Panel Decision for dispute CAC-ADREU-002881

Case number	**CAC-ADREU-002881**
Time of filing	**2006-08-29 11:38:10**
Domain names	**mrlodge.eu**

Case administrator

Name	**Kateřina Fáberová**

Complainant

Organization / Name	**Mr Lodge GmbH, Norbert Verbücheln**

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 relating to the disputed domain name.

FACTUAL BACKGROUND

The application for the domain name MRLODGE was made on 7 February 2006. The name of the Applicant was “Mr Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH”. In support of its application, the Applicant submitted a certificate of registration of “Mr Lodge GmbH” under number HRB 99686, issued by the Munich Commercial Register Court. The Applicant gave its address as Barer Strasse 32, 80333 München, Germany. The certificate of incorporation of Mr Lodge GmbH gives that company’s address as Kaulbachstrasse 61, 80539 München, Germany. The Registry rejected the application for the domain name MRLODGE on 17 July 2006 on the grounds that the Applicant had failed to show that it was the holder or the licensee of a prior right to the name MRLODGE. The Registry did not conduct its own investigation into the difference between the name of the Applicant and the name of the holder of the prior right before it rejected the application.

A. COMPLAINANT

The Complainant, Mr Lodge GmbH, seeks annulment of the disputed decision taken by the Registry and attribution of the domain name in dispute to the Complainant in accordance with Paragraph B11(c) of the ADR Rules.

In summary, the Complainant submits that it satisfies the general eligibility criteria for registration, as set out in Paragraph 4(2)(b) of Regulation EC 733/2002, in that it is an undertaking having its registered office, central administration or principal place of business within the Community. The Complainant states that it is the only Applicant for the domain name concerned.

The Complainant further submits that it was founded in April 1992 under the company name “Mr Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH” and that it was registered under number HRB 99686 on the Munich Commercial Register. The Complainant explains that, on 6 July 2004, a meeting of the shareholders of “Mr Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH” decided to change the company name to “Mr Lodge GmbH”, and that the change of the company name to “Mr Lodge GmbH” was registered on the Munich Commercial Register under number HRB 99686 on 23 December 2004.

The Complainant states that it applied for registration of the domain name MRLODGE through its registrar on 07 Feb 2006, claiming a prior right to the company name “Mr Lodge GmbH”. The Complainant further asserts that it transmitted documentary evidence, as required by Sections 8, 11.2(ii), and 16.1 and 16.4 of the Sunrise Rules, to the Registry in form of a certificate of registration of “Mr Lodge GmbH” under number HRB 99686, issued by the Munich Commercial Register Court, and that the documents evidencing the prior right were received by the Registry on 15 March 2006.

The Complainant contends that the Registry should have attributed the domain name MRLODGE to the Complainant because the domain name consists of the complete name for which the prior right exists, as written in the documentation which proves that the prior right exists, but with spaces in the complete name eliminated in accordance with Articles 10(2) and 11 of Regulation EC 874/2004. Furthermore, the company type (GmbH) has been omitted in accordance with Section 19.3 of the Sunrise Rules. The Complainant concludes that, on this basis, the Registry should have attributed the domain name MRLODGE to the Complainant Mr Lodge GmbH and that the decision of the Registry to reject the application conflicts with Regulations EC 733/2002 and EC 874/2004.

B. RESPONDENT

The Respondent, EURid, seeks rejection of the complaint and submits a detailed response, which may be summarised as follows.

The Applicant, "Mr. Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH", applied for the domain name MRLODGE on 7 February 2006. The Applicant submitted documentary evidence consisting of a certificate of registration from the Munich Commercial Register Court for the Complainant company "Mr Lodge GmbH", which the processing agent received within the applicable deadline. The Applicant did not submit documentary evidence substantiating that the Applicant is licensed to rely on the prior right of the Complainant, or that it is the same person as, or the legal successor to, the Complainant. Based on the documentary evidence, the validation agent found that the Applicant did not demonstrate that it was the holder or the licensee of a prior right on the name MRLODGE. The Respondent therefore rejected the Applicant's application.

The Respondent comments as follows on the Complainant's argument that it changed its name from "Mr. Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH" (the name of the Applicant) to "Mr Lodge GmbH" (the name of the Complainant), that it is the same person as the Applicant, and that its application should therefore have been accepted; and on the Complainant's request that the Panel annul the Respondent's decision and grant the domain name MRLODGE to the Complainant.

