Panel Decision for dispute CAC-ADREU-001992

Case number	**CAC-ADREU-001992**
Time of filing	**2006-07-10 11:29:46**
Domain names	**pallmann.eu**

Case administrator

Name	**Kateřina Fáberová**

Complainant

Organization / Name	**Pallmann Maschinenfabrik GmbH & Co. KG, Hartmut Pallmann**

Respondent

Organization / Name	**EURid**

FACTUAL BACKGROUND

Complainant is a German company, active in the field of manufacturing size reduction machines for use in the wood, plastics and chemical sectors.
Complainant registered the trademark Pallmann in Germany in 1989 (the trademark registration is currently in force until 30th November 2009).
On 16th December 2005 Complainant applied for two .eu domain names: pallmann.eu and pallmann-online.eu (which correspond to the .de domain names used by Complainant).
Complainant states that an application letter was sent for each requested domain name (therefore two cover letters were sent), together with "a copy of Complainant's trademark registration No. 1 158 411 and a copy of a certification confirming the extension of protection of trademark until November 30, 2009 issued by the German Patent and Trademark Office" (see paragraph 5 of the Complaint).
According to Complainant's own statement, all the above documents were transmitted in a single envelope.
Both applications were rejected and, in particular, the application for pallmann.eu was rejected on 12th May 2006 and the application for pallmann-online.eu was rejected on 30th March 2006.
According to Complainant (who makes reference to a telephone conversation with a Eurid's employees) the application for pallmann-online.eu was rejected because the applicant failed to provide evidence of a "prior right" (the trademark Pallmann is not identical to pallmann-online), while the application for pallmann.eu was rejected because no documentary evidence was attached to the application.
Complainant requests that:
1. the Eurid's decision to reject the application for the domain name pallmann.eu is annulled and
2. the above domain name is registered in the name of Complainant.

A. COMPLAINANT

Complainant expressly recognizes that its sunrise applications for the domain names being the object of this case were not in line with the Sunrise Rules and accepts that Eurid had an interest in streamlining the validation process and to strictly apply formal requirements in connection with sunrise applications.
On the other hand, Complainant is of the opinion that, even on the basis of strict interpretation of the Sunrise Rules, an

application may not be rejected when it is clear that the documentary evidence is attached to two different applications.
According to Complainant, since the purpose of the phase registration period is to "safeguard prior rights recognized by Community or national law" (recital 12 of Regulation 874/2004), a "minimum respect" should be given to holders of prior rights and the Registry has an obligation to guarantee the due process.
Complainant makes reference to decision of the Arbitration Panel in case n. 253 "SCHOELLER".
Rejecting an application negligently constitutes a breach of the due process and for this reason Eurid's decision should be annulled.

B. RESPONDENT

Respondent notes that the burden of proof of the existence of a prior right in on the applicant and that, according to section 8(6) of the Sunrise Rules, the Documentary Evidence must consist of one set of documents per application for the Documentary Evidence to be accepted by the validation agent.
Since Complainant expressly recognizes its breach of the above provision, Respondent claims that its decision to reject the applications is correct.
As far as the duty to carry on supplementary investigations is concerned, Respondent simply states that it had no obligations to investigate, but only the right to do so on its sole discretion.

DISCUSSION AND FINDINGS

While Complainant based its claims on the alleged violation of a general principle which, according to Complainant, requires that all applications should be processed following a fair procedure, Respondent replies that Complainant failed to providence sufficient evidence of a "prior right" within the meaning of Regulation 874/2004.
In the Panel's opinion, the real point is whether the Validation Agent failed to comply with the due process obligation or not.
Panel holds that, if such breach of the Validation Agent is ascertained, the Panel should declare Respondent's decision null, irrespective of fulfilment by Complainant of the evidence requirements provided by the applicable rules.
To support its claims Complainant makes reference to the decision rendered in case 253 (SCHOELLER). In that case Panelist held that Eurid violated the due process since it did not consider properly a "change of address and a slightly abbreviated name", i.e. two circumstances which were clear from the application.
Panel holds that this precedent is not applicable to the present case. In case 253 the application had been prepared in compliance with section 8(6) of the Sunrise Rules and the rejection was based on two minor formal aspects, which had been incorrectly evaluated (rectius not evaluated) by the Registry and its Validation Agent.
The violation of the due process was so clear in SCHOELLER that the Panelist's had no alternative than to annull the Registry's decision.
In this case Complainant did not submit an application in accordance with the above rule. The circumstance that Complainant did not comply with a formal requirement (one application - one envelope) constitutes sufficient ground for rejection of the application.
As a consequence Panel is of the opinion that this case should be rather decided on the basis of the principle stated in case 1549 (EPAGES) (incorrectly cited by Respondent as case 1546). In that case Complainant failed to provide evidence of the existence of a prior right because it simply filed documents regarding an application to register a national trademark.
Complainant argued that Registry should have carried out independent investigations, but Panel made reference to section 21(3) of the Sunrise Rules, which gives Registry the power, at its sole discretion, to carry on such supplementary investigations, but does not create any obligation of the Registry.
In the case in reference, Complainant failed to submit properly its applications and the Registry rejected them.
In the opinion of the Panel the Registry did not act negligently nor violated the due process principle. The Registry decided not to carry on further investigations, in accordance with the rule stated by section 21(3) of the Sunrise Rules.
The Panel notes “the intention of the legislator” as implicit in the rule of “only one application per envelope” which is clearly intended to avoid confusion between an application and supporting evidence. The rule-maker clearly places the burden of clarity of proof upon the applicant and attempts to compel the applicant to choose and carefully collate its evidence a priori.
Unlike Schoeller, where there was one application and one envelope, but where the dispute arose as a result of truncation within the application system and a tiny discrepancy in a postal address, (which renders reasonable an expectation of an attempt by the Validation Agent to be proactive in avoiding injustice and observing the spirit of “fisrt come, first served”) in this case the Complainant was careless to the extent of placing two applications in one envelope, in clear breach of the pre-

conditions. This relatively major act of carelessness in the face of clear transparent and pre-published regulations to the contrary is not a fault of the Validation Agent or the Registry but is admitted to as a defect in application by the Complainant. While the Validation Agent may be expected to utilize discretionary powers of investigation in cases where much of the evidence is clearly corroborative or where a resultant rejection is manifestly unjust, neither the Validation Agent nor the Respondent are obliged to go out of their way to correct gross carelessness on the part of the Applicant. Had they done so, rather than perform due dilifence with the Applicant they would be acting to the detriment of Justice with all the other Applicants who had utilized diligence and avoided gross carelessness when preparing and submitting an application. This, in itself would have constituted lack of due process with other applicants for, as is noted in 1614 (TELENET):
"when there is a queue of applicants a priori entitled to the domain name, it would appear improper if the Validation Agent carried out investigations to help an applicant when that applicant did not fulfill its duties (…) every applicant in the queue has a legitimate expectation to obtain the domain name and therefore, the observance of the application requirements must be strict. This Panel shares the view of the NAGEL case that the principle first-come, first-served is more properly described as "first-come-and-substantiate, first-served" (case no. 00119 NAGEL).

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	**Simon Moran**

DATE OF PANEL DECISION 2006-10-10

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Registry is not obliged to carry on additional investigations if Applicant files improperly its request for a .eu domain name.

In this case Applicant sent two different applications with one single envelope and this led to rejection of both applications.

Panel distinguished from SCHOELLER in which the application was filed properly but a problem arose due to the application automatic management system, which truncated a name and an address.