Panel Decision for dispute CAC-ADREU-001012

Case number	**CAC-ADREU-001012**
Time of filing	**2006-04-26 11:40:19**
Domain names	**50plus.eu**

Case administrator

Name	**Josef Herian**

Complainant

Organization / Name	**Direkte Leben Versicherung AG**

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

N.A.

FACTUAL BACKGROUND

Factual Background
On 7 December 2005 Singletreff Limited (in the person of Magrit Lee), with head office at 5 Cornforth Road, SO40 Southampton Calmore, Totten, UK, filed an application for the domain name 50PLUS.EU on the basis of an International Registration granted on 27 April 2000 and extended to Austria, Germany, Spain, France and Italy in the name of the Swiss company Brain Spot GmbH. The trademark owner, the Swiss company, licensed the trademark to the British company with express authorisation for the latter to file for the EU domain name 50PLUS.
On 24 June 2006 the Complainant – Direkte Leben Versicherung AG of Frankfurt am Main in Germany – filed a Complaint stating that the applicant does not qualify as a registrant under Reg. 733/2002. For the Complainant the real applicant is the Swiss trademark owner. The Respondent is Eurid. The Registrar is Swiss Voting System – A privately held company AG and one of the providers recognised by Eurid.

A. COMPLAINANT

The Complainant is the applicant for the disputed Domain name on the third position. After the second applicant's request expires, it is the next applicant in the queue. Documentary evidence in support was filed to prove that the real applicant of 50PLUS.EU was not the UK-based company but the Swiss company owner of the trademark registered in Germany and in other European Union member states. The Complainant contends that the Registry decision is in conflict with European Union Regulations because the applicant does not qualify as a registrant under Regulations 733/2002 and 874/2004.
The relevant documentary evidence filed by the Complainant consists of the following:
1) The undertaking by which Ms. Magrit Lee is acting for Singletreff Limited – a company incorporated on 26 September 2005.
2) Documents proving, in the Complainant's view, that the applicant is a letterbox company created for the sole purpose of acquiring a domain name.
3) A series of documents showing that the real owner of the trademark wishes to have a EU domain name and that Singletreff was established for the sole purpose of providing an EU address to Brain Spot GmbH and to request a EU domain name.
4) A telephone conversation report in which Ms Lee stated that "she replied that she has nothing to do with such a company", but after a while she remembered being the registered representative of the applicant. "During a second telephone conversation she provided a Swiss phone number 0041 714467788 belonging, as she explained, to a person she only knew by the first name Hans". "It should be Hans Egger representative of Brain Spot GmbH and also director of Singletreff Ltd."
After its investigation, the Complainant concluded that the true owner has taken every precaution possible to redirect any attempt to contact the Registrant to its place of business in Switzerland so as to avoid any contact with Ms. Lee, its only connection to EU.

The Complainant requests that the Eurid decision be cancelled and that the domain name 50PLUS.eu be transferred to the complainant itself.

B. RESPONDENT

The respondent firstly underlined the legal provisions of the regulations applicable to the case and then clearly defended its decision stating that the applicant is a UK-based company and that, for this reason, it is entitled to apply for a EU domain name because it is a European established company and has obtained a trademark licence on the registered trademark 50 PLUS valid in Germany.
The Respondent is of the opinion that the Complainant must have filed a bad faith petition because, in its view, the applicant is accused of having circumvented the Regulation provision. For this reason, the Complainant should have started a proceeding under articles 21 and 22(1)a of Reg.874/2004 in which the applicant should have had the chance to join the proceeding and "take appropriate measures".
In the respondent's opinion, the Registry should not have examined whether the Applicant circumvented the rules set forth by the Regulation. In fact, in the BPW case it was decided that the "validation agent is not obliged, but is permitted in its sole discretion, to conduct its own investigations into the circumstances of the application, the prior right claimed and the Documentary Evidence produced".
There is no obligation upon the Registry to assess the bad faith of the applicant, and as article 22(1)b states: a decision by the Registry can only be annulled when it conflicts with the Regulation.
The Respondent requires that the Complaint be dismissed and, as far as the transfer of the domain to the Complainant is concerned, that this request be rejected.