The Respondent argues that Article 10(1) of Regulation EC 874/2004 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 Regulation EC 874/2004, 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 in the name. It is therefore important 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 Regulation and the Sunrise Rules provide clearly and with certainty that the burden of proof is upon the applicant to demonstrate that it is the holder of a prior right. Where there is a difference between the name of the applicant and the name of the owner of the prior right, the applicant must submit official documents explaining this difference. Indeed, during the Sunrise Phase, the first applicant in the line does not have an unconditional right to the domain name, but only an opportunity clearly to demonstrate that it is the holder of a prior right. The relevant question is not whether the Complainant is the holder of a prior right, but whether the Complainant demonstrates to the validation agent that it is the holder of a prior right. If the applicant fails to do so, its application must be rejected.

In the present case, so the Respondent asserts, the documentary evidence submitted by the Applicant does not demonstrate that the Applicant was the holder of a prior right. The Applicant's name is "Mr. Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH". The owner of the prior right is "Mr Lodge GmbH". (The Panel observes that the Respondent's submissions refer to "trade mark" but in the context the Panel construes this simply to mean "prior right" since the Complainant does not rely on a trade mark as prior right). The Respondent points out that the Complainant itself mentions that it changed its name from "Mr. Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH" to "Mr Lodge GmbH".

The Respondent further submits that, where the name of the applicant and the name of the holder of the prior right differ, Section 20 of the Sunrise Rules lists the 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 Regulation EC 874/2004. Section 20 of the Sunrise Rules is intended to cover all situations where the documentary evidence provided does not clearly indicate the name of the applicant as being the holder of the prior right claimed. The Respondent refers to Section 20.3 of the Sunrise Rules, in particular, which states that: "[i]f, for any reasons other than as are referred to in Section 20(1) and 20(2) hereof, the Documentary Evidence provided does not clearly indicate the name of the Applicant as being the holder of the Prior Right claimed (e.g. because the Applicant has become subject to a name change, a merger, the Prior Right has become subject to a de iure transfer, etc.), the Applicant must submit official documents substantiating that it is the same person as or the legal successor to the person indicated in the Documentary Evidence as being the holder of the Prior Right".

The Respondent argues that the Applicant failed to submit any document explaining this difference in the names, and that this left the Respondent with legitimate doubts as to whether the Applicant was the holder of the prior right claimed. "Mr Lodge GmbH" could very well be a different company from "Mr. Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH". There was no evidence before the validation agent that they were the same company.

The Respondent continues its submissions by arguing that neither it nor the validation agent were under any obligation to investigate the circumstance of the application. The Respondent refers to Section 21.2 of the Sunrise Rules which 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". Pursuant to Section 21.3 of the Sunrise Rules, 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 stresses that Section 21.3 of the Sunrise Rules does not impose any obligation for the validation agent to conduct its own investigation, and furthermore points out by reference to prior ADR decisions that it cannot be reasonably anticipated that the validation agent would conduct its own investigation 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 the Sunrise Rules.

Finally, the Respondent asserts that the present ADR proceedings may not be used to remedy the Applicant's incomplete application, and that Article 22(1)b of Regulation EC 874/2004 states that a decision taken by the Respondent may only be annulled when it conflicts with the Regulation. These proceedings, so the Respondent concludes, do not serve as a "second chance" for applicants to remedy their imperfect original application that was rejected during the Sunrise Period.

DISCUSSION AND FINDINGS

The Panel reviewed and considered the parties' submissions, which were all received within the applicable time limits, the documentary evidence produced by the parties, and the online record in relation to the case in detail. The Panel further considered the ADR decisions referred to by the Respondent in its submissions. The Complainant did not cite specific ADR decisions but the Panel took into account other ADR decisions which may be regarded as relevant to the dispute and which were not cited by the Respondent. These are discussed further below.

Article 20(11) of Regulation EC 874/2004 requires 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 733/2002". Likewise, Paragraph B11(d)(2) of the ADR Rules provides that "[t]he Panel shall issue a decision granting the remedies requested under the Procedural Rules in the event that the Respondent proves in ADR Proceedings where the Respondent is the Registry that the decision taken by the Registry conflicts with European Union Regulations".

