

IN THE MATTER OF A COMPLAINT PURSUANT TO THE  
CANADIAN INTERNET REGISTRATION AUTHORITY  
DOMAIN NAME DISPUTE RESOLUTION POLICY

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Domain Name:           THERAFIRM.CA

Complainant:           Knit-Rite, Inc.

Registrant:             Faisal Malik

Registrar:             Netfirms, Ltd.

Panelist:               Daniel Anthony

Service Provider:      Resolution Canada, Inc.

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**DECISION**

**A.     The Parties**

1.     The Complainant in this matter is Knit-Rite, Inc., a US-based company incorporated in the state of Kansas.
2.     The Registrant for the domain name is listed as Faisal Malik, with an address in Mississauga, Ontario, Canada.

**B.     The Domain Name and Registrar**

3.     The disputed domain name is <therafirm.ca> (the “Domain Name”). The Registrar for the Domain Name is Netfirms, Ltd. The Domain Name was registered on July 25, 2018.

**C.     Procedural History**

4.     This is a proceeding under the Canadian Internet Registration Authority (“CIRA”) *Domain Name Dispute Resolution Policy* (Version 1.3), (the “*Policy*”) and the CIRA *Domain Name Dispute Resolution Rules* (Version 1.5), (the “*Rules*”).
5.     The History of the proceeding, according to the information provided by the dispute resolution provider, Resolution Canada, Inc. (the “Provider”), is as follows:
  - The Complainant filed its Complaint against the Registrant with Resolution Canada, Inc. on February 14, 2020, requesting that the registration for the domain name <therafirm.ca> be transferred to Knit-Rite, Inc.

- On February 14, 2020, Resolution Canada served notice of the Complaint to the Registrant as required by paragraph 4.3 of the *Rules*. The Notice of Complaint informed the Registrant that they had 20 days from February 14, 2020 to respond to the Complaint.
- At the time of filing the Complaint, the identity of the Registrant was redacted for privacy purposes. On February 14, 2020, the Provider requested and received the contact information for the Registrant. This contact information was also provided to the Complainant.
- Following the receipt of the Registrant’s identity, the Complainant filed additional submissions on March 13, 2020 as permitted by paragraph 11.1 of the *Rules*.
- No response was filed by the Registrant.

6. It is noted that the Complainant’s brief additional submissions filed on March 13, 2020 contained submissions relating to the bad faith factor. However, paragraph 11.1 restricts any new submissions and evidence following receipt of the Registrant’s identity to the legitimate interest factor. I have treated the additional submissions accordingly, relying upon them to assist in determining legitimate interest, and disregarding them in determining bad faith.

**D. Panelist Impartiality and Independence**

7. As required by paragraph 7 of the *Rules* I have submitted to the Provider a declaration of impartiality and independence in relation to this dispute.

**E. Eligibility**

8. The Complainant, Knit-Rite, Inc., is a company based in Kansas City, Kansas. It holds the Canadian trademark registration for THERAFIRM (TMA576557), for use with respect to braces and supports for limbs and joints for medical use; and support hosiery and stockings. This mark was registered on February 19, 2003. The Complainant also holds a number of different Canadian trademark registrations which feature the term THERAFIRM in combination with other elements. The Canadian trademark registration for THERAFIRM is sufficient to establish that Knit-Rite, Inc. is eligible to bring this Complaint, pursuant paragraph 1.4 of the *Policy*.

**F. Factual Background**

9. The Complainant describes itself as “a global leader in the research, design and manufacture of innovative textiles for medical and consumer markets.” According to the Complainant, “Its products include prosthetic textiles (such as socks and sheaths), orthotic textiles (such as ankle-foot orthosis socks and body/extremity interfaces), sensitivity products (for individuals experiencing sensory processing differences), diabetic socks and gradient-compression hosiery.” The Complainant states that it has used its THERAFIRM trademark in Canada since at least as early at 1998 and, through this use, it has achieved public recognition in Canada and around the world. The above is supported by printouts from the Complainant’s website setting out similar details. As noted above, the Complainant holds registered trademarks in Canada for THERAFIRM and for other THERAFIRM-related trademarks. These marks are registered in association with “support hosiery and stockings; braces and supports for limbs and joints for medical use”.

10. The Registrant registered the domain name <therafirm.ca> on July 25, 2018. Because the Registrant did not respond to the Complaint there is no information from the Registrant regarding its activities. As discussed below, the Complainant provided some information in its additional submissions.

