Panel Decision for dispute CAC-ADREU-001250

Case number	**CAC-ADREU-001250**
Time of filing	**2006-05-18 12:20:50**
Domain names	**voca.eu**

Case administrator

Name	**Josef Herian**

Complainant

Organization / Name	**Voca Limted, Mr Bob Bonnington**

Respondent

Organization / Name	**Name Battery, Ltd**

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 in relation to the disputed domain name.

FACTUAL BACKGROUND

The Complainant in this ADR Proceeding is Voca Limited, a private company, limited by share capital, registered in England and Wales, company number 1023742, having its registered office at Drake house, Homestead Road, Rickmansworth, Hertfordshire, WD3 1FX, England.

The Respondent in this ADR Proceeding is Name Battery, Ltd., according to available WHOIS information.

The Complainant launched a Complaint with the Czech Arbitration Court on May 16, 2006 against the Respondent in respect of the domain name <voca.eu>. The Czech Arbitration Court, after assigning as Time of Filing the date of May 18, 2006, requested EURid verification for the disputed domain name on May 18, 2006 and on May 23, 2006 EURid replied in a non-standard communication, confirming that the disputed domain name was registered with Columbiadomains, LLC, that the current Registrant of the domain name is the Respondent, providing the full contact details that are available in the WHOIS database for the domain name Registrant, technical contact, administrative contact and billing contact, confirming that the domain name will remain locked during the pending ADR Proceeding and indicating that the specific language of the registration agreement as used by the Registrant for the domain name is English.

On May 24, 2006 the Czech Arbitration Court notified the commencement of the ADR Proceeding, informing the Respondent that Respondent's Response was to be submitted within 30 working days from the delivery of the notification.

The Respondent did not comply with the deadline indicated in the Notification of Complaint and Commencement of ADR Proceeding for the submission of a formal Response and the Czech Arbitration Court notified the Respondent of Respondent's default on August 9, 2006. However, before the expiry of the prescribed deadline, the Respondent submitted a non-standard communication on June 22, 2006.

Following an invitation to serve as a Panelist in this dispute, the Panelist accepted the mandate and submitted the Declaration of Impartiality and Independence in due time. The Czech Arbitration Court duly notified the Parties of the identity of the Panelist appointed on August 17, 2006, in accordance with Paragraph B4(e) of the .eu Alternative Dispute Resolution Rules (hereafter "ADR Rules") and the date, by which a Decision on the matter was due, which was specified as September 17, 2006.

In the absence of a challenge of the Panel's appointment by either Party according to Paragraph B5(c) of the ADR Rules, the Czech

Arbitration Court forwarded the case file to the Panel on August 21, 2006.

A. COMPLAINANT

The Complainant in the Complaint contends that the Complainant has traded both within the European Community and elsewhere under the name VOCA since October 2004 and in the course of doing so has spent more than €1,470,000 (GBP1,000,000) in promoting the VOCA brand. The Complainant further contends that the Complainant is the proprietor of United Kingdom trademark registration 2363732—VOCA—registered on May 20, 2004 and United Kingdom trademark registration 2376150—VOCA—registered on October 20, 2005.

The Complainant contends that the Complainant is the registered holder of 42 domain names that incorporate the name VOCA, including the domain names <voca.com>, <voca.co.uk>, <voca.eu.com>, <voca.at>, <voca.ie>, <voca.lu>, <voca.se> and <voca.it> and that the Complainant operates a website at http//www.voca.com.

The Complainant contends that the Complainant has established a legitimate interest in the name VOCA through its continuous use of the name since 2004 by way of articles in the press, radio and television pieces, conferences, and public relation activities and that the Complainant is the holder of national and/or Community trademark law rights in the name VOCA. The Complainant also contends that the name VOCA is a company name protected under United Kingdom law.

