

Decision for dispute CAC-UDRP-105088

Case number	CAC-UDRP-105088
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Time of filing	2022-12-27 09:40:54
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Domain names	borhringer.com
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Case administrator

Organization	Denisa Bilík (CAC) (Case admin)
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Complainant

Organization	BOEHRINGER INGELHEIM PHARMA GMBH & CO.KG
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Complainant representative

Organization	NAMESHIELD S.A.S.
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Respondent

Name	Carolina Rodrigues
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OTHER LEGAL PROCEEDINGS

The Panel is not aware of any other legal proceedings which are pending or decided and which relate to the Disputed Domain Name.

IDENTIFICATION OF RIGHTS

The Complainant owns a large portfolio of trademarks including the wording “BOEHRINGER” in several countries, such as the BOEHRINGER® international registration number 799761 since December 2, 2002.

FACTUAL BACKGROUND

The Complainant is a German family-owned pharmaceutical group of companies with roots going back to 1885, when it was founded by Albert Boehringer (1861-1939) in Ingelheim am Rhein. Ever since, Boehringer has become a global research-driven pharmaceutical enterprise and has today about 140 affiliated companies world-wide with roughly 46,000 employees. The two main business areas of Boehringer are: Human Pharmaceuticals and Animal Health. In 2013 alone, net sales of the Boehringer group of companies amounted to about EUR 14.1 billion.

In addition to the portfolio of trademarks, the Complainant owns multiple domain names consisting in the wording “Boehringer”, such as <boehringer.com> since January 12, 2000.

The domain name in dispute <borhringer.com> (hereafter, the “Disputed Domain Name”) was registered on December 19, 2022 by Respondent. According to the evidence submitted by Complainant Respondent redirects the Disputed Domain Name to commercial links containing the word “ringer.”

PARTIES CONTENTIONS

COMPLAINANT:

The Complainant owns rights in the word mark BOEHRINGER® which predates the registration of the Disputed Domain Name by many years. Respondent's registration of the Disputed Domain Name varies from the mark by replacing the letter "e" with an "r." The Complainant contends that it has no business relationship with Respondent, did not authorize it to register the Disputed Domain Name, and states that the Respondent is using the Disputed Domain Name to attract Internet visitors to its website with links to "ringer" websites. The Panel has accessed the Disputed Domain Name and notes that Respondent has exchanged the "ringer" links to other links without any implied association with the Complainant.

RESPONDENT:

The Respondent has not appeared formally or informally to controvert the evidence submitted by the Complainant.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the Disputed Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights (within the meaning of paragraph 4(a)(i) of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the Disputed Domain Name (within the meaning of paragraph 4(a)(ii) of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the Disputed Domain Name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy).

PROCEDURAL FACTORS

The Panel is satisfied that all procedural requirements under UDRP were met and there is no other reason why it would be inappropriate to provide a decision.

PRINCIPAL REASONS FOR THE DECISION

Paragraph 15(a) of the Rules for the UDRP ('the Policy') instructs this Panel to "decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

Pursuant to Paragraph 4(a) of the Policy the Complainant is required to prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

- (i) the domain name registered by respondent is identical or confusingly similar to a trademark or service mark in which complainant has rights; and
- (ii) 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.

In view of the Respondent's failure to submit a response, the Panel shall decide this administrative proceeding on the basis of the Complainant's undisputed representations and adduced proof pursuant to paragraphs 5(f), 14(a) and 15(a) of the Rules and draw such inferences it considers appropriate pursuant to paragraph 14(b) of the Rules. The Panel is entitled to accept all reasonable allegations and inferences set forth in the Complaint as true unless the evidence is clearly contradictory. See *Vertical Solutions Mgmt., Inc. v. webnet-marketing, inc.*, FA 95095 (FORUM July 31, 2000) (holding that the respondent's failure to respond allows all reasonable inferences of fact in the allegations of the complaint to be deemed true); see also *Talk City, Inc. v. Robertson*, D2000-0009 (WIPO February 29, 2000) ("In the absence of a response, it is appropriate to accept as true all allegations of the Complaint.").

