WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

BroadcastAmerica.com, Inc. v. Cynthia Quo

Case No. DTV2000-0001

1. The Parties

The Complainant is BroadcastAmerica.com, Inc., a corporation organized in the State of Delaware, United States of America (USA), with place of business in Portland, Maine, USA.

The Respondent is Cynthia Quo, with address in Woodland Hills, California, USA.

2. The Domain Name and Registration Authority

The disputed domain name is "broadcastamerica.tv".

The Registration Authority for the disputed domain name is dotTV Corporation, with business address in Pasadena, California, USA.

3. Procedural History

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

a) Complainant initiated the proceeding by the filing of a complaint by e-mail received by the WIPO Arbitration and Mediation Center ("WIPO") on July 12, 2000, and by courier mail received by WIPO on July 17, 2000. Payment by Complainant of the requisite filing fees accompanied the courier mailing. On July 19, 2000, WIPO transmitted a Request for Registrar Verification to dotTV Corporation ("Registration Authority").

b) On July 28, 2000, the Registration Authority notified WIPO that the respondent named in the complaint ("Southern Global Investment Group and Kevin McLaine") did not match the respondent listed on the record of registration.

According to the Registration Authority, "Cynthia Quo" is the named registrant of record.

c) On August 1, 2000, WIPO completed its formal filing compliance requirements checklist. On August 4, 2000, WIPO notified Complainant of a deficiency in the complaint; namely, that the complaint did not accurately reflect the registrant of the disputed domain name.

d) On August 14, 2000, WIPO received from Complainant an amended complaint by e-mail, and on August 17, 2000, WIPO received from Complainant an amended complaint by courier mail.

e) On August 17, 2000, WIPO transmitted notification of the complaint and commencement of the proceeding to Respondent via e-mail and courier mail.

f) On September 17, 2000, WIPO transmitted notification to Respondent of its default in responding to the complaint via e-mail and courier mail.

g) On September 17, 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 September 17, 2000, the undersigned transmitted by fax the executed Statement and Declaration to WIPO.

h) On September 21, 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 4, 2000. On September 21, 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.

The Panel has not received any requests from Complainant or Respondent regarding further submissions, waivers or extensions of deadlines, and the Panel has not found it necessary to request any further information from the parties (taking note of Respondent's default in responding to the complaint). The proceedings have been conducted in English.

4. Factual Background

Complainant uses the mark "BroadcastAmerica.com" in connection with the offering of Internet broadcast services to users worldwide. More than 500 individual radio stations and 67 television stations in the United States and nine foreign countries employ Complainant as their exclusive Internet broadcast outlet (Complaint, para. 18 and Exhibit D). In June 2000, more than 2,000,000 individual users of the Internet accessed audio and video programming through the "broadcastamerica.com" website (*id.*, para. 21). Complainant is the registrant of the domain name "broadcastamerica.com" (*id.*, Exhibit H & I). Complainant's "BroadcastAmerica.com" mark is not registered with the United States Patent and Trademark Office. Complainant attests that it is not aware of any third party using the "BroadcastAmerica.com" mark either as a trademark, service mark or trade name in the United States or elsewhere (*id.*, para. 24).

On or about July 4, 2000, Kevin McLaine contacted Complainant by e-mail with an offer to sell the disputed domain name to it. When advised by return e-mail from Complainant that the matter would be referred to its legal counsel, Kevin McLaine offered to sell the name to Complainant for $1,500. Following receipt of a cease and desist and transfer demand from Complainant's counsel on July 5, 2000, Kevin McLaine indicated that he would auction the disputed domain name for $20,000 (e-mail of McLaine to Bruce Ewing of July 6, 2000, Complaint, Exhibit A), and he subsequently indicated that he had sold the disputed domain name to an undisclosed party for $500 (e-mail of McLeane to John Brier of July 10, 2000, *id.*).

At least as of the date of the filing of the initial complaint in this proceeding, the Registration Authority, dotTV, did not have an active "WHOIS" database query feature associated with its registration website, and Complainant's e-mail request to the Registration Authority for information regarding the registrant of the disputed domain name was not answered (initial complaint filed by Complainant, para. 8). On July 28, 2000, the Registration Authority notified WIPO that the listed registrant of the disputed domain name is "Cynthia Quo". The Registration Authority also notified WIPO that the Policy applies to the disputed domain name.

