Decision for dispute CAC-UDRP-103148

Case number	CAC-UDRP-103148
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Domain names	buylexaprousa.com

Case administrator

Organization	Iveta Špiclová (Czech Arbitration Court) (Case admin)

Complainant

Organization	H. Lundbeck A/S

Complainant representative

Organization	Zacco Danmark A/S

Respondent

Organization	Margarita Pilan

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 claims ownership of International Trademark Registration No. 778106, registered on March 16, 2002 for the word LEXAPRO in relation to pharmaceutical preparations acting on the central nervous system.

FACTUAL BACKGROUND

PARTIES' CONTENTIONS:

COMPLAINANT:

Founded in 1915, the Complainant is now is an international pharmaceutical company engaged in the research, development, production, marketing and sale of pharmaceuticals across the world. The company’s products are targeted at the disease areas within psychiatry and neurology. The Complainant owns an International Trademark Registration for the word LEXAPRO (registered on March 16, 2002) and also owns the domain name <lexapro.com>. In 2019, the Complaint's revenue was USD 2.56 billion and the Complainant employs approximately 5.800 people worldwide.

The disputed domain name <buylexaprousa.com> resolves to a website that appears to contain neutral information on the Complainant's Lexapro product along with messages claiming that the product is available without a doctor's prescription (the product is legally only available with such a prescription). The website also contains links to a third-party commercial online pharmacy website titled, "Online Pharmacy", that claims to offer the sale of the Complainant's LEXAPRO product as well as pharmaceutical products sold by other companies. The Online Pharmacy website also offers an affiliate program where outside persons can earn fees for directing the traffic of potential customers to the site.

RESPONDENT:

The Respondent has not filed a response or made any other submission in this case.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

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

A. The disputed domain name is confusingly similar to a trademark or service mark in which the Complainant has rights

Paragraph 4(a)(i) of the Policy is a standing requirement which is satisfied if the disputed domain name is identical or confusingly similar to a trademark in which the Complainant has rights. Furthermore, it is not as extensive as the "likelihood of confusion" test for trademark infringement applied by many courts. Rather, under the Policy confusing similarity is commonly tested by comparing the Complainant's trademark and the disputed domain name in appearance, sound, meaning, and overall impression. See Administradora de Marcas RD, S. de R.L. de C.V. v. DNS Manager / Profile Group, Case No. 101341 (CAC November 28, 2016).

In this case, the Complainant has submitted screenshots from the WIPO website as evidence that it owns an International registration of the LEXAPRO trademark (dated March 16, 2002) claiming pharmaceutical preparations that are dispensed only with a doctor's prescription. Complainant also hosts its product website at the domain name <lexapro.com>.

The disputed domain name, registered on November 10, 2017, reproduces Complainant's trademark in its entirety and merely adds the word "buy" as a prefix, the term "usa" as a suffix, and the ".com" TLD. Thus, the Complainant asserts that the second level of the disputed domain name is confusingly similar to the Complainant's trademark and will lead internet users to wrongly believe that the disputed domain name is endorsed by Complainant. Prior panels have found confusing similarity under similar fact situations. G.D. Searle & Co. v. Access Rx, CR, S.A., FA 100572 (FORUM December 4, 2001) ("Respondent's <buycelebrexonlinenow.com> is confusingly similar to Complainant's CELEBREX mark because it merely

adds generic terms to the CELEBREX mark. The addition of terms such as ‘buy,’ ‘online,’ and ‘now’ does not create a mark capable of defeating a claim of confusing similarity.”).

Also, the extension “.com” typically adds no meaning to the second level of a disputed domain name and may be disregarded in the paragraph 4(a)(i) analysis. Autodesk, Inc. v. hongyu lin, D2020-0995 (WIPO June 7, 2020) (“Further, it is well established that the addition of a gTLD ‘.com’ does not avoid confusing similarity between the Complainant’s trademark and the disputed domain names..“).

Accordingly, this Panel finds that the Complainant has rights to the LEXAPRO trademark and that the additions made in the disputed domain name are insufficient to avoid a finding that it is identical or confusingly similar to the Complainant’s trademark. Thus, the Complainant has satisfied paragraph 4(a)(i) of the Policy.

