Panel Decision for dispute CAC-ADREU-002534

Case number	**CAC-ADREU-002534**
Time of filing	**2006-08-04 14:48:18**
Domain names	**stickers.eu**

Case administrator

Name	**Kateřina Fáberová**

Complainant

Organization / Name	**Edwin Bieling**

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 other legal proceedings which are pending or decided and which relate to the disputed domain name

FACTUAL BACKGROUND

All capitalized terms not defined herein are used by reference to the various regulations and rules identified in this decision.

This complaint arises out of the interpretation and application of Commission Regulation (EC) No 874/2004 of 28 April 2004 (“Regulation”), European Parliament and Council Regulation (EC) No 733/2002 of April 22, 2002 (“EU Regulation”) and the .eu Domain Name Terms and Conditions and phased registration rules for domain name applications made during the phased registration period (“the Sunrise Rules” and the “Conditions”).

1. The domain name application proceeding

V.O.F. ZEEFDRUKKERIJ BIELING, "the Complainant", applied for the domain name STICKERS.EU ("Domain Name") on 4 January 2006. This application was based on Complainant’s Benelux Trademark Registration for STICKERS.

On 6 January 2006, the Registrar Contact filed the application for the domain name STICKERS.EU in the name of Zeefdrukekrij Bieling instead of in the full name of Zeefdrukkerij Bieling vof/Stickers.nl.

On 12 December 2005, V.O.F. Zeefdrukkerij Bieling filed an application for the registration of the trademark STICKERS in the Benelux Trade Marks Register in the name of Zeefdrukkerij Bieling vof/Stickers.nl. On 19 December 2005, the figurative trademark STICKERS was registered.

On 10 February 2006 the Registrar submitted Documentary Evidence which shows that Complainant is the owner of the Benelux trademark STICKERS to the Validation Agent for the prior right of Complainant in the form of an extract from the online database of the Benelux Trademark Register.

On 23 June 2006 EURid informed Complainant that it had rejected Complainant’s application because, according to EURid, (the "Respondent"), the Documentary Evidence did not sufficiently prove Complainant’s right.

2. The ADR proceeding

On 1 August 2006, Complainant submitted a Complaint to the ADR Center filed in English language against Respondent decision.

On 4 August 2006, the ADR Center notified that the Respondent has been notified of the Complaint and on its time of filing.

On 14 August 2006, the ADR Center confirmed the formal validity of the Complaint and notified Respondent that an ADR Proceeding has been commenced against it pursuant the Regulation and the EU Regulation.

On 2 October 2006, Respondent submitted a Response to the ADR Center. The ADR Center notified that the response was filed within the prescribed deadline.

On 6 October 2006, case number 2534 was transmitted by the ADR Center to the ADR Panel.

On 20 October 2006, the Complainant filed a non-standard communication (“NSC”) seeking amend the Complaint.

A. COMPLAINANT

1. Complainant

On 1 August 2006 the Complainant submitted a complaint to the ADR Center.

This is below:

COMPLAINT FROM V.O.F. ZEEFDRUKKERIJ BIELING FOR THE ANNULMENT OF THE DECISION OF EURID TO REJECT THE APPLICATION FOR STICKERS.EU

FACTS

Complainant has been trading under the name V.O.F. Zeefdrukkerij Bieling since 1962. On 12 December 2005, Complainant filed an application for the registration of the trademark logo STICKERS in the Benelux Trade Marks Register in the name of Zeefdrukkerij Bieling vof/Stickers.nl (registration date 19 December 2005, see Annex 1).

On 4 January 2006 Complainant filed a request with its service provider (and Registrar Technical contact for EURid) Computel Standby B.V. / www.nederland.net (the “Registrar Contact”) for the application of the domain name <stickers.eu> in the name of Zeefdrukkerij Bieling /Stickers.nl (Annex 2 – see page 2, Applicant Data (gegevens aanvrager)) (this was the second application of Complainant for <stickers.eu>; the first application was rejected on the basis of an absent prior right based on a Community Trademark Registration). This application was based on Complainant’s Benelux Trademark Registration for STICKERS.

The Registrar Contact filed the request with the registrar, Key-Systems GmbH (the “Registrar”) mistakenly in the name Zeefdrukekrij Bieling, instead of in the full name of Complainant, Zeefdrukkerij Bieling (vof)/Stickers.nl. On 6 January 2006, the Registrar filed the application for the domain name <stickers.eu> in the name of Zeefdrukekrij Bieling (the "Application").

On 10 February 2006 the Registrar submitted documentation (“Documentary Evidence”) to PricewaterhouseCoopers Belgium (the “Validation Agent”) for the prior right of Complainant in the form of an extract from the online database of the Benelux Trademark Register (the “Extract”) (attached as Annex 1).The Documentary Evidence shows that Complainant is the owner of the Benelux trademark STICKERS.

On 23 June 2006 EURid informed Complainant that it had rejected Complainant's application because, according to EURid, the Documentary Evidence did not sufficiently prove Complainant's right (Annex 3).

LEGAL GROUNDS

The Complainant founds its Complaint on its right to the Benelux trademark STICKERS with number 0784147 and registration date 19 December 2005 (see Annex 1). In accordance with Article 3 paragraph 1 of the Benelux Trademark Act ("Benelux Merkenwet"), Complainant holds the exclusive rights to this trademark on the basis of its registration.

The complaint of Complainant arises out of the interpretation and application of Commission Regulation (EC) No 733/2002 of 22 April 2002 ("Regulation 733/2002"), Commission Regulation (EC) No 874/2004 of 28 April 2004 ("Regulation 874/2004", together with

Regulation 733/2002, the "Regulations") and the .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period (the "Sunrise Rules").

