

**WORLD INTELLECTUAL PROPERTY ORGANIZATION
ARBITRATION AND MEDIATION CENTER**

Mercury Radio Arts, Inc &
Glenn Beck
Complainants

v.

Isaac Eiland-Hall
Respondent

Disputed Domain Name:
glennbeckrapedandmurderedayou
nggirlin1990.com

RESPONSE

(Rules, ¶ 5(b))

On September 21, 2009, the Respondent received a Notification of Complaint and Commencement of Administrative Proceeding from the WIPO Arbitration and Mediation Center (**Center**) by both email and fax informing the Respondent that an administrative proceeding had been commenced by the Complainant in accordance with the Uniform Policy for Domain Name Dispute Resolution, adopted by the Internet Corporation for Assigned Names and Numbers (**ICANN**) on August 26, 1999 (the **UDRP**), the Rules for Uniform Domain Name Dispute Resolution Policy, approved by ICANN on October 24, 1999 (the **UDRP Rules**), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the **WIPO Supplemental UDRP Rules**). The Center set October 11, 2009 as the date for the submission of a Response by the Respondent.

The Respondent hereby responds to the statements and allegations in Complaint and respectfully requests the Panel to deny the remedy requested by the Complainant.

Respondent's Contact Details

(UDRP Rules, ¶ 5(b)(ii) and (iii))

For the purposes of the administrative proceeding, the Respondent's contact details are as follows:

Name: *Isaac Eiland-Hall*
Address: *c/o Marc J. Randazza, Esquire*
Telephone: *978-865-4101*
Fax: *305-437-7662*
E-mail: *marc@mjrpa.com*

The Respondent's authorized representative in this administrative proceeding is:

*Marc J. Randazza, PA
P.O. Box 5516
Gloucester, Massachusetts 01930
Tel: 978-865-4101
Fax: 305-437-7662*

The Respondent's preferred method of communications directed to the Respondent in the administrative proceeding is as follows:

Electronic-only material

Method: *e-mail*
Address: *marc@mjrpa.com*
Contact: *Marc John Randazza*

Material including hardcopy

Method: *fax*
Address: *P.O. Box 5516, Gloucester, MA 01930*
Fax: *305-437-7662*
Contact: *Marc John Randazza*

The Parties stipulated on September 21, 2009 that unless required by technological limitations, that all communications should be transmitted electronically between the parties and the Centre.

Response to Statements and Allegations Made in Complaint
The Requested Relief Should be Denied

(Policy, ¶¶ 4(a), (b), (c); Rules, ¶ 5)

I. Introduction

The Complaint fails for multiple reasons. The Complaint fails to establish rights as required by the UDRP. Even if the Panel accepts that the Complaint establishes these rights, the Respondent has legitimate rights to the domain name.

To evaluate this case, the Panel must understand the cultural, social, and political background behind the Respondent's website. Without this knowledge, the Respondent's selection of the domain name might seem puzzling, mean-spirited, and at first blush might seem to carry indicia of a false accusation against the Complainant. However, none of this is true. The website is a legitimate criticism site, consists of political satire, and thus the Respondent has legitimate rights in the domain name.

Mr. Beck's attempt to censor this criticism is improper and should be rejected.

A. Why Are We Here? This is not a UDRP Issue.

The UDRP is not designed to resolve all Internet-related grievances. It is designed to handle a "relatively narrow class of cases of 'abusive registrations.'" See [Second Staff Report on Implementation Documents for the UDRP ¶ 4.1\(c\)](#).¹

None of the factors in ¶ 4(b) of the UDRP apply. There is no evidence that Respondent has registered and used the domain name for the purpose of selling it for profit. Respondent is not engaged in a pattern of cybersquatting. Respondent did not register the domain name to disrupt the business of a competitor, he registered it to pay homage to an existing internet meme that poked fun at Glenn Beck, to poke fun at Glenn Beck directly, and to express his political opinions.

