

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

Mercury Radio Arts, Inc &
Glenn Beck
Complainants

v.

Isaac Eiland-Hall
Respondent

Disputed Domain Name:
Glennbeckrapedandmurderedayo
unggirlin1990.com

SURREPLY

I. Introduction – Neither the Complaint nor the Supplemental Filing provides any basis for finding in Complainants' favor.

On October 13, 2009, Complainant filed a Supplemental Filing. Though the Supplemental Filing added to the volume of materials for the Panel to review, it fails to provide any basis for finding in the Complainants' favor, much like the Complaint before it. Section 4(a) of the Policy requires complainants to show trademark rights and that the domain name in question is confusingly similar to the mark; bad faith registration and use (as those terms are defined under the Policy); and a lack of a legitimate interest on the part of the Respondent. Like the Complaint, the Supplemental Filing fails to show any of the above. As described more fully below, the Complainant's arguments fail for the following four reasons:

1. Complainant has failed to meet his burden of showing common law rights. Nothing in the two separate briefs submitted by Complainant establishes that he has any common law trademark rights to the alleged mark.
2. There Is No Confusing Similarity. Nothing in Complainant's briefs amounts to evidence or argument, beyond bare conclusory statements, that audiences are likely to confuse Respondent's registered domain with Complainant's alleged mark.
3. Respondent Has A Legitimate Interest. Respondent has a legitimate interest in criticizing, mocking, and even ridiculing Glenn Beck, grounded in the First Amendment to the U.S. Constitution and hallowed by well-established free speech rights.
4. Respondent Has No Bad Faith. Protected, fair use criticism, such as the parody of Glenn Beck in Respondent's registered domain, cannot constitute the bad faith "disruption" of a business proscribed by the

Policy. “Disruption” due to internet users being diverted can be bad faith. “Disruption” because a respondent exposes a Complainant’s hypocrisy is not.

Each of those reasons, taken alone or together, is sufficient to dispense with the case. For the sake of completeness, this Sur-Reply will also address the following issues:

5. Complainant's Acquiescence. By failing to police third party use of his alleged mark, Complainant has acquiesced to the use of the alleged mark by Respondent and others.
6. Complainant's Defamation Claims. The UDRP is the wrong forum for Complainant's defamation claims, which are nonetheless unavailing and incorrect.
7. Respondent's Alleged “Subsequent Remedial Measures.” The UDRP should not weigh alleged “subsequent remedial measures” as evidence of bad faith by Respondent.
8. This Case Presents No Novel Legal Issues. Foundational principles of free speech, trademark law, and UDRP precedent fully support a finding on behalf of Respondent.
9. The Supplemental Filing Provides Further Support For Respondent.

II. The Complainant has presented no evidence of his alleged common law rights.

As detailed in the Reply to the Complaint, Complainant has not provided adequate evidence of common law rights. It is incumbent on Respondent to establish common law rights, if any. See *Amsec Enterprises, L.C. v. Sharon McCall*, WIPO Case No. D2001-0083 (“Complainant must prove secondary meaning”; bald claims as to length and amount of sales were “inadequate to prove any enforceable rights in the mark”). The Complaint failed to do so, and the second bite at the apple has not cured this fundamental flaw. “Without such compelling evidence proving the prior right, the Complainant may fall at the first hurdle.” *Fox News Network, L.L.C. v. C&D International Ltd. and Whois Privacy Protection Service*, WIPO Case No. D2004-0108.

III. The Complainant has submitted no evidence of “confusing similarity” between Respondent’s website and Complainant’s alleged mark, because there is none.

Complainant has again failed to provide anything more than conclusory statements of counsel that the disputed domain is “confusingly similar” to Complainant’s alleged mark. Under Section 4 of the Policy, Complainant bears the burden of demonstrating (not just asserting) any confusing similarity. He has

not done so, nor could he, because any confusing similarity between the two is extremely unlikely.

