Decision for dispute CAC-UDRP-101005

Case number	**CAC-UDRP-101005**
Time of filing	**2015-06-15 14:29:51**
Domain names	**brintellixfordepression.com**

Case administrator

Name	**Lada Válková (Case admin)**

Complainant

Organization	**H. Lundbeck A/S**

Complainant representative

Organization	**Wallberg IP Advice**

Respondent

Name	**Javier Correa**

OTHER LEGAL PROCEEDINGS

None of which the Panel is aware.

IDENTIFICATION OF RIGHTS

The Complainant has established trademark rights to BRINTELLIX. The Complainant adduced evidence to the Complaint showing that it is the registered owner of trademarks for BRINTELLIX in more than 80 countries.

In particular, the evidence shows that the Complainant is the registered owner of the trademark for BRINTELLIX , trademark No. VR 20112 registered in Denmark on November 17, 2011.

Moreover, the evidence shows that the Complainant is the registered owner of the trademark for BRINTELLIX ,trademark No.1328114 registered in Mexico, where the Respondent is domiciled, on November 16, 2012.

The evidence also shows that the Complainant is the registered owner of numerous other registered trademarks for BRINTELLIX registered by other trademark authorities around the world (hereinafter collectively referred to as " the BRINTELLIX mark").

FACTUAL BACKGROUND

The Complainant was founded in 1915 and is now 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 central nervous diseases and disorders such as depression and anxiety, psychotic disorders, epilepsy and Huntington's, Alzheimer's and Parkinson's diseases.

The Complainant is one of the world's leading pharmaceutical companies working with brain disorders. Today the Complainant employs approximately 5.600 people worldwide. Evidence to that effect is contained in the Annual Report of the Complainant which is attached to the Complaint. Further information to that effect may be seen at the Complainant's official website www.lundbeck.com.

The most recently launched compounds marketed by the Complainant for the treatment of brain diseases include: Brintellix® (depression), Cipralex® / Lexapro® (depression), Abilify Maintena® (schizophrenia), Selincro® (alcohol dependence), Northera® (symptomatic neurogenic orthostatic hypotension), Azilect® (Parkinson’s disease), Xenazine® (chorea associated with Huntington's disease), Sabril® (epilepsy) and Onfi® (Lennox-Gastaut syndrome).

The trademark Brintellix® is registered in more than 80 countries around the world. Details of those registrations have already been set out above.

The Complainant is also the holder of several domain names containing the Brintellix® brand, including <brintellix.com>.

The disputed domain name was registered on March 12, 2015 and it presently resolves to a website that appears to be a standard parking page of the Registrar Go Daddy.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

PARTIES' CONTENTIONS:

COMPLAINANT:

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

(Policy, Paragraph 4(a)(i); Rules, Paragraphs 3(b)(viii), (b)(ix)(1))

The disputed domain name is confusingly similar to the trade mark BRINTELLIX, in which the Complainant holds rights. The domain name incorporates the Complainants registered trademark combined with the generic and descriptive terms “for depression” as suffix. The Complainant claims that for the purpose of a UDRP proceeding, when a well-known and invented mark is combined with a common noun or adjective, that combination constitutes a domain name which is confusingly similar to an invented and well known mark.

Also, the Complainant asserts that it is an established and recognized principle under the UDRP that the presence of the ".com" top level domain designation is irrelevant in the comparison of a domain name to a trademark.

B. The Respondent has no rights or legitimate interests in respect of the disputed domain name;
(Policy, Paragraph 4(a)(ii); Rules, Paragraph 3(b)(ix)(2))

The Respondent has not received any license or consent, express or implied, to use the Complainant´s trademark BRINTELLIX, in a domain name or in any other manner from the Complainant, nor has the Complainant acquiesced in any way to such use or application by the Respondent. At no time did the Respondent have authorization from the Complainant

to register the disputed domain name.

Further, to the best knowledge of the Complainant, the Respondent has no rights or legitimate interests in the disputed domain name. The Respondent did thus not use the domain name as a trademark, company name, business or trade name prior to the registration of the disputed domain name, nor is the Respondent otherwise commonly known in reference to the name.

Finally, it is evident that the Respondent does not make a legitimate noncommercial or fair use of the domain name, as stated in § 4 c of the UDRP.

C. The disputed domain name was registered and is being used in bad faith.
(Policy, paragraphs 4(a)(iii), 4(b); Rules, paragraph 3(b)(ix)(3))

The Complainant´s trademark BRINTELLIX is registered in the recorded country of residence of the Respondent, namely Mexico.

The Complainant claims that because of the distinctive nature and intensive use of the Complainant´s trademark BRINTELLIX, the Respondent had positive knowledge as to the existence of the Complainant's trademark at the time the Respondent registered the domain name.