There is no indication that the Respondent has intentionally attempted to confuse anyone searching for Mr. Beck's own website, nor that anyone was unintentionally confused – even initially. Only an abject imbecile

¹ <http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm>

could believe that the domain name would have any connection to the Complainant.

We are not here because the domain name could cause confusion. We do not have a declaration from the president of the international association of imbeciles that his members are blankly staring at the Respondent's website wondering "where did all the race baiting content go?" We are here because Mr. Beck wants Respondent's website shut down. He wants it shut down because Respondent's website makes a poignant and accurate satirical critique of Mr. Beck by parodying Beck's very rhetorical style. Beck's skin is too thin to take the criticism, so he wants the site down. Beck is represented by a learned and respected legal team. Accordingly, it is beyond doubt that his counsel advised him that under the First Amendment to the United States' Constitution, no action in a U.S. Court would be successful. See, e.g., [Hustler Magazine, Inc. v. Falwell, 485 U.S. 46](#) (1988). Accordingly, Beck is attempting to use this transnational body to circumvent and subvert the Respondent's constitutional rights.

B. The UDRP is not for Defamation Claims.

Mr. Beck attempts to gather sympathy by arguing that he is being defamed. That is quite clearly not the case, as Respondent's site is satirical political humor, not unlike the famous Campari ad in *Hustler v. Falwell, supra*. See Annex A. Even if Beck's defamation claims were valid, these claims are not properly brought under the Policy. See, e.g., *Jules Kendall v. Donald Mayer*, [WIPO Case No. D2000-0868](#); *Norton Peskett v. Domain Privacy / Tom Hampson*, [WIPO Case No. D2009-0724](#).

*The majority of the comments appearing on the website which are detrimental to the Complainant are worded as opinion rather than fact. After moving past the title and the graphic on the landing page, it becomes obvious that the website is a criticism website. **Whether statements on the website are defamatory is not within the scope of the Policy, and is therefore not a matter for this Panel to decide.***

II. The Complaint fails under ¶ 4(a) of the UDRP.

In order for the Complainant to prevail, he must prove:

- (i) The domain name is identical or confusingly similar to a trademark in which the Complainant has rights; and,

- (ii) The Respondent has no rights or legitimate interests in respect of the domain name; and,
- (iii) The domain name has been registered and used in bad faith.

A. The Respondent has rights and legitimate interests in the domain;

The Panel must understand the concept of Internet memes, must understand the particular internet meme in play, and should apply the First Amendment to these proceedings.

1. Internet Memes

The Panel cannot evaluate this case unless it understands the underlying internet meme. The website is the name of an internet meme that came into existence just prior to the Respondent's registration of the domain.

*"The term Internet meme is a phrase used to describe a catchphrase or concept that spreads quickly from person to person via the Internet, much like an esoteric inside joke."*² See *Internet For Beginners* (Annex B)

From "Mr. Spock Ate My Balls," (defunct) to ALL YOUR BASE ARE BELONG TO US³ to "Leeroy Jenkins"⁴ to a slew of sub-memes based on the movie "300"⁵, internet memes are as old as the internet itself, and almost as ubiquitous as actual cybersquatters. See Squidoo "Top 10 Internet Memes" (Annex C). Memes are often puzzling to those who have never encountered them before, and they are similarly puzzling to the subjects of the memes when they involve real people.

For example, the director of the movie "Downfall" is likely baffled at the Internet meme that has grown from that film. At the end of the film, there is a dramatic scene depicting Adolf Hitler's inner circle breaking the news to him that the war is lost. As Hitler pounds the table, the actual dialogue from the movie depicts his frustration with the impending end. However, amateur editors have turned the English subtitles from that scene into a humorous meme, changing the dialogue to Hitler being angry about countless disappointments. See, e.g., *Hitler finds out the truth about*

² http://en.wikipedia.org/wiki/Internet_meme.

