Panel Decision for dispute CAC-ADREU-001228

Case number	**CAC-ADREU-001228**
Time of filing	**2006-05-17 13:50:16**
Domain names	**mylenses.eu, mylens.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**Eye-2 B.V., Rob van der Leeuw**

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

No other legal proceedings related to the disputed domain names is pending or decided as far as the Panel is aware of.

FACTUAL BACKGROUND

EYE-2 B.V. (hereinafter the “Complainant”) filed applications for registration (hereafter the “Application”) of the following “.eu” domain names (hereafter the “domain names”) :
- mylens.eu
- mylenses.eu
on December 8, 2005.

Applications were based on two registered Benelux nominative trademarks, respectively MYLENS (n° 0679045) of July 18, 2000 and MYLENSES (n°0950107) of November 10, 1999.

On January 12, 2006 the Complainant provided the Respondent with documentary evidence to support both applications. The documentary evidence produced within the 40 days time period set forth in article 8 (5) of the Sunrise Rules comprised certificates of registration of the trade marks on which the applications were based.

However the alleged trade marks were actually registered in the name of a company INTERLENS B.V. which was different from the Applicant.

The Respondent rejected both applications respectively on April 8, 2006 for MYLENS.EU and April 20, 2006 for MYLENSES.EU because the documentary evidence submitted was considered insufficient to establish the prior right of the Complainant to the domain names in the sense of article 10 (1) of the Public Policy Rules.

The Complainant decided to challenge both decisions of rejection notified by the Respondent and filed a Complaint in due time, according to provisions of Article 22 (2) of the Sunrise Rules, on May 17, 2006 seeking annulment of the rejections and requesting that the domain names be granted to the Complainant.

There is no discussion on the point that the Applicant and the Complainant are the same entity.

A. COMPLAINANT

The Complainant claims that the domain names he applied for are registered as trade marks in the name of the Complainant.

He assumes (the Complainant specifies “possibly”) that the rejection of both applications is due to the fact that the owner of the trade marks on which the applications were based is different from the Applicant/Complainant.

He asserts however that the owner of the trade marks officially changed its company name. So that that the owner of the trade marks and the Complainant are the same person. No further details are provided by the Complainant about the period this official change occurred. Official documentation is annexed to the Complaint to support the Complainant’s claim, consisting of two certificate of incorporation before the Business Register of the Hague.

The Complainant argues that both documents bear the same registration number which demonstrates that the trade mark holder and the Complainant are the same.

Consequently he requests that the domain names be granted to the Complainant.

B. RESPONDENT

The Respondent did not file any response to the Complaint within the prescribed term and was found in default by the Court. A notification of Respondent’s default was issued on July 12, 2006.

But the Respondent challenged this notification of default within the 5 day period provided by article B3 (g) of the ADR Rules, and presented arguments to motivate the grounds of its rejection decisions.

No argument was provided to support the annulment of the notification of Respondent’s default per se.
The Respondent’s arguments can be summarized as follows:

The Respondent grounds on articles 10 (1) and 14 (4) of EC Regulation n°874/2004 of April 28, 2004 and on section 20 (3) of the Sunrise Rules to explain that both applications were rejected because the documentary evidence did not prove that the Complainant was the actual owner of the MYLENS and MYLENSES trade marks : “The name of the Complainant and the name of the holders of the trade marks were different.The Registry therefore rejected the Complainant’s application.”

The Respondent claims that article 10 (1) of the EC Regulation 874/2004 states that only the holder of a prior right is eligible to be granted the corresponding domain name, while pursuant to article 14 (4) of the EC Regulation the documentary evidence must clearly show that the Applicant is the holder of the prior right claimed.

The Respondent refers to the NAGEL case (ADR 00119) where the panel decided that article 14 puts the burden with the applicant to prove that it holds a prior right.

The Respondent states that the Complainant submitted documents on the business letterhead of Mylenses.nl which state that there had been a name change as a documentary evidence with its application for registration of MYLENSES.EU. Nevertheless the Respondent reminds that section 20 (3) of the Sunrise rules clearly states that only official documents can be accepted as proof that the name of an entity has changed.

About the new documents submitted by the Complainant, the Respondent merely reminds that the extracts of the Dutch Chamber of Commerce were not enclosed by the Complainant with the documentary evidence.

The Respondent refers to the COLT case (ADR 00294) where the panel decided that “the Complainant did not prove the timely substantiation of the prior right and a copy of the articles of incorporation, enclosed with the Complaint, was submitted too late to be considered” and stated that the complainant failed to substantiate that it was properly licensed as it only submitted evidence thereof during the ADR Proceedings.

Therefore the Respondent requests the panel to disregard the extracts of the Hague Chamber of Commerce and the formal name change document as they were submitted to the Respondent for the first time in the framework of the present ADR proceedings.

Pursuant to article 22 (1) of the EC Regulation n°874/2004 a decision taken by the Registry may only be annulled when it conflicts with the Regulations. With reference to the documentary evidence he was able to examine at the time of the validation of the applications, the Respondent issued a decision that does not conflict with the Regulations.

As a consequence the Respondent claims that the Complaint should be denied.

DISCUSSION AND FINDINGS

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1. On the admissibility of the Respondent's argumentation

The panel notices firstly that the Respondent was found in default insofar as he did not reply to the Complaint in due time.
However the Respondent challenged the notification of Respondent's default issued by the Court in the 5 day period of section B3 (g) of the ADR Rules.

This section also states that in such case it belongs to the Panel in its sole discretion to accept of not arguments supporting a request to challenge the notification of Respondent's default.

