Panel Decision for dispute CAC-ADREU-002592

Case number	**CAC-ADREU-002592**
Time of filing	**2006-08-01 10:45:22**
Domain names	**tanos.eu**

Case administrator

Name	**Kateřina Fáberová**

Complainant

Organization / Name	**Matthias Freytag**

Respondent

Organization / Name	**EURid**

FACTUAL BACKGROUND

The Complainant requests the transfer of the domain name <tanos.eu> to Tanos GmbH, although the application was made by the Complainant.
The Complainant is an employee of TTS Tooltechnic Systems AG & Co KG, of which Tanos GmbH is a 100 % subsidiary.
Tanos GmbH was at the time of the application the owner of the trademark “TANOS”; the Complainant did not refer to the name of the holder of the TANOS trademark (Tanos GmbH) in the application form.
Tanos GmbH did not apply for the phased registration period.

A. COMPLAINANT

Complainant filed the application for the domain name tanos.eu to EURid for the German company Tanos GmbH. Tanos GmbH is a 100 % subsidiary of TTS Tooltechnic Systems AG & Co .KG by which the Complainant is employed. This application was rejected by EURid on the grounds that the applicant’s name did not match the name of the owner of the trademark invoked as prior right.
The decision by the Registry conflicts with the sole EC Regulations. The application has brought evidence that Tanos GmbH was entitled to register the domain name, therefore the domain name tanos.eu must be attributed to the company tanos.
Complainant as employee of TTS Tooltechnic Systems AG & Co .KG has been authorised from this company and its subsidiaries and other affiliated companies to apply for certain eu domains. He was especially authorised from Tanos GmbH to apply for the tanos.eu domain. He has been acting for and in the name of Tanos GmbH as a representative. This is obvious in the circumstances of this case.
Tanos GmbH and the Complainant were both named in the same application: Complainant as the applicant and Tanos in the trademark certificate. In the sunrise period domain names will be only available for the holders of prior rights, i.e. the right of Tanos GmbH to the trademark Tanos. As mentioned above, Tanos GmbH has the right of the trademark tanos. This certificate was filed in to eurid.
This is the important fact: The Documentary Evidence submitted by the Complainant included a valid trademark certificate which showed that, at the time of the application, the person for which the Domain Name transfer was claimed by the Complainant through this ADR proceeding, had a prior right. Therefore Tanos GmbH is entitled to have been transferred the domain name tanos.eu. Because EURid did not attribute the domain name tanos.eu to Tanos GmbH, its registration decision

conflicts with the European Union regulations.
Article 10.2 of this Regulation states that “[t]he registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists;” Such prior rights include registered national trademark, as the Tanos GmbH. Article 14 adds that “[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.”
This is all given in the case. In 6.2.4 and 6.3.4 of decision 01047 it is said: The Respondent received a documentation which proved the Complainant’s Company had a prior right. This documentation did not comply with the requirements set in the Sunrise Rules, which precisely define the Documentary Evidence and what it must contain. But under Section 26.2 of these Rules, it is stated that “[t]he 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 the Definitions of the Sunrise Rules, “Regulations” are defined as “the .eu Regulation and the Public Policy Rules,” the former meaning EC Regulation 733/2002 and the latter EC Regulation 874/2004.
Article 22.11 of EC Regulation 874/2004 also states that “[i]n the case of a procedure against the Registry, the ADR panel shall decide whether a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No 733/2002,” and not if it conflicts with any other rule. Therefore, the Panel considers it has to assess whether there is “documentary evidence which demonstrates the right under the law by virtue of which it exists” under Article 14 of EC Regulation 874/2004, and not whether the documents submitted constituted valid Documentary Evidence under “the technical and administrative measures” contained in the Sunrise Rules (the expression “technical and administrative measures” is used in the Object and Scope Section of these Rules).
The rationale of EC Regulations 733/2002 and 874/2004 is to safeguard prior rights recognized by Community or national law (see Recital 16 of the former and Recital 12 of the latter). Ruling that the Respondent’s decision is lawful would be contrary to the principles of the Regulations.

