Panel Decision for dispute CAC-ADREU-001930

Case number	**CAC-ADREU-001930**
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Domain names	**modeltrain.eu**

Case administrator

Name	**Eva Zahořová**

Complainant

Organization / Name	**Roland Bär**

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

The Panel is not aware of any other pending or decided legal proceedings which related to the Disputed Domain Name.

FACTUAL BACKGROUND

The Complainant is an individual living in Germany, Roland Bär, and the Respondent is the .eu domain name Registry, EURid.

On 1 January 2006 the Complainant filed an application to register the word mark "Mode Ltrain" in as a trade mark in Germany. This was registered on 15 March 2006 under registration number 30600137.3.

On 16 March 2006, the Complainant made a Sunrise application to register the Disputed Domain Name, "modeltrain.eu". In his application, the Complainant entered his first name "Roland", his surname "Baer" and his organization name, "EdvBaer". The Respondent confirmed receipt of the application and required the Complainant to provide the Documentary Evidence of its Prior Right by 25 April 2006.

On 23 March 2006 the Documentary Evidence was received by the Validation Agent, PricewaterhouseCoopers. The Documentary Evidence consisted of an extract from the German Trademark Register for the word mark "Mode Ltrain".

The Respondent rejected the application on the basis that the Complainant had not provided appropriate Documentary Evidence.

On 21 June 2006 the Complainant filed the Complaint with the ADR Center.

The proceedings formally commenced on 29 June 2006.

The Respondent filed its Response to the Complaint on 18 August 2006.

A. COMPLAINANT

The Complainant explains that he runs a business in the field of IT services and consulting under the name "EdvBär". This term is used as a trade name and is neither registered as a trade mark nor is it used as a company name. Under German law, an individual can use a trade name for his business under section 12 of the Civil Code and can register the name of his business in the register of companies, in which case the name is protected under section 17 of the Civil Code.

The Complainant acknowledges that Section 3(1)(i) of the Sunrise Rules states that, where the organisation field is filled in when making an application, that organisation is considered the applicant. However, the Complainant says that this interpretation may conflict with

Article 3 of Regulation 874/2004. Where both the name and the organisation fields are filled in, this may indicate that an individual is acting on behalf of a legal entity or, as in this case, that the individual is using a trade name as permitted by national law.

The Complainant says that it is absolutely unclear why the Respondent rejected his domain name application because the documentary evidence clearly proves that the Applicant and Complainant is the holder of the claimed prior right. The Complainant says that it must have been clear to the Validation Agent that the Complainant and the trade mark owner are identical because the name "Roland Baer" as well as the address is identical in the domain name application and the trade mark certificate.

If the Validation Agent had been in any doubt on how to judge the name "EdvBaer" in the organisation field it could have used its own judgment. The entry did not include an identifier such as GmbH, KG, OHG or AG, which would have been required to indicate that the organisation was a legal entity, and so it was clear that the organisation was a trade name which corresponded to the individual in the name fields. In support, the Complainant cites the decisions in cases 181 (OSCAR) and 232 (DMC). In addition, the trade mark certificate indicates that the correspondence address is "Firma EdvBaer Roland Bär" which also further evidence that the name "EdvBaer" is used by the Complainant as a trade name.

Second, on the basis of the decision in case 253 (SCHOELLER), the Validation Agent was required to undertake further investigations which would have clarified any doubts.

Third, on the basis of the decision in case 396 (CAPRI), justice must rule over a formalistic approach and so the Respondent was required to review the application more deeply to remove any doubts.

B. RESPONDENT

The Respondent argues that the applicant was bound by the Sunrise Rules (relying on the decisions in cases 127 (BPW), 210 (BINGO) and 293 (POOL)).

On the basis of Section 3(1)(i) of the Sunrise Rules, if an organisation is specified in an application then that organisation will be deemed to be the applicant. Therefore, the applicant was "EdvBaer".

The Documentary Evidence did not prove that the company "EdvBaer" was the holder of a prior right in "MODELTRAIN" but only showed that the Complainant held the trade mark "Mode Ltrain". The Documentary Evidence did not demonstrate or even contend that the applicant and the holder of the prior right were the same person.

Neither the Respondent nor the Validation Agent is obliged to engage in speculation and/or embark on its own enquiry in relation to the exact connection between two entities simply because they have similar names (relying on the decision in case 294 (COLT)).

The Panel should ignore any new information now provided by the Complainant (relying on the decisions in cases 294 (COLT), 551 (VIVENDI), 810 (AHOLD), 954 (GMP), 1194 (INSURESUPERMARKET), 1549 (EPAGES) and 1674 (EBAGS)).

