Panel Decision for dispute CAC-ADREU-002169

Case number	**CAC-ADREU-002169**
Time of filing	**2006-07-17 15:14:35**
Domain names	**tipcars.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**EBM system s.r.o.**

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

EBM system s.r.o (the “Complainant”) submitted its application for the domain name tipcars.eu (the “Domain Name”) on 7 December 2005. The Complainant submitted documentary evidence in support of its application for the Domain Name on 19 December 2005.

For reasons unknown, it appears that the documentary evidence did not evidence the ownership of (or other rights in) the name TIPCARS. Instead, the documentary evidence provided a trade mark certificate for the name EBM SYSTEM.

EURid (the “Respondent”) rejected the Complainant’s application for the Domain Name because the Complainant had not demonstrated that it was the holder of a prior right in the name TIPCARS.

The Complainant claims that it submitted its application for the Domain Name in accordance with the Sunrise Rules together with the “documents as requested” and that, therefore, the Respondent’s rejection of its application for the Domain Name was in breach of the Regulations.

The Complainant has therefore requested that the Respondent’s decision not to accept the application for the Domain Name is cancelled.

A. COMPLAINANT

The Complainant contends as follows:

“On Dec. 7, 2005 the petitioner submitted an application for assigning the domain tipcars.eu. The petitioner is the owner of trade mark TipCars which is registered by the Industrial Property Office in Prague, Czech Republic under the registration number 275154 and the petitioner is also the owner of image trade mark TipCars which is registered by the Industrial Property Office in Prague, Czech Republic under the registration number 273806. On the basis of the aforementioned trade mark Tip Cars the petitioner claimed his right for the domain tipcars.eu and therefore the petitioner has the preferential right for this domain due to the aforementioned reason. The petitioner submitted an application for assigning the domain tipcars.eu in line with the Guidelines for the Sunrise period and the application was accompanied by the documents as requested. Legal entity of the petitioner was documented by the extract from the Commercial Registry. The preferential right was documented by the certificate on Registration of the trade mark TipCars while this certificate was issued by the Industrial Property Office with its seat in Prague. Because the application for assigning the domain tipcars.eu submitted by

the petitioner was rejected the petitioner finds the decision of the Administrator to be in breach with the Regulations of the European Union. Based on the aforementioned facts the petitioner proposes to cancel the decision of the Administrator on rejecting the domain tipcars.eu claimed by the petitioner."

B. RESPONDENT

The Respondent contends as follows:

"1. GROUNDS ON WHICH THE RESPONDENT REJECTED THE APPLICATION BY EBM SYSTEM S.R.O. FOR THE DOMAIN NAME TIPCARS

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

Article 10 (2) of the Regulation states that the registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists.

Article 14 (4) of the Regulation states that every applicant must 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. If the documentary evidence has not been received by this deadline, the application for the domain name shall be rejected.

Section 21.2. of the Sunrise Rules states that "[t]he 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".

EBM SYSTEM S.R.O. (hereafter "the Complainant") applied for the domain name TIPCARS on 7 December 2005. The processing agent received the documentary evidence on 19 December 2005, which was before the January 16, 2006 deadline. The documentary evidence received by the validation agent consisted of a certificate of registration for the Czech semi-figurative trademark "EBM system". This documentary evidence is attached to the non-standard communication dated 28 July 2006.

On the basis of the documentary evidence submitted, the validation agent concluded that the Complainant had not demonstrated that it is the holder of a prior right on the name TIPCARS. Therefore, the Respondent rejected the Complainant's application.

2. COMPLAINANT'S CONTENTIONS

The Complainant argues that it is the holder of a Czech registered trademark "TipCars". The Complainant attaches to its complaint certificates of registration for the TipCars trademark. The Complainant therefore requests that the Respondent's decision be annulled and requests that the domain name is attributed to him.

3. RESPONSE

3.1 The burden of proof was with the Complainant to demonstrate that it is the holder or the licensee of a prior right It must be noted that the processing agent did not receive any documentary evidence which would have demonstrated that the Complainant is the holder of a prior right on the name TipCars. The validation agent only received documents related to the Czech semi-figurative trademark "EBM system". Those documents are attached to the non-standard communication filed by the Respondent on 28 July 2006.

Pursuant to the Regulation and the Sunrise Rules, it is to the applicant to submit all documents which the validation agent needs to assess whether an applicant is the holder of a prior right corresponding to the domain name. In case an applicant fails to submit such documents, its application must be rejected. (see for example ADR 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS)).

Pursuant to the Regulation, the relevant question is not whether an applicant is the holder of a prior right, but whether an applicant proves to the validation agent that it is the holder of a prior right (see ADR 1886 (GBG)).

Article 10 (1) of the Regulation states that only the holder of a prior right is eligible to be granted the corresponding domain name. It is therefore of great importance that the Registry is provided with all information that allows it to assess if the Applicant is the holder of a

prior right.

Pursuant to article 14 (4) of the Regulation, the documentary evidence must clearly show that the applicant is the holder of the prior right claimed on the name in question. The Panels in ADR 00119 (NAGEL, "Article 14, Section 1 of the Regulation 874/2004 requires that all claims for Prior Rights must be verifiable by documentary evidence which demonstrates the right under the law by virtue of which it exists").

