Panel Decision for dispute CAC-ADREU-002362

Case number	CAC-ADREU-002362
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Domain names	petit-forestier.eu

Case administrator

Name	Tereza Bartošková

Complainant

Organization / Name	PETIT FORESTIER, Monsieur Olivier FERNANDES, Admnistrateur systèmes et réseaux

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 decision or the disputed domain name.

FACTUAL BACKGROUND

1. History of the request for registration

1.1. The complainant is Petit Forestier, a company based in France, represented by Mr Olivier Fernandes (“the Complainant”).

1.2 On December 7, 2005, the Complainant applied for the domain name petit-forestier.eu (“the Domain Name”). The validation agent received the documentary evidence on January 6, 2006. This application was rejected on June 9, 2006 (decision 2390100622362555).

2. History of the ADR proceeding

2.1. The Complainant submitted a Complaint (“the Complaint”) against EURid (“the Respondent”) to the ADR Center for .eu attached to the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (“the Court”). The Complaint was received by the Court on July 18, 2006.

2.2. The Complainant requested the Court to require EURid to disclose the Documentary Evidence, defined in the .eu Registration Policy and Terms and Conditions for Domain Name Applications, made during the Phased Registration Period (“the Sunrise Rules”) as “the documentation to be provided by (or on behalf of) the Applicant to the Processing Agent, in accordance with these Sunrise Rules” (“the Documentary Evidence”).

2.3. The Respondent confirmed it received the Complainant’s application for the Domain Name on December 7, 2005, and disclosed the Documentary Evidence, as required, on July 31, 2006.

2.4. The Respondent also indicated that the date of commencement of the Sunrise Appeal Period was June 10, 2006. The Complaint was filed during the Sunrise Appeal Period, defined in the .eu Dispute Resolution Rules (“the ADR Rules”) as “a 40 day period during which a Complaint against the Registry’s decision to register a domain name within the Sunrise period can be filed as specified in the Sunrise Rules.”

2.5. The Court received the response to the Complaint (“the Response”) on September 18, 2006.

2.6. The Panel was duly appointed the next day.

A. COMPLAINANT

3. The Complainant contends as follows:

3.1. It alleges that it properly applied for the Domain Name ("[t]he domain name of petit-forestier.eu was deposited within the framework of the recording such as it was envisaged in the chapter IV recording by EC Regulation N°874/2004 of the commission of April 28, 2004" – sic), and that it has a prior right on the Community Trademark PETIT FORESTIER ("pursuant to item 1 of article 10 of the same EC Regulation, the company PETIT FORESTIER under the terms of the former right materialized by the recording of its Community mark PETIT FORESTIER the 02/05/03 asked for the recording of the domain name petit-forestier.eu" – sic).

3.2. The Complainant contends it sent the Documentary Evidence within 40 days of sending the application ("the company PETIT FORESTIER forwarded the documents necessary: Domain name to be recorded, addresses company, photocopies certificate of recording n° 003185378 of the Community mark PETIT FORESTIER by mail R.S.R delivered by your care the 06/01/06" – sic).

3.3. The Complainant attached several annexes to the Complaint, including a Certificate of Registration issued for the Community Trademark Petit Forestier, registered on August 20, 2004 under the number 3185378.

3.4. The Complainant "request[s] the admission and the attribution of the domain name petit-forestier.eu at the company PETIT FORESTIER and this pursuant to the provisions of EC Regulation mentioned above" (sic).

B. RESPONDENT

4. The Respondent's Response is grounded on articles 10.1 and 14.4 of EC Regulation 874/2004.

4.1. It alleges that "[t]he processing agent received a cover letter on 6 January 2006 which was before the January 16, 2006 deadline. As no documentary evidence was enclosed to the cover letter, the validation agent concluded that the Complainant had not demonstrated that it is the holder of a prior right," and emphasizes that "[t]he burden of proof was with the Complainant to demonstrate that it is the holder or the licensee of a prior right." When an applicant fails to submit all documents which the validation agent needs to assess whether this applicant is the holder of a prior right corresponding to the domain name, its application must be rejected.

4.2. Respondent also contends that "[d]ocuments submitted for the first time during the present ADR proceedings may not be taken into consideration … [T]he 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."

4.3. The Respondent concludes the Complaint must be rejected.

DISCUSSION AND FINDINGS

5. Before deciding on the merits, the Panel has to address first whether Mr Olivier Fernandes is entitled to represent the Complainant in this ADR proceeding.

5.1. Complainant writes that Mr Fernandez is "duly entitled to present in the capacity as System administrator and Networks" (sic). The Panel notes there is no evidence that Mr Fernandes has the capacity to represent the Complainant. The Complainant only declared in its Complaint that "all information mentioned in the present ones is complete and exact" (sic).

5.2. Nevertheless, pursuant to article 22.1 of EC Regulation 874/2004, "[a]n ADR procedure may be initiated by any party where … a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No 733/2002." A similar provision is laid down in the ADR Rules at B.1 (a): "Any person or entity may initiate an ADR Proceeding." Since "any" person can challenge a decision taken by the Registry, Mr Fernandes cannot be barred from initiating an ADR procedure in the name of the Complainant, whether or not he is duly authorized to do so (see Cases 596 – restaurants.eu, 597 – restaurant.eu, 761 – nobilia.eu, and 1047 – festool.eu).