The Complainant should have complied with the formal procedure laid down the Regulation 874/2004 and the Sunrise Rules which was required to allow the Respondent to deal with thousands of Sunrise applications. As the Panel stated in case 219 (ISL), "One could argue that sympathy is overruled by the application Regulations serving among other purposes the (cost-effective) functionality of the phased registration and the principles hereof".

DISCUSSION AND FINDINGS

1. Under Regulation 874/2004, Article 22(1)(b), an ADR procedure may be initiated by any party where a decision taken by the Registry conflicts with Regulation 874/2004 or Regulation 733/2002 (the Regulations).

2. Under the Respondent's ".eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period" (the Sunrise Rules), Section 22(2) second paragraph and Section 26(1), any interested party may initiate an ADR Proceeding against a decision of the Registry within 40 calendar days of that decision.

3. Under the Sunrise Rules, Section 22(2) second paragraph and Section 26(2) first paragraph, the grounds for such an ADR Proceeding are non-compliance of that decision with the Regulations and the sole object and purpose of the ADR Proceeding is to verify whether the relevant decision by the Registry conflicts with the Regulations.

4. Therefore, the question for this Panel is whether the Respondent's decision of 19 April 2006 to reject the Complainant's application for

the "modeltrain.eu" domain name conflicted with the Regulations.

5. The primary case raised by the Complainant is that the Respondent's approach in considering that, where a company or organisation is specified then that is regarded as the applicant, as laid down in Section 3(1)(i) of the Sunrise Rules, may conflict with Article 3 of Regulation 874/2004. If this is rejected, the Complainant's secondary case is that the applicant, the Complainant and the trade mark owner are all one and the same person and that the Respondent should have realised this or at the very least should have taken the steps necessary to resolve any doubts.

6. The primary case can be resolved easily. Under Article 3(a) of Regulation 874/2004, an request for domain name registration must include the name and address of the requesting party. This does not in any way preclude the approach taken by the Respondent under the Sunrise Rules to determining who the requesting party is is where an individual's name and an organisation are both provided in the request. The Respondent clearly indicated the approach it would take in the Sunrise Rules and this approach does not appear to be unreasonable. Therefore, the Respondent's decision does not conflict with Article 3 of Regulation 874/2004 and the applicant was "EdvBaer". In order to avoid potential problems in the future, Registrars may wish to consider making this clear in their application forms.

7. The Complainant's secondary case is more difficult. Under Regulation 874/2004, Article 14 fourth paragraph every Sunrise applicant must submit Documentary Evidence that shows that he or she is the holder of the Prior Right claimed. Although the Panel accepts, on the basis of the Complaint, that Roland Baer and EdvBaer are one and the same, this is irrelevant. Under Regulation 874/2004, the question is whether the Complainant submitted sufficient Documentary Evidence before 25 April 2006.

8. As the Complainant and Respondent have pointed out, a number of Panels have already considered the question of differences between the names of the applicant and the name of the owner of the Prior Right. Although not binding on the Panel, the decisions have been relied upon by the Parties and the discussions are helpful. The cases are:

(a) Case 181 (OSCAR), where the applicant was Société Coopérative Agricole d and the owner of the Prior Right was Société Coopérative Agricole des Producteurs de Kiwifruits de France. The Panel considered that the abbreviation in the application had resulted from technical limitations in the system and so the domain name should have been registered.

(b) Case 232 (DMC), where the applicant was DMC Design for Media and Communication GmbH and the owner of the Prior Right was DMC Design for Media and Communication GmbH & Co KG, an Austrian limited partnership for which the applicant was the general partner and sole representative. The Panel considered that the relationship between the applicant and the owner should have been clear to the Respondent and so the domain name should have been registered.

(c) Case 253 (SCHOELLER), where the applicant was Ernst Schöller GmbH + Co and the owner of the Prior Right was Ernst Schöller Wäschefabriken GmbH + Co. The Panel considered that the abbreviation in the application had resulted from technical limitations in the system and that any doubts about whether the entity was the same could have been rapidly checked by a Google search and so the domain name should have been registered.

(d) Case 294 (COLT), where the applicant was Mitsubishi Motors Europe BV which had a licence from Mitsubishi Motors Corporation and the owner of the Prior Right was Mitsubishi Jidosha Kogyo Kabushiki Kaisha (of which Mitsubishi Motors Corporation was the English translation). The Panel considered that no evidence had been provided that the owner and the licensor were the same entity and so the Respondent was correct to refuse registration of the domain name.

(e) Case 396 (CAPRI), where the applicant was Cabinet CAPRI and the owner of the Prior Right was Capri André Pinguet. The Panel considered that the Respondent could have done the same validation process as the Panel, which involved visiting various websites and asking for clarification from the Complainant, and so the domain name should have been registered.

