Panel Decision for dispute CAC-ADREU-002661

Case number	**CAC-ADREU-002661**
Time of filing	**2006-08-03 13:14:46**
Domain names	**klangwerk.eu**

Case administrator

Name	**Kateřina Fáberová**

Complainant

Organization / Name	**Kraftwerk GbR Ralf Hütter/Florian Schneider**

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 would relate to the disputed domain name or to the disputed decision

FACTUAL BACKGROUND

1. HISTORY OF THE DOMAIN NAME APPLICATION

1.1. The domain name klangwerk.eu ("the Domain Name") was applied for on March 13, 2006, in the name of "Kraftwerk GbR RAlf Huetter/Florian Scneider" ("the Applicant").
This is the accurate information mentioned on a communication by EURid dated August 17, 2006, which followed a request for verification by the ADR Center for .eu attached to the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic ("the Court") regarding the Domain Name status.

1.2 The validation agent received the documentary evidence on March 20, 2006. The application was rejected on June 29, 2006.

2. HISTORY OF THE ADR PROCEEDING

2.1. On August 2, 2006, a complaint against EURid ("the Respondent") was filed to the Court, in the name of Kraftwerk GbR Ralf Hütter/Florian Schneider ("the Complainant").

2.2. In the following weeks, the Complainant and the Court engaged in a correspondence through the Court's electronic platform, as, on the one hand, the latter notified two deficiencies in the complaint and, on the other hand, the former encountered technical problems when it subsequently tried to fill in the "Complaint Amend" form. Eventually, the Complainant was granted a prolonged deadline, and was offered to deliver the hard copy of its amended complaint ("the Complaint") by September 14, 2006.

2.3. The Court received the response to the Complaint ("the Response") on October 25, 2006.

2.6. The Panel was duly appointed on October 30, 2006.

A. COMPLAINANT

3. The Complainant contends as follows:

3.1. “Mr. Ralf Huetter and Mr. Florian Schneider are musicians and music producers. They compose and produce music and merchandising article. They have established a partnership pursuant to article 705 ff. BGB of the German Civil Code. This partnership has the competence to be the complainant on its own according to the jurisdiction of the German Supreme Court (Bundesgerichtshof) and will be represented jointly by its partners Mr. Ralf Huetter and Mr. Florian Schneider. Each partner can be entitled by the others to represent the partnership alone.”

3.2. “The partnership is the owner of different labels. One of them is the Label klangwerk, which is subject of this complaint. This label was first registered by Mr. Ralf Huetter and Mr. Florian Schneider and secondly on 2005-09-20. The copy of the second registration has already been submitted to the registration office by our letter of 2006-03-15 and in the time of the deadline of 2006-04-22.”

3.3. “The application for the domain name klangwerk.eu made by Mr. Hilpert on behalf of the partnership was rejected by EURid with the mail of 2006-06-29 because the complainant has not proved properly the right it has reserved for itself. We attached this mail to the complaint as Exhibit 3. Because the wording of the rejection is only in German we have made a translation of the rejection partly in English as far as it is relevant for the arbitration: The documents, which we received, could not sufficient occupy the validly made right (Der Nachweis, den wir erhalten haben, hat das geltend gemachte Recht nicht ausreichend belegt).” [sic]

3.4. The Complainant alleges it has “no idea, why EURid came to the conclusion that the complainant has failed to prove its right”. It assumes “the reason might be, that the complainant referred to a registered community / international trademark although it has submitted a copy of the national registration and a copy of the application for the international registration. If this should be the subject of the rejection [the Complainant] may refer to the panel decision of 2006-07-28, case no.: 00830, ADI.eu, by which the rejection of an application in a similar case by EURid was overruled. [the Complainant refers to] this decision wordily as follows:
In the case klangwerk.eu, the complainant has sent a copy of the national trademark by which the complainant has proved that it was the owner of the trademark. This document is without any doubt a documentary evidence for registered trademarks pursuant to section 13(2i) of the sunrise rules. According to the above mentioned decision by which the Validation Agent / Registry should adopt a substantive and not a formal approach EURid was obliged to grant the registration to the complainant.”

3.5. The Complainant requests that the Respondent’s decision to reject its application for the Domain Name be annulled and that said Domain Name be registered in its name.