Complainant's counsel, Mr. Bruce Ewing, has attested:

> "Respondent [Cynthia Quo] advised the undersigned counsel during a telephone conversation on August 8, 2000 that she was entirely unaware that Mr. McLaine, who she identified as a former boyfriend, had registered the disputed domain name in her name. Respondent further indicated that McLaine had made unauthorized use of her credit card to accomplish this goal." (Complaint, para. 26)

The record of this proceeding contains no additional information regarding the interests of the listed registrant, Cynthia Quo, in the disputed domain name.

The Service Agreement in effect between Respondent and dotTV Corporation subjects Respondent to dotTV's 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 as follows:

> "15. In Accordance with the Rules, paragraph 3(b)(viii), Complainant states that the service mark and trade name on which this Amended Complaint is based is BROADCASTAMERICA.COM, which has been used since December 1999 by BroadcastAmerica.com in connection with Internet broadcasting services. BroadcastAmerica.com was founded in December 1998 under the name 'BroadcastMusic.com, Inc.' for the purpose of developing an Internet broadcasting

network at which streamed music programming could be made available to consumers. However, between December 1998 and December 1999, the company found that its business grew far beyond its original conception to encompass all manner of audio and video content. Accordingly, the company changed its name in December 1999 to BroadcastAmerica.com, Inc. to better reflect the breadth of its business. The 'broadcastamerica.com' domain name was acquired from a third party prior to the time this name change took effect.

"16. [An] Exhibit … hereto contains current printouts from the www.broadcastamerica.com website that depict how the BROADCASTAMERICA.COM service mark and trade name is used therein. [An] Exhibit … hereto contains copies of various advertisements and promotional materials used by BroadcastAmerica.com to promote its services under its BROADCASTAMERICA.COM mark and trade name since December 1999. [An] Exhibit … hereto contains copies of various press releases issued by BroadcastAmerica.com since December 1999 to promote the company and its services. [An] Exhibit … hereto contains copies of various news articles appearing in both trade and consumer publications since December 1999 discussing BroadcastAmerica.com and its services. [An] Exhibit … hereto contains a copy of a printout from the website maintained by Network Solutions, Inc. ('NSI') that confirms BroadcastAmerica.com's ownership of the 'broadcastamerica.com' domain name. (This NSI printout incorrectly refers to the company by its prior name 'BroadcastMusic.com, Inc.' in several places.) Exhibit … hereto is a copy of BroadcastAmerica.com's certificate of incorporation issued by the State of Delaware confirming its change of name in December 1999.

"17. As the foregoing evidence confirms, BroadcastAmerica.com has established rights in its BROADCASTAMERICA.COM service mark and trade name. As an initial matter, the BROADCASTAMERICA.COM mark is protectable because it is a 'suggestive' mark that requires 'imagination, thought and perception' on the part of consumers to connect the mark with the Internet broadcasting services offered by BroadcastAmerica.com. See [citations omitted]

"18. BroadcastAmerica.com's rights in its BROADCASTAMERICA.COM service mark and trade name have only been amplified by their extensive degree of use, advertising and publicity since December 1999. BroadcastAmerica.com, Inc. is in the business of offering a broad array of Internet broadcasting services to consumers located all over the world. Through the 'broadcastamerica.com' website, consumers can access music, talk and sports radio programming, as well as streamed television broadcasts, weather, news and educational content, and a wide variety of other features. (See Exh… hereto.) More than 500 individual radio stations and 67 television stations located in the United States and 9 international countries have made BroadcastAmerica.com their exclusive Internet broadcasting outlet, as have a number of prominent players in the syndicated radio programming industry, including Dick Clark's United Stations Radio Network and Jimmy Buffett's Radio Margaritaville. (Id.)

"19. In addition, BroadcastAmerica.com owns the domain name 'broadcastamericaTV.com,' and a copy of the current website page available at this domain name is attached hereto as [an] Exhibit …. In August 2000, BroadcastAmerica.com plans to begin airing dozens of well known 'classic' television programs at this website, including 'I Love Lucy,' 'Bonanza,' 'Dragnet' and 'The Lone Ranger.'

