

## **ADMINISTRATIVE PANEL DECISION**

**Bayer AG v. Stephen Donnelly, bengtool**  
**Case No. D2023-2013**

### **1. The Parties**

The Complainant is Bayer AG, Germany, represented by BPM Legal, Germany.

The Respondent is Stephen Donnelly, bengtool, United States of America.

### **2. The Domain Name and Registrar**

The disputed domain name <bayenr.com> is registered with Google LLC (the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 5, 2023. On May 5, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On May 5, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent (Contact Privacy Inc. Customer 7151571251) and contact information in the Complaint. The Center sent an email communication to the Complainant on May 8, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on May 8, 2023.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on May 11, 2023. In accordance with the Rules, paragraph 5, the due date for Response was May 31, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on June 6, 2023.

The Center appointed Louis-Bernard Buchman as the sole panelist in this matter on June 13, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

#### 4. Factual Background

The Complainant is a German publicly traded corporation, originating in 1863 when Friedrich Bayer & Co. was established. Over the last 160 years, it has grown internationally to become one of the leading pharmaceutical companies in the world, with over 100,000 employees operating in 83 countries, and a turnover in 2021 of more than EUR 44 billion.

The disputed domain name <bayenr.com> does not resolve to an active website at the time of this decision.

The identity of the Respondent was disclosed by the Registrar in response to the Center's request for registrar verification in connection with the disputed domain name.

The Complainant has submitted evidence that the Respondent sent fraudulent emails to a third party in view of having that party make wire transfers to a bank account other than the account of one of the Complainant's subsidiaries, thus engaging in a phishing scheme.

The Complainant owns a large portfolio of registered trademarks containing the trademark BAYER, including, *inter alia*, the International Trademark No. 1462909, registered on November 28, 2018, and the International Trademark No. 1476082, registered on December 10, 2018 (together hereinafter referred to as "the Mark").

It also owns hundreds of domain names, including the <bayer.com> domain name, which resolves to its official website.

The disputed domain name, <bayenr.com>, was created on April 25, 2023.

#### 5. Parties' Contentions

##### A. Complainant

- (i) The Complainant submits that the disputed domain name reproduces the Mark, in which the Complainant has rights, and is confusingly similar to the Mark insofar as the disputed domain name contains the distinctive element "bayer" in its entirety, and that the insertion of a single, additional letter is not capable of dispelling the confusing similarity.
- (ii) The Complainant contends that the Respondent has no rights or legitimate interests in respect of the disputed domain name. Furthermore, the Complainant contends that it never authorized the Respondent to use the Mark in any manner and that the Respondent has never had any affiliation with the Complainant.
- (iii) The Complainant submits that the Respondent has registered the disputed domain name in bad faith. The Complainant alleges that the Respondent had knowledge of the Mark when registering the disputed domain name. The Complainant provides evidence of the Respondent's use of the disputed domain name for a fraudulent email scheme whereby the Respondent impersonates the Complainant's accounting department in emails to clients wherein payment is demanded to accounts other than those belonging to the Complainant.
- (iv) The Complainant submits that the Respondent is using the disputed domain name in bad faith.
- (v) The Complainant requests that the disputed domain name be transferred to the Complainant.

##### B. Respondent

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

## **6. Discussion and Findings**

### **6.1. Procedural Aspects - Failure to respond**

As aforementioned, no response was received from the Respondent.

Under the Rules, paragraphs 5(f) and 14(a), the effect of a default by the Respondent is that, in the absence of exceptional circumstances, the Panel shall proceed to a decision on the basis of the Complaint.

Under paragraph 4(a) of the Policy, it is the Complainant's burden to establish that all three of the required criteria for a transfer of the disputed domain name have been met, even in the event of a default.

Under paragraph 14(b) of the Rules, the Panel is empowered to draw such inferences from the Respondent's default as it considers appropriate under the circumstances.

In this case, the Panel finds that as a result of the default, the Respondent has failed to rebut any of the reasonable factual assertions that are made and supported by evidence submitted by the Complainant. In particular, by defaulting and failing to respond, the Respondent has failed to offer the Panel any of the types of evidence set forth in paragraph 4(c) of the Policy or otherwise, from which the Panel might conclude that the Respondent has any rights or legitimate interests in the disputed domain name, such as making legitimate noncommercial or fair use of the disputed domain name.

Moreover, as discussed below, the Respondent has failed to provide any exculpatory information or reasoning that might have led the Panel to question the Complainant's arguments that the Respondent has acted in bad faith.

### **6.2. Requirements of paragraph 4(a) of the Policy**

#### **A. Identical or Confusingly Similar**

In comparing the Mark with the disputed domain name, it is evident that the latter consists of the Mark, typosquatted with the letter "n" inserted before the last letter of the Mark, and followed by the generic Top-Level Domain ("gTLD") ".com".

It is well established that a gTLD does not generally affect the assessment of a domain name for the purpose of determining identity or confusingly similarity. See section 1.11 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)").

The Panel finds that the disputed domain name is confusingly similar to the Mark, which is incorporated in its entirety, and that the insertion of a single, additional letter in the disputed domain name does not prevent a finding of confusing similarity, the Mark remaining recognizable within the disputed domain name.

Thus, the Complainant has satisfied the requirement of paragraph 4(a)(i) of the Policy.

#### **B. Rights or Legitimate Interests**

Although a complainant bears the ultimate burden of establishing all three elements of paragraph 4(a) of the Policy, UDRP panels have recognized that with regard to paragraph 4(a)(ii) of the Policy, this could result in the often impossible task of proving a negative proposition, requiring information that is primarily, if not exclusively, within the knowledge of a respondent.

