Panel Decision for dispute CAC-ADREU-002021

Case number	**CAC-ADREU-002021**
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Domain names	**lohmann.eu, goethe.eu, mcr.eu**

Case administrator

Name	**Kateřina Fáberová**

Complainant

Organization / Name	**Lohmann Innovations e.K., Uwe Lohmann**

Respondent

Organization / Name	**EURid**

FACTUAL BACKGROUND

On December 8, 2005 the Complainant applied for 3 domain names: <lohmann.eu>, <goethe.eu>, and mcr.eu>. On January 16, 2006, the Complainant's documentation allegedly proving his ownership of corresponding and valid trade mark registrations in Germany for LOHMANN, GOETHE, and MCR was presented to the Validation Agent. However the Validation Agent rejected all 3 applications on the grounds that the applicant (Lohmann Innovations e.K) was not the same as the owner of the trade marks (Mr. Uwe Lohmann).

The Complainant argued that he is a registered entrepreneur (eingetragener Kaufmann) and that although the trade marks might have been registered in his own personal name, he and the "e.K" are the same person. Therefore the domain name applications were wrongly rejected. He filed with the Complaint, copies of a number of documents in support of his argument, in particular an extract from the Trade Register of the court of Hamburg; a Licence Agreement between Mr. Uwe Lohmann and Lohmann e.K. granting the latter an exclusive licence to use the 3 trade marks of the former; 3 Licence Declarations that confirm this; and several items showing use of the 3 trade marks.

The Respondent argued that the onus is on an applicant to demonstrate that he is the owner of a prior right claimed in an application during the Sunrise Period and, because Mr. Lohmann did not so demonstrate, the applications were correctly refused. The Respondent then quoted from a number of ADR Decisions which, it claimed, back up and confirm that this decision was correct.

The Respondent also noted that under the Sunrise Rules the Validation Agent has the discretion to make it own investigations into the circumstances surrounding the documentation provided by an applicant, but that it has no obligation to do so, and indeed can hardly be expected to make it own enquiries on every occasion when there is some doubt,.

With regard to the additional documents filed with the Complaint, the Respondent noted that the Regulation only permits the Validation Agent to examine documents received within 40 days of an application being filed and, as the additional documents referred to above were not received until June 23, 2006 while the 40 day period in this case expired on January 17. 2006 they should not be taken into consideration.

A. COMPLAINANT

A. COMPLAINANT

Mr. Uwe Lohmann is the owner of the German trade marks LOHMANN No. 397 02 258, GOETHE No. 396 45 826, and MCR No. 396 40 884. Applications for the registration of the corresponding .eu domain names <www.lohmann.eu>, <www.goethe.eu> and <www.mcr.eu> ("the 3 disputed domain names") were filed with EURid on December 8, 2005 i.e. during the Sunrise Period, as required by Section 13.2 of the .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period (the "Sunrise Rules"). On January 16, 2005 Mr. Lohmann provided copies of the Registration Certificates of all three trade marks. He also provided extracts from the official on-line database of the German Patent and Trademark Office relating to these marks.

However the applications for the 2 domain names <www.lohmann.eu> and <www.goethe.eu. were rejected on May 16,2006, and that for the domain name <www.mcr.eu> on May 24, 2006.

The Complainant submitted the following Legal Grounds as to why this rejection should be reversed and annulled:

I.
Paragraph 7 of the German Trademark Act provides that a natural person can be the owner of a registered trade mark and Mr. Uwe Lohmann is the owner of the exclusive trademark rights for the names LOHMANN, GOETHE and MRC in Germany in accordance therewith. Annexed to the Complaint were copies of the 3 registration certificates for these trade marks as well as the corresponding extracts from the Trademark Register of the German Patent and Trademark Office.

Mr. Lohmann is also a registered entrepreneur (eingetragener Kaufmann) in accordance with § 2 of the German Commercial Code, and he is active in this capacity under the name Lohmann Innovations e.K. according to § 17 of the German Commercial Code. Mr. Lohmann and Lohmann Innovations e.K. are therefore one and the same person under German law. Annexed to the Complaint was an extract from the Trade Register of the Court of Hamburg.

Consequently, the applications for the registration of the 3 disputed domain names were filed by Mr. Lohmann in his capacity as a registered entrepreneur. The Complainant contends therefore that Lohmann Innovations e.K. is the holder of the corresponding prior rights within the meaning of Article 10 of Commission Regulation No 874/2004 and so eligible to apply for the registration of the 3 disputed domain names during the Sunrise Period.

Also attached to the Complaint, as a matter of precaution, were copies of a trademark licensing agreement between Mr. Uwe Lohmann and Lohmann Innovations e.K. as well as Licence Declarations for the 3 registered Trade Marks.

