Panel Decision for dispute CAC-ADREU-000551

Case number	CAC-ADREU-000551
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Domain names	vivendi.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	Vivendi Universal

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

The Complainant submitted the application for registration (hereinafter the “Application”) of the .eu domain name “vivendi.eu” (hereinafter the “Domain Name”) on 7 December 2005.

The Application was based on the French national trademark “vivendi” No. 99825001 (“Trademark”) that established prior rights within the meaning of Article 10 (1) of Commission Regulation No. 874/2004 (hereinafter “Regulation”). However, according to the excerpt from the trademark registry, the said trademark was registered for a company “Vivendi,” not for the Complainant (which is the company “Vivendi Universal”).

The deadline for filing the documentary evidence pursuant to Article 14 of Public Policy Rules was on 16 January 2006 and within such deadline the Complainant failed to provide any evidence that the Complainant was in fact a holder of said trademark.

By its decision dated 5 April 2006 (hereinafter the “Decision”), the Respondent rejected the Application because the documentary evidence as provided by the Complainant was considered insufficient to establish the Prior Right of the Complainant to the Domain Name within the meaning of Article 10 (1) of the Public Policy Rules.

On 11 April 2006 and, thus, within the Sunrise Appeal Period as defined by the Sunrise Rules, the Complainant filed the complaint against the Decision, subsequently amended on 2 May 2006 (hereinafter the “Complaint”), seeking annulment of the Decision and requesting that the Domain Name be granted to the Complainant.

The Respondent submitted its unofficial response to the Complaint by way of a non-standard communication on 28 June 2006 (hereinafter the “Response”).

A. COMPLAINANT

The Complainant contends the following:

(a) The aforesaid trademarks constitute prior right within the meaning of Article 10 (1) of the Public Policy Rules.

(b) The Complainant is a legal successor of the company “Vivendi” (for which the Trademark is registered) as the Complainant was created by a merger by an amalgamation of the companies “Sofiee” and “Vivendi.” The Complainant attached to the Complaint a copy of

the treaty of merger by amalgamation as evidence. The Complainant further claims that even though no evidence on such merger was submitted to the validation agent together with the Application, such fact (i.e. that the Complainant is a legal successor of the company Vivendi and therefore a holder of the Trademark) should be taken into account during the ADR proceedings and, therefore, the Decision should be annulled.

(c) The Complainant also alleges that it instructed VeriSign France S.A.S. ("VeriSign") as the Registrar to submit such copy of treaty of merger as evidence to the validation agent during examination of the Application; however, the Registrar failed to do so. Hence, the Complainant contends that the Registry (EURID) should be responsible for such negligence of its accredited Registrar.

For all the aforesaid reasons, the Decision should be annulled and the Application should be examined in the light of circumstances described above and the Domain Name should be granted to the Complainant.

B. RESPONDENT

The Panel emphasizes that the Response was not filed within the period set forth by Paragraph B3 (a) of the ADR Rules. Nevertheless, the Respondent (by way of a non-standard communication) contends the following:

(a) The Application was rejected due to the fact that the owner of the Trademark (on the basis of which the prior right was asserted) was different from the Complainant and such difference was not explained in documentary evidence as required by Article 14 of the Regulation in conjunction with Section 20 (1) of the Sunrise Rules.

(b) The burden of proof as to establishment of the prior right is with the Complainant.

(c) The Complainant submitted to the Panel new documents (merger treaty) showing that he has the right to the Trademark (since it is a legal successor of the original trademark holder). Such documents, however, were not part of the documentary evidence. Pursuant to Section 21 (2) of the Sunrise Rules, the validation agent will examine whether the applicant has a prior right to the domain name in question exclusively on the basis of prima facie review of the first set of documentary evidence received. Therefore, the documents later provided (during the ADR Proceedings) by the Complainant are not relevant.

(d) The Registry (EURID) shall not be in any way liable for any act or omission of accredited registrars, including VeriSign.

