

the LOTTO REPORT

"Watchdogs of the Texas Lottery"

Publisher
Dawn Nettles

www.lottoreport.com
www.lottotexas.com
www.lottotexas.net
www.megaplier.org

Where drawing results and payouts are posted after each drawing ... where you can read about the winners ... and where players make predictions. Plus ... much more!

P. O. Box 495033
Garland, Texas
75049-5033

Phone: (972) 686-0660
Fax (972) 681-1048

lottoreport@lottoreport.com

Subscription Rates

6 Months - \$19.75
12 Months - \$37.50

January 29, 2010

Meyertons, Hood, Kevlin, Kowert & Goetzel Sent via Fax & E-mail
700 Lavaca
Suite 800
Austin, Texas 78701-3102

RE: Accusations of Infringing Use of Texas Lottery Trademarks

Dear Mr. Goetzel:

This is in response to the letter I received from you on January 25, 2010 alleging that I was "*infringing use of Texas Lottery trademarks.*" I am disappointed that you are accepting taxpayer money "again" in another attempt to obtain domain names you have already attempted and failed to obtain in the past. The Texas Legislature, the State Auditors Office, the DA of Travis County and the AG's office should thoroughly investigate this significant waste of taxpayer money used to bully private citizens out of their domain names on behalf of the Texas Lottery Commission.

I will specifically address each of the issues you raised. As you may recall, in August of 2001, you unsuccessfully attempted to acquire both the domain names lottotexas.com and lottotexas.net claiming infringement. At that time you received a response from lottotexas.com/net, that stated in part and has been edited for privacy concerns, the following:

"Your client knows, and will so inform you, that my client owns these domain names and has used them since at least as early as 1996. To this date, they have performed a public service in reporting lottery results in organized form to Texans, and has not made a dime from the sales of products or services from the websites. Your client will also inform you that your client's own website provides a royalty-free license to anyone using the logos of the Texas Lottery Commission which are the very subject of Registration 1,757,208 for "TEXAS LOTTERY & Design."

Examination of the various file histories of purported trademarks now owned by the Texas Lottery Commission shows a pattern of disclaiming material portions of the mark: (1) concerning Registration 1,757,208 for "TEXAS LOTTERY & Design", the words Texas Lottery are disclaimed apart from the mark as shown; (2) concerning application 76/241,413 for the "TEXAS TWO STEP" mark, the pending file history shows that your client's New York trademark prosecution firm was written a rejection on June 4, 2001 of the alleged mark with a requirement of disclaimer of the "descriptive word TEXAS apart from the mark as shown"; (3) concerning application 78/074,213 for the purported mark 'FREE TEXAS LOTTO' disclaimer was made by the Commission of the word TEXAS apart from the mark as shown; (4) concerning the alleged logo "TEXAS TWO STEP TEXAS LOTTERY and Design" the examiner wrote a similar letter to the

one in the '413 application (this application Serial No. 76/241,414) requiring disclaimer of the "descriptive word TEXAS and TEXAS LOTTERY apart from the mark as shown"; and (5) concerning Registration 2,391,987 for "TEXAS MILLION TEXAS LOTTERY & Design", the trademark examiner required disclaimer of the terms "Texas Million" and "Texas Lottery" on December 4, 1998, which was acquiesced on the part of the Commission on February 3, 1999 in an amendment filed by one of your client's New York prosecution firms. These disclaimers are conclusive admissions by the Commission of the descriptiveness of the terms involved: "Texas Lottery", "Texas" and "Texas Million". *In re K Mart Corporation*, 824 F.2d 976 (Fed. Cir. 1987).

While descriptive marks as a whole may be protected with a showing of secondary meaning, *Soweco, Inc. v. Shell Oil Company*, 617 F.2d 1178, 1183 (5th Cir. 1980), your client and you have not provided any showing, whether by survey or other evidence, of any purported "secondary meaning". Moreover, there is substantial case law that "disclaimers" in the PTO estop recapture of registrable or enforceable trademark or servicemark protection. Your client cannot recapture legally in court what it acquiesced to in the Patent & Trademark Office.