There are 45 characters in the disputed domain name, glennbeckrapedandmurderedayounggirlin1990.com. Only nine of those characters comprise Complainant's alleged mark. It is absurd to even imagine an Internet user searching for the term "Glenn Beck," but accidentally typing in enough of the 45-character string to land on Respondent's website. Even if a user somehow managed to stumble on the disputed site, it is equally absurd to imagine a user who would be confused about whether or not Beck is an owner, author, sponsor, or endorser of the site.

Complainant argues that the joke – the subject of the disputed site – may itself be confusing. The Supplemental Filing falsely states that, in the Response, “[t]he fact that Respondent has to work so hard to explain why the domain name is a ‘joke’ undermines his argument that it is unreasonable to believe that there could be no confusion when an average internet user comes upon the domain name.”

Whooooosh!

That is the sound of the point sailing over the Complainant's head. An average Internet user might not “get the joke.” In fact, the average Internet user does not understand **any** internet memes. That's the fun of a meme – it is an esoteric inside joke that will leave most people scratching their heads. To this day, **nobody** understands “Mr. Spock ate my balls,” but nobody thinks that a single statement in that sentence is true, and even if they did, nobody would think that it was an infringement upon Gene Roddenberry's intellectual property rights.

That the joke may appeal most readily to audience members with an obscure, sophisticated, or warped sense of humor does not mean that Respondent's registered domain is likely to be confused with Complainant's alleged mark. “Whether the commentary is in good taste, whether it is funny, whether it is effective, all is beside the point.” *The Reverend Dr. Jerry Falwell and The Liberty Alliance v. Gary Cohn, Prolife.net, and God.info*, WIPO Case No. D2002-0184. Confusing comedy and confusing similarity are not the same. Complainant has proffered no evidence of the latter.

Criticism and nominative fair use of a trademark (or an alleged trademark) does not require that everyone is in on the joke.

The point is not whether the average Internet user would see Respondent's domain name and automatically recognize the reference to Gilbert Gottfried. The point here, and the only narrow point the Panel should consider, is whether

the average Internet user would be likely to come upon the domain name and believe it to be sponsored by Glenn Beck or his company.

IV. Respondent has a legitimate interest in its criticism site, and in referring to Complainant by name in the course of criticizing him.

Respondent has a legitimate interest criticizing any public figure, Glenn Beck included, even if that criticism subjects him to mockery and ridicule.¹ This interest is wholly protected by the First Amendment. Complainant argues in his Supplemental Filing that he is not attempting to censor Respondent's criticism and that Respondent's First Amendment rights are not at issue. This is not so. At the core of the First Amendment's protection of free expression is the right to criticize, even by mockery and ridicule. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

As such, in order to prevail, Complainant would need to show that Respondent's site is not, *and cannot be construed as*, legitimate criticism. In his two filings, Complainant argues only that Respondent's criticism, styled as a parody, is not funny. This is not the relevant standard. Whether or not Complainant or others find the parody to be funny, or immediately obvious, is not germane and does not render Respondent's interest illegitimate. This is not "joke court." This case is about substantive rights, not Respondent's humor or taste.

Complainant also argues that the disputed domain name itself does not contain criticism, and that this shows a lack of legitimate interest. This is factually incorrect, as the domain name specifically references the Gottfried routine, applying the joke to Beck to cast a light on his slippery rhetorical habits

Complainant suggests that criticism becomes impermissible when it names its mark. This position is untenable (and counter to Beck's daily practices). It betrays Complainant's true intent – to silence a critic. It would not be possible to target the subject of criticism style without naming him personally. It seems to be the Complainant's position that if anyone wants to mock Glenn Beck, they must refer to him obliquely or in code. There is no support for this position. Glenn Beck's name is not sacred, and it may be uttered with either reverence or disdain. The only way that the Respondent may not use Mr. Beck's name is to

¹ Beck arguably volunteers himself for these forms of criticism as a public figure who makes his living, in no small part, by mocking and ridiculing others. See, e.g., <http://mediamatters.org/mmtv/200608100003> (Beck mocking names of missing Egyptian students); <http://mediamatters.org/blog/200909240012> (Beck mocking Asians by playing gong); http://www.salon.com/news/feature/2009/09/22/glenn_beck_two/index2.html (Beck mocking miscarriage by wife of competitor disc jockey).

confuse the public as to the source or origin of his website – a sin that has not been committed here.