Finally, the Complainant contends that, as a limited company registered in England and Wales, company number 1023742, the Complainant satisfies Article 4(2)(b) of Regulation (EC) No 733/2002, and the Complainant, as a result, seeks the remedy specified in Paragraph B11(b) of the ADR Rules, i.e. the transfer of the domain name to the Complainant.

B. RESPONDENT

The Respondent failed to submit a formal Response within the time frame prescribed by the ADR Rules, i.e. within 30 working days from the delivery of the notification of commencement of the ADR Proceeding.

However, before the expiry of the 30 working day period, the Respondent submitted a non-standard communication on June 22, 2006, contending that, although the Complainant in the Complaint contended Complainant's trademark rights in the name VOCA, the Complainant did not demonstrate how the disputed domain name has been registered by the Respondent without rights or legitimate interest or how the disputed domain name has been registered or is being used it in bad faith.

The Respondent contends that there appear to be numerous parties throughout the E.C. using the name VOCA or close variations thereof in respect of products and/or services, and that, therefore, no single party can invoke exclusive rights in respect of the name VOCA. Finally, the Respondent contends that the disputed domain name was not registered with the intention of selling it to a trademark holder for profit.

DISCUSSION AND FINDINGS

ISSUES

1. Respondent's default and settlement negotiations

The Respondent failed to submit a formal Response within the time frame prescribed by the ADR Rules, i.e. within 30 working days from the delivery of the notification of commencement of the ADR Proceeding.

However, before the expiry of the 30 working day period, the Respondent submitted a non-standard communication on June 22, 2006, to a certain extent incorporating elements that can be deemed to be elements of a Response and to a certain extent inviting the Complainant to enter into negotiations concerning a potential transfer of the disputed domain name.

As a formal Response was not submitted by the Respondent by the expiry of the prescribed date, the Czech Arbitration notified Respondent's default on August 9, 2006. The Respondent did not challenge the notification of Respondent's default according to Paragraph B3(g) of the ADR Rules.

Although the Respondent failed to submit a formal Response within the time frame prescribed by the ADR Rules, it is essential to examine whether Respondent's non-standard communication of June 22, 2006 is admissible in this ADR Proceeding.

Paragraph B8 of the ADR Rules states: "In addition to the Complaint and the Response, the Panel may request or admit, in its sole

discretion, further statements or documents from either of the Parties."

When exercising its discretion the Panel is, however, bound to observe procedural guarantees and Paragraph B7(b) reads: "In all cases, the Panel shall ensure that the Parties are treated fairly and with equality."

In light of the fact that, in the present case, the non-standard communication was submitted within the time frame of a formal Response and the admissibility of the non-standard communication was not challenged by the Complainant, the Panel holds the non-standard communication and the information contained therein as admissible in this ADR Proceeding.

In addition, the non-standard communication invited the Complainant to enter into negotiations concerning a potential transfer of the disputed domain name. The Complainant in a non- standard communication expressed interest in what was perceived to be an offer to transfer the disputed domain name. However, no further information has been brought to the Panel's or the Czech Arbitration Court's attention regarding ongoing or concluded settlement negotiations between the Parties in this dispute.

Paragraph A4 of the ADR Rules, entitled "Settlement or Other Grounds for Termination", clearly states:
"(a) The ADR Proceeding will be understood to be concluded once the Panel has received confirmation from both Parties that an agreement has been entered into by the Parties concerning the object of the dispute.
(b) If the Parties wish to negotiate a settlement, the Complainant may request that the Provider or, after its constitution, the Panel suspend the ADR Proceeding for a limited period. The suspension period may be extended by the Panel upon the Complainant's request. Any such suspension shall be without prejudice to the obligation of the Panel to forward its decision on the Complaint to the Provider within the time period specified in Paragraph B12(b) below. Resumption of the ADR Proceeding shall take place automatically upon receipt of a request thereto from either the Respondent or the Complainant or upon the expiration of such limited and specified time period.
[...]"