Identical or Confusingly Similar to a Mark in which Complainant has a Right

The Complainant has established that it has rights in the word mark BOEHRINGER by providing the Panel with the evidence that it has an International registration for its mark and claims without contradiction that it has registered trademarks in other jurisdictions. The Panel notes that a national or an international trademark registration is sufficient to establish rights in that mark. As such, the Panel finds that the Complainant has established that it has a right in the word mark BOEHRINGER.

The second part of the test under this first element is to establish that the Disputed Domain Name is identical or confusingly similar to BOEHRINGER. The Panel observes that the single difference is the displacement of the letter “e” with the letter “r” preceding the letter “h.” Typographical changes are immaterial. Where the relevant trademark is recognizable within the Disputed Domain Name it is sufficient to establish confusing similarity. The addition of the gTLD “.com” does not have any impact on the overall impression of the dominant portion of the Disputed Domain Name and is therefore irrelevant to determine the confusing similarity between the trademark and the Disputed Domain Name.

Accordingly, Complainant has satisfied Paragraph 4(a)(i) of the Policy.

Determining Whether Respondent Lacks rights or legitimate interests in the Disputed Domain Name.

To establish the second of the three elements, the Complainant must first demonstrate that Respondent lacks rights and legitimate interests in the Disputed Domain Name. Recognizing that the proof for establishing this element is under the Respondent’s control, the Complainant’s may satisfy this burden by offering a prima facie case based on such evidence as there is thus shifting the burden to the Respondent to produce evidence to overcome the presumption that it lacks rights or legitimate interests in the Disputed Domain Name.

The Complainant contends that the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name. It states that it did not authorize the Respondent to register the Disputed Domain Name, the Respondent is not using the domain name for any bona fide use, nor can it claim to be known by the name “Borhringer.” The Complainant has adduced evidence based on the use of the Disputed Domain Name that Respondent is not using it for any noncommercial or fair use. See *Croatia Airlines d. d. v. Modern Empire Internet Ltd.*, WIPO Case No. D2003-0455 (the Complainant is required to make out a prima facie case that the Respondent lacks rights or legitimate interests. Once such prima facie case is made, the Respondent carries the burden of demonstrating rights or legitimate interests in the Disputed Domain Name. If the Respondent fails to do so, the Complainant is deemed to have satisfied paragraph 4(a) (ii) of the UDRP). See also *Advanced International Marketing Corporation v. AA-1 Corp*, FA 780200 (Forum November 2, 2011) (finding that a complainant must offer some evidence to make its prima facie case and satisfy Policy paragraph 4(a)(ii).

Here, the Complainant’s contentions and proof satisfy the presumptive burden that Respondent lacks rights or legitimate interests in the Disputed Domain Name. A respondent has the opportunity to controvert the prima facie case by adducing evidence demonstrating that it has rights or legitimate interests. The Policy sets forth the following nonexclusive list of factors:

(i) “[B]efore any notice to you of the dispute, your 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.”

(ii) “[Y]ou (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights.”

(iii) “[Y]ou are 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.”

Evidence of any one of these defenses will satisfy the rebuttal burden, but the absence of any evidence supports a complainant’s contention that the respondent lacks rights or legitimate interests in the Disputed Domain Name. The failure of a party to submit evidence on facts in its possession and under its control may permit the Panel to draw an adverse inference regarding those facts. See *Mary-Lynn Mondich and American Vintage Wine Biscuits, Inc. v. Shane Brown, doing business as Big Daddy’s Antiques*, WIPO Case No. D2000-0004. Here, the Disputed Domain Name is virtually identical to the Complainant’s mark. The sole difference is the displacement of one letter for another. This strategy does not support a right or legitimate interest in a Disputed Domain Name and the Panel so finds in this matter. See *Emerson Electric Co. v. golden humble / golden globals*, FA 1787128 (Forum June 11, 2018) (“lack of evidence in the record to indicate a respondent is authorized to use [the] complainant’s mark may support a finding that [the] respondent does not have rights or legitimate interests in the disputed domain name per Policy ¶ 4(c)(ii)”).

As there is no evidence the contrary, the Panel finds that the Complainant has satisfied Paragraph 4(a)(ii) of the Policy.

