

## **ADMINISTRATIVE PANEL DECISION**

Anton Bilchik, MD, PhD, MBA, FSSO, FACS v. Domain Privacy Service FBO  
Registrant / Nami Lu

Case No. D2022-0411

### **1. The Parties**

The Complainant is Anton Bilchik, MD, PhD, MBA, FSSO, FACS, United States of America (“United States”), represented by Sheppard, Mullin, Richter & Hampton LLP, United States.

The Respondent is Domain Privacy Service FBO Registrant, United States / Nami Lu, United States, self-represented.

### **2. The Domain Name and Registrar**

The disputed domain name <antonbilchikisafake.com> is registered with Domain.com, LLC (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on February 7, 2022. On February 7, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On February 7, 2022, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name, which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to the Complainant on February 8, 2022, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amendment to the Complaint on February 11, 2022.

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

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on February 21, 2022. In accordance with the Rules, paragraph 5, the due date for Response was March 13, 2022. The Response was filed with the Center on March 10, 2022.

The Center appointed Evan D. Brown as the sole panelist in this matter on March 16, 2022. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

#### **4. Factual Background**

The Complainant is a medical doctor specializing in oncology. He owns a registered trademark in the United States for the mark ANTON BILCHIK (Reg. No. 6,606,565, registered on January 4, 2022).

On November 1, 2017, the Complainant performed a “Whipple procedure” on the Respondent’s father, such procedure involving the pancreas, small intestine, and bile duct. Several months after the surgery, another doctor performed an endoscopic examination of the Respondent’s father, and observed signs that were “suspicious for afferent loop syndrome”. The Respondent’s father continued to have health problems and passed away in May 2018.

The Respondent did not sue the Complainant for medical malpractice, and the Medical Board of California declined to move forward in response to a complaint the Respondent made to such board asserting that the Complainant had provided negligent treatment.

The Respondent registered the disputed domain name on August 21, 2020,<sup>1</sup> and set up a gripe site there targeting the Complainant, on which the Respondent has published, among other things, information tying the Complainant to the death of the Respondent’s father.

#### **5. Parties’ Contentions**

##### **A. Complainant**

The following facts, extracted from the Complaint and accompanying Annexes, are a summary of the Complainant’s pertinent assertions in support of his claims. The Complainant holds a number of prestigious roles in the medical community and is an internationally recognized surgeon and scientist, having pioneered techniques to improve cancer treatment. He has served as an investigator on international clinical trials and has more than 220 peer-reviewed publications to his name. He has received numerous awards and recognition, including the Duke Award and honors from the Anti-Defamation League. He has been recognized by the American Cancer Society and the American College of Surgeons for his cancer research, and has been ranked as one of the top cancer doctors in the country by Newsweek magazine. The Complainant has conducted important cancer research and has served on the editorial boards of many peer-reviewed journals, and on a number of boards of directors.

The Complainant asserts that it has acquired rights in the ANTON BILCHIK mark through decades of successful practice as a Board-certified surgeon. The United States trademark registration for the mark lists a date of first use of the ANTON BILCHIK mark as June 1998. Upon filing the application, the Complainant declared, under threat of criminal prosecution for false assertions, that the information set forth in the application (including the June 1998 date) is true. The Complainant contends that the disputed domain name is identical or confusingly similar to a trademark in which the Complainant has rights.

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<sup>1</sup> The Complainant alleges that the disputed domain name was registered on October 21, 2020, but the Annex 1 filed with the Complaint, containing Whois information, shows a registration date of August 21, 2020. The Respondent alleges the disputed domain name was registered on August 8, 2020. Though the date of registration of the disputed domain name is not dispositive in this matter, the Panel credits the filed Annex and current Whois data returned in response to the Panel’s own Whois search, to find that the disputed domain name was registered on August 21, 2020.

The Complainant contends that the Respondent has no rights or legitimate interests in the disputed domain name, asserting that: (1) the Respondent is not using the disputed domain name in connection with a *bona fide* offering of goods or services, (2) the Respondent has never been employed by the Complainant, (3) the Respondent has no authorization or license to use the ANTON BILCHIK mark within the disputed domain name, (4) that the registration of the disputed domain name and the establishment of the website there has been solely to harass and to defame the Complainant and tarnish the Complainant's reputation, and (5) the Respondent's use of the disputed domain name is not a fair use of the Complainant's ANTON BILCHIK mark.

