Panel Decision for dispute CAC-ADREU-002888

Case number	**CAC-ADREU-002888**
Time of filing	**2006-08-30 11:54:05**
Domain names	**germanwings.eu**

Case administrator

Name	**Josef Herian**

Complainant

Organization / Name	**Germanwings GmbH, Ruediger Peters**

Respondent

Organization / Name	**Vassilios Xefteris**

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

On 24 August 2006 the Complainant filed an interim injunction against the Respondent in a German civil court in Munich. The injunction was awarded, according to the Complainant, the next day. According to the Complainant, the transfer of the domain name could not be claimed in that process.

FACTUAL BACKGROUND

The Complainant is a German company, namely an air carrier Germanwings GmbH. The Respondent is an individual Vassilios Xefteris.

The Respondent applied for and registered domain name germanwings.eu on 25 July 2006. The Complainant contacted by email the Respondent's registrar, which directed the correspondence to the Respondent. Upon learning the identity of the Respondent, the Complainant contacted the Respondent directly, stating that the Complainant was the owner of legal rights to the brand Germanwings and asking the transfer of the disputed domain name to the Complainant. The Respondent replied, objecting the "threatening tone" of the received demand and stating that "should you be very interested in this domain name, I am open and available to discuss the "possibilities" for transferring the domain name to you".

The Complainant, through its representative, sent a cease and desist letter to the Respondent on 8 August 2006, stating that the Complainant was the owner of a German trademark GERMANWINGS and that the Respondent's actions violated several provisions of German trademark law and Act Against Unfair Competition. The Complainant also claimed that the Respondent had registered the domain name germanwings.eu in bad faith and demanded that that the domain was to be transferred to the Complainant. The Respondent sent a reply via email, stating that he would review the matter.

On 24 August 2006 the Complainant filed an interim injunction against the German civil court in Munich. The injunction was awarded, according to the Complainant, the next day. According to the Complainant, the transfer of the domain could not be claimed with the interim injunction. Thus, the Complainant started an ADR action against the Respondent.

A. COMPLAINANT

The Complainant's submission can be stated as follows:

The Complainant states that the domain name "germanwings.eu" is identical to the well-known company name "germanwings" in respect of which rights are established and recognised by German law. The domain name has been registered without any rights or legitimate interests by the Respondent. The complainant also states that the domain name has been registered in bad faith in order to exclude the Complainant from the registration and to sell it for profit to the Complainant.

The Complainant is a European-wide airline with headquarters in Germany. It is a wholly owned subsidiary of the Eurowings Luftverkehrs AG, in which Deutsche Lufthansa AG has a holding of 49 %. The Complainant uses the trademark no. 30237548 GERMANWINGS as the holder of a licence. The trademark was registered for Deutsche Lufthansa AG on 20 August 2002. The same company also owns an international registration no. 797101 GERMANWINGS, which is valid, inter alia, also in Greece.

The Complainant states that its company name is protected under sections 5 and 15 of the German Trademark Act. According to section 5 a company designation is protected under the Trademark Act if a company uses the name in its day-to-day business. Under section 15, subsection 2, the respondent as a third party is not allowed to use identical or similar name. In addition, as mentioned above, the Complainant has a licence to use Lufthansa's trademark GERMANWINGS.

The Complainant also argues that domain name "germanwings.eu" has been registered without rights or legitimate interests. The Complainant asserts that the Respondent does not have any rights in the name "germanwings" – neither as a trademark nor company name. Further, the domain name has been registered in bad faith: when the Complainant asked the Respondent to transfer the domain name, the Respondent rejected and offered the Complainant to buy the domain name instead. This, according to the Complainant, is proof of bad faith and intent to profit from the goodwill of the trademark of the Complainant. By doing so, the Complainant infringed various provisions of German trademark law as well as German law against unfair competition.

For these reasons, the domain name germanwings.eu has to be transferred to the Complainant.

