Panel Decision for dispute CAC-ADREU-001125

Case number	CAC-ADREU-001125
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Domain names	ets.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	EURO TELE SERVICES, Alexandre NAPPEY

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 legal proceedings, which are pending or decided and which relate to the disputed domain name.

FACTUAL BACKGROUND

The Complainant applied for the domain name ETS.eu on 7 December 2005 during the first sunrise period. In accordance with Article 14 of Commission Regulation (EC) No. 874/2004 (the “Public Policy Regulation”), the Complainant had 40 days to submit the relevant documentary evidence to the validation agent and this deadline expired on 16 January 2006.
On 14 December 2005 the Complainant applied to register the Benelux word mark ETS in respect of Class 38 services. This Benelux trade mark was registered on 16 December 2005 (Registration No. 0783947) and the registration was published on 1 January 2006.
On 13 January 2006 the Complainant submitted its documentary evidence to the validation agent in respect of its application to register ets.eu, which comprised the certificate of registration of the Benelux trade mark ETS.

A. COMPLAINANT

The Complainant asserts that it filed an application for registration of the domain name ets.eu during the first sunrise period on the basis of a registered Benelux word trade mark ETS. The Complainant further asserts that it did, in compliance with Article 14 of the Public Policy Regulation, submit documentary evidence to the validation agent which demonstrated that the Complainant had trade mark rights on the word ETS within the legal timeframe of 40 calendar days i.e. before 16 January 2006.
Accordingly, the Complainant asserts that the documentary evidence was submitted in accordance with Regulation (EC) No. 733/2002 (the “.eu Implementation Regulation”), the Public Policy Regulation and the .eu registration policy and terms and conditions for domain name applications made during the phased registration period (the “Sunrise Rules”).
To support this assertion, the Complainant made the following submissions, namely that:-
(i) at the time the documentary evidence was filed by the Complainant, the trade mark, which was the prior right claimed under the sunrise application for ets.eu, was registered in the Benelux;
(ii) there is no provision in either the .eu Implementation Regulation or the Public Policy Regulation that requires that the prior right should exist at a date prior to the filing of the documentary evidence;
(ii) according to Article 22 of the Public Policy Regulation, the .eu Implementation Regulation and the Public Policy Regulation is the only legal basis for the Respondent’s decision to accept or reject a .eu domain application;
(iv) at the time the relevant validation agent examined the application, the prior right claimed by the Complainant (i.e. the Benelux trade mark ETS) was registered; and
(v) the decision by the Respondent to either accept or reject the Complainant’s application cannot be based on the Sunrise Rules.
On the basis of the above, the Complainant submits that the decision by the Respondent to reject the Complainant’s application on the grounds that the Benelux trade mark ETS was not registered on the date the application for ets.eu was submitted is in conflict with the .eu Implementation Regulation and/or the Public Policy Regulation.

The Complainant seeks the following remedies in the Complaint:
(i) that the domain name ets.eu be registered on behalf of the Complainant; and
(ii) that the documentation submitted to the Respondent by the validation agent who examined the documentary evidence in respect of the domain name application for ets.eu be transmitted to the Complainant.
Finally, the Panel notes that the Complainant stated that it wished to reserve the right to complete or amend the Complaint, following receipt of the documentation submitted to the Respondent by the validation agent.

B. RESPONDENT

In response to the Complaint, the Respondent makes the following submissions, namely that:-
(i) Section 11(3) of the Sunrise Rules provides that an applicant must be the holder of the prior right claimed no later than the date on which the Respondent receives the application;
(ii) the rational for Section 11(3) of the Sunrise Rules is to prohibit certain applicants trying to "jump the queue" by applying for a .eu domain name before they actually have a prior right;
(iii) the Respondent submits that the Complainant applied for the domain name ets.eu on 7 December 2005 and that the Benelux trade mark ETS was registered on 16 December 2005, nine days after the Respondent had received the Complainant's application;
(iv) the Complainant appears to recognise that Section 11(3) of the Sunrise Rules provides that the trade mark must be registered at the moment of application but argues that the Respondent may only base its decision on the .eu Implementation Regulation and the Public Policy Regulation, and not the Sunrise Rules;
(v) the Respondent in assessing a domain name application can use the Sunrise Rules;
(vi) on the basis of Article 5.3 of the .eu Implementation Regulation the Respondent was given the authority to implement the Sunrise Rules;
(vii) the Sunrise Rules may contain more rules than the Public Policy Regulation; and
(viii) several previous administrative Panels have upheld the Sunrise Rules in cases such as Case No. 210 (BINGO), Case No. 127 (BPW) and Case No. 293 (Pool).
Accordingly the Respondent submits that the Complaint should be rejected.