"20. BroadcastAmerica.com has extensively advertised and promoted its services to broadcasters and consumers. Every radio and television station carried on the 'broadcastamerica.com' website and every radio program syndicator is required to air commercials on multiple occasions each day directly to their listeners to tune into 'broadcastamerica.com.' These advertisements have been exposed to more than

100 million consumers, and their value to the company is no less than $10 million since December 1999. In addition, the BROADCASTAMERICA.COM mark has been featured in an extensive array of print advertising directed to professionals in the broadcasting industry. Indeed, the most recent convention of the National Association of Broadcasters that took place in Las Vegas, Nevada in April 2000 featured an enormous advertisement featuring the BROADCASTAMERICA.COM service mark on the outside of the Las Vegas Convention Center. (See Exh. …hereto.)

"21. The degree of recognition by consumers and the trade in the BROADCASTAMERICA.COM service mark and trade name is reflected in the extensive array of media coverage received by the company, including pieces by such well-known news outlets as the Associated Press and CNN. (See Exh. … hereto.) In addition, the President of BroadcastAmerica.com, John Brier, was recently nominated by the trade publication Radio Ink magazine as one of the 25 most influential people in the field of Internet streaming, alongside such luminaries as Bill Gates of Microsoft. (See Exh. … hereto.) Finally, the best measure of the success of the services advertised and promoted under the BROADCASTAMERICA.COM mark is the degree to which the website of that name is accessed by consumers. More than 2 million individual consumers in June 2000 alone accessed audio and video programming through the 'broadcastamerica.com' website. The total number of accesses of such programming in that month was more than 5 million.

"22. As a result of the quality of BroadcastAmerica.com's services, the tremendous volume of sales of services under the BROADCASTAMERICA.COM mark and the extensive promotion and advertisement of said mark, the BROADCASTAMERICA.COM service mark and trade name is famous, has acquired substantial goodwill belonging exclusively to BroadcastAmerica.com and has come to be and is recognized as an indicia of origin with BroadcastAmerica.com.

"23. The similarities between the BROADCASTAMERICA.COM mark and the disputed domain name 'broadcastamerica.tv' are phonetically and visually obvious. Indeed, the disputed domain name is identical to the BROADCASTAMERICA.COM mark but for the substitution of the descriptive '.tv' suffix in place of the equally descriptive '.com' suffix. This minor distinction does nothing to diminish the confusing similarity between the BROADCASTAMERICA.COM mark and the 'broadcastamerica.tv' domain name. See [citations omitted]

"24. The BROADCASTAMERICA.COM service mark has no meaning or significance other than as a service mark and trade name identifying BroadcastAmerica.com's services and distinguishing them from the services of others. BroadcastAmerica.com is aware of no third party using its mark as either a trademark, trade name or service mark in the United States or elsewhere. There is no relationship between Respondent and BroadcastAmerica.com, and Respondent is not a licensee of BroadcastAmerica.com, nor has Respondent otherwise obtained an authorization to use BroadcastAmerica.com's mark and trade name. Further, the domain name in dispute does not consist of Respondent's trade name. As such, Respondent has no legitimate interest in said domain name.

"25. The 'broadcastamerica.tv' domain name was registered in bad faith pursuant to Rule 4b(i) of the Rules because Mr. McLaine registered 'broadcastamerica.tv' in Respondent's name without her knowledge or consent primarily for the purpose of selling the domain name registration to BroadcastAmerica.com, which is the owner of the service mark that corresponds to the domain name in dispute, for valuable consideration in excess of the documented out-of-pocket costs directly related to the domain name. (As shown in [an] Exh. … hereto, the registrar of the disputed domain name charges only $100 to register a domain name with the '.tv' suffix.)