B. RESPONDENT

4. The panel chose not to summarize the Response below but to reproduce it in its entirety, especially because it explains the factual and legal reasons for the rejection of the application for the Domain Name. It shall be noted that, under article B11 of the Supplemental Rules of the Court, the word limit of the Response shall be 5,000 words. The Respondent’s answer counts 3,630 words.
The Respondent contends as follows (paragraphs are renumbered):

4.1. GROUNDS ON WHICH THE RESPONDENT REJECTED THE APPLICATION BY KRAFTWERK GBR RALF HUETTER/FLORIAN SCNEIDER FOR THE DOMAIN NAME KLANGWERK

4.1.1. “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.
Article 14 of the Regulation states that "every applicant shall submit documentary evidence that shows that he or she is the holder of the prior right claimed on the name in question.(…) If the documentary evidence has not been received in time or if the validation agent finds that the documentary evidence does not substantiate a prior right, he shall notify the Registry of this.(…) The Registry shall register the domain name, on the first come first served basis, if it finds that the applicant has demonstrated a prior right in accordance with the procedure set out in the second, third and fourth paragraphs".
Article 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".”

4.1.2. “Kraftwerk GbR RAlf Huetter/Florian Scneider (hereafter "the Applicant") applied for the domain name KLANGWERK on 13 March 2006, claiming as prior right an international registration valid in Germany for the trademark "KLANGWERK".
The processing agent received the documentary evidence on 20 March 2006, which was before the 22 April 2006 deadline.
The Applicant submitted documentary evidence consisting of an international trademark application for the name "KLANGWERK", filed with the WIPO on 25 October 2005 by "Ralph Hütter + Florian Schneider" under the Madrid Agreement. There was no document

establishing that the international application had actually been registered.
The documentary evidence also contained a German trademark registration for the name "KLANGWERK", registered in the name of Ralph Hütter and Florian Schneider on 21 October 2005."

4.1.3. "The Applicant did not submit documentary evidence substantiating that the Applicant (Kraftwerk GbR RAlf Huetter/Florian Scneider) was licensed to rely on the German trademark owned by "Ralph Hütter and Florian".
Based on the documentary evidence received, the validation agent found that the Applicant did not demonstrate that it was the holder or the licensee of the claimed prior right on the name KLANGWERK.
Therefore, the Respondent rejected the Applicant's application."

4.2. COMPLAINANT'S CONTENTIONS

"The Complainant argues that it is a partnership formed by Ralph Hütter and Florian Schneider.
The Complainant also argues that the Applicant sufficiently demonstrated its prior rights in the form of a German trademark registration for the name "KLANGWERK", registered in the name of Ralph Hütter and Florian Schneider on 21 October 2005.
Therefore, the Complainant requests the Panel to annul the Respondent's decision."

4.3. RESPONSE

"The Respondent argues that the Regulation and the Sunrise Rules clearly and certainly provide that the burden of proof is with the Applicant to demonstrate that it is the holder of the prior right claimed in its application.
When there is a difference between the name of the Applicant and the name of the owner or the licensee of the prior right, the Applicant must submit official documents explaining this difference.
If the Applicant fails to do so, its application must be rejected. Indeed, during the Sunrise Rules, 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."

4.3.1. "The burden of proof was with the Applicant to demonstrate that it is the holder or the licensee of the claimed prior right"

4.3.1.1. "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 to submit documentary evidence [sic] 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 the claimed 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), 2350 (PUBLICARE), etc.
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"."

4.3.1.2. "The Applicant submitted documentary evidence consisting of an international application filed on 25 October 2005 by "Ralph Hütter + Florian Schneider" with the WIPO under the Madrid Agreement for the name "KLANGWERK".
There was no document establishing that the international application had actually been registered.
Therefore, the documentary evidence did not establish that it was the holder of the CLAIMED prior right, pursuant to article 14 of the Regulation.
Consequently, the Respondent correctly rejected the application."

4.3.1.3. "However, the Applicant also submitted a German registered trademark and the Complainant argues that it sufficiently establishes that the Applicant is the holder of "A" prior right.
If the panel was to decided [sic], despite the clear wording of article 14 of the Regulation, that it was sufficient for the Applicant to establish "A" prior right and not "THE CLAIMED" prior right, the Respondent's decision to reject the Applicant's application is still

compliant with the Regulation.
Indeed, the documentary evidence did not clearly establish that the Applicant was the holder of the German trademark."

