Panel Decision for dispute CAC-ADREU-001505

Case number	**CAC-ADREU-001505**
Time of filing	**2006-05-25 15:21:36**
Domain names	**hospital.eu**

Case administrator

Name	**Josef Herian**

Complainant

Organization / Name	**Christian Marolt**

Respondent

Organization / Name	**Traffic Web Holding BV, B.H. M. van der Heijden**

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 Complainant states that he is in progress to challenge the domain name in the Netherlands at the Netherlands Merken Bureau.

FACTUAL BACKGROUND

1. History of the registrations

On December 7, 2005 11:10:18 TRAFFIC WEB HOLDING BV (hereafter TWH or the Respondent) a company incorporated under the Laws of the Netherlands filed a request for registration of the domain name <hospital.eu> (hereafter the Domain Name) under Sunrise 1 period.

A few minutes later the same day, December 7, 2005 11:26:26, Mr Christian MAROLT (hereafter the Complainant) an individual established in Belgium filed its own request for the registration of the same domain name under Sunrise 1 period.

The Respondent was given 1st position in the queue of applicants, the Complainant obtained rank 2, on a « first come, first served » basis.

Both parties provided documentary evidence supporting their applications to the validation agent within the 40 days period prescribed under article 8 § 5 of the Sunrise Rules.

On January 13th, 2006 the validation agent received documents proving that the Respondent is the owner of a prior right on the wording HOSPITAL consisting of a Benelux nominative trademark registered on November 24, 2005 under n°0779740.

The Complainant provided supporting evidence to show its right on HOSPITAL registered as a Benelux figurative trademark “E HOSPITAL” n° 0641063 since November 26, 1998, of which the validation agent acknowledged receipt on January 16th, 2006.

The Registry was satisfied with the Respondent’s first ranked application and the disputed domain name was accepted in the name of TWH. The Complainant’s application was not examined.

The Sunrise appeal period to challenge the decision made by the Registry ended on May 20th, 2006, 23:59:59.

2. History of the ADR proceeding

On May 20th, 2006, 23:55:40, the Complainant filed an ADR proceeding via e-mail against the domain name holder, i.e. the Respondent,

and not against the Registry.

The complaint was received in hard copy on May 25th, 2006.

After having checked the complaint, the case administrator notified that the time of filing was May 25th, 2006.

Having received the documents regarding the proceeding only on June 21st, 2006, the Respondent sent a non standard communication on July 20th, 2006 through its authorized representative, asking whether it should file a response in this case insofar as to its opinion the Complaint should have been filed against the Registry and not the domain name holder.

On the same day, the Complainant sent a non standard communication to challenge the Respondent's argumentation.

The Respondent filed its official response to the Complaint on August 1st, 2006, the case administrator checked on August 10th, 2006.

On the same day, the Panel was appointed by the Court.

A. COMPLAINANT

A. Complainant

The Complainant's submissions in its very documented complaint and subsequent non standard communications may be summarized as follows :

1. Speculation is a commonly known problem in connection with domain name registrations. Some companies like the Respondent have registered many trademarks for the purpose of applying for the respective domain names under Sunrise 1 period, and subsequently transfer them for valuable consideration.
2. The domain name in dispute is identical to the Complainant's registered trademark HOSPITAL, as the characteristic element of the combined trademark is the word HOSPITAL.
3. The Complainant is the owner and publisher of Europe's leading hospital management publication, a trilingual journal name HOSPITAL, since 1999.
4. He is also the holder of the domain name <hospital.be> since 1999.
5. He claims copyright on the wording HOSPITAL, as being the title of the journal.
6. The Benelux trademark held by the Respondent on HOSPITAL is registered for lubricants. There are absolute and also relative grounds to invalidate said trademark: the term HOSPITAL is not suitable to connect lubricants to the Respondent. Therefore the trademark lacks distinctiveness. It is not valid and incontestable.
7. The Respondent is a specialized internet company and has no intention to use the disputed domain name for purpose of lubricants. It has really no other intention than to make an unlawful profit out of the disputed domain name.
8. The Respondent misused the procedural rules and acted contrary to the intentions of the Commission Regulations. It has no right nor legitimate interest in the disputed domain name.
9. Furthermore the domain name was registered primarily for the purpose of selling, renting, or otherwise transferring it, i.e in bad faith.
10. Considering that he satisfies the eligibility criteria set out in the Regulations, the Complainant requests that the disputed domain name be transferred to its profit.
11. In later non standard communications the Panel accepted to consider, the Complainant referred to the previous ADR decision in HELSINKI case (ADR 00475) where the Panel found TWH in bad faith because of speculative and abusive registration.
12. There is no evidence in the Sunrise Rules that it is not possible to file a complaint against the domain name holder before such domain is activated.
13. The Complainant refers to the German High Court decision in the SHELL.DE case, where the Court ruled that the economical interest of a party has also to be taken into account by deciding on a domain name.

B. RESPONDENT

B. Respondent
1. Since the domain name HOSPITAL.EU had not been activated at the time the complaint was filed, the Respondent claims that the complaint could not have been initiated against the domain name holder.
2. Before activation of the disputed domain name, a complaint may be initiated only against the Registry.
3. The Respondent refers also to the decision in the MEDIATION case (ADR 00335) where the panel ruled that a complaint filed within the 40 day period after the decision to register the domain, could only be addressed against the Registry. In that case the Court did not consider the complaint as addressed against TWH.

