Panel Decision for dispute CAC-ADREU-002274

Case number	**CAC-ADREU-002274**
Time of filing	**2006-07-17 11:10:42**
Domain names	**gca.eu**

Case administrator

Name	**Kateřina Fáberová**

Complainant

Organization / Name	**GCA projektmanagement + consulting gmbh, Roman Drexler**

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

To the knowledge of the Panel, there are no other legal proceedings pending or decided that related to the disputed domain name gca.eu.

FACTUAL BACKGROUND

The Complainant is GCA projectmanagement and consulting gmbh, established in Nürnberg, Germany. One of its CEO's Friedrich Hoerauf filed as Applicant on 20.12.2005 for registration of the domain name gca.eu ("the Domain Name"). The Registry rejected the application because the Applicant did not submit documentary evidence that the Applicant was the holder of the trademark GCA.

Complainant request the Arbitration Board (the Panel) to annul the decision of the Registry refusing the registration of the Domain Name gca.eu and to revise such application to the effect that the Domain Name be registered in favour of Complainant.

A. COMPLAINANT

Complainant mentions the following. Complainant submitted an application to register the disputed domain name <gca.eu> on December 20, 2005. The application was filed with the following details:
"Applicant:
Name: Friedrich Hoerauf
Language: German
Address: GCA projektmanagement + consulting gmbh
Obermaierstrasse 16-18
90408 Nuernberg
Deutschland"

The submitted documentary evidence consisted of a copy of the certificate of registration and an official extract from the register of the German Patent and Trademark Office dated May 23, 2003. The documentary evidence was received by EURid on January 10, 2006 within the deadline for the documents. EURid transmitted an e-mail to Complainant refusing the disputed domain name <gca.eu> on June 05, 2006.

Complainant's representative BETTINGER SCHNEIDER SCHRAMM contacted EURid on June 28, 2006 and requested the notification of the reasons for EURids refusal of the sunrise registration. In a telephone conversation between Peter Müller, Attorney at Law, BETTINGER SCHNEIDER SCHRAMM, and one of EURid's employees (his name was "Thomas", the family name of EURid's employees are not communicated), Mr. Thomas stated that Complainant's application to register the domain name <gca.eu> was refused solely because the documentary evidence did not prove that the applicant is owner of the contested trademark right. Faced with the fact, that

the trademark is registered on the Complainant and that Complainant is fully specified in the application form, Mr. Thomas stated, that the field <address> in the application form is not evaluated by the Validation Agent.

Complainant accepts that its sunrise application for the domain name <gca.eu> was not submitted accurately by its provider, as the applicant was not mentioned in the field “organization” but in the field “address”, and therefore is not in line with the formal rule in Chapter I Sec. 3 para 1 (i) of the Sunrise-Rules. Complainant also accepts that EURid has an interest in streamlining the validation process of sunrise applications and to apply strict formal requirements. However, Complainant contends that the fact that the applicant is specified in the field <address> instead of the field <organisation> does not justify the refusal of Complainant’s Sunrise application if the record contains the correct name and contact details of the applicant and it is obvious from the record that is was due to a mere typing error that the applicant was specified in the address field.

It is explicitly stated in Art. 12 of Regulation (EC) No. 874/2004 that EURid has a duty to “ensure a proper, fair and technically sound administration of the phased registration period”. The purpose of the phased registration period as set out in Recital 12 of the Regulation (EC) No. 874/2004 is to “safeguard prior rights recognised by Community or national law”. It follows that the holders of prior rights should therefore be accorded a minimum respect by the Registry and that Registry has an obligation to guarantee a basis due process in the validation process rather than have applications for domain names being rejected without due diligence. This obligation applies all the more in view of the fact that the Sunrise registration requirement were so intransparent and intricate that more than 1/3 of the Sunrise Registrations have been rejected, the vast majority for formal reasons.

The Complainant refers to the Decision of the Arbitration Panel in Case No. 00253, dated May 29, 2006 in which the Panel clearly stated EURid has duty to observe due process in the sunrise validation process. A copy of the decision is attached as Annex 3.

In Complainant’s case the documents submitted to EURid clearly evidenced Complainant’s trademark rights in the term “GCA” and the application form contained the full name and contact details of the applicant. It was therefore readily identifiable that the fact that the applicant was specified in the address field was due to a typing error and that the applicant was the Complainant.

The fact that EURid for whatever reason has ignored the address field of the application form during the validation process is therefore a clear violation of procedural due process and a violation of Art. 12 of the Regulation (EC) No. 874/2004 which explicitly contains an obligation that the Registry ensures a proper and fair administration of the phased registration and therefore requires due process and a minimum of procedural protection of the applicant of a domain name registration during the phased registration period.

B. RESPONDENT

Respondent argues that Commission (EC) No. 874/2004 of 28 April 2004 (‘the Regulator’) Regulation and the Sunrise Rules clearly and certainly provide that the burden of proof was with the Applicant to demonstrate that it is 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 this difference. 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 Rules, 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 burden of proof was with the Applicant to demonstrate that it is the holder or the licensee of a prior right
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. Pursuant to 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. 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". It is therefore of crucial importance that the validation agent is provided with all the documentary evidence necessary for it to assess if the applicant is indeed the holder of a prior right.

