Panel Decision for dispute CAC-ADREU-006421

Case number	**CAC-ADREU-006421**
Time of filing	**2013-04-26 12:32:55**
Domain names	**radioabsolut.eu**

Case administrator

Lada Válková (Case admin)

Complainant

Organization	**The Absolut Company AB**

Respondent

Organization	**NameHost.Ro**

FACTUAL BACKGROUND

The Complainant, which was established in 1917, is the Absolut Company AB based in Stockholm, Sweden, and it sells its products branded as ABSOLUT VODKA abroad since 1979; it conducts high sales of ABSOLUT VODKA in the Community and is one of the leading manufacturers, importers, and exporters of beverages and spirits in the European Union. Currently, it has 650 employees and is active in more than 150 markets worldwide.

The Complainant is the rightholder of the following community trademarks: Word trademark “ABSOLUT” no. 009669953 covering, inter alia, “apparatus for recording, transmission or reproduction of sound or images, magnetic data carriers re-cording discs” with priority date of January 19, 2011; word trademark “ABSOLUT” no. 005631841 with priority of May 28, 2004; and word trademark “ABSOLUT” no. 001521681 with priority date of February 22, 2000.

On January 4, 2012, the Respondent registered the domain name radioabsolut.eu but has not used said domain name for the promotion of services or products through the Internet. The Respondent has not provided the ADR with any proof of use of the aforesaid domain name.

On November 23, 2012, the Complainant addressed a letter to the Respondent claiming that the registration of the domain name radioabsolut.eu is a speculative registration in accordance with article 21(1) of Commission Regulation no. 874/2004, and, thus, the Complainant requested the Respondent to relinquish the subject domain name and attend to its permanent cancellation by December 14, 2012. Neither did the Respondent respond to this request nor did he relinquish the domain name radioabsolut.eu.

On January 15, 2013, the Complainant filed a complaint before the Czech Arbitration Court requesting the transfer of the domain name radioabsolut.eu to it claiming that the registration of this domain name is a speculative registration and the holder of it does not have any legitimate interest in that domain name. On January 22, 2013, EURid communicated to the Czech Arbitration Court the identification data of the Respondent as holder of the disputed domain and the Czech Arbitration Court notified some deficiencies regarding the name and the address of the Respondent. On January 28, 2013, the accurate identification data of the Respondent were registered so that the Complaint can become administratively compliant with the ADR Rules. The formal date of the commencement of the ADR proceedings is January 29, 2013. The Respondent has failed

to respond to this Complaint within the time permitted by the ADR Rules despite the fact that it confirmed receiving the notice of the ADR Proceeding by accessing the online platform on February 18, 2013. The Panel was appointed on April 11, 2013. The Panel typed regularly the disputed domain name radioabsolut.eu and confirmed that Internet does not display any use of said domain name, a.k.a. confirmed that the disputed domain name is not in use, currently.

A. COMPLAINANT

The Complainant claims that the domain name radioabsolut.eu has to be transferred to it since it satisfies the general eligibility criteria for registration according to Article 4(2)(b) of Regulation (EC) 733/2002 and according to articles 22(11) and 21(1)(a) and (2) of the Commission Regulation (EC) 874/2004.

The Complainant claims that the Respondent has registered the domain name radioasbolut.eu in a speculative way taking into consideration that said domain name is confusing as it is similar to the Complainant's famous trademarks "ABSOLUT" which is well known through the Community. It argues that in proceedings R 1204/2004 – 1 of July 2005 (ABSOLUT/ABSOLUTE) and b 432635 of June 2, 2003, (ABSOLUT/ABSOLWENT) the OHIM accepted that the trademark "ABSOLUT" of the Complainant enjoys a great reputation which is founded on the fact that it is known by a significant part of public in the Community so that the mark has an enhanced distinctive character.

Furthermore, the Complainant claims that it has built a strong reputation in the music industry by sponsoring music and ration events in the aforesaid industry. The trademark "ABSOLUT" is promoted in the market through substantial advertising activities such as promotion and fashion events like "ABSOLUT TOM FORD", "ABSOLUT GAUTIER", in cooperation with famous designers such as TOM FORD and JEAN-PAUL GAULTIER respectively; also, through advertising activities such as sponsorships for several cultural and musical events in cooperation with famous artists like LENNY KRAVITZ, through advertising activities such as radio and TV commercials and of course advertising via the Internet.

