Panel Decision for dispute CAC-ADREU-001071

Case number	CAC-ADREU-001071
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Domain names	essence.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	cosnova GmbH, Anna Weimar

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

The Panel is not aware of any other pending or decided legal proceedings which relate to the Disputed Domain Name.

FACTUAL BACKGROUND

The Complainant is a German company, cosnova GmbH, and the Respondent is the .eu domain name Registry, EurID.

On 31 January 2006 the Complainant made a Sunrise application to register the Disputed Domain Name, "essence.eu". The Respondent confirmed receipt of the application and required the Complainant to provide the Documentary Evidence of its Prior Right by 12 March 2006.

On 1 February 2006 the Complainant completed and signed the standard Cover Letter for the Documentary Evidence. However, the Documentary Evidence was not included when the Cover Letter was sent to the Validation Agent, PricewaterhouseCoopers.

On 6 February 2006 the Cover Letter was received by the Validation Agent.

On 19 April 2006 the Respondent rejected the application on the basis that it had not received Documentary Evidence which sufficiently evidenced the Prior Right.

On 19 May 2006 the Complainant filed the Complaint with the ADR Center. On 31 May 2006 the ADR Center informed the Complainant that it had not identified the correct Registrar on the complaint but had instead named the Registry, EurID. On 1 June 2006 the Complainant filed an Amended Complaint and on 2 June 2006 the Complainant filed a Nonstandard Communication correcting the identification of the Registrar.

The proceedings formally commenced on 6 June 2006.

The Respondent filed its Response to the Complaint on 21 July 2006.

A. COMPLAINANT

The Complainant believes that was entitled to apply for the Disputed Domain Name during the Sunrise period for the following reasons:
- the Complainant has a Prior Right in the name "essence" by virtue of a licence of Community Trade Mark 4109567 from its owner, Bora Creations SL (the Complainant provided by way of evidence an excerpt from the OHIM online register at Annex C2 to the Complaint and the standard licence declaration at Annex C3)
- this name corresponds to the Disputed Domain Name

- the Complainant is eligible to register a domain name as its registered office and domicile are within the Community.

However, the Complainant accepts that two mistakes were made in connection with its application for the Disputed Domain Name, as follows:
- the Complainant accidentally put its own name rather than the name for which the Prior Right was claimed in the relevant section of the Cover Letter
- the Complainant did not enclose the Documentary Evidence with the Cover Letter when it was sent to the Validation Agent

The Complaint states that it became aware of its mistakes in February 2006. However, the Complainant argues that under the Sunrise Rules and the procedure set up by the Respondent for filing Documentary Evidence it was not allowed to cure these mistakes by submitting the necessary documents to the Respondent. Therefore, the Complainant argues that it should be entitled to cure the mistakes in the present proceedings. In support of this argument the Complainant points not only to Regulation 874/2004, Articles 10(1), 10(2) and 12(2)(2) but also to the European Convention of Human Rights, Articles 6 and 13 and the Charter of Fundamental Rights of the European Union, Article 47.

B. RESPONDENT

The Respondent argues that under Regulation 874/2004, Article 14 fourth paragraph the Complainant was obliged to submit the Documentary Evidence of its Prior Right. The burden of proof was on the Complainant to prove its Prior Right and neither the Validation Agent nor the Registry has any obligation to make further enquiries (Sunrise Rules, Sections 21(2) and 21(3); decisions in cases 119 (NAGEL), 219 (ISL), 541 (ULTRASUN) and 954 (GMP))

As the Complainant admits that no Documentary Evidence was submitted, the Respondent's decision was correct.

The Respondent also submitted that the Panel should ignore any documents submitted with the Complaint and, more generally, any documents which were not part of the first set of documents submitted to the Validation Agent (Regulation 874/2004, Article 22(1)(b); Sunrise Rules, Section 21(2); decisions in cases 219 (ISL), 294 (COLT) and 954 (GMP)).

DISCUSSION AND FINDINGS

1. Under Regulation 874/2004, Article 22(1)(b), an ADR procedure may be initiated by any party where a decision taken by the Registry conflicts with Regulation 874/2004 or Regulation 733/2002 (the Regulations).

2. Under the Respondent's ".eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period" (the Sunrise Rules), Section 22(2) second paragraph and Section 26(1), any interested party may initiate an ADR Proceeding against a decision of the Registry within 40 calendar days of that decision.

3. Under the Sunrise Rules, Section 22(2) second paragraph and Section 26(2) first paragraph, the grounds for such an ADR Proceeding are non-compliance of that decision with the Regulations and the sole object and purpose of the ADR Proceeding is to verify whether the relevant decision by the Registry conflicts with the Regulations.

4. Therefore, the question for this Panel is whether the Respondent's decision of 19 April 2006 to reject the Complainant's application for the "essence.eu" domain name conflicted with the Regulations. The relevance of the Sunrise Rules to this question will be considered further below.

