Panel Decision for dispute CAC-ADREU-002298

Case number	**CAC-ADREU-002298**
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Domain names	**levis.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**Levi Strauss & Co. Europe S.C.A./Comm. V.A., David Taylor**

Respondent

Organization / Name	**EURid**

FACTUAL BACKGROUND

The Complainant, owner of the famous mark LEVI'S, was the first to submit an application for the domain name LEVIS. However, its application contained a minor error with respect to the name of the company that formally owned the mark.

Because of that error, and the resulting discrepancy between the name of the applicant and the name of the owner of the mark, the Registry refused the Complainant's application and assigned the contested domain name to the second applicant in the queue.

A. COMPLAINANT

The complainant was the first to apply for the domain name <levis.eu> on 7 December 2005. The documentary evidence demonstrating the complainant's prior right in the term LEVI'S was received by EURid on 10 January 2006. However, EURid rejected the complainant's application and accepted that of Akzo Nobel Coatings International B.V., the second applicant in the queue.

It is submitted that the decision taken by EURid to reject the complainant's application conflicts with Regulation Number 874/2004 of the European Commission (the "Regulation") and should thus be annulled in accordance with Article 22(11) of the Regulation.

Article 12(2) of the Regulation states that, during the first part of the phased registration period for .EU domain names, holders or licensees of registered national or Community trade marks may apply for .EU domain names (provided that they fulfil the general eligibility criteria set down in paragraph 4(2)(b) of Regulation (EC) Number 733/2002).

The complainant, being a company having its registered office within the European Community, satisfies the general eligibility criteria for registration, and is the licensee of a Community trade mark in the term LEVI'S (N.B. Article 11 of the Regulation permits the elimination of the apostrophe in the term LEVI'S when reflected in the domain name <levis.eu>).

The documentary evidence in relation to the complainant's application was sent to the validation agents,

PriceWaterhouseCoopers, in due time and in accordance with the provisions of Article 14 of the Regulation. The documentary evidence sent can be found at Annex 1, and includes the official cover letter, a copy of the trade mark certificate of registration for LEVI'S (number 000033159) in the name of Levi Strauss & Co. and the licence declaration made between Levi Strauss & Co. (the licensor) and Levi Strauss & Co. Europe (the licensee).

In view of the fact that it holds a relevant prior right and its application was first in the queue for the domain name, the complainant complied with the Regulation and EURid should therefore have accepted its application for the domain name.

The complainant is aware that it is likely that EURid rejected its application as a result of certain non material errors which came about as a result of a lack of attention to detail by its registrar, Melbourne IT. However, it is submitted that minor breaches of the procedure set down by EURid to deal with the registration should not affect whether or not a domain name is awarded to an applicant, as long as the applicant actually fulfils the criteria set down by the Regulation and complies with the Regulation in all material respects.

First, it may be seen that the name of the applicant on the cover sheet supplied as part of the documentary evidence is Levi Strauss Europe, which is slightly different from the name of the licensee of the trade mark in the licence declaration also included with the documentary evidence, namely Levi Strauss & Co. Europe (the correct name of the complainant, leaving aside the company type). The reason for the discrepancy is that Melbourne IT took the name of the applicant from an old document and subsequently failed to realise that it did not match the name of the licensee in the declaration supplied by the complainant. The complainant was not given the opportunity to check the documentary evidence before it was sent to EURid.

Despite this, it is submitted that the validation agent should have realised that the licensee and the applicant were, in effect, the same company. Levi Strauss & Co. is a well known US manufacturer of clothing, in particular jeans, and it is highly unlikely that there would be two unrelated European entities, one called Levi Strauss Europe and the other called Levi Strauss & Co. Europe. This is particularly so given the fact that the addresses for the applicant and the prior right holder on the cover letter and on the licence declaration respectively were the same.

Section 21.2 of the Sunrise Rules states that the validation agent must examine whether the applicant has a prior right to the name exclusively on the basis of a prima facie review of the documentary evidence. However, Section 21.3 provides that the validation agent is not obliged, but is permitted in its sole discretion, to conduct its own investigations into the circumstances of the application. The complainant is aware that a number of panelists in recent .EU ADR decisions brought against EURid have, in situations comparable to the one under consideration, found that the validation agent should have undertaken additional due diligence to clarify such minor discrepancies.