³ http://en.wikipedia.org/wiki/All_your_base_are_belong_to_us

⁴ http://en.wikipedia.org/wiki/Leeroy_Jenkins

⁵ http://www.encyclopediadramatica.com/TONIGHT_WE_DINE_IN_HELL

Santa,⁶ *Hitler hates Kanye West*,⁷ and *Hitler gets banned from World of Warcraft*.⁸ Nobody believes that the director of the critically acclaimed “Downfall” would have directed a script in which Hitler screams “YOU HOMOSEXUAL BLOOD ELF!”

Similarly, nobody really thinks that “*Every time you masturbate... God kills a kitten*,” which was an internet meme that originated on the same website that spawned the Glenn Beck meme, Fark.com. See Wikipedia “Every time you masturbate ... God kills a kitten” (Annex D). Memes are not supposed to be statements of fact, and audiences understand this.

Mememes often involve famous people, and they are often unflattering. Richard Gere has never dignified the infamous “Gerbil story” meme with a response, even though the story is nasty and false, and it too has entered the culture as an irrepressible meme, even making an appearance in *The Simpsons*, Episode 183. This is the price of celebrity – you just might wind up in a meme, and you *might* not deserve it. Richard Gere did nothing to bring the meme monster to his door. On the other hand, Mr. Beck has all but begged to become the subject of a meme. His wish has been granted, and then some. In a hilarious example of geometric memetics, the Beck Meme is now merging with other memes such as the [Hitler in “Downfall” meme](#).⁹ See also [Reddit post](#)¹⁰ (commenter “ytknows” merging Beck meme with the “Spock ate my Balls” meme).

2. The Glenn Beck 1990 Meme

The raw materials of the Glenn Beck Raped and Murdered a Young Girl in 1990 meme (hereinafter, the “Beck Meme”) are twofold. The meme is a parody of from Glenn Beck’s own argumentation style mated with a Gilbert Gottfried routine performed during the Comedy Central Roast of “comedian” Bob Saget. During Gottfried’s speech, he kept repeating (in his trademark nasally voice) that there were rumors that Bob Saget had raped and killed a girl in 1990. Gottfried admonished listeners to stop spreading this rumor – which had never existed in the first place. As there is no more sure fire way to destroy a joke than to explain it, much less in

⁶ http://www.youtube.com/watch?v=lsig_09MGTg

⁷ <http://www.youtube.com/watch?v=zcqhQMYX8IM>

⁸ <http://www.youtube.com/watch?v=0JF03i7NfIU>

⁹ http://www.youtube.com/watch?v=nleNP_APkWo

¹⁰ http://hu.reddit.com/r/reddit.com/comments/9gfm4/78_of_americans_believe_glenn_beck_was_involved/

legal papers, the Panel is asked to view [this short video of the performance](#).¹¹ The humor equation is simple: (Outrageous Accusation) + (Celebrity) + (Question Why the Celebrity Does Not Deny the Accusation) = (Confirmation of the Falsity of the Accusation + Laughter)

A poignant example of Beck using the Gottfried Technique is this [Glenn Beck interview with Congressman Keith Ellison](#), a Muslim. Beck famously said:

*"No offense and I know Muslims, I like Muslims, I've been to mosques, I really don't think Islam is a religion of evil. I think it's being hijacked, quite frankly. With that being said, you are a Democrat. You are saying let's cut and run. And I have to tell you, I have been nervous about this interview **because what I feel like saying is, sir, prove to me that you are not working with our enemies.** And I know you're not. I'm not accusing you of being an enemy. But that's the way I feel, and I think a lot of Americans will feel that way."*

See transcript at Annex E. Video available [here](#).¹²

The rhetorical style is simple. Beck attacks Ellison by asking **Ellison** to **prove** that Ellison is not "working with our enemies," thus placing the burden upon Ellison to "prove" that the accusation is untrue.

Quite simply, Beck's shtick is simply a cheap imitation of Gilbert Gottfried, sans the humor.

This kind of behavior led a poster on Fark.com to give the meme wheel a spin on August 31, 2009. On that forum, a user by the name of "oldweevil" gave birth to the Beck Meme at precisely 08:32:26 PM by posting the following comment:

Why haven't we had an official response to the rumor that Glenn Beck raped and murdered a girl in 1990?

