

DISPUTE RESOLUTION SERVICE**D00019703****Decision of Independent Expert**

Bayer A.G.

and

Paul Heeley

The Parties

Complainant: Bayer AG
Kaiser-Wilhelm-Allee 1
Leverkusen
Germany
51373
Germany

Respondent: Paul Heeley
17 Marie Lloyd Court
Brighton Tce
London
SW9 8DL
United Kingdom

The Domain Name

bayermonsanto.co.uk

Procedural History

1. I can confirm that I am independent of each of the parties. To the best of my knowledge and belief, there are no facts or circumstances, past or present, or that could arise in the foreseeable future, that need be disclosed as they might be of a such a nature as to call in to question my independence in the eyes of one or both of the parties.

2. The following is a brief summary of the procedural steps in this case, -

29 December 2017	Complaint received by Nominet;
02 January 2018	Complaint validated by Nominet and notification of Complaint sent to the parties;
19 January 2018	Response reminder sent;
23 January 2018	Response received and notification of Response sent to parties;
26 January 2018	Reply reminder sent, Reply received and notification of Reply sent to parties;
31 January 2018	Mediation started;
26 March 2018	Mediation failed;
09 April 2018	Expert decision payment received by Nominet.

Factual Background

3. The Complainant is a German company, which carries on business, with its many affiliated companies, throughout the world in pharmaceuticals, crop-science, agricultural chemicals and other areas of enterprise. On 12 May 2016 the international media first reported that Bayer was exploring a potential bid for its US competitor, Monsanto Co.

4. The Respondent registered the Domain Name on 24 May 2016 and until recently the Domain Name resolved to a one-page website with a holding page. Following service of the Complaint, the Respondent posted photographs of his two pet cats, which he says are called 'Bayer' and 'Monsanto'.

The Parties' Contentions

5. The Complaint alleges, -
 - 5.1 The Complainant is a global enterprise with core competencies in the fields of health care, nutrition and plant protection. The company name BAYER dates back to 1863, when the firm of "Friedrich Bayer & Co." was established in the town of Elberfeld in Germany. In 1881, the name was transferred to a stock corporation called "Farbenfabriken vorm. Friedrich Bayer & Co.". This company began manufacturing and marketing pharmaceutical products in 1888 and has sold such products under the BAYER trade mark ever since that time.
 - 5.2 The Complainant is represented by over 250 affiliates and has more than 100,000 employees worldwide. The Complainant, itself or through the subgroups like HealthCare and CropScience, does business on all five continents, manufacturing and selling numerous products, including pharmaceutical and medical care products, veterinary products, diagnostic products, and agricultural chemicals. In the UK, where the Respondent is located, the Complainant has a local subsidiary, trading as 'Bayer PLC (UK).'
 - 5.3 The Complainant is the owner of about 700 registrations and pending applications of the word mark "BAYER" alone, including registrations in the UK, where the Respondent is located, inter alia UK trade mark registration no. UK00001005868 for "BAYER", registered on February 2, 1973 for goods in classes 1, 2, 3, 4, 5, 17, 21, 22, 23, and 28, and Community trade mark no. 011628625 for "BAYER",

registered on March 6, 2013 for goods and services in classes 1, 3, 5, 9, 10, 17, 19, 31, 32, 37, 42, and 44.

- 5.4 The Complainant has a strong presence on the Internet. The Complainant and its subsidiaries own hundreds of domain name registrations containing the BAYER Mark, including <bayer.com> and <bayer.co.uk>. Due to the Complainant's global online use of its BAYER Marks, such marks are obviously and solely connected with the Complainant. A search for the query "bayer" at the website www.google.co.uk shows that nearly all of the search results refer to the Complainant or its subsidiaries.
- 5.5 As a result of that exclusive and extensive use, the Complainant's BAYER Marks have acquired a significant goodwill and are widely known. Previous decisions decided under the UDRP have already found that the Complainant's BAYER marks are well-known.
- 5.6 On 12 May 2016, the international media reported that the Complainant was exploring a potential bid for U.S. competitor Monsanto Co.
- 5.7 The Respondent registered the Domain Name on 24 May 2016.
- 5.8 The Domain Name is currently not used in connection with an active website. It incorporates the well-known BAYER Marks and is similar to such marks.
- 5.9 The fact that the disputed domain name includes the third party trade mark "MONSANTO" does not eliminate the similarity between Complainant's trade mark and the Domain Name. On the contrary, the use of the BAYER marks in connection with the MONSANTO marks strengthens the likelihood of confusion as the second level in both domains directly refers to the Complainant and its intentions to merge with the company Monsanto.