For example, in Case Number 00253 (<schoeller.eu>), the name of the trade mark holder (Ernst Schoeller Waeschenfabriken GmbH & Co KG) did not match the name of the applicant (Ernst Schoeller Gmbh & Co KG) because the automated application system limited the name of the applicant to 30 characters (N.B. the decision is not particularly clear, but the complainant is aware that it was the registrar's system that was deficient, not EURid's). Different addresses were provided for the applicant and the trade mark holder, but the panelist considered that the validation agent should have acted reasonably and made some basic investigations (both addresses were in the same smallish German town and the panelist felt that it was unlikely that there would be two such similarly named companies situated there).

EURid refused to register the domain name in the name of the complainant, but the panelist annulled EURid's decision on the basis that "the proof of prior right was valid, produced in good time and is sufficient for an applicant to become the holder of a .EU domain name".

Similarly, in Case Number 00181 (<oscar.eu>), the name of the trade mark holder (Société Coopérative agricole des producteurs de kiwifruits de France) did not match the name of the applicant (Société coopérative agricole d) for the same reason. EURid therefore refused to register the name in the name of the complainant. However, the panelist annulled EURid's decision, finding that such discrepancy should not have prevented the domain name from being granted.

In Case Number 00232 (<dmc.eu>) the applicant (DMC Design for Media and Communication GmbH) again did not match the name of the trade mark holder (DMC Design for Media and Communication GmbH & Co KG). EURid therefore refused to register the domain name. However, once again EURid's decision was annulled. The panelist based his decision on the fact that the validation agent/EURid should have been familiar with Austrian law and realised that the applicant was a general partner of the trade mark holder (a partnership) and thus entitled to act on its behalf.

The complainant is aware that there is a line of decisions where panelists have placed more emphasis on Section 21.2 of the Sunrise Rules, rather than Section 21.3, and found that the validation agent was under no duty to make further investigations (see for example Case Number 00127 in relation to <bpw.eu> or Case Number 00219 in relation to <isl.eu>). However, it is submitted that these cases may be distinguished from the present case in that they relate to fundamental issues regarding the applicant's prior right (such as whether or not it belonged to the applicant or whether or not it had expired), rather than a minor discrepancy in the name of the applicant. In Case Number 00325 (<esge.eu>), the applicant failed to provide the correct evidence of trade mark ownership, and the panelist subsequently found that EURid was correct to reject the application (although EURid's decision was overturned for procedural reasons). The panelist commented as follows:

"in decision 00253, the Panel found that pursuant to Section 21 (3) the Validation Agent should have conducted its own investigations but in that case, the issue was purely formal and related to a minor discrepancy in the Applicant’s name and address between the different documents filed whereas in the present case, the issue was indeed fundamental, i.e.: whether the earlier rights claimed by the Applicant were in force; on such a substantial issue, one may not reverse the burden of proof and require the Validation Agent to conduct its own investigations to palliate the applicant’s failure."

Furthermore, certain panelists have found that EURid's rejection of an application in circumstances where there was a minor anomaly between the name of the applicant and the trade mark holder would result in a breach of the spirit of the Regulation and thus the protection of prior rights holders.

In Case Number 00396 (<capri.eu>), the applicant was not awarded the domain name because its application was not accurate in many respects (the name, address and form of the applicant were slightly different to those of the trade mark holder). However, the panelist annulled EURid's decision and commented as follows:

"• The Panel/the Panelist is of the opinion that the justice shall always rule over the formalistic approach and technical means of communication.

• The complainant has finally proven that he is and was before filing the .eu domain name application an owner of the relevant Community trademark CAPRI, No. 000276113, he therefore properly claimed his prior right for the relevant .eu domain name.

• It has to be stated that the complainant has made many mistakes in its application which were very confusing and could have let the registry to believe that the complainant has not proven its right.

• The registry had, however, all possible means and rights to validate properly the prior rights. The registry is not only allowed but even obliged to obey all respective relevant regulations and obligations from these regulations to provide fair and complete validation process. The registry could have done the same validation process as the Panel/the Panelist did which would allow the registry to review more deeply the application and easily remove all relevant discrepancies in the .eu domain name application."