Registration and Use in Bad faith

It is the Complainant’s burden under Paragraph 4(a)(iii) of the Policy to prove that the Respondent both registered and is using the Disputed Domain Name in bad faith. It is not sufficient for a complainant to rest its case on the finding under Paragraph 4(a)(ii) of the Policy, although the fact that the Respondent lacks rights or legitimate interests in the Disputed Domain Name will be a factor in assessing its motivation for registering a domain name that is virtually identical to the Complainant’s mark.

In this case, the Respondent employs a strategy of use known as typosquatting, which is defined as the “intentional misspelling of words with intent to intercept and siphon off traffic from its intended destination, by preying on Internauts who make common typing errors,” *Nat’l Ass’n of Prof’l Baseball League, Inc. v. Zuccarini*, WIPO Case No. D2002-1011. On the Qwerty keyboard, the letter “r” is adjacent to the letter “e”. “Borhringer” can easily be mistaken for BOEHRINGER. The evidence establishes that the Respondent intended to convey that impression.

The Policy provides a non-exclusive list of circumstances that evidence registration and use of a domain name in bad faith. Any one of the following is sufficient to support a finding of bad faith:

- (i) circumstances indicating that the respondent has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that the complainant, for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the domain name; or
- (ii) the respondent has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct; or
- (iii) the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- (iv) by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to its website or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's website or location or of a product or service on the respondent's website or location.

The Complainant's proof in this case focuses the Panel's attention on the fourth factor. As there is no proof that would support the other factors, the Panel will not address them. Here, the Complainant contends that the Respondent has targeted the Complainant's mark for the purpose of taking advantage of its goodwill and reputation to attract Internet users to its website. This conduct "creat[es] a likelihood of confusion [. . .] as to the source, sponsorship, affiliation, or endorsement of [its] website". Such a strategy will initially mislead Internet users into believing that that the website is associated with the Complainant, but It has performed the task for which it was designed, namely to attract Internet users to the hyperlinks on the website. See *Justice for Children v. R neetso / Robert W. "Steen*, WIPO Case No. D2004-0175 (holding that "harm results from the confusion caused by the initial attraction to the site by means of borrowing complainan's mark. And that is exactly the harm the Policy was adopted to address.")

For these reasons, the Panel finds that the Respondent is using the Disputed Domain Name in bad faith. The preamble to Paragraph 4(b) states: "For the purposes of Paragraph 4(a)(iii) [the finding of any of the circumstances] shall be evidence of the registration [. . .] of a domain name in bad faith." In the absence of a respondent to explain and justify its registration and use of a domain name corresponding to a famous or well-known mark, a Panel is compelled to examine the limited record for any exonerative evidence of good faith. Here, the Panel finds none. The Respondent has appropriated a well-known mark to serve an infringing purpose. See *Royal Bank of Canada-- Banque Royale Du Canada v. Registration Private, Domains By Proxy, LLC / Randy Cass*, D2019-2803 (WIPO February 23, 2020) (<investease.com>), the Panel noted: "It is clear that where the facts of the case establish that the respondent's intent in registering or acquiring a domain name was to unfairly capitalize on the complainant's [. . .] trademark, panels have been prepared to find the respondent acted in bad faith."

The evidence here is such that the only inference that can be drawn from the use of a virtually identical domain name that the Respondent is using as a vehicle for links that undoubtedly accrue to its benefit is that the purpose for the registration was to cash-in on Complainant's goodwill and reputation. See *Singapore Airlines Ltd. v. European Travel Network*, D2000-0641 (WIPO August 29, 2000) (holding that "[t]he registration of domain names obviously relating to the Complainant is a major pointer to the Respondent's bad faith and desire to 'cash in' on the Complainant's reputation.").

Accordingly, since the Complainant has demonstrated that the Respondent registered and is using <borhringer.com> in bad faith, it has satisfied Paragraph 4(a)(iii) of the Policy.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

- 1. **borhringer.com**: Transferred

PANELLISTS

Name Gerald Levine Ph.D, Esq.

DATE OF PANEL DECISION 2023-02-01

Publish the Decision