

## **ADMINISTRATIVE PANEL DECISION**

**Cheezburger, Inc. v. WeKnowMemes LLC (c/o Dynadot Privacy)**

**Case No. D2012-2452**

### **1. The Parties**

The Complainant is Cheezburger, Inc.<sup>1</sup> of Seattle, Washington, United States of America, represented by Focal PLLC, United States.

The Respondent is WeKnowMemes LLC (c/o Dynadot Privacy) of San Mateo, California, United States of America, represented by The Muscovitch Law Firm, Canada.

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

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

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on December 13, 2012. On December 14, 2012, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On December 14, 2012, the Registrar transmitted by email to the Center its verification response confirming that the Respondent was listed as the registrant and providing the contact details for the Domain Name.

The Center verified that 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(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced December 20, 2012. In accordance with the Rules, paragraph 5(a), the due date for Response was January 9, 2013. On January 2, 2013, the Respondent sent an email

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<sup>1</sup> The Complaint and other filings by the Complainant are captioned with this company name, and the cited United States trademark registration is in this name. The Panel will therefore ignore the unexplained reference in the “Parties” section of the Complaint to a company called “Texts From Last Cheezburger, Inc.”)

requesting an extension to file its Response by one week. On January 3, 2013, the Complainant sent an email indicating it had no objection to the Respondent's request for extension. Accordingly, on January 4, 2013, the Center confirmed to the Parties that the new deadline for the Respondent to file its Response was January 16, 2013. The Response was filed with the Center on January 16, 2013.

On January 22, 2013, the Complainant submitted its supplemental filing to the Center. The Center replied on the same date that it would be within the discretion of the Panel to determine whether to accept supplemental filing. On January 24, 2013, the Respondent submitted its supplemental filing to the Center. On January 25, 2013, the Center replied likewise that it would be within the discretion of the Panel to determine whether to accept supplemental filing.

The Center appointed W. Scott Blackmer, Jonathan Agmon and Diane Cabell as panelists in this matter on January 31, 2013. The Panel finds that it was properly constituted. Each member of 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**

According to the Wikipedia article cited in the Response, "Meme" (a word used in the Domain Name and by both the Complainant and the Respondent on their respective websites) describes "an idea, behavior or style that spreads from person to person within a culture". In the Internet context, it refers to "a concept that spreads from person to person via the Internet."

The Complainant is a Delaware business corporation located in Seattle, Washington. Since 2007, according to the Complaint, the Complainant has researched and documented "Internet memes and viral phenomena". The Complainant operates a website at "www.knowyourmeme.com" describing and either displaying or linking to viral videos, image macros, catchphrases, and websites concerning web celebrities. The Complainant's website provides commentary about these items and allows users to post their own comments about featured images and videos through various popular social media channels. The Complainant's website, which also displays commercial advertising to earn revenue, has been mentioned in numerous online and print media articles.

The Complainant holds United States Trademark Registration No. 4052197 (registered November 8, 2011) for the standard-character mark KNOW YOUR MEME. The registration expressly disclaims any exclusive right to use the word "meme" apart from the mark as registered.

The Respondent is a California limited liability company of which Mr. Peterson is the principal. Mr. Peterson was a 25-year-old student in Film and Media Studies at the University of California at Irvine when he registered the Domain Name on April 22, 2011. Mr. Peterson and his brother developed an Internet media website associated with the Domain Name. The website, which became active in April 2011, serves as a repository of Internet memes, some of which were originally created or by Mr. Peterson and his team. The Respondent's website displays or links to popular images and videos, much as the Complainant's website does, and it is not disputed that the Respondent is in that respect a competitor with the Complainant. Like the Complainant's website, the Respondent's website earns revenues from advertising and has been mentioned in numerous media articles. Statistics from Alexa.com show that the Respondent's website has attracted more than 25 million unique visitors. A receipt from LegalZoom, attached to the Response, indicates that Mr. Peterson ordered the establishment of the Respondent as a limited liability company on October 12, 2011. The Respondent was ultimately registered as a California limited liability company on December 5, 2011.

Counsel for the Complainant sent the Respondent a cease-and-desist letter dated October 24, 2011, claiming both trademark and copyright infringement and demanding the transfer of the Domain Name. The Respondent replied with an email dated November 14, 2011, denying infringement but reporting that the Respondent had removed material (four memes and related editorial content copied from the Complainant's

website, as described in the Complaint and Response) that could be construed as infringing the Complainant's copyright. The email stated that the Respondent had also discontinued its "service", similar to the Complainant's, of "explaining the origins and rationale behind the memes and viral phenomena." The Respondent offered to add a disclaimer of affiliation and to discuss any other concerns. A subsequent email from the Complainant's counsel suggests that the Parties discussed the possible transfer of the Domain Name but did not reach an agreement.

