Panel Decision for dispute CAC-ADREU-002929

Case number	CAC-ADREU-002929
Time of filing	2006-11-07 10:29:24
Domain names	softage.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	SoftAge Services GmbH, Joerg Robert Plaschka

Respondent

Organization / Name	Zheng Qingying

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 that are pending or decided and which relate to the disputed domain name.

FACTUAL BACKGROUND

The Complaint was filed by “SoftAge Services GmbH, Joerg Robert Plaschka”. A Community Trademark (CTM) “SoftAge” has been registered for Joerg Robert Plaschka in 2002 with the number 00150 5 379. The application for the CTM was filed in 2000.

The Complainant’s Complaint was received (electronically) by the Czech Arbitration Court (CAC) as of 31 Oct., 2007. After a notification by EURid of certain deficiencies in the Complaint, the Complainant submitted an Amended Complaint on 10 Nov., 2007 within the term set. In this Amended Complaint Complainant identified the correct Respondent. Furthermore he explained that he/his firm is the owner of the domain names “softage.at” and “softage.de”.

The domain name “SOFTAGE.eu” has been registered for the Respondent on 25 July, 2006.

The Respondent answered the Complaint by filing its Response on 3 Jan., 2007 (electronically) and submitted copies of his website www.xwonline.com . On this website the term Soft AGE is used as logo and business identifier. The copies carry the date 22 December, 2006.

The Complainant requests the Panel to decide:

Transfer of the domain name SOFTAGE.eu to the Complainant.

A. COMPLAINANT

Complainant argues that the domain name has been registered by Respondent without rights or legitimate interests in the name “softage”. Further, Respondent intended to sell the domain name to third parties out of commercial interests.

B. RESPONDENT

The Respondent states that he has rights and legitimate interests in the domain name. He argues that he has provided a domain name reseller program under the mark "Soft Age" since the first quarter of the year 2005 and offered several products under its website www.xwonline.com by using the name “Soft AGE”, as proven by several copies taken from such website. Particularly he named the following offered products:

”1) A Comprehensive Product portfolio for the Respondent's Partner's Customers and their Resellers

2) A Ready made, private labelled website for the Respondent's Partner's Customers and their Resellers

3) Multilingual private labelled Control panels for the Respondent's Partner and their Resellers

4) Complete Business Process Automation

5) A Comprehensive API for seamless integration for the Respondent's Partner's.

Further, Respondent states that the domain name is identical or confusingly similar to the sign used by the himself. Thus, he is of the opinion to have a legitimate interest as laid down in Article 21.1 a) and Article 21.2 a) of EC Regulation No. 874/2004.

The Respondent isn't a competitor of the Complainant. Therefore, it could be demonstrated that the Respondent has made fair use of the domain name, without intent to mislead consumers or harm the reputation of the Complainant acc. to Article 21.1 a) and Article 21.2 c) of EC Regulation No. 874/2004.

The Respondent denies that he has acted out of commercial interests or wanted to sell the domain name to someone else.

The Respondent registered the domain for the sole purpose to use it for his business. The Respondent never offered the domain for sale. The Complainant has not provided any evidence to prove its claim.

DISCUSSION AND FINDINGS

I. Identity of the Complainant

The panel had to clarify firstly, if the Complainant is “SoftAge Services GmbH” or Mr. Joerg Robert Plaschka in person, as in the Complaint under “name” the Complainant was identified as “SoftAge Services GmbH, Joerg Robert Plaschka”. However, in the Complaint, it was stated that “the “Complainant has registered the CTM “SoftAge””. As the CTM “SoftAge” is registered for Mr. Joerg Robert Plaschka, the Panel regards him as the Complainant.

II. Claim for transfer of the domain name

A claim for the transfer of the domain name to Complainant can only be granted in case the requirements of Article 21.1 of the EC Regulation No. 874/2004 (Speculative and abusive registrations) are complied with and Complainant is eligible to register .eu domain names acc. to Article 4.2 b) of the EC Regulation No. 733/2002 (see also Paragraph B.11(b) ADR Rules).