DISCUSSION AND FINDINGS

The provisions to be applied to this case are the following:
Art.4.2. lett. b Regulation 733/2002 and art. 3 Regulation 874/2004
The first provision states as follows:
The Registry shall register domain names in the .eu TLD through any accredited .eu Registrar requested by any:
Undertaking having its registered office, central administration or principal place of business within the Community or
Organisation established within the community without prejudice to the application of national law or
Natural person resident within the Community

ELIGIBILITY CRITERION – ART.4.2 lett. b Reg.733/2002
It is quite clear that this provision does not require anything more than the said formal requirements. It is sufficient to have a registered office in the Community in order to establish a sufficient connection with the European Union and this is what Singletreff Limited/Brain Sport has/have established through Singletreff's head office in the United Kingdom.
However, the Complainant argues that the licensee of the Swiss company Brain Spot GmbH is just a mere letterbox company with no real intention of doing business in the Community.
In my opinion, a company created for the mere purpose of filing a .eu domain name sufficiently satisfies the requirements of art.4.2.b Reg.733/2002.
There are no provisions in the system that require a .eu domain name proprietor to do business in the Community and, above all, to prove the existence of EU trade already started by a .eu domain name proprietor or licensee. What suffices is that the applicant be a EU-based company or a Community national.
The Regulations quite clearly admit the possibility for the applicant to be a licensee of a trademark valid in the EU and therefore it is enough for the licensee to be a EU national or EU-based company. And this has not been challenged by the Complainant.
Appointing a licensee might have different consequence on the use of the trademark and of the domain name and therefore if a non-EU trademark proprietor has accepted all the pros and cons of granting licence to a different entity which will have the right on itself as the registrant of a specific .eu domain name this is a sufficient formal link to the European Union.

Art.3 of Regulation 874/2004

The Complainant rightly states that it is not a question of bad faith or of speculative or unlawful registrations: in fact, art. 21 Reg.874/2004 covers different cases. It is a question , however, of good faith as indicated in art. 3 "Request for domain name registration". This provision states that
The request for domain name registration shall include all of the following:
(a) the name and address of the requesting party;
(b) a confirmation by electronic means from the requesting party that it satisfies the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No 733/2002;
(c) an affirmation by electronic means from the requesting party that to its knowledge the request for domain name registration is made in good faith and does not infringe any rights of a third party;

(d) an undertaking by electronic means from the requesting party that it shall abide by all the terms and conditions for registration, including the policy on the extra-judicial settlement of conflicts set out in Chapter VI.
Any material inaccuracy in the elements set out in points (a) to (d) shall constitute a breach of the terms of registration.
Any verification by the Registry of the validity of registration applications shall take place subsequently to the registration at the initiative of the Registry or pursuant to a dispute for the registration of the domain name in question, except for applications filed in the course of the phased registration procedure under Articles 10, 12, and 14.

Any material inaccuracy could constitute breach of the terms of registration. There is no inaccuracy in stating that Singletreef satisfies the eligibility criteria for the reasons mentioned in the previous pages: as far as good faith is concerned, this is a general principle that has to be defined.
The Registry could, of its own initiative, have refused to register or could have revoked a eu domain name if an applicant (i) had no registered office in the Community or was not a Community national. Or (2) if Singletreff were in good faith when it filed the application.

