Panel Decision for dispute CAC-ADREU-002046

Case number	CAC-ADREU-002046
Time of filing	2006-07-10 15:48:08
Domain names	postbank.eu

Case administrator

Name	Kateřina Fáberová

Complainant

Organization / Name	ING, Ms Louise McGregor

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

There are no other legal proceedings of which the Panel is aware that are pending or decided and that relate to the disputed domain name.

FACTUAL BACKGROUND

On December 7, 2005, the Complainant filed a request for registration of the domain name <postbank.eu> in the name of ING Groep N.V. and on January 16, 2006, the processing agent received documentary evidence which was submitted electronically by the Complainant's registrar. The submitted electronic file was corrupt and the validation agent was not able to open and/or review the content of the electronic file.

Since the content of the submitted electronic file could not be accessed, the Respondent had no documentary evidence to assess the prior right of the Complainant.

On May 17, 2006, the Respondent rejected the request for registration on the grounds that the documentary evidence received did not sufficiently prove the right claimed.

The Complainant filed a Complaint via e-mail and telefax on June 27, 2006. The Czech Arbitration Court ("CAC") acknowledged receipt of the Complainant on July 10, 2006. On July 18, 2006, CAC informed the Complainant of a discrepancy between the hard copy and the electronic Complaint and that signed hardcopies of the Complaint were missing and that the registrar with whom the disputed domain name was registered had to be identified. On July 25, 2006 CAC received the Complaint in hardcopy and after the compliance review, CAC declared that the formal date of the commencement of the ADR proceeding was July 25, 2006.

The Respondent submitted a Response on September 13, 2006.

The Respondent requested a three-member panel and on September 29, CAC appointed the panellists in order to prepare a decision.

A. COMPLAINANT

The Complainant requests that the Registry's decision to deny Complainant the domain name <postbank.eu> shall be annulled and that the contested domain name shall be transferred to the Complainant.

The Complainant applied for the domain name <postbank.eu> on December 7, 2005 and sent a printout from the online register of the Benelux Trademark Office regarding the trademark POSTBANK with registration number 520549 electronically through his registrar.

On May 18, 2006, the Complainant received a standard rejection e-mail saying that the application for the domain name <postbank.eu> had been rejected because the documentary evidence did not sufficiently prove the right claimed.

The Complainant argues that the extract from the Benelux Trade Marks Office, which is specifically listed in the rules, clearly demonstrates that the Complainant is the owner of the trademark. The fact that the address as published on the trademark registration is different than the address of the Complainant (and the Applicant) should not be an obstacle for registering the domain name according to the Complainant.

Furthermore the Complainant informs that The Respondent did not communicate to the Complainant or to the Complainant's registrar, that the submitted evidence had been corrupted. Thus the electronic pdf file must have been corrupted during transmission or on arrival with EURid, because it was not corrupt when submitted by the registrar.

B. RESPONDENT

The Respondent contends as follows:

Article 10(1) of Commission Regulation (EC) No 874/2004 of 28 April 2004 ("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 phased registration before general registration of .eu domains starts.

Pursuant to article 14 of the Regulation, it is up to the Applicant 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 Complainant applied for the domain name <postbank.eu> on December 7, 2005 and the processing agent received the documentary evidence on January 16, 2006. The documentary evidence was submitted electronically, via the Complainant's registrar, as allowed by section 8(5) of the Sunrise Rules.

The validation agent was not able to open the electronic file in which the asserted documentary evidence was enclosed. Therefore, the validation agent and the Respondent had no documentary evidence to assess the prior right of the Complainant. The application for the domain name <postbank.eu> was rejected.

The burden of proof lies with the Complainant. Article 10(1) of the Regulation states that only the holders of prior rights shall be eligible to register domain names during the period of phased registration.

Article 14 of the Regulation states that every Applicant shall submit documentary evidence that shows that he or she is the holder of a prior right claimed on the name in question. 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. 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 the holder of a prior right.

The Respondent refers to Case No. 1886 (GBG) in which it was stated that the relevant question is 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.

That the burden of proof regarding a prior right is with the Applicant is also clear from Section 21(3) of the Sunrise Rules, which states that the validation agent is not obliged, but 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. Moreover, 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 if documentary evidence it has received.