## **5. Parties' Contentions**

### **A. Complainant**

The Complainant argues that the Domain Name is confusingly similar to its registered KNOW YOUR MEME trademark, since both contain the word "know" and either "meme" or "memes", along with a personal pronoun ("your" and "we", respectively). The Complainant contends that the Respondent has no right or legitimate interest in the Domain Name, because the use of a domain name confusingly similar to the Complainant's mark, for a competing website, cannot be considered use in connection with a *bona fide* offering of goods or services. The Complainant states that the Respondent was not commonly known by a name corresponding to the Domain Name before the dispute, because the Respondent was not registered as a company until December 2011, after the October 24, 2011 demand letter from the Complainant.

The Complainant infers that the Domain Name was registered and is being used in bad faith, arguing that the Complainant's mark was well-known by the time the Domain Name was registered and that the Complainant had already applied for trademark registration. The Complainant concludes that the Domain Name was selected to disrupt the Complainant's business and to misdirect Internet users for commercial gain.

### **B. Respondent**

The Respondent argues that the Domain Name is generic or descriptive and is sufficiently different from the Complainant's mark to which it is not confusingly similar.

The Response asserts a legitimate interest in using a descriptive domain name for a website devoted to relevant content and services. The Response cites numerous instances of the words "we know" used in trademarks, media names, and domain names. Mr. Peterson's Declaration, annexed to the Response, states that Mr. Peterson learned about "memes" in a university media course. The Response cites the Wikipedia article on "Meme", which defines a meme as "an idea, behavior or style that spreads from person to person within a culture", such as concepts that spread via the Internet. Mr. Peterson's Declaration insists that the Domain Name was chosen in good faith for its generic or descriptive value, not in reference to the Complainant's website, and was used legitimately in a manner relevant to that sense.

## **6. Discussion and Findings**

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of the Domain Name, the Complainant must demonstrate each of the following:

"(i) the Domain Name is identical or confusingly similar to a trademark or service mark 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 is being used in bad faith."

Under paragraph 15(a) of the Rules,

“A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable.”

### **A. Supplemental Filings**

The Policy contemplates prompt, efficient resolution of domain name disputes on a narrow range of issues and with only two limited remedies, transfer or cancellation of a domain name. Accordingly, the Rules and Supplemental Rules provide only for a complaint and response, within strict time and word limits. There is no explicit provision for additional filings except for further statements or documents provided in response to a request from the Panel (Rules, paragraph 12). Paragraph 10 of the Rules directs the Panel to conduct the proceeding “with due expedition” and empowers the Panel to “determine the admissibility, relevance, materiality and weight of the evidence.”

Panels are consequently reluctant to countenance delay through additional rounds of pleading and require some showing of “exceptional circumstances.” They typically accept supplemental filings only to consider new evidence or provide a fair opportunity to respond to new arguments. See WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition (“WIPO Overview 2.0”), paragraph 4.2, and cases cited therein. These “exceptional circumstances” involve matters that arise after the initial pleading was filed and which could not reasonably have been anticipated at that time. See, e.g., *Digital Ceramic Systems Limited v. Baltea SRL*, WIPO Case No. D2012-1198 (“the supplemental filings should address relevant issues which were not known by the filing party at the time that it filed its documents [...]”); *Mani Brothers, LLC v. Lincoln Gasking*, WIPO Case No. D2008-0097 (“[p]anels that have allowed additional pleadings generally do so only when the response includes a matter that the complainant could not reasonably have anticipated when the complaint was filed”).

The Complainant’s supplemental filing addresses argumentation in the Response concerning the Respondent’s alleged copyright infringements, and the Respondent’s supplemental filing offers a rebuttal to the Complainant’s arguments. Neither of these supplemental filings concern newly discovered evidence or new arguments that the Parties could not reasonably have anticipated when filing their original pleadings. Moreover, as discussed below, the Panel does not find the alleged copyright infringements to be material to the decision in this UDRP proceeding. Hence, the Panel will not consider the supplemental filings as part of the record in this proceeding.