1.
Complainant has proved that he is the owner of the CTM “SoftAge” (00150 5 379). A CTM is a right acc. to Article 10.1 of the EC Regulation No. 874/2004.

2.
The domain name “SOFTAGE.eu” is at least confusingly similar to the Complainant’s trademark “SoftAge” acc. to Article 21.1 of the EC Regulation No. 874/2004, as the suffix “.eu” is to be disregarded in this respect (see also ADR 475 “HELSINKI”; 387 “GNC”; 596, “RESTAURANT”) and the difference consisting of the use of capital and small letters can also be neglected.

3.
Complainant has argued that Respondent has no rights or legitimate interests in the domain name “SOFTAGE.eu”. The burden of proof is on Complainant’s side (see also ADR 1304 “KEMET”, 3510 “BIGDUTCHMAN”, the latter against the same Respondent, ADR 1250 VOCA). The Complainant has – at least – to present a prima facie evidence to shift the burden of proof to the Respondent (ADR 2888 “GERMANWINGS”). This requires that Complainant substantiates its claim, whereby it has to be considered that the proof of negative facts is almost impossible. However, the Panel is of the opinion that the Complainant has an obligation to present evidence supporting its allegations.

Complainant has not presented any results of investigations with respect to the negative fact of the missing rights and legitimate interests of Respondent in the domain name “SOFTAGE.eu”. Particularly, Complainant did not present any proof of the (eventually)

missing use of the name “SOFTAGE” by the Respondent prior to this proceeding (Article 21.2 a) EC Regulation No. 874/2004). Neither did he provide, e.g., copies of search engine results showing that the use of the name “SOFTAGE” by the Respondent could not be demonstrated.

On the other hand, Respondent stated that he has been using the name since the first quarter of 2005 and has provided proof of its usage under the domain name www.xwonline.com. Although the question arises, for which reason the Respondent did not use the name as second level domain within another domain name, this does not give reason to doubt the Respondent’s contentions. Such other domain names (as www.softage.com) could be in possession of third parties. Further, the fact that Respondent submitted copies of his website dating from 22 December, 2006, does not give reason to query his arguments as he had no reason to copy that site earlier.

It has been accepted as sufficient in other ADR decisions that the Complainant supported its argumentation that the Respondent has no rights or (other) legitimate interests in a domain name, by presenting negative search engine results, etc. However, if a Complainant does not support its mere allegation at all, in view of a substantial Response of Respondent as in this case, the Panel is hindered to accept the allegation as proven.

The Respondent disputed the allegations and submitted proof that he was using the domain name for business purposes prior to this proceeding acc. to Article 21.2 a) of the EC Regulation No. 874/2004. Therefore the Panel could not follow the Complainant’s allegations.

The same applies to the question, if Respondent has registered or uses the domain name in bad faith. Moreover, also as the Respondent applied for registration after the Sunrise Period (July 2006), it cannot be assumed offhand that the Respondent acted as “Domain Grabber” in this case, even if there already are a number of panel decisions suggesting this (ADR 3510 “BIGDUTCHMAN”, 3444 OCUNET, 3588 “XIRONA”2429 “ERICPOL”, 2325 “GLENDIMPLEX” 2606 “IPAROS”). The Complainant was not able to present proof that could support its allegations.

DECISION

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

the Complaint is Denied

PANELISTS

Name	**Dominik Eickemeier**

DATE OF PANEL DECISION 2007-02-02

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant is the owner of a Community Trademark (CTM) “SoftAge”. The Respondent registered the domain name “ SOFTAGE.eu” on 25 July, 2006. Complainant alleged that Respondent did not have rights or legitimate interests in the domain name acc. to Article 21.1, and 2 of the EC Regulation No. 874/2004. However, the Complainant did not present any evidence in this respect. The Respondent disputed the allegations and submitted proof that he has been using the domain name for business purposes prior to this proceeding acc. to Article 21.2 a) of the EC Regulation No. 874/2004. He also disputed to act and to have acted in bad faith. The Complainant was not able to prove Respondent’s bad faith.

As the Panel could not establish that Respondent has no rights or legitimate interests in the domain name or registered or used it in bad faith, the Panel decided to deny the Complaint.