The Complainant claims that the Respondent's sole purpose has been revenge. According to the Complainant, the Respondent has misrepresented medical records and conversations with medical professionals, made false and outrageous allegations against the Complainant, and serially published false and defamatory statements about the Complainant. More specifically, the Complainant asserts that the Respondent's false and defamatory statements about the Complainant, made at the website found at the disputed domain name, include the following:

- That the Complainant performed below the appropriate standard of care. The screenshots submitted by the Complainant include statements by the Respondent that the Complainant "missed something crucial" in providing treatment, and assert "deception" on the part of the Complainant.
- Misstated facts regarding afferent limb syndrome.
- False accusations that the Complainant has misrepresented his skills, and false assertions that the Complainant has no significant experience or expertise in performing pancreatic resections and other gastrointestinal surgeries.
- Misleading assertions that the Complainant is negligent, based on two lawsuits filed in 2000 that were dismissed with prejudice, and not finding the Complainant liable.
- Multiple denigrating statements about the Complainant, including that he is "fake", "not a real expert", a "sham", a "shyster", a "sociopath", and a "psychopath".
- The false suggestion that the Complainant lies about having attended Yale Medical School.
- The false assertion that the Complainant is not affiliated with Cedars Sinai Hospital.
- The false suggestion that the Complainant has lied about being Chief of Surgery at Century City Hospital.
- False statements that the Complainant has lied about being a prolific author and publisher of articles and studies.
- False statements that the Complainant has not worked on any clinical trials since 2004.

The Complainant makes additional assertions regarding the Respondent's conduct not directly related to the disputed domain name, including the Respondent's purchase of false Google ads, the impersonation of the Complainant in setting up a Google My Business account, and mass mailings to third parties, directing recipients of such correspondence to the website found at the disputed domain name.

The Complainant asserts that the use of the disputed domain name to spread defamatory content is not conduct within the Respondent's free speech rights under the First Amendment. Similarly, the use of the disputed domain name by the Respondent is a tarnishment of the Complainant's trademark.

## **B. Respondent**

The following facts, taken from the Response and accompanying Annexes, are a summary of the

Respondent's pertinent assertions.

The Respondent challenges the Complainant's trademark rights in the ANTON BILCHIK mark, indicating that such rights did not accrue until the United States Patent and Trademark Office issued the registration certificate for the mark, which was after the Respondent registered the disputed domain name. The Respondent asserts the timing of the registration is relevant to both the first and third UDRP factors. The Respondent points out that in a demand letter that the Complainant sent to her through counsel, the Complainant made no mention of trademark infringement, only defamation. However, the Complainant did not file a defamation lawsuit.

The Respondent asserts that the disputed domain name is not confusingly similar to the ANTON BILCHIK mark because there cannot be confusion when there is a very clear and concise pejorative present. Visitors to the site would quickly understand the site to be a criticism site and would not be confused into thinking it belongs to the Complainant. The Respondent included a disclaimer at the bottom of the page on the website, to reiterate that the site's contents are her opinions.

As for right or legitimate interests in the disputed domain name, the Respondent asserts generally that her use of the disputed domain name for a gripe site is a fair use and is noncommercial free speech. She asserts that the criticism is "genuine and noncommercial", that there is nothing on the site that "personally" attacks the Complainant or any related persons, that the materials on the site are "concise and factual", that there are arguments and evidence with links as to why she believes the Complainant's claims about himself are false.

On the question of bad faith use and registration, in addition to asserting that the Complainant had no trademark rights when the disputed domain name was registered, the Respondent claims that she relied on legal counsel to conclude use of the Complainant's mark in a domain name is "perfectly legal", and that she was motivated in large part to register the disputed domain name because the Complainant has sought to silence her online speech. She asserts that the disputed domain name "was painstakingly chosen to telegraph to internet users a prima-facie rebuttal to the magnified image [the Complainant] incessantly presents online using multiple variations of his name."

The Respondent also argues that tarnishment cannot serve as the basis for bad faith use, since the website's content is fair criticism. And there is no likelihood of confusion because of the derogatory phrase "is a fake" being included within the disputed domain name.

Moreover, the Respondent asserts that a finding of Reverse Domain Name Hijacking is appropriate because the Complainant filed this action to silence and harass the Respondent, and to abuse the services of the Center.

## **6. Discussion and Findings**

To succeed, the Complainant must demonstrate that all of the elements listed in paragraph 4(a) of the Policy have been satisfied: (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights, (ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name, and (iii) the disputed domain name has been registered and is being used in bad faith.

### **A. Identical or Confusingly Similar**

This element requires the Panel to consider two issues: first, whether the Complainant has rights in a relevant mark; and, second, whether the disputed domain name is identical or confusingly similar to that mark. This element under the Policy functions primarily as a standing requirement. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (["WIPO Overview 3.0"](#)), section 1.7.

A registered trademark provides a clear indication that the rights in the mark shown on the trademark certificate belong to its respective owner. See *Advance Magazine Publishers Inc., Les Publications Conde Nast S.A. v. Voguechen*, WIPO Case No. [D2014-0657](#). The Complainant has demonstrated its rights in the ANTON BILCHIK mark by providing evidence of his trademark registration.