- 5.10 Given the strength and the renown of the trade marks, it is inconceivable that the Respondent did not have the knowledge of the Complainant and its rights at the time of the registration of the domain name in dispute. Registration of 'Bayer Monsanto' cannot be a mere coincidence.
- 5.11 In the circumstances, the Respondent has registered the Domain Name as a blocking registration for the purposes of the DRS Policy.
- 5.12 In addition, the Respondent has not provided any evidence to prove the opposite and nothing suggests that the Domain Name is likely to operate as authorised domain of the Complainant, that will consequently confuse third parties, inter alia consumers and competitors, and disrupt in that way the Complainant's business. Consequently, by registering the Domain Name, the Respondent intends to unfairly disrupt the business of the Complainant and create initial interest confusion, an element which is tightly connected to the disruption of a business.
- 5.13 The Respondent has no reasonable justification for having registered the Domain Name and the Complainant has not licensed or otherwise permitted the Respondent to use any of its trade marks and has not permitted the Respondent to apply for, or use, any domain name incorporating the BAYER marks.
- 5.14 Paragraph 1.3 of the Nominet Dispute Resolution Service – Experts' Overview states the following in relation to non-use of a domain name:

'Moreover, some Experts have found that in certain circumstances, e.g. where the name is a known brand and the Respondent has no obvious justification for having adopted the name and has given no explanation, the non-use itself can

constitute a threatened abuse hanging over the head of the Complainant.’

5.15 Although the Domain Name incorporates the Complainant’s BAYER marks and the third party trade mark MONSANTO, the intended merger of these two companies makes transfer to the Complainant an appropriate remedy here.

6. The Response alleges, -

6.1 The Respondent did not know who or what Bayer was until he read into Nominet’s email with the Complaint. It looks like it is a German company so why is there a problem with this as the Respondent is in the UK. The same goes for Monsanto – are they German as well?

6.2 Bayer and Monsanto are the Respondent’s two brother-and-sister pedigree Russian Blue cats. He has attached some photos of them to the Response, which show the name tags.

6.3 The reason Bayer and Monsanto have their names is thanks to the 1993 film ‘Mrs Doubtfire’. In it, Robin Williams impersonates a Scottish woman when applying for a job over the telephone. At the end of the call, Williams is unexpectedly asked for his (her) name. Unable to think of something quickly, he sees an open newspaper next to him with a headline that includes the words “...doubt fire...,” and so gives that as his name.

6.4 Mrs Doubtfire is at the absolute top of the Respondent’s list of all-time favourite films. Two years ago, it was also a favourite of his partner. So, when they got their cats and were thinking about names for them, they had the fun idea of choosing their names Mrs Doubtfire-style. They had probably been drinking as well! They opened a newspaper or magazine and saw something that mentioned ‘...Bayer and

Monsanto...'. They did not read the article. The whole point was to pick something completely at random.

- 6.5 So, they named the cats Bayer and Monsanto, which they thought were really lovely names for a girl and a boy.
- 6.6 Whenever asked how they chose their names, the Respondent and his partner tell those who asked that Mrs Doubtfire chose them.
- 6.7 The Respondent had not heard of the Bayer company when he and his partner named their cats. For all he knew, Bayer could have been the name of a pop star, a car or a town or city somewhere in the world. The Respondent knew even less about the Monsanto company.
- 6.8 It was the Respondent's partner's idea to chart Bayer and Monsanto growing up by setting up a website so that others, in particular their mothers, who also adore cats but live elsewhere in the UK, could see how beautiful they are. So, the Respondent bought the Domain Name, but he never got around to setting up the website.
- 6.9 But all this business about wanting the Domain Name has annoyed him. So, he posted photos of Bayer and Monsanto on his website.
- 6.10 The Respondent has read all the information about the Bayer company in the Complaint and accepts that they do all of the things that they say they do. But the Respondent would not know one plant food or cosmetics manufacturer from the next. The same goes for Monsanto. He has no interest in either company and it is presumptuous of Bayer to think that it can force the Respondent to hand over his domain name just because someone somewhere has the same name (and a cat!).
- 6.11 Bayer surely cannot object to anyone using the word 'Bayer' in some way in a domain name – if they could, there would be none of the domain names that came up when the Respondent searched against

'Bayer' on internet: patrickbayer.com, miltonbayer.com, bayersolicitors.co.uk, mikebayer.ca, fcbayern.com. The list goes on and on. None of these has anything to do with the Bayer company.