The Complainant did not submit a request for suspension of this ADR Proceeding to the Panel or the Czech Arbitration Court, nor did the Panel receive any confirmation that an agreement has been entered into by the Parties concerning the object of the dispute.

For these reasons, and in the absence of any other circumstances to indicate otherwise, the Panel will proceed to the examination of the dispute and the rendering of a decision.

2. The relevant provisions

This Complaint arises in relation to the application and interpretation of primarily Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration (hereafter "Regulation 874/2004") and is governed by the ADR Rules and the ADR Supplemental Rules.

Article 21 of Regulation 874/2004 states:
"1. A registered domain name shall be subject to revocation, using an appropriate extra-judicial or judicial procedure, where that name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/or Community law, such as the rights mentioned in Article 10(1), and where it:
(a) has been registered by its holder without rights or legitimate interest in the name; or
(b) has been registered or is being used in bad faith.
2. A legitimate interest within the meaning of point (a) of paragraph 1 may be demonstrated where:
(a) prior to any notice of an alternative dispute resolution (ADR) procedure, the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so;
(b) the holder of a domain name, being an undertaking, organization or natural person, has been commonly known by the domain name, even in the absence of a right recognized or established by national and/or Community law;
(c) the holder of a domain name is making a legitimate and non-commercial or fair use of the domain name, without intent to mislead consumers or harm the reputation of a name on which a right is recognised or established by national and/or Community law.
3. Bad faith, within the meaning of point (b) of paragraph 1 may be demonstrated, where:
(a) circumstances indicate that the domain name was registered or acquired primarily for the purpose of selling, renting, or otherwise transferring the domain name to the holder of a name in respect of which a right is recognised or established by national and/or Community law or to a public body; or
(b) the domain name has been registered in order to prevent the holder of such a name in respect of which a right is recognised or established by national and/or Community law, or a public body, from reflecting this name in a corresponding domain name, provided

that:
(i) a pattern of such conduct by the registrant can be demonstrated; or
(ii) the domain name has not been used in a relevant way for at least two years from the date of registration; or
(iii) in circumstances where, at the time the ADR procedure was initiated, the holder of a domain name in respect of which a right is recognised or established by national and/or Community law or the holder of a domain name of a public body has declared his/its intention to use the domain name in a relevant way but fails to do so within six months of the day on which the ADR procedure was initiated;
(c) the domain name was registered primarily for the purpose of disrupting the professional activities of a competitor; or
(d) the domain name was intentionally used to attract Internet users, for commercial gain, to the holder of a domain name website or other on-line location, by creating a likelihood
of confusion with a name on which a right is recognised or established by national and/or Community law or a name of a public body, such likelihood arising as to the source, sponsorship, affiliation or endorsement of the website or location or of a product or service on the website or location of the holder of a domain name; or
(e) the domain name registered is a personal name for which no demonstrable link exists between the domain name holder and the domain name registered.
4. The provisions in paragraphs 1, 2 and 3 may not be invoked so as to obstruct claims under national law."

Article 22 of Regulation 874/2004 sets out:
"1. An ADR procedure may be initiated by any party where:
(a) the registration is speculative or abusive within the meaning of Article 21;
[…]
2. Participation in the ADR procedure shall be compulsory for the holder of a domain name and the Registry.
[…]
4. Unless otherwise agreed by the parties, or specified otherwise in the registration agreement between registrar and domain name holder, the language of the administrative proceeding shall be the language of that agreement. This rule shall be subject to the authority of the panel to determine otherwise, having regard to the circumstances of the case.
5. The complaints and the responses to those complaints must be submitted to an ADR provider chosen by the complainant from the list referred to in the first paragraph of Article 23. That submission shall be made in accordance with this Regulation and the published supplementary procedures of the ADR provider.
[…]
7. The ADR provider shall examine the complaint for compliance with its rules of procedure, with the provisions of this Regulation and with Regulation (EC) No 733/2002, and, unless non-compliance is established, shall forward the complaint to the respondent within five working days following receipt of the fees to be paid by the complainant.
[…]
11. In the case of a procedure against a domain name holder, the ADR panel shall decide that the domain name shall be revoked, if it finds that the registration is speculative or abusive as defined in Article 21. The domain name shall be transferred to the complainant if the complainant applies for this domain name and satisfies the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No 733/2002.
[…]"