B. The Respondent has no rights or legitimate interests in respect of the disputed domain name

Pursuant to paragraph 4(a)(ii) of the Policy, a complainant has the burden of making a prima facie showing that the respondent has no rights or legitimate interests in a domain name. Cephalon, Inc. v. RiskIQ, Inc., 100834 (CAC September 12, 2014). Once this burden is met, it then shifts to the respondent to demonstrate that it does have rights or legitimate interests in the domain name.

Paragraph 4(c) of the Policy offers respondents several examples of how to demonstrate their rights or legitimate interests to a domain name.

With reference to Paragraph 4(c)(ii) of the Policy the Complaint states that the Respondent has not received any license or consent, express or implied, to use the Complainant´s trademark. The Respondent has not participated in this case and so it does not contest this. As such, the Panel concludes that the Respondent is not affiliated with the Complainant, nor is it authorized or licensed to use the Complainant’s trademark or to seek registration of any domain name incorporating the aforementioned trademark. Furthermore, the Whois record for the disputed domain name identifies the Registrant as Margarita Pilan. There is no evidence that the Respondent is known otherwise. Based upon the available evidence in this case, the Panel cannot conclude that the Respondent is commonly known by the disputed domain name or that it has any rights to the Complainant’s trademark.

Next, under Paragraphs 4(c)(i) and 4(c)(iii) of the Policy the Panel considers whether the Respondent is using the disputed domain name to make a bona fide offering of goods or services or whether it is making a legitimate non-commercial or fair use of the disputed domain name. Resolving a confusingly similar domain name to a page that contains monetized links to a third party site that competes with a Complainant is typically not considered to be a bona fide use in past UDRP decisions. See, Walgreen Co. v. alex Neal / ATT QQ, FA 1901817 (FORUM July 8, 2020) (“The disputed domain names incorporate Complainant's famous registered mark without authorization, and they are being used to host or redirect to a website that uses a variant of Complainant's mark to promote cannabis-related products and services that are likely unlawful, and to promote other services that compete directly with services offered by Complainant. Such use does not give rise to rights or legitimate interest under the Policy.”).

Here, the Complainant has submitted screenshots of the Respondent’s own website as well as of a third-party “Online Pharmacy” site to which links at the Respondent’s website direct users. The Respondent’s site displays the message “BUY LEXAPRO CHEAP – ORDER GENERIC LEXAPRO ONLINE NO PRESCRIPTION BEST PRICES”. The site also contains the phrase “Where To Buy Lexapro?” followed by a link to the third-party Online Pharmacy site. When a user clicks on this link and arrives at the Online Pharmacy site it is presented with an offer to purchase product that bears the Complainant’s trademark. The site also displays links to, and offers for sale, pharmaceutical products of third parties who, in some cases, appear to be the Complainant’s competitors. Considering this evidence, it is apparent to this Panel that the Respondent is not using the disputed domain name for a bona fide offering of goods or services or in connection with a legitimate non-commercial or fair use but rather to earn affiliate revenue by promoting the products and services of a third-party, namely the Online Pharmacy website.

For all of the above-stated reasons, this Panel finds, by a preponderance of the evidence, that the Complainant has met its burden of proof under Paragraph 4(a)(ii) of the Policy and that the Respondent has not refuted this to show that it has any rights or legitimate interests in the disputed domain name. Thus, it is held that the Respondent has no rights or legitimate interests in respect to the disputed domain name.

C. The disputed domain name was registered and is being used in bad faith

Under paragraph 4(a)(iii) of the Policy, the complainant must demonstrate both that the domain name was registered and is being used in bad faith. Further guidance on that requirement is found in paragraph 4(b) of the Policy, which sets out four examples of actions by a respondent that may satisfy this burden of proof.