II.
The second legal Ground was an explanation of German trade nark law, which it is not necessary to summarise for the purposes of this Complaint. Suffice it to say that Mr. Lohmann contends that his exclusive trademark rights originate from his registration of the respective trademarks with the German Patent Office in accordance with § 4 Section 1 of the German Trademark Act,

III.
The 3 trademarks have been used by Mr. Lohmann in connection with offering goods and services over a significant period of time and have acquired a fair market value in Germany and abroad.

All 3 of the trademarks have existed in Germany for over 10 years.

Under the trademark LOHMANN Mr. Lohmann produces and sells electronic audio and video devices. Over 110,000 of these devices were sold to the German pay-TV channel Premiere. The audio and video devices are produced abroad and sold in Germany. Annexed to the Complaint was what was claimed to be a picture of the packaging of audio and video devices produced and sold under this trademark.

The Complainant contends that under the trademark MCR over 100.000 storage mediums such as music CDs and DVDs

have been produced and sold. Some of these music CDs were sold, for example, in the stores of German retailer OBI. DVDs under the trademark MCR were produced for advertising purposes. Annexed to the Complaint were: a picture of a CD bearing the trademark MCR sold in the OBI stores, and a picture of the advertising DVD sold under the trademark MCR.

The Complainant contends that the trademark GOETHE – which is also registered in 10 European countries as well as in China and Russia – has been used for German beer, and annexed to the Complaint was a picture of a beer bottle bearing the trademark.

The Complaint concludes that all of the above certifies that: Mr. Lohmann is a legitimate holder of the trademarks LOHMANN, MCR and GOETHE; that they are registered in Germany; that they have existed for over 10 years; that they have been used by Mr. Lohmann in connection with offering goods and services; that they have acquired a fair market value; that Mr. Lohmann therefore fulfils all the conditions for the registration of the corresponding .eu domain names during the Sunrise period; and that the rejection of registration of the domain names by EURid therefore has no legal grounds.

The Complainant seeks the following remedies:

• Annulment of the Decision of the Registry dated May 16, 2006 declining the registration of the domain name www.lohmann.eu within the Sunrise Period;
• Annulment of the Decision of the Registry dated May 24, 2006 declining the registration of the domain name www.mcr.eu within the Sunrise Period;
• Annulment of the Decision of the Registry dated May 16, 2006 declining the registration of the domain name www.goethe.eu within the Sunrise Period;
• Attribution of the domain name www.lohmann.eu to the Complainant;
• Attribution of the domain name www.mcr.eu to the Complainant;
• Attribution of the domain name www.goethe.eu to the Complainant.

On October 4, 2006, the Complainant filed an Additional Observation which it stated was in accordance with paragraph A2(k) of the .eu Alternative Dispure Resolutiuon Rules (“the ADR Rules”)>

In this Additional Observation the Complainant stated that all the applications for the registration of the 3 disputed domain names made by Mr. Uwe Lohmann in his capacity as a sole trader “Lohmann Innovations” were signed by Mr. Uwe Lohmann as the owner of the corresponding trade marks LOHMANN, GOETHE and MCR. The Application Form clearly indicated that the application was being made by Mr. Lohmann. Moreover, at point No. 1 of the Application Form it is stated that the person who signed the Form is the applicant or is authorised to represent the applicant. This was certified by Mr. Lohmann through a hand-written notice “read and accepted” and through his signature. It was therefore obvious from the Form that the holder of the trademark rights and the applicant is one and the same person – Mr. Uwe Lohmann. Copies of the 3 Application Forms were annexed to the Additional Observation.

The Complainant concluded from this that the prior rights belonged therefore, not to “someone else” as stated by EURid in the Response to Complaint, but to the same person who signed the application – Mr. Uwe Lohmann.

Section 20.3 of the Sunrise Rules is applicable where the “Documentary Evidence provided does not clearly indicate the name of the Applicant as being the holder of the Prior Right claimed”. However for the above stated reasons this was not the case. The application and the documentary evidence indicated the same name – Uwe Lohmann.

It is correct that under section 21 (3) of the Sunrise Rules the Validation Agent is not obliged to conduct investigations into the circumstances of the application. This provision however does not mean that the Validation Agent can ignore the circumstances of the application, especially where the trademark owner and the person signing the application is one and the same. The intention of this Rule was to give the persons who have the prior rights to certain names or indications a right to register corresponding .eu domain names. If the Validation Agent were to ignore the obvious fact of the concurrency of the name of the applicant and the name of the trademark owner, the owners of the prior rights would be deprived of the right to register a corresponding domain names. The fact that the Registry/Validation Agent has to deal with the “thousands of

applications" does not justify such negligence.

