Panel Decision for dispute CAC-ADREU-007458

Case number	CAC-ADREU-007458
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Domain names	bayer-monsanto.eu

Case administrator

Aneta Jelenová (Case admin)

Complainant

Organization	Bayer AG

Respondent

Name	D. Otten

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

None

FACTUAL BACKGROUND

The Complainant was established in Germany in 1863 and is now a leading global company in the field of health care, nutrition and plant protection. This company began manufacturing pharmaceutical products in 1888 and has sold such products under the BAYER trade mark ever since that time.

The Complainant owns the trade mark BAYER, which is registered on a global basis, including in the Netherlands where the Respondent is based. The Complainant further owns a number of domain names, which consists of or includes the BAYER trademark such as <bayer.com> and <bayer.nl>.

Among others, the Complainant is the owner of the EU word trademark, reg. No. 011628625, for the term BAYER, registered on 19 August 2013,in respect of goods and services in 13 classes.

A. COMPLAINANT

The Complainant contends as follows:
1
The disputed domain name fully incorporates the well-known BAYER mark and is confusingly similar to this mark.

The fact that the disputed domain name includes the third party trademark “MONSANTO” does not eliminate the similarity between Complainant’s trademark and such domain name. On the contrary, the use of the BAYER mark in connection with the MONSANTO mark strengthens the likelihood of confusion as the second level directly refers to the Complainant and its intentions to merge with the company Monsanto.

2
The BAYER mark is well known and obviously connected with the Complainant and its products. “Bayer” is not a word any market participant or other domain registrant would legitimately choose unless seeking to create an impression of an association with the Complainant. Since the Complainant has not licensed or otherwise permitted the Respondent to use any of its trademarks and has not permitted the Respondent to apply for or use any domain name incorporating the BAYER mark, these circumstances themselves are sufficient to constitute a prima facie showing by the Complainant of absence of rights or legitimate interests in the disputed domain name on the part of the Respondent.

Furthermore, there is no evidence of the Respondent's use of, or demonstrable preparations to use the disputed domain name or a name corresponding to the disputed domain name in connection with a bona fide offering of goods or services..

Finally, there is also no evidence that suggests that the Respondent is making a legitimate non-commercial or fair use of the disputed domain name or is commonly known by the disputed domain name or the name BAYER-MONSANTO.

3.
Based on the Complainant's high profile worldwide, it is inconceivable that the Respondent registered the disputed domain name unaware of the Complainant and its rights in its highly distinctive and well-known BAYER mark.

In addition, the fact that the Respondent registered a domain name consisting of the Complainant's well-known BAYER mark as well as the well-known trademark MONSANTO shortly after both companies agreed on a merger clearly evidences that the Respondent is an alert entrepreneur deliberately targeting the Complainant and its trademarks.

In addition, the disputed domain name is used in bad faith.

The fact, that the disputed domain name is not actively used but merely passively held does not obstruct a finding of bad faith use under the Policy as, in the present case, such passive holding of the domain name is equal to active use. There is consensus view among Panelists that the element of use in bad faith is satisfied not only if a domain name is actively being used on the Internet, but also if in the light of the overall circumstances of the domain registration, the passive holding of a domain name equates with an active use of a domain name.

The Respondent's registration of the disputed domain name also prevents the Complainant from reflecting its trademarks in a corresponding domain name.

In addition, as the elements expressly mentioned in Art. 21(3) of the Regulation (EC) no. 874/2004 are non-exhaustive, practice has regarded a number of other indications and aspects as establishing bad faith.

The fact that the Respondent registered a domain name which includes a trademark that is obviously connected with the Complainant and its products also supports the finding of bad faith as the very use of such domain name by someone with no connection with the products suggests opportunistic bad faith.

The Complainant further claims that the Respondent's use of the disputed domain name is qualified to disrupt the Complainant's business and that it is capable of reducing the number of visitors to the Complainant's website, may adversely affect the Complainant's business and therefore constitutes bad faith.

Finally, the Complainant states that the registration of the disputed domain name by the Respondent also constitutes an abusive threat hanging over the head of the Complainant, which also supports a finding of bad faith.

B. RESPONDENT

The Respondent did not reply to the Complainant's contentions.

DISCUSSION AND FINDINGS

According to article 21,1 of the Commisssion Regulation (EC) No 874/2004 and paragraph B 11 (d) of the ADR Rules a registered domain name shall be subject to revocation provided that each of the three following elements are satisfied:

(A) The domain name is identical or confusingly similar to a trademark or service
mark in which the Complainant has rights that are recognised or established by national a
and/or Community law; and
(B) Respondent has no rights or legitimate interests in respect of the domain name; or
(C) The domain name has been registered or is being used in bad faith.

The Respondent is in default and paragraph B 10 (a) of the ADR Rules states that the Panel may consider the failure to comply with the time limits for filing a Response as grounds to accept the claims of the Complainant. Paragraph B 10 (b) of the ADR Rules further states that if a party does not comply with any provision of, or requirement under, the Rules or the Supplemental Rules or any request from the Panel, the Panel shall draw such inferences there from as it considers appropriate.