V. The Complainant has presented no evidence of Respondent's alleged bad faith.

Respondent has not acted in bad faith (as that is defined under the Policy), and Complainant has presented no evidence thereof. As noted in the Response, Respondent has no commercial intent. Instead, Respondent structured his web site as criticism styled as a parody, with the intent to spotlight Complainant's hypocritical, manipulative, unsavory rhetorical style. The site – even the domain name – adopts Glenn Beck's style to better expose it. The goal of this criticism would be that some readers might see Complainant's hypocrisy.²

Criticism that mocks or ridicules in order to persuade is protected under the First Amendment. It must be understood as distinct from “disruption,” “tarnishment,” or “dilution,” if trademark law and the First Amendment are to live in harmony. This is why the Policy targets illegitimate commercial use. “[F]air-use criticism, even if libelous, does not constitute tarnishment and is not prohibited by the Policy, the primary concern of which is cybersquatting.” *Brittania Building Society v. Brittania Fraud Prevention*, WIPO Case No. D2001-0505. Though there is no evidence that the disputed site is likely to cause confusion, even “a low level of confusion is a price worth paying to preserve the free exchange of ideas on the Internet.” *Id.*

“Here, there is no diversion ‘for commercial gain’ and thus no loss of legitimacy.” *Id.* Respondent had no intent to profit from the use of Glenn Beck's name. As shown by Respondent's comment on Reddit.com, introduced by the Complainant, stating that he was there for the start of the “meme,” he intended to display a parallel between the Gottfried Technique and Beck's style. Respondent only offered another venue for the criticism that started on fark.com.

VI. The Complainant seems to have acquiesced to third party use of his alleged mark.

The Supplemental Filing notes that Respondent holds other domains that host or mirror the disputed site, and that Complainant has not challenged those domains as infringing on the alleged mark. (Supplemental Filing, at p. 3). This

² It makes no difference that Beck used this absurd rhetorical style before Gilbert Gottfried. Respondent's references to “The Gottfried Technique” are merely a moniker of convenience – not an attempt to falsely designate the origin of the style.

certainly does not prove (nor even suggest) that the Complainant has brought this claim in good faith. In fact although selective enforcement is not a valid defense in a UDRP action, it can demonstrate that a Complainant has not regularly policed his mark, and thus has acquiesced to third-party use of his alleged mark. Mr. Beck's Supplemental Filing opens the door to this as a legitimate topic for consideration by the Panel.

There are many domains registered that wholly subsume Complainant's alleged mark, reference Complainant by his full or partial name, or allude to Complainant by an alternate spelling of his name. When the Respondent conducted a few simple searches, he discovered that Mr. Beck is the victim of many cybersquatters. See Exhibit A (A domain tools report of a sampling of "glenn beck" typo domains). There are a number of "Glenn Beck" domains for sale on Sedo.com. See Exhibit B. One of those domains is <glennbeckrapedandkilledagirlin1990.com> See Exhibit C – however, the website found at this domain contains no criticism of Mr. Beck – just a pay per click ad. Most curiously, Mr. Beck has only targeted the Respondent's domain, thus calling his motives into question (as if they were not already).

This would suggest either that Mr. Beck has acquiesced to third party use of his alleged trademark or that this case was filed for an improper purpose.

VII. This is not the proper forum for a defamation claim. Even if it were, the claim would fail.

It has already been adequately argued in the Response that even a valid defamation claim is not properly brought under the UDRP. "Claims sounding in commercial libel must be brought in other legal venues." *Brittania Building Society v. Brittania Fraud Prevention*, WIPO Case No. D2001-0505 (citing Policy ¶ 5). This Panel should not consider whether the average Internet user would see the domain name at issue and think that it is a false statement of fact about Mr. Beck. The perceived truth or falsity of the statements made in Respondent's website, by those who don't get the joke, is irrelevant to the trademark issues involved here; truth or falsity are issues that could only be relevant in a defamation case, but are not fit for consideration or determination under the Policy.