The disputed domain name radioabsolut.eu is similar to the Complainant's widely known "ABSOLUT" trademark given that the disputed domain name at hand consists of two words, a.k.a. "radio" and "absolut". The word "absolut" is identical to the Complainant's famous trademark "ABSOLUT" which is protected in Europe-wide not only for vodka spirits but also for goods in the radio sector such as apparatus for recording transmission or reproduction of sound or images magnetic data carrier discs. Therefore, the addition of the word "radio" in the domain name absolutradio.eu is not sufficient to distinguish it from Complainant's protected trademark.

In addition, the Complainant claims that the Respondent has no rights or legitimate interest taking into account that he has not registered either a European Community or Romanian trademark that relates somehow to the disputed domain name, and he does not use the aforesaid disputed domain name. The Complainant also claims that the Respondent's account is suspended; it does not meet the requirement provisioned by law that the domain name has to be used in connection with the offering of goods or services. In this regard, it has become judicial precedent through case 01375 – RABBIN that the registration of an "under construction web site" is not sufficient to demonstrate the use or preparation to use of a domain name in accordance with article 21(2) of Commission Regulation (EC) 874/2004.
The Complainant aims at registering and using the domain name radioabsolut.eu for the sale of broadcasting equipment under its "ABSOLUT" trademarks and in relation to sponsoring activity of ABSOLUT VODKA in the music and radio industry.

B. RESPONDENT

The Respondent failed to respond.

DISCUSSION AND FINDINGS

A.Legal Frame

According to paragraph B7 of the ADR Rules "The Panel shall conduct the ADR Proceeding in such manner as it considers appropriate in accordance with the Procedural Rules. The Panel is not obliged, but is permitted in its sole discretion, to conduct its own investigations on the circumstances of the case.
(b) In all cases, the Panel shall ensure that the Parties are treated fairly and with equality. The Panel shall ensure that the

ADR Proceeding takes place with due expedition.
(d) The Panel shall determine in its sole discretion the admissibility, relevance, materiality and weight of the evidence."

According to paragraph B11(a) of the ADR Rules "the Panel decides on the basis of the statements and documents submitted."

According to paragraph B10(a) of the ADR Rules "in the event that a Party does not comply with any of the time periods established by these ADR Rules or the Panel, the Panel shall proceed to a decision on the Complaint and may consider this failure to comply as grounds to accept the claims of the other Party." Even though, according to paragraph B10(a) the absence of a response per se may be considered as acceptance of all the claims of the Complainant, the Panel follows the approach of the majority of the previous Panels namely that despite the absence of a Response the Complainant should establish a prima facie case.

According to article 22 paragraph 11 of the Regulation (EC) 874/2004 "In the case of a procedure against a domain name holder, the ADR panel shall decide that the domain name shall be revoked, if it finds that the registration is speculative or abusive as defined in Article 21. The domain name shall be transferred to the complainant if the complainant applies for this domain name and satisfies the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No 733/2002."

According to article 4(2)(b) of Regulation (EC) 733/2002 "the Registry shall organise, administer and manage the .eu TLD in the general interest and on the basis of principles of quality, efficiency, reliability and accessibility; (b) register domain names in the .eu TLD through any accredited .eu Registrar requested by any:
(i) undertaking having its registered office, central administration or principal place of business within the Community, or
(ii) organisation established within the Community without prejudice to the application of national law, or
(iii) natural person resident within the Community;" .

According to article 21 of the Regulation (EC) 874/2004 "1.A registered domain name shall be subject to revocation, using an appropriate extra-judicial or judicial procedure, where that name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/or Community law, such as the rights mentioned in Article 10(1) (community trademarks), and where it:
(a) has been registered by its holder without rights or legitimate interest in the name; or
(b) has been registered or is being used in bad faith.
2. A legitimate interest within the meaning of point (a) of paragraph 1 may be demonstrated where:
(a) prior to any notice of an alternative dispute resolution (ADR) procedure, the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so;
(b) the holder of a domain name, being an undertaking, organisation or natural person, has been commonly known by the domain name, even in the absence of a right recognised or established by national and/or Community law;
(c) the holder of a domain name is making a legitimate and non-commercial or fair use of the domain name, without intent to mislead consumers or harm the reputation of a name on which a right is recognised or established by national and/or Community law. [30.4.2004 EN Official Journal of the European Union L 162/47.]"