The documentary evidence did not demonstrate that the Applicant was the holder of a prior right. The Applicant's name is "FRIEDRICH HOERAUF". The owner of the trademark is "GCA Projektmanagement + Consulting GmbH". The Complainant does not dispute that the names of the Applicant and the name of the owner of the trademark are different.
When the name of the Applicant and the name of the owner of the trademark are different, section 20 of the Sunrise Rules clearly lists the documents that the Applicant needs to provide in order to demonstrate how it is entitled to rely upon the claimed prior right pursuant to article 14 of the Regulation. Section 20 of the Sunrise is intended to cover all situation where the documentary evidence provided does not clearly indicate the name of the applicant as being the holder of the prior right claimed. The Applicant failed to explain the difference in the names of the Applicant and the owner of the trademark. The validation could not reasonably conclude that the Applicant was the holder of a prior right, because the Applicant failed to meet its burden of proof. Therefore, the Respondent correctly rejected the

Applicant's application, pursuant to the Regulation and the Sunrise Rules.

According to Respondent, the Registry and the validation agent were under no obligation to investigate into the circumstance of the application. The Complainant contends that the mistake in the application should have been obvious to the Respondent and that the Respondent should have corrected the Applicant's application, since the Complainant's name was mentioned in the address field. 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". 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". No obligation for the Validation agent may be derived from Section 21 (3), since of this provision does not state that the validation agent is obliged to conduct its own investigations, but merely that the validation agent is permitted in its sole discretion, to conduct its own investigations.

According to Respondent it is not established that the Respondent is in breach of article 12 of the Regulation. The Complainant argues that, by not correcting the Applicant's mistake in its application, the Respondent did not act according to the article 12 the Regulation. The Complainant's reading of article 12 of the Regulation is not correct. This provision reads as follows: "At the end of the phased registration an independent audit shall be performed at the expense of the Registry and shall report its findings to the Commission. The auditor shall be appointed by the Registry after consulting the Commission. The purpose of the audit shall be to confirm the fair, appropriate and sound operational and technical administration of the phased registration period by the Registry". Therefore, the Respondent could only be in breach of Article 12 of the Regulation if such audit was not performed due to the Respondent's fault. The Complainant does not establish or even contend that the Respondent committed such a fault. If the Complainant's contention should be read as meaning that the Complainant the operational and technical procedures put in place by the Registry are not fair or appropriate, the Respondent wishes to note that the case at hand clearly shows that the Registry has been acting in full compliance with the Regulation and the Sunrise Rules, by rejecting an application that did not comply with the Regulation and the Sunrise Rules. Respondent concludes by mentioning that the complaint must be rejected.

DISCUSSION AND FINDINGS

In the opinion of the Panel, Complainant’s argument that Respondent on its own initiative should have replaced the name of the Applicant (Mr. Friedrich Hoerauf) mentioned in the application for the domain name gca.eu by the name of Complainant as specified in the address field of the application is invalid. Mr. Friedrich Hoerauf made the application and not Complainant. Although this mistake may have been due to a clerical error within the organization of Complainant, making such mistake is at the risk of Complainant. Even if it was identifiable that the name of Complainant is mentioned in the address field, this does not mean that Respondent should have deleted the name of Mr. Friedrich Hoerauf from the application and should have replaced it by the name of Complainant. The Panel adds that Article 14 of Commission Regulation No. 874/2004 specifies that every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right on the name in question. Obviously, Mr. Hoerauf was not the holder of the prior right in question. While non-material obvious errors could perhaps be corrected by Respondent, the Panel finds that Respondent could not and did not have a duty under Commission Regulation (EC)No. 874/2004, nor under any due process rule, to correct the fundamental mistake made by Mr. Hoerauf in the application. A choice of the name of the applicant which turns out to be incorrect cannot be corrected in an ADR proceeding. Consequently, the Panel is of the opinion that Respondent’s decision does not conflict with Commission Regulation (EC) No. 874/2004 of 28 April 2004.

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	**Dinant Oosterbaan**

DATE OF PANEL DECISION 2006-10-04

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

In the opinion of the Panel, Complainant’s argument that Respondent on its own initiative should have replaced the name of the Applicant (Mr. Friedrich Hoerauf) mentioned in the application for the domain name gca.eu by the name of Complainant as specified in the address field of the application is invalid. Mr. Friedrich Hoerauf made the application and not Complainant. Although this mistake may have been due to a clerical error within the organization of Complainant, making such mistake is at the risk of Complainant. Even if

it was identifiable that the name of Complainant is mentioned in the address field, this does not mean that Respondent should have deleted the name of Mr. Friedrich Hoerauf from the application and should have replaced it by the name of Complainant. The Panel adds that Article 14 of Commission Regulation No. 874/2004 specifies that every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right on the name in question. Obviously, Mr. Hoerauf was not the holder of the prior right in question. While non-material obvious errors could perhaps be corrected by Respondent, the Panel finds that Respondent could not and did not have a duty under Commission Regulation (EC) No. 874/2004, nor under any due process rule, to correct the fundamental mistake made by Mr. Hoerauf in the application. A choice of the name of the applicant which turns out to be incorrect cannot be corrected in an ADR proceeding. Consequently, the Panel is of the opinion that Respondent's decision does not conflict with Commission Regulation (EC) No. 874/2004 of 28 April 2004.