The Complainant therefore reiterated its request for the 3 disputed domain names to be granted to the Complainant.

B. RESPONDENT

After setting out the relevant sections of the Law and Regulations, the Respondent summarised the facts from his point of view, namely that -

• Lohmann Innovations e.K. ("the Complainant") had applied for the domain names LOHMANN, GOETHE, and MRC on December 8, 2005.
• The Validation Agent received the documentary evidence on January 16, 2006, which was before the 17 January 2006 deadline.
• The documentary evidence consisted of trademark registrations for LOHMANN, GOETHE, and MRC all of which were registered in Germany in the name of Mr.Uwe Lohmann.
• The Validation Agent concluded from the documentary evidence that the Complainant had not demonstrated that it was the holder of the claimed prior rights. Therefore, the Respondent rejected the Complainant's application.

The Respondent then briefly summarised the Complainant's contentions, which are set out in detail elsewhere, adding only that the Complainant had submitted new documents in the form of a license declaration signed between Lohmann Innovations e.K. and Mr. Uwe Lohmann.

The Respondent pointed out that Article 10 (1) of the Regulation states that only the holders of prior rights shall be eligible to apply to register domain names during the period of phased registration; and that under 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.

It is therefore of crucial importance that the Respondent is provided with all the documentary evidence necessary for it to assess if the applicant is indeed the holder of a prior right.

When there is a difference between the name of the applicant and the name of the owner of the prior right, the applicant must submit official documents explaining why and how it is entitled to rely on a prior right which, in the face of the documentary evidence, belongs to someone else.

If the applicant fails to do so, its application must be rejected and Respondent must then give the next applicant in line the opportunity to try to demonstrate its prior rights. During the Sunrise Period, the principle "first-come, first-served" is indeed more properly described as "first-come-and-substantiate, first-served" (see ADR 119 NAGEL and 1614 TELENET). In other words, during the Sunrise Period, the first applicant in the line does not have an unconditional right to the domain name, but only has an opportunity to try to clearly demonstrate that it is the holder of a prior right.

The Regulation and the Sunrise Rules clearly and certainly provide that the burden of proof was on the Complainant to demonstrate that it was the holder or the licensee of a prior right, and in this regard the Respondent referred to Cases Nos. 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), and 1931 (DIEHL, DIEHLCONTROLS)).

The Respondent then quoted from Case No. 1886 (GBG), "According to the Procedure laid out in the Regulation the relevant question is thus not whether the Complainant is the holder of a prior right, but whether the Complainant demonstrated to the Validation Agent that it is the holder of a prior right. If an applicant fails to submit all documents which show that it is the owner of a prior right the application must be rejected".

In this instance, the documentary evidence did not demonstrate that the Complainant was the holder of a prior right. The Complainant's name is "Lohmann Innovations" but the owner of the trademarks is "UWE LOHMANN". Furthermore in the Complaint, the Complainant did not dispute that the names of the Complainant and the name of the owner of the trademarks

are different.

However the Complainant does contend that the two different names refer to the same person, since the name of the Complainant is nothing more that the name under which the Mr. Uwe Lohmann trades as a sole trader, namely an "eingetragener Kaufmann".

When the name of the applicant and the name of the owner of the prior trademark are different, Section 20 of the Sunrise Rules clearly explains what documents should be submitted to demonstrate how the applicant is entitled to rely upon the claimed prior right, pursuant to article 14 of the Regulation.

When the names are different because the applicant is a licensee, then article 20 (1) of the Sunrise Rules will apply and when the applicant is a transferee of the prior right, then article 20 (2) of the Sunrise Rules will apply. For any other situation, where the name of the applicant is not the same as the name of the owner of the prior right, section 20 (3) of the Sunrise Rules states that: "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, or the Prior Right has become subject to a de jure 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 documentary evidence submitted by the Complainant did not clearly indicate the name of the Complainant (Lohmann Innovations) as being the holder of the prior rights claimed which are in the name of Mr. Uwe Lohmann.

The Complainant failed to explain this difference between the names of the Complainant and of the owner of the trademarks. Without any further explanation in the documentary evidence, the Respondent was in no position to determine whether the Complainant was entitled to rely on the claimed trademarks.

Therefore, the Respondent correctly rejected the Complainant's application, pursuant to the Regulation and the Sunrise Rules, because the Complainant failed to meet its burden of proof.

The Respondent then referred the Panel to the following Cases:

In case No. 810 (AHOLD), the Panel decided that: “As confirmed by sec. 20 of SR, it is important to make sure that the applicant is the same holder of the prior rights, to avoid any domain name registration deprived of legitimation on the applicant’s side. As a result, when faced before a difference between the applicant name and the prior right holder name, correctly detected by the Validation Agent, the Registry may not accept the corresponding domain name application”.

