

Panel Decision for dispute CAC-ADREU-000335

Case number	CAC-ADREU-000335
-------------	------------------

Time of filing	2006-03-20 09:05:23
----------------	---------------------

Domain names	mediation.eu
--------------	--------------

Case administrator

Name	Tereza Bartošková
------	-------------------

Complainant

Organization / Name	(the independent administrative body according to Dutch law) Raad voor Rechtsbijstand
---------------------	---

Respondent

Organization / Name	EURid
---------------------	-------

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

None

FACTUAL BACKGROUND

On 30 November 2005, Traffic Web Holding B.V. ("TWH"), a company incorporated under Dutch Law, filed a trademark application concerning the word "MEDIATION" in class 3, for bleaching products, before the Benelux Trademark Office.

On 1 December 2005, the Benelux Trademark Office registered the trademark "MEDIATION", as trademark number 1093216.

On 7 December 2005, day of commencement of the Sunrise Period for the registration of .eu domain names, TWH filed an application for registration of the domain name "mediation.eu".

On 23 December 2005, the Raad voor Rechtsbijstand ("RvR" or the "Claimant"), an independent administrative body under Dutch Law, depending on the Dutch Ministry of Justice, filed an application for registration of the domain name "mediation.eu".

While TWH was given first position in the queue of applicants, RvR obtained fourth position, on a "first come, first served" basis. Both entities duly submitted the documents justifying their rights within the time limit provided for, in accordance with Article 14 of the Commission Regulation (EC) 874/2004 (the "Regulation"). Applicants in second and third position failed to submit their documents, so their applications expired, and RvR's application became second in the queue.

On 4 February 2006, EURid, acting as Registry in accordance with Article 14 of the Regulation, analysed TWH's application and accepted it, as it found that it complied with the requirements of the Regulation and of Regulation (EC) 733/2002, and, in particular, that TWH was holder of a "prior right", in accordance with Article 10(1) of the Regulation.

On 16 March 2006, before the expiration of the forty-day period provided for in Section 22(1) of the .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period (the "Sunrise Rules"), RvR filed a Complaint (the "Complaint") before the ADR Centre for .eu attached to the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (the "ADR Centre").

The Complaint was addressed against two Respondents: TWH, as first respondent; and EURid as second respondent.

On 20 March 2006, EURid provided the registration information requested by the ADR Centre.

The ADR Centre requested the Complainant to amend its Complaint, due to the existence of some formal defects. Among the issues requested by the ADR Centre was to specify whether the Complaint was addressed against TWH or against EURid. On 6 April 2006, the Complainant filed an amended Complaint, which amended some of the defects identified by the ADR Centre, and insisted in having its Complaint addressed against the two Respondents, EURid and TWH.

The ADR Centre issued a notice of commencement of proceedings and only notified EURid, since it considered that the Complaint did not meet the procedural requirements to be addressed against TWH, as a Domain Name Holder.

EURid failed to file a response to the Complaint within the time limit provided for, and was declared in default by the ADR Centre. Nevertheless, it filed a late response on 6 June 2006.

A. COMPLAINANT

RvR's Complaint contains five different petitions, against two Respondents:

1. That EURid's decision not to grant the domain name "mediation.eu" to RvR be annulled.
2. That EURid's decision to grant the domain name "mediation.eu" to TWH be annulled.
3. An order against EURid and /or TWH to transfer the domain name "mediation.eu" to RvR.
4. An order of such measures as the Court (sic) considers appropriate for an effective transfer of the domain name to RvR.
5. That EURid and/or TWH be ordered to pay the costs of these proceedings.

The petitions of RvR are based on the grounds that registration of the domain name "mediation.eu" infringes Article 21 of the Regulation, since the domain name has been registered without rights or legitimate interests and has been registered or is being used in bad faith.

In support, RvR states that TWH is a company with no activity, which applied for and obtained the trademark "MEDIATION" only for the purpose of obtaining the domain name "mediation.eu". This trademark has never been used by TWH. The word "MEDIATION" has no connection with any goods or services provided by TWH. Finally, RvR states that TWH has engaged in similar patterns of conduct with a number of .eu domain names.

B. RESPONDENT

EURid's response was submitted after the time period provided for by Article 22(8) of the Regulation. For this reason, it will not be considered by the Panel.

