Panel Decision for dispute CAC-ADREU-002138

Case number	**CAC-ADREU-002138**
Time of filing	**2006-07-03 13:49:23**
Domain names	**novum.eu**

Case administrator

Name	**Kateřina Fáberová**

Complainant

Organization / Name	**NOVUM Märkte GmbH, Michael Schnelle**

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 other legal proceedings which are pending or decided and which relate to the disputed domain name

FACTUAL BACKGROUND

1. The Complainant is a company with seat of business in Germany and the owner of the German trademark no. 399 46 634 “novum” (word/device) registered on 21 February 2000. The trademark consists of a square in font size. In the square there is a pink triangle. In the triangle is another grey triangle. This device is followed by the word “novum” in slightly stylized letters.

2. On 8 December 2006 the Complainant filed a request for the registration of the domain name “novum.eu” (the Domain) within part one of the phased registration period. On 5 January 2005, hence before the deadline on 17 January 2006, the Processing Agent received the documentary evidence, submitted by the Respondent via mail.

3. With decision of 24 May 2006 the Respondent rejected the request for registration on the grounds that the documentary evidence presented by the Complainant did not substantiate the prior right claimed in the request for registration.

4. The documentary evidence that was received as the answer to the Request for EURid Verification consists of a Cover Letter in German duly filled out, signed and dated 30 December 2005, but without enclosures.

A. COMPLAINANT

1. The Complainant asserts that the handling agent whom he had instructed with the filing of the request for registration duly filled out the cover letter form provided by the Respondent and attached a photocopy of the registration certificate of the German trademark no. 399 46 634 “novum” and a database printout of the said trademark.

2. The Complainant submits as “exhibit 3” a document titled “Eidesstattliche Versicherung/Affidavit” in which the handling agent confirms the facts with respect to the submission of the documentary evidence of a prior right as asserted by the Complainant.

3. The Complainant is of the opinion that he had submitted documentary evidence that sufficiently proved that he is the holder of a prior right according to the relevant provisions and that the documentary evidence was received by the Processing Agent in due time.

Hence, the Complainant requests that the decision of the Respondent of 24 May 2006 will be annulled and that the Domain will be attributed to the Complainant.

B. RESPONDENT

1. The Respondent contends that he was informed by the Processing Agent that only the cover letter without any enclosures was received.

2. The respondent, in referring to Art. 14 Regulation EC 874/2004, is of the opinion that it is not sufficient that the documentary evidence was submitted (i.e. given to the mail) but that the documentary evidence must have actually been received by the Processing Agent. The Respondent contends that the affidavit submitted by the Complainant may only prove that the enclosures were submitted but not that they were received by the Processing Agent.

3. As a consequence, the Respondent regards the trademark registration certificate and the database printout submitted as exhibits to the Complaint as new documentary evidence that must not be considered since it was not submitted timely.

The Respondent requests to deny the complaint.

DISCUSSION AND FINDINGS

1. Contentious Issue

1.1 The pivotal question to be decided in this case is, whether the Complainant's documentary evidence was completely submitted and received in time by the Respondent.

1.2 Art. 14 of the Regulation 874/2004 states that "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. […] 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."

1.3 The Complainant states that he submitted the cover letter together with the complete documentary evidence whereas EURid argues that it received the cover letter only.
This issue is, hence, a matter of evidence.

1.4 The Complainant wants to prove his position with the submission of an affidavit. However, the affidavit only contains a statement of how many pages of documentary evidence were sent to the Respondent but not of how many pages were actually received by the Respondent and the Processing Agent respectively. As stated above, Art. 14 of the Regulation EC 874/2004 requires that the documentary evidence was not only sent but also received. Hence, the success of the Complaint depends on who carries the burden of proof with respect to whether or not the documentary evidence was received. In case the burden lies on the Complainant, the Complaint would have to be denied since the presented affidavit cannot prove the receipt of the documentary evidence.

2. Burden of Proof

Considering the aforementioned, it needs to be clarified which party bears the burden of proof upon the receipt of submitted documentary evidence.

2.1 The Sunrise or ADR-Rules do not provide a special rule concerning the burden of proof. As a general rule, the party that relies on an asserted fact has the onus of proving it. Since the Complainant relies on the complete submission of the documents it would be up to him to prove it.

2.2 It is argueable, that the burden of proof for the receipt of documents should be reversed because even for an 'ideal applicant' it would be impossible to prove that he submitted the documentary evidence in complete form. Sec. 8 (5) only permits to send documentary evidence via regular mail, registered or recorded delivery mail or courier. None of these methods is suitable to prove how many pages were received by the Processing Agent, since registered mail can only prove whether an envelope has been received but not what was in the envelope. The confirmation notice the Complainant receives according to the Sunrise Rules does not provide which documents have been received by EURid in detail (Sec. 6).