My client's position is that not only are the disclaimed terms descriptive, they are generic. One cannot get enforceable protection for the term "Texas Lottery" more than "Aspirin" or "Elevator". Lotteries do not have to be state-sponsored. They can be privately sponsored, when people play bingo at churches or bet on football games in fraternity, sorority, or company pools. What you might have a position is in the logos. But your client offers free license to use those logos, and at least another dozen websites do the same.

When it comes to "Texaslotto" or "Lottotexas" or the like, Webster's dictionary defines "Lotto" as "lottery" in Italian and French; so the active portion of my client's website means the very term you disclaimed. Note, *Enrique Bernat F., S.A. v. Guadalajara, Inc.*, 210 F.3d 439 (5th Cir. April 18, 2000) and *In re Northern Paper Mills*, 64 F.2d 998 (CCPA1933).

My client's website has been on the Internet for five years, providing a public service. He has not realized a financial gain in that time, but holds the right to do so. He provides the Internet community with timely information, which is public record. The Commission does not have -- and does not have the right to have -- a monopoly on this information.

My client has invested years of time and energy to this end, and predates the current TLC website by several years. The Commission was well aware of the domain *Lottotexas.com* and its presence on the Internet when they chose the domain *Txlottery.org*. Where was the concern, at that time? My client certainly has winning acquiescence and laches positions. Your client should have made the Patent & Trademark Office aware of my client's domains, and did not. It was material information. *Meineke Discount Muffler v. Jaynes*, 999 F.2d 126 (5th Cir. 1993).

Regarding the issue of confusion; *Lottotexas.com* has a disclaimer on each page of its website stating no affiliation with the Texas Lottery Commission, or any agency of the state of Texas. The domain extensions make a vast difference. The extensions (.com and .net) used by my client are for commercial websites. The extension that TLC uses (.org) is one reserved for organizations that are not in the commercial realm, but usually reserved for non-profit, or sometimes educational, groups. The Internet community is well aware of these differences.

My client has not sold anything. He certainly does not sell lottery tickets. His attitude has never felt an adversarial relationship with the TLC because there is no competition. On the contrary, his website has only supported the TLC, and given additional exposure to their drawings. Where is the gain by the TLC in the action you suggest? There is no conflict between the two web sites. My client refers users to the TLC site for specific information that he doesn't post. You indicated something in your letter about the domain names of my client "diluting" your client's purported marks. Diluting what? The disclaimed portions of your Registration and applications? Certainly you cannot be taking that position.

Your client's logos are indicated to be usable by the public for free -- a free license. Are you indicating that your client's purported marks are being "diluted" by the logos which your client indicated are free to the public? Last but not least, the dilution doctrine only pertains to famous marks. Certainly you are not claiming that.

*Ignoring the descriptive/generic problem of your client's marks, ignoring the multitude of disclaimers, ignoring the indicated free license on your client's website, ignoring your client's lack of candor with the Patent & Trademark Office, ignoring the fact my client has not sold anything but has provided a public service -- it is clear that my client has material "fair use" and -- separately -- equity defenses. Note, *The Alta Vista Corporation, Ltd. v. Digital Equipment Corporation*, 44 F.Supp.2d 72 (D. Mass. 1998) and *555-1212.com, Inc. v. Communication House International, Inc.*, 2001 WL 964114 (N.D. Cal. April 30, 2001). The mere registration of a domain name cannot cause infringement. There has to be commercial activity. With my client's disclaimer and lack of sales activity, what the court's have indicated is that your client has no issue, nor complaint.*

Absent some proofs of something legally recognizable, the file histories and the case law indicate the Commission has no legal position concerning "Texas Lottery", "Lottery Texas", "Lottotexas" or "Texaslotto". They are in the public domain.

Please give me a call after you have had the opportunity to digest this. If the Commission files suit against my client based on the aforesaid fact pattern, it will be one truly worthy of sanctions against your client and you under TRCP 13 and Civ. Prac. & Rem. Code 10.001 et seq., so guide your actions accordingly."

Interestingly, lottotexas.com/net has not heard anything from you regarding this matter in 8 and one half years. Once again, you are attempting to bully and intimidate us in an effort to acquire these domain names. It is my understanding, according to the Lanham Act, that the statute of limitations has expired. Knowing that you dropped your claims in 2001, I question your motive and your timing for sending this letter to me now.

More importantly, the question that should be raised is how much is the state is paying you for a second attempt to obtain these names? And why is it being raised again in 2010?