DISCUSSION AND FINDINGS

The Public Policy Regulation and the Sunshine Rules

Under Article 22 of the Public Policy Regulation, the Panel has jurisdiction to determine whether the decision taken by the Respondent conflicts with the .eu Implementation Regulation and/or the Public Policy Regulation. Having considered the Factual Background and the Parties' Contentions outlined above, the Panel sets out its decision below.
Article 10.1 of the Public Policy Regulation provides that:-
"Holders of prior rights recognised or established by national and/or Community law and public bodies shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts."
Article 10.1 of the Public Policy Regulation clearly provides that only holders of prior rights shall be eligible to apply to register a domain name during the Sunrise Period.
Article 12.1 of the Public Policy Regulation requires the Respondent to publish the detailed technical and administrative measures used by it in the administration of the Sunrise Period. Under Article 12.1, the Respondent developed and published the Sunrise Rules and the Panel is of the view that the Sunrise Rules form an integral part of the registration procedure for .eu domain names during the Sunrise Period and that applicants are duly bound to follow those rules.
Article 11.3 of the Sunrise Rules provides as follows:-
"The Applicant must be the holder (or licensee, where applicable) of the Prior Right claimed no later than the date on which the Application is received by the Registry, on which date the Prior Right must be valid, which means that it must be in full force and effect."
Based on Article 11.3 of the Sunshine Rules developed by the Respondent it seems very clear to this Panel that the Applicant must hold a valid Prior Right as at the Application Date in order to secure registration under the Sunrise Period system.
The 40 day period for submission of supporting evidence after the application date, as separately provided for under Article 14 of the Public Policy Regulation is in the Panel's view merely a time frame which provides the Applicant with an opportunity to assemble evidence that is supportive of its claim to prior rights. The period starts running from the application date and Article 14 is premised upon that date. It seems to this Panel that the overall scheme of the Public Policy Regulation and of the Sunshine Rules made under the Public Policy Regulation is to enable an applicant to plant its flag in the sand by claiming prior rights at a certain date and it makes no sense and could not have been the intention under the Public Policy Regulation that this date should be the arbitrary date 40 days after the application date.
Article 14 of the Public Policy Regulation makes it clear that all claims for prior rights under Article 10.1 of the Public Policy Regulation must be verifiable by documentary evidence which demonstrates the right under the law by virtue of which it exists. Under Article 10.1 of the Public Policy Regulation only holders of prior rights are eligible to apply to register a domain name during the Sunrise Period. For that

reason the Panel is of the view that the documentary evidence required under Article 14 of the Public Policy Regulation must substantiate an applicant's eligibility to apply to register a domain name during the Sunrise Period i.e. the documentary evidence must demonstrate that the applicant was the holder of a prior right at the application date.
In this Panel's view the Respondent was also entitled under the Public Policy Regulation to develop the Sunshine Rules and properly interpreted the Regulation in Article 11.3 as requiring an applicant to hold prior rights as at the Application Date. Further this interpretation is consistent with the prevailing view taken by other Panels of the Public Policy Regulation, for example in Case No. 00127 (BPW) in which the Panel stated:
"The purpose of the Regulation 874/2004 is, inter alia, to grant domain names during the Sunrise Period on a first come first served basis as properly claims Complainant provided that the applicant can demonstrate a right which is prior to his domain name application".

The Complainant's Case

At the time of the Complainant's application for ets.eu, the Complainant had not even applied to register the Benelux trade mark claimed as the prior right under the application. The application to register the Benelux trade mark ETS was made five days after the submission of the application for the domain name ets.eu on 14 December 2005. The Complainant was not eligible to apply to register the domain name ets.eu during the Sunrise Period until such time as the Benelux trade mark was registered, i.e. 16 December 2005. Accordingly, at the time of the Application for the domain name ets.eu, the Complainant was not the holder of a prior right as required under Article 11.3 of the Sunrise Rules. Therefore, the Respondent properly rejected the Complainant's application, as it was not in compliance with the Sunrise Rules.
The Panel notes the decisions of previous Panels in cases such as Case No. 01407 (LEXOLUTION) and Case No. 00404 (ODYSSEY), concerning claims by applicants to prior rights in trade mark applications that are made before the application date for a domain name but only achieve registration after the application date (i.e. during the 40 day period to submit documentary evidence). Such trade mark applications were not considered valid prior rights for the purposes of a .eu domain name application under the Public Policy Regulations and/or the Sunrise Rules. The Complaint concerns an application for a trade mark that is made after the application date by the Complainant for the domain name ets.eu.
The Panel is also of the view that the Complaint can be distinguished from the previous Administrative Panel decision in Case No. 00778 (PSYCHOLOGY). In that decision, the Benelux trade mark claimed as a prior right was registered on the same day as the .eu domain application and on that basis the Panel upheld the registration as being in accordance with Article 11.3 of the Sunrise Rules. In contrast, the Complainant's trade mark was registered nine days after the application for the domain name ets.eu.
In summary, the Panel finds that the Respondent's decision not to accept the Complainant's application for the domain name ets.eu is not in conflict with either the .eu Implementation Regulation or the Public Policy Regulation and in view of its analysis as set out above, sees no requirement to consider further the Complainant's request to make an order for transmission of any documentation submitted to the Respondent by the validation agent in respect of the Complainant's domain name application.

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	**Alistair Payne**

DATE OF PANEL DECISION 2006-08-09

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The ADR Proceeding relates to a Complaint challenging the decision of the Respondent to reject the Complainant's application for the registration of the domain name ets.eu.
The Complainant applied to register the domain name ets.eu on 7 December 2005. The Respondent rejected the application on the basis that the prior right submitted with the documentary evidence was a Benelux trade mark for the word ETS (Registration No. 0783947) that was applied for on 14 December 2005, and registered on 16 December 2005, i.e. after the date of application for the domain name ets.eu.
The Panel held that as the Complainant was not the holder of a prior right at the time of application for the domain name ets.eu, the Complainant's application was not in accordance with Article 10.1 of the Public Policy Regulation or Article 11.3 of the Sunrise Rules.
The Panel also held that the documentary evidence required under Article 14 of the Public Policy Regulation must demonstrate that an applicant is eligible to apply to register a domain name during the Sunrise Period i.e. the documentary evidence must demonstrate that the applicant was the holder of a prior right at the application date.

On the basis that the Panel did not accept the Complainant's assertion that the Respondent's decision not to accept the Complainant's application for the domain name ets.eu was in conflict with either the .eu Implementation Regulation or the Public Policy Regulation, the Panel saw no requirement to consider further the Complainant's request to make an order for transmission of any documentation submitted to the Respondent by the validation agent in respect of the Complainant's domain name application.
Accordingly, the Panel denied the Complaint.