



UTILITY CONSUMERS' ACTION NETWORK
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February 18, 2009

Mark David Bowen
1936 S. Andrews Avenue
Fort Lauderdale, Florida 33316

Dear Mr. Bowen,

We are in receipt of your letter dated January 12, 2009, when you demanded that UCAN cease the use of the "Ask Hal" blog on auto fraud matters. Utility Consumers' Action Network respects Mr. Rosenthal's right to actively police the use of his marks 'Ask Hal' and 'askhal.com' which were registered in connection with providing a website on a global network featuring information and consultation in the field of forensic and investigative accounting. Nevertheless, we disagree with Mr. Rosenthal that our fair use of the descriptive term 'Ask Hal' to merely describe what people should do in order to receive free advice on car-related issues infringes his registered mark.

Fair use principles recognized under current trademark law permit the use of a protected mark to describe aspects of goods or services, provided the use is in good faith and not as a mark. *See* 15 U.S.C. § 1115(b)(4). UCAN's use of the descriptive term 'Ask Hal' merely refers to the ability of consumers to ask our friend Hal Rosner for free advice concerning auto fraud issues. Mr. Rosenthal certainly isn't the first person to use the word 'ask' in conjunction with his own or another name to describe advice related services.

The secondary meaning acquired in connection with Mr. Rosenthal's niche services in the areas of forensic and investigative accounting may be what allowed him to register his mark; however, registration of a descriptive mark which has acquired secondary meaning does not grant an exclusive right to the owner to use the mark in its original, lexicographic sense.

Furthermore, while Mr. Rosenthal alleges that consumers have been diverted to www.ucan.org when attempting to search for his services, a more comprehensive analysis of the likelihood of confusion between Mr. Rosenthal's mark and UCAN's use of the descriptive term 'Ask Hal' suggests that UCAN has not infringed his mark.

First, the services offered by Mr. Rosenthal and UCAN are significantly dissimilar. Mr. Rosenthal registered the mark for use in the fields of forensic and investigative accounting. UCAN uses the descriptive term in connection with free advice to consumers about auto fraud. Mr. Rosenthal specifically markets his services in connection with his mark to lawyers and accountants for a fee, whereas UCAN uses the descriptive term to provide free advice to non-lawyers.

Second, it seems highly unlikely that Mr. Rosenthal will 'bridge the gap' and begin providing free advice to the public about auto fraud law. While UCAN would be delighted to see Mr. Rosenthal do so, such an action is reasonably unforeseen.

Third, the lawyers and accountants who comprise Mr. Rosenthal's potential client base are sophisticated buyers, not likely to be confused into thinking that UCAN's offering of free auto fraud advice is the same as Mr. Rosenthal's costly forensic and investigative accounting services. As Mr. Rosenthal's website declares "Hal's customers as such, are law firms," not individual consumers seeking advice from a non-profit consumer advocacy group because they got ripped off at the car lot.

Fourth, UCAN has always and continues to use the descriptive term 'Ask Hal' for their services in good faith. Not only does UCAN use the term for a non-commercial use, UCAN is a non-profit entity itself. UCAN's lack of pecuniary interest in using the descriptive term seriously undermines any reasonable bad faith argument.

While UCAN currently uses the term 'Ask Hal' to merely describe its free auto fraud advice service, as their use of the term acquires its own secondary meaning UCAN may also assert its own rights in an 'Ask Hal.' UCAN appreciates Mr. Rosenthal's desire to protect his trademark, but here his mark has not been infringed.

Sincerely,

A handwritten signature in black ink that reads "Art H. Neill". The signature is written in a cursive style and is positioned above a horizontal line.

Art Neill
Attorney
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