"26. Respondent advised the undersigned counsel during a telephone conversation on August 8, 2000 that she was entirely unaware that Mr. McLaine, who she identified as a former boyfriend, had registered the disputed domain name in her name. Respondent further indicated that McLaine had made unauthorized use of her credit card to accomplish this goal. BroadcastAmerica.com submits that such unauthorized registration by Mr. McLaine of the disputed domain name as part of an apparent effort to obscure the nature of his involvement demonstrates that the disputed domain name was registered in bad faith. In addition, as shown in the e-mail correspondence attached hereto as Exhibit A, Mr. McLaine, purporting to act on behalf of an apparently fictitious entity known as 'Southern Global Investment Group,' contacted BroadcastAmerica.com on July 4, 2000 to announce that his 'company' had 'recently registered (WWW.BROADCASTAMERICA.TV) in order to start an American Broadcast Internet Interactive Television Division' but that it now wanted to 'sell/transfer the name to BROADCASTAMERICA for a 'reasonable' price.' In subsequent communications later that day, after BroadcastAmerica.com indicated that it would not pay McLaine any money for the name at issue, McLaine responded 'Does it make sense to pay your attorneys to stop me from using [the 'broadcastamerica.tv' domain name] or just give me $1,500 to go away.' When this 'offer' was again rejected by BroadcastAmerica.com, McLaine labeled the refusal a 'very dumb move' and then announced that he would auction the name at an asking price of $20,000 on the Internet. Thereafter, McLaine purported to 'sell' the disputed domain name on July 8 or 9 for $500, but he refused to identify the purchaser and provided BroadcastAmerica.com with no written confirmation of this 'sale.' Based on information provided by the relevant registrar, no such 'sale' or transfer of the disputed domain name was ever processed, and it remains in Respondent's name.

"27. Numerous panels appointed pursuant to the Rules and the Supplemental Rules have recognized that this sort of conduct, in which a blatant efforts are made to market a domain name identical or confusingly similar to a service mark owned by a third party to that third party for financial gain shortly after the domain name is registered, amounts to bad faith use and registration of that domain name under paragraph 4(b)(i) of the Policy. [citations omitted]

"28. The disputed domain name at issue here has also been registered and used in bad faith pursuant to Rule 4(b)(iii) of the Policy because the use of the 'broadcastamerica.tv' domain name would disrupt the business of BroadcastAmerica.com. McLaine has claimed that he plans to use the disputed domain name in connection with an interactive television network similar to the services offered at www.broadcastamerica.com and even closer to the television broadcasts that BroadcastAmerica.com plans to air shortly at www.broadcastamericatv.com. In these circumstances, the use of the disputed domain name in accordance with McLaine's stated intention and in defiance of BroadcastAmerica.com's rights would clearly disrupt the complainant's business." (Complaint)

Complainant requests that the Panel ask the Registration Authority to transfer the domain name "broadcastamerica.tv" from Respondent to it (*id.*, para. 29).

B. Respondent

Respondent did not reply to Complainant's contentions.

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 have 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).

In this case, the Panel is satisfied that WIPO took all steps reasonably necessary to notify the Respondent of the filing of the complaint and initiation of these proceedings, and that the failure of the Respondent to furnish a reply is not due to any omission by WIPO. There is ample evidence in the form of air courier receipts and confirmations of the sending of e-mail that Respondent was notified of the complaint and commencement of the proceedings (*see* Procedural History, *supra*).

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.

Because the Respondent has defaulted in providing a response to the allegations of Complainant, the Panel is directed to decide this administrative proceeding on the basis of the complaint (Rules, para. 14(a)), and certain factual conclusions may be drawn by the Panel on the basis of Complainant's undisputed representations (*id.*, para. 15(a)).

This Administrative Proceeding exhibits certain characteristics not ordinarily present in proceedings conducted under the Policy.

The Complainant initially filed its complaint against a party claiming by e-mail to be the registrant of the disputed domain name. Complainant and WIPO subsequently determined that the listed registrant of that name was another party, and Complainant amended its complaint to reflect this new information.

Factual information concerning the circumstances of the registration was apparently available to Complainant only after it filed its initial complaint. This appears to have

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

resulted from the fact that, at least as of the relevant time prior to the filing of Complainant's initial complaint, the Registration Authority (dotTV Corporation) did not make available a WHOIS database query feature in connection with its registration website, and did not respond to Complainant's e-mail query for information regarding the identity of the registrant of the disputed domain name (*see* Factual Background, *supra*).

