Panel Decision for dispute CAC-ADREU-001800

Case number	**CAC-ADREU-001800**
Time of filing	**2006-06-28 15:22:39**
Domain names	**vacation.eu, domain.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**Simon Hamberger**

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

None of which the Panel is aware.

FACTUAL BACKGROUND

Complainant in this administrative proceeding is Mr. Simon Hamberger, a natural person. His place of residence and his principal place of business is Remchingen, Germany. The Complainant runs a business in the field of IT services and consulting. The Complainant runs his business under the name “www-services”. This term is used by the Complainant as a trade name and is neither registered as a trade mark nor is it used as a Company name.
Complainant is the holder of two Swedish word marks. The word mark “domain” registered under the Number 370993 and the word mark “vacation” registered under the number 375228.
On December 7, 2005, Complainant submitted two applications for the domain names «domain.eu» and «vacation.eu», respectively at 11:00:08.760 and 11:01:14.286.
From EURid public database it appears that Complainant timely filed the related documentary evidence.
EURid rejected Complainant’s applications for the disputed domain names.
The factual and legal grounds for both domain name applications are identical. Therefore this ADR-Dispute will refer to both applications at the same time.

A. COMPLAINANT

Complainant's statements are as follows:

Complainant has claimed prior rights for two registered trade marks. These two word marks, “domain” and “vacation” were registered at the Swedish trademark office on 2005-03-04 and on 2005-09-30 respectively. Complainant thus affirms that this corresponds with the terms in Section 13 (1) (i) of the Sunrise Rules. As both trademarks were registered in 2005, they both were in full force and effect at the time of the domain name applications.

Complainant maintains that the documentary evidence clearly proves that the Applicant and Complainant is the holder of the claimed prior rights.

Complainant acknowledges that the technical handling of the fields of the online form might be the cause for this ADR proceeding. In fact, from the overview page it appears that it is the organisation “www-services” that has applied for the domain names. This may have confused the Registry whilst validating the documentary evidence.

Complainant affirms that under the laws of the Federal Republic of Germany, if a person is a trader or merchant, he has the opportunity

to register the name of his business in the register of companies. This name would be protected by § 17 HGB, section 17 of the commercial code of Germany. If a business is being carried out by a legal entity, this legal entity is allowed to carry its own name under protection of § 5 MarkenG, section 5 of the German trademark law. In all other cases, the natural person carrying out a business can use a certain name as a trade name for the business itself. This name is protected under § 12 BGB, section 12 of the civil code of Germany.

Consequently, Complainant asserts that Simon Hamberger and www-services are the same entity. Accordingly, Complainant affirms that from the detailed information for his domain name applications in the Whois-Database it is clear that he (Simon Hamberger), has also used his own name as well as the trade name (www-services) of his business. Thus it must have been clear to the Validation Agent that the Complainant and the trademark owner are identical. The name “Simon Hamberger” as well as the address is identical in the domain name applications and the trademark certificates.

Complainant, while admitting that there was not an immediate and perfect match between the Documentary Evidence and the Organization field in the domain name applications, maintains that this was not a sufficient excuse to reject the application for a domain name out of hand.

Complainant indeed stresses that in the circumstances of the case, the Validation Agent could have easily cleared up any doubts by seeking and obtaining further proof of identity despite the differences in the name and organization field.

Complainant’s Remedies Sought are:
1. The annulment of the decisions taken by the Registry, and
2. The transfer of the domain names domain.eu and vacation.eu to Complainant.

B. RESPONDENT

Respondent rejected Complainant’s application for the disputed domain names on the following grounds:

Article 10 (1) of Commission Regulation (EC) No 874/2004 of 28 April 2004 (hereafter "the Regulation") states that only holders of prior rights which are recognised or established by national or Community law shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts.

Pursuant to article 14 of the Regulation, the applicant must submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question. Based on this documentary evidence, the validation agent shall examine whether the applicant has prior rights on the name.

Section 21 (2) of the Sunrise Rules states that the validation agent shall examine whether an applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of documentary evidence it has received.

www-services (hereafter "the Applicant") applied for the domain names "VACATION" and "DOMAIN" on 7 December 2005. The validation agent received the documentary evidence for the two domain names on 08 December 2005, which was before the 16 January 2006 deadline.