According to Paragraph B.11 (a) of the ADR Rules a Panel shall decide a Complaint on the basis of statements and documents submitted. Evidence was brought before the Respondent, and before the Court, that Tanos GmbH is the owner of the word mark Tanos, that this trademark was registered in 1999.
The Complainant should be entitled to request the transfer of the Domain Name to Tanos GmbH. The Complainant brought the evidence, before the Respondent and before the Court, that Tanos GmbH held prior rights on the German word mark Tanos and was eligible to register this name under article 10 of EC Regulation 874/2004. The request was the first the Registry received. Therefore, the decision made by the Registry not to allocate the Domain Name to the Trademark holder conflicts with EC Regulation 874/2004.
The Complainant has also the authorisation to claim the rights of his employer TTS Tooltechnic Systems AG und Co. KG including all its subsidiaries and affiliated companies. He has especially the authorisation to claim the rights of Tanos GmbH in the ADR proceeding in the name and on behalf of Tanos GmbH as a representative.
Under 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.” The same provision is laid down in the ADR Rules at B.1 (a): “Any person or entity may initiate an ADR Proceeding.” Since “any party” can challenge a decision taken by the Registry, the Complainant cannot be barred from initiating an ADR procedure.

Complainant may therefore request the transfer of the Domain Name to his company Tanos GmbH and refers to the panel decision 01047 which contains the identical case.

B. RESPONDENT

1. GROUNDS ON WHICH THE RESPONDENT HAS REJECTED THE APPLICATION FOR THE DOMAIN NAME TANOS.EU BY THE COMPLAINANT
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 for registration of domain names during a period of phased registration before general registration of .eu domain starts.
Article 14 (4) of the Regulation states that every applicant must submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question.
The Complainant applied for the domain name TANOS on December 7, 2005. The documentary evidence was received by

the processing agent on January 11, 2006, which is before the January 16, 2006 deadline. The Validation agent concluded from its examination of the documentary evidence that the Complainant was not the owner of the TANOS trademark as the name of the holder mentioned on the trademark certificate differed from the name of the Complainant. The Respondent therefore rejected the Complainant's application.

2. COMPLAINANT'S CONTENTIONS
The Complainant argues that he is an employee of the controlling company of the holder of the TANOS trademark. The Complainant argues that he was authorized to apply for the TANOS domain name in the name of the holder of the TANOS prior right. The Complainant argues that he was authorized thereto is obvious as: "Tanos GmbH and the Complainant were both named in the same application: The Complainant as the applicant and Tanos in the trademark certificate". Hence, the Complainant argues, the application should have been accepted. The Complainant requests that the Respondent's decision be annulled and that the domain name be attributed to Tanos GmbH.

3. RESPONSE
The Respondent would like to note that the domain name applicant (also the Complainant) is: “MATTHIAS FREYTAG” whereas the owner of the trademark which was submitted as documentary evidence is: “TANOS GMBH VERPACKEN ORDNEN PRÄSENTIEREN “
In the Complainant's view it is not required that the name of the applicant for a domain name matches the name which appears as the holder of the prior right in the documentary evidence. The Respondent disagrees, for the reasons set out below. The Respondent would also like to note that the present ADR proceedings is not the first between the Complainant and the Respondent. Two decisions, both dealing with the same issue as the case at hand, have already been issued. One with regard to the FESTOOL domain name (case n° 1047 dated July 25, 2006), the other with regard to the PROTOOL domain name (case n° 1686 dated September 9, 2006). In the former, the complaint was accepted. In the latter, the Panel held differently and rejected the complaint. Court proceedings have been initiated by the Respondent with regard to the FESTOOL decision pursuant to article 22 (13) of the Regulation.