Paragraph B1(b)(10) of the ADR Rules specifies:
"The Complaint shall be submitted in hard copy and in electronic form and shall:
[…] Describe, in accordance with these ADR Rules, the grounds on which the Complaint is made including, in particular,
(i) In case of an ADR Proceeding against the Domain Name Holder in respect of which domain name the Complaint is initiated:
A. why the domain name is identical or confusingly similar to the name or names in respect of which a right or rights are recognized or established by national and/or Community law (as specified and described in accordance with Paragraph B1(b)(9)); and, either
B. why the domain name has been registered by its holder without rights or legitimate interests in respect of the domain name that is the subject of the Complaint; or
C. why the domain name should be considered as having been registered or being used in bad faith.
[…]"

According to Paragraph B11(d) (1) of the ADR Rules:
"The Panel shall issue a decision granting the remedies requested under the Procedural Rules in the event that the Complainant proves
(1) in ADR Proceedings where the Respondent is the holder of a .eu domain name registration in respect of which the Complaint was initiated that
(i) The domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State and/or Community law and; either

(ii) The domain name has been registered by the Respondent without rights or legitimate interest in the name; or
(iii) The domain name has been registered or is being used in bad faith."

Therefore, in light of the aforementioned provisions, it is clear that the burden of proving that a domain name registration is speculative or abusive lies with the Complainant, in that the Complainant needs to invoke the relevant grounds and present the Panel with the necessary evidence in order to make out Complainant's case. In this context, it is imperative to examine, whether the Complainant has proven, firstly, that the disputed domain name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/or Community law and, secondly, that the domain name has been registered by the Respondent without rights or legitimate interest in the name or the domain name has been registered or is being used in bad faith.

It is only if these requirements are satisfied as set out by the relevant provisions that the Complainant may be granted the remedy requested, i.e. the transfer of the disputed domain name.

3. Domain name identical or confusingly similar

The Complainant presented the Panel with proof of registration of the trademark VOCA as a Community trademark and a national UK trademark, in the form of copies of the official certificates of registration issued for the word mark VOCA by the Office for Harmonization in the Internal Market, No. 003917192, registered on November 8, 2005, and for the mark VOCA by the UK Patent Office, No. 2363732, registered on May 20, 2004 and No. 2376150, registered on October 20, 2004, for goods or services in classes 9, 36 and 42 of the Nice classification. Since the evidence disclosed with the Complaint has not been contested by the Respondent, the Panel is satisfied that the Complainant is the proprietor of a Community trademark and a national UK trademark for the name VOCA.

When assessing whether the domain name is identical or confusingly similar to Complainant's recognized right, it is established practice to disregard the top-level part of the domain name, as its existence is dictated by the very nature of the DNS and the inclusion of a gTLD or a ccTLD merely fulfils the function of distinguishing one namespace from others.

As the disputed domain name is <voca.eu>, it is obvious that the disputed domain name is identical to the trademark, in which the Complainant has established to have rights.

Therefore, the Panel is satisfied that the Complainant has proved Article 21(1), first part and Paragraph B11(d)(1)(i) of the ADR Rules.

4. Registration without rights or legitimate interest in the name

The Complainant has not contended that the Respondent has registered the disputed domain name without rights or legitimate interest in the name, nor has the Complainant presented the Panel with any piece of information or evidence, establishing that the domain name has been registered by the Respondent without rights or legitimate interest in the name.