The validation agent concluded from the documentary evidence that the Applicant was not the holder of prior rights. Therefore, the Respondent rejected the Applicant's application.

Respondent's response to Complainant's statements is as follows:

The Applicant's name ("www-services") is alleged to be nothing more than the trade name under which the Complainant trades as a sole trader. It is neither registered as a trademark, nor used as a company name. The Complainant agrees that "this may have confused the Registry whilst validating the documentary evidence in this way that the domain applicant and the trademark owner are not identical".

However, the Complainant argues that this error should have been corrected by the validation agent. The Complainant argues that as his name was mentioned on the cover letter (albeit not as the applicant) the validation agent should have understood the Complainant's/Applicant's intentions.

The application for the domain names "VACATION" and "DOMAIN" was made by the company "www-services" and not by the Complainant Mr. Simon Hamberger.

A request for the application of a domain name made during the Sunrise Period must contain the information listed in section 3 (1) of the Sunrise Rules.

In particular, section 3 (1) i of the Sunrise Rules states that: "where no name of a company or organisation is specified, the individual requesting registration of the Domain Name is considered the Applicant; if the name of the company or the organisation is specified, then the company or organisation is considered the Applicant". Section 2.3 of the .eu Domain Name WHOIS Policy, entitled Identifying Natural Persons and Legal Persons, repeats the same rule: " If the 'Company' field is completed, it is assumed that the company is the Registrant".

Thus if one specifies a company in the application form (as was done in casu), the actual applicant will be the company and not the natural person who submitted the application (the natural person will only be considered as the contact person within the company).

In casu the cover letter which the Applicant annexed to its application for the "VACATION" and "DOMAIN" domain names clearly and specifically mentions the company name "www-services" in the "organisation" field. Even though the name of the Complainant ("Mr Simon Hamberger") was also mentioned on the cover letter, the company "www-services" must be considered as the domain name applicant.

The documentary evidence submitted did not prove that the company " www-services" was the holder of prior rights on the "VACATION" and "DOMAIN" names

Pursuant to article 14 of the Regulation, it is the applicant's responsibility to submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question. Based on this documentary evidence, the validation agent shall examine whether the applicant has prior rights on the name.

The applicant for the "VACATION" and "DOMAIN" domain names was not the Complainant, Mr. Simon Hamberger, but the company www-services. The documentary evidence must therefore prove that the company "www-services" and not Mr. Simon Hamberger personally, holds prior rights on the "VACATION" and "DOMAIN" signs.

Pursuant to article 20.3 of the Sunrise Rules, it is moreover up to the applicant to dispel in its documentary evidence any potential doubts on the ownership of the prior rights: "If, for any reasons other than as are referred to in Section 20(1) and 20(2) hereof, the Documentary Evidence provided does not clearly indicate the name of the Applicant as being the holder of the Prior Right claimed (e.g. because the Applicant has become subject to a name change, a merger, the Prior Right has become subject to a de iure transfer, etc.), the Applicant must submit official documents substantiating that it is the same person as or the legal successor to the person indicated in the Documentary Evidence as being the holder of the Prior Right".

In the present case, the validation agent was provided with two extracts from the Swedish Trademark Register for the "VACATION" and "DOMAIN" trademarks. These extracts however mentioned the Complainant, "Mr. Simon Hamberger", as the right holder, not the actual Applicant i.e. www-services. Moreover, the documentary evidence did not demonstrate (or even contend) that the Applicant ("www-services ") and the holder of the prior right ("Mr. Simon Hamberger") were the same person.

Facing such conclusions, the Respondent had no other option than to reject the application as the Applicant did not demonstrate that it was the holder of the claimed prior right.

A similar situation was discussed in case Nr. 294 (COLT), in which the Panel clearly explained that: "In this respect, the attention must be drawn to section 21.2 of the Sunrise Rules that expressly states that the Validation Agent will examine whether the applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of Documentary Evidence received. It means that an applicant should not expect the Registry or Validation agent to engage in speculation and/or embark upon its own enquiry in relation to the exact connection between two entities simply because they have similar names".