6. The central question in this case is whether or not the Complainant brought proper evidence of its prior right under EC Regulation 874/2004 article 14 on "Validation and registration of applications received during phased registration." The Panel "shall decide whether a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No 733/2002" (article 22.11) and not whether Registry's decision is correct under the Sunrise Rules (as demonstrated in Cases 1047 – festool.eu, 1071 – essence.eu, 1310 – astrodata.eu, 1539, setra.eu, and 1674 – ebags.eu ; See also Case 1930 – modeltrain.eu). The Panel notes that the Respondent's

Response was grounded on the sole EC Regulations.

6.1. The Documentary Evidence that was disclosed, as described above at 2.2 and 2.3, shows that the Respondent only received the Cover Letter (defined by the Sunrise Rules as “the pre-formatted electronic document that the Registry makes available to the Applicant (or the person indicated by the Applicant in the Application, if any) upon receipt by the Registry of an Application”), without any other document, in particular without any trademark certificate”).

6.2. The Complainant alleges it “forwarded the documents necessary: Domain name to be recorded, addresses company, photocopies certificate of recording n° 003185378 of the Community mark PETIT FORESTIER by mail R.S.R delivered by your care the 06/01/06.” The Panel observes the Complainant did not state to whom these documents were forwarded, and did not attach any evidence that the addressee received this certified mail.
The Panel could require the Complainant to submit to the Court such evidence, pursuant to Paragraph B.8 of the ADR Rules which states that “the Panel may request or admit, in its sole discretion, further statements or documents from either of the Parties.” This would be useless, considering it would not prove what the content of the sending was.

6.3. In the Complaint, the Complainant alleged it sent “the documents necessary” and declared that “all information mentioned in the present ones is complete and exact.” The Respondent affirms that the validation agent only received the Cover Letter, and no evidence of a prior right. Both versions being diametrically opposed, the Panel is thus unable to decide on this sole basis

6.4. The Panel observes there has been a previous case involving the same parties, over the domain name petitforestier.eu (the Domain Name in the present case is similar, except that it is hyphenated: petit-forestier.eu). In said Case (1432), the validation agent received, on January 6, 2006, only a cover letter, signed by Mr. Olivier Fernandes, without any document evidencing a prior right of the applicant. These facts are exactly identical to the facts in the case at hand.

6.5. The Panel also observes that, following the disclosure of Documentary Evidence, the Complainant did not react as it discovered what it consisted of, whereas in several other cases brought before this Court, complainants submitted further statements regarding the disclosed Documentary Evidence (see for example Cases 192 – atoll.eu, 827 – travex.eu, 1674 – ebags.eu).

6.6. The Complainant did not allege all its documentary evidence were lost but the Cover Letter. In the other case involving the Complainant and summarized above at 6.3, it appears that its application was rejected for the same reason. To the Panel, this cannot be a coincidence.

6.7. Given these circumstances, the Panel believes chances are higher that the Complainant did not send the required documentary evidence (although it alleges the contrary), and that the document disclosed in this proceeding is actually what the validation agent actually received.

6.8. Under article 14.4 of EC Regulation 874/2004, an applicant must submit documentary evidence that shows that it is the holder of the prior right claimed on the name in question. It must submit said evidence within 40 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 must be rejected.
The Complainant did not show it is the holder of a prior right within 40 days of applying. As provided by the EC Regulation, the Complainant’s application must be rejected.

7. The Complainant attached to the Complaint a certificate which shows that it is the holder of the Community Trademark PETIT FORESTIER. This is of no effect: The rule is that a prior right must be demonstrated within 40 days after application (see for example Cases 219 – isl.eu, 865 – hi.eu, 894 – beep.eu, 1071 – essence.eu, 1275 – thun.eu, 1280 – aeris.eu, 1342 – travelchannel.eu, 1432 – petitforestier.eu, 1504 – systimax.eu, 1518 – vanhouten.eu, 1549 – epages.eu, 1886 – gbg.eu).

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the ADR Rules, the Panel orders that the Complaint be denied.

PANELISTS

Name	**Cedric Manara**

DATE OF PANEL DECISION 2006-09-23

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Registry rejected the Complainant's application on the grounds that the latter did not demonstrate any prior right under Articles 10 and 14 of EC Regulation 874/2004. Complainant challenged this decision, and sustained it properly filed its application and demonstrated its prior right on a community trademark identical to the domain name applied for.
The disclosed documentary evidence showed that the Complainant only submitted a cover letter, and no evidence of its prior right on the trademark.
The Panel first ruled that the Complainant's employee was entitled to initiate an ADR proceeding.
It then ruled that the facts showed that the Complainant did not send the required documentary evidence, contrary to what it alleges.
Considering that no evidence was brought within 40 days of application, the Registry had to reject this application, as provided for by article 14 of EC Regulation 874/2004.