In Case No. 1627 (PLANETINTERNET), the Panel decided that: “The validation agent conducted a prima facie review of the submitted document, and in conjunction with point (ii) below, reached the conclusion that as the names did not match, and there was no other documentary evidence to explain such a discrepancy, that the applicant (i.e. the Complainant) had not established its prior right”.

In Case No. 1242 (APONET), the Panel decided that: “Therefore, in the absence of any document clearly indicating that a) VGDA Gmbh was the short term for Verwaltungsgesellschaft Deutscher Apotheker mbH; b) that VGDA was also an official company name of the Applicant; and c) considering the Complainant’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 VGDA Gmbh and Verwaltungsgesellschaft Deutscher Apotheker mbH were the same entity, did not err in its decision to reject the Complainant's application. 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 Right claimed”.

The Respondent further referred the Panel to Cases Nos. 551 (VIVENDI), 1232 (MCE), 1699 (FRISIA), 1625 (TELEDRIVE), 294

(COLT), 2075 (E-MOTION), 1614 (TELENET), 2124 (EXPOSIUM) and 1299 (4CE).

Section 21.2 of the Sunrise Rules states that “The Validation Agent examines 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 and scanned by the Processing Agent (including the Documentary Evidence received electronically, where applicable) and in accordance with the provisions of these Sunrise Rules”.

Section 21.3 of the Sunrise Rules states that "The Validation Agent is not obliged, but it is permitted in its sole discretion, to conduct its own investigations into the circumstances of the Application, the Prior Right claimed and the Documentary Evidence produced".

This Section of the Sunrise Rules does not impose any obligation on the Validation Agent to conduct its own investigation, it is a mere possibility that the Respondent can use “in its sole discretion”. This is supported by the consideration that the Regulation places the burden of proof on the applicant to show that it is the holder of a prior right (see supra).

No obligation for the Validation Agent may therefore be derived from Section 21 (3), since this provision does not state that the Validation Agent is obliged to conduct its own investigation, but merely that the Validation Agent is permitted in its sole discretion, to conduct its own investigations, and the Respondent referred the Panel to Cases Nos. 1483 (SUNOCO), ISL (219), 551 (VIVENDI), and 843 (STARFISH).

Also, in Case No. 127 (BPW), the Panel decided that: “Section 21.3 of .eu Sunrise Rules reads that the Validation Agent is not obliged, but it is permitted in its sole discretion, to conduct its own investigations into the circumstances of the Application, the Prior Right claimed and the Documentary Evidence produced. Since the burden of proof was on the applicant (Complainant) who clearly failed to proof the ownership rights according to Section 21.3. of .eu Sunrise Rules it was on sole discretion of the Validation Agent to conduct its own investigation and it cannot be deemed as the breach of the Section 21.3 of .eu Sunrise Rules if he decided not to conduct any investigation. Summarizing the above stated, I did not find the contested decision to reject the application of the Complainant made by the Respondent in conflict with any of the European Union Regulations”.

In Case No. 1323 (7X4MED), the Panel decided that “Therefore, it cannot be reasonably anticipated that the Validation Agent (although it has the permission to do so pursuant to Section 21 (3) of the Sunrise Rules) would investigate into the circumstances of each and every domain name application where the documentary evidence submitted by the applicant does not comply with the requirements set forth by Sunrise Rules”.

In Case No. 501 (LODE, PROCARE), the Panel decided that “In this case, the documentary evidence in support of the applications for the Domain Names was incomplete in respect of the requirements set out in Section 20.1 of the Sunrise Rules. The Panel accepts that the applicant should not expect the Registry or the Validation Agent to engage in its own investigations to establish the exact relationship between the registered holder of the trade mark and the applicant”.

The Registry/Validation Agent cannot be expected and/or forced to speculate whether the Complainant is a holder of the prior right claimed, and therefore correctly rejected the Complainant's application. See Case No. 1443 (URBIS)).

Documents submitted for the first time during the present ADR proceedings may not be taken into consideration

Pursuant to the Article 14 of the Regulation, the Respondent may only accept, as documentary evidence, documents that are received by the Validation Agent within 40 days from the submission of the application for the domain name.

In the present case, the 40 days period ended on January17, 2006.

The Complainant launched its Complaint on June 23, 2006 and submitted new information with this Complaint, namely: an extract from the Trade Register of the Court of Hamburg showing that the name of the Complainant is a registered trade name under which the Mr. UWE LOHMANN is registered as a sole trader, a License Agreement; Licence Declarations

between the Complainant and Mr. Uwe Lohmann; and copies showing how the 3 trade marks are used.