The named registrant of the disputed domain name has advised Complainant's counsel that the registration was undertaken in her name, without her knowledge, by a person using her credit card without her consent. This information has been submitted to WIPO and the Panel by Complainant's counsel in a formal legal document (i.e., the Complaint in this matter), and said counsel has personally certified the accuracy of his representation. In light of the ethical and legal obligations imposed on legal counsel in the United States (and elsewhere), the Panel accords such representation the presumption of veracity.

The person who apparently registered the disputed domain name in Respondent's name, but without her consent, offered to sell the name to Complainant. Although not expressly indicated in the complaint, the Panel assumes that this offer was also made without Respondent's consent.

The listed registrant (i.e., Respondent) has not responded to the complaint. At least insofar as the record would indicate, she has not expressed an interest in retaining the disputed domain name.[2]

Complainant has presented substantial evidence that it has acquired common law service mark rights in "BROADCASTAMERICA.COM". This includes evidence of extensive use of that mark to identify Complainant as the source of broadcast services over the Internet, and evidence that there is wide recognition among Internet users of Complainant as the source of broadcast services. Respondent has not challenged this evidence. For purposes of this proceeding, the Panel determines that Complainant has common law rights in the service mark "BROADCASTAMERICA.COM."

Respondent has registered the domain name "BROADCASTAMERICA.TV". Based on a comparison of the overall impression that "BROADCASTAMERICA.TV" as a domain name and "BROADCASTAMERICA.COM" as a service mark (and domain name) are likely to make on users of the Internet, the Panel determines that the domain name "BROADCASTAMERICA.TV" is confusingly similar to the service mark "BROADCASTAMERICA.COM" within the meaning of paragraph 4(a)(i) of the Policy.[3] Complainant has therefore established the first of the three elements necessary to a finding that Respondent has engaged in abusive domain name registration.

---

[2] The Panel recognizes that Respondent could have volunteered to transfer the disputed domain name to Complainant, and there is no indication she did so. However, since Complainant had initiated this proceeding prior to learning of Respondent's identity and contacting her, and had paid its filing fees and largely absorbed its legal costs, the Panel also considers that Complainant had only a limited interest in a voluntary offer to transfer from Respondent.

[3] The Panel's analysis of confusing similarity in this proceeding is informed by the bad faith motives of the party undertaking the registration. *See* Brookfield Communications v. West Coast Entertainment, 174 F.3d 1036, 1059 (9th Cir. 1999).

There is no evidence on the record of this proceeding that Respondent may hold any rights or legitimate interests in the disputed domain name. Respondent appears to have disclaimed any interest in the disputed domain name.

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 third element needed to establish abusive domain name registration, as stated in Paragraph 4(a) of the Policy, is: "(iii) your domain name has been registered and is being used in bad faith."

Respondent has stated that an acquaintance, without her consent, registered the disputed domain name. That party offered to sell the disputed domain name to Complainant for an amount substantially in excess of his out-of-pocket expenses associated with registration. Paragraph 4(b)(i) of the Policy specifically addresses a respondent's registration of a domain name with the primary intention of selling to a complainant or its competitor for an amount in excess of out-of-pocket expenses connected with registration. Paragraph 4(b)(i) of the Policy does not expressly contemplate the atypical circumstances of this proceeding (that is, when a third party has undertaken registration without the consent of the listed registrant), but the express enumeration of bad faith factors in paragraph 4(b) of the Policy is non-exhaustive.

Although the named Respondent may not herself have engaged in any bad faith act, the disputed domain name has in fact been registered and used in bad faith. Bad faith constitutes the third element of abusive domain name registration under paragraph 4(a)(iii) of the Policy. The Panel determines that the disputed domain name was registered and used in bad faith because it was registered with the primary intention of sale to Complainant for an amount in excess of Respondent's out-of-pocket expenses connected with registration.

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 Registration Authority to transfer the domain name "broadcastamerica.tv" to the Complainant.

7. Decision

Based on its finding that the Respondent, Cynthia Quo, has engaged in abusive registration of the domain name "broadcastamerica.tv" within the meaning of paragraph 4(a) of the Policy, the Panel orders that the domain name "broadcastamerica.tv" be transferred to the Complainant, BroadcastAmerica.com, Inc.

Frederick M. Abbott
Sole Panelist

Dated: October 4, 2000