11. The Complainant alleges that “the Domain Name remains active and resolves to the Registrant’s website where the Registrant is selling and/or offering for sale the Complainant’s products (or imitation/counterfeit products similar thereto), without the Complainant’s authorization.” Printouts of the Registrant’s website at <therafirm.ca> and the Complainant’s website at <therafirm.com> are provided in support. The Complainant also argues that the products “showcased on the Registrant’s website also include products manufactured and sold by entities that compete with the Complainant in the same market.” Printouts depicting the websites of two relevant third-party competitors are provided in support.

12. In the Complainant’s additional submissions, the Complainant states that the Registrant’s address “corresponds with the address of the Canadian Muscle and Joint Pain Clinic in Mississauga, Ontario; and Dr. Faisal Malik is listed as the clinic’s chiropractor.” The Complainant also provided evidence that “Dr. Malik’s clinic offers services in the areas of (among other things) custom orthotics, sport braces, and compression socks, and related therapies (and related underlying medical conditions),” which are the same kinds of goods in the Complainant’s registration for THERAFIRM.

**G. CIRA Domain Name Dispute Resolution Policy Requirements**

13. Paragraph 3.1 of the *CIRA Domain Name Dispute Resolution Policy* (CDRP) requires that the Complainant establish that:

- (a) the Registrant’s dot-ca domain name is Confusingly Similar to a Mark in which the Complainant had Rights prior to the date of registration of the domain name and continues to have such Rights;
- (b) the Registrant has no legitimate interest in the domain name as described in paragraph 3.4; and
- (c) the Registrant has registered the domain name in bad faith as described in paragraph 3.5.

14. According to paragraph 4.1 of the CDRP, the Complainant must establish elements (a) and (b) above on a balance of probabilities. The Complainant must also provide “some evidence” that the Registrant has no legitimate interest in the Domain Name.

## H. Analysis

### Confusingly Similar

15. The Complainant must first establish that the disputed domain name is confusingly similar to a mark in which the Complainant has rights in Canada prior to the date of registration of the Domain Name, and that it continues to have such rights as of the date of the Complaint.

16. The Complainant's trademark is THERAFIRM and is a Mark in accordance with paragraph 3.2 of the *Policy*. The Domain Name is <therafirm.ca>. The Complainant's rights in the trademark began well before the registration date of the Domain Name, and it continues to have rights in its Mark.

17. According to paragraph 3.3 of the *Policy*, a domain name is confusingly similar to a Mark when it "so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely to be mistaken for the Mark." As noted in *Coca-Cola Ltd. V Amos B. Hennan*, BCICAC Case No. 00014, "For the purposes of this Policy, "domain name" means the domain name excluding the "dot-ca" suffix". Applying that definition, the domain name is identical to the Complainant's trademark THERAFIRM. Therefore, I find that the Complainant has met its burden of establishing, on a balance of probabilities, that <therafirm.ca> is confusingly similar with the Complainant's trademark THERAFIRM. This factor of the test is met.

### Legitimate Interest

18. The Complainant submitted that there has never been any relationship between the Complainant and Registrant and that it has never licensed or authorized the Registrant to register or use the mark THERAFIRM in any manner, including as a domain name. In the absence of any responding submissions, I accept this evidence.

19. Under sub-paragraph 4.1(c) of the *Policy*, the Complainant must provide "some evidence" that "the Registrant has no legitimate interest in the domain name". Paragraph 3.4 identifies six circumstances in which a legitimate interest may arise. These are:

- (a) the domain name was a Mark, the Registrant used the Mark in good faith and the Registrant had Rights in the Mark;
- (b) the Registrant registered the domain name in Canada in good faith in association with any wares, services or business and the domain name was clearly descriptive in Canada in the English or French language of: (i) the character or quality of the wares, services or business; (ii) the conditions of, or the persons employed in, production of the wares, performance of the services or operation of the business; or (iii) the place of origin of the wares, services or business;
- (c) the Registrant registered the domain name in Canada in good faith in association with any wares, services or business and the domain name was understood in Canada to be the generic name thereof in any language;

- (d) the Registrant used the domain name in Canada in good faith in association with a non-commercial activity including, without limitation, criticism, review or news reporting;
- (e) the domain name comprised the legal name of the Registrant or was a name, surname or other reference by which the Registrant was commonly identified; or
- (f) the domain name was the geographical name of the location of the Registrant's non-commercial activity or place of business.

