Sentence arbitrale for dispute CAC-ADREU-000642

Case number	CAC-ADREU-000642
Time of filing	2006-04-24 09:32:13
Domain names	crux.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	Mr. Bipin TANEJA

Respondent

Organization / Name	EURid

AUTRES PROCÉDURES JURIDIQUES

The Panel is not aware of any other legal proceeding connected to the disputed domain name CRUX.EU. No such information was obtained from the parties and the Panel is not entitled to make any own investigations.

SITUATION DE FAIT

The Complainant is a Dutch national who is trading under the name “Southern Cross”. The Complainant is further owner of a prior national right, namely the Benelux trademark No 740 428 for the word CRUX. Confusion has arisen regarding the question who in fact filed the application, i.e. whether the application was filed by a natural person, Mr Bipin Taneja, or whether the application was filed by a trade entity Southern Cross. Another issue is the fact that the application contained the name of Mr Bipin Taneja as the holder of the prior right, on which the application was based; thus, there was a difference in the name of the entity requesting the registration of the CRUX.EU domain name, and the entity who was stated in the application as applicant and owner of prior right.

The application for registration of the CRUX.EU domain name was rejected by the Respondent and this decision is subject of the complaint, by which the Complainant seeks the attacked decision be annulled and the domain name CRUX.EU be registered in his name.

A. PARTIE REQUÉRANTE

(i) General reasoning

In the opinion of the Complainant, the attacked decision in contrary to the Regulation (EC) 733/2002, namely contrary to Article 4, sub 1; and Article 4, sub 2(d) in conjunction with Article 5 sub 1. The Complainant further argues that the attacked decision of the Respondent conflicts with the provisions of Regulation (EC) 874/2004, inter alia preamble, sub (16); Article14 para 7 and Article 22 sub 1 (b).

The Complainant further argues that the attacked decision was made due to an obvious and inadvertent error, that the error is immediately obvious, and that the correction of the error was possible, if the Respondent had exercised a certain level of

due care. The Complainant is of the opinion that the decision lacks any transparent reasoning, that it is further disproportionate in light of any discrepancy that may or may not have occurred during filing of the application for registration of the domain name CRUX.EU.

(ii) Prior rights

The application is based on a prior Benelux trademark no. 740428 for the word "crux", registered in the name of the Complainant. A copy of this registration is on the Panel's file.
The Complainant is the holder of said prior right. The Complainant is also trading under the name of Southern Cross. This was evidenced by the extract from the respective Dutch national register issued by the Chamber of Commerce, district of The Hague.

(iii) Complainant's description of the registration process of CRUX.EU

In the application form, the Complainant's name was stated as "Bipin Taneja/Southern Cross", with the name "Bipin Taneja" being noted as name and "Southern Cross" being stated as surname. The Complainant argues that this entry was possibly construed by the Respondent as "Southern Cross" meaning the applicant and "Bipin Taneja" meaning the holder of the prior right. Since these two names are not identical, the application was rejected.
The Complainant argues that this conclusion was incorrect, since it was immediately apparent that "Bipin Taneja/Southern Cross" and "Bipin Taneja" and "Southern Cross" are at least linked to each other, if not inextricably linked to each other.

The Complainant points out that the application form (the cover letter), which was generated automatically beyond his control, was pre-formatted. It did not provide for correction of any obvious error. The obviousness of this error is immediately apparent from the very format of the name. This is within the limits of what a person taking a decision would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the originally filed documents.

It is argued by the Complainant that the correction is obvious in the sense that it is immediately evident that nothing else would have been intended than what is offered as the correction, namely that the application is by applicant "Bipin Taneja".

The Complainant refers to the Sunrise Rules, Section 21, Article 3, under which the Validation Agent is not obliged, but it is however permitted to conduct its own investigations into the circumstances of the application, the prior right claimed and the documentary evidence produced.