The Complainant has merely confined the analysis in the Complaint to elements establishing Complainant's own trademark rights to the name VOCA for certain goods or services, but that is not enough. The fact that the Complainant is entitled to use the name VOCA in relation to the offering of certain goods or services does not necessarily, and certainly not automatically, mean that any other party is not entitled to the use of a domain name incorporating the name VOCA for a number of plausible reasons.

One might argue that Complainant's task is difficult, but not impossible, as it requires the Complainant to prove a negative. However, in the present case, the Complainant has failed to both contend that the domain name has been registered by the Respondent without rights or legitimate interest and provide adequate evidence to that effect. Complainant's contentions that the Complainant is the registered holder of 42 domain names that incorporate the name VOCA, which are unhelpfully unaccompanied by actual proof of ownership, cannot make up for Complainant's complete absence of reference and substantiation of why the domain name has been registered by the Respondent without rights or legitimate interest or indeed justify an inference of Respondent's lack of rights or legitimate interest.

Furthermore, the fact that the Panel has not been presented with relevant evidence by the Respondent evidencing or at least indicating Respondent's rights or legitimate interest in the name does not mean that the Complainant should be entitled to default judgment. A prima facie establishment by the Complainant of Respondent's lack of rights or legitimate interest in the name is needed before the burden of proof can shift to the Respondent to present rebuttal evidence. In that sense, the Complainant has failed to discharge the minimal burden of proof. It is deeply regrettable and unfortunate that, even in the absence of evidence on the part of the Respondent, the Complainant has not adequately satisfied the requirements to be granted the remedy sought.

Therefore, the Panel has no other choice, but to find that the Complainant has not proved Article 21(1)(a) of Regulation 874/2004 and Paragraph B11(d)(1)(ii) of the ADR Rules.

5. Registration or use in bad faith

The Complainant has not contended that the disputed domain name has been registered or is being used in bad faith, nor has it presented the Panel with any piece of information or evidence, establishing that the disputed domain name has been registered or is being used in bad faith.

The Complainant has merely confined the analysis in the Complaint to elements establishing Complainant's own trademark rights to the name VOCA for certain goods or services, but that is not enough. The fact that the Complainant is entitled to use the name VOCA in relation to the offering of certain goods or services does not necessarily, and certainly not automatically, mean that the disputed domain name has been registered or is being used in bad faith.

Again, in the present case, the Complainant has failed to both contend that the domain name has been registered or is being used in bad faith and provide adequate evidence to that effect. Complainant's contentions that the Complainant is the registered holder of 42 domain names that incorporate the name VOCA, which are unhelpfully unaccompanied by actual proof of ownership, cannot make up for Complainant's complete absence of reference and substantiation of why the disputed domain name has been registered or is being used in bad faith or indeed justify an inference of registration or use in bad faith.

Furthermore, the fact that the Panel has not been presented with relevant evidence by the Respondent evidencing or at least indicating that the Respondent has not registered the disputed domain or is using it in bad faith, apart from Respondent's allegation in the non-standard communication of June 22, 2006 that the Respondent did not register the disputed domain name with the intention of selling it to a trademark holder for profit, does not mean that the Complainant should be entitled to default judgment. A prima facie establishment by the Complainant of why the domain name should be considered as having been registered or being used in bad faith is needed before the burden of proof can shift to the Respondent to present rebuttal evidence. In that sense, the Complainant has failed to discharge the minimal burden of proof. It is deeply regrettable and unfortunate that, even in the absence of evidence on the part of the Respondent, the Complainant has not adequately satisfied the requirements to be granted the remedy sought.

Therefore, the Panel has no other choice, but to find that the Complainant has not proved Article 21(1)(b) of Regulation 874/2004 and Paragraph B11(d)(1)(iii) of the ADR Rules.