Section 4 (2) (b) of Regulation 733/2002 provides that the Registry shall register domain names in the .eu TLD through any accredited .eu registrar requested by, inter alia, any undertaking having its registered office, central administration or principle place of business within the Community.

Recital 12 of Regulation 874/2004 provides that, in order to safeguard prior rights recognised by Community or national law, a procedure for phased registration should be put in place and that the Registry should ensure that validation of the rights is performed by appointed validation agents.

Section 3 of Regulation 874/2004 provides that the request for a domain name shall include inter alia the name and the address of the requesting party and further that any material inaccuracy in the name shall constitute a breach of terms of registration.

Section 10 (1) of Regulation 874/2004 provides that holders of prior rights 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, and that prior rights shall be understood to include, inter alia, registered national and community trademarks.

Section 12 (3) of Regulation 874/2004 provides that the request to register a domain name based on a prior right shall include a reference to the legal basis in national or Community law for the right to the name, as well as other relevant information, such as the trademark registration number.

Pursuant to Section 14 of Regulation 874/2004 EURid must register a domain name if it finds that the applicant has demonstrated a prior right in accordance with the procedure set out in that Section. The procedure includes examination by a validation agent to assess whether the documentary evidence submitted by the applicant substantiates the applicant's prior right.

The Regulations are further elaborated in the Sunrise Rules. Section 3 (1) (i) of the Sunrise Rules provides that an application is only considered complete when the applicant provides the Registry, via a registrar, with specific information, including the full name of the applicant.

Section 11 (1) of the Sunrise Rules provides that "during the first phase of the Phased Registration Period, only Domain Names that correspond to (i) registered Community or national trade marks (…), may be applied for by the holder (...) of the Prior Right concerned (…)."

According to Section 11 (3) of the Sunrise Rules, the applicant for a domain name must be the owner or licensee of the claimed Prior Right.

Section 13 (1) (ii) of the Sunrise Rules provides that where the Prior Right claimed by an applicant is a registered trademark, the trademark must be registered by a trade mark office in one of the member states, the Benelux Trade Marks Office or the Office for Harmonisation in the Internal Market (OHIM), or it must be internationally registered and protection must have been obtained in at least one of the member states of the European Union.

Section 13 (2) (ii) provides that it is sufficient to submit, as Documentary Evidence for a registered trademark, an extract from an official (on-line) database operated and/or managed by the relevant national trademark office, the Benelux Trade Marks Office, the OHIM or WIPO.

Section 21 (1) (ii) of the Sunrise Rules provides that on the instructions of EURid, the validation agent shall verify whether the requirements for the existence of a prior right, claimed in the application, are fulfilled.
The validation agent and the registry are not obliged to notify the applicant where the above requirements are not complied with.

Section 21 (3) provides 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.

THE VALIDATION AGENT AND EURID ACTED UNREASONABLY

EURid rejected the Application, apparently since the Documentary Evidence showed that the trademark STICKERS was registered on the name of Zeefdrukkerij Bieling vof/Stickers.nl, while the Application was conducted in the name of Zeefdrukekrij Bieling. This is a

technical and obvious mistake in the application which the Validation Agent could (and should) have easily clarified.

When faced with such a discrepancy between the name of the applicant and that of the rightful owner in a Sunrise application, the Validation Agent should ask the question whether a mistake has been made. It is for these situations that the Validation Agent, in terms of section 21 (3) of the Sunshine Rules, has received the power to conduct its own investigation.

In this case, the applicant and the trademark holder are the same legal entity, but their names are not identical. However, the discrepancy is of such a nature that the Validation Agent should have easily noticed that a (simple) mistake was made. The name Zeefdrukekrij Bieling in the Application and the name Zeefdrukkerij Bieling vof/Stickers.nl in the Extract differ form each other in three insignificant aspects:

a) Zeefdrukkerij is misspelled in the Application. The third “e” is placed between the “kk” instead of after these letters, resulting in the word Zeefdrukekrij. This is a very simple misspelling, which can not lead to the conclusion that another entity is involved, especially since “zeefdrukkerij” is the Dutch (and Belgian) word for a silk-screen printer office, while “zeefdrukekrij” is not an existing word.
b) The company type “vof” is omitted from the Application. Again, the absence of a company type can not lead to the conclusion that the applicant is a different entity then the trademark holder. This might be different in case of an addition of another company type, e.g. B.V., but a simple absence does not justify that conclusion.
c) The addition Stickers.nl is missing in the Application. The registered name of the Complainant is V.O.F. Zeefdrukkerij Bieling and Stickers.nl is a trade name of the Complainant (see Annex 4). In the Netherlands, a company can have one or more trade names (i.e. a name under which it carries its business) in addition to the official company name. In the Extract Stickers.nl is printed after the company type and is preceded by a “/” (slash), simply indicating an alternative name for the Complainant, namely its trade name. The absence of Stickers.nl in the Application does not justify the conclusion that the applicant is another party.

Another clear indication that a simple mistake was made was the fact that the addresses of the applicant and the trademark holder are the same. The conclusion that the entity Zeefdrukekrij Bieling applying for the domain name <stickers.eu> is a different entity than the trademark holder of STICKERS named Zeefdrukkerij Bieling vof/Stickers.nl is therefore not justified.