B. RESPONDENT

The Respondent's submission is as follows:

On 25 July 2006 the Respondent registered domain name germanwings.eu through an accredited registrar.

The Respondent did not have knowledge of the company Germanwings nor had any bad faith intensions against anybody.

The Respondent received an email from the Complainant and was insulted by the "threatening tones" of its content. The Respondent replied to the email that he would be willing to discuss the possibilities of transferring the domain to the Complainant. Later, the Respondent received a "threatening" letter from the representative of the Complainant, accusing the Respondent of "bad faith intent", "cyber squatting", "offer to sell for profit", "along with cease and desist letter to sign, threats for penalties and lawsuits for hundreds of thousands of Euros and charges of thousands of Euros". The Respondent replied that he (nor anybody else on his behalf) had not offered the domain name for sale.

In conclusion, the Respondent drew the panel's attention to the following points:

- To the best of the Respondent's knowledge, one is not required to declare some particular reasoning in order to register and own a .eu domain. The rights of trademark and trade name holders were settled during the Sunrise period, and after that domain names were open to general public on first come, first serve basis.
- There was sufficient and specific information and time allowed to companies to apply and secure domain names that they were entitled to during the Sunrise period. The Respondent considers it "inappropriate and non democratic at best, to have "big" companies behind "big" law firms charging "big" fees, accusing, intimidating and threatening individuals the "day after", because they just did not do their job properly and in time, or they failed to prove their claim during and after the periods specified by EURid".
- The Respondent stated that he legally purchased a product (domain name) and denied all wrongdoings.

Finally, the Respondent requested the case administrator or the arbitration court to inform him of the possibility of obtaining legal aid.

DISCUSSION AND FINDINGS

As a preliminary matter, the panel is not in a position to give advice regarding the possibility of obtaining legal aid for these proceedings.

First, the panel has to decide the effect of other legal proceedings to this case. The situation is governed by the ADR Rules, which provide in Paragraph A(4)(c) that the "the Panel shall terminate the ADR Proceeding if it becomes aware that that the dispute that is subject of the Complaint has been finally decided by a court of competent jurisdiction or an alternative dispute resolution body" (emphasis added). Otherwise, it is provided in Paragraph A5 of the ADR Rules, that "the conduct of the ADR Proceeding shall not be prejudiced by any court proceeding, subject to Paragraph A(4)(c) above".

The Complainant has provided information that the object of the legal proceedings in Germany is to get an interim injunction preventing

the Respondent to transfer or otherwise dispose of the domain name in question. The court cannot order the transfer of the domain name. On the contrary, the subject matter of this ADR proceeding is to decide whether or not to transfer the domain name to the Complainant. The subject matter of this dispute has not, and will not be decided by the court in Munich. Therefore, the panel finds that a decision can be rendered in these ADR proceedings.

The decision will be rendered taking into account the requirements under Commission Regulation (EC) No 874/2004 Article 21 and ADR Rules Paragraphs B11(d), B11(e) and B11(f). The Complainant has to prove that the domain name is identical or confusingly similar to a name in respect of which the Complainant has rights under national and/or Community law, and either one of the following:

a) the domain name has been registered by its holder without rights or legitimate interest in the name; or
b) the domain name has been registered or is being used in bad faith.

This is the legal framework that guides the decision-making. The burden of proof is on the Complainant.

1. Identity and confusing similarity to a protected name

The first requirement is that the domain name is identical or confusingly similar to a protected name. The Complainant is the owner of trade name Germanwings GmbH. In deciding the identity or similarity of the signs, the corporate designation (in this case “GmbH”) is not taken into account, as it merely describes the type of an entity concerned.

German Trademark Act protects trade names in section 5 and prohibits unauthorised third party use of a protected name in the course of trade under section 15(2). The Complainant has provided an extract from the trade register. This extract proves that “Germanwings” is a registered trade name. This name is identical to the disputed domain name germanwings.eu.