20. I find that the Complainant has provided more than just "some evidence" of the Registrant's lack of a legitimate interest in the Domain Name and has strongly established this factor of the test. In particular, the following are my findings on why none of the six circumstances of legitimate interest apply:

- (a) The Complainant has provided evidence, in the form of Canadian trademark registrations and supporting evidence of longstanding use and reputation, showing that the Complainant had rights in the mark in Canada prior to the date of registration of the Domain Name. In contrast, there is no evidence showing that the Registrant had rights in the trademark THERAFIRM and used it in good faith. Indeed, the evidence filed by the Complainant (including the additional submissions) indicates that the Registrant is a chiropractor selling the Complainant's goods, as well as third party competing goods. In this regard, any good faith use of the mark THERAFIRM by the Registrant to refer to the Complainant's products accrues to the benefit of the Complainant, and not the Registrant. The Complainant also submitted evidence that the Registrant appears to be impersonating the Complainant, has copied portions of its website without permission, and has engaged in a pattern of registering domain names corresponding to third party marks. The Complainant argues that trading off another person's goodwill, engaging in deceptive practices, and other bad faith conduct undermine any potential claim of "good faith". I agree. The Registrant has not used the mark for its own benefit, or alternatively, any use of the mark for its benefit was not made in good faith.
- (b) There is no evidence that the Domain Name was clearly descriptive of any characteristic of the wares, services or business of the Registrant. On the contrary, the evidence is that the Domain Name exactly matches a trademark owned by the Complainant, and that the Registrant itself uses (or has used) the Domain Name to evoke the Complainant's trademark (being a vendor of the Complainant's goods) and does not use the Domain Name in any descriptive manner.
- (c) There is no evidence to indicate that the Domain Name is understood to be the generic name of any wares, services or business. The Domain Name instead exactly matches a registered trademark in good standing.
- (d) There is no evidence that the Registrant has used the Domain Name in association with any non-commercial activity. In fact, the Domain Name appears to be used (or to have been used in the past) to host a commercial website that offers the Complainant's goods and competing goods.
- (e) There is no evidence that the Domain Name is or was the legal name of the Registrant or a name by which the Registrant was commonly identified. The evidence

before me is that the Registrant is Dr. Faisal Malik, a chiropractor, and his business is called the Canadian Muscle and Joint Pain Clinic. I find no connection between the Registrant's actual name and the Domain Name.

(f) There is no evidence that the Domain Name is a geographical name of the location of the Registrant's non-commercial activity or place of business. Based on the evidence, the Domain Name has no known geographic meaning.

21. Additionally, as will be discussed in great detail below, the Complainant has satisfied its burden of showing, on a balance of probabilities, that the domain name was registered in bad faith, thus precluding any legitimate interest circumstance requiring good faith, such as those under paragraphs 3.4(b), (c), or (d) discussed above.

22. Accordingly, I find that the Complainant has exceeded its burden to provide "some evidence" that the Registrant has no legitimate interest in the Domain Name. This factor of the test is met.

#### Bad Faith

23. Several non-exhaustive bases for a finding of bad faith are set out in sub-paragraph 3.5 of the *Policy*. The Complainant has advanced arguments under the bad faith grounds set out in paragraphs 3.5(b), (c) and (d). Each of these is addressed below.

24. Paragraph 3.5(b) of the *Policy* provides:

(b) the Registrant registered the domain name or acquired the Registration in order to prevent the Complainant, or the Complainant's licensor or licensee of the Mark, from registering the Mark as a domain name, provided that the Registrant, alone or in concert with one or more additional persons has engaged in a pattern of registering domain names in order to prevent persons who have Rights in Marks from registering the Marks as domain names

25. The Complainant submits that the evidence shows that "the Registrant has engaged in an unauthorized pattern of domain name registrations, having registered at least five domain names to which he is not entitled." The Complainant provided a list of dot-ca domain names owned by the Registrant, generated by CIRA, showing that the Registrant currently owns at least 24 domain names. The Complainant also provided evidence of prior third-party rights in at least five of these domain names (in the form of Canadian trademark registrations and/or screenshots of third-party websites) and screenshots of the Registrant's apparent unauthorized use of such third-party rights.

26. It has been held that as few as two domain name registrations are sufficient to establish that the Registrant has engaged in a pattern of registering domain names in order to prevent persons who have rights in marks from registering the marks as domain names. See: *Great Pacific Industries Inc. v. Ghalib Dhalla*, BCICAC Case No. 00009; *Canadian Broadcasting Corporation/Société Radio-Canada v. William Quon*, *supra*; *Allergan Inc. v. Hiebert Net Inc.*, BCICAC Case No. 00058. I find that the Complainant has provided sufficient evidence to show

that the Registrant has engaged in a pattern of registering domain names to which he is not entitled. Bad faith is therefore established under paragraph 3.5(b).