These facts should have alerted the Validation Agent to the possibility of a clerical error in the Application. By not making any enquiry with the Registrar, the Registrar Contact or Complainant in this respect and therefore not using its investigative powers under section 21 (3) of the Sunrise Rules, the Validation Agent under these circumstances acted unreasonably.

In a recent ADR case concerning <schoeller.eu>, where the ground for refusal was also that the name of the applicant differed from that of the holder of the prior right, the Panelist decided:

"While the same section 21(3) of the Sunrise Rules grants the Validation Agent “sole discretion” to carry out such investigations, IT IS A FUNDAMENTAL PRINCIPLE OF JUSTICE that, when granted such discretion, THE VALIDATION AGENT IS NOT EXEMPTED FROM THE REQUIREMENT TO ACT REASONABLY. Indeed, it may be argued that the extent of the discretion granted to the Validation Agent implies A HIGHER STANDARD OF CARE AND REASONABLENESS.(….) It would be UNREASONABLE for the Validation Agent not to have expended the MINIMUM OF EFFORT REQUIRED TO CLEAR ANY SMALL DOUBT. For it is clearly the INTENTION of the .eu Sunrise Rules THAT THE ROLE OF THE VALIDATION AGENT SHOULD GO FAR BEYOND THAT OF A MERE CLERICAL FUNCTION, OTHERWISE IT WOULD NOT HAVE ENDOWED THIS OFFICE WITH SUCH WIDE AND IMPORTANT INVESTIGATIVE POWERS.

(…)

"The Registry is duty bound to observe the spirit and the letter of the Regulations. The purpose of the phased registration period as set out in Recital 12 of the Regulation is "to safeguard prior rights recognised by Community or national law". It follows that the holders of PRIOR RIGHTS should therefore be accorded THE MINIMUM OF RESPECT BY the Registry RATHER THAN HAVE APPLICATIONS FOR DOMAIN NAMES BEING REJECTED WITHOUT DUE DILIGENCE BEING APPLIED." (Capital letters added, AP)
Panel Decision 00253

Likewise, as set out above, in the present case the Validation Agent could have easily deduced from the Application that a mistake had been made, if it had only expended the minimum of effort to contact the Registrar, the Registrar Contact or Complainant. Therefore, the Validation Agent and EURid could not, on reasonable grounds, simply reject the Application of Complainant, without any investigation for which they have been endowed with such wide and important investigative powers. That the Validation Agent should have used such powers in this case is underlined by the fact that under Section 21 (1) (ii) of the Sunrise Rules it is not required to draw the applicant's attention to a possible mistake prior to rejecting an application, thereby depriving the applicant of the opportunity to correct any mistake. This contrasts with the widespread practice of national trademark authorities in the European Union and of the OHIM to alert an

applicant of a trademark right to any mistakes and omissions in the application, in order to enable the applicant to make the necessary corrections and additions.

The decision is all the more unreasonable since Complainant filed a correct instruction to its Registrar Contact for the application (see Annex 2) and since EURid's decision implies - in view of the first comes first serve principle - that the domain name now might be awarded to another party, as there are currently two other Sunrise applicants, which will cause irreparable harm to Complainant. The fact that the Validation Agent has had to deal with thousands of Sunrise applications and was therefore under time pressure, is no justification for this breach of the fundamental principle of justice to act reasonably.

THE COMPLAINANT HAS A PRIOR RIGHT

According to the Regulations and the Sunrise Rules cited above, holders of prior rights recognised or established by national or Community law shall be eligible to apply to register domain names during the Sunrise Period. The prior rights include, inter alia, registered national trademarks. Since (i) the Complainant is the owner of the Benelux Trademark Registration for the trademark STICKERS, (ii) the Complainant was the first (and only) applicant for the <stickers.eu> domain name in phase one of the Sunrise Period and (iii) no material inaccuracy did take place, the rights of the Complainant should be respected and the domain name <stickers.eu> should be attributed to Complainant.

THE APPLICATION DID NOT CONSTITUTE A BREACH OF THE TERMS OF REGISTRATION

Section 3 of Regulation 874/2002 provides that the request for a domain name shall include, inter alia, the name and the address of the requesting party and further that any material inaccuracy in the name shall constitute a breach of terms of registration. As mentioned above, according to Recital 12 of that Regulation, the purpose of the phased registration period is "to safeguard prior rights recognised by Community or national law". In the ADR case concerning <oscar.eu>, the Panelist considered that Section 3 of Regulation 874/2002 should be interpreted in a teleological manner in the light of Recital 12 of that same Regulation. This means that any accuracy should be assessed in accordance with the safeguarding of prior rights recognised by, inter alia, national law. In Complainant's Application, the inaccuracy that occurred was NOT of a material nature, as it concerned only minor inaccuracies in the name, while Complainant was and is both the owner of the prior right and the applicant of the domain name. Under Benelux Trademark law, such a mistake can be corrected during or after the application process, without the application or the granting of a trademark right being refused. Therefore, no MATERIAL inaccuracy took place and the Application did not constitute a breach of the terms of registration.

INTERIM ORDER FOR SUSPENSION OF THE ATTRIBUTION OF <STICKERS.EU> TO ANY OTHER APPLICANT

Complainant requests that the Panelist orders EURid to suspend any decision regarding the attribution of the domain name <stickers.eu> until the Panelist has rendered its decision in this case. Such an order is imperative in this case, where two other Sunrise applications have been made.