Section 26.2 of the Sunrise Rules contains a similar provision. It follows from these provisions defining the jurisdiction of the Panel, that the Panel has no authority to validate the Complainant's application retrospectively based on additional documentary evidence which was submitted in the ADR proceedings but which was not submitted to the validation agent within the applicable time limits (see cases 219 (ISL), 294 (COLT), 706 (AUTOWELT), 954 (GMP), and 1627 (PLANETINTERNET)). Previous ADR decisions, with which this Panel concurs, concluded that the ADR procedure is not intended to correct domain name applicants' mistakes (see cases 551 (VIVENDI), 810 (AHOLD), 1194 (INSURESUPERMARKET), and 1627 (PLANETINTERNET)).

The Panel observes at the outset that it is not in dispute between the parties that the Applicant is an eligible party in principle within the meaning of Art 4(2)(b) of Regulation EC733/2002, and that the domain name MRLODGE as such satisfies the formal requirements of Art 10(2) and 11 of Regulation EC 874/2004, and of Section 19.3 of the Sunrise Rules. The Panel does not understand this to be the reason why the Respondent rejected the application for registration of the domain name.

In considering whether the decision of the Respondent in relation to the disputed domain name conflicts with the European Union Regulations (as defined in the ADR Rules), the principal relevant provisions of Regulation EC 874/2004 for present purposes are the following:

1 Article 10(1), which provides, insofar as relevant, that only holders of prior rights recognised 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 [sic] starts. Such prior rights may include company names.

2 Article 14, which provides 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. 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.

The Panel is not called upon to consider whether the application for the domain name complies with the Sunrise Rules, or, vice versa, whether the decision of the Registry conflicts with the Sunrise Rules, which were promulgated on the basis of Art 12(1) of Regulation EC 874/2004. They are intended to be "a detailed description of all the technical and administrative measures that [the Registry] shall use to ensure a proper, fair, and technically sound administration of the phased registration period". The Panel adopts the observations of the panel in Case 1071 (ESSENCE) on the relevance of the Sunrise Rules.

Of particular importance in this case is Section 20.3 of the Sunrise Rules, which states that "[i]f, for any reasons other than as are referred to in Section 20(1) and 20(2) hereof, the Documentary Evidence provided does not clearly indicate the name of the Applicant as being the holder of the Prior Right claimed (e.g. because the Applicant has become subject to a name change, a merger, the Prior Right has become subject to a de iure transfer, etc.), the Applicant must submit official documents substantiating that it is the same person as or the legal successor to the person indicated in the Documentary Evidence as being the holder of the Prior Right".

The Panel does not consider that Section 20.3 of the Sunrise Rules imposes additional requirements on applicants which go beyond those set out in Regulation EC 874/2004. Rather, Section 20.3 of the Sunrise Rules clarifies what documentary evidence shall be submitted by the applicant to show that he is the holder of the prior right claimed in the domain name in question in accordance with Art 14 of Regulation EC 874/2004. There is therefore no conflict between Art 14 of Regulation EC 874/2004 and Section 20.3 of the Sunrise Rules. In circumstances where the documentary evidence submitted by the applicant does not clearly indicate that the applicant is the holder of the prior right claimed, a failure by the applicant to submit official documents pursuant to Section 20.3 of the Sunrise Rules, substantiating that it is the same person as, or the legal successor to, the person named in the documentary evidence as holder of the prior right, or that it is otherwise entitled to rely upon the prior right, amounts to a failure to show that he is the holder of the prior right in accordance with Article 14 of Regulation EC 874/2004 because the claim to the prior right is not verifiable by documentary evidence.

In the present case the name of the Applicant is "Mr Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH". The documentary evidence submitted by the Applicant in support of its application indicates that the holder of the prior right in the name MRLODGE was Mr Lodge GmbH. There is therefore a material difference between the name of the Applicant and the name of the holder of the prior right according to the certificate of registration relied upon by the Applicant. The Applicant did not submit any other documentary evidence clearly explaining the difference between the name of the Applicant and name of the right holder which would have enabled the Registry to verify that the Applicant was identical with, or a successor to, the right holder identified in the documentary evidence, or that the Applicant was otherwise entitled to rely on the prior right. Accordingly, the documentary evidence did not demonstrate that the Applicant had a prior right to the name MRLODGE as required by Article 14 of Regulation EC 874/2004 (see cases 810 (AHOLD), 1299 (4CE), 1625 (TELEDRIVE), 1627 (PLANETINTERNET), 2350 (PUBLICARE), 2268 (EBSOFT), 1242 (APONET)).