In so far as the Validation Agent construed the applicant to be "Southern Cross" (and not "Bipin Taneja/Southern Cross" nor "Bipin Taneja") and established that there was no license agreement enclosed as documentary evidence, it thus could reasonably have been expected of the Validation Agent to check and establish that "Bipin Taneja" as part of "Bipin Taneja/Southern Cross" should not be denied in light of it being immediately apparent that "Bipin Taneja" being the person indicated in the documentary evidence as being the holder of the prior right and prima facie also being the same person in his capacity as applicant and as such being entitled to the domain name in question.

It is thus submitted by the Complainant, that a decision by the Registry/EURid on the application cannot be detrimental to the entitlement of "Bipin Taneja" to the domain name on the grounds of his prior right and his application being the first in line for the domain name www.crux.eu .It is further argued by the Complainant that the assessment by the Validation Agent was incomplete.

It is argued by the Complainant that the assessment of his application by the Validation Agent through an overly mechanical procedure has led to an unfair result.

(iv) Claim of the Complainant

The Complainant therefore request the ADR panel to (i) annul the attacked decision taken by the Respondent and (ii) decide that the domain name www.crux.eu is attributed to the Complainant.

B. PARTIE DÉFENDANTE

Introductory part /by the Panel/

The Response was filed on 20th July 2006, i.e. obviously after the deadline set by the Case Administrator. The Respondent was notified of his delay by the communication of the Case Administrator dated 14th July 2006. It is up to the Panel to decide in its sole discretion whether or not to consider the defective Response. However, the Panel sees it as appropriate to include the argumentation of the Respondent into its decision. The ADR process should be conducted in a quick manner and no serious procedural or material reasons not to consider late submissions of the Respondent were found by the Panel in this concrete case. As the Panel accepted late submission of the Respondent, the Panel decided to accept also respective procedural responses of the Claimant; other procedure could lead to unjust treatment of the Parties and thus to unfair trial.

(i) General reasoning

Article 10 (1) of Commission Regulation (EC) No 874/2004 of 28 April 2004 (hereafter "the Regulation") states that only holders of prior rights which are recognized or established by national or Community law shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts.

Pursuant to article 14 of the Regulation, it is up to the applicant to submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question. Based on this documentary evidence, the validation agent shall examine whether the applicant has prior rights on the name.

Section 21 (2) of the Sunrise Rules states that the validation agent shall examine whether an applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of documentary evidence it has received.

Southern Cross (hereafter "the Applicant") applied for the domain name CRUX on December 7, 2005. The validation agent received the documentary evidence on December 14, 2005, which was before the January 16, 2006 deadline.

The validation agent concluded from the documentary evidence that the Applicant was not the holder of a prior right. Therefore, the Respondent rejected the Applicant's application.

(ii) Respondent´s position

The Sunrise Rules are essential for the application procedure. Indeed, millions of applications have been submitted on a very short term and the validation can only be managed if strict rules are complied with. An automated process can only be managed when strict rules are applied. Before submitting an application it is important that the applicant acquaints itself with these rules.

Moreover, so as to make the application procedure more transparent to the applicants, article 12 (1) 3 of the Regulation states that the additional framework rules, such as the Sunrise Rules, must be published on the Respondent's website. The Sunrise Rules can be viewed on that page.

Moreover, the cover letter which every applicant must sign clearly states that:
The Rules, including the special terms that relate to the phased registration period, apply and have been read and approved without reservation by the Applicant.
Therefore, any applicant is bound by the Sunrise Rules.

The Sunrise Rules have been amply applied by several Panels in many .eu domain name arbitration cases, such as case No 00210 (BINGO), 00127 (BPW), 00293 (POOL), etc.

A request for the application of a domain name made during the Sunrise Period must contain the information listed in section 3 (1) of the Sunrise Rules. The information provided is then processed in the whois database and printed on a cover letter. This cover letter is then sent to the applicant, who must forward it to the validation agent together with the documentary evidence which shows that the applicant is the holder of a prior right.

The request form contains various fields. Two of these fields are important in the case at hand, the field "name" and the field "organisation".