Section 27 (1) of the Sunrise Rules provides that if the ADR proceedings concern a decision by the Registry not to register a domain name and the Panel or Panelist appointed by the Provider 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. This is possible only if the domain name is not yet attributed to another party. Although this is not specifically provided for in the Sunrise Rules, in order to enable the Register to give (immediate) effect to the Panelist's decision, the handling of other applications for the domain name should therefore be suspended by the Registry. This is in accordance with the practical aim and the purpose of the phased registration of .eu domain names, as set out in the Regulations and the Sunrise Rules. Likewise, Section 22 of Regulation 874/2004 provides for the suspension of the domain name from cancellation or transfer until the dispute resolution proceedings or subsequent legal proceedings are complete and the decision has been notified to the Registry.

CONCLUSION

Complainant hereby requests your panel to order EURid to immediately suspend its decision regarding the registration of the domain name <stickers.eu> until this ADR procedure or any subsequent legal proceedings have been completed.

Secondly, since the Validation Agent acted unreasonably with respect to Complainant's Application, EURid's decision to reject the Application is unfounded and therefore contrary to Recital 12 and Section 14 of Regulation 874/2004 and Section 21 of the Sunrise Rules. Furthermore, the Application did not constitute a breach of terms of registration as provided in Section 3 of Regulation 874/2004. Complainant therefore requests your Panel to annul EURid's decision and to order EURid to attribute the domain name <stickers.eu> to Complainant.

Following the response dated 2 October 2006, the Complainant requests in a Nonstandard communication filed on 20 October 2006, the following further additional argument to support the complaint (case 2534) and to consider this argument as a part of this case also because it concerns the issue of consistency of decisions.

In an almost identical application of Complainant, the Registry did in fact accept the application. I am referring to the registration of the domain name <sticker.eu> (singular).

Complainant holds almost exactly the same prior right in the name "sticker" as he holds in the name "stickers".

Annex 1 evidences the prior right Complainant has in "sticker". It is the Benelux trademark registration no. 0784150, comprising of the figurative mark "sticker". The letters are in the colour yellow (PMS 124) while the background is in the colour blue-purple (PMS 273). The Benelux trademark registration is dated December 19, 2005.

Annex 2 evidences the prior right Complainant has in "stickers". It is the Benelux trademark registration no. 0784147, comprising of the figurative mark "stickers". The letters are in the colour yellow (PMS 124) while the background is in the colour blue-purple (PMS 273). The Benelux trademark registration is dated December 19, 2005.

Annex 3 shows that the Registry accepted the application for the domain name <sticker.eu>. The documentary evidence on the basis of which the application for domain name <sticker.eu> was accepted, is practically identical to the documentary evidence supporting Complainant's application for <stickers.eu>. The requirement of consistency and equality of decisions in my view demands that the application for <stickers.eu> is granted.

In this connection, Zeefdrukkerij Bieling also wishes to rely on the Panel Decision in Levi Strauss & Co. Europe S.C.A./Comm. V.A., David Taylor v. EURid, concerning the domain name <levis.eu>, case no. 02298, dated September 28, 2006 (See Annex 4). In this case, the Complainant was the first to submit an application for the domain name LEVIS. However, it's application contained an error with respect to the name of the company that owned the mark. Because of that error, and the resulting discrepancy, the Registry refused the Complainant's application.

The facts in both cases are strikingly similar. Both in the case concerning <levis.eu> as in the present Complaint, the facts comprise a minor error with respect to the company name resulting in the refusal of the application. On the matter of the error regarding the company name, the Panel considered the following:

"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." This is a reason for the majority of the Panel to find the error concerning the company "non material".

Such is also true in the case at hand. Both the names and adresses of the Applicant / Complainant and the holder of the Benelux trademark registration no. 0784147 ("stickers") are the same, namely: Zilverenberg 15, 5234 GL, 's Hertogenbosch, The Netherlands. The holder of the trademark and the applicant are clearly the same entity, as already put forward in the initial Complaint.

The Panel in the case concerning <levis.eu> also considered:

"(…) 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."

Again, these consideration also apply to the Complaint at hand. To deny the Complainant’s application at this stage would be excessively formalistic would frustrate the fundamental purpose of the Sunrise Rules and the purpose of Article 14 of the Regulations. This is especially true in this particular case, as the Registry already accepted <sticker.eu>, under virtually equal circumstances.

For these reasons and the arguments initially put forward I request you to grant the domain name to Complainant.

B. RESPONDENT

2. Respondent

The respondent responded via a Nonstandard Communication filed on 2 October 2006.

The respondent asserts:

1. GROUNDS ON WHICH THE REGISTRY REJECTED THE APPLICATION BY ZEEFDRUKEKRIJ BIELING FOR THE DOMAIN NAME STICKERS

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, "[a]ll 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 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. (…) The relevant validation agent shall examine whether the applicant that is first in line to be assessed for a domain name and that has submitted the documentary evidence before the deadline has prior rights on the name. 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 (…)".

Section 20.3. of the Sunrise Rules states that "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".

Section 21 (2) of the Sunrise Rules states that the validation agent shall examine whether an applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of documentary evidence it has received.

Zeefdrukekrij Bieling (hereafter "the Applicant") applied for the domain name STICKERS on 6 January 2006. The processing agent received the documentary evidence on 10 February 2006, which was before the 15 February 2006 deadline.

The documentary evidence consisted of a semi-figurative Benelux trademark registration for the name STICKERS, applied for on 12 December 2005 and registered on 19 December 2005.

The documentary evidence establishes that the trademark is registered in the name of "Zeefdrukkerij Bieling vof/Stickers.nl".

The Validation Agent concluded from the documentary evidence that the Applicant did not demonstrate that it was the holder of the claimed prior rights.