(f) Case 903 (SBK), where the applicant was SBK Advies & Training and the owner of the Prior Right was SBK Advies en Training B.V. The Panel noted that the differences were immaterial as they consisted of the substitution of an ampersand for the Dutch word "en" (meaning "and") and the absence of the form of incorporation of the applicant (B.V.) and so the domain name had been correctly registered.

9. This Panel agrees that, where the name of the applicant is not the same as the name of the owner of the Prior Right, the Documentary Evidence must make it clear why the applicant nevertheless has the Prior Right. Even if there may be some obligation on the Respondent not to be unduly pedantic or formalistic when interpreting the Documentary Evidence in this regard, which the Panel does not need to determine, any such obligation does not extend so far as to cover the present case.

10. The applicant was "EdvBaer" and the Documentary Evidence showed that the Prior Right belonged to "Roland Baer". Even if the Respondent should have realised that EdvBaer was a business name and not a company due to the lack of an identifier, which the Panel notes would conflict with the decision in Case 903 (SBK), there was no clear indication that EdvBaer was the business name used by the Complainant himself rather than a third party for whom the Complainant had made the application. It is not reasonable to suggest that this was clear from the fact that the Complainant's correspondence address in the extract from the German trade mark register in the Documentary Evidence began "Firma EdvBaer Roland Bär". Nor is it reasonable to suggest that the Respondent should have searched on the Internet or contacted the Complainant in order to resolve the question. To this extent the Panel respectfully disagrees with the approach taken by the Panel in Case 396 (CAPRI).

11. Therefore, the Panel, after careful consideration, concludes that the Respondent was correct to say that the Documentary Evidence supplied by the Complainant was insufficient and therefore to reject the application.

12. Although this disposes of the Complaint, there is one further issue which should be mentioned. The relevance of the Sunrise Rules in ADR proceedings has already been considered by this Panel in its decision in case 1071 (ESSENCE), paras 13-26, which need not be repeated here. However, the Panel notes that the Respondent has again argued that any applicant is bound by the Sunrise Rules. This appears to the Panel to be highly likely. However, this does not mean that an applicant's non-compliance with the Sunrise Rules is a sufficient basis for rejection of an application which complies with the Regulations.

14. The Panel has considered the arguments raised by the Respondent in this case and the three decisions cited by the Respondent and does not consider that this affects the conclusion in the previous paragraph. The arguments raised by the Respondent indicate that the Sunrise Rules may be binding on the applicant but not that they constitute a separate ground for rejection of the application. In cases 127 (BPW) and 293 (POOL), the Panels clearly focussed on the question of whether the decisions of the Respondent conflicted with the Regulations. In case 210 (BINGO), the Panel considered whether the decision of the Respondent conflicted with the Sunrise Rules in response to an allegation by the Complainant that the Respondent had wrongly granted an application which did not comply with the Sunrise Rules. As the Panel in that case found that the application did comply with the Sunrise Rules there was no need for the Panel to consider what the consequences of non-compliance should have been.

15. The Panel also notes that in one of the decisions cited by the Respondent (in relation to a different issue), case 1674 (EBAGS), the Panel held that "the Sunrise Rules cannot be applicable, and [the Panel] will decide only on the basis of [the Regulations]".

DECISION

For all the foregoing reasons, in accordance with Paragraph B12 (b) of the Rules, the Panel orders that the Complaint is Denied.

PANELISTS

Name	Christopher Stothers

DATE OF PANEL DECISION 2006-09-01

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant contested a decision of the Registry to reject its Sunrise application for the domain name "modeltrain.eu".

The Complainant had made the application under the name "EdvBaer" but had then provided Documentary Evidence of a trade mark owned by "Roland Baer". However, the Complainant had not provided Documentary Evidence that EdvBaer was his business name and not a different entity and so the Registry was correct to reject the application under Article 14 of Regulation 874/2004.

The Complainant's argument that the application should have been regarded as made in his own name, as he had included his name as well as his business name, was rejected on the bases that the Registry had made clear its intended approach to determining who is the applicant in the Sunrise Rules, that this approach was reasonable and that it did not conflict with Article 3 of Regulation 874/2004.

The Complainant's argument that the Registry should have realised that EdvBaer was his business name and not a different entity, or should have taken steps to find this out, was also rejected on the bases that this was not clear from the Documentary Evidence and that there was no obligation on the Registry to have searched on the Internet or contacted the Complainant in order to resolve the question.

In response to an additional argument by the Registry, the Panel noted that, although it is highly likely that any applicant is bound by the Sunrise Rules, this does not mean that an applicant's non-compliance with the Sunrise Rules is a sufficient basis for rejection of an

application which complies with the Regulations.