Thus, the consensus view of UDRP panels is that paragraph 4(c) of the Policy shifts the burden of production of evidence to the respondent to come forward with evidence of rights or legitimate interests in a domain name, once the complainant has made a *prima facie* showing, as the Panel believes the

Complainant has made in this case. See *Document Technologies, Inc. v. International Electronic Communications Inc.*, WIPO Case No. [D2000-0270](#) and section 2.1 of the [WIPO Overview 3.0](#).

As previously noted, the Respondent offered no reason for selecting the disputed domain name.

There is no evidence that the Respondent is known by the disputed domain name or uses (or has made *bona fide* preparations to use) the disputed domain name in a business. The disputed domain name does not direct the public to any active website.

No information is provided on what rights or legitimate interests the Respondent may have in the disputed domain name.

To counter any notion that the Respondent has such rights or legitimate interests, the Complainant has argued that the Respondent (i) has no affiliation with the Complainant and (ii) received no authorization from the Complainant to register or use the disputed domain name.

In addition, the nature of the disputed domain name, comprising the Complainant's trademark in its entirety in combination with the additional letter "n" and the gTLD ".com", carries a risk of implied affiliation. See section 2.5.1 of the [WIPO Overview 3.0](#). Moreover, the actual use of the disputed domain name affirms the reality of such risk, seeing as the Respondent has used the disputed domain name to impersonate the Complainant in a fraudulent email scheme demanding payment from the Complainant's customers. Such use can never confer rights or legitimate interests upon a respondent. See section 2.13 of the [WIPO Overview 3.0](#).

In the circumstances, the Panel concludes that the Complainant has established the requirement of paragraph 4(a)(ii) of the Policy with respect to the disputed domain name.

### **C. Registered and Used in Bad Faith**

As noted above, the Respondent has failed to provide any exculpatory information or persuasive reasoning that might have led the Panel to question the Complainant's arguments that the Respondent acted in bad faith by creating confusion to the detriment of the Complainant by registering the disputed domain name.

First, the registration of a domain name that is confusingly similar to a trademark by an entity that has no relationship to that mark may be, depending on the circumstances, evidence of opportunistic bad faith. See *Ebay Inc. v. Wangming*, WIPO Case No. [D2006-1107](#); *Veuve Clicquot Ponsardin, Maison Fondée en 1772 v. The Polygenix Group Co.*, WIPO Case No. [D2000-0163](#).

Second, it is well established that the mere passive holding of a domain name may not in appropriate circumstances prevent a finding of bad faith when assessing the totality of the circumstances. See *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Case No. [D2000-0003](#); *DCI S.A. v. Link Commercial Corporation*, WIPO Case No. [D2000-1232](#); *Mary-Lynn Mondich and American Vintage Wine Biscuits, Inc. v. Shane Brown, doing business as Big Daddy's Antiques.*, WIPO Case No. [D2000-0004](#); and *Alitalia –Linee Aeree Italiane S.p.A v. Colour Digital*, WIPO Case No. [D2000-1260](#). While the disputed domain name is ultimately being used for an email scheme, the website connected to the disputed domain name is inactive, but this does not prevent a finding of bad faith given the totality of the circumstances present here and particularly the underlying use.

Third, it is established in prior UDRP decisions that where the respondent knew or should have known of a trademark prior to registering the disputed domain name, such conduct may be, in certain circumstances, sufficient evidence of bad faith registration and use. See *Weetabix Limited v. Mr. J. Clarke*, WIPO Case No. [D2001-0775](#).

In this case, considering the fact that the Mark is well known, as more than a dozen prior UDRP panels have confirmed, and particularly the Respondent's clear targeting of the Complainant in the use of the disputed

domain name, the Panel finds that it is impossible to believe that the Respondent chose to register the disputed domain name randomly with no knowledge of the Mark. See *Barney's Inc. v. BNY Bulletin Board*, WIPO Case No. [D2000-0059](#); *Kate Spade, LLC v. Darmstadter Designs*, WIPO Case No. [D2001-1384](#), citing *Cellular One Group v. Paul Brien*, WIPO Case No. [D2000-0028](#); and *Sembcorp Industries Limited v. Hu Huan Xin*, WIPO Case No. [D2001-1092](#).

Furthermore, section 3.1.4 of the [WIPO Overview 3.0](#), states that evidence that a disputed domain name has been used for phishing purposes may be considered evidence of bad faith use. The Complainant provided evidence that phishing emails using the disputed domain name were sent, purportedly signed by an employee of one of the Complainant's subsidiaries. The Panel draws from these circumstances an inference of bad faith use of the disputed domain name by the Respondent.

Besides, the Panel notes that many UDRP panels have held that bad faith use of a domain name by a respondent may result from the fact its good faith use is in no way plausible (see *Audi AG v. Hans Wolf*, WIPO Case No. [D2001-0148](#)), considering the specificity of the activity. The Panel notes that the Respondent has submitted no evidence of any good faith use of the typosquatting disputed domain name and finds it is not possible to imagine any plausible future active use of the disputed domain name that would not be illegitimate.

The Panel concludes in the light of all these circumstances that the Respondent's registration and use of the disputed domain name constitute bad faith, and that the requirement of paragraph 4(a)(iii) of the Policy is also satisfied in this case.

## 7. Decision

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the disputed domain name, <bayenr.com>, be transferred to the Complainant.

*/Louis-Bernard Buchman/*

**Louis-Bernard Buchman**

Sole Panelist

Date: June 27, 2023