Therefore, the Respondent rejected the Applicant's application.

2. COMPLAINANT'S CONTENTIONS

Edwin Bieling (hereafter "the Complainant") acknowledges that the Applicant's application contained some mistakes, but argues that the Respondent's decision to reject its application conflicts with the Regulation because:
The validation should have corrected the mistakes, by using the discretional investigation powers pursuant to section 21.3 of the Sunrise Rules,
The Applicant is the holder of the prior right and the purpose of the Regulation is to safeguard the prior rights recognised by Community or national law (Recital 12 of the Regulation),

The Complainant submits new documents, in particular an abstract from the register of the Chamber of Commerce of "Oost-Brabant" dated 28 July 2006 showing that stickers.nl and stickers.eu are registered trade names of the Applicant,
The mistakes were made by the Applicant's registrar.

Therefore, the Complainant requests the Panel to annul the Respondent's decision and to attribute the domain name STICKERS to the Complainant.

3. RESPONSE

The Respondent argues that the Regulation and the Sunrise Rules clearly and certainly provide that the burden of proof was with the Complainant 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 why and how it is entitled to rely on a prior right which, in the face of the documentary evidence, belongs to someone else.

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 Period, the principle "first-come, first-served" is indeed more properly described as "first-come-and-substantiate, first-served" (see ADR 119 NAGEL and 1614 TELENET). In other words, during the Sunrise Period, 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.

3.1 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.

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.

The burden of proof was thus on the Complainant to substantiate that it is the holder or the licensee of a prior right (see for example cases 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS)).

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".

3.2 The documentary evidence did not demonstrate that the Complainant was the holder of a prior right

The Applicant's name is "Zeefdrukekrij Bieling".

The owner of the trademarks is "Zeefdrukkerij Bieling vof/Stickers.nl".

The Complainant does not dispute that the names of the Applicant and the name of the owner of the trademarks are different.

Indeed, as clearly summarised by the Complainant, the name "Zeefdrukkerij" is misspelled as "Zeefdrukekrij", the company type "vof" is omitted and so is the elements "/Stickers.nl"

When it appears from the documentary evidence that the name of the applicant and the name of the owner of the trademark are different, section 20 of the Sunrise Rules clearly explains what documents should be submitted to demonstrate how the applicant 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. When the names are different because the applicant is a licensee, article 20 (1) of the Sunrise Rules will apply and it is because the applicant is a transferee of the prior right, article 20 (2) of the Sunrise Rules will apply. For any other situation where the name of the applicant is not the same as the name of the owner of the prior right, section 20 (3) of the Sunrise Rules states that: "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 submitted by the Applicant did not clearly indicate the name of the Applicant ("Zeefdrukekrij Bieling") as being the holder of the prior rights claimed ("UWE Zeefdrukkerij Bieling vof/Stickers.nl").

The Applicant failed to explain this difference in the names of the Applicant and the owner of the trademarks. Without any further explanation in the documentary evidence, the Respondent was in no position to determine whether the Applicant was entitled to rely on the claimed trademarks.

Therefore, the Respondent correctly rejected the Applicant's application, pursuant to the Regulation and the Sunrise Rules, because the Applicant failed to meet its burden of proof.

The Respondent wishes to refer the Panel to the following cases:
The legal and factual elements of the present case are very similar to those that led to the decision in ADR 1242 (APONET) where the applicant incorrectly used a short name (VGDA) instead of its real name (Verwaltungsgesellschaft Deutscher Apotheker). The Panel clearly stated 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".
ADR 1625 (TELEDRIVE) is another very similar case where the applicant incorrectly used its short name (IAV GmbH) instead of its real name (IAV GmbH Ingenieurgesellschaft Auto und Verkehr). The Panel in this case decided that 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".
In ADR 1930 (MODELTRAIN), the Panelist decided that the Registry was correct to reject the application by " EdvBaer", which appeared to be the trade name of the Complainant that was mistakenly mentioned instead of the applicant's real name.
In ADR 294 (COLT), the Panel decided that: "The Panel is of the opinion that section 20.1 of the Sunrise Rules requires that the Licence Declaration, in the absence of specific circumstances to be demonstrated by the Applicant, must be signed by the registered trademark owner (as resulting from the documents proving the existence of the mark) in his quality of licensor. Otherwise, the possible substantiation of a prior right on the basis of a document showing a possible serious lack of legitimation on the licensor’s side would be admissible. This, of course, cannot be accepted by the Panel".
In ADR 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 ADR 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".

Finally, the Respondent further refers the Panel to 551 (VIVENDI), 1232 (MCE), 1699 (FRISIA), , 294 (COLT), 2075 (E-MOTION), 2124 (EXPOSIUM) and 1299 (4CE).

3.3 The Respondent and the Validation Agent were under no obligation to investigate into the circumstance of the application

As already explained, pursuant to article 14 of the Regulation, it is up to the applicant to submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question.

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".

Section 21.3. of the Sunrise Rules does not impose any obligation for the Validation agent to conduct its own investigation: it is a mere possibility that the Respondent can use "in its sole discretion". This is supported by the consideration that the Regulation places the burden of proof on the applicant to show that it is the holder of a prior right (see supra. 3.1.).

No obligation for the Validation agent may therefore 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 (see for example case 1483 (SUNOCO), ISL (219), 551 (VIVENDI) and 843 (STARFISH)).