In light of the difference between their names, the Respondent could have legitimate doubts whether the Applicant and the right holder were the same company. "Mr Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH" could be a different company from "Mr Lodge GmbH". The Registry therefore rightly decided that the Applicant had failed to demonstrate that it was the holder of a prior right to the name MRLODGE, and correctly rejected the application for registration of the domain name by the Applicant, even if this was due to an oversight or genuine mistake on the part of the Applicant (see case 1627 (PLANETINTERNET)). The Panel further observes that it is quite unclear why the application was made in the name of "Mr Lodge Agentur für Wohnen und Vermieten auf Zeit GmbH" and not in the name of "Mr Lodge GmbH" if the company had changed its name to "Mr Lodge" some 14 years ago.

It is now established by a continuous line of ADR decisions that the burden of proof was on the Applicant to demonstrate that it was the holder of a prior right (see cases 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), and 1931 (DIEHL/DIEHL CONTROLS)). The Panel refers, in particular, to the decision in case 2350 (PUBLICARE), where the applicant "Publicare" relied on a prior right registered in the name of "Publicare Marketing Communication GmbH"; and to case 1625 (TELEDRIVE), where the applicant "IAV GmbH" relied on prior rights owned by IAV GmbH Ingenieurgesellschaft Auto und Verkehr". In both cases the absence of documentary evidence explaining the difference in the names of the applicants and the owners of the prior right resulted in a rejection of the application for registration of the relevant domain name. In both cases the complaints against the disputed decisions of the Registry were rejected in resulting ADR proceedings (see also case 2268 (EBSOFT)). The panel in case 1886 (GBG) summarized the position succinctly when it stated that "[a]ccording 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 present case, the Applicant failed to satisfy the burden of proof because the prior right was not verifiable by the documentary evidence submitted.

Section 21.1 of the Sunrise Rules provides that the validation agent and the Registry are not obliged to notify the applicant if the requirement sufficiently to establish the prior right to a domain name is not complied with (see also case 551 (VIVENDI)).

The Respondent submits that, pursuant to Section 21.3 of the Sunrise Rules, the validation agent was not obliged, but was 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. Neither Regulation EC 733/2002 nor Regulation EC 874/2004 require the validation agent or the Registry to conduct such investigations. Indeed, Article 10(2) of Regulation EC 874/2004 provides that "if the validation agent finds that the documentary evidence does not substantiate a prior right, he shall notify the Registry of this". The Regulation therefore assumes that the validation agent bases its assessment only on the documentary evidence before it. Section 21.2 of the Sunrise Rules confirms this principle. A decision taken by the validation agent not to conduct its own investigation in accordance with Section 21.3 of the Sunrise Rules therefore does not place a decision taken by the Registry in circumstances where an investigation could have usefully been carried out but had not in fact been carried out by the validation agent into conflict with Regulation EC 733/2002 or Regulation EC 874/2004 within the meaning of Article 20(11) of Regulation EC 874/2004.

The Respondent's submission that no obligation on the part of the validation agent to conduct an investigation can be derived from Section 21.3 of the Sunrise Rules, is supported by the ADR decisions in cases such as case 1483 (SUNOCO), 219 (ISL), 551 (VIVENDI), 843 (STARFISH) and 2350 (PUBLICARE). However, the Respondent fails to refer in its submission to ADR decisions such as cases 174 (DOMAINE) and 253 (SCHOELLER), which held that the validation agent was obliged to exercise its discretion in favour of conducting its own investigation where technical reasons led to the difference in the names of the applicant and the holder of the prior right, or where the differences between the names were minimal, or a mistake was obvious (see also case 768 DELCAM). This Panel respectfully disagrees with the decisions in cases 174 (DOMAINE) and 253 (SCHOELLER) since neither Regulation EC 733/2002 nor Regulation EC 784/2004 imposes an obligation on the validation agent or the Registry to conduct investigations to clear up discrepancies between a domain name application and the documentary evidence submitted in support of a domain name application. Indeed, in light of the extraordinary volume of applications received by the Registry during the phased registration period, to impose an obligation to investigate differences in the names of applicants and right holders would in all likelihood lead to inordinate and unacceptable delay in the registration process, and undermine the objective of creating a proper, fair and technically sound administration of the phased registration period, as required by Article 12(1) of Regulation EC 874/2004. While the decision of the Registry may at first glance appear formalistic, it must be seen in this wider context.

