its supplemental submission, nor did Complainant indicate to the Panel any reason why it should accept it.

Paragraph 4(a) of the Policy sets forth three elements that must be established by a complainant to merit a finding that a respondent has engaged in abusive domain name registration, and to obtain relief. These elements are that:

(i) respondent's domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) respondent has no rights or legitimate interests in respect of the domain name; and

(iii) respondent's domain name has been registered and is being used in bad faith.

Each of the aforesaid three elements must be proved by a complainant to warrant relief.

Complainant is the holder of a service mark registration for the letter mark "KZZO" and has used that mark in commerce (*see* Factual Background, *supra*). Complainant's registration of the "KZZO" mark on the Principal Register at the PTO establishes a presumption of its validity in U.S. law.[2] The Panel determines that Complainant has rights in service mark "KZZO". Based on the June 1, 1997, date of first use claimed in Complainant's service mark registration, and in the absence of contrary evidence from Respondent, the Panel determines that Complainant's rights in the mark arose prior to Respondent's registration, on November 17, 1999, of the disputed domain name "kzzo.com".

Respondent has registered the domain name "kzzo.com". This name is identical to Complainant's service mark "KZZO", except that (1) the domain name adds the generic top-level domain ".com", and (2) the domain name employs lower case letters, while the mark is generally used with capital letters.

Respondent's addition of the generic top-level domain (gTLD) ".com" to Complainant's mark is without legal significance since use of a gTLD is required of domain name registrants, ".com" is one of only several such gTLDs, and ".com" does not serve to identify a specific service provider as a source of goods or services.[3]

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[2] 15 USCS § 1057(b). See, e.g., Avery Dennison v. Sumpton, 189 F.3d 868 (9th Cir. 1999).

[3] *See* Sporty's Farm v. Sportsman's Market, 202 F.3d 489, 498, (2d Cir. 2000), citing Brookfield Communications v. West Coast Entertainment, 174 F.3d 1036, 1055 (9th Cir. 1999). For purposes of its decision, the Panel need not address whether ".com" may be capable of acquiring secondary meaning in another context.

Similarly, insofar as domain names are not case sensitive, the Panel concludes that use of the lower case letter format in "kzzo.com" is a difference without legal significance from the standpoint of comparing "kzzo.com" to "KZZO".[4]

Respondent has argued that because he intends to use the disputed domain name for an Internet-based business involving the retail sale of sports apparel, the name should not be considered confusingly similar to Complainant's mark (that is primarily used to identify Complainant's radio broadcast services). However, Respondent has not made use of the disputed domain name in commerce, and his assertion is merely hypothetical. Respondent is not using a domain name which is substantially similar to Complainant's mark in a distinct line of commerce, nor (as discussed below) has he made demonstrable preparations to use that domain name.

For purposes of this proceeding, it is unnecessary to decide whether, in light of the foregoing factors, Respondent's domain name "kzzo.com" is "identical" to Complainant's service mark, since Respondent's domain name "kzzo.com", is without doubt confusingly similar to Complainant's service mark "KZZO".

Complainant has established the first of the three elements necessary to a finding that Respondent has engaged in abusive domain name registration.

The second element of a claim of abusive domain name registration is that the respondent has no rights or legitimate interests in respect of the domain name (Policy, para. 4(a)(ii)). The Policy enumerates several ways in which a respondent may demonstrate rights or legitimate interests:

> "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)
>
> (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 trademark or service mark rights; or
>
> (iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue." (Policy, para. 4(c)).

There is no evidence on the record of this proceeding to suggest that Respondent has been commonly known by the disputed domain name, or that Respondent has made legitimate noncommercial or fair use of the name.

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[4] *See* Brookfield, *id.*

Respondent has sought to establish rights or legitimate interests in the disputed domain name by asserting that he has made demonstrable preparations to use the name in connection with a bona fide offering of goods, before notice to him of this dispute. In support of this assertion, Respondent submits his own declaration stating that he has thought about a business for some time, that he has talked to some potential suppliers of products, and that he has contacted an insurance agent. He has submitted the affidavit of an insurance agent that makes no reference to a business name, and does not explain why the agent did not seek to obtain a rate quote when initially contacted (such that might more concretely establish when and for what purpose he was contacted).