The domain name is currently used for what appears to be a standard parking site for the Registrar of the disputed domain name GoDaddy. As it was first stated in Telstra Corporation Limited v. Nuclear Marshmallows, WIPO Case No. D2000-0003, concerning the domain name <telstra.org> and applied in numerous subsequent decisions, the apparent lack of "active use" (passive holding), does not as such prevent a finding of bad faith use under the UDRP.

In this case the Complainant further submits that the disputed domain name is offered for sale. When the internet user clicks on the link entitled "Learn how to get this domain" on the corresponding website www.brintellixfordepression.com, it is stated that the user can place an offer to buy the disputed domain name, and there is even indicated a price for it. Since it is the Registrant of a domain name, the Complainant bears the responsibility for how the domain name is used, this is a clear indication of the bad faith intention of the Registrant; see inter alia Danbyg Ejendomme A/S v. Ib Hansen / guerciotti, NAF Case 1613867, June 2, 2015, concerning <danbyg.com>.

RESPONDENT
The Respondent did not submit a Response in this proceeding. However, the Provider received an email from the Respondent claiming he wanted to make a forum to help people that are suicidal and depressed.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the 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 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 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

DISCUSSION AND FINDINGS

This is a mandatory administrative proceeding pursuant to Paragraph 4 of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the CAC Supplemental Rules.

A. Administrative deficiency

By notification dated June 15, 2015 and in accordance with paragraph 4 (b) of the Rules, the CAC notified the Complainant that the Complaint was administratively deficient in that the Complaint specified an insufficient identification of the Respondent as the postal code of the address of the Respondent was omitted.

On June 15, 2015 the Complainant filed an Amended Complaint and the CIC determined that in view of the amendments so made, the Complaint should be forwarded to the Respondent.

The Panel has reviewed all of the above matters and makes a finding that within the meaning of paragraph 4(b) of the Rules, the administrative deficiencies have been corrected and that this matter has proceeded properly to the Panel in accordance with the Policy and the Rules.

B. Substantive matters

Paragraph 15 of the Rules provides that the Panel is to decide the complaint on the basis of the statements and documents submitted and in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable.
In that regard, the Panel also notes that the onus is on the complainant to make out its case and past UDRP panels have consistently said that a complainant must show that all three elements of the Policy have been made out before any order can be made to transfer a domain name.

The Panel therefore turns to discuss the various issues that arise for decision on the facts as they are known.

For the complainant to succeed it must prove, within the meaning of paragraph 4(a) of the Policy, that:
(i) The domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
(ii) The 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.

The Panel will therefore deal with each of these requirements in turn.

A. Identical or Confusingly Similar

The Panel finds that the disputed domain name <brintellixfordepression.com> is confusingly similar to the BRINTELLIX trademark for the following reasons. First, the domain name consists of the entirety of the BRINTELLIX trademark to which the Respondent has added the words "for depression", which can only be taken to mean that the domain name is invoking the trademark and that the goods to which the domain name is being applied are the goods of the Complainant sold under the name Brintellix, that they are used for the treatment of depression and that they are products of the Complainant. In this regard it has long been held by UDRP panels, as the Complainant correctly submits , that the mere addition of generic words or, as the Complainant submits, a "common noun or adjective", to a trademark does not eliminate confusing similarity that is otherwise present, as it is in the present case. That principle has been articulated and applied in many prior UDRP decisions. The same principle clearly applies to the present case because internet users would naturally assume that the

<brintellixfordepression.com> domain name relates to the Complainant's products sold under the name and trademark BRINTELLIX and used for the treatment of depression.

Secondly, the gTld ".com" which is part of the domain name is regularly understood to be ignored for the purposes of the present analysis and cannot negate confusing similarity that is otherwise present, as it is in the present case: see WIPO Case D2006-1268 Credit Industriel et Commercial SA v. XUBO.

Accordingly, the domain name is confusingly similar to the Complainant's trademark and the Complainant has thus shown the first of the three elements that it must establish.

B. Rights or Legitimate Interests

Under paragraph 4(a)(ii) of the Policy, the Complainant has the burden of establishing that the Respondent has no rights or legitimate interests in respect of the disputed domain name. But by virtue of paragraph 4(c) of the Policy, it is open to a respondent to establish its rights or legitimate interests in a domain name, among other circumstances, by showing any of the following elements:
(i) before any notice to you [respondent] 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; or
(ii) you [respondent] (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; or
(iii) you [respondent] 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.
Thus, if a respondent proves any of these elements or indeed anything else that shows that it has a right or legitimate interest in the domain name, the complainant will have failed to discharge its onus and the complaint will fail. It is also well-established that a complainant is required initially to make out a prima facie case that the respondent lacks such rights or legitimate interests and that when such a prima facie case is made, the respondent carries the burden of demonstrating rights or legitimate interests in the domain name. If the respondent cannot or does not do so, a complainant is deemed to have satisfied paragraph 4(a)(ii) of the UDRP.

