Panel Decision for dispute CAC-ADREU-001387

Case number	**CAC-ADREU-001387**
Time of filing	**2006-05-30 12:48:54**
Domain names	**biomark.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**Peter A. Rueckert, General Manager**

Respondent

Organization / Name	**Domain Handler**

FACTUAL BACKGROUND

The disputed domain name is <biomark.eu>. It was registered on April 7, 2006 (i.e. the first day of the Land Rush period) by the Respondent, Domain Handler of the organisation Lexicon Media Ltd., which has an address in Hull, England.

The Complainant claims to be the owner and user of the name BIOMARK in most of the EU countries as well as many other countries worldwide. The Complainant also has a pending European Community trade mark for BIOMARK and a website at <www.biomark.info> in several different languages.

Although given the opportunity to do so, the Respondent did not file a Response.

A. COMPLAINANT

The Complaint was extremely short and, in its entirety, reads as follows –

“Under Eurid rules, owners of European trademarks have first right to register this trademark also as domain.eu.
Biomark GmbH owns and has used the trademark "Biomark" for most of the old EU countries and for many countries worldwide. Biomark has also applied for common EU trademark "Biomark", receipt confirmed by Harmonisation Office in Alicante on 24. Sept. 2003, under confirmation number: 003355286.
Biomark companies (in Germany, UK, U.S.A. and India) use the trademark "Biomark" for products worldwide.
Biomark has a website: www.biomark .info, which is available in several languages (English, German, French, Spanish) and more are planned.
Biomark email worldwide is: biomark@biomark.info or .....@biomark.info.”

The remedies sought by the Complainant are –
• To lock the disputed domain name <biomark.eu> during the pending ADR Proceeding;
• To cancel the ownership of the disputed domain name by Lexicon Media Ltd; and
• To award ownership of the disputed domain name to Biomark GmbH.

B. RESPONDENT

There was no Response from the Respondent.

DISCUSSION AND FINDINGS

Although the Respondent did not file any Response, that does not necessarily mean that he has no answer to the Complaint. It is still incumbent on the Complainant to make out a case and a credible Complaint, after which the burden of proof falls upon the Respondent to rebut it.

Although this is an inter partes dispute, and not one filed against EURid, it still falls to be decided in accordance with the .eu Alternative Dispute Resolution Rules ("the ADR Rules"). According to paragraph B.1(b)(10) of these Rules, when a Complaint is made against a domain name holder, the grounds on which it is made should include, in particular –

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; 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

The first question to be addressed concerns the identity of the Conplainant. In the Complaint the Complainant is stated to be a "Mr. Peter A. Ruecker, General Manager". However the rights referred to in the Complaint belong to a company called "Biomark GmbH". One assumption could be that Mr. Ruecker is the General Manager of Biomark GmbH, but this is a legal proceeding and in such a proceeding one cannot proceed on the basis of an assumption, a hunch, or guesswork. Consequently, since Mr. Ruecker has neither claimed nor proved that he has any interest in the name BIOMARK, the Complaint must be denied.

However, as the ADR proceedings are at an early stage of their development, and as few inter partes Decisions have yet to be published, for the benefit of the parties and also of future Complaints, the Panel will nevertheless proceed to examine the facts of the case as if the Complaint had been correctly filed by Biomark GmbH and as if it is that company which is the Complainant.

So far as A of the above three requirements is concerned, the Complainant claims to own and to have used the trade mark BIOMARK, but has provided no proof thereof. Nor have there been provided details of any registration or application for this mark, other than a pending CTM application No. 3355286. In other words, with the exception of this trade mark application (which the Panel discusses below), the Complainant has failed to comply with paragraph B.1(b)(9) of the ADR Rules which states that for every name in respect of which a Complaint is brought a Complainant must "describe exactly the type of right(s) claimed" and "specify the law or law(s) as well as the conditions under which the right is recognized and/or established".

So far as the pending CTM application is concerned, the Complainant has admitted that this mark is not yet registered, and this is confirmed by the records of the OHIM in Alicante, where it is shown as being still pending (possibly because it is the subject of a still unresolved opposition). However the ADR Rules do not require that a Complainant's trade mark should be registered, just that the rights in it be recognised or established by, for example, Community law. The law on Community trade marks is contained in Council Regulation No, (EC) 40/94. Article 9.3 of this Regulation states that "The rights conferred by a Community trade mark shall prevail against third parties from the date of publication of registration of the trade mark." In the case of the CTM application for BIOMARK this publication had not occurred before the Complaint was filed. Therefore, as yet, the Complainant has no rights in it and, in the opinion of the Panel, although it is clearly identical to the disputed domain name, it is not a sufficient basis for a claim under paragraph B.1(b)(10)A.

It is true that the Complainant owns the domain name <www.biomark.info> but in the opinion of the Panel this is not "a right

recognized or established by the national law of a member State and/or Community law" which is a requirement of paragraph B.1(b)(9) of the ADR Rules.

Consequently, in the absence of any proof of any other rights that the Complainant may have acquired in the name BIOMARK either through registration or use, his Complaint must fall at the first hurdle.

Neither does the Complaint satisfy the requirements of paragraphs B or C. In his Complaint, the Complainant has not made any reference either to the Respondent's lack of rights or legitimate interest in the disputed domain name, or to its registration or use in bad faith. Instead, the Complainant only implies that since he has trade mark rights in the name BIOMARK, and because it is the "owners of European trademarks" who have the first right to a .eu domain name, he (presumably) should have been awarded the disputed domain name. But it was only during the Sunrise Period that the owners of trade marks had a priority to register .eu domain names, and this Period expired the day before the disputed domain name was registered. Furthermore, as outlined above, the Complainant's alleged claim to own the trade mark BIOMARK in most of the old European Countries has not been documented.

Therefore, in the opinion of the Panel even if the Complainant had been Biomark GmbH, it has not even begun to make out a credible case and so the Complaint would have failed in any case.

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	**David Tatham**

DATE OF PANEL DECISION 2006-09-06

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complaint was filed by Mr. Peter A Rueckert against the domain name <biomark.eu> which was registered by Domain Handler of the organisation Lexicon Media Ltd.

The Complainant claimed that a company called Biomark GmbH owned and used the trade mark BIOMARK in many EU countries as well as worldwide. This company also had a pending Community trade mark application and a website at www.biomark.info. He also stated that it was the owners of European trade marks who had the first right to register them as .eu domain names.

The Complaint was timely filed, but there was no Response.

The Complainant was an individual and made no claim to own the name BIOMARK himself. As a consequence, the Complaint failed.

However the Panel proceeded to discuss the case as if it had in fact been filed by Biomark GmbH.

In an inter partes dispute, a Complainant must say: why the domain name is identical or similar to his prior right, and either why the holder has no legitimate rights or interest in it, or why it was registered in bad faith.

The only alleged prior right clearly identified was a still pending Community trade mark application, but rights in a CTM only arise when the registration of the mark is published so the Panel held that the first of the above requirements had not been proved. So, in the absence of any provable rights, and also without any proof or argument that the Respondent either had no

legitimate rights or interest in the disputed domain name or that it had been registered in bad faith, a Complaint filed in the name of Biomark GmbH would also have been denied.