However, even if this Panel were to follow the decisions in cases 174 (DOMAINE) and 253 (SCHOELLER), it would conclude in the circumstances of the present case that, in light of a material difference not only between the name of the Applicant and that of the holder of the prior right, but a difference also in the addresses of both entities as they appear on the face of the documentary evidence, the validation agent would have been entitled to exercise its discretion in favour of not conducting its own investigation. In the present case the difference between the name of the Applicant and that of the holder of the prior right was neither due to technical reasons, nor was the difference minimal, or a mistake obvious (see also cases 758 (DELCAM) and 984 (ISABELLA) on the exercise of the validation agent's discretion).

The Panel therefore accepts the Respondent's submission that the validation agent was not obliged, but was permitted in its sole discretion, to conduct its own investigations into the circumstances of the application. The Panel follows the ADR decisions relied upon by the Respondent in this regard. It is an established principle that applicants cannot expect the validation agent or the Registry to engage in their own investigations to establish the exact relationship between the owner of the prior right and the applicant where the documentary evidence submitted by the applicant does not comply with the requirements of the Sunrise Rules (see also cases 501 (LODE, PROCARE) and 1323 (7X4MED)).

The Panel concludes that the Respondent's decision to refuse the application for the domain name MRLODGE does not conflict with Regulation EC 733/2002 or Regulation 784/2004.

DECISION

For all the foregoing reasons, and in accordance with Paragraph B12(b) of the ADR Rules, the Panel orders that the Complaint is denied.

PANELISTS

Name	**Gregor Kleinknecht**

DATE OF PANEL DECISION 2006-11-17

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Applicant filed an application for the domain name MRLODGE. The name of the Applicant is "Mr Lodge Agentur für Wohnen und

Vermieten auf Zeit GmbH". In support of its application, the Applicant submitted a certificate of registration of "Mr Lodge GmbH". The Registry rejected the application on the grounds that the Applicant had failed to show that it was the holder or the licensee of a prior right to the name MRLODGE. The Registry did not conduct its own investigation into the difference between the name of the Applicant and the name of the holder of the prior right before it rejected the application.

The Complainant, Mr Lodge GmbH, seeks annulment of the disputed decision taken by the Registry and attribution of the domain name in dispute to the Complainant in accordance with Paragraph B11(c) of the ADR Rules. The Respondent, EURid, seeks rejection of the complaint.

The Panel orders that the Complaint is denied on the grounds that there is a material difference between the name of the Applicant and the name of the holder of the prior right relied upon by the Applicant. The Applicant did not submit any documentary evidence clearly explaining the difference between the name of the Applicant and name of the right holder which would have enabled the Registry to verify that the Applicant was identical with, or a successor to, the right holder identified in the documentary evidence, or that the Applicant was otherwise entitled to rely on the prior right.

The burden of proof was on the Applicant to demonstrate that it was the holder of a prior right. The Applicant failed to satisfy the burden of proof because the prior right was not verifiable by the documentary evidence submitted. The validation agent and the Registry were not obliged to notify the applicant if the requirement sufficiently to establish the prior right to a domain name is not complied with.

The Panel holds that the validation agent was further not obliged, but was permitted in its sole discretion, to conduct its own investigations into the circumstances of the Application. A failure by the validation agent to conduct its own investigation in accordance with Section 21.3 of the Sunrise Rules does not place a decision taken by the Registry into conflict with Regulation EC 733/2002 or Regulation EC 874/2004 within the meaning of Article 20(11) of Regulation EC 874/2004. It is an established principle that applicants cannot expect the validation agent or the Registry to engage in their own investigations to establish the exact relationship between the owner of the prior right and the applicant where the documentary evidence submitted by the applicant does not comply with the requirements of the Sunrise Rules.

The Respondent's decision to refuse the application for the domain name MRLODGE did not conflict with Regulation EC 733/2002 or Regulation 784/2004.