Nevertheless, since the Complainant has tried to make this an issue of whether the Respondent has defamed Mr. Beck, and the Panel may take that into account, the Respondent will provide a representative sampling of authority that should convince even the most skeptical panelist that even if he were empowered to adjudicate a defamation claim, he would still find for the Respondent.

When it comes to defamation, it is not a simple matter of (False Statement) + (Angry Plaintiff) = Defamation. Context is everything. See *Greenbelt Coop. Pub. Ass'n. v. Bresler*, 398 U.S. 6 (1970) (when it is apparent, in the context of a statement, that its meaning is figurative and hyperbolic, the falsity of the literal meaning does not equal a knowing falsehood or reckless disregard for the truth, thus a public figure can not prove actual malice as a matter of law).

In *Dworkin v. L.F.P, Inc.*, 839 P.2d 903 (Wyo. 1992), *Hustler Magazine* called Andrea Dworkin *inter alia* a "shit-squeezing sphincter" and "a cry-baby who can dish out criticism but clearly can't take it," *Id.* at 915.

Under prevailing constitutional First Amendment safeguards, that language cannot, as a matter of law, form the basis for a defamation claim...We agree with that said by the Ninth Circuit Court of Appeals: "Ludicrous statements are much less insidious and debilitating than falsities that bear the ring of truth. We have little doubt that the outrageous and the outlandish will be recognized for what they are." Dworkin v. Hustler, 867 F.2d at 1194. Vulgar speech reflects more on the character of the user of such language than on the object of such language. Curtis Publishing Co. v. Birdsong, 360 F.2d 344, 348 (5th Cir. 1966). Id at 915-916.

This analysis is strongly followed in Florida, and as a resident of that state, the Respondent has a right to presume that Florida law will protect his speech. See *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So. 2d 666 (Fla. 3d DCA 1981) (even otherwise defamatory words are hyperbolic, and thus protected speech when taken "in their proper context."); *Horsley v. Rivera*, 292 F.3d 695, (11th Cir. 2002) (a claim that plaintiff was an "accomplice to homicide" protected as rhetorical hyperbole when taken in context); *Fortson v. Colangelo & NY Post*, 434 F.Supp.2d 1369 (S.D. Fla. 2006) (when words literally accuse plaintiff of a crime, there is no defamation when the context makes it clear that it is rhetorical and parodical speech).

Accordingly, if the Panel is so inclined as to consider whether the domain name is defamatory, it is clear to see that given Mr. Beck's public figure status, no U.S. court would hold that it is.

The **only** kind of confusion that is relevant in the UDRP context is trademark confusion – whether the average internet user would think that the domain name was somehow sponsored by, published by, or approved of by, the owner of the alleged mark.³

³ It is worth noting that Mr. Beck, even with an unusual second bite at the apple has failed to provide any evidence of actual registered rights or evidence of

VIII. The Complainant improperly introduces evidence of subsequent remedial measures – or so the Complainant thinks.

The Complainant makes great sport of the fact that the Respondent has placed a new disclaimer on his website. If this disclaimer were, indeed, a subsequent remedial measure, as the Complainant seems to argue that it is, then it would seem to be improperly introduced as evidence of liability. See Fed. R. Civ. P. 407. While the Federal Rules are not applicable to this dispute, the public policy underlying them has caused most jurisdictions in the United States to adopt this rule. If we are to accept Mr. Beck's fanciful tale that he is being harmed in a legally cognizable way by the Respondent's website, then any measures taken after notice of a dispute to mitigate that harm should not be introduced to prove culpability. See *It's Just Lunch Int'l LLC v. Dialog Software*, NAF Claim No. FA0804001177284 ("The Panel gives little weight to what may be characterized as a subsequent remedial measure by Respondent as creating an evidentiary inference that Respondent admits that its use of the domain name use ran afoul of Complainant's rights. Rather, the Panel sees the action as simply an accommodation to Complainant concerns.").