5. Under Regulation 874/2004, Article 10, holders of certain rights were entitled to apply to register .eu domain names during a period of phased registration (the Sunrise period) before general registration began. However, under Regulation 874/2004, Article 14, such applicants were required to submit Documentary Evidence of their prior right to the Respondent's Validation Agent within 40 days of the deadline. If no such Documentary Evidence was received, the application was to be rejected.

6. The Complainant accepts that no such Documentary Evidence was sent or received. It follows that the Respondent's rejection of the Complainant's Application to register the Disputed Domain Name was correct under Article 14 of Regulation 874/2004 and it is irrelevant whether or not the Complainant in fact had a Prior Right for the purposes of Articles 10(1), 10(2) and 12(2) second paragraph of that Regulation. The evidence of the Complainant's Prior Right filed with the Complaint as Annexes C2 to C4 is accordingly also irrelevant.

7. The Complainant argues that, although it realised its mistake within the 40 day period, "Once the Documentary Evidence was sent to the Registry, no further notification to the Registry was possible" under the Sunrise Rules. Therefore it argues that it should be entitled to correct the mistake in these proceedings.

8. This Panel finds that this statement does not accurately reflect the Sunrise Rules.

9. First, the Definitions and Sections 8 and 9 of the Sunrise Rules draw a clear distinction between the Cover Letter and the Documentary Evidence. Therefore, it appears that no first set of Documentary Evidence was ever sent to the Processing Agent but only a Cover Letter.

10. Second, Sections 7(3) and 9(2) of the Sunrise Rules clearly contemplate multiple sets of Documentary Evidence being sent to the Processing Agent. Although Section 8(6) states that "each Application must be supported by one (1) set of Documentary Evidence" and Section 21(2) states that "The Validation Agent examines whether the Applicant has a Prior Right to the name exclusively on the basis of a prima facie review of the first set of Documentary Evidence received and scanned by the Processing Agent", Sections 8(7), 9(2) and 21(3) indicate that the the Registry, the Processing Agent and the Validation Agent have the discretion (but not the obligation) to consider second or subsequent sets of Documentary Evidence. Therefore, under the Sunrise Rules the Complainant would not have been prohibited from sending a "second" set of Documentary Evidence to the Processing Agent, although the Respondent reserved the right to ignore such Documentary Evidence. The Complainant is therefore incorrect in suggesting that these proceedings were the only way for the Complainant to correct its mistake.

11. As no Documentary Evidence was in fact sent to the Processing Agent within 40 days of the Application, in order to decide this Complaint this Panel does not have to determine whether a decision by the Respondent to ignore such Documentary Evidence would have conflicted with the Regulations. However, the relevance of the fact that such a decision would have been permitted by the Sunrise Rules is considered further in paragraphs 13-27 below.

12. The Complainant has not explained why Articles 6 and 13 of the European Convention of Human Rights or Article 47 of the Charter of Fundamental Rights of the European Union mean that this Panel should ignore the requirement of Article 14 of Regulation 874/2004 on the basis that it is "merely" a "form requirement". This Panel has considered those Articles and can see no basis in them for such an argument. The requirement that evidence of prior rights be provided within a restricted timeframe is an important part of the procedural framework of the Sunrise period. Therefore, as this Panel has already held that the Respondent's decision to reject of the Complainant's Application to register the Disputed Domain Name was correct under Article 14 of Regulation 874/2004, it follows that the Complainant's rights under the Regulations have not been violated.

13. Although this deals with the Complaint, as a further point has been raised by the Respondent the Panel will also address the argument that the Respondent's decision was justified under Article 21(2) of the Sunrise Rules and that "documents which were...not part of the first set of documents submitted to the validation agent at the application stage should be disregarded in ADR proceedings against the Respondent".

14. As stated in paragraph 4 above, the role of an ADR Panel under Regulation 874/2004, Article 22(1)(b) is to determine whether a decision taken by the Registry conflicts with the Regulations. The fact that a decision taken by the Registry complies with the Sunrise Rules does not, in itself, mean that the decision complies with the Regulations. This will only be the case to the extent that the Regulations themselves require compliance with the Sunrise Rules.

15. The Respondent relies upon the decisions of the Panels in Cases 219 (ISL) and 954 (GMP). The Panel in the latter decision said that it was following the Panel in Case 119 (NAGEL) in relation to the Sunrise Rules.

16. In Case 119 (NAGEL), the Panel held that the language of the ADR Proceeding was English based on Section 16(3) of the Registry's Terms and Conditions, to which the Complainant was required to agree under Article 3(d) of Regulation 874/2004 (Discussion and Findings, para 5). On the substance of the dispute, the Panel went on to hold that the Registry was correct to reject the application on the basis that the Documentary Evidence had not been submitted to the Vaidation Agent in due time under Article 14 fourth paragraph of Regulation 874/2004 (Discussion and Findings, para 8.5).

17. In Case 219 (ISL), the Panel held that the Registry was correct to reject the application on the basis that insufficient Documentary Evidence had been submitted to the Validation Agent in due time and that this could not be remedied by supplying further evidence in ADR Proceeedings. Again, the Panel did not mention the Sunrise Rules in its substantive Discussion and Findings but relied on Article 14 of Regulation 874/2004.