1 Identical or confusingly similar to the Complainant´s trademark

The disputed domain name consists of the Complainant's BAYER mark and the third-party trade mark MONSANTO. The Panel finds that the Complainant's mark is a dominant and thus identifiable part of in the disputed domain name and that the addition of the MONSANTO mark does not distinguish the disputed domain name from the Complainant's trade mark. The Panel agrees with the Panel in WIPO Case D2016-2354 Bayer AG v. Syed Hussein regarding the domain name <bayermonsanto.com> that "the confusion may, in fact, be increased by the addition of MONSANTO as the Complainant's intention to merge with the MONSANTO pharmaceutical company have been reported in the press".

Since the inclusion of the TLD denomination ".eu" does not avoid confusing similarity of domain names and trademarks the Panel finds that the disputed domain name is confusingly similar to a trademark in which the Complainant has rights.

2
It is clear from the facts of the case that the Complainant has not licensed or otherwise permitted the Respondent to use its trademark and given the circumstances of this case, the Panel is of the opinion that the Complainant has established a prima facie case that the Respondent has no rights or legitimate interests in the disputed domain name.

The Respondent has not rebutted this by way of a formal response or otherwise and the way that the Respondent has been "using" the disputed domain name, see immediately below, does not support a finding of rights or legitimate interests.

Consequently the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name.

3
Given the circumstances of the case, namely that the disputed domain name was registered immediately after the publication of the possible mergers between the Complainant and the company Monsanto, and given the extent of use of the Complainant's trademark and the distinctive nature of the mark, it is inconceivable to the Panel that the Respondent registered the disputed domain name without prior knowledge of the Complainant and the Complainant's mark. Further, the Panel finds that the Respondent could not have been unaware of the fact that it chose a domain name which could attract Internet users in a manner that is likely to create confusion for such users.

The Panel therefore finds that the disputed domain name was registered in bad faith.

The disputed domain name is not actively used. However, as first stated in Telstra Corporation Limited v. Nuclear Marshmallows, WIPO Case No. D2000-0003, and repeated in many subsequent decisions under the UDRP: "the concept of a domain name 'being used in bad faith' is not limited to positive action; inaction is within the concept. That is to say, it is possible, in certain circumstances, for inactivity by Respondent to amount to the domain name being used in bad faith." This line of thinking has also been followed by a number, albeit not all, Panels in disputes under the .eu TLD, see to this effect Part V.3 in the "CAC .EU Overview 2.0".

The Panel finds that the Respondent's lack of bona fide use of this disputed domain name is likely to disrupt the business of the Complainant since it prevents the Complainant from reflecting their reputed trademark in a corresponding ".eu" domain name. Further, given the world-wide fame of the Complainant's BAYER mark, it is immediately inconceivable that the Respondent will be able to use the disputed domain name for any purpose that would not be infringing the Complainant's rights.

Noting that the disputed domain name incorporates the particular trademark, BAYER, that no Response has been filed, and that there appears to be no conceivable good faith use that could be made by the Respondent of the disputed domain name, and considering all the facts and evidence, the Panel finds that all the requirements of paragraph 21, 1 of the Commisssion Regulation (EC) No 874/2004 and of paragraph B 11(d) of the ADR Rules are met.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that the domain name BAYER-MONSANTO.EU be transferred to the Complainant

PANELISTS

Name	**Knud Wallberg**

DATE OF PANEL DECISION 2017-07-07

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

I. Disputed domain name: BAYER-MONSANTO.EU

II. Country of the Complainant: GERMANY , country of the Respondent: THE NETHERLANDS

III. Date of registration of the domain name: 14 September 20167

IV. Rights relied on by the Complainant (Art. 21 (1) Regulation (EC) No 874/2004) on which the Panel based its decision:

1. Word CTM, reg. No. 011628625, for the term BAYER, registered on 19 August 2013,in respect of goods and services in 13 classes

V. Response submitted: No

VI. Domain name is confusingly similar to the protected rights of the Complainant

VII. Rights or legitimate interests of the Respondent (Art. 21 (2) Regulation (EC) No 874/2004):
1. No
2. Why: The Complainant has not licensed nor authorized the Respondent to use its trademark in the disputed domain name. Further there is no evidence that the Respondent is making a legitimate non-commercial or fair use of the disputed domain name.

VIII. Bad faith of the Respondent (Art. 21 (3) Regulation (EC) No 874/2004):
1. Yes
2. Why: the disputed domain names was registered immediately after press reports of the possible merger between the companies BAYER and MONSANTO

IX. Other substantial facts the Panel considers relevant: The Respondent did not file a Response and holds the disputed domain name without any active use.

X. Dispute Result: Transfer of the disputed domain name

XI. Procedural factors the Panel considers relevant: None.

XII. Is Complainant eligible? Yes