Article 14 (4) further states that the applicant shall submit the evidence in such a way that it shall be received within forty days from the submission of the application for the domain name. If the documentary evidence has not been received by this deadline, the application for the domain name shall be rejected.

In the present case, the documentary evidence received by the validation agent within forty days from the submission of the application consisted only of a certificate of registration for the Czech semi-figurative trademark “EBM system”.

TIPCARS (the domain name applied for) is not the complete name for which the prior right exists (EBM SYSTEM) and therefore, the Czech trademark “EBM system” may not serve as a prior right for the domain name TIPCARS.

Therefore, the Respondent rejected the Complainant’s application because the documentary evidence received by the validation agent did not demonstrate that the Complainant was the holder of a prior right on the name TipCars.

3.2 Documents submitted for the first time during the present ADR proceedings may not be taken into consideration Pursuant to the Regulation 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 16 January 2006. The Complainant filed its complaint on 30 June 2006 and submitted new documents attached to this complaint.

Those documents may not serve as a basis to asses whether the Complainant is the holder of a prior right, since those documents were submitted more than five months after the end of 40 days period set forth by 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 (see notably cases Nr. 294 (COLT), Nr. 954 (GMP), Nr. 01549 (EPAGES) and Nr. 1674 (EBAGS)).

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 an option to remedy their imperfect original application that was rejected during the Sunrise Period (see cases Nr. 551 (VIVENDI) and Nr. 810 (AHOLD)). In other words, as decided in case Nr. 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.

3.3 Conclusion

The Regulation and the Sunrise Rules give holders of prior rights the opportunity to demonstrate their prior rights during the phased registration, 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 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 fulfil the substantial requirements.

Any right given to the Complainant to correct its defective application at this stage of the procedure would clearly be in breach of the Regulation and the Sunrise Rules.

As the Panel in ADR 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 ADR 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 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".

For these reasons, the complaint must be rejected."

DISCUSSION AND FINDINGS

1. Article 14 of Commission Regulation (EC) No 874/2004 (the "Regulation") states the following:

"All 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 documentary evidence shall be submitted to a validation agent indicated by the Registry. 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. If the documentary evidence has not been received by this deadline, the application for the domain name shall be rejected"

2. Under the wording of Article 14 of the Regulation, the Respondent was not permitted to accept the Complainant's application for the Domain Name if the Complainant failed to provide documentary evidence (within forty days of the submission of its application) which showed it was the holder of a prior right in TIPCARS.

3. The Complainant has asserted that its application for the Domain Name was "in line with the Guidelines for the Sunrise period and the application was accompanied by the documents as requested". This suggests that the Complainant is of the view that it provided documentary evidence which showed it was the holder of a prior right in TIPCARS.

4. The Respondent has provided the Panel with a copy of the documentary evidence provided by the Complainant in support of its application for the Domain Name. The form on the front page of the evidence is written in Czech, but it is stated to relate to the Domain Name (i.e. tipcars.eu). The remaining pages are also in Czech, but appear to be a copy of a trade mark certificate for the Czech registered trade mark EBM SYSTEM. Every page is stamped with date in the format "20051216". There is nothing in the documents or otherwise which suggests the documents are not what was provided by the Complainant.

5. The Complainant has attached a number of documents to its Complaint which show that it is the owner of the Czech registered trade mark TIPCARS. However, it has not submitted any evidence which shows that it provided such evidence within forty days of its application for the Domain name.

6. The Panel therefore accepts the Respondent's assertion that the Complainant did not provide the documentary evidence required by the Regulation within forty days of its application for the domain name. As a result, it was not entitled to succeed on its application for the domain name.

7. Section 21.3 of the Sunrise Rules states:

"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."

8. The Complainant has not suggested that the Respondent should have used its discretion (upon receiving deficient documentary evidence) to check to see whether the Complainant had rights in the name TIPCARS. In addition, the Complainant has not provided any evidence to the Panel as to whether it would have been easy to check online, for example at the Czech Trade Mark Registry, to see whether the Complainant owned a registered trade mark for the name TIPCARS.

9. However, even if the Panel had received such evidence from the Complainant, Section 21.3 of the Sunrise Rules gives permission to the Respondent to carry out such checks at its sole discretion. The Respondent is not required by the Sunrise Rules to exercise such discretion and, more importantly, it is not required by the Regulation to exercise such discretion.

10. For the above reasons, the Panel does not find any breach of the Regulation, Regulation (EC) No 733/2002, or the Sunrise Rules by the Respondent. The complaint is therefore denied.

DECISION

For all the foregoing reasons, the complaint is denied

PANELISTS

Name	**Isabel Davies**

DATE OF PANEL DECISION 2006-11-06

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant did not provide documentary evidence which showed it was the holder of a prior right in TIPCARS within forty days of its application of the domain name during the Sunrise period. As a result, and in accordance with Article 14 of Commission Regulation (EC) No 874/2004, the Respondent did not accept the Complainant's application for the domain name tipcars.eu.

The Panel does not find any breach of Regulation (EC) No 874/2004, Regulation (EC) No 733/2002, or the Sunrise Rules by the Respondent. The complaint is therefore denied.