That said, the Complainant has now doubly made himself the butt of the Respondent's sense of humor. The Respondent's disclaimer, reproduced on page 4 of the Supplemental Filing is poking fun at Mr. Beck and at discussions and publications by Mr. Beck's supporters in which they have launched all sorts of conspiracy theories – claiming that the website is somehow an effort by ACORN to silence Mr. Beck.⁴

In any event, the disclaimer does not indicate that the domain name and alleged mark are "confusingly similar" – just that the humor embodied in the parody may be too sophisticated for some readers – mostly the kind of readers who frequent the Free Republic. The disclaimer accordingly explains the thrust of the website's joke in terms that should be understandable, even by *morons in a hurry*. But this bears only on the issue of whether the parody is funny, not on its legitimacy as nominative fair use.

common law rights. He continues to rely solely upon the fact that he is famous, which is not a proxy for trademark rights.

⁴ See, e.g., <http://www.freerepublic.com/focus/f-bloggers/2359495/posts>; <http://freerepublic.com/focus/news/2337877/posts?q=1&page=1>

IX. There is nothing novel about the underlying principles of this case.

The Panel accepted the Supplemental Filing and requested an additional Surreply from the Respondent on October 15, 2009. In doing so, the Panel noted:

Respondent indicated that certain parts of its legal argument are novel in so far as they have not been previously addressed by panel decisions under the Policy.

The Panel is reminded that the **Respondent** has not indicated that any parts of its legal argument are novel, nor is there a single issue raised in the Response that has not been previously addressed by another panel decision. The only thing novel about this case is that the subject of an internet meme has tried to kill that meme by filing a UDRP action, and so the Respondent has found it necessary to educate a panel on an internet meme. The existence of the meme is undisputed. The fact that the Respondent's website was created to pay homage to the meme is undisputed.

This is not the first time (nor will it likely be the last) that someone has tried to shut down a criticism website by abusing the UDRP process. Cases rejecting such efforts are numerous, fully cited in the Response, and the Respondent will not waste the Panel's time repeating arguments that have been made in the Response.

X. Authorities cited in Section B of the Supplemental Filing are distinct from this case in ways that support Respondent's position.

Section B of the Supplemental Filing, aside from its conclusory statements, seems to be written in support of the Respondent, not the Complainant. In fact, the Respondent is delighted at the Complainant's choice of authority. Despite the fact that the Complainant selected two cases in which the respondents defaulted, neither seems (upon a full reading) to support the Complainant's position – but they rather seem to support the Respondent.

The Complainant cites *Union Square Partnership, Inc. v. unionsquarepartnership.com*, [WIPO Case No. D2008-1234](#). In that case, the Panel explains it perfectly:

Intentionally misleading identity to attract, not the criticism, is what makes this illegitimate. As the panel in *Escada AG v. Phil Mitchell*, WIPO Case No. D2008-0274, succinctly stated, **“What is being curtailed is not free speech, but impersonation.”** (emphasis added)

If in addition to using a third party's marks without modification the erstwhile parodist intentionally imitates the look and feel of the mark owner's site and provides text apparently related to Complainant's programs and content, as Respondent did here, the diverted Internet user's confusion extends beyond initial interest. Absent a prominent disclaimer someone diverted to the parody site may not know for some time that he has reached the wrong address and is reviewing unauthorized or inaccurate information. One of the reasons given by panels that deem criticism sites legitimate¹⁰ is the unlikelihood of confusion or the correction of any initial interest confusion immediately after reaching the criticism site, see, e.g. *Fundación Calvin Ayre Foundation v. Erik Deutsch*, WIPO Case No. D2007-1947 (One criterion of evaluating legitimacy of criticism site is "it is immediately apparent to Internet users visiting the website at the domain name that it is not a website of the owner of the mark."); *Ryanair Limited v. Michael Coulston*, WIPO Case No. D2006-1194 ("Any consumers who mistakenly stumble on this site while looking for Complainant's website will no doubt immediately realize their error, and need only click on the "back" button to return to their search results.")