DISCUSSION AND FINDINGS

As a preliminary question, the Panel, in accordance with Article 22(10) of the Regulation, confirms that EURid's failure to respond to the Complaint will not be considered as grounds to accept the Complainant's claims. The claims shall be analysed and decided in accordance with the applicable rules, which shall be applied by the Panel's own motion.

In the present case, the Complainant includes in its Complaint five different claims against two Respondents. Claims 1 and 2 are addressed against EURid. Claims (3) and (5) are addressed against both EURid and TWH. Claim (4) is ancillary to request (3).

The first issue is whether or not it is possible to address a Complaint against two separate Respondents: one, the Registry, under number (1) of Section B.1(a) of the .eu Alternative Dispute Resolution Rules (the "Rules"); one, a Domain Name Holder, under number (2) of Section B.1(a) of the Rules. And, therefore, whether the ADR Centre's decision to consider the Complaint as addressed solely against EURid was correct or not.

The solution to this question is clear under the Rules. The final paragraph of Section B.1(a) of the Rules provides that a party can initiate an ADR Proceeding against a Domain Name Holder only where the domain name in respect of which the Complaint is initiated has been registered and activated. In addition, Section 26 of the Sunrise Rules provide that "...during the Sunrise Appeal Period, being a period of forty (40) calendar days following a decision by the Registry to register or not to register a Domain Name, the Applicant or any other interested party may initiate an ADR Proceeding (as defined in the .eu Dispute Resolution Rules) against the Registry with regard to that decision...". It is therefore clear that the applicable rules foresee two successive periods for the initiation of ADR Proceedings: a first period, covering the forty days following the decision of the Registry to register or not a Domain Name, where a Complaint may be addressed only against the decision of the Registry, and during which the Domain Name will not be activated; and a second period, once the Domain Name is activated after forty days of the Registry's decision, during which the Complaint can only be addressed against the Domain Name Holder, but not against the Registry.

In the current case, therefore, the Complaint cannot continue to exist as against both Respondents. The issue at hand is whether the Complaint was filed before or after the expiration of the forty day period from the decision of the Registry.

The decision of the Registry was issued on 4 February 2006; therefore, the last day of the forty-day period was 16 March 2006. A search in the database whois.eu shows that the "status" of the domain name "mediation.eu" is "accepted" (registered) but that it has never been activated. In accordance to Section 22(2) of the .eu Sunrise Rules, a domain name is activated on the day following the expiry of the forty-day period following the decision by the Registry to register the domain name concerned.

RvR's Complaint was filed on 16 March 2006, i.e. before the forty day period expired and the name had to be activated. For this reason, RvR Complaint against TWH cannot be admitted under any circumstances, and the decision of the ADR Centre to have the Complaint addressed only against EURid was correct.

Nevertheless, this finding does not prevent RvR from filing a new Complaint against THW if and when the domain name is activated, should they wish to do so.

Therefore, the Complainant's Complaint shall be understood as solely addressed against EURid.

In accordance with Article 22(11), second paragraph, of the Regulation, the jurisdiction of this panel is limited to deciding whether the Registry's decision shall be annulled or not, and whether the domain name shall be transferred, revoked or attributed.

Neither the Regulation nor the Rules nor any other applicable set of rules gives the Panel jurisdiction to decide neither in respect of claims regarding costs of this ADR proceeding, nor in respect of ancillary measures to implement the Panel's decision. This decision does not prevent RvR from claiming the costs they might incur in connection with this proceeding as damages, before any competent courts, should they be entitled to them.

Therefore, the issues in dispute are limited to claims (1), (2) and (3).

In respect of claim (1), RvR applies for the Registry's decision not to grant the domain name to the Complainant to be annulled. However, such a decision has never been issued, since the Registry has never taken into consideration the Complainant's application. In accordance with the "first come, first served" principle contained in Article 14, last paragraph of the Regulation, the Registry only analysed TWH's application, for being the first in the queue, and decided on the basis of its merits, as it found that it duly complied with the applicable requirements. As a consequence, since the decision not to grant the domain name to the Complainant has never existed, this Panel cannot decide on its annulment, so this claim must necessarily be dismissed.

Finally, claims (2) and (3) should be dealt with together. Under claim (2), the Complainant requests that the Registry's decision to grant the domain name to TWH be annulled. Under claim (3), construed accordingly, the Complainant requests that, as a consequence of the annulment, and following its own rights, the domain name be transferred to them.