In case Nr. 127 (BPW), the Panel decided that: "Section 21.3 of .eu Sunrise Rules reads 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. Since the burden of proof was on the applicant (Complainant) who clearly failed to proof the ownership rights according to Section 21.3. of .eu Sunrise Rules it was on sole discretion of the Validation Agent to conduct its own investigation and it cannot be deemed as the breach of the Section 21.3 of .eu Sunrise Rules if he decided not to conduct any investigation. Summarizing the above stated, I did not find the contested decision to reject the application of the Complainant made by the Respondent in conflict with any of the European Union Regulations".

In case Nr. 1323 (7X4MED), the Panel decided that "Therefore, it cannot be reasonably anticipated that the validation agent (although it has the permission to do so pursuant to Section 21 (3) of the Sunrise Rules) would investigate into the circumstances of each and every domain name application where the documentary evidence submitted by the applicant does not comply with the requirements set forth by Sunrise Rules".

In case Nr. 501 (LODE, PROCARE), the Panel decided that "In this case, the documentary evidence in support of the applications for the Domain Names was incomplete in respect of the requirements set out in Section 20.1 of the Sunrise Rules. The Panel accepts that the applicant should not expect the Registry or the Validation Agent to engage in its own investigations to establish the exact relationship between the registered holder of the trade mark and the applicant".

The Registry/validation agent cannot be expected and/or forced to speculate whether the Complainant is a holder of the prior right claimed, and therefore correctly rejected the Complainant's application. (see case 1443 (URBIS)).

In ADR 1695 (VANDIJK), the Panel also explained the practical reasons behind the strictly legal reasons: "Other applicants for .eu domain names have invested the effort (and the costs) to diligently comply with the requirements of the Sunrise Rules, while the Complainant has not. If the validation agent would have been obliged (and not merely entitled) to investigate further in cases like the present one, this would have increased the already substantial verification costs (both in time and in money) for the phased registration period, which would have benefited a few (like the Complainant) to the disadvantage of most other applicants who have submitted their applications and documentary evidence in full compliance with the Sunrise Rules".

Furthermore, the Respondent refers the Panel to the decision in ADR 1299 (4CE). In this decision, the Complainant was formerly named “VEAGCOM Telekommunikationgesellschaft mbH” but changed its name to its present name, “Vattenfall Europe Netcom GmbH”. In this case, the Panel expressly addressed the reference by the complainant to the case SCHOELLER also cited by the Complainant in the present proceedings: " The Panel is aware of some cases such as no. 174 DOMAINE and no. 253 SCHOELLER where it was held that the Respondent should have carried out further investigations even though the documentary evidence submitted did not itself establish that the applicant owned the prior right relied upon. The Panel considers that these cases were wrongly decided. The Panel prefers the approach followed in cases such as nos. 127 BPW, 294 COLT, 541 ULTRASUN, 865 HI, 984 ISABELLA, 1625 TELEDRIVE and 1930 MODELTRAIN. ".

Finally, the Respondent refers to the case ADR 1930 (MODELTRAIN), in which after making an extensive review of the case law related to section 21.3 of the Sunrise Rules, the Panel decided that: "The applicant was "EdvBaer" and the Documentary Evidence showed that the Prior Right belonged to "Roland Baer". Even if the Respondent should have realised that EdvBaer was a business name and not a company due to the lack of an identifier, which the Panel notes would conflict with the decision in Case 903 (SBK), there was no clear indication that EdvBaer was the business name used by the Complainant himself rather than a third party for whom the Complainant had made the application. It is not reasonable to suggest that this was clear from the fact that the Complainant's correspondence address in the extract from the German trade mark register in the Documentary Evidence began "Firma EdvBaer Roland Bär". Nor is it reasonable to suggest that the Respondent should have searched on the Internet or contacted the Complainant in order to resolve the question".
3.4 The Respondent acted in conformity with Recital 12 of the Regulation

The Complainant also contends that the Respondent's decision was in violation of Recital 12 the Regulation because, pursuant to this provision, the purpose of the Regulation is to safeguard prior rights recognised by Community or national law.

The Complainant's reading of Recital 12 of the Regulation is not correct. The provision referred to by the Complainant reads as follows: "In order to safeguard prior rights recognised by Community or national law, a procedure for phased registration should be put in place.".

This provision needs to be read in relation with other provisions of the Regulation, especially articles 12 and 14. This is clearly established by the fact that Recital 12 of the Regulation clearly states that : "On the basis of evidence provided by the applicants, validation agents should assess the right which is claimed for a particular name. Allocation of that name should then take place on a first-come, first-served basis if there are two or more applicants for a domain name, each having a prior right".

Pursuant to Recital 12 of the Regulation, the purpose of the phased registration (the so-called Sunrise Period) is not to safeguard the rights of one or two specific applicants (such as the Complainant seems to argue), but the rights of the many holders of prior rights recognized by Community or national law.

In this case, this means that the first applicant in the line during the Sunrise Period 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.

If it fails to do so, the next applicant in the line must also have the opportunity to try to demonstrate its prior rights. The subsequent applicants must also be given the opportunity to have their applications examined, if the first applicant's application did not comply with the substantial requirements. This is clearly established by article 14, which reads as follows: " This examination of each claim in chronological order of receipt shall be followed until a claim is found for which prior rights on the name in question are confirmed by a validation agent".

Therefore, the Respondents contends that Recital 12 of the Regulation may not be read as to meaning that the domain name should be attributed to the first applicant in the line, even if it failed to demonstrate that it was the holder of a prior right pursuant to the procedure laid out in the Regulation and the Sunrise Rules.

