

**DISPUTE RESOLUTION SERVICE****D00016903****Decision of Independent Expert****Teva Pharmaceuticals Ireland****and****Mr William Deakin****1. The Parties:**

Complainant: Teva Pharmaceuticals Ireland  
Computerweg 10  
Utrecht  
Netherlands  
3542DR  
Netherlands

Respondent: Mr William Deakin  
Wormleighton Manor  
Wormleighton  
Southam  
Warwickshire  
CV47 2XW  
United Kingdom

**2. The Domain Name:**

spiromax.co.uk

**3. Procedural History:**

On 31 December 2015 the dispute was received by Nominet and validated on 04 January 2016. Notification of the complaint was sent to both parties on the same day. On 21 January a response reminder was sent and on 26 January a response was received and notification of same was sent to both parties. On 27 January a reply was received and notification of the reply was sent to both parties on 28 January and a mediator was appointed. On 03 February mediation started but failed on 04 March and the close of mediation documents were sent the same day. On 21 March the Expert decision payment was received. The Expert, Tim Brown, was appointed on 05 April.

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 such a nature as to call in to question my independence in the eyes of one or both of the parties.

#### **4. Factual Background**

The Complainant - IVAX International B.V. trading as Teva Pharmaceuticals Ireland – is a wholly owned subsidiary of Teva Pharmaceutical Industries Limited, a global pharmaceutical company. The Complainant operates in 60 countries worldwide and produces 73 billion tablets a year. In 2014 the Complainant's net revenues amounted to USD\$20.3 billion.

The Complainant manufactures and sells a variety of products for the treatment of respiratory conditions and produces over 55 million inhalers each year. Within its ranges of inhalers is a multi-dose dry-powder inhaler for the management of asthma called SPIROMAX.

The Respondent is an individual located in Southam, United Kingdom who has been involved in businesses relating to music and digital music for some thirty-five years. The Respondent founded, among other businesses, a company called Fontaine Computer Systems, which was the first PC company to "adopt [a] total Intel solution".

The Respondent has a business, product or service called SPIROMAX which is sub-titled "Enhanced digital music systems" on the paperwork produced by the Respondent. The Respondent says the name SPIROMAX is derived from the concept of the convergence of digital storage and traditional music media. The SPIRO element comes from a "spinning hard disc (platter) AND spinning record / CD / Reel or Reel [sic.] / Tape" and the MAX element "impl[ies] a lot or high capacity [sic.]"

The Domain Name appears to have been originally registered by the Respondent on 05 February 2000 for a period of two years. It seems to have then been allowed to lapse by the Respondent and was re-registered by him on 21 November 2004.

The Domain Name resolved to pay per click advertisements but was changed at some point after 04 January 2016 to resolve to a simple web page headed "SPIROMAX" and sub-titled "IT - DIGITAL - ENTERTAINMENT - LEISURE – BRANDS / We make a powerful difference .....". The bulk of the site's content is made up of the following three paragraphs:

*Spiromax was founded by [the Respondent] in 1996 initially concentrating on the inception design, and development of enhanced [sic.] digital music systems, convergence technology strategies and media content distribution solutions for consumers and businesses.*

*With uniquely clear perspectives and innate [sic.] generic understanding we have been working at the forefront of emerging and maturing technology markets as well as refining skill and digital application in the entertainment, leisure and luxury brand sectors continually applying and adding value.*

*Spiromax has developed into a dynamic business investment strategy consultancy drawing from considerable visionary expertise in pioneering businesses and developing success in five key growth sectors over 35 years.*

#### **5. Parties' Contentions**

I have set out the Parties' primary contentions below.

### **a. Complainant – Rights**

The Complainant says that it has rights in the term SPIROMAX which pre-date the registration of the Domain Name in 2004. It has exhibited an extract from the OHIM database for the European Community word mark number 001381938 for the term SPIROMAX in classes 5 and 10. This mark was filed on 12 November 1999 and registered on 24 April 2001.

The Complainant contends that as the country code .co.uk does not “negate similarity” the Domain Name is identical to its SPIROMAX mark.

### **b. Complainant – Abusive Registration**

The Complainant avers that the Domain Name resolves to a domain parking service provided by the Respondent’s registration service provider, 123-Reg. The Complainant contends that the parking service displays relevant advertisements and that the subscriber to the service gets paid each time a visitor clicks on those advertisements. The Complainant further notes that the parking system automatically optimises parked domain names to display highly appropriate advertisements and to maximise the number of clicks.

The Complainant contends that the Respondent has registered or otherwise acquired the Domain Name primarily for the purpose of unfairly disrupting the business of the Complainant per paragraph 3.a.i.C of the Policy. The Complainant says that the Respondent has utilised “highly sophisticated algorithms” to ensure that healthcare professionals and, possibly, patients searching for the Complainant’s SPIROMAX products encounter targeted commercial advertisements related to its SPIROMAX mark but which have no affiliation or connection with the Complainant.