Others joined in the fun, and the internet had its newest meme. See Fark discussion board (Annex F). Immediately thereafter, "Glennbeck" became a verb on urbandictionary.com meaning "To rape and murder someone (especially a young girl in 1990)." See Annex G. The meme

¹¹ <http://www.poetv.com/video.php?vid=41913>.

¹² <http://www.youtube.com/watch?v=tgbg604XqPY>

spread to Yahoo Answers. See Annex H. And the next day, Respondent registered the domain name in order to memorialize the meme and to further the meme's criticism of Beck. Both are legitimate interests and neither constitute bad faith under the Policy.

For a full discussion of the history of the Beck Meme see Sam Bayard, *Will Glenn Beck Sue a Defamatory Website in 2009?* (Annex I); Jeffrey Weiss, *'Glenn Beck as Murderer' Meme: Vaccine or Infection?* (Annex J); Michael Stone, *Glenn Beck 1990: Politics of Retribution* (Annex K).

The Respondent's site itself invokes the Glenn Beck – Keith Ellison interview:

"Why won't Glenn Beck deny these allegations? We're not accusing Glenn Beck of raping and murdering a young girl in 1990 -- in fact, we think he didn't! But we can't help but wonder, since he has failed to deny these horrible allegations. Why won't he deny that he raped and killed a young girl in 1990?"

Beck has tried to paint himself as a “babe in the woods” who has fallen victim to a vicious character attack. In reality, Beck is an accomplished and deliberate manipulator of public opinion, and it is absurd to suggest that he himself does not understand the nature and function of Respondent's website. Given his long history of using the Gottfried Technique, Beck must have recognized that the respondent has merely presented Mr. Beck with a mirror. If Beck does not like what he sees, the Respondent is not to blame.

3. The Respondent, who registered and used the domain name to criticize the Complainant and pay homage to, and participate in, an Internet meme, has legitimate Rights in the domain name.

Although this seems to be the first time a subject of an Internet meme has tried to kill the meme by filing a UDRP action, there are many UDRP decisions involving complainants attempting to take down legitimate criticism websites, and those decisions should guide this Panel.

There are two views under the Policy when it comes to criticism sites. See “WIPO Overview of WIPO Panel Views on Selected UDRP Questions”, Paragraph 2.4.¹³ Under either view, the domain name is a permissible use.

¹³ <http://www.wipo.int/amc/en/domains/search/overview/index.html#24>

View 1 states: “The right to criticize does not extend to registering a domain name that is identical or confusingly similar to the owner’s registered trademark or conveys an association with the mark.”

View 2 states: “Irrespective of whether the domain name as such connotes criticism, the respondent has a legitimate interest in using the trademark as part of the domain name of a criticism site if the use is fair and non-commercial.”

View 1 only applies if the Panel rejects the notion that this dispute between two Americans should not be guided by the First Amendment.

It is the Respondent’s position that the Panel’s decision should be guided by the U.S. Constitution, and presumably Mr. Beck would prefer to take the American view rather than the transnational view.¹⁴ Nevertheless, in the event that the Panel is inclined to adopt the internationalist view, the Respondent will provide arguments against both Views.

a) Under the disfavored View 1, the Complainant’s claim fails unless the Panel rejects the “Moron in a Hurry” test.

View 1 should be the easiest to dispense with. The claimed “mark” is GLENN BECK. This is clearly not identical to the domain name. Accordingly, in order for the criticism to fail under View 1, the mark must be “confusingly similar to” GLENN BECK.

While the Respondent prefers to apply U.S. law, the principles of U.S. law and that of other common law countries are the same when it comes to the likelihood of confusion between a junior user and a senior user of a “mark.” However, U.K. and Canadian jurists have a much pithier and more to-the-point way of discussing clear cases where no confusion could issue – the “*moron in a hurry*” test.