In the Panel decision in ADR case 2035 (WAREMA) the Panel stated: "Furthermore, the Panel holds that although the burden of proof lies with the Complainants, the existence of a right or legitimate interest is difficult to prove since the relevant facts lie mostly in the sphere of the holder. Hence, the Panel holds that it is sufficient that the Complainants contend that the obvious facts do not demonstrate a right or legitimate interest of the Respondent in the Domain Name. The onus then shifts to the Respondent to produce factual evidence for a right or legitimate interest."

Also, according to article 21 of the Regulation (EC) 874/2004 "3. Bad faith, within the meaning of point (b) of paragraph 1 may be demonstrated, where:
(a) circumstances indicate that the domain name was registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name to the holder of a name in respect of which a right is recognised or established by national and/or Community law or to a public body; or

(b) the domain name has been registered in order to prevent the holder of such a name in respect of which a right is recognised or established by national and/or Community law, or a public body, from reflecting this name in a corresponding domain name, provided that:
(i) a pattern of such conduct by the registrant can be demonstrated; or
(ii) the domain name has not been used in a relevant way for at least two years from the date of registration; or
(iii) in circumstances where, at the time the ADR procedure was initiated, the holder of a domain name in respect of which a right is recognised or established by national and/or Community law or the holder of a domain name of a public body has declared his/its intention to use the domain name in a relevant way but fails to do so within six months of the day on which the ADR procedure was initiated;
(c) the domain name was registered primarily for the purpose of disrupting the professional activities of a competitor; or
(d) the domain name was intentionally used to attract Internet users, for commercial gain, to the holder of a domain name website or other on-line location, by creating a likelihood of confusion with a name on which a right is recognised or established by national and/or Community law or a name of a public body, such likelihood arising as to the source, sponsorship, affiliation or endorsement of the website or location or of a product or service on the website or location of the holder of a domain name; or
(e) the domain name registered is a personal name for which no demonstrable link exists between the domain name holder and the domain name registered."

B.Conclusions

According to paragraph B11(a) of the ADR Rules as well as paragraphs B10, 10(a) and B7 of said Rules the Panel based on:
i) the statements and documents submitted by the Complainant i.e. the Complaint extracts of OHIM regarding the registration of trademarks "ABSOLUT", i.e. trademark no.00009669953 covering, inter alia, "apparatus for recording, transmission or reproduction of sound or images, magnetic data carriers re-cording discs" with priority date of January 19, 2011, trademark no. 005631841, and trademark no. 001521681,
ii) the letter addressed to the Respondent dated December 5, 2012,
iii) the affidavit of Gabriella Waldhauser, corporate and legal IP counsel employed by the Complainant, and
iv) the Certificate of the Sweden Companies Registration Office as well as
v) the results of online research conducted by the Panel which provided sufficient evidence that the disputed domain name is not used by the Respondent for the offering of goods or services via the Internet, and
vi) the fact that the Respondent did not file any response despite that he had properly been notified,

rules the following:
1.Speculative and abusive registration of the domain name radioabsolut.eu
Given the facts that:
i. the Complainant is the owner of three community word trademarks "ABSOLUT" bearing registration numbers 001521681, 005631841 and 009669953 with priority date of January 19, 2011, securing protection for "apparatus for recording, transmission or reproduction of sound or images, magnetic data carriers re-cording discs",
ii. the word trademark "ABSOLUT" is a worldwide famous trademark, also well-known and widely recognized in all European countries, among which is Romania, the country in which the Respondent resides, and the aforesaid trademark(s) is/are connected with vodka spirits, and has/have an enhanced and distinctive character in relation to the aforementioned product,
iii. the Complainant enjoys a long-lasting and strong reputation also in the music and radio industries using the name "ABSOLUT" in multiple sponsoring events in the aforesaid industries,
iv. the disputed domain name radioabsolut.eu consists of two words the word –radio and the word –absolut; that the word "absolut" is identical to the Complainant's trademarks "ABSOLUT"; and that the word radio as well as the word .eu have no distinctive character for the disputed domain name,
v. the Czech Arbitration Court in similar cases such as the transfer of the domain name microsoftservice.eu to the company Microsoft Corporation B.V. has considered that said domain name was confusingly similar to the famous trademark "Microsoft" of the aforesaid company because of the fact that the word "service" is a generic and descriptive term without distinctive character (Case no. 06063 Microsoft Corporation v. Biance Werne regarding the domain name micrososftservice.eu),

the Panel decides that according to article 21(1) of the Regulation (EC) 874/2004 the domain name radioabsolut.eu is confusingly similar to the name “ABSOLUT” in respect of which trademark rights are assigned to Complainant by European Community legislation.