3.1 The Sunrise Rules as an integral part of the body of law dealing with the application of domain names under the .eu TLD. The Regulation sets out the framework for the application and validation process. However, the Regulation does not provide a full framework. The Sunrise Rules contain many rules that further clarify the intention of the Regulation. The Sunrise Rules are of great importance in the validation process as they not only provide in rules regarding the validation itself but also details certain matters of a technical and formal nature regarding the application itself (as will be explained here below). With regard to the validity and the importance of the Sunrise Rules, article 5 (3) of Regulation N° 733/2002 states that "Before starting registration operations, the Registry shall adopt the initial registration policy for the .eu TLD in consultation with the Commission and other interested parties. The Registry shall implement in the registration policy the public policy rules adopted pursuant to paragraph 1". So as to make the application procedure more transparent to applicants, article 12 (1) 3 of the Regulation states that the additional framework rules, such as the Sunrise Rules, must be published on the Respondent's website. The Sunrise Rules can be easily accessed on the Respondent's website.
Moreover, the cover letter which every applicant must sign clearly states that: "The Rules, including the special terms that relate to the phased registration period, apply and have been read and approved without reservation by the Applicant." Therefore, any applicant is bound by the Sunrise Rules. The Sunrise Rules have been amply applied by several Panels in many .eu domain name arbitration cases, such as case n° 210 (BINGO), 127 (BPW), 293 (POOL), 810 (AHOLD), 1407 (LEXOLUTION), 954 (GMP), 119 (NAGEL), etc.

3.2 The distinction between the natural person/department who submitted the application for a domain name and the company which is listed as the applicant. A request for the application of a domain name made during the Sunrise Period must contain the information listed in section 3 (1) of the Sunrise Rules. The information provided is then processed in the WHOIS database and printed on a cover letter. This cover letter is then sent to the applicant, who must sign it and forward it to the validation agent together with the documentary evidence which shows that the applicant is the holder of a prior right. The request form contains various fields. Two of these fields are important in the case at hand, the field "name" and the field "organisation". Filling in these fields is of great importance with regard to the qualification of "applicant". In order to facilitate communication with a company which is the registrant of a domain name, a contact person may be provided. The natural person/department who is mentioned in the "name" field will be considered as the contact person within the company. The

actual applicant however, will not be the natural person/department who submitted the request form, but the company. To that regard, section 3 (1) i of the Sunrise Rules states that: "where no name of a company or organisation is specified, the individual requesting registration of the Domain Name is considered the Applicant; if the name of the company or the organisation is specified, then the company or organisation is considered the Applicant;". Thus if one fills in the "organisation" field, one effectively states that: the company listed as "organisation" is a separate entity the domain name must be granted to the company listed as "organisation", if an examination of the documentary evidence shows that the company is entitled to that domain name. An example of the application of this rule is enclosed as "exhibit tanos.eu ". This extract shows that the contact person is Mr. Marc Van Wesemael (see the "name" field), whereas the registrant is EURid vzw (see the "organisation" field).
The Sunrise Rules clearly distinguish the contact person from the actual applicant. The effect of this distinction is far stretching. Indeed, the domain name must be granted to the company who is the actual applicant. Therefore, it is of great importance that when a company is mentioned in the "organisation" field, documentary evidence is submitted which proves that this company is the holder of a prior right.
It must be stressed that the Respondent's registration system, as is clearly indicated in the Sunrise Rules, make it possible for a physical person who is an employee to list both his name as the contact person and the name of the company he works for as the "organisation" in the application form. In the case at hand, the Complainant did not refer to the name of the holder of the TANOS trademark in the "organisation" field of the application form. Indeed, the WHOIS for the TANOS domain name, which contains more details than the cover letter, lists all the details which the Complainant provided to the Respondent. One shall see that, in contrast to the WHOIS for the EURID domain name, no name was provided as "organisation". The effect hereof is that the Complainant was considered as the applicant for the TANOS domain name. The Respondent will now show that an applicant bears the burden of proof to show that it is the holder of a prior right.