The Panel must examine the alleged mark and the domain name and ask whether any sensible member of the public would ever be confused. To

¹⁴ This presumption is founded in Beck’s own expressed views. Specifically, Beck rejects any attempt to have international law supersede U.S. Constitutional Law when the two are in tension. For example, on April 2, 2009, Beck described Harold Koh’s legal views (Koh is a transnationalist) as a “threat to American democracy.” See Annex L, a transcript of Beck’s show on that day. As such, Respondent would presume that Mr. Beck would wish for the Panel to adopt View 2, as does the Respondent.

further immortalize the words of Mr. Justice Foster, the only person who could possibly be misled would be "a moron in a hurry". See *Morning Star Co-Operative Ltd. v. Express Newspapers Ltd* [1979] FSR 113, 117; *Newsweek, Inc. v. British Broadcasting Corp.*, [1979] RPC 441, 444 (Mr. Justice Walton approving of Foster's analysis). Canadian courts have also approved of this short-cut analysis rather than a tortured multi-factor analysis that is favored by we Americans. See, e.g., *Ratiopharm Inc. v. Laboratoires Riva Inc.*, [2006] F.C.J. No. 1130 (Fed.C.C. 2006); *Mattel, Inc. v. 3894207 Canada, Inc.*, 2006 SCC 22 (Can. Sup. Ct. 2006); *Molson Canada v. Oland Breweries Ltd.*, [2001] O.T.C. 129 at P 21. ('It is not sufficient that the only confusion would be to a very small, unobservant section of society; or as Foster J. put it recently, if the only person who would be misled was "a moron in a hurry'.")

b) Under View 2, the Complaint fails because the Respondent's domain and website are used as part of a non-commercial criticism site.

Generally speaking, the UDRP is not intended to apply the law of any particular nation, but when the Complainant and the Respondent are citizens of the same country, it is appropriate to do so.

In this case, it is imperative to do so, as the Complainant and the Respondent are both Americans, the website is based in the US, and the registrar is in the US. See *Xtraplus Corporation v. Flawless Computers*, [WIPO Case No. D2007-0070](#) ("UDRP panels have in applicable cases repeatedly stated that a U.S.-based website engaged in noncommercial criticism of a U.S.-based trademark owner's activities enjoys First Amendment protection, even if the domain name incorporates the complainant's trademark").

In *Howard Jarvis Taxpayers Association v. Paul McCauley*, [WIPO Case No. D2004-0014](#), the Panel clarified how and when the First Amendment should apply to UDRP proceedings.

[T]he United States' robust free speech tradition, which derives from the First Amendment to the United States Constitution, tends to tolerate more criticism than the laws of other countries.

The Panel explained that in most UDRP cases over criticism sites resulting in a transfer, the parties were not Americans, and non-U.S. law was applied to the case. The prevailing view, as the *Howard Jarvis* case outlined, is

that in cases involving U.S. parties, Panels apply U.S. law and find that legitimate criticism sites are protected under the First Amendment.

The best example of this principle is the case noted above, *Jerry Falwell v. Gary Cohn* [WIPO Case No. D2002-0184](#), which rejected Falwell's claim not only because he did not have trademark rights in his name, but because the domain names at issue in that case, <jerryfalwell.com> and <jerryfallwell.com> were used to mock Jerry Falwell by actually making it seem as if the websites at those domains were themselves published by Mr. Falwell. Even though an unsuspecting visitor could have typed in either of the domain names in that case in seeking to find Falwell's own website, his attempt to stifle his critics through the UDRP process was turned back. In this case, the facts are not so sympathetic to the Complainant – as anyone looking for Glenn Beck's website would be very unlikely to type in the Respondent's entire domain name in a quest for Mr. Beck's particular shtick.