These documents may not serve as a basis to assess whether the Complainant is the holder of a prior right, since those documents are submitted more than five months after the end of 40 days period set forth by the Regulation. Accepting these documents as documentary evidence would clearly violate the Regulation.

Furthermore, article 22 (1) b of the Regulation states that a decision taken by the Respondent may only be annulled when it conflicts with the Regulation.

Therefore, only the documentary evidence which the Respondent was able to examine at the time of validation of the application should be considered by the Panel to assess the validity of the Respondent's decision, and the Respondent referred the Panel to Cases Nos. 294 (COLT), 954 (GMP), 1549 (EPAGES), 1674 (EBAGS), and 2124 (EXPOSIUM).

This verification is the only task for the Panel in these proceedings, which may not in any case serve as a “second chance” or an additional round providing applicants with an option to remedy their imperfect original application that was rejected during the Sunrise Period, as was decided in Cases Nos. 551 (VIVENDI) and Nr. 810 (AHOLD).

In other words, as decided in Case No. 1194 (INSURESUPERMARKET), “[t]he ADR procedure is not intended to correct domain name applicants’ mistakes”.

The new documents attached to the present complaint were not received by the Validation Agent during the 40 days period, 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.

The Response concludes by stating that the Regulation and the Sunrise Rules give holders of prior rights the opportunity to demonstrate their prior rights during the phased registration period, which is an exception to the basic principle of first-come first-served.

In order to benefit from this opportunity to demonstrate its prior rights, the applicant must comply with the strict procedure laid out by the Regulation for dealing with the thousands of applications received during the phased registration period and making sure that these applications are substantiated.

The Complainant in the present case did not seize this opportunity, because its application did not correctly fulfill the substantial requirements.

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. As clearly expressed in Cases Nos. 706 (AUTOWELT) and 1710 (PARLOPHONE, EMI, EMIMUSIC, EMIRECORDS, ANGEL, THERAFT): “Should the Panel consider new evidence now, it would treat unfairly any other applicant that may have filed for the Domain Names immediately after the Applicant”.

As the Panel in Case No. 219 (ISL) stated: “One could argue that sympathy is overruled by the applicable Regulations serving among other purposes the (cost-effective) functionality of the phased registration and the principles hereof”. In Case No. 1627 (PLANETINTERNET), the Panel agreed with the Panel in ISL and further explained that "the Regulations and the Sunrise Rules were clearly drafted to ensure a fair distribution of .eu domain names during the phased period and if an applicant fails to fulfill its primary obligations, then, even where such failure is due to an oversight or genuine mistake, the application must be rejected by the validation agen”..

Since the Respondent correctly decided to reject the Complainant's application, pursuant to the Regulation, Respondent's decision may not be annulled and the domain names LOHMANN, GOETHE, and MRC may not be granted to the Complainant. Indeed, a domain name may only be attributed to the Complainant by this Panel, when the Panel finds that the Respondent's

decision conflicts with the Regulation (article 11 of the ADR Rules).

For these reasons, the Complaint must be rejected.

DISCUSSION AND FINDINGS

The Facts
Lohmann Innovations ("the Complainant") applied for the domain names <www.lohmann.eu>, <www.goethe.eu>, and <www.mrc.eu> ("the 3 disputed domain names") on December 8, 2005.

The Validation Agent received the documentary evidence on January 16, 2006, which was before the January 17, 2006 deadline for doing so.

The documentary evidence consisted of copies of trade mark registrations for LOHMANN, GOETHE, and MRC which showed that these marks are all registered, not in the name of Lohmann Innovations, but in the name of Mr. Uwe Lohmann.

The Validation Agent concluded from this documentary evidence that the applicant had not demonstrated that it was the holder of the claimed prior rights.

Therefore, the Respondent rejected the applications for the 3 disputed domain names.

The Complainant's Contentions
The Complaint has been filed by Lohmann Innovations e.K. and contends that this name is nothing more than the name under which the Mr. Uwe Lohmann trades as a sole registered trader i.e. an "eingetragener Kaufmann".

Therefore, the Complainant contends that 'Lohmann Innovations e.K'. and 'Uwe Lohmann' are one and the same person.

The Complainant also submitted new documents in the form of a License Agreement signed between Lohmann Innovations e.K. and Mr. Uwe Lohmann, 3 corresponding Licence Declarations, an extract from the Trade Register of the Court of Hamburg dated February 27, 2006 showing that Lohmann innovations e.K. is registered under No. 103404 with, as its owner, Uwe Lohmann, a copy of the packaging of a TV Monitor radio sold under this trademark LOHMANN, a CD produced for and sold in the stores of German retailer OBI as well as an advertising DVD both bearing the trade mark MCR, and a picture of a beer bottle bearing the trademark GOETHE.