4. Therefore the Respondent requests that the complaint be dismissed.

DISCUSSION AND FINDINGS

1. Influence of an other legal proceeding on the ADR proceeding

In the complaint, the Complainant informed the Court that he was in progress of starting a challenge of the domain name HOSPITAL.EU before the Netherlands Merken Bureau.

The panel is of the opinion that such proceeding should have been initiated against the trademark HOSPITAL registered by the Respondent before the Benelux Trademark Office.

An opposition proceeding regarding a trademark should have furthermore no consequence on the ADR proceeding.

Anyway, with reference to paragraph A5 of the ADR Rules “The conduct of the ADR Proceeding shall not be prejudiced by any court proceeding, subject to Paragraph A4(c) above”

Paragraph A4 (c) states that “The Panel shall terminate the ADR Proceeding if it becomes aware that the dispute that is the subject of the Complaint has been finally decided by a court of competent jurisdiction or an alternative dispute resolution body.”

To the panel’s best knowledge no final decision was issued in this proceeding.

Therefore a decision shall be issued in the present ADR proceeding.

2. Admissibility of the Complaint filed against the domain name holder.

The disputed domain name has been accepted by the Registry on April 11, 2006. The deadline for filing a complaint against the Registry under sunrise appeal period was May 20th, 2006, according to paragraph 26 (1) of the Sunrise Rules.
In the present case, the complaint has been filed via e-mail on May 20th, 2006 23:55:40. A proof of payment is also attached to the complaint which shows that a wire transfer has been ordered by the Complainant on May 20th, 2006 22:33.

Therefore the panel is of the opinion that the Complainant tried hard to fill his complaint within the 40 day time period of the Sunrise Appeal Period.

However the complaint has been filed against the domain name holder instead of the Registry.

It has also to taken into account the fact that the complaint was received in hardcopy together with the complete fee on May 25th, 2006. The official time of filing set by the Case Administrator was May 25th, 2006, i.e. after the deadline of the Sunrise Appeal Period.

Nonetheless after the deadline for Sunrise Appeal Period set out in paragraph 26 (1) of the Sunrise Rules, only an ADR proceeding filed against the domain name holder may be initiated.

Consequently it must be determined whether the ADR proceeding has been initiated on May 20th, 2006 before the end of the Sunrise Appeal Period or on May 25th, 2006 after the deadline.

The panel here refers to previous cases where it was decided that a complaint was filed at the date it was submitted via the online platform (ADR 00119 – NAGEL, and particularly ADR 00335 – MEDIATION).

In that decision the panel stated : “(The) Complaint was filed on 16 March 2006, i.e. before the forty day period expired and the name had to be activated.
For this reason, RvR Complaint against TWH cannot be admitted under any circumstances, and the decision of the ADR Centre to have the Complaint addressed only against EURid was correct."

It results also from the MEDIATION case that the time limit to initiate an ADR proceeding against the Registry under Sunrise Appeal Period, and consequently the date from which a complaint may be filed against a domain name holder, also depends on the status of the domain name in dispute.

According to paragraph B1 (a) of the ADR Rules “For the avoidance of doubt, until the domain name in respect of which the Complaint is

initiated has been registered and activated, a party can initiate an ADR Proceeding only against the Registry."

In the present case the panel notes from the parties contentions that at the time the complaint was filed by the Complainant, the disputed domain name was accepted but not yet registered nor activated.

In its non formal response of July 20th 2006 the Respondent declared that the domain name had not been activated yet. On the same day, the Complainant replied to this statement and claimed that if a trademark owner should wait until the disputed domain name is activated, it would certainly violate the purpose of ADR.

The complainant's statement implies that the domain name in dispute was indeed not activated at the time the complaint was initiated.

Having consideration to the fact that the complaint was filed before the deadline for Sunrise Appeal Period and that the domain name in dispute was not yet registered and activated, such a complaint could only have been filed against the Registry and not the domain name holder.

Whatever the merits of the complaint, the panel cannot examine the substance of the case.

As a consequence the panel must dismiss the complaint, due to formal deficiency.

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 2006-09-10

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The complainant applied for the registration of the domain name HOSPITAL.EU under sunrise 1. Its application ranked 2 after the Respondent's application.

Both parties provided documentary evidence to the Registry showing their respective trademark rights on the wording HOSPITAL.

The Respondent's application was accepted by the Registry on a 1st come, 1st served basis.

The 40 day-period to challenge the decision of the registry ended on May 20th, 2006 24:00:00.
The complainant initiated a complaint on May 20th, 2006 23:55:40.
However the complaint was filed against the domain name holder instead of the Registry.

The Complainant claimed that the disputed domain name had been registered without right nor legitimate interest and in bad faith by the Respondent, which is a domain name grabbing company.

The Respondent replied that the complaint was formally deficient since it was filed against the domain name holder during the Sunrise Appeal Period and before the name be registered and activated.

Having consideration to the Sunrise Rules paragraph 26 (1) and ADR rules paragraph B1(a), and with regard notably to the panel's decisions in ADR 00119 NAGEL and 00335 MEDIATION, the panel rules that :

A complaint submitted within the 40 day-period set out by the Rules for Sunrise Appeal Period and before the domain name in dispute is definitely registered and activated must be brought only against the Registry.

Whatever the merits of the content, the panel has to dismiss the complaint.