GOOD FAITH PRINCIPLE
What does good faith mean?
Wilkipedia offers a very good definition:
“Good faith, or in Latin bona fides, is the mental and moral state of honesty, conviction as to the truth or falsehood of a proposition or body of opinion,
One who acts in good faith, so far as the violation of positive law (or even in certain junctures of natural law) is concerned, is said to labor under an invincible error, and hence to be guiltless. This consideration is frequently applied to determine the degree of right or obligation prevailing in the various forms of human engagements, such as contracts (common law) and the law of obligations (civil law). In fact, good faith has been identified as the key essence of a contract, and the parties are expected to act in good faith in their dealings. In the matter of prescription, good faith is held to be an indispensable requirement whether there be question of acquiring dominion or freeing oneself from a burden. Also, in deciding the duty incumbent upon one who finds himself in possession of another's property, cognizance is taken of the good faith with which perchance the holding began and was accompanied.”
In short, it may be defined as compliance with standards, honesty and fairness.
In the light of this criterion, Singletreff acted in good faith. It was established with the purpose of obtaining a .eu domain name in its name on the basis of a registration valid in one or more of the Member States of the European Community. It does not matter whether the party really responsible for the applicant is a Swiss national or whether the owner of the trademark is a Swiss company. In everyday business life companies are created and established in order to obtain some benefit (sometimes tax benefits for their owners) and this is not against the law if not specifically and expressly established by a provision of law. In EU Regulations there is no hint of prohibition for non-EU nationals to constitute a EU company just to be eligible under art 4.2. b and to be able to register a domain name. Therefore, this practice is not against the law and thus is not in violation of the good faith principle.
The legal literature and Jurisprudence on the principle of good faith is impressive in any civil law country (in common law countries this principle has been less fortunate, probably because it is too undetermined for the less theoretical and more empirical British culture). In fact, in every European Jurisdiction, legal scholars express the same concerns related to the potentially very discretional power offered through this “general principle” of bona fides to Judges. Notwithstanding this, good faith represents the “common core of legal systems” and it has been applied to adapt the systems to new social economic situations and needs.
However, there has been debate on the ways in which this principle can be applied. There are those who think that this principle refers to legal standards; others believe that it refers to values on which legal systems are founded and, finally, there are those who are of the opinion that good faith has to be interpreted in the light of values introduced by specific provisions. (see La bonne foi, Travaux Ass. H. Capitant, XLIII Paris 1992,; Wieacker (Zur rechtstheoretische Praezisierung des par 242 BGB, Tubinga, 1957; Grundlagen der buergerlichen Rechtsordnung, Boehmer 1951; Fonti del diritto,clausola generale di buona fede,diritto giurisprudenziale di Guido Alpa in Diritto giurisprudenziale, a cura di Mario Bessone, Giappichelli 2001).
In this case, I would opt for the third definition: good faith as an interpretation criterion of the values introduced by specific provisions which, in our case, are those contained in Regulations 733/2002 and 874/2004
Even applying good faith (defined above as an ethical principle), the Applicant’s behaviour cannot be considered in violation of it.
Its behaviour was crystal-clear and transparent. Indeed, the fact was never concealed that the applicant was a licensee of a Swiss company owner of a trademark validly registered in Germany. The e-mail address of the applicant shown in the domain name request was clearly that of Brain Spot.
The representative of Singletreff is Mr Hans Egger, who is also the representative of Brain Spot GmbH. This is clearly evident from the documents filed by the Complainant, but also from the documents filed by the Applicant. Ms. Lee was only appointed as a person in charge of the .eu domain name of Signletreff. The circumstance that she did not know about it may be colourful and naïve but certainly does not support the argument of lack of good faith on the part of Singletreff in filing the .eu domain name request.
Good faith within art. 3 Reg.874/2004 must be interpreted with reference to the requirements of this provision and with the rationale of the entire system. Anybody with a registered trademark valid in the European Union can request an identical .eu domain name under the sunrise period and can establish a company just for that purpose. This is a sufficient connection to the European Union to justify a .eu

domain name.
In the 6th Whereas of Reg.733/2002, the EU legislator stated that “Through the .eu TLD the internal market would acquire higher visibility in the virtual marketplace in the internet. The .eu TLD should provide a clearly identified link with the Community, the associated legal framework, and the European market place. It should enable undertakings, organisations and natural persons within the Community to register in a specific domain which will make this link obvious. As such the .eu TLD will not only be a key building block for electronic commerce in Europe but will also support the objective of art. 14 of the Treaty.”
Therefore, the purpose of the system is not to build a new Fortress Europe shutting out non-EU nationals and companies but, on the contrary, to bring them in and to facilitate non-EU companies and nationals to create more and more links to our market – both virtual and real links. In so doing, the importance of our virtual marketplace will increase, along with electronic commerce in Europe.
Instances of violation of the good faith principle in relation to art. 4. 2. b of reg.733/2002 might occur (such as when a European natural person files a .eu domain name under monetary compensation for a non-EU national or firm with no link to Europe whatsoever), but this is not the case with the present circumstance.
The decision taken by the Registry has to be upheld because all the formal requirements established by the eligibility provisions of the regulations were satisfied. No violation of the good faith principle arises in the circumstances brought to the Panels’ attention.

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	**Massimo Cimoli**

DATE OF PANEL DECISION 2006-07-10

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The ADR proceeding is related to a Complaint challenging the registry’s decision to register 50plus.eu as a domain name in the name of Singletreef Ltd, a newly established UK company who registered, as a trademark licensee, the said domain name in the sunrise period on the basis of an International Registration for 50plus extended to Germany and owned by the Swiss company Brain Sport GbmH.
The Complaint lamented the wrong application of the European Union Regulations and art.4.2.b of Reg.733/2002 and violation or circumvention of the said eligibility criterion.
The decision is based on art. 4.2.b of reg.733/2002 and art. 3 of Reg. 847/2004, and particularly on the good faith criterion included in the latter regulation.
The Eurid decision is upheld because under art. 4.2.b the circumstance that the applicant is a UK-based company satisfies this provision. Under art. 3 the good faith principle has to be applied as a criterion which helps to read those provisions. There is no violation of good faith meaning fairness, honesty transparency of behaviour in establishing a European company, and namely a UK company, for the purpose of filing a .eu domain name under a trademark licence of a foreign company.