

ADMINISTRATIVE PANEL DECISION

Bayer Intellectual Property GmbH v. Bediamond GmbH
Case No. D2023-5303

1. The Parties

Complainant is Bayer Intellectual Property GmbH, Germany, represented by Nordemann, Germany.

Respondent is Bediamond GmbH, Germany.

2. The Domain Name and Registrar

The disputed domain name <bevigra.com> is registered with EPAG Domainservices GmbH (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on December 21, 2023. On December 21, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On January 3, 2024, 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 (Unknown (not disclosed)) and contact information in the Complaint. The Center sent an email communication to Complainant on January 4, 2024, providing the registrant and contact information disclosed by the Registrar, and inviting Complainant to submit an amendment to the Complaint. Complainant filed an amendment to the Complaint on January 8, 2024.

The Center verified that the Complaint together with the amendment to the 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 Respondent of the Complaint, and the proceedings commenced on January 10, 2024. In accordance with the Rules, paragraph 5, the due date for Response was January 30, 2024. Respondent did not submit any response. Accordingly, the Center notified Respondent’s default on February 1, 2024.

The Center appointed Stephanie G. Hartung as the sole panelist in this matter on February 7, 2024. 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

Complainant is a company organized under the laws of Germany that belongs to a larger group of companies related to the Bayer AG, a multinational pharmaceutical and biotechnology company. Among the portfolio of the Bayer group's pharmaceutical products is a medication for potency enhancement branded LEVITRA.

Complainant has provided evidence that is the registered owner of numerous trademarks relating to its brand LEVITRA, inter alia, but not limited to the following:

- word mark LEVITRA, European Union Intellectual Property Office (EUIPO), registration number: 001481936, registration date: February 21, 2003, status: active;
- word mark LEVITRA, International Registration, World Intellectual Property Office (WIPO), registration number: 744146, registration date: September 25, 2000, status: active.

Respondent, according to the disclosed Whois information for the disputed domain name and the Registrar's verification, is as well located in Germany. The disputed domain name was registered on February 14, 2016. By the time of rendering this Decision, the disputed domain name does not resolve to any relevant content on the Internet, but is currently unavailable. Complainant, however, has demonstrated that at some point before the filing of the Complaint, the disputed domain name resolved to a website at "www.bevigra.com", used to promote a pharmaceutical product for potency enhancement under the brand BEVIGRA; no direct reference was made to Complainant and/or its LEVITRA pharmaceutical product and official logo.

Complainant has demonstrated that, since at least 2018, the Parties have been involved in various legal disputes concerning (1) a trademark opposition proceeding filed by Complainant with the German Patent and Trademark Office and a related appellate proceeding filed by Respondent with the German Federal Patent Court in relation to a trademark application BEVIGRA by Respondent which was finally denied (upon a withdrawal of the appeal on July 15, 2019) due to a likelihood of confusion found to exist between the signs LEVITRA and BEVIGRA, and (2) a further trademark case brought by Complainant before the Regional Court of Cologne confirming on January 13, 2021, a trademark infringement of Complainant's LEVITRA trademark by Respondent's use of the disputed domain name.

Complainant requests that the disputed domain name be transferred to Complainant.

5. Parties' Contentions

A. Complainant

Complainant contends that it has satisfied each of the elements required under the Policy for a transfer of the disputed domain name. Notably, Complainant contends to be one of the largest and most well-known pharmaceutical companies in the world, offering the LEVITRA product on the European market since 2003, which belongs, together with e.g., VIAGRA and STENDRA, to the most frequently prescribed erectile dysfunction non-generic products in the world.

Complainant submits that the disputed domain name is confusingly similar to Complainant's LEVITRA trademark, as the signs contained therein coincide in five letters, both consist of three syllables, and are pronounced very similar due to identical vowels placed in the identical position. Moreover, Complainant asserts that Respondent has no rights or legitimate interests in respect of the disputed domain name since (1) Respondent is not connected to Complainant in any way and there exists no license, permission or other sort of authorization by which Respondent could own or use the disputed domain name, (2) Respondent has been using the disputed domain name to advertise and offer for sale BEVIGRA branded pharmaceuticals, namely medication for potency enhancement, and – as has been confirmed by the Regional Court of Cologne – thus infringes Complainant's rights in the LEVITRA trademark, and (3) in light of the above, Respondent is using the website under the disputed domain name to benefit from Complainant's reputation

in relation to its LEVITRA products. Finally, Complainant argues that Respondent has registered and is using the disputed domain name in bad faith since (1) at the time of the registration of the disputed domain name, Complainant's LEVITRA trademark had already been in use for medication for potency enhancement for more than ten years and had built up an international reputation, so that Respondent by then was perfectly aware of Complainant, its LEVITRA trademark and its potency enhancement product, (2) in any case, at the latest after the withdrawal of the appeal before the German Federal Patent Court on July 15, 2019, and once the default judgement of the Regional Court of Cologne was issued on January 13, 2021, Respondent had knowledge of the disputed domain name infringing Complainant's earlier rights in the LEVITRA trademark, but nevertheless decided to maintain the disputed domain name and continue use thereof, (3) bearing in mind the Regional Court of Cologne's decision and the reputation of Complainant's LEVITRA trademark, simply the passive holding of the disputed domain name constitutes bad faith, and (4) Respondent uses the disputed domain name with the aim of taking advantage of Complainant's consumer awareness, namely by attracting Internet users to Respondent's website in order to generate revenues.