4.3.2. "The documentary evidence did not clearly establish that the Applicant was the [holder] of a prior right"

4.3.2.1. "The Applicant's name is "Kraftwerk GbR RAlf Huetter/Florian Scneider".
The owners of the trademark are " Ralph Hütter + Florian Schneider ".
When the name of the applicant and the name of the holder of the prior right differ, Section 20 of the Sunrise Rules clearly lists the necessary documents that the applicant needs to provide in order to demonstrate how it is entitled to rely upon the claimed prior right pursuant to article 14 of the Regulation. Section 20 of the Sunrise is therefore 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"."

4.3.2.2. "In the present case, the documentary evidence submitted by the Applicant did not indicate the name of the Applicant ("Kraftwerk GbR RAlf Huetter/Florian Scneider"), as being the holder of the prior right claimed ("Ralph Hütter + Florian Schneider").
The Applicant failed to submit any document explaining this difference in the names, which left the Respondent with legitimate doubts as to whether the Applicant was indeed the holder of the prior right claimed, the licensee of the trademark holder or simply another person.
This has been clearly established in ADR 1299 (4CE), where the Panel decided that: "In this case, the documentary evidence did not establish that the Applicant owned the prior right relied upon, since the name of the Applicant according to the Application differed from the name of the owner of the prior right according to the certificate of registration. Even though the apparent difference was relatively small, the names could have referred to different companies and there was no evidence that they were the same company. The Panel is satisfied that the Respondent was justified in rejecting the Application under Article 14 of Regulation 874/2004".
In ADR 2021 (LOHMANN, GOETHE, MCR), the Panel decided that: "To an outsider, ignorant of the German Commercial Code, and moreover to the Panel, there is a difference between the applicant for the domain names (Lohmann Innovations) and the owner of the trade marks (Uwe Lohmann). Lohmann is, after all, not an especially uncommon name in Germany so it seems more than likely that the 'Lohmann Innovations' who is named as the applicant is different from the 'Lohmann' who signed the Application Form. In the opinion of the Panel, whoever filed the Documentary Evidence on January 16, 2006 should also have filed an explanation as to why the domain name applicant and the trade mark owner were the same because on the face of it they appeared to be different. There is actually an obligation to do this under Section 20.3 of the Sunrise Rules. However it was not done. Therefore the decision by the Validation Agent to reject the applications was legally correct. (...) The Panel has considerable sympathy with the Complainant but, as he said in case 1393 (HANSA) "… the law is the law and rules are rules …" and in the present case there is a clear breach of the Law and the Rules. The Panel has therefore concluded, on the basis of the evidence and arguments submitted, that the Complaint should be denied".
In ADR 2301 (WHITELIGHT, WHITE-LIGHT, LAMPTRONIC, ELLER-TECHNOLOGIES, ELLERTECHNOLOGIES), the Panel similarly decided that : "If Mr Eller has licensed his trademark "Eller Technologies" to Eller Technologies GmbH, the Complainant should have submitted suitable documentation of such license to the validation agent in support of its domain name application. Such documentation, however, was not provided".
In ADR 2350 (PUBLICARE), the Panel similarly found that "The Applicant did not submit any other documentary evidence explaining the difference between the name of the Applicant and name of the trademark holder. Therefore the Respondent could have legitimate doubts if the Applicant and the trademark owner is the same company. "PubliCare" could indeed very well be a different company from "Publicare Marketing Communication Gmbh".
In ADR 2268 (EBSOFT), the Panel found that "The Complainant did not submit official documents proving that the applicant is the same person or the legal successor to the person indicated in the documentary evidence as being the holder of the prior right. Therefore Registrar's obligation to examine if the applicant for the domain name is the same entity as the holder of a prior right was not verifiable by the presented documentary evidence".
In ADR No. 1242 (APONET), the Panel had to decide on the same issue and followed the same approach: "Therefore, in the absence of any document clearly indicating that a) VGDA Gmbh was the short term for Verwaltungsgesellschaft Deutscher Apotheker mbH; b) that VGDA was also an official company name of the Applicant; and c) considering the Complainant's burden of proof with respect to its prior rights and wording of relevant provisions governing registration of .eu domain names in Sunrise Period, the Panel concludes that the Respondent, without having at its disposal any pertinent document proving that VGDA Gmbh and Verwaltungsgesellschaft Deutscher Apotheker mbH were the same entity, did not err in its decision to reject the Complainant's application. On the contrary, this Panel