In Case Number 00431 (<cashcontrol.eu>) the name of the trade mark holder (Cashcontrol Kassensysteme GmbH) did not match the name of the applicant (CashControl GmbH). The panelist annulled EURid's decision not to register the domain name and commented as follows:

"Though the Respondent was right not to register a name considering that the applicant at issue has not “demonstrated a prior right in accordance with the PROCEDURE” (emphasis added) set out at article 14, ruling that the Respondent’s decision is lawful would be contrary to the reason why this procedure was laid down. One of the rationales of EC Regulation

874/2004 is to safeguard prior rights recognized by Community or national law."

Finally, it should also be noted that Melbourne IT submitted applications for four other domain names on behalf of the complainant, all of which contained the same non material error, namely that the name of the prior right holder contained an additional "& Co" after Levi Strauss, which was not reflected in the name of the applicant. These applications relate to the following domain names: <501.eu>, <dockers.eu>, <levistrauss.eu> and <slates.eu>, and the related documentary evidence is included at Annexes 2 to 5. All four applications were accepted, and it is therefore submitted that EURid's rejection of <levis.eu> for this particular reason would result in unacceptable inconsistency. Such inconsistency would result in a lack of transparency, fairness and predictability, the achievement of which is a key aim of the Regulation.

The second minor error in the complainant's application was again caused by Melbourne IT who wrongly completed the "Prior Right on" field. The field was completed with the name of the applicant (Levi Strauss Europe), rather than the trade mark term (LEVIS), although Melbourne IT did include a document headed "Note to PwC Validation team" in the documentary evidence in order to explain this error (see Annex 1).

It is submitted that this second registrar error is also non material and should not have proved fatal to the complainant's application. This is underlined by Case Number 00328 (<last-minute.eu>), where the complainant argued that EURid was wrong to grant the domain name to the applicant, L'Tur Tourismus AG, as the "Prior Right on" field had been competed as simply " ". EURid responded as follows:

"[…] the application for the domain name last-minute was technically incomplete and incorrect. However, article 21.3 of the Sunrise Rules allows the validation agent to conduct its own investigations into the circumstances of the application, the Prior Right claimed and the documentary evidence. Such investigation has shown that the applicant is the owner of the trademark last-minute, thus holder of a prior right recognised by national law and therefore eligible to apply to register the domain name in accordance with article 10.1 of Regulation 874/2004."

The panelist denied the complaint and commented that:

"While the use of double quotation marks to denote requisite information in a domain name application is far from commendable, in the present circumstances, L'Tur's application, in omitting the complete name for which the Prior Right was claimed and replacing it with double quotation marks, did not interrupt the application process as the applicant submitted in time the correct and necessary documentary evidence showing that it is the holder of the Prior Right claimed in "Last Minute".

Accordingly, the Panel, bearing in mind that the principal purpose of the phased registration period as set out in Recital 12 of Regulation 874/2004 is "to safeguard prior rights recognised by Community or national law", does not find that the decision taken by the Respondent for the domain name <last-minute.eu> conflicts with the European Union Regulations as defined in the ADR Rules."

Furthermore, many applicants who completed the "Prior Right on" field wrongly were successful in their application. For example the Sunrise WHOIS for the domain name <yahoo.eu> (now registered) lists the prior right as being on Yahoo! UK Ltd, the name of the applicant, rather than on the trade mark, YAHOO. The domain name <gsk.eu> has also been registered, although the "Prior Right on" field reads SmithKline Beecham plc, as opposed to, presumably, GSK. Other examples where a domain name has been registered despite the "Prior right on" field being wrongly completed include <baileys.eu>, where the "Prior Right on" field reads R & A Bailey & Co., and <ikea.eu>, where the "Prior Right on" field reads Inter IKEA Systems B.V.. Again it is submitted that EURid's rejection of the complainant's application for <levis.eu> on the basis of the wrongly completed "Prior Right on" field, when other applications with the same error were accepted, would result in inconsistency, unfairness and a lack of transparency, contrary to the purpose of the Regulation.