3.5 Mistakes made by the Applicant's registrar may not be attributed to the Respondent

Section 5.3 of the Sunrise Rules states that "The Registry, Validation Agents and the Government Validation Points are not party to the agreement between the Applicant and his Registrar or to the agreement between the Applicant and his Document Handling Agent and therefore cannot incur any obligation or liability under these agreements".

The Complainant contends that the mistake in the Applicant's application was made by the Applicant's registrar.

In response, the Respondent argues that pursuant to section 5.3. of the Sunrise Rules, the mistake which the Complainant attributes to its Registrar may not create any obligation on behalf of the Respondent.

Section 5.3. of the Sunrise Rules is perfectly clear to this respect. In the case Nr. 984 (ISABELLA), the Panel decided that: "As to the supposed mistake by the Complainant's Registrar, the Sunrise Rules, Section 5(3) make it clear that EURid is not a party to the agreement between an Applicant and its Registrar, and that EURid does not incur any liability. The .eu Domain Name Registration Policy, Section 6, also puts responsibility on the Registrar to enter information directly into the systems of EURid, provided the Applicant has furnished all the necessary information to the Registrar. In the circumstances, the Panel agrees with the suggestion of the Panel in 4M that any default by the Registrar should be taken up as between the Applicant and the Registrar, and is not a reason for overturning EURid's decision".

3.6 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 15 February 2006.

The Complainant filed its complaint on 1 August 2006 and submitted new information with this complaint, in particular an abstract from the register of the Chamber of Commerce of "Oost-Brabant" dated 28 July 2006 showing that stickers.nl and stickers.eu are registered trade names of the Applicant.

The Complainant wishes to add those documents to the documentary evidence, thereby trying to correct the Applicant's application.

These documents may not serve as a basis to asses whether the Applicant is the holder of a prior right, since those documents are submitted more than five months after the end of 40 days period set forth by the Regulation. Accepting these documents as documentary evidence would clearly violate 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 ADR 294 (COLT), 954 (GMP), 1549 (EPAGES), 1674 (EBAGS), 2124 (EXPOSIUM), etc.).

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.

3.7 Regarding the Complainant's request for attribution of the domain name to the Complainant

With regard to the Complainant's request to have the domain name transferred to it, and merely for the sake of completeness, the Respondent would like to refer the Panel to article 11 (c) of the ADR Rules. Two conditions need to be met before the Panel may order the transfer of a domain name:
• the Complainant must be the next applicant in the queue for the domain name concerned; and
• the Respondent must decide that the Complainant satisfies all registration criteria set out in the Regulation.

The Complainant is not the next applicant in the queue. Consequently, should the Panel consider that the Respondent’s decision must be annulled, the Complainant's transfer request must be rejected.

3.8 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 Applicant 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 the Applicant's defective application at this stage of the procedure would be unfair to the other applicants and would clearly be in breach of the Regulation and the Sunrise Rules. As clearly expressed in cases n° 706 (AUTOWELT) and 1710 (PARLOPHONE, EMI, EMIMUSIC, EMIRECORDS, ANGEL, THERAFT): "Should the Panel consider new evidence now, it would treat unfairly any other applicant that may have filed for the Domain Names immediately after the Applicant ".

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".

Since the Respondent correctly decided to reject the Applicant's application, pursuant to the Regulation, Respondent's decision may not be annulled and the domain name STICKERS may not be granted to the Applicant. Indeed, a domain name may only be attributed to the Complainant by this Panel, when the Panel finds that the Respondent's decision conflicts with the Regulation (article 11 of the ADR Rules).

For these reasons, the complaint must be rejected.

DISCUSSION AND FINDINGS

DISCUSSION AND FINDINGS

1. PROCEDURAL POINTS

1.1 Domain name lock status pending an ADR decision

There is no need for the Panel to order EURid to suspend any decision regarding the attribution of the domain name <stickers.eu> until this ADR Proceeding has been completed. This will have automatically been achieved by initiating the ADR Proceeding. The relevant provisions in this regard are Section 9(3)(b) of the .eu Domain Name Registration Terms and Conditions and the last sentence of Section B(1)(e) of the .eu Alternative Dispute Resolution Rules. The wording of these provisions may seem to apply to registered domain names only, which can no longer be “transferred” etc. after an ADR Proceeding has been initiated. It is the clear aim of these provisions, however, to preserve the current domain status whilst a an ADR proceeding is pending, whatever this domain’s status may currently be, i.e. whether or not the disputed domain name has already been registered.

It is therefore standard practice that EURid places a “lock” on any disputed domain names for the duration of the ADR Proceeding. In the present case EURid has confirmed this lock for <stickers.eu> in its NSC of 11 August 2006.

1.2 Documentary Evidence furnished during the ADR proceeding

The additional Documentary Evidence submitted by the Complainant during the ADR Proceeding are not relevant for deciding this case.

Pursuant to Article 14 of the Regulation, EURid 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 and in this case the 40 days period ended on 15 February 2006.

Consequently, the Panel only has to decide whether EURid and the Validation Agent, based on the Documentary Evidence originally submitted by the Complainant prior to February 15, 2006, could make an informed decision as to the attribution of the Domain Name to the Applicant. The Panel’s mission is not to act as a Validation Agent.

2. SUBSTANTIVE ISSUES

It is not disputed that the Applicant made a mistake in its application, by not providing the correct company name when the application for the domain name STICKERS.EU.

2.1. Burden of proof to demonstrate a prior right

The question before this Panel is whether or not the Applicant provided sufficient evidence to the Validation Agent that it is the holder 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.