The Complainant says that its business is being disrupted by the Respondent as the advertisements displayed on the website associated with Domain Name suggest that the landing pages and targeted advertisements originate with, or are authorised by, the Complainant; creating an impression of a commercial connection or affiliation with the trade character or repute of its mark. The Complainant suggests the Respondent has intentionally done this for his own financial gain at the expense of patients and healthcare professionals.

The Complainant avers that disruption also arises from the unfair advantage taken by the Respondent of the distinctive character and repute of its SPIROMAX mark to “ride on its coat-tails”, in order to benefit from the power of attraction that arises from its reputation and prestige and to exploit, without paying any financial compensation, the marketing effort expended by the Complainant in order to create and maintain the goodwill in its SPIROMAX mark.

The Complainant further contends that the Domain Name has been used in a manner that is likely to confuse patients and healthcare professionals into believing that the Domain Name is registered to, operated or authorised by, or otherwise connected with Complainant per Paragraph 3.a.ii of the Policy. The Complainant says the Respondent exploits initial interest confusion by displaying the SPIROMAX mark in conjunction with highly related commercial advertisements, again it suggests, to the detriment of healthcare professionals and/or patients for Respondent’s financial gain.

### **c. Respondent – Rights**

The Respondent says it conceived the name SPIROMAX as a portmanteau of the word “SPIRO” meaning a “spinning hard disc (platter) AND spinning record / CD / Reel or Reel [sic.] / Tape” and the word “MAX” “implying a lot or high capacity”.

The Respondent has exhibited a number of undated documents as evidence of his use of the term SPIROMAX:

- "Original artwork designs", which show five variations of logos featuring the term SPIROMAX, four of which also include the phrase "Enhanced digital music systems" above the logo.
- "Original letterhead/card", which shows a business card with a variation of the "SPIROMAX" logo noted above, with the Respondent's name and contact details. The business card is shown resting on a piece of paper featuring the same "SPIROMAX" logo in the top left corner.
- "Original Non-Disclosure Agreement" is the front page of a document which says:

Private and confidential  
Confidentiality and Non-Disclosure Agreement  
between  
Spiromax  
[Respondent's address]  
and

The rest of the page has been redacted.

- "Original Address / Cheque Accounts", which shows three images, two of which are evidently elements of a cheque which both show the word "SPIROMAX" under the amount payable box. The third image shows what appears to be an inked stamp showing the Respondent's name, the word "SPIROMAX" and the Respondent's address. I note that each image features at least the last three characters of the Respondent's postcode and that these characters differ in each of the three images.

The Respondent has conducted a number of trade mark database searches and notes that the term SPIROMAX has also been registered, in different use classes to the Complainant's mark, by an unrelated third party.

The Respondent further contends that while he has not registered a mark for the term SPIROMAX, he would be fully entitled to do so in different use classes from the Complainant's mark.

#### **d. Respondent – Abusive Registration**

The Respondent says he registered the Domain Name in good faith and that he had no knowledge of any other entity or product or service called SPIROMAX. The Respondent contends that, contrary to the Complainant's view, he registered the Domain Name on 05 February 2000.

The Respondent avers that he never sought to pass himself off as the Complainant and has no knowledge or experience of the Complainant's industry sector.

The Respondent has exhibited screenshots showing the results for searches on a number of search engines for a variety of terms including "SPIROMAX ASTHMA", "SPIROMAX WATCH" and "SPIROMAX SPRING".

The Respondent says he has no input or control as to how his registration service provider displays information on the website associated with the Domain Name. The Respondent contends that his registration service provider has said that the contents of the website "are simply created based on the users search and therefore non specific in any event whilst or if such links were in place and the area of interest was the industry sector the complainant operates."

The Respondent avers that there was no disruption to the Complainant and no revenue, trade or benefit has been received by him through the Domain Name.

**e. Complainant – Reply**

The Complainant contends that the Respondent cannot deny that he was aware of the Complainant's Rights at the point of the Domain Name's registration in 2004. The Complainant further avers that the Respondent has not supported his claim that the Domain Name was registered in 2000 with any evidence.

The Complainant says that if the Respondent had genuine plans for the Domain Name then the Respondent should have at least produced evidence to show that these plans were genuine and were not "dreamt up simply to defeat the complaint". The Complainant avers that the only evidence put forward includes an undated title page of a purported non-disclosure agreement with no identified third-party, pictures of a business card and a cheque that features the word SPIROMAX but conceals the identity of the payer, payee, the issuing bank and every other detail.