In conclusion, the complainant correctly demonstrated its prior rights in accordance with the Regulation and was first to apply for the domain name <levis.eu>. Any errors in the complainant's application were non material and did not affect the complainant's compliance with the Regulation. EURid's rejection of the complainant's application for <levis.eu> is therefore

contrary to the Regulation and inconsistent with its acceptance of other similar applications. The complainant therefore requests that EURid's decision be annulled.

B. RESPONDENT

1. GROUNDS ON WHICH THE RESPONDENT REJECTED THE APPLICATION BY LEVI STRAUSS EUROPE S.A. FOR THE DOMAIN NAME LEVIS

1.1 Legal framework

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.

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.

Article 20.3. of the Sunrise Rules states that in case the documentary evidence provided does not clearly indicate the name of the applicant as being the holder or the licensee of the prior right claimed, the applicant must submit documents substantiating that it is the same person as or the legal successor to the person or company indicated in the documentary evidence.

1.2 Facts

Levi Strauss Europe S.A. (hereafter "the Applicant") applied for the domain name "LEVIS" on 7 December 2005. The validation agent received the documentary evidence on 10 January 2006, which was before the 16 January 2006 deadline.

The documentary evidence submitted by the Applicant consisted of:

- a community trademark certificate on the sign "LEVI'S" (with registration number 33159), registered in the name of Levi Strauss & co.;
- a license declaration between the trademark holder Levi Strauss & co and the Levi Strauss & Co Europe for the use of the LEVI's trademark in the context of a domain name application in the sunrise period.

The Applicant, Levi Strauss Europe S.A., did not submit documentary evidence substantiating that the Applicant is the same person or the legal successor of "Levi Strauss & co" and/or "Levi Strauss & Co Europe".

Based on this documentary evidence, the validation agent concluded that the Applicant did not demonstrate that it was the holder or the licensee of a prior right on the name "LEVIS". The Respondent agreed with the validation agent and rejected the Applicant's application.

2. COMPLAINANT'S CONTENTIONS

Levi Strauss & Co Europe S.C.A. (hereafter "the Complainant") first argues that although the field "Prior right on" on the cover letter was wrongly completed with the name of the Applicant, "Levi Strauss Europe S.A.", rather than with the prior right claimed, "Levi's", the Respondent should still have accepted its application as, amongst others, a letter was enclosed in the documentary evidence explaining this error.

The Complainant also argues that although the name of the Applicant, Levi Strauss Europe S.A., did not entirely match with the name of the licensee, Levi Strauss & Co Europe, the Respondent should still have accepted its application as it is evident that "Levi Strauss Europe S.A." is one and the same company as "Levi Strauss & Co Europe".

Moreover, in case the validation agent had any doubt about this, the Complainant refers to section 21 (3) of the Sunrise Rules which provides that the validation agent is not obliged but is permitted in its sole discretion to conduct its own investigations into the circumstances of the application.

Furthermore, Complainant notes that it made the same error in its applications for other domain names (501.eu, dockers.eu, levistrauss.eu and slates.eu) but that these domain names were accepted by the Respondent.

3. RESPONSE

3.1 The Applicant's mistake in completing the field "Prior right on" on the cover letter

The Complainant admits that the field "Prior right on" on the cover letter was wrongly completed with the name of the Applicant, "Levi Strauss Europe S.A.".

As the Respondent however did not refuse the domain name application for this reason, it is not necessary for the Respondent to answer the Complainant's arguments in this respect.

3.2 The documentary evidence did not demonstrate that the Applicant was the holder or the licensee of a prior right

(a) The burden of proof is 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 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 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".
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 indeed the holder of a prior right.
As the panel clearly summed up in case ADR 1886 (GBG):
"According to the Procedure laid out in the Regulation 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. If an applicant fails to submit all documents which show that it is the owner of a prior right the application must be rejected".
(b) The documentary evidence did not proof that the Applicant was entitled to the LEVIS sign
It is obvious that the names of the Applicant and of the owner and licensee of the trademark are different.

- the Applicant's name is "Levi Strauss Europe S.A.";
- the name of the owner of the trademark "LEVI'S" is Levi Strauss & co";
- the name of the licensee of the trademark "LEVI'S" is "Levi Strauss & co Europe".