B. Respondent

Respondent did not reply to Complainant's contentions.

6. Discussion and Findings

Under paragraph 4(a) of the Policy, Complainant carries the burden of proving:

- (i) that the disputed domain name is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- (ii) that Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) that the disputed domain name has been registered and is being used in bad faith.

Respondent's default in the case at hand does not automatically result in a decision in favor of Complainant, however, paragraph 5(f) of the Rules provides that if Respondent does not submit a response, in the absence of exceptional circumstances, the Panel shall decide the dispute solely based upon the Complaint. Further, according to paragraph 14(b) of the Rules, the Panel may draw such inferences from Respondent's failure to submit a Response as it considers appropriate.

A. Identical or Confusingly Similar

First, it is well accepted that the first element functions primarily as a standing requirement. The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between Complainant's LEVITRA trademark and the disputed domain name. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, ("[WIPO Overview 3.0](#)"), section 1.7.

Based on the available record, the Panel finds Complainant has shown rights in respect of the LEVITRA trademark for the purposes of the Policy. [WIPO Overview 3.0](#), section 1.2.1.

The Panel further finds Complainant's LEVITRA trademark is reproduced within the disputed domain name, however, with two deviations by substituting the first letter "l" through the letter "b" and the fifth letter "t" through the letter "g". An independent Internet research undertaken by the Panel within its General Powers set forth by paragraph 10 of the Rules has revealed no relevant Google top search results for "bevigra" when searching for "levitra", and vice versa. Still, given remaining similarities between these terms such as those submitted by Complainant (e.g., coincidence in at least five letters, three syllables and three vowels placed at the identical position) and noting the links to goods in the same area as those offered by Complainant, a more holistic aural or phonetic approach would in principle allow the Panel to conclude that the disputed domain name is confusingly similar to Complainant's LEVITRA trademark for the purposes of standing under the Policy. [WIPO Overview 3.0](#), section 1.7.

Based on the available record, the Panel, therefore, finds the first element of the Policy has been established.

B. Rights or Legitimate Interests, Registered and Used in Bad Faith and the Scope of the UDRP

Second, under paragraph 4(a)(ii) of the Policy, Complainant has the burden of establishing that Respondent has no rights or legitimate interests in respect of the disputed domain name, while paragraph 4(c) of the Policy provides a list of circumstances in which Respondent may demonstrate such rights or legitimate interests. And third, according to paragraph 4(a)(iii) of the Policy, Complainant needs to demonstrate that Respondent has registered and, as a conjunctive requirement, is using the disputed domain name in bad faith, with paragraph 4(b) of the Policy establishing circumstances, in particular but without limitation, that if found by the Panel to be present, shall be evidence of the registration and use of the disputed domain name in bad faith.

The Panel has well recognized that the Parties to this case have been engaged for a considerable amount of time of at least six years in various legal proceedings (even involving more but just one instance) on whether or not there is a “likelihood of confusion” under the German Trademark Act between the sign “LEVITRA” (as reflected in Complainant’s LEVITRA trademark) and the sign “BEVIGRA” (as reflected in Respondent’s applied-for BEVIGRA trademark as well as in the disputed domain name), and whether or not the making use of the disputed domain name to operate a website thereunder promoting BEVIGRA medication for potency enhancement infringes upon Complainant’s rights in the LEVITRA trademark. In this context, the Panel has also noted that – on the basis of the facts brought before it – the disputes between the Parties resolved around trademark and unfair competition law issues involving e.g., questions of similarity of the conflicting signs, channels of trade, actual confusion, etc.

In view of the above circumstances, the Panel considers that the disputed domain name is part of a much wider and more complex dispute that involves typical issues of trademark infringement and unfair competition law cases, and, therefore, is not taking part in a typical straightforward domain name dispute under the UDRP. Against this background, the Panel recalls that the Policy is not designed to adjudicate all types of disputes that relate in any way to domain names, but rather the Policy establishes a streamlined, inexpensive administrative dispute resolution procedure intended only for cases of “abusive cybersquatting” (see e.g., *Boku, Inc. v. Phuc To*, WIPO Case No. [D2023-1338](#)). The Panel is also mindful that the issues of this case substantially overlap with the issues dealt with by several German courts already and, thus, finds the latter better suited to the overall handling of the issues between the Parties. As such, the UDRP is not an appropriate process to adjudicate a complex trademark infringement dispute, given that panels e.g., do not have the powers granted to a competent court to first enlighten and finally resolve disputes, including e.g. witness testimony, disclosure of documents, or other procedural instruments (see: *Symphony Holdings Limited v. Jaimie Fuller, Fuller Consultancy F.Z.E.*, WIPO Case No. [D2019-2887](#), *Paradise International General Trading LLC v. Suwanna Mayeux*, WIPO Case No. [D2023-1569](#)).

Consequently, the Panel considers this dispute brought before it to exceed the typical “cybersquatting” scope of the UDRP and would be more appropriately addressed by a court of competent jurisdiction, or perhaps in mediation (see [WIPO Overview 3.0](#), section 4.14.6). Therefore, this Decision does not prevent either Complainant or Respondent from pursuing this dispute in relation to the specific and obviously yet unanswered question of who should own the disputed domain name in a court of competent jurisdiction.

/Stephanie G. Hartung/

Stephanie G. Hartung

Sole Panelist

Date: February 16, 2024