### **B. Identical or Confusingly Similar**

The Complainant indisputably owns the registered trademark, KNOW YOUR MEME. The mark is a phrase comprised of dictionary words, and the Domain Name, <weknowmemes>, is not identical or overwhelmingly similar. However, Policy claims are not based on proof of trademark infringement, and the kinds of evidence necessary to establish confusing similarity in trademark litigation are not required in this proceeding. UDRP panels typically apply a “low threshold” test for confusing similarity under the first element of a Policy complaint, essentially to establish the Complainant’s standing to proceed to the merits of the case under the other elements of the UDRP complaint, rights or legitimate interests and bad faith. See, e.g., *Research in Motion Limited v. One Star Global LLC*, WIPO Case No. D2009-0227; *Sermo, Inc. v. CatalystMD, LLC*, WIPO Case No. D2008-0647; WIPO Overview 2.0, paragraph 1.2. This is commonly tested by comparing the mark and the disputed domain name in appearance, sound, meaning, and overall impression.

The Panel considers it a close question whether the Domain Name should be considered confusingly similar to the Complainant’s mark for UDRP purposes. But the overall impression is sufficiently similar, especially for the Domain Name used for a competing website, that the Panel concludes the first Policy element has been satisfied.

### **C. Rights or Legitimate Interests**

Paragraph 4(c) of the Policy gives non-exclusive examples of instances in which the Respondent may establish rights or legitimate interests in the Domain Name, by demonstrating any of the following:

“(i) before any notice to [it] of the dispute, [the respondent’s] use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a *bona fide* offering of goods or services; or

(ii) that [the respondent] ha[s] been commonly known by the domain name, even if [it] ha[s] acquired no trademark or service mark rights; or

(iii) [the respondent is] making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.”

The Domain Name is a phrase comprised of dictionary words. The Respondent’s use of the Domain Name for a website with content relevant to its generic or descriptive sense can represent a legitimate interest, so long as there is no persuasive evidence that the Domain Name was actually selected for its trademark rather than generic or descriptive value. See WIPO Overview 2.0, paragraph 2.2. As discussed further below in connection with the bad faith element of the Complaint, the Panel is not persuaded on this record that the Respondent chose the Domain Name to exploit the Complainant’s trademark.

Apart from the use of the Domain Name, which is generic or descriptive, for a relevant, commercial website, there is also evidence in the record of “demonstrable preparations” to establish a company by the same name before notice of the dispute. Mr. Peterson ordered the formation of the company through the LegalZoom service before the Complainant’s demand letter. It is conceivable that such a step might have been taken in bad faith, in anticipation of a trademark or domain name dispute, but the Panel is not persuaded that this was the Respondent’s motivation. The Respondent had been operating a successful website under the name it sought for the company for nearly half a year by that time, and the name is relevant for the company’s online activities.

The Panel concludes, therefore, that the second element of the Complaint has not been established.

Although this conclusion is sufficient to dismiss the Complaint, the Panel will proceed to address the third element of the Complaint, which requires an evaluation of many of the same facts and inferences that underlie the Respondent’s claim to a legitimate interest in the Domain Name.

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

The Policy’s non-exhaustive list of instances of bad faith in paragraph 4(b) includes the following cited by the Complainant:

“(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.”

The Panel must decide these issues on the basis of the submitted record, including the signed Declaration of Mr. Patterson annexed to the Response. Unlike trademark litigation in the United States, there is no opportunity in a UDRP proceeding to conduct discovery or examine witnesses. Mr. Patterson’s Declaration does not deny his awareness of the Complainant’s website, but he plausibly claims that he chose the Domain Name for its undeniable generic or descriptive value, and he made relevant use of it from the outset. In the Panel’s view, the Domain Name is not so similar to the Complainant’s mark that it is inconceivable that the Respondent chose the Domain Name for its generic or descriptive value.

The Complainant relies heavily on alleged copyright violations to demonstrate that the Respondent sought to exploit the Complainant's efforts and reputation. A handful of copied images or videos, with accompanying text, among hundreds or thousands that appeared on the Respondent's website, is not persuasive evidence of an intent to disrupt the Complainant's business or target the Complainant's mark, especially given the nature of both the Respondent's and the Complainant's "meme" websites. In any event, resolving a copyright dispute is beyond the scope of this Policy proceeding.

The Panel concludes on the available record that the Complainant has not met its burden of proof on the third element of the Complaint, bad faith in registration and use of the Domain Name on the part of the Respondent.

## **7. Decision**

For the foregoing reasons, the Complaint is denied.

**W. Scott Blackmer**  
Presiding Panelist

**Jonathan Agmon**  
Panelist

**Diane Cabell**  
Panelist  
Date: February 19, 2013