Panel Decision for dispute CAC-ADREU-002209

Case number	**CAC-ADREU-002209**
Time of filing	**2006-07-27 13:07:19**
Domain names	**commscope.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**CommScope Europe, Mr. Robert Carl Smith**

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 any other pending or decided legal proceedings which relate to the Disputed Domain Name.

FACTUAL BACKGROUND

The Complainant is a Belgian company, CommScope Europe, SPRL, and the Respondent is the .eu domain name Registry, EurID.

On 8 February 2006 the Complainant made a Sunrise application to register the Disputed Domain Name, "commscope.eu". The Respondent's processing agent confirmed receipt of the application and required the Complainant to provide the Documentary Evidence of its Prior Right by 20 March 2006.

On 13 March 2006, the Complainant's Documentary Evidence was received by the Respondent's processing agent.

On 25 May 2006, the Respondent rejected the application on the basis that it had not received Documentary Evidence which sufficiently evidenced the Prior Right.

On 3 July 2006, the Complainant filed the Complaint with the ADR Center.

On 4 August 2006, the Respondent provided a copy of the Documentary Evidence.

On 7 August 2006, the proceedings formally commenced.

On 27 September 2006, the Respondent filed its Response to the Complaint and the Panel was appointed.

A. COMPLAINANT

The Complainant accepted that it made two mistakes in filing its application.

First, it originally said that its prior right was a Belgian national trade mark when in fact it was a Community trade mark.

Second, the Community trade mark was registered in the name of CommScope Inc of North Carolina and not in the name of the Complainant. No evidence of a licence had been filed with the Documentary Evidence.

However, the Complainant filed a Licence Declaration with its Complaint, declaring that the trade mark had been licensed to the Complainant by CommScope Inc.

On this basis, the Complainant asked that the domain name be registered to CommScope Solutions Ireland, Ltd [sic] and immediately activated.

B. RESPONDENT

The Respondent said that the Complainant had not explained how the Respondent's decision conflicted with the Regulation.

The Respondent said that the burden was on the Complainant to substantiate its prior right and that, as stated in case 1886 (GBG), "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." The Complainant had only provided evidence that CommScope Inc was the holder of the Community trade mark but no evidence of any licence to the Complainant. The Respondent said that failure to provide such Documentary Evidence was a ground for refusing to register the Disputed Domain Name under Articles 10(1) and 14 of Regulation 874/2004 and sections 20(3) and 21(2) of the Sunrise Rules. The Respondent referred to a number of ADR decisions to support this proposition.

The Respondent also said that the fact that the Complainant had specified a different right in its application was a proper ground for refusing to register the Disputed Domain Name under section 3(1) of the Sunrise Rules, which were based on Article 5(3) of Regulation 733/2002 and approved by Article 12(1) of Regulation 874/2004. The Respondent again referred to a number of ADR decisions to support this proposition.

Finally, the Respondent said that the ADR proceedings cannot be used to correct the Complainant's application as the Licence Declaration was submitted after expiry of the 40 day period permitted by Article 14 of Regulation 874/2004 on 20 March 2006, as was clear from the fact it was dated 28 June 2006. The Respondent again referred to a number of ADR decisions to support this proposition, in particular cases 1931 (DIEHL) and 1504 (SYSTIMAX).

DISCUSSION AND FINDINGS

1. Under Regulation 874/2004, Article 22(1)(b), an ADR procedure may be initiated by any party where a decision taken by the Registry conflicts with Regulation 874/2004 or Regulation 733/2002 (the Regulations).

2. Under the Respondent's ".eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period" (the Sunrise Rules), Section 22(2) second paragraph and Section 26(1), any interested party may initiate an ADR Proceeding against a decision of the Registry within 40 calendar days of that decision.

3. Under the Sunrise Rules, Section 22(2) second paragraph and Section 26(2) first paragraph, the grounds for such an ADR Proceeding are non-compliance of that decision with the Regulations and the sole object and purpose of the ADR Proceeding is to verify whether the relevant decision by the Registry conflicts with the Regulations.

4. Therefore, the question for this Panel is whether the Respondent's decision of 19 April 2006 to reject the Complainant's application for the "essence.eu" domain name conflicted with the Regulations.