The Panel, after considering all of the evidence in the Complaint, finds that the Complainant has made out a prima facie case that the Respondent has no rights or legitimate interests in the domain name <brintellixfordepression.com>. That prima facie case is made out from the following considerations.

First, the Respondent chose for the disputed domain name, without the Complainant's authorization, the Complainant's well-known trademark BRINTELLIX which it has had registered and used in its business name to describe one of its products.

Secondly, as well as the trademark being a prominent one, it is also a name that has clearly been invented, suggesting that its significance would not have gone unnoticed at the time of its use by the Respondent as part of the disputed domain name.

Thirdly, the evidence shows, as the Complainant has alleged, that the Respondent has not received any license or consent from the Complainant, express or implied, to use the Complainant´s BRINTELLIX trademark in a domain name or in any other manner, or to register the disputed domain name. Nor has the Complainant acquiesced in any way to such use or application by the Respondent. Moreover, at no time did the Respondent have authorization from the Complainant to register the disputed domain name.

Further, to the best knowledge of the Complainant, and the Panel so finds, the Respondent has no rights or legitimate interests in the disputed domain name as the Respondent did not use the domain name as a trademark, company name, business or trade name prior to the registration of the disputed domain name. Nor is the Respondent otherwise commonly known in reference to the name.

Finally, it is apparent from the evidence that the Respondent has not made a legitimate noncommercial or fair use of the

domain name, as set out in § 4 c of the UDRP.

These facts give rise to the prima facie case made out by the Complainant.

The Respondent has not filed an administratively compliant Response. However, an email from the Respondent was delivered to the CAC in which the Respondent claims he wanted to make a forum to help people that are suicidal and depressed. Nevertheless, the Respondent did not submit any evidence proving demonstrable preparations to use the disputed domain name in such a way and there is no other evidence on the record which would support such a claim.

Accordingly, the prima facie case has not been rebutted and the Complainant has made out the second of the three elements that it must establish.

C. Registered and Used in Bad Faith

The Complainant must prove on the balance of probabilities both that the disputed domain name was registered in bad faith and that it is being used in bad faith: Telstra Corporation Limited v. Nuclear Marshmallows, WIPO Case No. D2000-0003. Paragraph 4(b) of the Policy sets out four circumstances, any one of which is evidence of the registration and use of a domain name in bad faith, although other circumstances may also be relied on, as the four circumstances are not exclusive. The four specified circumstances are:
(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 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 the respondent's website or other on-line 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 site or location.

The Panel finds that the Complainant has shown that the Respondent registered and used the disputed domain name in bad faith both in general and in particular because the Respondent's conduct puts the case squarely within the provisions of paragraph 4(b) of the Policy. That is so for the following reasons.

First, the Complainant´s BRINTELLIX trademark is registered, among many other places, in Mexico, the country of domicile of the Respondent. Because of that fact and the distinctive nature and intensive use of the trademark, the Panel finds that the Respondent had actual knowledge of the existence of the Complainant's trademark at the time it registered the domain name. Accordingly, the Panel finds that the Respondent registered and has used the domain name in bad faith.

Secondly, the domain name is currently used for what appears to be a standard parking site for the Registrar of the disputed domain name, GoDaddy. The Respondent, as registrant of the domain name is responsible for the contents of the web page to which the disputed domain name resolves. The Panel has examined the website to which the domain name resolves and finds that it carries links to a wide variety of general goods and services. This gives the impression to the internet user that the website is approved or sponsored by the Complainant which is not true. All of these circumstances give rise to confusion within the meaning of paragraph4(b)(iv) of the Policy showing that the Respondent registered and used the domain name in bad faith.

Thirdly, the Complainant further submits that the disputed domain name is offered for sale. When the internet user clicks on the link entitled "Learn how to get this domain" on the corresponding website www.brintellixfordepression.com it is stated that the user can place an offer to buy the disputed domain name, and there is even indicated a price for it. As the

Respondent bears the responsibility for how the domain name is used, the Panel finds that this is a clear indication of the bad faith intention of the Registrant. There are many UDRP decisions to that effect.

Fourthly, as the Respondent has registered a domain name including the Complainant's well known trademark and has clearly sought to capitalise on that conduct for the purpose of making money, the Panel finds on the totality of the evidence that the Respondent registered and has used the disputed domain name in bad faith.

Accordingly, the Complainant has shown the third of the three elements that it must establish.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **BRINTELLIXFORDEPRESSION.COM**: Transferred

PANELLISTS

Name	**The Hon. Neil Brown, QC**

DATE OF PANEL DECISION 2015-07-17

Publish the Decision