UDRP complaints involving Americans are routinely denied when the website criticizes or offers commentary about the complainant. See, e.g., *Sermo, Inc. v. CatalystMD, LLC*, [WIPO Case No. D2008-0647](#) (transfer of criticism site denied even when respondent defaulted); *Bridgestone Firestone, Inc. v. Myers*, [WIPO Case No. D2000-0190](#) (claim denied as [bridgestone-firestone.net](#) was a criticism site); *TMP Worldwide Inc. v. Potter*, [WIPO Case No. D2000-0536](#) (claim denied as [tmpworldwide.net](#) and [tmpworldwide.org](#) criticized the complainant); *Bruce Springsteen v. Jeff Burgar and Bruce Springsteen Club*, [WIPO Case No. D2000-1532](#) (denying Bruce Springsteen's attempt to seize <brucespringsteen.com> from a fan site); *Bosley Medical Group v. Kremer*, [WIPO Case No. D2000-1647](#) (denying complaint when respondent merely planned to launch a criticism site); *Bakers Delight Holdings Ltd. v. Andrew Austin*, [WIPO Case No. D2008-0006](#) (website with no commercial content “dedicated to genuine criticism” without commercial gain nor an attempt to divert users looking for complainant's site was legitimate fair use); *Pensacola Christian Coll. v. Gage*, [NAF Case No. FA101314](#) (claim denied as [pensacolachristiancollege.com](#) was a criticism site); *Action Instruments, Inc. v. Technology Associates*, [WIPO Case No. D2003-0024](#) (same).

In U.S. courts, would-be censors meet the same fate. See [Taubman v. Webfeats](#), 319 F.3d 770 (6th Cir. 2003). In that case, the Court held that <taubmansucks.com> was protected speech, even if there was economic damage to the plaintiff, stating:

"We find that Mishkoff's use of Taubman's mark in the domain name <taubmansucks.com> is purely an exhibition of Free

Speech, and the Lanham Act is not invoked. And although economic damage might be an intended effect of Mishkoff's expression, the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of a business. Such use is not subject to scrutiny under the Lanham Act."

"Hence, as per the language of the Lanham Act, any expression embodying the use of a mark not 'in connection with the sale . . . or advertising of any goods or services,' and not likely to cause confusion, is outside the jurisdiction of the Lanham Act and necessarily protected by the First Amendment."

See also, [Lamparello v. Falwell, 420 F.3d 309](#) (4th Cir. 2005) (no bad faith intent to profit, thus no ACPA violation for a website criticizing the views of Jerry Falwell); [TMI Inc. v. Maxwell, 368 F.3d 433](#) (5th Cir. 2004) (non-commercial criticism site not a violation of the dilution act nor the ACPA); [Lucas Nursery & Landscaping, Inc. v. Grosse, 359 F.3d 806](#) (6th Cir. 2004). (<lucasnursery.com> used for legitimate criticism site and defendant showed no intent to mislead visitors or commercially profit from use of the domain).

Recognizing these principles, the UDRP tolerates nominative fair use of trademarks in the context of a criticism site. In this particular case, since the likelihood of confusion is nonexistent and there are no other indicia of bad faith, the Panel should find for the Respondent. See, e.g., *Covance, Inc. and Covance Laboratories Ltd. v. The Covance Campaign*, [WIPO Case No. D2004-0206](#); *Howard Jarvis Taxpayers Association v. Paul McCauley*, [WIPO Case No. D2004-0014](#).

c) Beck misapplies tarnishment theory

Beck argues that "the domain name constitutes classic tarnishment." Respondent is at a loss as to what "classic tarnishment" means. In the UDRP context, "tarnishment" means something different than whatever Mr. Beck is trying to imply it means (which is unclear).

Criticism and tarnishment are not the same thing. Associating an existing mark with unwholesome products is "tarnishment." For Example, in [Hasbro, Inc. v. Internet Entertainment Group, Ltd., 40 U.S.P.Q. 2d 1479](#) (W.D. Wash. 1996), there was an adult entertainment site at <candyland.com>. The registrant of that website was not trying to critique the children's board game, but rather was simply selling

pornography under a venerable existing trademark. There is no tarnishment if Respondent makes a "[n]oncommercial use of a mark," 15 U.S.C. § 1125(c)(4)B), which is the case when the site is used for criticism. See [L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26](#) (1st Cir. 1987) (First Amendment is defense to dilution tarnishment claim when use is noncommercial parody).