considers that EURid, in accordance with, Paragraph 3. Section 11 of the Sunrise Rules, correctly considered the Applicant as a different entity from the holder of the Prior Right claimed".
In case ADR No. 810 (AHOLD), the Panel decided that: "As confirmed by sec. 20 of SR, it is important to make sure that the applicant is the same holder of the prior rights, to avoid any domain name registration deprived of legitimation on the applicant's side. As a result, when faced before a difference between the applicant name and the prior right holder name, correctly detected by the Validation Agent, the Registry may not accept the corresponding domain name application".
In case No. 1627 (PLANETINTERNET), the Panel decided that: " The validation agent conducted a prima facie review of the submitted document, and in conjunction with point (ii) below, reached the conclusion that as the names did not match, and there was no other documentary evidence to explain such a discrepancy, that the applicant (i.e. the Complainant) had not established its prior right".
In case No. 1625 (TELEDRIVE), the Panel decided that: "Moreover, when examining an application for a domain name, the Registry's obligation is to examine whether the applicant holds a prior right to the domain name (Article 14 of the Regulation). The right must be verifiable by the presented documentary evidence. This shall demonstrate that the right exists and that the applicant is the holder of this right claimed on the domain name. In the presented case the documentary evidence submitted by the Complainant showed that the IAV GmbH Ingenieurgesellschaft Auto und Verkehr, and not the iav GmbH is the holder of the trade mark TELEDRIVE. Therefore, the documentary evidence in support of the application for the domain name teledrive.eu was incomplete".

Therefore, the Respondent rejected the Applicant's application, pursuant to the Regulation and the Sunrise Rules."

4.3.3. "The Respondent and the Validation agent were under no obligation to investigate into the circumstance of the application"

"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".
The Respondent wishes to stress that 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".
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 (to do so) in its sole discretion, to conduct its own investigations (see for example case 1483 (SUNOCO), ISL (219), 551 (VIVENDI), 2350 (PUBLICARE), 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 Applicant is a holder of the prior right claimed, and therefore correctly rejected the Applicant's application. (see case 1443 (URBIS))."

4.3.4. "The present ADR proceedings may not be used to remedy the Applicant's incomplete application"

"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.
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".“

4.3.5. “Conclusion”

“The Regulation and the Sunrise Rules give all the holders of prior rights the opportunity to demonstrate their prior rights during the phased registration, which is an exception to the basic principle of first-come first-served.
In order to benefit from this opportunity to demonstrate its prior rights, the applicant must comply with the strict procedure laid out by the Regulation for dealing with the thousands of applications received during the phased registration and making sure that these applications are substantiated.
The Applicant in the present case did not seize this opportunity, because its application did not correctly fulfil the substantial requirements.
As the Panel in ADR 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 ADR1627 ("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".
Any right given to the Applicant to correct its 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 stated in ADR 706 (AUTOWELT) and 1710 (PARLOPHONE, EMI, EMIMUSIC, EMIRECORDS, ANGEL, THERAFT).
This consideration is particularly important in the present case since other legitimate applicants with presumably valid prior rights are standing in the queue. When the first applicant in the line failed to fully comply the substantial requirements, its application must be rejected and the next applicant in line must now have the opportunity to try to demonstrate its prior rights. 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.
As explained in 1614 (TELENET), " when there is a queue of applicants a priori entitled to the domain name, it would appear improper if the Validation Agent carried out investigations to help an applicant when that applicant did not fulfill its duties (…) every applicant in the queue has a legitimate expectation to obtain the domain name and therefore, the observance of the application requirements must be strict. This Panel shares the view of the NAGEL case that the principle first-come, first-served is more properly described as "first-come-and-substantiate, first-served" (case no. 00119 NAGEL)".“

4.4. The Respondent concludes that complaint must be rejected, “[s]ince [it] correctly decided to reject the Applicant's application, pursuant to the Regulation, Respondent's decision may not be annulled and the domain name KLANGWERK may not be granted to the Applicant. Indeed, a domain name may only be attributed to the Applicant by this Panel, when the Panel finds that the Respondent's decision conflicts with the Regulation (article 11 of the ADR Rules)."

DISCUSSION AND FINDINGS

The Respondent rejected the application on the grounds that, after reviewing the documentary evidence submitted by the Applicant, the validation agent came to the conclusion that such evidence did not demonstrate that the Applicant was the holder of the prior right claimed on the Domain Name (see 4.1.3 above).

The Respondent relies on Article 14 of EC Regulation 874/2004 (validation and registration applications received during phased registration), and on Sections 20 (Licences, transfers and changes as regards the Applicant) and 21 of the Sunrise Rules (examination by the validation agent).

This leads the Panel to determine whether the Sunrise Rules are applicable or not (5), the respective powers of the validation agent (6) and of the Registry (7) when it comes to the validation of an application, and to determine whether they correctly used their powers in the present case (8).

5. SUNRISE RULES ARE NOT APPLICABLE IN ADR PROCEEDINGS

5.1. “[T]he ADR Panel shall decide whether a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No 733/2002” (article 22.11 of EC Regulation 874/2004), and NOT whether Registry's decision is correct under the Sunrise Rules (as demonstrated or stated in Cases 1047 – festool.eu, 1071 – essence.eu, 1310 – astrodata.eu, 1481 – wisdom.eu, 1539, setra.eu, 1674 – ebags.eu, 2019 – drinks.eu / estragon.eu / krauter.eu / opskrift.eu / salat.eu / urter.eu, 2145 – cvc.eu, 2209 – commscope.eu, 2362 - petit-forestier.eu, and 2592 – tanos.eu ; see also Cases 1774 – psp.eu and 1930 – modeltrain.eu). Panels have limited jurisdiction in

ADR proceedings against the Registry.

5.2. Article 26.2 of the Sunrise Rules excludes the application of these Sunrise Rules to ADR proceedings against the Registry. This article states: "The sole object and purpose of an ADR Proceeding against the Registry is to verify whether the relevant decision by the Registry conflicts with the Regulations"… and therefore NOT with the Sunrise Rules. The Sunrise Rules are contractual rules, binding on the Respondent. It thus does not make sense that the Response relies on rules the Respondent knows are irrelevant, since it agreed to exclude their application.

5.3. Nevertheless, the Response is partly grounded on the Sunrise Rules, and on precedents grounded on the Sunrise Rules. Be this a way for the Respondent to justify how it chose to interpret the Regulations, such contentions cannot constitute legal arguments, for the procedural and contractual reasons explained above.

6. OBLIGATIONS OF THE VALIDATION AGENT UNDER THE REGULATION AS REGARDS THE DEMONSTRATION OF A PRIOR RIGHT

6.1. According to the Respondent, “[t]he Respondent and the Validation agent were under no obligation to investigate into the circumstance of the application”. Respondent cites Article 21.2 of the Sunrise Rules – according to which the validation agent must only examine the prior right “on the basis of a prima facie review” of the documentary evidence –, and Article 21.3 of the Sunrise Rules – according to which the validation agent “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”, but is not obliged to do so.
These are rules set out in the Sunrise Rules. As such, they cannot be applicable to the present proceedings. The Panel must take into account the obligations of the validation agent as defined in the EC Regulations.

6.2. According to Article 14 of EC Regulation 874/2004, which is of relevance here, “[v]alidation agents shall examine applications for any particular domain name in the order in which the application was received at the Registry", and “[t]he 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".
The Panel notes that “to examine” is the verb used in these two sentences to define the validation agent’s duty.
What does “to examine” mean? According to The Shorter Oxford English Dictionary (Revised & Edited by Onions C. T., Oxford, Oxford University Press, 1973, Third edition, p. 694, volume I), the verb “to examine” derives from the Latin word “examinare”, which means “weigh accurately”. This dictionary gives the following definitions:
- To try, test, assay
- To test judicially or critically; to try by a standard
- To investigate by inspection or manipulation; to inspect in detail, scan, scrutinize
- To inquire into, investigate; to discuss critically, etc.
A multi-source dictionary search online service gives no different results. The website Dictionary.com aggregates definitions from different dictionaries (http://dictionary.reference.com/browse/examine). The relevant definitions based on the Random House Unabridged Dictionary (2006) are: To inspect or scrutinize carefully; To inquire into or investigate. The relevant definitions of The American Heritage® Dictionary of the English Language, Fourth Edition (2000), are: To observe carefully or critically; inspect; To study or analyze. The relevant definitions from the Merriam-Webster's Dictionary of Law (1996) are: To investigate or inspect closely; To question closely. And in the Princeton University WordNet tool (2003), one finds: Consider in detail and subject to an analysis in order to discover essential features or meaning; Observe, check out, and look over carefully or inspect.
The verb “to examine” obviously implies a scrutiny. And as a result, it is clear that the examination by the validation agent cannot be limited to a prima facie review (which means that Section 21.2 of the Sunrise Rules violates the EC Regulation 874/2004 in that it 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”).
Given the definitions of this word, the use of “examine” also implies investigations (in this approach, Section 21.3 of the Sunrise Rules violates the EC Regulation 874/2004 in that it states that the validation agent is not obliged to conduct its own investigations).

7. OBLIGATIONS OF THE REGISTRY UNDER THE REGULATION AS REGARDS THE DEMONSTRATION OF A PRIOR RIGHT

7.1. It must also be stressed that, under Article 14 of EC Regulation 874/2004, “if the validation agent finds that the documentary evidence does not substantiate a prior right, he shall notify the Registry of this”. This means that the Registry is only notified of the validation agent’s findings, but does not mean that the Registry is bound by the validation agent’s findings. Although much of the validation is done by the dedicated agent, the Registry is not deprived of any power regarding the fate of an application.

7.2. Under Article 14 of EC Regulation 874/2004, “[t]he Registry shall register the domain name, on the first come first served basis, if it finds that the applicant has demonstrated a prior right in accordance with the procedure set out in the second, third and fourth paragraphs.” This means that the Registry is, ultimately, the one which finds whether an application is correct or not. To do so, although it takes into account the validation agent’s findings, the Registry does have free will.

8. OBLIGATIONS OF THE VALIDATION AGENT AND THE REGISTRY AS REGARDS THE EXAMINATION OF THE APPLICANT’S PRIOR RIGHT IN THIS CASE

8.1. The Documentary Evidence submitted by the Applicant consisted of 18 pages. It is described in the Response (see 4.1.2 above) as “consisting of an international trademark application for the name "KLANGWERK", filed with the WIPO on 25 October 2005 by "Ralph Hütter + Florian Schneider" under the Madrid Agreement”, and of “a German trademark registration for the name "KLANGWERK", registered in the name of Ralph Hütter and Florian Schneider on 21 October 2005.”

8.2. The first document the Respondent refers to is an international trademark application. To the Respondent, “[t]here was no document establishing that the international application had actually been registered”.
As demonstrated above (see 6.2 above), any application for a domain name must be carefully inspected, and is subject to investigation. In this approach, there was no proper examination pursuant to Article 14 of EC Regulation. To verify whether the trademark applied for was actually registered, a simple search on the WIPO Intellectual Property Digital Library Web site, which provides access to the Trademarks database “Madrid Express”, free of charge, could have been performed. Such a search, performed by the Panel in a few seconds, shows that a trademark “Klangwerk” is registered in the name of Ralf Hütter and Florian Schneider since October 26, 2005. The address of the owners is the same as the address of the Applicant.

8.3. The Respondent acknowledges the Documentary Evidence included a valid German trademark “KLANGWERK”, registered in the name of Ralph Hütter and Florian Schneider. To the Applicant, such evidence could not substantiate that the Applicant had a prior right, considering that the Application names “Kraftwerk GbR RAlf Huetter/Florian Scneider” as Applicant and that the German trademark is registered in the name of "Ralph Hütter and Florian Schneider".

8.3.1. The Respondent argues there is a difference between the name of the Applicant and the name of the owner of the prior right. It refers to the Section 20.3 of the Sunrise Rules, which states that in case of difference between the name of the Applicant and the name of the owner of the prior right, the Applicant must submit official documents explaining this difference. This provision, like all the Sunrise Rules, is not applicable in this proceeding.

8.3.2. The Respondent argues that, because of the difference between the name of the Applicant and the name of the holders of the prior right, it had “legitimate doubts as to whether the Applicant was indeed the holder of the prior right claimed, the licensee of the trademark holder or simply another person”. The Panel is not satisfied that this difference can lead to “legitimate doubts”.

8.3.2.1. The trademark owners’ names are Ralph Hütter and Florian Schneider. These names appear in the field “Applicant”, preceded by the name “Kraftwerk GbR”, as “RAlf Huetter/Florian Scneider”. The trademark owners’ names obviously appear in the “Applicant” field. The fact that there is a typo in these names is not even discussed by the Respondent.

8.3.2.2. This leaves the Respondent’s argument according to which the Applicant is “Kraftwerk GbR” and not “RAlf Huetter/Florian Scneider” unanswered.
To the Respondent an Applicant can only be a single person. The Panel will address this question below. Before addressing it, the Panel raises a preliminary question: What is “Krafwerk GbR”?
The Complainant alleges – and this is not disputed by the Respondent – that it is “a partnership pursuant to article 705 ff. BGB of the German Civil Code. This partnership has the competence to be the complainant on its own according to the jurisdiction of the German Supreme Court (Bundesgerichtshof) [sic] and will be represented jointly by its partners Mr. Ralf Huetter and Mr. Florian Schneider”. This is not really clear to the Panel, who is not familiar with this German law institution.
Although it is reluctant to use the internet as a source, knowing that online content is not always reliable, the Panel made further search on what is a “GbR”. It found an interesting source, which it believes is reliable: The IPR Helpdesk, a service funded by the European Commission, which content is provided by academic institutions. A 22 pages document titled “Joint Ownership in Intellectual Property Rights”, available on the IPR Helpdesk website at ipr-helpdesk.org/documentos/docsPublicacion/pdf_xml/, which is “intended to provide … with a first idea of the underlying concepts”, explains the rules relating to joint ownership in several EU Countries, including Germany, as regards trademarks (paragraph 4.3).
According to this source, joint ownership is allowed in Germany. Contracts will define the relationship between owners. “In the absence of any agreement to the contrary, the effect of Joint Ownership is to create a legal entity sharing undivided interests in the intellectual

property right - i.e. each party holds a nominal equal share, divided simply per head (Bruchteilsgemeinschaft, §§ 741 ff BGB). … Joint Ownership can lead to a specific form of business entity (Gemeinschaft bürgerlichen Rechts, §§ 705 ff. BGB)".
The Panel concludes from its review that "Kraftwerk GbR" is an entity legally entitled to represent the joint owners of trademark rights. As such, "Kraftwerk GbR" could apply for the Domain Name, considering that it satisfies the general eligibility criteria set out in Article 4(2)(b) of Regulation (EC) No 733/2002.

9. CAN A DOMAIN NAME BE SUBJECT TO JOINT USE?

The EC Regulations do not prevent the allocation of a domain name to co-users.
One could object they always refer to the domain name user in the singular, but it is common for rules of law to be written in the singular.
The EC Regulations take into account the demonstration of a prior right as the basis for allocation of a domain name during the phased registration. During the phased registration, "holders of prior rights have appropriate opportunities to register the names on which they hold prior rights" (EC Regulation 874/2004, Recital 12). EC Regulations do not forbid applications based on a jointly owned trademark
If an application based on a jointly owned trademark is successful, it shall translate into a joint use by two or more persons of a single domain name.
A domain name can be a used by a unique person, by several persons, or, by several persons along with a specific form of business entity that can represent them to protect their intellectual property interests, like in this case.

10. CONCLUSION

The Sunrise Rules are not applicable in ADR proceedings. The Panel had to review the duty of the validation agent and of the Registry under the EC Regulations.
After reviewing the EC Regulations, the Panel concluded that the validation of an applicant's prior right cannot consist of a rough review or the documentary evidence, but requires a careful inspection.
Such careful inspection could have led to the conclusion that there had been a demonstration of a prior right on the Domain Name.
Given that the prior right is a jointly owned trademark, the Domain Name must be registered on the basis of this joint ownership in the names of the persons who have a right.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that
EURid's decision be annulled
the domain name klangwerk.eu be transferred to the Complainant

PANELISTS

Name	**Cedric Manara**

DATE OF PANEL DECISION 2006-11-21

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Sunrise Rules are not applicable in ADR proceedings. The Panels have to review the duty of the validation agent and of the Registry under the EC Regulations.
After it scrutinized the EC Regulations, the Panel concluded that the validation of an applicant's prior right cannot consist of a rough review or the documentary evidence, but requires a careful inspection.
Such careful inspection could have led to the conclusion that there had been a demonstration of a prior right on the Domain Name in the present case.
Given that the prior right is a jointly owned trademark, the Domain Name must be registered on the basis of this joint ownership in the names of the persons who have a right.