6.12 From the Respondent's website it is blindingly obvious that it has absolutely nothing to do with drugs or cosmetics or any other sort of company or business. Bayer does not have a worldwide monopoly on the use of the word Bayer and so as long as the Respondent is not causing anyone any trouble, why should he be made to give up his property?

6.13 Bayer says that using 'Bayer' and 'Monsanto' together causes confusion because the two companies are to merge. Until that happens the point is totally academic. And whether or not Bayer and Monsanto become one company, no-one is going to be confused.

6.14 Where is the 'confusing similarity'? The ordinary person knows the difference between a company selling cosmetics and two pretty cats. If the Bayer company thinks the names of the Respondent's cats is a 'threatened abuse hanging over the head' of their company, they are being totally ridiculous.

7. The Reply alleges, -

7.1 It is inconceivable that the Respondent did not know the Complainant or did not even hear the name of the Complainant during these years, especially since it has become a giant in the pharmaceutical sector.

7.2 The Respondent's story of how the names Bayer and Monsanto came to be used lacks credibility. The Respondent has not presented a clear timeline as to when he acquired the animals and when the names were given. The cats did not have those names from the very beginning but only after the news reported about the intended merger. And it would

be difficult to believe that they had had no name from the time when the Respondent acquired them.

7.3 Furthermore, UDRP panels have been dealing for years with the issues of pet names and related domain names, which include a third-party's trade mark. They have decided that such allegations should be supported with the necessary evidence.

7.4 Further, the Respondent has registered the domain name on May 24, 2016, a few days after the news of the intended merger went public. But the disputed domain name was not used until the very moment of the Response. The Complainant firmly believes that the Respondent is now showing a bad faith behaviour and that the registration of the Domain Name in the hands of the Respondent is an abusive registration. It is particularly objectionable to start using the Domain Name in connection with an active website now, when faced with the Complaint.

7.5 The fact that the Domain Name is registered with the suffix co.uk clearly indicates the existence of a business. That suffix is only used for companies and businesses to ensure that Internet users will recognise that the domain name is referring to a company.

Discussion and Findings

8. A Complainant is required under subparagraphs 2.1 and 2.2 of the Policy to prove on the balance of probabilities that the following two elements are present, namely: -

8.1 he has Rights in respect of a name or mark which is identical or similar to the Domain Name; and

8.2 the Domain Name, in the hands of the Respondent, is an Abusive Registration.

9. I have taken into account all the facts and matters relied on by each party, but have limited the findings in this decision to those necessary to dispose of the dispute in accordance with the Policy. Therefore, it is not necessary to resolve all the issues raised by the parties.
10. I refer to, and repeat as findings, paragraphs 3 and 4 above.

Rights

11. By paragraph 1 of the Policy, -

'Rights means rights enforceable by the Complainant, whether under English law or otherwise, and may include rights in descriptive terms which have acquired a secondary meaning.'

12. The documents exhibited to the Complaint show that Bayer owns UK registered trade mark no: UK00001005868 for "BAYER", registered on 2 February 1973 for goods in classes 1, 2, 3, 4, 5, 17, 21, 22, 23, and 28, and Community trade mark no. 011628625 for "BAYER", registered on 19 August 2013 for goods and services in classes 1, 3, 5, 9, 10, 17, 19, 31, 32, 37, 42, and 44.
13. The comparison under the DRS between the Domain Name and the Complainant's name or mark ignores the '.co.uk' suffix. The word 'bayer' is a prominent part of the word 'bayermonsanto'. 'Bayer' is also the dominating part of the Domain Name, constituting the first part of the Domain Name and appearing to qualify 'monsanto' as 'bayermonsanto'. Bayer and Monsanto also trade in similar fields and a merger between them has been contemplated. In all these circumstances, therefore, the two 'BAYER' marks are similar to 'bayermonsanto'.
14. Accordingly, the Complainant has Rights in respect of a name or mark, which is similar to the Domain Name. Accordingly, the Complainant has established that it owns Rights.