6. Panel's general powers and mandate

Paragraph B7 sets out the general powers of the Panel. The provision reads:
"(a) The Panel shall conduct the ADR Proceeding in such manner as it considers appropriate in accordance with the Procedural Rules. The Panel is not obliged, but is permitted in its sole discretion, to conduct its own investigations on the circumstances of the case.
(b) In all cases, the Panel shall ensure that the Parties are treated fairly and with equality.
(c) The Panel shall ensure that the ADR Proceeding takes place with due expedition.
(d) The Panel shall determine in its sole discretion the admissibility, relevance, materiality and weight of the evidence."

According to Paragraph B11(a) of the ADR Rules, a Panel shall decide a Complaint on the basis of the statements and documents submitted and in accordance with the Procedural Rules.

According to Paragraph B11(d) (1) of the ADR Rules:
"The Panel shall issue a decision granting the remedies requested under the Procedural Rules in the event that the Complainant proves (1) in ADR Proceedings where the Respondent is the holder of a .eu domain name registration in respect of which the Complaint was initiated that
(i) The domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State and/or Community law and; either
(ii) The domain name has been registered by the Respondent without rights or legitimate interest in the name; or
(iii) The domain name has been registered or is being used in bad faith."

By virtue of the aforementioned provisions, the Panel's mandate is to decide the Complaint on the basis of submitted statements and documents in accordance with the Procedural Rules. The Panel may, but is not obliged to, conduct its own investigations on the circumstances of the case. In the event that such investigations are conducted, they cannot prejudice the fair treatment and equality of the Parties, nor can they be so extensive as to call in question the Panel's impartiality and independence in the eyes of the Parties or lead

to excess of mandate.

In the present case, the Complainant has proven that the Complainant is the proprietor of the Community and national UK trademark registration VOCA for certain goods or services, but the Complainant has neither invoked nor adequately established fundamental elements for the success of the Complaint, i.e. that either there is a prima facie lack of rights or legitimate interest in the name on the part of the Respondent or that the disputed domain name has been registered or is being used in bad faith. In doing so, the Complainant failed to adequately satisfy minimal standards of burden of proof. Failure to do so can only lead to the consequence, according to Paragraph B11(d)(1), that the Complainant has not proven that the domain name registration is either speculative or abusive. The onus is on the Complainant to produce and present the Panel with a full, detailed Complaint satisfying the requirements of Paragraph B1(b)(10) of the ADR Rules, and, in particular, to invoke all relevant grounds and support the relevant contentions with documentary evidence.

The Panel cannot substitute the Complainant in Complainant's role and sole responsibility to present Complainant's case and the Panel cannot base its decision on speculations and/or assumptions.

In the absence of evidence to conclude otherwise, Panel has no choice, but to dismiss the Complaint.

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

Foteini Papiri
Sole Panelist
Dated: September 17, 2006

PANELISTS

Name	**Foteini Papiri**

DATE OF PANEL DECISION 2006-09-17

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant launched an ADR Proceeding against the Respondent in respect of the domain name <voca.eu>. The Complainant contended that the Complainant is the proprietor of the Community and national UK trademark registration VOCA and should, therefore, be entitled to transfer of the disputed domain name incorporating Complainant's registered trademark.

According to Articles 21(1) and 22(11) of Regulation 874/2004 and Paragraph B11(d)(1), in order to be granted the remedy sought, the Complainant bears the burden of, at the very least prima facie, proving that:
1. the domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State and/or Community law and; either
2(a). the domain name has been registered by the Respondent without rights or legitimate interest in the name; or
2 (b). the domain name has been registered or is being used in bad faith.

After careful examination of the Complaint and the accompanying evidence, the Panel found that although the Complainant proved that it held trademark rights in the name VOCA, the Complainant failed to both invoke and establish that either the domain name has been registered by the Respondent without rights or legitimate interest in the name or that the domain name has been registered or is being used in bad faith.

The Panel found that, according to Paragraph B11(d)(1) of the ADR Rules, the Complainant failed to prove that the domain name registration was speculative or abusive and, therefore, the Complaint was denied.