Article 14 of the Regulation imposes on the Applicant to submit Documentary Evidence showing that he or she is the holder of the prior right in the name. Such Documentary Evidence is examined by the Validation Agent who determines based on such evidence whether the applicant has prior rights on the name. It is thus for the Applicant to demonstrate his or her prior right in the domain name through the submitted documentary evidence.

Consequently, the Panel agrees with the respondent which refers to the case ADR 1886 (GBG) which states that "…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" and confirms that the burden of proof is on the Applicant to demonstrate that it is the holder of a prior right.

2. Error regarding the company name

The Complainant does not dispute that the name of the Applicant "Zeefdrukekrij Bieling" and the name of the owner of the trademarks "Zeefdrukkerij Bieling vof/Stickers.nl" are different.

2.1 Documentary evidence

Referring to the Sunrise rules, Section 20.3 states that "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".

The Respondent notes that in the present case, the Applicant failed to explain the difference in the names of the Applicant and the owner of the trademark in the name and that without any further explanation it was in no position to determine whether the Applicant was entitled to rely on the claimed trademarks.

2.2 Miss-spelled name : "obvious or technical mistake"

The Complainant clearly admits that the name "Zeefdrukkerij" is miss- spelled as "Zeefdrukekrij".

As stated in the Case No. 843 – STARFISH, the notion of "obvious" mistake should not be interpreted broadly. A miss-spelling or something written but not meant by the Applicant belongs to the class of obvious or technical mistakes.

The Panel finds that the third "e" placed between the "kk" instead of after these letters in the word "Zeefdrukekrij" is an obvious mistake. As a consequence, it is a non material error which can be considered as a minor error.

Section 3 of Regulations 874/2002 provides that the request for a domain name shall include, inter alia, the name and the address of the requesting party and further that any material inaccuracy in the name shall constitute a breach of terms of registration.

Section 21(2) states that "the 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) further 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". If the regulator had added in these Rules the expression "in reasonableness" or "under exceptional circumstances the Validation Agent should investigate", there would have been room for the Panel to evaluate the decision not to investigate. But the Rules do not provide such language.

The Panel agrees that the Validation Agent cannot be expected to take initiatives to conduct additional investigations for each and every application. Section 21(3) states clearly that it is the “sole discretion” of the Validation Agent. Therefore, the Panel does not believe that it can decide for the Validation Agent whether it should or should not have conducted an investigation.

A prima facie review as prescribed by Section 21(2) of the Sunrises Rules would highlight the misspelling. However, the error is so obvious on its face that the Validation Agent without even having to conduct further investigations should have disregarded it.

2.3 Omission to provide full name of owner

The company clearly admits that the company type “vof” and the addition “/Stickers.nl” are omitted from the Application.

The question is whether the Validation Agent was obliged to investigate the ownership of the Prior Right claimed. Complainant contends that the Validation Agent, in view of the almost identical company names and the identical street addresses, should have suspected a mere clerical mistake, and should therefore have conducted further investigations as permitted by Section 21(3) of the Sunrise Rules.

In this case, although Documentary Evidence was provided, the name of the company given for the registration of the trademark differed obviously from the name of the Applicant itself.

The error resides in the omission in the Application to provide full name of the owner of the Prior Righ “Zeefdrukkerij Bieling vof/Stickers.nl” and instead only provide “Zeefdrukkerij Bieling”.

Under Article 22(1) of the Regulation the Panel is directed to “decide whether a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No. 733/2002”.

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 “Zeefdrukkerij Bieling vof/Stickers.nl” and not “Zeefdrukekrij Bieling” is the holder of the trade mark “STICKERS”. Therefore, the documentary evidence in support of the application for the domain name “stickers.eu” was incomplete.

Section 21(2) states that “the 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) further 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”.

A prima facie review as prescribed by Section 21(2) of the Sunrises Rules would highlight the incomplete name. However, the mistakes although more important than a misspelling becomes so obvious on its face when the Application and Documentary Evidence are compared (everything is the same in the name except what is obviously an added bit /stickers.nl and the details of both companies are identical) that the Validation Agent without even having to conduct further investigations should have disregarded it. It could at its sole discretion have conducted further investigations to confirm its conclusion but the information provided could leave little doubt as to (1) the existence of a simple mistake that could easily be explained (by the limited spacing available to file an application or the laziness of a registrar) and 2 the fact that the Applicant and the Prior Right owner where one.

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panelist orders that EURid's decision be annulled and the domain name <stickers.eu> be registered in the name of Zeefdrukkerij Bieling vof/Stickers.nl as per Section 27 (1)§3. There is no reason to transfer the Domain Name to Complainant since Complainant, Applicant and the holder of the Prior Right are the same entity.

DECISION

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

the EURID's decision be annulled

PANELISTS

Name	**Jean Albert**

DATE OF PANEL DECISION 2006-11-02

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Section 21(2) states that “the 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) 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”. If the regulator had added in these Rules the expression “in reasonableness” or “under exceptional circumstances the Validation Agent should investigate”, there would have been room for the Panel to evaluate the decision not to investigate. But the Rules do not provide such language.

The Panel agrees that the Validation Agent cannot be expected to take initiatives to conduct additional investigations for each and every application. Section 21(3) states clearly that it is the “sole discretion” of the Validation Agent. Therefore, the Panel does not believe that it can decide for the Validation Agent whether it should or should not have conducted an investigation.

A prima facie review as prescribed by Section 21(2) of the Sunrises Rules would highlight the errors in the application. However, the errors is so obvious on their face that the Validation Agent without even having to conduct further investigations should have disregarded them.