In that case, the mark was "Union Square Partnership," and the domain names were <unionsquarepartnership.com> and <.org>. The Complainant's trademark and the domain names were identical, and used "without modification," thus creating indications that the Respondent was attempting to impersonate the Complainant. In the instant case, the alleged mark has clearly been modified. In this case, what is being curtailed is not impersonation, but free speech. The Complainant's goal is evidently to squelch criticism by making an end run around the First Amendment.

Similarly, in *Justice for Children v. R neetso / Robert W. O'Steen*, [WIPO Case No. D2004-0175](#), the

Respondent has not added a derogatory or uncomplimentary word (e.g., "sucks") in the Disputed Domain Names, **thus distinguishing this case from those in which a panel or a court found for Respondent on grounds that use of such a derogatory term would make the domain name unmistakably dissimilar to the mark, so that the Complainant failed to satisfy paragraph 4(a)(i) of the Policy.** (emphasis added) ... Furthermore, a panelist deciding a complaint under the Policy lacks the means to determine truth or falsity, effect on a mark, or effect on a party's business reputation, of a website's content. These are matters for civil litigation.

In this case, we clearly have derogatory and uncomplimentary additions to the alleged mark, and as explained in the Response, Mr. Beck's true grievances are outside the scope of the Policy.

XI. Section D of the Supplemental Filing also supports the Respondent's position.

If a domain name was registered in order to trade off of the mark holder's goodwill or to prevent the mark holder from registering a domain name corresponding to his own mark, then it was registered in bad faith. If it was registered to honor and promote a meme, then this is not bad faith.

The Complainant offers no evidence that "Daychilde" is the Respondent's alias. See Supplemental Filing at 5. However, accepting Complainant's position as true, then Daychilde's remarks would clearly establish a lack of bad faith under the policy.

The Complainant's claim that the "Gilbert Gottfried routine," was added later is absolutely true. See Supplemental Filing at 6. Of course it was. The meme is based on a comparison of Glenn Beck's style to a Gilbert Gottfried joke. The domain name is in honor of the meme. It does not follow that for either of those factors to be true, that the Respondent's website needed to have a Gilbert Gottfried clip on it. For the record, the original video on the site was a parody of **yet another meme**. In the video "[DON'T LEAVE GLEN BECK ALONE!!!!!!!](#)"⁵, a girl mimics yet another meme in which a disturbed boy implores the world to "[LEAVE BRITNEY ALONE!](#)"⁶ The "BRITNEY" video has been mocked and mimicked into memehood many times over. See Exhibit D (Wikipedia Entry explaining Chris Crocker and the "LEAVE BRITNEY ALONE" meme).

Is Mr. Beck really trying to convince this Panel that a website with a video spoof of the LEAVE BRITNEY ALONE meme, stating that "every time people stop mocking Glenn Beck, a baby ghost gets turned into a human being" would con the average into presuming that the website was set up by the Glenn Beck fan club? The logical pretzel that the Supplemental Filing creates defies any sense of reason. It is so irrational that one must wonder if it is yet another esoteric inside joke – an attempt by Mr. Beck to achieve the same level of memetic success as Pedobear.

⁵ <http://www.youtube.com/watch?v=c1YzXkHq2c>

⁶ <http://www.youtube.com/watch?v=kHmvkRoEowc>.

CONCLUSION

Step one in getting out of a hole is to simply stop digging. Mr. Beck has disregarded this logic with a Supplemental Filing that has done little more than actually prove the Respondent's position.

Glenn Beck is the butt of a viral joke. He may not get the joke, but this does not make the joke likely to confuse or subject the domain name to transfer under the UDRP. Glenn Beck's failure to understand these basic principles of law does not make the joke any less humorous, and does not make him any less of the butt. The First Amendment protects Respondent's right to make Glenn Beck the butt, and his hypocritical attempts to squelch legitimate free speech criticism do nothing to portray himself in a more flattering light. Because his arguments do not satisfy Section 4(a) of the Policy, his request should be denied. Because he has attempted to silence a critic by circumventing (and thereby devaluing) the First Amendment -- which he publically (and in this proceeding) claims to love -- he should be deeply ashamed.

Respectfully Submitted,

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