In order to facilitate communication with a company which is the registrant of a domain name, a contact person may be provided. The natural person/department who is mentioned in the "name" field will be considered as the contact person within the company. The actual applicant however, will not be the natural person/department who submitted the request form, but the company. To that regard, section 3 (1) i of the Sunrise Rules states that:
where no name of a company or organisation is specified, the individual requesting registration of the Domain Name is considered the Applicant; if the name of the company or the organisation is specified, then the company or organisation is considered the Applicant;
Thus if one fills in the "organisation" field, one effectively states that the company listed as "organisation" is a separate entity and the domain name must be granted to the company listed as “organization”.

(iii) Argument’s regarding the burden of proof during the registration proceeding

Pursuant to the Regulation and the Sunrise Rules, it is to the applicant to submit all documents which the validation agent needs to assess whether an applicant is the holder of a prior right corresponding to the domain name.

In the case at hand, the Respondent was requested to grant the domain name to the Applicant. The Respondent was not provided with any information on the Applicant. The only documentary evidence which it was provided with stated that the CRUX trademark was registered by Mr. Bipin Taneja. Although Mr. Bipin Taneja was mentioned in the request form, the Respondent had no idea whether he actually had given his consent to the granting of the domain name to the Applicant.

As the panel in case No 219 (ISL) stated one could argue that sympathy is overruled by the applicable Regulations serving among other purposes the (cost-effective) functionality of the phased registration and the principles hereof.

(iv) Claim of the Respondent

The Respondent demands the complaint be rejected.

DÉBATS ET CONSTATATIONS

(i) Late submissions of the Parties

The Respondent filed his response after the expiry of the deadline set by the Case Administrator. Under the ADR.eu rules, it is up to the Panel to decide whether such response filed in default will be considered by the Panel in the decision making, or not.

The Panel finds it appropriate to point to the Respondent’s argumentation as used in his response that the validation of the applications can only be managed if strict rules are complied with and that a process can only be managed when strict rules are applied and complied with (stressed by the Panel).

The Panel sees a certain discrepancy in the Respondent’s approach to applicants asking for registration of EU domain names, where a quite strict approach is applied, and to the Respondent’s attitude in this proceeding, where apparently a late response of the Respondent should be admitted and the Respondent does not worry about it.

Nevertheless, the Panel decided to take into consideration all submissions made by the Parties in this proceeding. The ADR process should be conducted in a quick manner and no serious procedural or material reasons not to consider late submissions of the Respondent were found by the Panel in this concrete case. As the Panel accepted late submissions of the Respondent, the Panel decided to accept also respective procedural responses of the Claimant; other procedure could lead to unjust treatment of the Parties and thus to unfair trial.

(ii) Legal assessment of the case

It is obvious to the Panel that the Complainant, being a Dutch natural person is trading under the name of "Bipin Taneja/Southern Cross", or "Bipin Taneja – Southern Cross." This is evidenced by the extract from the respective Dutch companies register issued by the Chamber of Commerce, district of Hague.

Regardless whether the Panel can give a precise assessment of the legal situation of use of names of entrepreneurs under Dutch law or not, it is clear from the extract issued by the Chamber of Commerce in Hague that the Complainant is entitled to perform legal acts and to trade under the name of Bipin Taneja in connection with Southern Cross.

It ensues from the documentary evidence as presented by the Complainant, which was not disputed in any way by the Respondent that the application for the registration of the CRUX.EU domain name was filed in the name of Southern Cross Bipin Taneja, from the organization of Southern Cross.

It further ensues from the documentary evidence presented to the Panel that the relevant proof of prior right, i.e. the BENELUX trademark No 740 428 CRUX owned by Mr Bipin Taneja was presented to the Respondent.

The Panel is well aware of the problems with the application form and the unclear legal terms used in it. In fact the application form can in many cases lead to confusion of normal and standard applicants, but also to confusion of experienced users of the system, such as internet service providers. The purpose of the registration process is to enable the users to obtain EU domain name on a possibly smooth basis, taking into account their prior rights, where applicable.

The issue is whether the acquisition of rights (based even on prior rights) in the European Union will depend on the question of whether the applicant has filled in correctly a form, or whether such acquisition will depend on sound and thorough assessment of the filings of the applicants, based on communication with the applicants.

The Panel shall not use any automated processes and the Panel is of the opinion that current legal rules governing the registration process of EU domain names contain sound provisions, which could have been used by the Respondent during the registration process.