The Complainant contends that for a company purportedly established in 1996, the lack of evidence undermines the claim that an entity called SPIROMAX exists in connection with any enhanced digital music system. The Complainant notes that no business records of any kind have been produced, neither from Companies House, nor any financial statements, correspondence, advertising expenditures, redacted tax records, invoices / receipts, or anything else to substantiate the existence of such an entity.

The Complainant contends that the Respondent created a new website associated with the Domain Name after the Complainant submitted the dispute and this was created only to defeat the Complaint and is contrived for the purpose of a defence. The Complainant says that as the Respondent generated this new website specifically in response to the Complaint it calls into question the other evidence submitted by the Respondent.

The Complainant contends that there is nothing to corroborate the Respondent's bare-bone assertions and notes there is no third-party testimony regarding any use of the term SPIROMAX in connection with an enhanced digital music system. The Respondent says not one piece of evidence pre-dates the Respondent's knowledge of the current proceeding and that nothing shows SPIROMAX existed when the Respondent registered the Domain Name, even as a concept in planning stages, let alone as an established entity since the 1990s.

The Complainant again turns to the advertising originally displayed on the website associated with the Domain Name and has put forward detailed submissions relating to the various scripts that provide the advertising seen on the website.

The Complainant further notes that while the Respondent might not have controlled the specific advertisements, the Respondent must have known the domain parking system will have automatically optimised the Domain Name to display highly appropriate advertisements and maximize the number of clicks, allowing the Respondent to earn more money.

Finally, the Complainant contends that even if the Respondent did not benefit directly through parking revenue derived through the Domain Name, then his registration service provider will have done so. The Complainant says that nobody compelled the Respondent to use his particular registration service provider and that he did so voluntarily, presumably because of pricing or other convenience, and in exchange, allowed the registration service provider to monetise the Domain Name.

## **6. Discussions and Findings**

For a Complaint to succeed under the DRS a complainant must show that, on the balance of probabilities, it has Rights in respect of a name or mark which are identical or similar to the domain name and that the domain name, in the hands of the respondent, is an Abusive Registration. I will discuss each of these elements in turn.

### **a. Date of registration**

The WhoIs database record for the Domain Name, provided to me by Nominet, shows that the Domain Name was registered on 21 November 2004. However, the Respondent has said that he actually registered the Domain Name on 05 February 2000. The Respondent and Complainant have both provided emails from Nominet which set out the timeline of events.

It appears that the Respondent did indeed register the Domain Name on 05 February 2000 for a period of two years (the standard registration period for .co.uk domain names at the time) and renewed it once in 2002. However, in the correspondence before me, Nominet notes that the Domain Name was not renewed on its fourth anniversary in February 2004 and was cancelled at some point in May 2004.

The Domain Name will have then lain unregistered and available to any party, until it was re-registered by the Respondent on 21 November 2004. The Respondent then renewed the Domain Name from 2004 to the present date.

From Nominet's correspondence, it is clear there is not an unbroken chain of ownership by the Respondent between February 2000 and the present date. At some point between February and May 2004 the Respondent relinquished his registration. The Respondent then re-registered the Domain Name and entered a new contract with Nominet on 21 November 2004.

The Respondent is therefore incorrect in his assertion that the Domain Name was registered in February 2000 and maintained to the present date. It is clear from the record that the Domain Name was registered in November 2004 and I will proceed on this basis.

### **b. Rights**

The Complainant has exhibited a Community trade mark (now known as a European Union trade mark) with the number 001381938 for the term SPIROMAX. The mark itself is registered by IVAX International B.V. and documents from the Netherlands Chamber of Commerce, submitted by the Complainant, show that the Complainant - Teva Pharmaceuticals Ireland – is a trading name of IVAX International B.V. I am therefore satisfied that the Complainant has Rights in the term SPIROMAX.

That third parties may also have registered SPIROMAX marks in different use classes does not have any effect on the Complainant's Rights.

As is customary in proceedings under the DRS, the .co.uk suffix is required only for technical reasons and therefore I find that the Complainant has Rights in respect of a mark which is identical to the Domain Name in terms of Policy 2.a.i.

### **c. Abusive Registration**

The Complainant has said that the Domain Name is identical to its SPIROMAX mark and that the pay per click advertising displayed on the web site associated with the Domain Name for the majority of its period of registration has unfairly disrupted its business in terms of Policy 3.a.i.C and that this use is likely to confuse people or businesses into believing that the

Domain Name is registered to or otherwise connected with the Complainant in terms of Policy 3.a.ii.

On the other hand, the Respondent has said that before being made aware of the Complainant's cause for complaint that he has used the Domain Name in connection with a genuine offering of goods and services in terms of Policy 4.a.i.A and that he has been common known and legitimately connected with the word SPIROMAX in terms of Policy 4.a.i.B.