Inherently prerequisite to a finding of bad faith under Paragraph 4(a)(iii) is some attribution of knowledge of a complainant's trademark, whether actual or based upon a conclusion that a respondent should have known of the mark. See, Domain Name Arbitration, 4.02-C (Gerald M. Levine, Legal Corner Press, 2nd ed. 2019) ("Knowledge and Targeting Are Prerequisites to Finding Bad Faith Registration"); USA Video Interactive Corporation v. B.G. Enterprises, D2000-1052 (WIPO Dec. 13, 2000) (claim denied where "Respondent registered and used the domain name without knowledge of Complainant for a bona fide commercial purpose."). See also, WIPO Overview 3.0, par. 3.1.1 (when examining whether "circumstances indicate that the respondent's intent in registering the disputed domain name was in fact to profit in some fashion from or otherwise exploit the complainant's trademark", Panels may consider such issues as "the respondent's likely knowledge of the complainant's rights"). Here, the Complainant asserts that its trademark is "a well-known and invented mark." In support, the Complainant submits a copy of its 2019 Annual Report which sets out the scope of the Complainant's advertising and promotion expenditures and the geographic scope of its product sales. Most importantly, the Respondent's website itself is focussed entirely on the Complainant's product and even displays an image of it in its packaging. From this evidence, the Panel concludes that the Respondent had actual knowledge of the Complainant's trademark at the time it registered the disputed domain name.

Next, attention is given to the Complainant's claim that the Respondent uses the disputed domain name in bad faith. Paragraph 4(b)(iv) of the Policy states that bad faith may be found where a respondent intentionally attempts to attract, for commercial gain, internet users to its website by creating a likelihood of confusion with a complainant's trademark as to the source, sponsorship, affiliation, or endorsement of its products or services. It has been held in many prior UDRP decisions that the hosting of monetized links on a website using a confusingly similar domain name is evidence of bad faith under Paragraph 4(b)(iv) of the Policy. Securian Financial Group, Inc. v. Zhichao Yang, FA 1893148 (FORUM May 21, 2020) ("Use of a disputed domain name to display pay-per-click hyperlinks relating to competing goods or services can be evidence of bad faith disruption of a complainant's business under Policy 4(b)(iii) and an attempt to attract users for commercial gain under Policy 4(b)(iv).") As noted above, the screenshots submitted by the Complainant show that the disputed domain name resolves to a website which displays a description and image of the Complainant's trademarked product as well as a link to a third-party Online Pharmacy website which claims to offer for sale Complainant's trademarked product as well as pharmaceutical products from other companies, some of which compete with the Complainant. The Respondent does not offer any evidence or argument to refute the Complainant's assertions or to otherwise explain its actions with regard to the disputed domain name.

Finally, the Complainant cites two prior decisions under the Policy that were adverse to the Respondent and claims that these further support a finding of bad faith. Although not specifically cited by the Complainant, Paragraph 4(b)(iv) of the Policy states that a pattern of conduct with regard to the misuse of domain names can support a finding of bad faith. Fandango, LLC v. 21562719 Ont Ltd, FA 1464081 (FORUM November 2, 2012) ("Respondent's past conduct and UDRP history establishes a pattern of registered domain names in bad faith under Policy 4(b)(ii).") Here, the Complainant cites two cases that were brought against the Respondent: Cephalon Inc. v. Margarita Pilan, D2020-0931 (WIPO June 10, 2020) (the domain name <provigilpro.com> was ordered transferred to the Complainant, owner of the trademark PROVIGIL for a line of central nervous system pharmaceuticals); and Sanofi v. Margarita Pilan, D2019-0572 (WIPO May 20, 2020) ("The Complainant provided evidence that the Respondent has used the disputed domain name for a website that offers for sale pharmaceutical products competing with those of the Complainant…") In light of these prior adverse decisions and the Respondent's actions involving the presently disputed domain name, the Panel finds that the Respondent has engaged in a

pattern of conduct with confusingly similar domain names and has prevented the Complainant from reflecting its trademark in the corresponding disputed domain name. This bolsters the finding of bad faith registration and use of the disputed domain name previously made by the Panel.

In view of the above-mentioned circumstances, this Panel finds, by a preponderance of the evidence, that the disputed domain name was registered and used in bad faith under Paragraph 4(b)(iv) of the Policy. Thus, the Complainant has satisfied its burden of proof with respect to 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. **BUYLEXAPROUSA.COM**: Transferred

PANELLISTS

Name	**Steven M. Levy, Esq.**

DATE OF PANEL DECISION 2020-07-31

Publish the Decision