The panel in *Britannia Building Society v. Britannia Fraud Prevention*, [WIPO Case No. D2001-0505](#) explained this in the context of the UDRP:

Tarnishment in [the UDRP] context refers to such unseemly conduct as linking unrelated pornographic, violent or drug-related images or information to an otherwise wholesome mark.

In *Newell Operating Company v. HostMonster.com and Andrew Shalaby*, [WIPO Case No. D2008-1805](#), the panel explained the difference between tarnishment and merely speaking ill of a complainant:

In contrast, fair-use criticism, even if libelous, does not constitute tarnishment and is not prohibited by the Policy, the primary concern of which is cybersquatting.

See also *Wal-Mart Stores, Inc. v. Richard MacLeod d/b/a For Sale*, [WIPO Case No. D2000-0662](#) (protection for genuine criticism sites is provided by Policy's legitimate interest and bad faith prongs).

d) There is no commercial use

Beck makes a desperate play to characterize the Respondent's site as a commercial enterprise by noting that it has a link to another criticism site, <foxnewsboycott.com>, which in turn sells items to support its protest message. See Complaint at ¶ 24. The mere fact that Respondent's site may have a link to another site that may itself sell something does not make the Respondent's site a commercial enterprise.

In fact, in many of the cases cited in part (b), *supra*, the protest sites had direct commercial elements to them. Nevertheless, when the overall purpose of a site is to communicate a message, and the message is not a mere subterfuge to infringe on an existing trademark, there is no bad faith.

B. The Complainant has failed to prove "Rights" under the Policy, and even if he had, the domain name is neither identical nor confusingly similar to the claimed mark.

Although the Complaint fails for the above reasons, it must be noted that Beck has even failed to make a case that he has rights, as that term is defined by the UDRP.

Although Mr. Beck is famous, fame does not automatically vest his name with trademark rights.

1. Personal Names are Not Protected Under the UDRP

“While the UDRP does not specifically protect personal names, in situations where an unregistered personal name is being used for trade or commerce, the complainant can establish common law trademark rights in the name.” WIPO Overview ¶1.6.¹⁵

2. The Complainant has no registered rights

The Trademark Application shown in Complaint Exhibit C has been filed on an “Intent to Use” basis. ITU applications are granted no weight under the Policy. The Application shown in Exhibit D is, admittedly, likely to issue given recent events in the trademark file. However, this was not the case when the original complaint was filed – as this did not occur until September 16, 2009, and this was after the date that the domain name was registered – September 1, 2009.

Given these facts, the USPTO documents in Exhibit C and D to the Complaint are of no value.

3. The Complainant has failed to provide adequate evidence of common law rights

The Rules compel the Panel to “*decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.*” Complainant relies upon common law rights and it was incumbent upon him to provide evidence of those rights with the complaint. He has failed to do so. “Where there is uncertainty as between conflicting allegations, insufficiency of evidence is a basis for finding against the party with a burden of proof,” *Percy Miller dba Boutit, Inc. Soldier University, Inc. v. Divine Mafa dba The New No Limit Records, Inc.*, [NAF Case No. 114771](#).

¹⁵ <http://www.wipo.int/amc/en/domains/search/overview/index.html>

Mr. Beck's complaint is replete with arguments of counsel that he is famous. See Complaint at ¶ 13-19. These were wasted arguments, since nobody, especially not the Respondent, disputes this. Mr. Beck seems to believe that because he is famous, his name is therefore a trademark. This is neither the case under the UDRP, nor under U.S. law.

The record is void of evidence of Mr. Beck's "common law rights." They may exist, but it was incumbent upon Mr. Beck to make the case for it, and he offered only six paragraphs of conclusory statements of counsel. Bald assertions of counsel are not sufficient to prove rights under the UDRP. See *David Pecker v. Mr. Ferris*, [WIPO Case No. D2006-1514](#). No evidence of secondary meaning is provided. The only piece of evidence that was given is a printout of Mr. Beck's website. The mere fact that Mr. Beck is a celebrity with a website, without more, does not demonstrate trademark rights.