Respondent asserts that his choice of the domain name "kzzo.com" followed frustration of his initial intention to register and use the domain name "kazoo.com" and other "kazoo"-formative names.

Respondent works for radio station "KWOD" in Sacramento. His e-mail address, as listed in the registration of the disputed domain name, is at "kwod.com". "KZZO" and "KWOD" are direct competitors in the same geographical market for radio broadcast services. Under these circumstances, the mere assertion of an intention to establish a business, unaccompanied by documentary support (except the non-specific recollections of an insurance agent), do not "demonstrate" preparations to use the name for a *bona fide* offering of goods or services. To the reasonable finder of fact, the likelihood that an employee of a competitor of "KZZO" would choose "kzzo.com" as a domain name because he intended to establish a business named "kazoo", and without regard to the "KZZO" mark, is exceedingly low. The Panel might have been persuaded that merely coincidental events transpired, but this would have required more persuasive evidence than is present on the record of this proceeding.

The Panel determines that Respondent has no rights or legitimate interests in the disputed domain name. Thus, the Complainant has established the second element necessary to prevail on its claim that Respondent has engaged in abusive domain name registration.

The Policy indicates that certain circumstances may, "in particular but without limitation," be evidence of bad faith (Policy, para. 4(b)). Among these circumstances are: (1) that the domain name has been registered or acquired by a respondent "primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of [respondent's] documented out-of-pocket costs directly related to the domain name" (i*d.,* para. 4(b)(i)); (2) that a respondent has registered the domain name "in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that [the respondent has] engaged in a pattern of such conduct" (*id.*, para. 4(b)(ii)); (3) that a respondent has "registered the domain name primarily for the purpose of disrupting the business of a competitor" (*id.*, para. 4(b)(iii); and (4) that a respondent "by using the domain name, … [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 [respondent's] web site or location of a product or service on [its] web site or location" (*id.*, para. 4(b)(iv)).

Following notice of this dispute and a request from Complainant, Respondent refused to transfer the disputed domain name to Complainant for its out-of-pocket costs directly related to the domain name. Respondent demanded a higher price.[5]

Respondent's registration of the disputed domain name using the mark of Complainant's business (that is in competition with the business that employs him), combined with his demand for compensation in excess of his out-of-pocket costs of registration, persuades the Panel that Respondent registered and used the disputed domain name with the primary purpose of selling it to Complainant for valuable consideration in excess of his out-of-pocket expenses in connection with the name. Respondent has acted in bad faith within the meaning of paragraph 4(b)(i) of the Policy.

The Panel having determined that Respondent has acted in bad faith within the meaning of paragraph 4(b)(i) of the Policy, the Panel need not address whether Respondent's conduct may have additionally been in bad faith within the meaning of other parts of paragraph 4(b) of the Policy.

Complainant has established the third and final element necessary for a finding that the Respondent has engaged in abusive domain name registration.

The Panel will therefore request the registrar to transfer the domain name "kzzo.com" to the Complainant.

7. Decision

Based on its finding that the Respondent, Ron Bunce, has engaged in abusive registration of the domain name "kzzo.com" within the meaning of paragraph 4(a) of the Policy, the Panel orders that the domain name "kzzo.com" be transferred to the Complainant, CBS Broadcasting Inc.

Frederick M. Abbott
Sole Panelist

Dated: October 24, 2000

[5] Respondent has argued that consideration by the Panel of his undisputed demand for payment by Complainant is governed by, and is excluded by, the California Evidence Code. These proceedings are governed by the Rules (Policy, para. 1). The Panel has discretion to determine the admissibility of evidence under the Policy and Rules (Rules, para. 10(d)), and rules it deems applicable (Rules, para. 15(a)). The Rules do not require, and the Panel does not find it necessary or appropriate, to adopt the evidentiary rules of a particular U.S. state jurisdiction to conduct, as here, affecting multiple state jurisdictions.