The Complainant has also relied on German trademark no. 30237548 GERMANWINGS. This trademark is registered for Deutsche Lufthansa AG, but the respondent claims to have a licence to use the mark. The Complainant has not provided any evidence as to the existence of such a licence. It has drawn the panel’s attention to the fact that the Complainant is a company fully owned by a German company called Eurowings Luftverkehrs AG, in which Deutsche Lufthansa AG has a holding of 49 %. This fact might indicate that there is indeed such a licence. However, the panel cannot make that finding without any evidence. It would be untenable to assume that due to a corporate link between Deutsche Lufthansa AG, Eurowings Luftverkehrs AG, and Germanwings GmbH that there exists a trademark licence between them. It is for the Complainant to prove the existence of such a licence, and in the absence of any evidence to the contrary the panel must rule against the Complainant. The existence of the licence could have been demonstrated in many different ways. Regardless of the method, the existence of such a licence must be positively proved. In the present case the Complainant has not proved that it is the licensee of Deutsche Lufthansa AG.

The panel finds nevertheless that the Complainant is the owner of trade name Germanwings GmbH and that the disputed domain name is identical to this protected name. Accordingly, the Complainant has satisfied the first requirement.

2. Lack of rights or legitimate interests in the name

The Complaint has asserted that the Respondent does not have rights or legitimate interest in the name. Again, the burden of proof is on the Complainant. However, as recognised in various previous ADR decisions, proving a negative is impossible. To shift the burden of proof the Complainant has to put forward a prima facie case that the Respondent does not have rights or legitimate interest (see for example ADR decisions 982 and 1250).

The Complainant has asserted that the Respondent does not have a trademark or a trade name that would justify the registering of domain name “germanwings.eu”. This assertion has not been denied by the Respondent. Despite submitting a substantial response to the Complaint, the Respondent did not provide any evidence or reasoning as to why he would have a legitimate interest to have the disputed domain name. Neither does Respondent’s correspondence with the Complainant put forward any arguments regarding the Respondent’s rights or legitimate interest in the disputed domain name. Commission Regulation (EC) 874/2004 provides in Article 21(2) a non-exhaustive list that illustrates how the existence of legitimate interests might be demonstrated. These include, inter alia, situations where the domain name holder is commonly known by the name corresponding to the domain name, and where the domain name holder is making legitimate non-commercial fair use of the domain name without intending to mislead the consumers. As the list is merely illustrative, various other arguments could have been put forward. Because no reasons to this effect was put forward by the Respondent, the panel must conclude that the domain name “germanwings.eu” was registered without rights or legitimate interest. The Complainant put forward a prima facie case that was not rebutted by the Respondent.

The Respondent's submission that the Complainant should have registered the disputed domain name during the Sunrise period must be rejected as having no basis in law. The Complainant did not forfeit its right to the disputed domain name by failing to apply it during the Sunrise period.

Accordingly, the panel finds that the Respondent did not have rights or legitimate interest in the disputed domain name.

3. Bad faith

Since the Complainant has proved that the disputed domain name is identical to the Complainant's trade name, and that the Respondent did not have rights or legitimate interest in the domain name, it is not be necessary to examine whether the domain name was registered or used in bad faith.

DECISION

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

the domain name GERMANWINGS be transferred to the Complainant.

PANELISTS

Name	**Erkki Holmila**

DATE OF PANEL DECISION 2006-10-23

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant claimed that it is the owner of trade name Germanwings GmbH and a licensee of German trademark GERMANWINGS. The panel found on the evidence that the Complainant is the owner of German trade name Germanwings GmbH, but had failed to prove that it is the licensee of the said trademark. The disputed domain name germanwings.eu was found to be identical to the protected name of the Complainant.

The Complainant established a prima facie case that the Respondent did not have rights or legitimate interests in the domain name and the Respondent failed to rebut this allegation. Therefore, the panel concluded that the domain name was registered without rights or legitimate interests. Accordingly, there was no need to consider the issue of bad faith.

For these reasons, the panel ordered the domain name to be transferred to the Complainant.