2.3 To give the Applicant the opportunity to prove his submissions, EURid would have to be obliged by procedural rules to give a detailed confirmation, not only confirming the receipt as such but confirming the receipt of certain documents.

The Sunrise Rules clearly state, that the Validation Agent and the Registry are not obliged to inform the Applicant of whether the Documentary Evidence has or has not met the requirements, Sec. 8 (7). In Sec. 8(6) it is stated, that it is the sole responsibility of the

Applicant to ensure that the requirements for registration are fulfilled. Following these rules, EURid has no duty to assist the Applicant with his application. Under the Sunrise procedure, the Applicant does not get a second chance to correct or complete his application (Nr. 551 (Vivendi), Nr. 294 (Colt)).

It has been held in several panel decisions, that allowing additional submissions of evidence would affect the legitimate expectancy of the next applicant in the queue for the domain name in question and would conflict with the 'first come first served principle', Art. 14 874/2004 (Nr. 894 (BEEP!)).

Since there is no procedural situation where additional documents are permitted at a later stage, there is no procedural requirement to give a detailed feedback on the documents received.

The Complainant in this case did not ask for a second chance to send additional documents. But the Applicant, who submitted complete documents which were finally not received by EURid due to a mistake which cannot be attributed to him, is left empty-handed and treated as if the sent incomplete documentation.

This procedure might seem 'unfair' because mistakes happen everywhere and one could argue that if an application is obviously incomplete as in this case without the Applicant being at fault, the Applicant should get a second chance. But it needs to be stressed here, that the Complainant made an application during the Sunrise period. A strict and efficient procedure is necessary to permit EURid to deal with the workload of thousands of applications received during this period. It is obvious that such a fast-track procedure has to be extremely formalistic to be efficient and strict formalism always has a tendency to restrict the parties procedural rights. As stated in case Nr. 129 (ISL) "sympathy is overruled by the applicable Regulations serving among other purposes the (cost-effective) functionality of the phased registration and the principles thereof."

Another justification for this strict and formalistic procedure lies in the nature of domain-name distribution itself. The situation is different from a person claiming the enforcement of a right in court. In the latter situation, the Claimant holds a legal position which might deserve protection by procedural safeguards and justice should not be denied by formalistic rules. In the first scenario, the legal position of the claimant is just about to come into existence by registering his domain name. His 'right' to register the domain is not necessarily stronger than that of other Applicants. There is no reason to consider an Applicant with an incomplete submission while other Applicants in the same legal position and with a complete application in their hands are in the queue. A strict and formalistic procedure is therefore tolerable.

To permit complaints that documents were submitted complete on the mere basis of affidavits would risk to delay the whole system of registration and could easily be abused.

It therefore has to be assumed that EURid received the documents in the same manner as noted by the Processing Agent. The burden of proof cannot be shifted to EURid as the recipient. A procedure that permits detailed evidence on discrepancies between receipt and submission is not suitable for a formalistic procedure for a massive number of applications as it is in operation here.

3. Conclusion

As pointed out above, the Complainant could not prove that he not only sent complete documentary evidence but that the complete documentary evidence was actually received by the Respondent. Documentation submitted at a later stage is not considered.

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	Thomas Johann Hoeren

DATE OF PANEL DECISION 2006-10-09

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant asserts that he sent a cover letter with three pages of documentary evidence enclosed thereto to the Respondent. The Respondent claims that he only received the cover letter but no enclosures. Consequently, the Respondent rejected the application due to a lack of documentary evidence. The Complainant submits an affidavit signed by his handling agent which states he enclosed three

pages of documentary evidence to the cover letter, put all together in an envelope and mailed the envelope to the Respondent.

The Panel holds that Art. 14 Regulation EC 874/2004 requires not only that the documentary evidence was sent to the Respondent but that it, furthermore, was actually received by the Respondent. The submitted affidavit, however, cannot prove the receipt of the documentary evidence.

The Panel holds that the relevant rules do not address the question of the burden of poof but that the general rule applies that the party that relies on a certain fact carries the onus of proving that fact. The Panel then considers whether there was a justification to shift the burden of proof to the Respondent in this case since even a diligent and compliant Applicant could not establish that the mistake happened in the sphere of the Respondent and not on the Applicant's side.

However, the Panel decided to apply the rules strictly and formally in the interest of an efficient and cost effective fast-track-procedure. In case the burden of proof would be shifted to the Respondent, the ADR-proceedings would be opened to abuse and applicants would get a second chance by simply alleging that complete documentary evidence was submitted, a result contrary to the intentions of a fast-track-proceeding and the legitimate expectancies of the next applicants in the queue.

Since the Complainant could not discharge his onus of proof the Complaint had to be denied.