18. In Case 954 (GMP), the Panel held that the Complainant was bound by the Sunrise Rules due to its acceptance of the Sunrise Rules under Article 3(d) of Regulation 874/2004 and because the Registry had published the Sunrise Rules on its website under Article 12(1) third paragraph of Regulation 874/2004. Therefore the Panel held that the Registry was correct to reject an application supported by an extract from a commercial trademark register, which was deemed to be unacceptable as Documentary Evidence under Section 13(2)(ii)

of the Sunrise Rules. The Panel also agreed that the Registry was correct to reject the application on other grounds.

19. This Panel agrees with the Panel in Case 119 (NAGEL) that the language of ADR Proceedings is determined by the Registry's Terms and Conditions, which the Complainant had accepted under Article 3(d) of Regulation 874/2004. This is because Article 22(4) of Regulation 874/2004 states that the language of the proceedings can be agreed between the parties.

20. However, for the following reasons this Panel respectfully disagrees with the broader approach taken by the Panel in Case 954 (GMP), and advocated by the Respondent in that case and in this one, that the Respondent is entitled to reject applications simply for failure to comply with the Sunrise Rules regardless of whether the applications comply with the Regulations. The only basis for rejection of applications is non-compliance with the Regulations themselves.

21. Under Article 3(d) of Regulation 874/2004, an application for registration of a .eu domain name must include an undertaking by the applicant that it shall abide by all the terms and conditions for registration. However, there is no dispute that the Complainant's application included such an undertaking and the application was not rejected on that basis.

23. Under Article 12(1) third paragraph of Regulation 874/2004, the Registry was required to "publish on its website two months before the beginning of the phased registration a detailed description of all the technical and administrative measures that it shall use to ensure a proper, fair and technically sound administration of the phased registration period". This was the basis for the Sunrise Rules, as is made clear in the "Object and Scope" section of those Rules. The Registry was not given the power to amend the Regulations by such measures and thus, to the extent that the Sunrise Rules conflict with the Regulations, the Regulations will apply.

24. Under Article 14 seventh and eighth paragraphs of Regulation 874/2004, the role of the Validation Agent is to examine whether the documentary evidence submitted by the applicant substantiates that the applicant has prior rights for the domain name. It is not to examine whether the documentary evidence complies with the Sunrise Rules published under Article 12(1) third paragraph or the terms and conditions of registration which the applicant accepted under Article 3(d). Again, to the extent that the Sunrise Rules conflict with the Regulations, the Regulations will apply.

25. The Registry's remedy for breach of its terms and conditions of registration is to revoke the domain name under Article 20(c). The Registry was required to lay down a procedure for doing so under Article 20 second paragraph, which were to include giving the domain name holder notice and the right to take appropriate measures, and has done so in Section 12(2) of the ".eu Domain Name Registration Policy". Thus this Panel's approach does not prevent the Registry from enforcing its terms and conditions of registration.

26. Therefore, this Panel is of the view that, while the Sunrise Rules may lay down technical and administrative measures to ensure a proper, fair and technically sound administration of the phased registration period, they may not give additional grounds for the rejection of applications which otherwise comply with the Regulations. Therefore any rejection of an application should be on the basis of the Regulations themselves and, while the Sunrise Rules should not be disregarded when considering the Regulations, the Rules are only persuasive and do not constitute a binding interpretation or amendment of the Regulations.

27. On this basis, this Panel does not accept the Respondent's argument that on the basis of Section 21(2) of the Sunrise Rules "documents which were...not part of the first set of documents submitted to the validation agent at the application stage should be disregarded in ADR proceedings against the Respondent". All documents submitted to the validation agent within the 40 days permitted under Article 14 fourth paragraph of Regulation 874/2004 should be considered in ADR proceedings. Nevertheless, as indicated in paragraph 6 above, this Panel agrees that documents which were not submitted within that period should be disregarded in ADR proceedings.

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	Christopher Stothers

DATE OF PANEL DECISION 2006-07-24

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant contested a decision of the Registry to reject its Sunrise application for the domain name "essence.eu".

The Complainant had filed the Cover Letter for the Documentary Evidence of its Prior Rights but not the Documentary Evidence itself. Therefore the Registry was correct to reject the application under Article 14 of Regulation 874/2004.

The Complainant's argument that it was not permitted to make a further notification to the Registry under the Sunrise Rules, and so its only remedy was to file its Documentary Evidence in these proceedings, was rejected on the basis that there is no such prohibition in the Sunrise Rules. The Complainant's argument that the formal requirements of Article 14 of Regulation 874/2004 should be ignored by reason of Articles 6 and 13 of the European Convention of Human Rights or Article 47 of the Charter of Fundamental Rights of the European Union were also rejected.

However, the Respondent's additional argument that it was correct to reject the application under Section 21(2) of the Sunrise Rules was also rejected. The Sunrise Rules may not give additional grounds for the rejection of applications which comply with the Regulations.