3.3 The burden of proof is with an applicant to show 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. Pursuant to article 14 of the Regulation, "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". Based on this documentary evidence, the validation agent shall examine whether the applicant has prior rights on the name, as is clearly indicated by the 12th recital of the Regulation which states that "ON THE BASIS OF EVIDENCE PROVIDED BY THE APPLICANTS, validation agents should assess the right which is claimed for a particular 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 Applicant 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), 2075 (E-MOTION), 1607(BES), …).
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."
In the case at hand, the Complainant submitted an extract from the German Trademark Register for the TANOS trademark which mentioned TANOS GMBH VERPACKEN ORDNEN PRÄSENTIEREN as the owner. There can be no doubt that the Complainant is not the holder of the TANOS trademark. This fact is not disputed by the Complainant who identifies himself as an employee of the controlling company of Tanos GmbH, not the holder of the TANOS trademark itself. The Complainant however argues that he was authorized to use the TANOS in the framework of its application for the TANOS domain name. The Complainant argues that this is obvious due to the fact that “Tanos GmbH and the Complainant were both named in the same application: The Complainant as the applicant and Tanos in the trademark certificate".
The Respondent would again like to refer the Panel to article 14 (10) and the 12th recital of the Regulation. Pursuant to these provisions, the exercise for the validation agent will be to determine if the name of the applicant matches the name of the holder of the prior right which was submitted as documentary evidence. One must distinguish the name of the application form as also printed on the cover letter (the applicant) from the name of the documentary evidence (the holder of the prior right). One cannot infer from the fact that both are different that the applicant must have been authorized or must have been the employee, as the Complainant argues. Only one clear conclusion can be made when both names are different: the applicant is not the holder of the prior right. Such a conclusion must lead to the rejection of the application.
An applicant for a domain name must not necessarily be the actual owner of the prior right, he may well be authorized to use

that prior right through a licence. Section 20 (1) of the Sunrise Rules states to that regard that if an applicant has obtained a licence for a registered trade mark in respect of which it claims a prior right, it must enclose with the documentary evidence an acknowledgement and declaration form, duly completed and signed by both the owner of the prior right (as licensor) and the applicant (as licensee). Pursuant to section 20 (1) of the Sunrise Rules, which clarifies article 14 and the 12th recital of the Regulation, one must thus also submit proof when one is authorized to use the prior right. However, the Complainant did not submit any licence declaration with his documentary evidence. The Respondent had no information before it that the Complainant was indeed authorized to use the TANOS trademark and therefore rejected his application. To that regard, the Panel in case n° 192 (ATOLL) agreed that: ""“Those requesting to register a .eu Domain Name are required to provide certain information through an accredited .eu Registrar. In respect of the name of the Registrant there are two fields: The first is 'Name' and the second is 'Company'. Both fields may be completed or just the 'Name' field. If only the first field is completed, it is assumed that the registration is in the name of a private individual (natural person). If the 'Company' field is completed, it is assumed that the company is the Registrant. This ensures that the Domain Name of the company cannot be "held hostage" by an employee who suddenly leaves or who is dismissed, and who tries to transfer or delete the Domain Name or to link it to another website via the managing agent."
Complainant unfortunately does not specify in the Complaint on whose behalf the application was made nor does Complainant specify whether, if the application was made on behalf of the legal person, evidence was supplied to the effect that the Domain Name Applicant had prior rights. In this latter case, in the absence of conclusive evidence and pursuant to Section 21(3) of the Sunrise Rules, Respondent cannot be held to have erred in its decision to reject the domain name application on the basis of the Validation Agent’s findings, as the onus is on the Domain Name Applicant to produce the relevant documentary evidence to substantiate that the Domain Name Applicant held the prior right claimed."

3.4 New documents submitted by the Complainant. In annex to its complaint, the Complainant submitted a number of documents in which inter alia the owner of the trademark states that the Complainant is its representative. The documents annexed the complaint may not serve as a basis to asses whether the Complainant is the holder of a prior right, since those documents were not received within the end of 40 days period set forth by article 14 the Regulation. Furthermore, the Respondent wishes to stress that 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 Nr. 294 (COLT), Nr. 954 (GMP), Nr. 01549 (EPAGES) and Nr. 1674 (EBAGS)).
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. The Respondent cannot have made a decision which would conflict with the Regulation if it was not provided with all the information. It must again be noted that an applicant bears the burden of proof thereto. Therefore, this new information may not be taken into consideration to evaluate whether the Respondent's decision conflicts with the Regulation.

