Panel Decision for dispute CAC-ADREU-002604

Case number	CAC-ADREU-002604
Time of filing	2006-08-01 11:48:18
Domain names	altitude.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	ALTITUDE DEVELOPPEMENT, RIVIERE

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 any other legal proceedings involving the disputed domain name.

FACTUAL BACKGROUND

1. On 7th December 2005, the first day on which it was possible to apply to register .EU Domain Names, the ALTITUDE DEVELOPPEMENT (hereafter the “Complainant") applied for the domain name “ALTITUDE.EU” (hereafter the “Domain Name”).

2. On 26 December 2005 the Complainant sent the documentary evidence to the processing agent (which was before the 16th January 2006 deadline). The documentary evidence consisted of a proof of registration of the trademark "ALTITUDE" in France. This trademark has been registered, in the name of ALTITUDE S.A..

3. On 21st June 2006 the EURID refused the Complainant's application; due to the difference in name between the holder of the prior right (ALTITUDE S.A.) and the Complainant, the validation agent concluded that both were different entities.

4. On 31st July 2006 the Complainant filed the Complaint. The Response was filed by the Respondent on 11st October 2006.

5. On 6th September 2006 Pierfrancesco Fasano was appointed as panelist in this proceeding(hereafter the “Panel") having filed the necessary Statement of Acceptance and Declaration of Impartiality and Independence.

A. COMPLAINANT

The Complainant contends that:

1. Article 4 paragraph 2 b) i) of Commission Regulation (EC) No 733/2002 (hereafter “Regulation 733/2002”) provides that the Registry shall “register domain names in the .eu TLD through any accredited .eu Registrar requested by any: undertaking having its registered office, central administration or principal place of business within the European Community.”

2. It is in fact the case that the registered office of Altitude Développement is located in Paris at La Défense. Consequently, the registered office of Altitude Développement is certainly located within the Community.

3. According to Article 10, par. 1 and 2 of Commission Regulation (EC) No 874/2004 (hereafter “Regulation 874/2004”) : “Holders of prior rights recognised or established by national and/or Community law and public bodies shall be eligible to apply to register domain names during a period of phased registration before general registration of. Eu domain starts”. “Prior rights’ shall be understood to include, inter alia, registered national and community trademarks (…)”.

4. Since 8th December 2005 Complainant has been the registered holder of the french trademark “Altitude”, despite the fact that this trademark was initially registered by Altitude SA on 11st December 1996. This happens because of the restructuring of the Altitude group, Complainant, a telecommunications company, took over certain activities previously conducted by Altitude SA.

5. A partial transfer of corporate assets effective as of 1st January 2005, was carried out by Altitude SA in favour of Altitude Développement. This partial transfer of assets included the assets and associated liabilities related to the activities conducted under the “Altitude” trademark. For this reason, it was necessary to "legalize" the change in registered holder of that same trademark.

6. Complainant has been the holder of the “Altitude” trademark since 8th December 2005, and has prior rights above mentioned.

For these reasons, the Complainant seeks the cancellation of the EURid decision dated 21st June 2006 and the granting of the Domain Name to its company.

B. RESPONDENT

The Respondent (which is the Registry, EURid) contends as follows:

1. Pursuant to article 14 of the Regulation 874/2004, “all 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 (…)".

2. 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".

3. 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”.

4. 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.

5. In case of a difference between the name of the applicant and the name of the owner of the prior right, the applicant must submit official documents demostrating 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 queue the opportunity to try to demonstrate its prior rights.

6. The documentary evidence did not demonstrate that the Complainant was the holder of a prior right The Complainant itself admits that the holder of the ALTITUDE trademark is a separate legal entity from the name of the Complainant who applied for the Domain Name.

7. The name of the domain name applicant, "ALTITUDE DEVELOPPEMENT", differed substantially from the name of the trademark holder, ALTITUDE SA. The Complainant failed to demostrate this difference in the names. Without any further explanation in the documentary evidence, the Respondent was in no position to determine whether the Complainant was entitled to rely on the claimed trademark. Therefore, the Respondent correctly rejected the Complainant's application, pursuant to the Regulation and the Sunrise Rules, because the Complainant failed to demostrate the ownership of the prior right.

For these reasons, the Respondent contends that the complaint must be rejected.

DISCUSSION AND FINDINGS

Article 10 (1) Regulation 874/2004 states that “Holders of prior rights recognized or established by national and/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”.

Article 14 (1) and (4) Regulation 874/2004 states that “All 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” and that “Every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question (…) 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 Complainant applied for the Domain Name on 7th December 2005, the first day on which it was possible to apply to register .EU Domain Names, or rectius, the first day of the First phase of the phased Registration Period where only Domain Names that correspond to
(i) registered Community or national trademarks or
(ii) geographical indications or designations of origin
may be applied for by the holder and/or licensee (where applicable) of the Prior Right concerned.

The problem of the Complainant’s application was that the submitted documentary evidence consisted of a French trademark, registered in the name of ALTITUDE S.A., a different and separate legal entity from the Complainant.

With the documentary evidence, the Complainant did not demonstrate to the validation agent - according to Article 14 (1) Regulation 874/2004 - that it is the holder of a prior right, because the prior right (the French trademark) has been registered in the name of ALTITUDE S.A.

The prior right’s holder - as the Complainant itself admits - is ALTITUDE S.A., a different and separate legal entity from the Domain Name’s applicant/Complainant.

It is not relevant that the Complainant “obtained” the trademark “ALTITUDE” from ALTITUDE S.A., on 1st January 2005, because of a partial transfer of corporate assets.

The Complainant become holder of the prior right (the French Trademark) on 8th December 2005.

The legal elements of the present case are very similar to other ADR proceedings, where the applicant incorrectly used its short name instead of its real name (ADR 01242 – Aponet; ADR 1625 - Teledrive). In above mentioned proceedings the Panel decided that the prior right has to be verifiable by the presented documentary evidence.

For sake of completeness, the Panel wishes to refer to the Complainant that it should wait one day and apply for the Domain Name on 8th December 2005, day which it become holder of the trademark “ALTITUDE” (the prior right).

On 7th December 2005 the Complainant was not holder of a prior right to apply for Domain Name. For this reason the Respondent’s position, who rappresented that the Complainant had to explain the difference between the name of the applicant and the name of the prior right’s holder, is not relevant.

For all the foregoing reasons, the Panel upholds EURid’s decision to reject the Complainant’s application for the Domain Name.

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	**Pierfrancesco Fasano**

DATE OF PANEL DECISION 2006-11-07

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Article 10 (1) Regulation 874/2004 states that “Holders of prior rights recognized or established by national and/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".

Article 14 (1) and (4) Regulation 874/2004 states that "All 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" and that "Every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question (…) 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".

With the documentary evidence, the Complainant did not demonstrate to the validation agent - according to Article 14 (1) Regulation 874/2004 - that it is the holder of a prior right, because the prior right (the French trademark) has been registered in the name of ALTITUDE S.A..

The prior right's holder - as the Complainant itself admits - is ALTITUDE S.A., a different and separate legal entity from the Domain Name's applicant/Complainant.

It is not relevant that the Complainant began to use the trademark "ALTITUDE", on 1st January 2005, because of a partial transfer of corporate assets.

The Complainant became holder of the prior right (the French Trademark) on 8th December 2005.

For all the foregoing reasons, the Panel upholds EURid's decision to reject the Complainant's application for the Domain Name.