The Panel finds the disputed domain name confusingly similar to the ANTON BILCHIK mark. The disputed domain name incorporates the mark in its entirety. This is sufficient for showing confusing similarity under the Policy. The words “is a fake” do not eliminate the confusing similarity.

Rather than accept the Respondent’s argument that there is no confusing similarity in this case because “there cannot be confusion when there is a very clear and concise pejorative present”, the Panel adopts the principle of [WIPO Overview 3.0](#), section 1.13, which provides that “[a] domain name consisting of a trademark and a negative or pejorative term [...] is considered confusingly similar to the complainant’s trademark for the purpose of satisfying standing under the first element. The merits of such cases, in particular as to any potential fair use, are typically decided under the second and third elements.”

The Panel finds that the Complainant has established this first element under the Policy.

## **B. Rights or Legitimate Interests**

The Panel evaluates this element of the Policy by first looking to see whether the Complainant has made a *prima facie* showing that the Respondent lacks rights or legitimate interests in respect of the disputed domain name. If the Complainant makes that showing, the burden of production of demonstrating rights or legitimate interests shifts to the Respondent (with the burden of proof always remaining with the Complainant).

The Complainant has made a *prima facie* showing. It asserts that: (1) the Respondent is not using the disputed domain name in connection with a *bona fide* offering of goods or services, (2) the Respondent has never been employed by the Complainant, (3) the Respondent has no authorization or license to use the ANTON BILCHIK mark within the disputed domain name, (4) that the registration of the disputed domain name and the establishment of the website there has been solely to harass and to defame the Complainant and tarnish the Complainant’s reputation, and (5) the Respondent’s use of the disputed domain name is not a fair use of the Complainant’s ANTON BILCHIK mark.

The Panel must evaluate whether the Respondent’s assertions, or anything else in the record, overcome the *prima facie* showing under the Policy. In particular for this case, the Panel assesses whether the Respondent’s use of the disputed domain name to publish a gripe site is in accord with rights or legitimate interests.

Where a domain name is not identical to a complainant’s trademark, but comprises the mark plus a derogatory term (e.g., <trademarksucks.tld>), panels tend to find that the respondent has a legitimate interest in using the trademark as part of the domain name of a criticism site if such use is *prima facie* noncommercial, genuinely fair, and not misleading or false. [WIPO Overview 3.0](#), section 2.6.3.

As a preliminary matter, the site at the disputed domain name appears to be noncommercial. The site does not appear to contain commercial links, offers for sale of the dispute domain name or products found thereon, or any other clearly commercial offerings. Instead, it provides text and links to articles about the Complainant, various medical procedures, and other informative articles.

The Panel next considers the question of whether use of the ANTON BILCHIK MARK as part of the disputed domain name is “genuinely fair”. The analysis of this point overlaps with the “false or misleading” question. To support fair use under UDRP paragraph 4(c)(iii), the respondent’s criticism must be genuine and noncommercial. [WIPO Overview 3.0](#), section 2.6.1; *The Hartman Media Company, LLC v. Host Master, 1337 Services LLC*, WIPO Case No. [D2018-1722](#). The UDRP is an expedited process intended to prevent clear cases of cybersquatting. In this context, the Panel finds it appropriate to focus the analysis regarding

whether the Respondent has rights or legitimate interests or whether the Respondent's criticism is primarily a pretext for cybersquatting, commercial activity, or tarnishment. In this case, as noted already, the Respondent's use appears noncommercial. Also, this is not a typical cybersquatting case where a respondent is seeking to take unfair advantage of the Complainant's trademark. Rather, the Respondent has used the disputed domain name in order to specifically provide information, in particular criticism, about the Complainant and his services. Turning to the question of tarnishment, noting the noncommercial and clear criticism use, the Panel is unable to determine on the present record that the use of the disputed domain name is clearly a pretext for tarnishment of the Complainant's mark. Moreover, the choice of additional term "isafake" *prima facie* suggests the critical nature of the site.

While the Complainant provides great detail of the ways in which it contends the content on the Respondent's website is misleading or false (see Section 5.A., *infra.*), it is not for the Panel to determine the truth or otherwise of critical statements which may be better adjudicated in other forum.

Accordingly, the Panel finds that the Complainant has not established this second UDRP element.

### **C. Registered and Used in Bad Faith**

Noting the Panel's finding under the second UDRP element, the Panel need not make a determination under the third UDRP element.

### **7. Reverse Domain Name Hijacking**

Noting the conflicting Party contentions, and in particular the detailed arguments of the Complainant about the veracity of the content on the Respondent's site, the Panel declines to find Reverse Domain Name Hijacking.

### **8. Decision**

For the foregoing reasons, the Complaint is denied.

*/Evan D. Brown/*

**Evan D. Brown**

Sole Panelist

Date: April 13, 2022