3.5 The FESTOOL and PROTOOL decisions. As mentioned above, two decisions have already been served between the Complainant and the Respondent. Both these decisions deal with the same issue as in the case at hand.
In case n° 1047 (FESTOOL), the Panel stated that: "6.1.3. Nevertheless, the Respondent was right to reject the application it received." However, the Panel accepted the Complaint. On the basis of the new elements from the complaint, the Panel found that the domain name should be attributed to the holder of the prior right (not even the Complainant). As the Respondent explained here above, it respectfully disagrees with such a decision and therefore decided to initiate Court proceedings.
As the Panel in case n° 706 (AUTOWELT) put it: "Finally, it should be made clear that this procedure is not an appeal against Respondent’s decisions whereby the application may be presented afresh to the Panel. The Panel’s function is merely to check that, given the Documentary Evidence, as received on December 16, 2005, in support of the initial application, the Respondent made the appropriate decisions. 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."
In case n° 1686 (PROTOOL), the Panel rejected the Complainant's complaint: "To this regard this Panel believes that,

although the Complainant argues that he acted in the name of the owner of the PROTOOL trademark which is TTS TOOLTECHNIC SYSTEMS AG & CO. KG, as its representative, -even though said documentation was not delivered on time, but once the ADR Proceeding was started- it is clear that he was not the owner of the prior right. But this Panel must remark that the Complainant neither provided any information allowing to determine whether the complainant was entitled to apply for the PROTOOL domain name on the basis of the PROTOOL trademark. It's quite important to provide this information to the Validation Agent, and the Complainant did not do so in the relevant moment."

Finally, and merely for the sake of completeness, the Respondent would like to note that the domain name could never be attributed to Tanos GmbH Verpacken Ordnen Präsentieren, as the Complainant seems to be arguing, as Tanos GmbH Verpacken Ordnen Präsentieren did not even apply for the domain name. The Respondent wishes to remind that pursuant 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:
Tanos GmbH Verpacken Ordnen Präsentieren must be the next applicant in the queue for the domain name concerned;
the Respondent must decide that Tanos GmbH Verpacken Ordnen Präsentieren satisfies all registration criteria set out in the Regulation.

It is the Respondent's view that the Panel in the PROTOOL decision was correct. Therefore, the complaint must be rejected.

DISCUSSION AND FINDINGS

1. Legal Framework
The Panel wants to stress the following legal aspects:
Following the European Council Meeting in Lisbon on March 23rd and 24th, 2000, the creation of the .eu Top Level Domain was one of the targets to accelerate electronic commerce in the e-Europe initiative. The Regulation (EC) No 733/2002 on the implementation of the .eu Top Level Domain and the Regulation (EC) No 874/2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration set up the framework on this aspect.

Art 5 (3) Reg 733/2002 and Art 12 Reg 874/2004 set out principles for the phased registration, following these principles the Registry shall publish a detailed description of all the technical and administrative measures that it shall use to ensure a proper, fair and technically sound administration of the phased registration period. The Sunrise Rules give this detailed description – especially Sec 3 (1) specifies for instance that if the name of the company or the organisation is specified when applying for registration in the phased period, then the company or organisation is considered as applicant, if no organisation/company is specified, than the individual requesting for registration is considered as applicant. It is the majorities view of this Panel, that this rule is within the scope of the EC-Regulations to ensure proper, fair and a sound technical administration of the registration procedure for the registration of a domain name in the phased period.

Art 22 (1) (b) Reg 874/2004 states, that an ADR procedure may be initiated by any party where a decision taken by the Registry conflicts with this Regulation or Reg 733/2002. Hence, a violation against the Sunrise Rules per se, is not sufficient to make out a successful case against the Registry [see for example Cases 1047 (festool.eu), 1071 (essence.eu), 1310 (astrodata.eu), 1481 (wisdom.eu), 1539 (setra.eu), 1674 (ebags.eu), 2145 (cvc.eu) and 2362 (petit-forestier.eu)].