The Complainant submits new information to explain the difference in the names of the Applicant ("www-services") and the holder of the prior right ("Mr. Simon Hamberger "), thereby trying to correct its mistake. Indeed the Complainant now argues that the Applicant's name ("www-services") is alleged to be nothing more than the trade name under which the Complainant trades as a sole trader.

The Respondent wishes to stress that this information was not enclosed with the documentary evidence, which means that the Respondent could not use this information in taking its decision. Therefore, this new information may not be taken into consideration to evaluate whether the Respondent's decision conflicts with the Regulation, which is the only purpose of the present ADR proceedings.

Of course, "www-service" was the first applicant in the line, but because it failed to fully comply with the substantial requirements, its applications must be rejected and the next applicant in line must now have the opportunity to try to demonstrate its prior rights.

Any right given to the Complainant to correct its defective application at this stage of the procedure would be unfair to the other applicants and would clearly be in breach of the Regulation and the Sunrise Rules (see case n° 706 (AUTOWELT)).

For these reasons, the Complaint's complaint must be rejected.

DISCUSSION AND FINDINGS

Discussion and Findings:
Complainant in its complaint affirms that Complainant (Simon Hamberger) and the Applicant (www-services) are the same Entity, consequently the Applicant and Holder of prior rights are coincident, therefore EURid should have registered the disputed domain names in the name of this Entity i.e. Simon Hamberger/www-services. In addition, whilst admitting that the validation agent might have been confused by the existing differences between the Applicant's name, www-services and the Complainant's name, Simon Hamberger, Complainant affirms that it would have been the validation Agent's duty to investigate or at least to request further clarifications from the Applicant.

EURid on the contrary affirms that Applicant www-services and Complainant Simon Hamberger are different entities. EURid therefore arguments that it would have been Applicant's duty to clearly show and demonstrate through the documentary evidence what Applicant and Complainant relations were.

This Panel agrees with EURid's arguments and reasonings.

In fact, in both applications, www-services was indicated in the "Organisation" field. It is true that the name of Simon Hamberger was also indicated, nevertheless as clearly affirmed in section 3 (1) i of the Sunrise Rules: " if the name of the company or the organisation is specified, then the company or organisation is considered the Applicant". Section 2.3 of the .eu Domain Name WHOIS Policy, entitled Identifying Natural Persons and Legal Persons, repeats the same rule: " If the 'Company' field is completed, it is assumed that the company is the Registrant".
Consequently, the Documentary Evidence filed by the Applicant should have provided the Validation Agent with documents showing either that www-services was itself the holder of prior rights or that www-services and Simon Hamberger were the same Entity and therefore the holder of the Swedish word marks filed.
While the principal obligations of EURid regarding its decisions to register .eu domain names during the phased registration period are regulated by Article 14 of the Public Policy Rules, the final paragraph of that Article states that EURid shall register the domain name on a first come, first served basis if it finds that the applicant has demonstrated a prior right in accordance with the procedure set out in the second, third and fourth paragraphs of Article 14. In addition, article 12(1) of the Public Policy Rules requires EURid to publish a detailed description of all the technical and administrative measures that it shall use to ensure a proper, fair and technically sound administration of the phased registration period. Those measures are set out in the Sunrise Rules.
In this case, before rejecting Complainant's application for the domain names domain.eu and vacation.eu, EURid should have verified whether or not the applicant was the holder of valid prior rights. In this case, whether the applicant was the holder of corresponding and valid registered trademarks i.e. DOMAIN and VACATION. In other words, EURid should have verified: a) whether Applicant was eligible to request the disputed domain names; b) whether the domain names applied for corresponded to a registered national or Community trademark; and c) whether the trademarks claimed as prior rights (i.e. DOMAIN and VACATION) were valid, namely in full force and effect.

It clearly appears that the trademarks indicated by Complainant in the Documentary Evidence are identical to the disputed domain names and that they were registered and valid on the date of Applicant's application for the disputed domain names.
Nevertheless, in the Documentary Evidence provided by the Applicant (i.e. the Swedish registration certificates), there is no reference to any entity named www-services even less is there evidence that www-services was the trademarks holder.
In fact, from the case file it appears that the domain names were applied for by www-services, while the copies of the two Swedish registration certificates for the trademarks Domain and Vacation indicate as their holder Mr. Simon Hamberger.