In light of the foregoing, it must be concluded that the Complainant failed to establish the prior right to the Domain Name and, therefore, the Complaint should be dismissed.

DISCUSSION AND FINDINGS

It should be noted that the ADR Proceedings initiated against the Registry (EURID) shall not in any way serve as a "second chance" or an additional round providing applicants an option to remedy their imperfect original application that was rejected during the Sunrise Period (i.e. by way of submitting additional documentary evidence that was not duly presented within the deadline as stipulated in the Article 8 (5) of the Sunrise Rules).

On the contrary, the ADR Proceedings against EURID is strictly limited to a review whether EURID's decision conflicts with the Regulation and with Sunrise Rules.

In light of the above, the Panel observes as follows:

1. Decision Does Not Conflict with the Regulation or Sunrise Rules.

According to Article 10 of the Regulation, only an applicant who is able to establish a prior right to a domain name is eligible for registration of such domain name during the Sunrise Period.

According to Article 14 of the Regulation, every applicant shall submit documentary evidence that shows he or she is the holder of the prior right claimed on the domain name in question. This requirement is further specified with respect to each type of prior right by the Sunrise Rules. If the prior right is based on a trademark, the applicant must provide documentary evidence according to the requirements set forth in Section 13 (2) (i) or (ii) of the Sunrise Rules.

Section 20 of the Sunrise Rules sets forth additional requirements the applicant must meet in the event that it is not completely clear

from the documentary evidence that the applicant is holder of the prior right on which the application is based. Such requirements, inter alia, apply in cases where the applicant is different from the holder of the prior right in question due to transfer of the prior right, merger or other reasons (Section 20 (2) and (3) of the Sunrise Rules).

According to Section 8 (5) of the Sunrise Rules, all such documentary evidence must be submitted (received by the validation agent) within forty calendar days following receipt of the application in question. This, without a shadow of doubt, also applies to submission of all additional documents (if any) under Section 20 (3) of the Sunrise Rules. As for the Application, such deadline expired on 16 January 2006.

According to Section 21 (1) (ii) of the Sunrise Rules, the validation agent shall verify whether the requirement for existence of the prior right to the domain name claimed by the applicant is fulfilled. According to Section 21 (2), the validation agent examines whether the applicant has a prior right to the domain name in question on the basis of a prima facie review of the first set of documentary evidence received. According to Section 21 (1) in fine of the Sunrise Rules, the validation agent and the Respondent are not obligated to notify the applicant if the requirement to sufficiently establish the prior right to a domain name is not complied with.

The documentary evidence provided by the Complainant shows that the owner of the trademark, on the basis of which the prior right to the Domain Name was asserted, is the company Vivendi, and not the Complainant ("Vivendi Universal"). The Complainant did not provide any proof within the documentary evidence which would explain that Vivendi Universal is a legal successor (as a result of a merger or otherwise) of the company Vivendi, which was (at the time of filing of the Application) a registered holder of the Trademark. Therefore, a conclusion must be drawn that the Complainant failed to demonstrate its prior right to the Domain Name.

Generally, throughout the world, domain names have always been registered on a "first come first serve" principle without having specific regard to rights of owners of the intellectual property. The European Community, regarding legitimate interests of intellectual property rights owners, provided such owners with the opportunity of privileged registration of domain names corresponding to their intellectual property rights during the Sunrise Period. In order to administer such a tremendous task, it was absolutely necessary to establish strict and straightforward rules for demonstrating those intellectual property rights on which the privileged registration of the domain names should be based. These strict rules were, without any doubt, justified and necessary in situations where hundreds of thousands of applications for registration of domain names during the Sunrise Period had to be examined. Nothing in the Sunrise Rules construes the obligation of the validation agent or the Respondent to investigate the circumstances of applications where the prior right was not sufficiently demonstrated, or notify applicants of deficiencies in their application. Quite to the contrary, Section 21 (1) and (2) of the Sunrise Rules expressly stipulate that the validation agent and the Respondent shall not have any such obligations.