Following Art 10 (1) Reg 874/2004 holders of prior rights shall be eligible to domain names during a period of phased registration before general registration of .eu domain starts. Art 10 (2) Reg 874/2004 stresses the point that the registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists.

Art 14 Reg 874/2004 states, that all claims for prior rights under Art 10 (1) and (2) must be verifiable by documentary evidence that he or she is the holder of the prior right claimed. This evidence, moreover, shall be submitted to a validation agent indicated by the registry in such a way that it shall be received by the validation agent within forty days from the submission of the application. If the documentary evidence has not been received by this deadline, the application for the domain name shall be rejected.

Art 13 Reg 874/2004 defines validation agents as legal persons established within the territory of the Community with

appropriate expertise. Art 14 Reg 874/2004 moreover sets out, that the validation agent shall examine whether the applicant that is first in line to be assessed has submitted the documentary evidence before 40 days after submission of the application. 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. Following Recital 12 Reg 874/2004 the validation agent should assess the right which is claimed for a particular name on the basis of evidence provided by the applicants.

Art 4 (2) (d) and Art 5 Reg 733/2002 as well as Art 22 Reg 874/2004 oblige the registry to implement an extra-judicial settlement of conflicts policy. The .eu Alternative Dispute Resolution Rules (ADR Rules) stresses the point (page 2), that the interpretation and application of the ADR-Rules will be done in the light of the EU legal framework which will prevail in case of conflict. Under Sec 11 (c) ADR Rules it is stated, that the main remedy where the Respondent is the Registry shall be the annulment of the disputed decision taken by the Registry. However, the Panel may decide in appropriate cases that the domain name in question related to the phased period shall be transferred, revoked or attributed but only if the Complainant is the next applicant in the queue for the domain name concerned.
It is a general principle set out by the EC-Regulations (esp Recital 11 Reg 874/2004), that the principle of first-come-first-served should be the basis for resolving a dispute between holders of prior rights during the phased registration.

2. Panel ruling
2.1 This Panel wants to stress the point, that following Art 22 (11) Reg 874/2004 the ADR Panel shall decide whether the decision at hand taken by the Registry conflicts with Reg 733/2002 or Reg 874/2004. ADR Decisions grounded merely on the Sunrise Rules are outside the Panels jurisdiction. The relevant rules for scrutinizing the Registry decisions are therefore the above cited EC-Regulations.

2.2 It is the Panels view, that for showing prior rights, the applicant has to submit documentary evidence to show that he is the holder of the prior right claimed on the name in question within forty days from the submission of the application to the indicated validation agent. Although the applicant is allowed to submit additional evidence, this only is true, if the additional evidence will be submitted within the forty day period since the submission of the application. This view is also supported by the first-come-first-served principle as well as the fact, that the registration shall be fair, non-discriminatory and transparent. Under Art 10 (2) Reg 874/2004 it is also stated that the registration shall consist of the complete name for which the prior right exists, as written in the documentation.

2.3 From the wording of Art 10 and 14 Reg 874/2004 it is clear, that the evidence that shows the prior right claimed must be a documentary evidence and must show that the applicant is the holder of the prior right claimed on the name in question. With regard to Art 13 Reg 874/2004 the validation agent has to have appropriate expertise. However, he shall examine applications in the order in which the application was received at the Registry and with regard to the submitted documentary evidences. It is moreover in the validation agents sole discretion (Art 21 (3) Sunrise Rules) to do further investigation. It is however the majority view of the Panel that with respect to the fact that the validation agent shall have appropriate expertise it has also the duty to examine the application and the supported documents materially but only to the extend, that it shall verify/conform obvious errors between the application and the documentary evidence (e.g. the applicant indicated the wrong right or country at the cover letter – iura novit curia); but this shall not amount to verifying/confirming a difference in legal forms regarding the applicant and the evidence documentation - that would be against Art 10 and 14 Reg 874/2004 and the principle first-come-first-served.