In Section 13 of the .eu Sunrise Rules – Registered Trademarks (Documentary Evidence for Registered Trade Marks) it is affirmed that: «Unless otherwise provided .. omissis.. it is sufficient to submit the following Documentary Evidence for a registered trade mark: (i) a copy of an official document issued by the competent trade mark office indicating that the trade mark is registered… omissis .. In the foregoing case, the Documentary Evidence must clearly evidence that the Applicant is the reported owner of the registered trade mark.».
In Paragraph 2. Section 21 of the Sunrise Rules (Chapter VI. Examination of prior right claims) it is stated that: «the Validation Agent will examine whether the Applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of

Documentary Evidence received».

Therefore, in the absence of any document clearly indicating that a) www-services was the trade name used by Simon Hamberger and b) considering the Applicant's burden of proof with respect to its prior rights and wording of relevant provisions governing registration of .eu domain names in Sunrise Period, the Panel concludes that the Respondent, without having at its disposal any pertinent document proving that www-services and Simon Hamberger were the same entity, did not err in its decision to reject the Applicant's applications.
On the contrary, this Panel considers that EURid, in accordance with, Paragraph 3. Section 11 of the Sunrise Rules, correctly considered the Applicant as a different entity from the holder of the Prior Rights claimed.
This ADR Panel finds that the decision taken by Respondent to reject Complainant's application does not conflict with the Regulation 874/2004.

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	**Fabrizio Bedarida**

DATE OF PANEL DECISION 2006-09-14

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Complainant affirms that Complainant (Simon Hamberger) and the Applicant (www-services) are the same Entity, consequently the Applicant and Holder of prior rights are coincident, therefore EURid should have registered the disputed domain names in the name of this Entity i.e. Simon Hamberger/www-services.
EURid on the contrary affirms that Applicant www-services and Complainant Simon Hamberger are different entities. EURid therefore arguments that it would have been Applicant's duty to clearly show and demonstrate through the documentary evidence what Applicant and Complainant relations were.

This Panel agrees with EURid's arguments and reasonings.

In fact, in both applications, www-services was indicated in the "Organisation" field. It is true that the name of Simon Hamberger was also indicated, nevertheless as clearly affirmed in section 3 (1) i of the Sunrise Rules: " if the name of the company or the organisation is specified, then the company or organisation is considered the Applicant". Section 2.3 of the .eu Domain Name WHOIS Policy, entitled Identifying Natural Persons and Legal Persons, repeats the same rule: " If the 'Company' field is completed, it is assumed that the company is the Registrant".
Consequently, the Documentary Evidence filed by the Applicant should have provided the Validation Agent with documents showing either that www-services was itself the holder of prior rights or that www-services and Simon Hamberger were the same Entity and therefore the holder of the Swedish word marks filed.
In this case, before rejecting Complainant's application for the domain names domain.eu and vacation.eu, EURid should have verified whether or not the applicant was the holder of valid prior rights. In this case, whether the applicant was the holder of corresponding and valid registered trademarks i.e. DOMAIN and VACATION. In other words, EURid should have verified: a) whether Applicant was eligible to request the disputed domain names; b) whether the domain names applied for corresponded to a registered national or Community trademark; and c) whether the trademarks claimed as prior rights (i.e. DOMAIN and VACATION) were valid, namely in full force and effect.

It clearly appears that the trademarks indicated by Applicant in the Documentary Evidence are identical to the disputed domain names and that they were registered and valid on the date of Applicant's application for the disputed domain names.
Nevertheless, in the Documentary Evidence provided by the Applicant (i.e. the Swedish registration certificates), there is no reference to any entity named www-services even less is there evidence that www-services was the trademarks holder. In fact, from the case file it appears that the domain names were applied for by www-services, while the copies of the two Swedish registration certificates for the trademarks Domain and Vacation indicate as their holder Mr. Simon Hamberger.

Therefore, in the absence of any document clearly indicating that a) www-services was the trade name used by Simon Hamberger and b) considering the Applicant's burden of proof with respect to its prior rights and wording of relevant provisions governing registration of .eu domain names in Sunrise Period, the Panel concludes that the Respondent, without having at its disposal any pertinent document proving that www-services and Simon Hamberger were the same entity, did not err in its decision to reject the Applicant's applications.