2. Lack of the legitimate interest of the holder of the domain name radioabsolut.eu.
Given the facts that:
i) according to article 21(2) of Regulation (EC) 874/2004 a legal interest of the holder of a .eu domain name may be demonstrated where (a) prior to any notice of an alternative dispute resolution (ADR) procedure, the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so; (b) the holder of a domain name, being an undertaking, organisation or natural person, has been commonly known by the domain name, even in the absence of a right recognised or established by national and/or Community law; (c) the holder of a domain name is making a legitimate and non-commercial or fair use of the domain name, without intent to mislead consumers or harm the reputation of a name on which a right is recognised or established by national and/or Community law,
ii) though the domain name radioabsolut.eu has been registered by the Respondent as of January 4, 2012, i.e. for more than a year before the submission of the Complaint by the Complainant, the disputed domain name has yet to be associated with or identify to any website through which the Respondent offers goods or services,
iii) the Respondent did not file any evidence aiming at the fulfilling of requirements of article 21(2) of Regulation (EC) 874/2004,

and based on prima facie evidence on the lack of legitimate interest of the Respondent, the Panel decides that the domain name radioabsolut.eu is registered by the Respondent without any legal interest on said domain name and according to article 21(1) and (2) of Regulation (EC) 874/2004.

3.Transfer of the disputed domain name to the Complainant
Given the certificate of the Swedish Registration Office the Complainant has its registered office in Stockholm, Sweden which is a European country; therefore the Complainant fulfils the eligibility criteria set out in article 4(2)(b) of Regulation (EC) 733/2002. As a consequence and in consideration of article 21 and article 22(11) of Regulation 874/2004, the domain name radioabsolut.eu in case of speculative and abusive use by the Respondent may be transferred to the Complainant.

Outlining the above ruling, the Panel in consideration of paragraphs B7, B11(a) B10(a) of the ADR Rules, as well as articles 21(1) and (2), 22(11), of Regulation (EC) 874/2004 and article 4(2)(b) of Regulation (EC) 733/2002, decides that the registration of the domain name radioabsolut.eu by the Respondent is a speculative registration without any legal interest of the holder of the disputed domain name and therefore said domain name must be transferred to the Complainant.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that

the Complaint is Accepted

the domain name RADIOABSOLUT.EU be transferred to the Complainant.

PANELISTS

Name	**Alexandra Kaponi**

DATE OF PANEL DECISION 2013-04-26

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

I. Disputed domain name: [radioabsolut.eu]

II. Country of the Complainant: [Sweden], country of the Respondent: [Romania]

III. Date of registration of the domain name: [4 January, 2012]

IV. Rights relied on by the Complainant (Art. 21 (1) Regulation (EC) No 874/2004) on which the Panel based its decision:
1. word CTM] , reg. No. 005631841, for the term ABSOLUT, filed on 28 May 2004, registered on 22 February 2007 in respect of goods and services in classes 6,16,18,20,21,22,24,28,29,30,32,33,41 and 43
2. word CTM, reg. No. 001521681, for the term ABSOLUT, filed on 31 January 2000, registered on 19 June, 2001 in respect of goods and services in classes 6,14,16,18,21,24,28,29,30,32,33,41 and 42[numbers]
3. word CTM, reg. No. 009669953, for the term ABSOLUT, filed on 19 January 2011, registered on 1 June 2011 in respect of goods and services in classes 9,42

V. Response submitted: No

VI. Domain name is confusingly similar to the protected rights of the Complainant

VII. Rights or legitimate interests of the Respondent (Art. 21 (2) Regulation (EC) No 874/2004):
1. No
2. Why: The disputed domain name is not in use and the Respondent did not file any evidence aiming the fulfilment of requirements of article 21 (2) of Regulation (EC) 874/2004

VIII. Bad faith of the Respondent (Art. 21 (3) Regulation (EC) No 874/2004):
1. Not considered
2. Why: The Panel has reached its decision based on speculative registration of the disputed domain name in consideration of paragraphs B7, B11(a) B10(a) of the ADR Rules, as well as articles 21(1) and (2), 22(11), of Regulation (EC) 874/2004 and article 4(2)(b) of Regulation (EC) 733/2002. The Complainant did not provide any claim relevant to bad faith of the Respondent.

IX. Other substantial facts the Panel considers relevant: None

X. Dispute Result: Transfer of the disputed domain name

XI. Procedural factors the Panel considers relevant: None

XII. [If transfer to Complainant] Is Complainant eligible? Yes