2.4 Following Art 12 Reg 874/2004 the Registry has to publish a detailed description of all the technical and administrative measures that it shall use for ensuring a fair, transparent and technical sound administration of the phased registration period. This description is laid down in the Sunrise Rules – for ensuring these principles the Sunrise Rules, inter alia, state in Sec 3 (1) (i) that the Registry shall be provided with the full name of the applicant; where no name of a company or organisation is specified, the individual requesting registration of the Domain Name is considered the applicant; if the name of the company or the organisation is specified, then the company or organisation is considered as the applicant.
This approach also is taken by national registries to facilitate the registration process and is not only coherent with the Sunrise Rules but also intended by the relevant EC-Regulations.
In the case at hand, the Complainant did not refer to the name of the holder of the TANOS trademark in the “organisation”

field of the application form; the Registry therefore considered the Complainant as Applicant with the consequence of bearing the burden of proof showing that the Complainant is the holder of a prior right.
The authorisation showed in the annex by the Complainant only refers to this proceeding but not to rights arising out of the trademark TANOS. This authorisation was moreover submitted by the Complainant after 40 days since the submission of the application– hence the Complainant cannot use this authorisation as evidence documentation for showing prior rights.

2.5 All cover letters are signed, and bear the clauses, under the title “Representations, warranties and disclaimer”: "1. The undersigned is the Applicant and has obtained all necessary powers to legally commit the Applicant in this respect.…3. The Applicant is the owner, right-holder or licensee of the claimed (prior) right.…5. The Documentary Evidence attached … is complete, accurate, up to date and not fraudulent …". Could this be enough for showing prior rights?
The Panel does not see this declaration as a sufficient documentation/proof for showing prior rights: To show prior rights means either being an original right-holder (e.g. trademark owner) or showing a document which gives the right from the original right holder to the applicant (e.g. licence agreement) – a one-sided declaration from the applicant does not fulfil this prerequisite. Such clauses in the cover letter cannot be enough evidence for the Validation Agent and the Registry so as to accept the application without more ado on the basis of those clauses. If they were enough, obviously the figure of the Validation Agent would not make any sense. The Validation Agent has to verify whether the documents attached to the application prove that the applicant has obtained all necessary powers to legally commit the Applicant, that the Applicant is the owner, right-holder or licensee of the claimed (prior) right and that the documentary evidence attached is complete, accurate, up to date and not fraudulent.

2.6 Following Rec 11 Reg 874/2004 (fist-come-first served) and Sec 11 (c) ADR Rules that a transfer-decision against the Registry only is available with regard to Complainants, who are the next applicant in the queue for the domain name, the requested remedy (“transfer” to Tanos GmbH) at the case in hand is not lawful. If the Panel would accept this remedy, it would act against the general Regulations-principle “first-come-first-served” but also Art 22 (11) Reg 874/2004 would be disrupted, because Tanos GmbH does not fulfil the general eligibility criteria set out in Art 4 (2) (b) Reg 733/2002 – Tanos GmbH did not even apply for the domain name at issue.

3. For all the above mentioned reasons, the complaint is not justified.

DECISION

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

PANELISTS

Name	**Berta Ramos Palenzuela**

DATE OF PANEL DECISION 2006-10-25

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

For challenging a decision taken by the Registry the decision has to conflict with the EC-Regulations 733/2002 or 874/2004; violations against the Sunrise Rules per se are not sufficient.
The cited EC-Regulations moreover set out the principle "first-come-first-served" as well as the fact that the registration shall be fair, non-discrimminatory and transparent.
The applicant has to submit documentary evidence to show that he is the holder of the prior rights claimed within 40 days since the submission of the application. Additional evidence after the 40 days shall not be taken into consideration.
The cover letter per se is not a sufficient documentation/proof for showing prior rights.
The validation agent has to have appropriate expertise; he therefore has the duty to examine the application and the supported documents materially, but only to the extend, that he shall verify/conform obvious errors between the application and the documentary evidence. Further investigations are in his sole discretion, but always within the scope of the principles set out in the EC-Regulation especially the "first-come-first-served-principle".

A transfer-decision against the Registry only is available to whom is the next applicant in the queue for the domain name and fulfils the general eligibility criteria set out in Art 4 (2) (b) REg 733/2002.