27. Paragraph 3.5(c) of the *Policy* provides:

(c) the Registrant registered the domain name or acquired the Registration primarily for the purpose of disrupting the business of the Complainant, or the Complainant's licensor or licensee of the Mark, who is a competitor of the Registrant

28. The Complainant submits that "the Domain Name resolves to a website that features, alongside the Complainant's products, products manufactured and sold by the Complainant's competitors in the same market" and that this "creates a likelihood of confusion with the Complainant as to source of its products". The Complainant also submits that the "Registrant's behaviour in this regard is highly disruptive to the Complainant and its business, redirecting potential business away from the Complainant."

29. The Complainant has submitted evidence of the Registrant's website hosted at <therafirm.ca>, establishing that the Registrant advertises and offers for sale the Complainant's products directly alongside third party competing products. This clearly establishes that the Registrant is a competitor since it sells the same kind of goods as those produced, distributed and sold by the Complainant. I also find the Registrant's behaviour disrupts the Complainant's business by potentially directing customers looking for the Complainant's products to competitor products. Also, as the Complainant has carefully pointed out, the "About Us" page on the Registrant's <therafirm.ca> website is a copy of the About Us page from the Complainant's website, thus impersonating the Complainant, except the Registrant's own address and contact details are included. This conduct is likely to cause some customers that are seeking to contact the Complainant to erroneously contact, which I agree would also be highly disruptive. Overall, the Complainant has persuasively established that the Registrant is a competitor and acquired the Domain Name primarily to disrupt the Complainant's business. Bad faith is therefore established under paragraph 3.5(c).

30. Paragraph 3.5(d) of the *Policy* provides:

(d) the Registrant has intentionally attempted to attract, for commercial gain, Internet users to the Registrant's website 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 the Registrant's website or location or of a product or service on the Registrant's website or location

31. The Complainant argues that "the Registrant's therafirm.ca website utilizes misappropriated and infringing images and verbatim THERAFIRM® product and business descriptions, and imitates itself as, and declares that it is, the Complainant." The Complainant submits that "the Domain Name is likely to confuse potential consumers into believing that the Registrant is somehow affiliated with, or endorsed by, the Complainant". I agree.

32. The evidence provided by the Complainant shows that certain products offered on the Registrant's <therafirm.ca> website are those of the Complainant, as well as third parties. The evidence also establishes that images and text describing the "THERAFIRM® product and

business” appearing on the Registrant’s website are identical to images and text appearing on the Complainant’s websites. The Complainant submits that these appropriated images are the subject of copyright, which is therefore infringed. Taken together, the evidence leads me to conclude that a person encountering the website hosted at <therafirm.ca> is like to conclude that the website is part of the business operations of the Complainant itself or is sponsored by or affiliated with the Complainant.

33. I find that the Complainant has established, on the balance of probabilities, that the Registrant’s website is nothing less than a vehicle to attract online customers for the Registrant’s own commercial gain, by falsely suggesting that it is the Complainant, or is directly sponsored by, authorized by or affiliated with the Complainant. Bad faith is therefore established under paragraph 3.5(d).

34. As a final point, the Complainant argues that the registrant’s actual or constructive knowledge of a Complainant’s rights at the time of registration can reinforce a finding of bad faith, citing *Canadian Broadcasting Corporation/Société Radio-Canada v. William Quon*, BCICAC Case NO. 00006; *Coca-Cola Ltd. v. Amos B. Hennan*, BCICAC case NO. 00014; *Government of Alberta, on behalf of Her Majesty the Queen in Right of Canada v. Advantico Internet Solutions Inc.*, BCICAC Case No. 00012.

35. I find that the Registrant copied text and images from the Complainant’s website that included the ® symbol (e.g. THERAFIRM®), which is sufficient to conclude that the Registrant had full knowledge of the Complainant’s rights. This is further supported by the pattern of at least five bad faith registrations discussed above. While I have already found bad faith under paragraphs 3.5(b), (c) and (d), I would also have reached a general finding of bad faith based on the Registrant’s overall conduct to impersonate, compete with, and interfere with the Complainant.

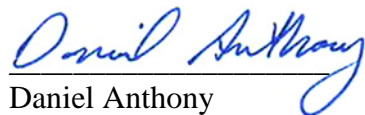
## **I. Conclusion and Decision**

36. In conclusion, I find that the Complainant has rights in the mark THERAFIRM. I find that the Domain Name is confusingly similar to the mark, the Registrant had no legitimate interest in the Domain Name and the Domain Name was registered in bad faith.

## **J. Remedy**

37. The Domain Name shall be transferred to the Complainant in accordance with paragraph 4.3 of the *Policy*.

Dated April 1, 2020

  
Daniel Anthony