The crux of this matter is therefore whether the Respondent is able to show that he independently came up with and used the term SPIROMAX for his business or product, without any knowledge or intent to target the Complainant's SPIROMAX mark, before notice of the Complainant's cause for complaint.

I have referred to Paragraph 4.3 of the Dispute Resolution Service – Experts' Overview (the "Overview" - a document available on Nominet's website, which deals with a range of issues that regularly come up in DRS disputes). Paragraph 4.3 asks "What is required in the way of evidence to demonstrate "preparations to use" in paragraph 4(a)(i)A of the Policy?" and answers:

*Most abusive registrants do not respond to complaints, but those who do will commonly assert the existence of plans, which are designed to defeat the complaint. Experts will generally view purported 'plans' which are totally unsupported by any contemporaneous evidence with a heavy measure of scepticism.*

*Accordingly, if the registrant has genuine plans for the domain name, arrived at wholly without reference to the rights of the Complainant, it makes sense for the registrant to produce evidence to show that they are genuine and were not dreamt up simply to defeat the complaint. The more straightforward the registrant's case, the less that the Expert is likely to need in the way of supporting evidence. However, any evidence produced should sensibly include evidence pre-dating the registrant's awareness of the Complainant's rights. Failing that, the evidence may not be worth a lot, but a credible explanation for the absence of any such evidence may assist.*

*The usual evidence will comprise correspondence with third parties (banks, lawyers, partners etc) in which the plans are identified.*

The Respondent has said that his SPIROMAX business has been in operation since 1996. Over a period of twenty years I would expect even a very modest, small business to have generated a reasonable volume of paperwork, advertising, sales figures, correspondence with customers, financial records and so on.

Instead, the Respondent has produced only a very small number of documents to demonstrate that he has traded for two decades and given no reason, credible or otherwise, why further evidence has not been produced. The Respondent's evidence is undated and gives no indication of when it was produced and if it pre-dates the Complainant's Rights or cause for complaint. In my view, it is perhaps curious that the Respondent chose to exhibit evidence such as "original artwork" for a twenty-year-old business, rather than, say, invoices, correspondence with customers, suppliers or other third parties which might be reasonably expected to be more readily available.

Turning to the website associated with the Domain Name, it appears that it resolved to pay per click advertising for the majority of its registration. The screenshot generated by Nominet on 04 January 2016 shows the pay per click advertising to which the Complainant objects. The Respondent therefore updated his website to show the basic page promoting his "SPIROMAX" business or product after notification of the Complainant's cause for complaint and, indeed, the Complaint itself.

I have again referred to the Overview. Paragraph 4.2 asks "What is meant by "before being aware of the Complainant's cause for complaint" in paragraph 4(a)(i) of the Policy?" and answers:

*The circumstances set out in paragraph 4(a)(i) of the Policy are only likely to constitute satisfactory answers to the Complaint if they commenced when the Respondent was unaware of the Complainant's name or mark forming the basis for the Complaint. Matters which only arise after the Respondent has become aware of the Complainant's name or mark forming the basis for the Complaint are more likely to have been contrived for the purpose of defending an apprehended Complaint or legal action.*

That the Respondent's website stopped displaying pay per click advertising and instead was changed to show a basic website promoting his business or product only after these proceedings commenced is highly indicative that this change was indeed contrived for the purpose of defending an apprehended complaint, as envisaged by the Overview.

In my view, the Respondent's scant, undated evidence and last-minute website activity are not sufficient to objectively show that he had made demonstrable preparations to use the Domain Name in connection with a genuine offering of goods and services or that he had been commonly known or legitimately connected with the term SPIROMAX.

Turning to the pay per click advertising that was displayed on the website associated with the Domain Name for the majority of its registration period, the Complainant has exhibited a number of screenshots which show advertisements leading web users to respiratory-related products manufactured by the Complainant's competitors.

In my view, the association of such advertising with a domain name identical to the Complainant's mark clearly takes unfair advantage of the Complainant's Rights and is highly indicative of an Abusive Registration.

The Respondent has said that he did not benefit financially from the advertisements displayed on his website; however, in my view, this does not negate the unfair advantage that is being taken of the Complainant's Rights. An Abusive Registration is not repudiated merely because a third party, rather than a respondent, benefits financially.

I therefore find that the Domain Name is an Abusive Registration.

## **7. Decision**

Having found that the Complainant has Rights in respect of a mark which is identical to the Domain Name and that the Domain Name, in the hands of the Respondent, is an Abusive Registration I order that the Domain Name is transferred to the Complainant.

**Signed: Tim Brown**

**Dated: 07 April 2016**