After the initial Complaint, and after a Response had been filed, the Complainant filed an Additional Observation in which he pointed out that the applications for the 3 disputed domain names had all been signed by Mr. Uwe Lohmann in his capacity as a sole trade "Lohmann Innovations". To prove this, copies of all 3 applications were attached.

The Complainant asks the Panel to annul the Respondent's decision because there was no legal ground for the rejection and to grant the 3 disputed domain names to it.

The Respondent's Response
The Respondent contends that the documentary evidence filed initially did not demonstrate that the Complainant was the holder of a prior right because the Complainant's name is Lohmann Innovations e.K., while the owner of the trade marks is Mr. Uwe Lohmann.

The Regulation and the Sunrise Rules clearly provide that the burden of proof is on the applicant for a domain name to demonstrate that it is the holder of a prior right, but in this case the Complainant did not do so.

When there is a difference between the name of the applicant and the name of the owner of the prior right, the applicant must submit official documents explaining why and how it is entitled to rely on a prior right which, in the face of the documentary evidence, belongs to someone else.

If the applicant fails to do so, its application must be rejected and the Respondent must then give the next applicant in line the opportunity to try to demonstrate its prior rights. During the Sunrise Period, the principle 'first-come, first-served' is indeed more properly described as 'first-come-and-substantiate, first-served'. In other words, during the Sunrise Period, the first applicant in the line does not have an unconditional right to the domain name, but only has an opportunity to try to clearly demonstrate that it is the holder of a prior right.

The Legal Position
The Articles from Commission Regulation (EC) No 874/2004 of 28 April 2004 ("the Regulation") and the Sections from the .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period ("the Sunrise Rules") that are relevant to this case are as follows:

Article 10 (1) of the Regulation states that only "Holders of prior rights recognised or established by national and/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."

Article 14 of the Regulation states, inter alia, that "[a]ll claims for prior rights under Article 10(1) and (2) must be verifiable by documentary evidence which demonstrates the right under the law by virtue of which it exists. …… Every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question. …… The applicant shall submit the evidence in such a way that it shall be received by the validation agent within forty days from the submission of the application for the domain name. …… The relevant validation agent shall examine whether the applicant that is first in line to be assessed for a domain name and that has submitted the documentary evidence before the deadline has prior rights on the name. If the documentary evidence has not been received in time or if the validation agent finds that the documentary evidence does not substantiate a prior right, he shall notify the Registry of this. …… The Registry shall register the domain name, on the 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".

Section 20.3 of the Sunrise Rules states that "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 jure 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".

Section 21.2 of the Sunrise Rules states that "The Validation Agent examines 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 ……"

Section 21.3 of the Sunrise Rules states that "The Validation Agent is not obliged, but is permitted in its sole discretion, to conduct its own investigations into the circumstances of the application, the prior right claimed and the Documentary Evidence produced."

Decision
As a preliminary point, the Panel sees no reason why the Complainant's Additional Observation should not be taken into account. It was timely filed and appears to meet all of the necessary requirements.

The Panel considers that there are three issues to be decided in this case –
1. Whether Lohmann Innovation e.K. and Mr. Uwe Lohmann are indeed the same entity
The Panel is not a German lawyer and comes from a common law background so he has no personal knowledge of the legal status of an 'eingetragener Kaufmann'. However, having made appropriate enquiries of those who do, as well as other persons practicing in civil law countries, he has concluded that in fact Lohmann Innovations e.K. is indeed just a pseudonym for Mr. Lohmann. The German Commercial Code quoted by the Complainant is applicable to anyone carrying out a commercial activity i.e. a 'Kaufmann'. It is open for anyone to register as a Kaufmann, but there is no obligation to do so and registration does not, in itself, create a new entity. There is no legal obligation to register, and the only reason why anyone should do so would be to ensure that he is subject to the Commercial Code. Consequently Mr. Uwe Lohmann is indeed no

different from Lohmann innovations e.K.

Nevertheless it would seem that the Complainant does not entirely believe this himself. For example, although in all of the different parts of this Decision it is 'Lohmann Innovations e.K.' who has been referred to as 'the Complainant', in fact the Complaint was filed in the joint names of 'Lohmann Innovations e.K.' and 'Mr. Uwe Lohmann'. Why, in the circumstances, was it necessary to distinguish between the two entities in this manner? Furthermore, the Complaint itself appears to confirm that Mr. Lohmann and the 'eingetragener Kaufmann' are different entities because filed with it was a copy of a Licence Agreement between the two. If they are one and the same, there was no need for any such Agreement, so why was it entered into?