The request to annul the decision to grant the domain name to TWH is based on the alleged infringement of Article 21(1) of the Regulation. Article 21(1) refers to cases in which a domain name's registration may be revoked, for being speculative or abusive, as a consequence of extra-judicial or judicial procedures.

The extra-judicial procedure is regulated under Article 22 of the Regulation, which under subsection (1) provides for two different situations under which ADR procedure may be initiated: (a) proceedings pursuing the revocation of a domain name whose registration is speculative or abusive within the meaning of Article 21; or (b) proceedings pursuing the annulment of the Registry's decision for being contrary to the Regulation or to Regulation (EC) No 733/2002.

The first situation refers to complaints against Domain Name Holders, and requires that a domain name is already registered and that the forty-day period to challenge the Registry's decision to register the domain name has expired.

On the contrary, under the second situation, the complainant challenges the validity of the decision to register that domain name, for infringing the conditions required for its registration, and is addressed against the Registry, during the forty-day period of the decision.

Article 21(1), which requires that a domain name has been registered, cannot serve as a basis for annulment of the decision to register a domain name under Article 22(1)(b). Article 21(1) only applies in ADR procedures under Article 22(1)(a).

This conclusion is consistent with Article 14, last proviso, of the Regulation, which provides that "The Registry shall register the domain name, on the first come first served basis, if it finds that the applicant has demonstrated a prior right in accordance with the procedure set out in the second, third and fourth paragraphs". In particular, the fourth paragraph of Article 14 of the Regulation provides that the Registry will make use of a validation agent to verify the prior right, in accordance with the documentary evidence submitted by the applicant. A 'prior right' is defined in Article 10(1) of the Regulation as to include any "...registered national and community trademark...". Nothing in the Regulation or in the applicable rules entitles the Registry or the validation agent to reject documentary evidence that is formally valid, under the grounds that the registration of a national trademark is abusive or has been obtained with the sole purpose of obtaining a certain domain name.

In addition, the Complainant has not filed any evidence proving that the registration of the trademark has been challenged before the competent administrative or judicial authorities for being abusive or fraudulent.

The Registry made a correct analysis of the prior rights claimed and the documentary evidence submitted by TWH to support its application.

For these reasons, claim (2) by RvR shall be dismissed. The dismissal of this claim (2) automatically entails the dismissal of claim (3).

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

the Complaint is Denied.

PANELISTS

Name	Alejandro López Ortiz
------	-----------------------

DATE OF PANEL DECISION 2006-06-27

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant filed a Complaint both against EURid, in respect of its decision to grant the domain name "mediation.eu" to Traffic Web Holding B.V. ("TWH") and not to grant it to the Complainant; and against TWH.

The Panel decided, in accordance to Sections 22(2) and 26 of the Sunrise Rules, that since the Complaint had been filed before the expiration of the forty-day period after the decision to register the domain name, the Complaint could only be addressed against EURid, and therefore, validated the ADR Centre's decision not to consider the Complaint as addressed against TWH.

In respect of the requests of the Complaint against EURid, the Panel found that EURid's decision to register the domain name in favour TWH had been correctly made. EURid granted the domain name to the applicant with the first position in the queue, which in addition, filed valid documentary evidence in respect of its prior right.

The Complainant's contention that EURid's decision infringed Article 21(1) of the Regulation was dismissed. Article 21(1) of the Regulation does not apply to challenges to the decisions of the Registry, but to complaints addressed against domain name holders, pursuing the revocation of a registered domain name. Article 21(1) requires that a domain name had been registered and cannot serve as a basis for annulment of the decision to register a domain name under Article 22(1)(b).

In addition, EURid or the validation agent are not entitled to reject documentary evidence that is formally valid, under the grounds that the registration of a national trademark is abusive or has been obtained with the sole purpose of obtaining a certain domain name.

Furthermore, the Panel found that it could not decide on the Complainant's request that the decision of EURid not to grant the domain name to the Complainant be annulled, because such a decision never existed. EURid granted the domain name the first applicant in the queue, in accordance with its prior right and documentary evidence filed. For this reason, EURid never made a decision in respect of the Complainant's application.

Finally, the Panel found that it did not have jurisdiction in accordance with the Regulation and the various applicable rules to decide in respect of requests regarding the costs of the ADR proceeding and in respect of requests to order ancillary measures to ensure the transfer of a domain name.

Consequently, the Complaint was Denied.