The Panel would like to refer to the following statements in ESGE case (ADR 00325):
"The Panel wishes to emphasize that the Respondent, especially being in the present case the EURID itself, is bound by the ADR Rules and by the official terms prescribed therein like any other party.

Article 4 of Regulation EC No. 733/2002 of April 22, 2002 makes it very clear that "the Registry must observe the rules, policies and procedures laid down in this Regulation and the contracts referred to in Article 3".

Applicants for domain name are themselves subject to official deadlines which they must necessarily comply with, save for being subject to the loss of their rights.

The Panel is of the opinion that the Respondent, even though it has been afforded sufficient time and opportunity to respond to the Complainant, has ignored the official time limits imposed by the Rules and filed arguments lately."
In the present case the Respondent challenged of the Notification of Respondent's default.

The Panel notes however that the Respondent does not provide with any relevant argument to support its challenge of the Respondent's default. Its argumentation is strictly limited to discuss the disputed rejection decisions and to motivate why the Panel should deny the Complaint.

It is the Panel opinion therefore that the Respondent's arguments must be found inadmissible in the present proceedings.

2. On the merits of the Complaint

It clearly results from the case that the discussion here is to know whether the Complainant did support its applications with sufficient elements to demonstrate ownership of the trade mark on the basis of which the domain names were based, since the name of the trade mark holder differs from the name of the applicant/complainant.

Such evidence have to be part of the documentary evidence the Applicant has to submit within 40 days after its application, as prescribed in article 14 (4) of the EC Regulation n°874/2004.

In case the name of the Applicant differs from the holder of the alleged prior right, article 20 (3) states that "the Applicant must submit official documents substantiating that it is the same person as (…) the person indicated in the documentary evidence as being the holder of the prior right."

At the time he submitted its documentary evidences related to both applications for the domain names MYLENS.EU and MYLENSES.EU the Complainant produced a non-official declaration of name change, on its business letterhead, stating that INTERLENS B.V. (the trade marks holder) had become EYE-2 B.V. (the Complainant).

The Panel would like to point out the fact that this declaration was only attached to its documentary evidence related to the application for MYLENSES.EU. It should also be noted that both applications had (great) chance to be examined by different Validation Agents.

The Validation Agent who examined the documentary evidence for MYLENS.EU certainly remained unaware of the declaration, so that he did not find any evidence supporting that the holder of the prior right and the Complainant were the same person.
To the Panel opinion, the notification of rejection concerning the application for MYLENS.EU does not conflict with the EC Regulations.

So did the Panel in the VIVENDI case (ADR 00551):
"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."

As to the documentary evidence supporting the application for MYLENSES.EU, and especially the non formal declaration of name change, the Panel examined it very carefully to determine whether such document could satisfy the provisions of article 20 (3) of the Sunrise rules.

If the Panel is aware that the provisions of the EC Regulations n°733/2002 and 874/2004 should be construed as to guarantee a fair and equal treatment for any eligible applicant, it should not overcome an other fundamental purpose as set out in Recital 12 of said Regulation 874/2004 "to safeguard prior rights recognised by Community or national law".

To the Panel's mind, it would be contrary to the spirit of the Regulations and article 20 (3) of the Sunrise Rules to accept the non formal declaration provided by the Complainant as an official document supporting the alleged name change. It would have been even insecure that the Validation Agent have hold this document as official in the sense of acceptable.

A document used to evidence that the holder of the prior right is the same person as the applicant should be issued by an official authority.

Therefore the Panel considers the documentary evidence provided by the Complainant to support its application for MYLENS.EU was insufficient to demonstrate its prior right, and the decision to reject the application notified by the Respondent does not conflict the EC Regulations.

3. On the admissibility of documentation annexed to the Complaint
Article 20 (3) of the Sunrise Rules states that "the Applicant must submit official documents substantiating that it is the same person as (…) the person indicated in the documentary evidence as being the holder of the prior right."

The Rules do not expressly require that such documents be produced at the time of the filing of the documentary evidence.

In the SCHOELLER case (ADR00253) the Panel ruled that:
"It is a moot point as to whether this section places the onus on the Applicant to submit official documents at the time of the filing of the application or whether these official documents may be requested/supplied at a later date ."

So did the Panel in the DOMAINE case (ADR 00174) and in the circumstances of the present case there is no reason to disregard these documents.

The Complainant underlines that both companies have the same registration number. This argument is based on the supplemental evidence attached to the Complaint.

However the main point of the "sunrise appeal period" ADR and the present proceedings is to know whether the disputed decisions by the Respondent to reject the applications for MYLENS.EU and MYLENSES.EU conflict with the EC Regulations.

And the Panel has to recognize that on the basis of the evidence he was able to examine at the time he issued its decisions the Respondent did not conflict with the EC Regulations.

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	**Alexandre Nappey**

DATE OF PANEL DECISION 2006-08-11

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Registry rejected both application for the Registration of MYLENS.EU and MYLENSES.EU on the grounds that the Applicant failed to prove it was the current holder of the alleged Prior Right.

Since the difference was due to a change in its company name, the Complainant requests the rejection decisions be annulled and the domain names be granted to the Complainant.

He provides supplemental documentation with its complaint, consisting of two certificates of incorporation and an official name change document.

Despite the fact he challenged the notification of the Court, the Panel finds the respondent in default and disregards its late arguments.

However the Panel considers that the documentary evidence produced by the Complainant at the time of filing was insufficient to demonstrate its prior right, and even he later enclosed relevant documentation to its complaint, at the time the disputed decisions were issued by the Registry, they did not conflict with the EC Regulations.

Therefore the Complaint is denied.