You may recall, in Aug of 2001, you almost obtained the domain name - texaslotto.com/net using these same scare tactics. In fact, you scared the owner of that website with your intimidation tactics. Fortunately, he contacted me for help and advice as he could not afford to hire an attorney. I was able to convince him that you were without merit on this issue. He does, in fact, still own those domain names. I addressed this issue by posting an investigative story that you were aware of at www.lottoreport.com/bullies.htm regarding domain name bullies.

With reference to megaplier.org. I purchased this name in March 2004 and in absolute good faith. Extensive research, including communications with the Federal Trademark Office, was involved. PRIOR to your filing for a copyright, mark, trademark - whatever it is that the TLC now owns on that name - the name was already in commercial use and is still being used by the original purchaser as I write this letter to you. This is an individual who claims to be a private, lottery playing citizen who has absolutely no ties to any state lottery. He claims he's simply running a lottery website for interested lottery players - just like me. If his claims are not true, then I'm quite certain the FBI would have an interest in him.

The Patent & Trademark Office should have been made aware that the domain name "megaplier.com" was already in use, but apparently you did not do so if they granted you a copyright on this name. It was, in fact, material information that was wrongfully omitted. See *Meineke Discount Muffler v. Jaynes*, 999 F.2d 126 (5th Cir. 1993), as the attorney stated above regarding lottotexas.com.

In March 2004, I did make the Patent and Trademark Office aware of commercial use of the name "megaplier" prior to your filing for a copyright on behalf of the TLC. Their response was, "we do not get involved in legal issues."

If I had purchased the name in bad faith - with the intent of selling the name - I would have also purchased megaplier.net as that domain name was also available in March 2004. I chose “.org” because my intent and purpose was that of an educational web site - specifically a profit/loss financial page for a lottery game. As you may know, I am known as the “Watch Dog of the Texas Lottery” and my web sites are where I disseminate news and public information to lottery players and others about the lottery.

Further, in Aug/Sept 2003, the Texas Lottery Commission Executive Staff was instructed to purchase/protect whatever names, marks, logo’s, domains names they wanted to use for Mega Millions. This “instruction” came as a direct result of the colossal expense expended to your law firm(s) in acquiring domain names from private citizens in 2001.

In March 2004, some 7 months later, when I decided to cover profit/loss on the Megaplier game and was searching for an appropriate domain name, I reasonably concluded that the TLC had no interest in the domain name “megaplier” or they would have purchased it in Aug/Sept 2003. It is after all, the name of a lottery game that is widely published on many web sites and in newspapers daily. After purchasing the name, I immediately told the TLC and I posted the fact, on my website, that I had purchased the name. It is common knowledge that the TLC monitors my web site daily and definitely was aware of this. The TLC could have contacted me - at that time - where I may have simply transferred the name to them had it been requested.

It is nonsensical that the first response with regard to my good faith purchase comes 6 years later - on Jan 25, 2010.

My lottery websites are always current. It would be impossible for anyone to confuse megaplier.org as being affiliated with any state lottery. Moreover, no profit has been made as a result of my posting drawing results, sales data and profit/loss information. My simple goal for my website has and continues to be to educate and inform lottery players in this state and country who choose to play this game. I do NOT sell lottery tickets.

You have requested that I “*voluntarily transfer the three domain names listed above to me or to TLC,*” (you have a typo in your letter, it should be ‘the TLC’). I noticed that the registration numbers have changed since 2001 indicating you have tried to clean up/fix your errors. Therefore, I am requesting that you send me copies of each file wrapper for each mark specified in your letter. After receiving the file histories, I will need at least 60 days to review before I can make a final decision. If you refuse to provide this information, then I wish to respectfully decline your request.

Very Truly Yours,

Dawn Nettles
Publisher

cc: The Honorable Governor Rick Perry
The Honorable Senator Kay Bailey Hutchison
Ms. Debra Medina
The State Auditors Office
The DA of Travis County
The Honorable Attorney General Greg Abbott
Honorable State Representative Chente Quintanilla
Honorable State Representative Edmund Kuemple
The Honorable Senator Jane Nelson

The Associated Press
The Dallas Morning News
The Ft. Worth Star Telegram
The Austin American Statesman
The Houston Chronicle
The San Antonio Express-News