The Respondent quoted from the following the following three Decisions which, he argued, are relevant to this particular case:

Case 1886 GBG.
"According to the Procedure laid out in the Regulation the relevant question is thus not whether the Complainant is the holder of a prior right, but whether the Complainant demonstrated to the validation agent that it is the holder of a prior right. If an applicant fails to submit all documents which show that it is the owner of a prior right the application must be rejected".

However this appears to be a misquotation. It is nowhere in the Decision for Case No. 1886 which relates to the filing, by an applicant, of a copy of his trader mark application rather than the registration. It is therefore not relevant to the present case.

Case 810 AHOLD.
"As confirmed by sec. 20 of SR, it is important to make sure that the applicant is the same holder of the prior rights, to avoid any domain name registration deprived of legitimation on the applicant's side. As a result, when faced before a difference between the applicant name and the prior right holder name, correctly detected by the Validation Agent, the Registry may not accept the corresponding domain name application".

Case 1242 APONET.
"Therefore, in the absence of any document clearly indicating that a) VGDA Gmbh was the short term for Verwaltungsgesellschaft Deutscher Apotheker mbH; b) that VGDA was also an official company name of the Applicant; and c) considering the Complainant'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 VGDA Gmbh and Verwaltungsgesellschaft Deutscher Apotheker mbH were the same entity, did not err in its decision to reject the Complainant's application. 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 Right claimed".

Both of these Decisions are good precedents, and furthermore the law is clear. Under Article 14 of the Regulation, an applicant for a domain name during the Sunrise Period must submit documentary evidence to prove that he is the true owner of a valid prior right corresponding to the domain name he has applied for. If there is any doubt, then under Section 20.3 of the Sunrise Rules, an applicant must submit further documentary evidence to resolve that doubt.

To an outsider, ignorant of the German Commercial Code, and moreover to the Panel, there is a difference between the applicant for the domain names (Lohmann Innovations) and the owner of the trade marks (Uwe Lohmann). Lohmann is, after all, not an especially uncommon name in Germany so it seems more than likely that the 'Lohmann Innovations' who is named as the applicant is different from the 'Lohmann' who signed the Application Form. In the opinion of the Panel, whoever filed the Documentary Evidence on January 16, 2006 should also have filed an explanation as to why the domain name applicant and the trade mark owner were the same because on the face of it they appeared to be different. There is actually an obligation to do this under Section 20.3 of the Sunrise Rules. However it was not done. Therefore the decision by the Validation Agent to reject the applications was legally correct.

2. Whether the validation agent was obliged to investigate whether Lohmann Innovations and Mr. Uwe Lohmann are indeed

the same entity
Again, in the opinion of the Panel, the law is clear on this point.

Under Section 21.3. of the Sunrise Rules, the Validation Agent is not obliged, but is permitted in its sole discretion, to conduct its own investigations into the circumstances of the Application, the Prior Right claimed and the Documentary Evidence produced. As pointed out above, the onus is on an applicant to show that it is the holder of a prior right so, as the Respondent points out, this Section does not impose any obligation on the Validation Agent to conduct its own investigation: it is a mere possibility that EURid could use but at its sole discretion.

Again this is confirmed by the case law, and the Respondent quoted from three allegedly relevant Decisions:

Case 127 BPW
“Section 21.3 of .eu Sunrise Rules reads that the Validation Agent is not obliged, but it is permitted in its sole discretion, to conduct its own investigations into the circumstances of the Application, the Prior Right claimed and the Documentary Evidence produced. Since the burden of proof was on the applicant (Complainant) who clearly failed to proof the ownership rights according to Section 21.3. of .eu Sunrise Rules it was on sole discretion of the Validation Agent to conduct its own investigation and it cannot be deemed as the breach of the Section 21.3 of .eu Sunrise Rules if he decided not to conduct any investigation. Summarizing the above stated, I did not find the contested decision to reject the application of the Complainant made by the Respondent in conflict with any of the European Union Regulations”.

Case 1323 7X4MED
“Therefore, it cannot be reasonably anticipated that the validation agent (although it has the permission to do so pursuant to Section 21 (3) of the Sunrise Rules) would investigate into the circumstances of each and every domain name application where the documentary evidence submitted by the applicant does not comply with the requirements set forth by Sunrise Rules”.

Case 501 LODE and PROCARE
“In this case, the documentary evidence in support of the applications for the Domain Names was incomplete in respect of the requirements set out in Section 20.1 of the Sunrise Rules. The Panel accepts that the applicant should not expect the Registry or the Validation Agent to engage in its own investigations to establish the exact relationship between the registered holder of the trade mark and the applicant”.

Case 1443 URBIS
“It is also necessary to point out that the validation agent/Registry cannot be expected and/or forced to speculate whether the Complainant is a holder of the prior right claimed”.