Article 20 (3) of the Sunrise Rules clearly provides that in such case the applicant must submit official documents substantiating that it is the same person as or the legal successor to the person indicated in the documentary evidence as being the holder or licensee of the prior right:
"If, for any reasons other than as are referred to in Section 20(1) and 20(2) hereof, the Documentary Evidence provided does not clearly indicate the name of the Applicant as being the holder of the Prior Right claimed (e.g. because the Applicant has become subject to a name change, a merger, the Prior Right has become subject to a de iure transfer, etc.), the Applicant must submit official documents substantiating that it is the same person as or the legal successor to the person indicated in the Documentary Evidence as being the holder of the Prior Right".
In the present case, the documentary evidence did not contain any document explaining the difference between the name of the Applicant ("Levi Strauss Europe S.A.") and the name of the owner or licensee of the trademark relied upon in the application (respectively "Levi Strauss & co" and "Levi Strauss & co Europe").
The Complainant argues that the Applicant is one and the same company as the licensee and that the Respondent should have realised so in view of the largely similar names of the Applicant and the licensee.
However, the difference between both names is not as trivial as the Complainant suggests. Two similar names can denote two entirely different legal entities. From a cursory research of the Belgian public company register in preparation of this response, the Respondent has found that the following largely similar names, all separate legal entities, exist:

- Levi Strauss Benelux Retail SPRL/BVBA;
- Levi Strauss International Group Finance Coordination Services SCA/Comm. VA;
- Levi Strauss International Group Finance SPRL/BVBA;
- Levi Strauss Continental SA/NV;
- Levi Strauss Belgium SA/NV;
- Levi Strauss & Co Financial Services SA/NV;
- Levi Strauss & Co Europe SCA/Comm. VA (this company changed its legal structure from Levi Strauss & Co Europe SA/NV);
- Levi Strauss & Co Europe Financial Services SCA/Comm. VA.

Moreover, the legal form of the Applicant and the licensee differed. Whereas the Applicant is a société anonyme, the licensee is a Société en Commandite par Actions. Although the Complainant does not explain this difference, it is probably due to the fact that the Complainant has apparently changed its legal structure from a société anonyme to a Société en Commandite par Actions. Nevertheless, the Applicant failed to submit any documentary evidence attesting such change of legal structure.
Finally, the signature on the cover letter of the Applicant was by Ms Stina Molander, whereas the signature of the licensee on the license declaration was of Mr Ivo Vliegen. This added to the probability that the Applicant differed from the licensee of