In light of the foregoing, it must be concluded that it is the responsibility of the domain name applicant to provide before applicable deadlines all documentary evidence in a manner that its prior right to the domain name applied for is clearly demonstrated. Should the documentary evidence show that the holder of the prior right is different from the applicant, the documentary evidence must include an appropriate explanation and documents demonstrating its authorization to register the domain name on the basis of the asserted prior right.

In light of the above, the Complainant failed to provide satisfactory evidence on its prior rights (i.e. proof of a merger) within the statutory deadline. The Registry (EURID) should not be held responsible for such Complainant's failure and the purpose of the ADR Proceeding is not to remedy such Complainant's omission.

Thus, the Registry (EURID) correctly rejected Complainant's application and its decision conflicts neither with the Sunrise Rules, nor with the Regulation.

2. Alleged EURID's Responsibility for Omissions of Its Accredited Registrars (i.e. VeriSign)

The Complainant also asserts that the Registrar failed to submit the requested evidence (merger treaty), although the Complainant specifically requested the Registrar (VeriSign) to do so. The Complainant provides copies of e-mail correspondence with the Registrar as a proof in this regard.

Consequently, the Complainant argues that the Registry (EURID) should be liable for such alleged Registrar's (VeriSign's) failure to act in line with Complainant's instructions. Such argument by the Complainant is apparently purpose-built and cannot stand. Neither the Regulation nor the Sunrise Rules establishes the Registry's (EURID) vicarious liability for acts or omissions of accredited Registrars. The Registry (EURID), therefore, cannot be held liable for the alleged negligence of VeriSign as an accredited Registrar.

In addition, the Panel reviewed a copy of the e-mail correspondence between the Complainant and the Registrar. The Panel observed

that such e-mail correspondence (regardless whether authentic or not) took place on 1 February 2006, i.e. after the deadline for submission of documentary evidence (which was on 19 January 2006). As a result, at the time of the correspondence, the Registrar (VeriSign) could not file such treaty on merger as additional evidence since the deadline for provision thereof had already expired. It even seems apparent from the correspondence that both Complainant as well as the Registrar were aware of this.

As a result, the Complainant's assertion that the Registrar neglected its obligations and failed to provide the validation agent with all necessary evidence (despite being requested to do so by the Complainant) and, hence, did not act in line with Complainant's instructions, does not seem to be properly documented. However, such potential Registrant's (VeriSign's) negligence is not subject to this ADR Proceedings and has no influence on the Panel's decision.

DECISION

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	Jiri Cermak

DATE OF PANEL DECISION 2006-07-31

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant applied during the Sunrise Period for a domain name "vivendi.eu." The domain name application was rejected due to the fact that the owner of the trademark on the basis of which the prior right was asserted was different from the Complainant and such difference was not explained in the documentary evidence.

The Complainant later on submitted to the Panel new documents (merger treaty) showing that he has the right to trademark on the basis of which the prior right should be established (since it is a legal successor of the original trademark holder). Such documents, however, were not part of the documentary evidence.

The Panel holds that the Complainant failed to provide satisfactory evidence on its prior rights (i.e. proof of a merger) within the statutory deadline. The Registry (EURID) should not be held responsible for such Complainant's failure and the purpose of the ADR Proceeding is not to remedy such Complainant's omission.

In addition, the Complainant also asserted that the Registrar (VeriSign) failed to submit the requested evidence (merger treaty), although the Complainant specifically requested the Registrar to do so. Therefore, the Complainant further argued that the Registry (EURID) should be responsible for such alleged Registrar's (VeriSign's) failure to act in line with Complainant's instructions.

The Panel holds that neither the Regulation nor the Sunrise Rules establishes the Registry's (EURID) vicarious liability for acts or omissions of accredited Registrars. The Registry (EURID), therefore, cannot be held liable for the alleged negligence of VeriSign as an accredited Registrar to comply with Complainant's instructions.

The Panel dismissed the Complaint.