Abusive Registration

15. By paragraph 1 of the Policy, -

*'an **Abusive Registration** means a Domain Name which either:*

- i. was registered or otherwise acquired in a manner which, at the time when the registration or acquisition took place, took unfair advantage of or was unfairly detrimental to the Complainant's Rights; or*
- ii is being or has been used in a manner which has taken unfair advantage of or has been unfairly detrimental to the Complainant's Rights.'*

By paragraph 5 of the Policy, -

5. Evidence of Abusive Registration

'5.1 A non-exhaustive list of factors which may be evidence that the Domain Name is an Abusive Registration is as follows:

5.1.1 Circumstances indicating that the Respondent has registered or otherwise acquired the Domain Name primarily:

5.1.1.1 for the purposes of selling, renting or otherwise transferring the Domain Name to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of the Respondent's documented out-of-pocket costs directly associated with acquiring or using the Domain Name;

5.1.1.2 as a blocking registration against a name or mark in which the Complainant has Rights; or

5.1.1.3 for the purpose of unfairly disrupting the business of the Complainant;

5.1.2 Circumstances indicating that the Respondent is using or threatening to use the Domain Name in a way which has confused or is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant;

.....'

16. Paragraph 8 of the Policy provides as follows, -

'8. How the Respondent may demonstrate in its response that the Domain Name is not an Abusive Registration

8.1 A non-exhaustive list of factors which may be evidence that the Domain Name is not an Abusive Registration is as follows:

8.1.1 Before being aware of the Complainant's cause for complaint (not necessarily the 'complaint' under the DRS), the Respondent has:

8.1.1.1 used or made demonstrable preparations to use the Domain Name or a domain name which is similar to the Domain Name in connection with a genuine offering of goods or services;

8.1.1.2 been commonly known by the name or legitimately connected with a mark which is identical or similar to the Domain Name; or

8.1.1.3 made legitimate non-commercial or fair use of the Domain Name.

.....’

17. The Appeal Panel in DRS 04331 ‘verbatim.co.uk’ decided that for a Complaint to succeed, -

‘the Complainant must satisfy the Panel, as an opener, that the Respondent was aware of the existence of the Complainant or its brand at the date of registration of the Domain Name or at commencement of an objectionable use of the Domain Name.’

18. Was the Respondent aware of the Complainant when he registered the Domain Name? He says that he had not heard of the Bayer company when he and his partner named their cats and that they did not read the article. Bayer could have been the name of a pop star, a car or a town or city somewhere in the world, for all he knew. The Respondent knew even less about the Monsanto company, so he says.

19. The name ‘Bayer’ was brought to the Respondent’s attention as a result of media interest in the proposed merger. He claims that it was not a name known to him before that time. However, I find it unlikely that the Respondent was only aware of two words and none of the context in the article. He and his partner may not have read the whole article containing the two names, but surely would have noticed the title of the article, some of its contents or both, which must have indicated a possible tie-up between two commercial enterprises. I also find it inconceivable that there was not some discussion between them as to the nature or identities of ‘Bayer’ and ‘Monsanto’. I also note that it is not said that the Respondent’s partner was unaware of Bayer and Monsanto as being commercial entities.

20. The Complainant has not licensed or otherwise permitted the Respondent to use its Bayer mark for incorporation in or use as part of, the Domain Name.

21. The DRS Experts’ Overview states (section 3.3), -

‘Commonly, Internet users will visit web sites either by way of search engines or by guessing the relevant URL. If the domain name in dispute is identical to the name of the Complainant and that name cannot sensibly refer to anyone else, there is bound to be a severe risk that a search engine, which is being asked for the Complainant, will produce high up on its list the URL for the web site connected to the domain name in issue. Similarly, there is bound to be a severe risk that an Internet user guessing the URL for the Complainant’s web site will use the domain name for that purpose.

In such cases, the speculative visitor to the registrant’s web site will be visiting it in the hope and expectation that the web site is a web site “operated or authorised by, or otherwise connected with the Complainant.” This is what is known as ‘initial interest confusion’ and the overwhelming majority of Experts view it as a possible basis for a finding of Abusive Registration, the vice being that even if it is immediately apparent to the visitor to the web site that the site is not in any way connected with the Complainant, the visitor has been deceived.’

Although this is not a case where the Respondent has registered a domain name that is identical to the complainant’s name or mark, the Domain Name is no less likely to confuse. Persons seeking information about Bayer’s proposed merger (particularly customers and businesses with a commercial interest in Bayer’s activities, whether other businesses or competitors) are likely to type in the two words into a search engine and there is a severe risk that they will come across the Respondent’s website. There is a like risk that such persons seeking news or other information about Bayer’s proposed tie-up would seek out a dedicated website and type in the URL of the Domain Name, guessing the name of the dedicated website.

22. The Respondent’s case is that visitors to the website will not be confused, because when they arrive at the website associated with the Domain Name,

they will see it has nothing to do with the business of either company or any business relevant to a merger between them.