Previous case law suggests that an application must be rejected if an Applicant has failed to submit relevant documentary evidence during the prescribed forty days period. See for example Case No. 219 (ISL), Case No. 1232 (MCE), Case No. 1546 (EPAGES), Case No. 1071 (ESSENCE), Case No 1318 (SYS) and Case No. 1710 (EMI et al).

According to Section 8(5) of the Sunrise Rules, a hard copy of the documentary evidence must be submitted by the Applicant to the processing agent. However, a registrar may be authorized to send the documentary evidence electronically.

In the case at hand, the Complainant seems to have instructed its registrar to send the documentary evidence electronically. It has been argued by the Complainant that the file was not corrupted when sent to its registrar. However, at the moment of validation, the validation agent was unable to open the electronic file. The Complainant's registrar may not have encoded the electronic file properly. The result was that the validation agent did not receive any documentary evidence at all. Such a situation would be the same as if the validation agent had received an empty envelope. Thus, the Complainant did not submit any documentary evidence and therefore failed to meet its burden of proof.

Mistakes made by the applicant's registrar may not be attributed to the Respondent. Section 5.3 of the Sunrise Rules states that "The Registry, Validation Agents and the Government Validation Points are not party to the agreement between the Applicant and his Registrar or to the agreement between the Applicant and his Document Handling Agent and therefore cannot incur any obligation or liability under these agreements".

In Case No. 984 (ISABELLA) it was stated that EURid is not a party to the agreement between an Applicant and its Registrar and any default by the Registrar should be taken up as between the Applicant and the Registrar and is not a reason for overturning EURid's decision. The Respondent argues that the Complainant should turn to its Registrar when looking for a remedy.

Furthermore, the Respondent argues that the extract of the Benelux trademark database brought into the ADR proceeding by the Complainant shall be considered new evidence which has to be disregarded. The document was not enclosed with the documentary evidence, but provided to the Respondent for the first time in the framework of the ADR proceeding.

The Complainant was provided with forty days to demonstrate its prior right and chose to send the documentary evidence on the last possible day. Once that forty day period has passed, the Respondent must assess the prior right on basis of the evidence received.

According to previous case law, the ADR procedure is not intended to correct "mistakes" made by applicants. The contrary would be unfair to the next applicants in the line who did the endeavour to enclose a complete set of documentary evidence with their applications. See for example Case No. 1194 (INSURESUPERMARKET).

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. See for example Case No. 294 (COLT), Case No. 954 (GMP) and Case No. 1549 (EPAGES).

The Respondent also refers to Case No. 1627 (PLANETINTERNET) in which it was stated that "the Regulations and the Sunrise Rules where clearly drafted to ensure a fair distribution of .eu domain names during the phased period and if an Applicant fails to fulfil its primary obligations, then, even where such failure is due to an oversight or genuine mistake, the application must be rejected by the validation agent".

The Respondent requests that the Complaint is rejected.

DISCUSSION AND FINDINGS

In this case the Complainant submitted an electronic pdf file to the processing agent on January 16, 2006, which was the deadline for filing evidence. The electronic file could not be opened and therefore it was impossible for the processing agent to assess applicant's right to the domain name <postbank.eu>. The Complainant has argued that the file could have been corrupted during transmission or on arrival with EURid. From the submitted evidence it is impossible for the panel to conclude the reason why the submitted pdf file was corrupt.

Due to the fact that the Respondent was unable to open or view the submitted documentary evidence, the Respondent had no documentary evidence or any other material to review. Therefore, the Respondent rejected the Complainants application for the domain name <postbank.eu>.

Later, in the ADR proceeding, the Complainant submitted a trademark extract from the Benelux Trademark Office for the trademark POSTBANK. The submitted trademark extract indicates that the owner of the trademark is indeed the Complainant, ING Groep N.V.

The question here is whether the Registry's decision to reject the Complainant's application for the domain name <postbank.eu> was correct or not.

The purpose of the Commission Regulation (EC) No 874/2004 is to grant domain names during the Sunrise period on first come first served basis provided that an Applicant can demonstrate a right which makes him entitled to the domain name application. According to

paragraph 4 of Article 14 of the said Regulation, every Applicant shall submit documentary evidence that shows that he or she is the holder of the Prior Right claimed in question and if such documentary evidence has not been received within forty days from the domain name application, the application for the domain name shall be rejected.