the trademark.
The validation agent and the Respondent were therefore confronted with an application in which the Applicant and the licensee/owner of the trademark (a) had different company names, (b) had a different legal structure and (c) signed by different people.
The Respondent had thus no right (and a fortiori no obligation) to speculate on the relationship between the Applicant and the owner/licensee of the trademark, and therefore correctly rejected the Applicant's application.
In addition, the Respondent wishes to refer the Panel to the following cases:
- In case No. 810 (AHOLD), the Panel decided that : "As confirmed by sec. 20 of SR, it is important to make sure that the applicant is the same holder of the prior rights, to avoid any domain name registration deprived of legitimation on the applicant's side. As a result, when faced before a difference between the applicant name and the prior right holder name, correctly detected by the Validation Agent, the Registry may not accept the corresponding domain name application".
- In case No. 894 (BEEP), the Panel decided that: "Therefore, where the Prior Right claimed is a trademark, the burden of proof regarding ownership and license declaration is placed on the Applicant (Complainant) of the domain name. EURid and the validation agent have to rely upon the documentary evidence submitted by the Applicant and from the submitted evidence in the present case, it was clear that the Applicant of the domain name <beep.eu> was not the same company as the owner of the trademark BEEP. Thus, the Complainant failed to submit the relevant evidence regarding the license declaration within the forty day period set out in Article 14".
- In case No. 1242 (APONET), the Panel decided that: "Therefore, in the absence of any document clearly indicating that a) VGDA Gmbh was the short term for Verwaltungsgesellschaft Deutscher Apotheker mbH; b) that VGDA was also an official company name of the Applicant; and c) considering the Complainant's burden of proof with respect to its prior rights and wording of relevant provisions governing registration of .eu domain names in Sunrise Period, the Panel concludes that the Respondent, without having at its disposal any pertinent document proving that VGDA Gmbh and Verwaltungsgesellschaft Deutscher Apotheker mbH were the same entity, did not err in its decision to reject the Complainant's application. On the contrary, this Panel considers that EURid, in accordance with, Paragraph 3. Section 11 of the Sunrise Rules, correctly considered the Applicant as a different entity from the holder of the Prior Right claimed".
- In case No. 551 (VIVENDI), the Panel decided that: "The documentary evidence provided by the Complainant shows that the owner of the trademark, on the basis of which the prior right to the Domain Name was asserted, is the company Vivendi, and not the Complainant ("Vivendi Universal"). The Complainant did not provide any proof within the documentary evidence which would explain that Vivendi Universal is a legal successor (as a result of a merger or otherwise) of the company Vivendi, which was (at the time of filing of the Application) a registered holder of the Trademark. Therefore, a conclusion must be drawn that the Complainant failed to demonstrate its prior right to the Domain Name".
- In case No. 1627 (PLANETINTERNET), the Panel decided that: "The validation agent conducted a prima facie review of the submitted document, and in conjunction with point (ii) below, reached the conclusion that as the names did not match, and there was no other documentary evidence to explain such a discrepancy, that the applicant (i.e. the Complainant) had not established its prior right".
- In case No. 1625 (TELEDRIVE), the Panel decided that: "Moreover, when examining an application for a domain name, the Registry's obligation is to examine whether the applicant holds a prior right to the domain name (Article 14 of the Regulation). The right must be verifiable by the presented documentary evidence. This shall demonstrate that the right exists and that the applicant is the holder of this right claimed on the domain name. In the presented case the documentary evidence submitted by the Complainant showed that the IAV GmbH Ingenieurgesellschaft Auto und Verkehr, and not the iav GmbH is the holder of the trade mark TELEDRIVE. Therefore, the documentary evidence in support of the application for the domain name teledrive.eu was incomplete".
(c) The Respondent did not breach article 21(3) of the Sunrise Rules
The Complainant argues that the Respondent should have corrected any mistakes by further investigating its application pursuant to section 21 (3) of the Sunrise Rules.
First of all, it is obvious that the Respondent could not be in breach of section 21(3) of the Sunrise Rules since this section only concerns the examination by the validation agent. The provision that concerns the Respondent's decision is section 22 and not section 21(3).
Therefore, the Respondent's decision may only be annulled when the Respondent decided to reject an application for which the applicant demonstrated that it has a prior right pursuant to the Regulation and the Sunrise Rules (which was not the case here).
From this point of view, the Respondent is not responsible for the tasks of the validation agent, as long as the Respondent's

decision complies with the Regulation.
For the sake of completeness, it must be noted that the Complainant does not establish any violation of section 21(3) by the validation agent itself.

Indeed, Section 21 (3) of the Sunrise Rules 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 (see for example case 1483 (SUNOCO), ISL (219), 551 (VIVENDI) and 843 (Starfish)).

3.3 The Respondent's decision must only be evaluated with regards to the applicable rules and regulations

The Complainant notes that it made the same error in its applications for other domain names (501.eu, dockers.eu, levistrauss.eu and slates.eu) but that these domain names were accepted by the Respondent.
The Respondent wishes to stress that the only object of the ADR proceedings is to determine whether the Respondent's decision to reject the Applicant's application conflicts with the Regulation (Article 22(1) of the Regulation). The legality of the Respondent's decision may not be assessed based on previous applications dealt with by the validation agent and/or the Respondent.

This is clearly stated in Section 22(4) of the Sunrise Rules, which states that

“[t]he decision by the Registry to register a Domain Name in the name of an Applicant has no value as a precedent in any judicial or non-judicial settlement of conflicts proceeding […]”.
This consideration is further reinforced by reasoning by analogy with the decision of the Court of First Instance in Case T-123/04 (Cargo Partner AG v. OHIM) at para. 68:
"It must be remembered that, whilst it may be accepted that factual or legal grounds contained in an earlier decision might constitute arguments to support a plea alleging infringement of a provision of Regulation No 40/94, it does not take away from the fact that the legality of the decisions of Boards of Appeal must be assessed solely on the basis of this regulation, as interpreted by the Community judicature, and not on the basis of a previous decision-making practice". (see also para. 69-70 not reproduced here).