These are very clear precedents and the Panel has therefore concluded that the Validation Agent was perfectly justified in not doing anything to make further checks on the documentation filed by the Complainant or to investigate why the names on the documents did not match.

3. Whether the additional documentation filed by the Complainant can be
accepted.
The Complaint was filed on June 23, 2006 and with it the Complainant submitted new information in the form of the documents listed above under ‘The Complainant’s Contentions’.

Further additional documents were filed with the Additional Observation, namely copies of the 3 domain name Application Forms. The Complainant pointed out that these applications had all been signed by Mr. Uwe Lohmann, and one of the conditions of the Form (under all of which Mr. Lohmann has written “read and accepted”) is that it has to be signed by ‘the applicant or someone authorised to represent the applicant”. The Complainant argued that because of this signature it is clear that the domain name applications all belonged to Mr. Uwe Lohmann.

However only the documentary evidence which the Validation Agent was able to examine at the time of its validation of the

application can be considered as being relevant. Bearing in mind that the last date for the Complainant to file its proof of a prior right was January 17, 2006, it is quite clear to the Panel that the additional documents filed with the Complaint cannot now, at this stage, be accepted as evidence. There are several reasons for this –

• According to Article 14 of the Regulation, EURid may only accept, as documentary evidence, documents that are received by the Validation Agent within 40 days from the submission of the application for the domain name. In this case, that period ended on January 17, 2006.

• The Extract from the Hamburg Court is dated February 27, 2006 and it appears to indicate that the registration was only made on February 3, 2006 which, again, is subsequent to January 17, 2006.

• The Licence Agreement is dated March 15, 2006 and the 3 Licence Declarations are all dated June 22, 2006, both dates being well after the due date of January 17, 2006.

• The examples of how the 3 trade marks are used add nothing to the case.

• The 3 Application Forms also add nothing. They state that the name of the applicant is "Lohmann Innovations" and the fact that they have been signed by Mr. Uwe Lohmann who, the Panel notes, identifies himself in the Box headed 'Function' as the "Markeninhaber" or as the owner of the corresponding trade mark, should have raised no doubts in the mind of the Validation Agent as he would expect the Form to be signed by someone authorised to act on behalf of the applicant. Despite the function selected by Mr. Lohmann for himself, the Validation Agent would have expected the documentary evidence to show either that the corresponding trade marks are registered in the name of Lohmann Innovations – which they are not – or an explanation for this difference – which was not forthcoming.

The Panel has considerable sympathy with the Complainant but, as he said in case 1393 (HANSA) "… the law is the law and rules are rules …" and in the present case there is a clear breach of the Law and the Rules. The Panel has therefore concluded, on the basis of the evidence and arguments submitted, that the Complaint should be denied.

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 2006-10-19

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant filed a Complaint against the Respondent's decision to reject its application for the 3 domain names: <lohmann.eu>, <goethe.eu>, and <mcr.eu>. The rejection was based upon the fact that the applications were made in the name of Lohmann Innovations but the 3 corresponding trade marks were all registered in the name of Mr. Uwe Lohmann.

The Complainant argued that he is a registered entrepreneur (eingetragener Kaufmann) and that although the trade marks might have been registered in his own personal name, he and the "e.K" are the same person. Therefore the domain name applications had been wrongly rejected. He filed copies of a number of documents in support of his argument.

The Respondent argued that the onus is on an applicant to demonstrate that he is the owner of a prior right claimed in an application during the Sunrise Period and, because Mr. Lohmann did not so demonstrate, the applications were correctly refused.

The Respondent also noted that under the Sunrise Rules the Validation Agent has the discretion to make it own investigations into the circumstances surrounding the documentation provided by an applicant, but that it has no obligation to do so, and indeed can hardly be expected to make it own enquiries on every occasion when there is some doubt,.

With regard to the additional documents filed with the Complaint, the Respondent noted that the Regulation only permits the Validation Agent to examine documents received within 40 days of an application being filed.

Having reviewed all the evidence, the Panel concluded that Lohmann Innovations is a pseudonym for Mr. Uwe Lohmann and that they are therefore one and the same. However there was a clear discrepancy between the name of the applicant for the domain names and the owner of the trade marks and in such a case an applicant has an obligation to file an explanation for any discrepancy together with the Documentary Evidence that has to be submitted within 40 days of a domain name application being made. In this case no such explanation was filed. Furthermore, not only was the Complaint made in the names of both Mr. Uwe Lohmann and Lohmann Innovations e.K. but there was also a Licence Agreement between them, both of which facts indicated that the Complainant himself believed the two to be separate and different. Also, since many of the documents filed with the Complaint were dated after the end of the above mentioned 40 day period they could not be accepted.

As a result, the Complaint was rejected.