Furthermore, according to the .eu Registration Policy and the Terms and Conditions for Domain Name Applications made during the Phased Registration Period ("Sunrise Rules") under Section 5(2) it states that the Applicant may appoint a document handling agent by indicating the e-mail address of the document handling agent in the application. In Section 5(3) it states that "The Registry, Validation Agents and the Government Validation Points are not party to the agreement between the Applicant and his Registrar or to the agreement between the Applicant and his Document Handling Agent and therefore cannot incur any obligation or liability under these agreements".

Section 8 (6) of the Sunrise Rules states that it is the sole responsibility of the Applicant to ensure that all requirements for documentary evidence in Section 8 are complied with and that any documentary evidence sent to the processing agent by a third party in the name and on behalf of the Applicant is deemed to have been sent by the applicant.

Section 9(2) of the Sunrise Rules states that the processing agent may, via the Registry, request the Applicant to submit a new set of documentary evidence if the original documentary evidence received is accidentally damaged or destroyed during or after transmission thereof. From the wording in Section 9(2) it is evident that the processing agent is permitted in its sole discretion to request a new set of documentary evidence if the original evidence is damaged or destroyed during transmission, but is not obliged to do so.

In the light of the foregoing the Panel finds that it is the responsibility of the Applicant (Complainant) of the domain name to ensure that all requirements concerning the documentary evidence are complied with and that the burden of proof for demonstrating a prior right during the phased period lies with the applicant. EURid and the validation agent have to rely upon the documentary evidence submitted by the Applicant and in the present case, it was clear that the validation agent was unable to open or view the corrupt electronic pdf file which allegedly contained the documentary evidence. Thus, the Complainant failed to submit the relevant evidence demonstrating the prior right within the forty day period set out in Article 14 of the Regulation.

If there would be exceptions in favour of the Applicant, allowing additional submissions of evidence after the forty day period, it would affect the legitimate expectancy of the next Applicant in the queue for the domain name in question and conflict with the first come first served principle set out in Article 14 of the Commission Regulation (EC) No 874/2004.

Consequently, the panel is of the opinion that the Respondent's decision to reject the Complainant's application on the grounds that the submitted documentary evidence did not sufficiently prove the right claimed does not conflict with the European Regulations Nos 874/2004 and 733/2002.

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	**Guido Maffei**

DATE OF PANEL DECISION 2006-10-27

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

ING GROEP N.V. applied for the disputed domain name during the phase one of the Sunrise Period, stating, as prior right, the ownership on a national trademark registered in Benelux. The Complainant submitted the requested documentary evidence electronically via its registrar.

The validation agent was not able to open the electronic file in which the asserted documentary evidence was enclosed since the electronic file was corrupted. The registry rejected the Complainant's application for registration of the domain name.

In the case at hand, the panel had to consider whether the registry's decision to reject the Complainant's application for the contested domain name was correct or not.

It is the panel's opinion that the decision taken by the registry does not conflict with the relevant EC-Regulations and as stated in

previous cases, the burden of proof is always and entirely on the Complainant's side.

In other words, it is up to the Complainant to demonstrate the existence of the prior right claimed and, if the relevant evidence is furnished by way of a corrupt electronic file, the consequence is the clear impossibility for the validation agent of verifying the existence of the prior right claimed.

Furthermore, it must be considered that, under Section 9(2) of the Sunrise Rules, the processing agent is permitted in its sole discretion to request a new set of documentary evidence if the original evidence is damaged or destroyed during transmission, but is not obliged to do so.

In the case at hand, the validation agent had no documentary evidence for assigning the domain name to the Applicant, first in the queue for the domain name <postbank.eu>.

The evidence related to the ownership of the prior right claimed by the Complainant was readable only in the framework of the ADR proceeding and, therefore, too late to be considered since the documents which serves as evidence in order to substantiate a prior right must be submitted within the period of 40 days from the submission of the application .

Therefore, since the Respondent complied with all the relevant rules and regulations in rejecting the domain name application in the name of ING GROEP N.V, the panel concluded that the Respondent's decision was correct and therefore dismissed the Complaint.