5. Under Regulation 874/2004, Article 10, holders of certain rights were entitled to apply to register .eu domain names during a period of phased registration (the Sunrise period) before general registration began. However, under Regulation 874/2004, Article 14, such applicants were required to submit Documentary Evidence of their prior right to the Respondent's Validation Agent within 40 days of the deadline. If no such Documentary Evidence was received, the application was to be rejected.

6. The Complainant accepts that its Documentary Evidence comprised a Community trade mark registered by a different entity, CommScope Inc, but no evidence of any licence from that entity to the Complainant. The Complainant therefore failed to provide evidence that it had any Prior Right at all and it is irrelevant whether there was in fact such a licence at time of the Complainant's application. The Licence Declaration annexed to the Complaint is also irrelevant as it was submitted too late. It follows that the Respondent's rejection of the Complainant's application to register the Disputed Domain Name was correct under Article 14 of Regulation 874/2004 and thus did not conflict with the Regulations.

7. There is therefore no need to decide upon the Respondent's second ground for rejection, namely that by specifying a different Prior Right in its application the Complainant had failed to comply with section 3(1) of the Sunrise Rules and that this was a ground to reject the application.

8. This Panel has already given its views on the relevance of the Sunrise Rules in its decisions in cases 1071 (ESSENCE) and 1930 (MODELTRAIN). The Panel has read the six decisions cited by the Respondent in support of its view that it would be correct to reject a Sunrise application for failure to comply with the Sunrise Rules. The Panel has previously considered the decisions in cases 119 (NAGEL) and 954 (GMP). The decision in case 404 (ODYSSEY) relied on the Regulations as well as the Sunrise Rules. The decision in case 843 (STARFISH), by a panel of three, also relied on both the Regulations and the Sunrise Rules, although the Panel notes and has considered carefully the decision of the dissenting panelist in that case which disagrees with the decision in case 1071. The decision in case 1262 (NATIONALBANK) relied solely on the Regulations and specifically stated that "whilst the Sunrise Rules are helpful in clarifying the meaning of the Regulations, they are not particularly pertinent when deciding whether the Respondent's actions were in accordance with the Regulations". Finally, the decision in case 1710 (PARLOPHONE) relied solely on the Sunrise Rules to refuse to allow new Documentary Evidence to be submitted with the Complaint, a result which in the view of this Panel would be the same under the Regulations.

9. The Panel remains of the opinion that failure to comply with the Sunrise Rules alone cannot constitute a ground for rejection of a Sunrise application where such a decision conflicts with the Regulations.

10. In the present case, the rejection of an application due to the provision of Documentary Evidence relating to a different prior right than that claimed in the application might have been justified under the fourth paragraph of Article 14 of Regulation 874/2004, which requires the applicant to "submit documentary evidence that shows that he or she is the holder of THE prior right claimed on the name in question" (emphasis added). However, such an interpretation may be unnecessarily formalistic where the applicant merely provided the wrong jurisdiction for the trade mark relied upon. Given that no argument under the Regulation has been raised by the Respondent, and that the Panel has already rejected the Complaint on the Respondent's first ground, the point will be left open.

DECISION

For all the foregoing reasons, in accordance with Paragraph B12 (c) of the Rules, the Panel orders that the Complaint is Denied.

PANELISTS

Name	**Christopher Stothers**

DATE OF PANEL DECISION 2006-10-18

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant contested a decision of the Registry to reject its Sunrise application for the domain name "commscope.eu".

In its application, the Complainant had claimed a prior right based on a Belgian national trade mark. However, its Documentary Evidence was of a Community trade mark registered in the name of CommScope Inc and the Complainant provided no evidence of a licence of the mark from CommScope Inc to the Complainant.

The Complainant submitted a Licence Declaration with its Complaint. However, this was too late to comply with Article 14 of Regulation 874/2004. Therefore, the Registry's decision was correct and did not conflict with the Regulations.

The Panel left open the question of whether the fact that the Complainant had claimed a prior right based on a Belgian national trade mark rather than a Community trade mark would have been a sufficient ground for rejection of the application. However, the Panel indicated that such an argument should be based on the Regulations and not merely on the Sunrise Rules.