4. CONCLUSION
The Regulation and the Sunrise Rules give the 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 Applicant in the present case did not seize this opportunity, because its application did not correctly fulfil the substantial requirements.
As the Panel in case n° 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 case n° 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

Procedural Points

Pursuant to 26.1 of the Sunrise Rules, an ADR proceeding against the Registry may be initiated within 40 days of a decision by the Registry. In the present case the contested decision was made on 1 June 2006 and the Complaint was submitted on 7 July 2006. The Complaint was therefore submitted within the deadline and is admissible.

Substantive Issues

1. Error in the “Prior right on” field.

It is not contested that that the field "Prior right on” in the cover letter was wrongly completed with the name of the Applicant, "Levi Strauss Europe S.A.” as opposed to containing the mark LEVI’S.

However, EURid did not refuse the domain name application for this reason, so it did not answer the Complainant's arguments in this respect.

In order to avoid any possible doubts regarding the Complainant’s right to register the contested mark, the majority of the Panel will nevertheless analyze this issue.

As the Complainant correctly points out, an Annex attached to the cover letter rectifies the error in the “Prior right on” field. Thus, the validation agent had the correct information, albeit not quite in the correct place. There is no reason to believe that the validation agent would not have used the correct information that was available.

Therefore, the majority of the Panel concludes that EURid cannot deny the Complainant’s application on the grounds that the “Prior right on” field was incorrect.

2. Error regarding the company name

It is not disputed that the Complainant made a mistake in its application, by not providing the correct company name for the owner of the mark LEVI’S.

This Panel agrees with the reasoning of the panel in case ADR 1886:

"According to the Procedure laid out in the Regulation 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. If an applicant fails to submit all documents which show that it is the owner of a prior right the application must be rejected".

Thus, the question before this Panel is whether or not the Complainant provided sufficient evidence to the validation agent that it is the holder of a prior right.

The majority of the Panel notes that the address on the application is the same as the address in the Documentary Evidence supplied with the application.

The majority also notes that both the brand LEVI’S and the Levi Strauss group of companies are very well known. Indeed, the brand LEVI’S is one of the world’s oldest famous brands.

Given that Levi Strauss and its brand LEVI’S are so well known, and that the addresses supplied on the application and the Documentary Evidence were identical, the majority of the Panel finds that the error concerning the company name was non material.

The Respondent states, in light of the errors made by the Applicant, that it had no right (and a fortiori no obligation) to speculate on the relationship between the Applicant and the owner/licensee of the trademark, and therefore correctly rejected the Applicant's application.

Further, the Respondent notes that 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, which was not the case here.

The Panel agrees that the validation agent cannot be expected, given the large number of applications that have to be processed, to take initiatives to conduct additional investigations for each and every application.

However, a majority of the Panel holds that, in this particular case, the validation agent should either have accepted the application, or taken additional steps to investigate the discrepancies: each application has a cost attached to it and the administrative costs of examining each application properly were or should have been built into the application fee. All it would have taken is a short e-mail from the validation agent querying the apparent discrepancies in the documentation submitted and the presumed response would have ensured that the full supporting documentation would have been received within the 40-day period. Such a small action by the validation agent would have put the Respondent into a position where it would have seen that all documentary evidence had been satisfactorily submitted and then upheld the spirit and intention of the "prior right" rule by awarding the Domain Name LEVIS to the Complainant in the first place.

A majority of the Panel holds that the Respondent, given the facts presented to it, had no choice but to refuse the incorrect application.

A minority of the Panel holds that the Respondent appears to have overly relied on the diligence of a validation agent who had all the discretion granted to investigate any application but did not choose to exercise it. This cannot be held to be good practice and nowhere is the Respondent absolved of its responsibilities in ensuring that justice is done and the spirit of the regulations respected as much as the letter. Nor should it overly rely on ADR mechanisms to resolve problems caused at validation stage.