Jerry Falwell was much more famous than Mr. Beck, and like Mr. Beck, he was notoriously thin skinned about being criticized or mocked, and he deployed phalanxes of lawyers to make ill-fated attempts to silence his critics. See *Hustler v. Falwell*, *supra*.

Falwell, realizing that the U.S. Constitution would not tolerate his attempts to censor his critics, also turned to the UDRP in an attempt to circumvent the U.S. Constitution. See *The Reverend Dr. Jerry Falwell and The Liberty Alliance v. Gary Cohn, Prolife.net, and God.info*, [WIPO Case No. D2002-0184](#). In that case, Falwell's claim failed on two independent grounds – one being that despite Jerry Falwell's far-reaching fame, his rights in his personal name were not protectable under the Policy (the other is discussed below)

Similarly, when Anna Nicole Smith attempted to seize <annanicolesmith.com> from its Registrant, the learned panelist in that case clearly articulated how these cases are viewed under the Policy in *Anna Nicole Smith c/o CMG Worldwide v. DNS Research, Inc.* [NAF Claim No. FA0312000220007](#):

*[T]he mere fact of having a successful career as an actress, singer or TV program star does not provide exclusive rights to the use of a name under the trademark laws. The cases require **a clear showing of high commercial value and significant recognition of the name as solely that of the performer.***

CONCLUSION

It is specious *at best* for Mr. Beck to assert that his fans, or the public as a whole, would confuse Respondent's website with Mr. Beck himself—unless of course it is Mr. Beck's view that his fans and the average internet user are in fact hurried morons. Respondent presumes that this is not how Mr. Beck regards his audience. And, even if he does so regard his audience, this is not a basis for upholding his complaint.

Given that Mr. Beck cannot genuinely believe or reasonably assert that Respondent's website will cause such confusion, there can be only one purpose to filing this complaint: as an attempt to silence a critic because he doesn't like being criticized.

However, Mr. Beck's lawyers are no fools. They are well aware that the First Amendment will give full protection to the Respondent's website. Therefore, we find ourselves mired in a bogus "defamation" claim under the guise of this UDRP complaint. But, this is not the forum to raise such a claim. If the "defamation" alluded to in the Complaint were truly believed to have legal validity, this case would have been brought in a U.S. court.

As the learned panel stated in *La Quinta v. Heartland Times*, [WIPO Case No. D2007-1660](#), "something more than criticism is required to establish illegitimacy and bad faith within the meaning of the Policy." In this case, nothing more exists and the claim must be denied.

Administrative Panel

(Rules, paras. 5(b)(iv) and (b)(v) and para. 6; Supplemental Rules, para. 7)

The Respondent accepts the Complainant's decision to have this matter resolved by a single member panel.

Other Legal Proceedings

(Rules, para. 5(b)(vi))

None.

Communications

(Rules, paras. 2(b), 5(b)(vii); Supplemental Rules, para. 3)

A copy of this Response has been sent or transmitted to the Complainant on September 28, 2009 by email to Mr. Beck's attorney, Matthew Kaplan via email to mkaplan@cdas.com and by facsimile to 212.974.8474.

This Response is submitted to the Center in electronic form only, as stipulated to by the parties and as accepted by WIPO on September 22, 2009.

Certification

(Rules, para. 5(b)(viii), Supplemental Rules, para. 12)

The Respondent agrees that, except in respect of deliberate wrongdoing, an Administrative Panel, the World Intellectual Property Organization and the Center shall not be liable for any act or omission in connection with the administrative proceeding.

The Respondent certifies that the information contained in this Response is to the best of the Respondent's knowledge complete and accurate, that this Response is not being presented for any improper purpose, such as to harass, and that the assertions in this Response are warranted under the Rules and under applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument.