Panel Decision for dispute CAC-ADREU-002796

Case number	**CAC-ADREU-002796**
Time of filing	**2006-09-18 12:53:02**
Domain names	**eichhorn.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**Helmut Eichhorn**

Respondent

Organization / Name	**EURid**

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

There are no other legal proceedings of which the Panel is aware of that are pending or decided and that relate to the disputed domain name.

FACTUAL BACKGROUND

The Complainant, a natural person with the civil name Helmut Eichhorn filed an application in the Sunrise II period for the domain eichhorn.eu on Februar 7, 2006. Within the deadline for submitting documentary evidence which was March 19, 2006, Eurid received such documents on March 16, 2006. The documents consisted of the coversheet and a notarially recorded document (UR-NR.R 315/2006) with the title “Eidesstattliche Versicherung” (in English “Affidavit”). According to this document, Mr. Helmut Eichhorn identified himself with his identity card as Mr. Helmut Eichhorn. Furthermore Mr. Eichhorn rendered an affidavit after being informed about the consequences of a wrong affidavit as follows (hereinafter in an English translation):

"Affidavit

as follows :

I, Mr. Helmut Eichhorn, born on November 20, 1942 in Schwerin, with residence at Uferstrasse 13 in 88149 Nonnenhorn, have filed an application for the domain name eichhorn.eu with Eurid. I herewith declare in lieu of oath that I use my family name since my birth. In view of the related rights I have filed the aforementioned application.

I, Mr. Helmut Eichhorn further declare that I have the right to use my own name and can exclude third parties from an unlegitimate use of this name; this name right covers any use of the own name in a designating way, e.g. as a domain name; this right is protected in accordance with section 12 of the German Civil Code.

I, Mr. Eichhorn further declare that I herewith have the right to apply for the domain name “eichhorn.eu”.

The document ends with the seal of the notary, the signature of Mr. Helmut Eichhorn and the signatu-re of the notary.

A. COMPLAINANT

The Complainant is of the opinion that he is entitled to register the domain name eichhorn.eu in the Sunrise Period II, since he is the owner of the family name “Eichhorn” which was proved by the do-cumentary evidence. The Complainant claims that he met the essential provisions of Section 12 of the .eu Sunrise Rules, since the affidavit was signed by a competent authority and contained the relevant legal provisions. The fact that the family name is protected in Germany in accordance with Section 12 of the German Civil Code must be known to the validation agents since PricewaterhouseCoopers as validation agents received over seven thousand applications from German owners of other rights. Furthermore the Complainant as well as the notary acted in good faith to fulfil the regulations of the .eu Sunrise Rules.

B. RESPONDENT

Respondent is of the opinion that the rejection of the application was correct.

The burden of proof was with the applicant to demonstrate that the claimed prior right is protected or established under national law. The applicant did not comply with Section 12 of the Sunrise Rules since the affidavit must be signed by a legal practitioner or a competent authority which explains the requirement of local law and subsequently confirms the prior right claimed by the applicant meets those requirements. In the present case, this was not done by the public notary, but only by the applicant.

DISCUSSION AND FINDINGS

The factual background is not disputed. The Panel must answer the question whether or not the sub-mitted documentary evidence by the Complainant is sufficient to prove his civil name right according to German Law in view of Section 12 of the Sunrise Rules.

The Complainant has submitted documentary evidence containing an affidavit signed by a legal prac-titioner who had verified that the Complainant has the name he claimed. Furthermore, proof of the name being the name of the Complainant by filing a copy of the identity card of Mr. Eichhorn was submitted.

According to Sect. 12 (1) and 17 (2) of the Sunrise Rules, the registration of civil/family names is based on Documentary Evidence containing the signed affidavit by a legal practitioner. The document in question contains all the material information necessary to identify the rights and the legal situation in Germany. The document was as well signed by the notary. The only mistake which was made is that the statement was formulated in a way as if it was made by the Complainant whereas it should have been formulated in a way that the document contains the legal considerations of the notary himself. However, the content and the material substance of the document is compatible with Sect. 12 of the Sunrise Rules. Since a German notary is by law not allowed to notarize wrong statements and the Complainant is not a lawyer, it must be presumed that the legal statement in the document was de-signed by the notary, but only by mistake not phrased as his own statement. In this very specific situa-tion, the Panel considers the given formal incorrectness as an obvious mistake which shall not lead to a refusal of the application. As other Panels have decided already, at least obvious mistakes (ADR 253 – Schoeller, ADR 903 - SBK) should not form the basis of a refusal.

DISSENTING OPINION OF PANELIST FLIP PETILLION

1. Undoubtedly, panelists should concert and conduct a discussion to find a common standpoint for a particular case. However, when the view of one of the panelists remains outweighed by the view reached by the two other panelists, the former should be given the chance to explain why a unanimous decision could not be reached. Reversely, whilst a dissenting panelist is not obliged to issue a dissenting opinion in a particular case, he should not be prevented from doing so if he so wishes.

To my knowledge, dissenting opinions are admitted under the CAC proceedings. The CAC has never been opposed to the issuing of dissenting opinions. The CAC ADR rules do not expressly provide for dissenting decisions but they do not prohibit them either. Subsequent to the single case in which a dissenting 'judgment' was issued by one of the panelists of a three member panel (case STARFISH (N° 00843)), the CAC has not amended the CAC proceedings.

2. In this case, I choose to express the reasons why I cannot share the view of my colleague panelist. I have indeed reached a different conclusion.

(i) The burden of proof was with the Applicant

Actori incumbat probatio. The applicant bears the burden of proof. The applicant must produce the evidence required by the applicable rules.

Article 10 (1) of Commission Regulation (EC) No 874/2004 of 28 April 2004 ("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. Indeed, Article 10 (1) the Regulation provides that: "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, geographical indications or designations of origin, and, in as far as they are protected under national law in the Member-State where they are held: unregistered trademarks, trade names, business identifiers, company names, family names, and distinctive titles of protected literary and artistic works".

Pursuant to article 14 of the Regulation, the applicant must submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question. Based on this documentary evidence, the validation agent shall examine whether the applicant has prior rights on the name.

Section 17 of the Sunrise Rules provides that: "If an Applicant claims a Prior Right to a name on the basis of his family name, in as far as it is protected in the member state of which he is a resident of, he must select the "other" type of Prior Right in his Application and it must prove the existence of such Prior Right in accordance with Sections 12(1) or (2) hereof".

Section 12(1) of the Sunrise Rules provides that: "Unless otherwise provided under Sections 13 to 18 of these Sunrise Rules, the Applicant must

submit Documentary Evidence containing
(i) an affidavit signed by a competent authority, legal practitioner or professional representative decla-ring that the type of Prior Right claimed by the Applicant is protected under the laws of the relevant member state, including
a. references to the relevant legal provisions, scholarly works and court decisions and
b. the conditions required for such protection; and
(ii) proof that the complete name for which a Prior Right is claimed meets all of the conditions set forth in such laws, including the relevant scholarly works and court decisions, and that such name is pro-tected by the relevant Prior Right claimed".

The affidavit is meant to avoid fraud. It must be produced by an author (competent authority, legal practitioner or professional representative) who confirms by himself that the applicant has a right. He cannot limit himself to confirming what the applicant claims to have as a right.
The author should, thus, first explain the requirements under the applicable local law and subsequently confirm that the prior right claimed by the applicant meets those requirements.

In contrast, in the present case, the documentary evidence consisted of a copy of the applicant's iden-tity card and a document signed by a notary, that records an affidavit by the complainant himself sta-ting that the type of prior right claimed is protected under the laws of Germany. In the present case, the notary did not explain the requirements under German law and did not state that the prior right claimed by the applicant meets those requirements. The statement was drafted by the applicant himself and the notary only recorded the statement of the applicant: he acknowledged that the applicant came to his office on 13 March 2006 and that the applicant stated what he stated. The notary was not involved in the legal analysis required by Section 12(1) of the Sunrise Rules and took no responsibility for the statements made by the applicant, except that they were indeed made in front of him on 13 March 2006.

On these grounds it was correct for the validation agent and EURid to refuse to register the domain name applied for by the applicant.

(ii) The validation agent could reject the application on the basis of a prima facie review of the evidence received.

Section 21.2. of the Sunrise Rules states that the validation agent examines whether the applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of documentary evidence received and scanned by the processing agent.

In the present case, the defect of the evidence produced by the applicant was not minor.
On the basis of the documentary evidence produced in this case, the validation agent could conclude that the Complainant did not sufficiently establish the protection of the claimed prior right.

Therefore, it was correct to reject the application.

(iii) The Validation agent had not to examine the application any further

Section 21.3 of the Sunrise Rules provides that "The Validation agent is not obliged, but it is permitted in its sole discretion, to conduct its own investigations into the circumstances of the Application, the Prior Right claimed and the Documentary Evidence produced".

The Validation agent was not obliged to proceed to an examination of the application.

(iv) Applicants should be treated equally and each of them should be given an equal chance

Also, if an application is incomplete, the applicant should not be granted a "second chance" (see for example AHOLD (N° 810), AUTOWELT and other (N° 706), COLT (N° 294), GMP (N° 954), INSU-RESUPERMARKET (N° 1194), PROTOOL (N° 1686), SYSTIMAX (N° 1504), ULTRASUN (N° 541) and many others.

It would appear inappropriate if the Validation agent carried out investigations to help an applicant when that applicant did not fulfill its duties.

The Validation agent is required to perform an objective and non-discriminatory examination of appli-cations.

3. In conclusion, I see no justification why, in view of all of the above, the panelists should part from the presumption "that the legal statement in the document was designed by the notary", as my fellow panelists have done. The panelists were not informed of the identity of the person who drafted the legal statement filed with the application and the panelists should not make presumptions in a situation where, prima facie, the proof required under the applicable rules is seriously incomplete.

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 and the domain name eichhorn.eu be registered for the Complainant.

PANELISTS

Name	**Thomas Johann Hoeren**

DATE OF PANEL DECISION 2006-12-18

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant, a natural person with the civil name Helmut Eichhorn filed an application in the Sunrise II period for the domain eichhorn.eu. As documentary evidence, he filed a notarially recorded document including an own affidavit stating his name right whereas the name was verified by the notary who also signed the document. The application was rejected.

Whereas Complainant claimed that the documentary evidence met the essential provisions of Section 12 of the .eu Sunrise Rules, since the affidavit was signed by a competent authority and contained the relevant legal provisions, Respondent is of the opinion that the rejection of the application was correct since the applicant did not comply with Section 12 of the Sunrise Rules since the affidavit must be signed by a legal practitioner or a competent authority which explains the requirement of local law and subsequently confirms the prior right claimed by the applicant meets those requirements.

The majority view of the Panel is of the opinion that the documentary evidence showed all the material information necessary to identify the rights and the legal situation in Germany. The document was as well signed by the notary. Since a German notary is by law not allowed to notarize wrong statements and the Complainant is not a lawyer, it must be presumed that the legal statement in the document was only by mistake not phrased as the statement of the notary. In this very specific situation, the majority of the Panel considered the given formal incorrectness as an obvious mistake which shall not lead to a refusal of the application.