Reference is made, among others, to Recital 12 of the Regulation 874/2004, under which the aim of the registration process is to ensure that holders of prior rights have appropriate opportunities to register names on which they hold prior rights. It further follows from this recital that validation agents should assess rights claimed for a particular name properly. Reference is further made to Article 14 of the Regulation No 874/2004, under which the validation agent should examine the application.

Under Sunrise Rules, Article 21.3, the validation agent may, at his own discretion, conduct investigation into the circumstances of the respective application.

The Panel appreciates the high number of application received and processed by the Respondent, and the Panel also understands the tendency of the Respondent to apply those automated processes as mentioned in the Respondent's response to the Complaint. The respective legal provisions cited above put the Respondent under clear legal obligation to examine the application (Art. 14 of the Regulation 874/2004) and to assess the respective right of the applicant (recital 12 of the Regulation 874/2004.

In the opinion of the Panel, these obligations to examine and assess are clearly in conflict with the absolute idea of an uncompromised automated process.

The Panel should, under the ADR, however provide the necessary corrections to procedures and decisions of the Respondent, where the facts of the case allows so, and where such procedure is admissible under the ADR Rules and the respective legal provisions governing the registration process.

In the present case, it is obvious that the application for registration of the CRUX.EU domain name was filed in good faith by Mr Bipin Taneja. The mistake in the application form, which is in the opinion of the Panel not due to bad understanding of the Complainant or due to his lack of understanding of any explanatory notes, cannot be construed to the detriment of the Complainant (the Applicant).

It was within the powers and possibilities of the Respondent to ask the Complainant for explanation of the names used in the application form and the Respondent could have proceeded in compliance with the above mentioned legal provisions.

The Respondent decided, within his discretionary power, not to do so during the registration proceeding.

The Panel in his position decided, after having considered the arguments of the Parties and the presented documentary evidence to provide for the necessary correction of the procedure of the Respondent.

Before the verdict of the Panel is handed down, the Panel would like to express its understanding for the opinion as express by the panel in case No 219 that one really could argue that sympathy is overruled by the applicable regulations serving among other purposes the (cost-effective) functionality of the phased registration and the principles hereof, however the Panel is convinced that justice may not be overruled either by sympathy or by cost-effective functionality, notwithstanding the fact that justice may not depend on the question how one fills in a registration form, which in itself is quite confusing.

DECISION

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

the EURID's decision be annulled and

the domain name CRUX be registered in the name of the Complainant.

PANELISTS

Name	**Marieke Westgeest**

DATE DE LA SENTENCE ARBITRALE 2006-08-30

Summary

LE RÉSUMÉ EN ANGLAIS DE LA SENTENCE ARBITRALE SE TROUVE À L´ANNEXE 1

The Complainant is a Dutch national/natural person trading under the name “Southern Cross”. The Complainant is owner of a prior national right, i.e. the Benelux trademark No 740 428 CRUX. Confusion has arisen regarding the question who in fact filed the application, i.e. whether the application was filed by a natural person, Mr Bipin Taneja, or whether the application was filed by a trade entity Southern Cross. The application for registration of the CRUX.EU domain name was rejected by the Respondent and this decision is subject of the complaint, by which the Complainant seeks the attacked decision be annulled and the domain name CRUX.EU be registered in his name.

The issue of the proceeding was whether the acquisition of rights in the European Union will depend on the question of whether the applicant has filled in correctly a form, or whether such acquisition will depend on sound and thorough assessment of the filings of the applicants, based on communication with the applicants, based on assessment of the

respective legal rules governing the registration process. The Panel referred to, among others, Recital 12 of the Regulation 874/2004, under which the aim of the registration process is to ensure that holders of prior rights have appropriate opportunities to register names on which they hold prior rights. The Panel concluded from this recital that validation agents should assess rights claimed for a particular name properly. Reference is further made to Article 14 of the Regulation No 874/2004, under which the validation agent should examine the application.

The Panel concluded that the obligations imposed upon the Respondent to examine and assess are clearly in conflict with the absolute idea of an uncompromised automated process.