23. However, in view of my conclusions on ‘initial interest’ confusion, I accept the Complainant’s case that Internet users are likely to mistake the Domain Name as an authorised domain of the Complainant that will consequently confuse those third parties, including consumers and competitors, and so disrupt the Complainant’s business. For those purposes, it matters not that Internet users will realise their mistake once they arrive at the Respondent’s website.
24. Indeed, until recently when the Respondent uploaded pictures of the cats to his website, it is likely that a substantial number of Internet users would not have realised their mistake at all. The website previously displayed the words ‘*website coming soon*’, which would be likely to lead them to conclude that there were no ‘official’ announcements about the proposed merger. This is plainly disruptive to the Complainant’s business.
25. Therefore, I conclude that there are circumstances indicating that the Respondent is using and also threatening to use the Domain Name in a way which has confused and is likely to confuse people or businesses into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with the Complainant. Therefore, the Complainant has established the grounds under paragraph 5.1.2 of the Policy.
26. I have considered whether any of the circumstances specified in paragraph 8 of the Policy apply in the circumstances of this case. In particular, has the Respondent made legitimate non-commercial or fair use of the Domain Name?
27. The Respondent has not asserted that he chose the pets’ names before the date when the merger was announced, and without reference to the Complainant. This is not a case where, for example, a person has used their own name or even named a pet before becoming aware of the Complainant’s name or mark. Nor is it a case where the registration pre-dated the Complainant’s trade mark

or other Rights. The choice of name for the Domain Name was triggered in substantial part by the Complainant's name and mark.

28. To that important extent, therefore, the Respondent has taken advantage of the 'Bayer' mark in his registration of the Domain Name. Even if, contrary to my findings as to the state of the Respondent's knowledge at the time of registration (see above), the Respondent knew nothing of the attributes of 'Bayer', it was the Complainant's mark (and not some other 'Bayer') that was the reason why he chose that name as part of the Domain Name.
29. Further, by choosing a domain name combining the names of Bayer and another company with which (as he knew) Bayer was possibly to merge in order to put up a website about his cats, the Respondent must have known that this was likely to have a disruptive effect on Bayer's business: by causing confusion among members of the public, who would be likely to be misled into believing that the Domain Name and its accompanying website were 'official', and had been sanctioned and authorised by Bayer.
30. The Respondent has not used the Domain Name at all for the purpose he says he had in mind. The only way in which he has used it until recently is likely to have misled persons looking for information about the proposed merger. Even then, he did not put up the photographs of the cats onto his website for the enjoyment of his parents, but because he was annoyed by the Complaint.
31. In those circumstances, I am satisfied that the Respondent's use of the Domain Name has never been, and is not, legitimate non-commercial or fair use. In view of the findings set out above, I have also concluded that none of the other factors in paragraph 8 of the Policy apply in this case.
32. Although I am not satisfied that the Domain Name was registered primarily for any of the purposes specified in paragraph 5.1.1 of the Policy, I am satisfied that in view of my findings, registration of the Domain Name took unfair advantage of and was unfairly detrimental to, the Complainants' Rights. As stated in paragraph 5.1 of the Policy, the factors in that paragraph of the

Policy are non-exclusive indicators which may be evidence of abusive registration. The overriding question is whether the registration (at the time of registration) was objectionable in view of subparagraph *i* of the governing definition of ‘Abusive Registration’: see paragraph 15 above. I have concluded that it was, in view of the conclusions set out in paragraphs 27 – 29 above in particular.

33. I also find that the registration is abusive on the grounds set out in paragraph *ii* of the definition of Abusive Registration, i.e. use since registration. There are no circumstances that justify the confusion within paragraph 5.1.2 of the Policy that has been brought about by use of the Domain Name and by the confusion that is likely to continue.
34. In all the circumstances, therefore, the Domain Name is being used and has been used in a manner which has taken unfair advantage of and has been unfairly detrimental to the Complainant’s Rights.
35. Therefore, the Domain Name is an Abusive Registration.

Decision

36. The Complainant has Rights in a name or mark, which is similar to the Domain Name, and the Domain Name in the hands of the Respondent is an Abusive Registration.
37. I accept the Complainant’s argument that the presence of the word ‘monsanto’ in the Domain Name does not render transfer of the Domain Name to the Complainant inappropriate.

38. Therefore, I determine that the Domain Name bayerm Monsanto.co.uk be transferred to the Complainant.

Signed

Dated 03.05.18

STEPHEN BATE