However the ADR proceeding do provide a mechanisms to rectify situations where, for whatever reason, a decision was made that appears to be inconsistent with the basic purposes of the Regulation and the Sunrise Rules (whose purpose is to implement the Regulation).

As the Respondent correctly points out, the Regulation and the Sunrise Rules give the holders of prior rights the opportunity to demonstrate their prior rights during the phased registration. And the dispute resolution process is an integral part of the Regulation and of the Sunrise Rules.

The majority of the Panel holds that, to deny the Complainant's application at this stage, in light of all the arguments presented by the Complainant, would be to admit that the initial non-material error cannot be rectified. The majority of the Panel believes that this approach would be excessively formalistic and would frustrate the fundamental purpose of the Sunrise Rules and the purpose of Article 14 of the Regulations.

The Respondent cites case no. 1627. But the facts in that case are very different from the facts in the present case. In case no. 1627, the Complainant had failed to submit a trademark renewal application, and submitted evidence with respect to its trademark only during the dispute resolution proceedings. As the panel correctly noted, "documents which did not form part of the first set of documents submitted to the validation agent should be disregarded when assessing the validity of a decision of the Respondent [EURid]".

But such is not the case here: the documents submitted by the Complainant in its original application suffice to establish that it does have rights to the contested domain name. Similar reasoning also distinguishes case no. 219 (cited by the Respondent) from the present case.

In accordance with 26.2 of the Sunrise Rules, the sole object and purpose of an ADR Proceeding against the Registry is to verify whether the relevant decision by the Registry conflicts with the Regulations.

In accordance with 10.2 of the Sunrise Rules, the validation agent validates whether the Documentary Evidence substantiates the Prior Right claimed by the Applicant in the Application.

In accordance with Article 14 of the Regulations, if the validation agent finds that prior rights exist regarding the application for a particular domain name that is first in line, he shall notify the Registry accordingly.

The majority of the Panel holds that, in the present case, the validation agent erred in not validating the Complainant's prior right on the basis of the documents submitted by the Complainant in its application. Therefore the majority of the Panel holds that the Registry's decision conflicts with the Regulations.

The minority of the Panel holds that the validation agent strictly acted according to the relevant rules and consequently correctly rejected the application in question. Indeed, the Complainant has not itemized any violation of section 21(3) of the Sunrise Rules by the validation agent, and according to section 22 the Respondent's decision to reject the application was made because the applicant did not really demonstrate that it has a prior right pursuant to the Regulation and the Sunrise Rules. And this because the complete documentary evidence was not provided in time.

In accordance with 27.1 of the Sunrise Rules, if the ADR Proceeding concerns a decision by the Registry not to register a Domain Name and the Panel concludes that that decision conflicts with the Regulations, then, upon communication of the decision by the Provider, the Registry will register the Domain Name in the name of the Applicant and will immediately activate the Domain Name.

Such is the case here: the Panel orders (by a majority) the Registry to register the name LEVIS in the name of the Complainant and to activate it immediately.

DECISION

For the reasons set forth above, in accordance with 27.1 of the Sunrise Rules and B.11.c of the ADR Rules, the Panel (by a majority) annuls EURid's decision to accept Akzo Nobel Coatings International B.V.'s application for the domain name LEVIS and it orders EURid to cancel the present registration. Further, it orders EURid to register the name LEVIS in the name of the Complainant and to activate it immediately.

PANELISTS

Name	**Joseph André Cannataci**

DATE OF PANEL DECISION 2006-09-28

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Complainant challenges the registration of the domain name LEVIS on the ground that the Registry incorrectly refused its prior application for that domain name.

The Registry had refused the Complainant's application because it contained a minor error concerning the name of the legal entity that owns the mark LEVIS.

By a majority, the Panel finds that the Registry acted appropriately in light of the information that it had, but that the validation agent erred in not finding that the Complainant had indeed provided sufficient evidence to substantiate its rights in the domain name LEVIS.

Therefore the Panel (by a majority) annuls EURid's decision to grant the domain name LEVIS to the second applicant in the queue and it orders EURid to register the name LEVIS in the name of the Complainant and to activate it immediately.