Panel Decision for dispute CAC-ADREU-002986

Case number	CAC-ADREU-002986
Time of filing	2006-09-15 11:55:38
Domain names	terxon.eu

Case administrator

Name	Tereza Bartošková

Complainant

Organization / Name	Security Center GmbH & Co. KG, Andreas Kupka

Respondent

Organization / Name	Zheng Qingying 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

The Panel is not aware of any other legal proceedings concerning the disputed domain name.

FACTUAL BACKGROUND

The Complainant in this proceeding is Security Center GmbH & Co. KG based in Affing, Germany. The Respondent in this proceeding is Zheng Qingying based in London, Great Britain. The disputed domain name is “terxon”.
The Complainant is the owner of the Community word mark No. 00443822 “TERXON”. The Complainant had attempted to register the domain name “terxon.eu” during the sunrise phase. However the Registry did not accept the application.
The Respondent has registered the domain name during the landrush period. Since then the domain has not been used by the Respondent.
The Complainant requests the transfer of the disputed domain name. The Respondent requests the Complaint to be rejected.

A. COMPLAINANT

The Complainant argues that the domain name is identical or confusingly similar to a name in respect of which a right is recognized or established by the national law of a Member State and/or Community law. The domain name at issue is terxon.eu. The Complainant is owner of the community trademark 004438222 “TERXON” (wordmark).
According to the Complainant the Respondent has no rights or legitimate interests in respect of the domain name. The Complainant argues that (1) the Respondent has not used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so; (2) the Respondent is not known by the domain name; (3) the Respondent is making no use of the domain name.
Furthermore the Complainant claims that the domain name has been registered or is being used in bad faith. The Complainant argues that the registration of a domain name incorporating another’s mark does not confer any rights or legitimate interests in the domain name to Respondent, but rather constitutes bad faith (see WIPO UDRP-Case No. D2000-0003; WIPO UDRP-Case No. D2000-0179; WIPO UDRP-Case No. D2005-0362).
The Complainant finds that it has to be taken into account that the Respondent applied for the domain at issue immediately after it was deblocked after the sunrise period.
In an E-Mail dated 25th July 2006 the Complainant has asked the Respondent about its intention to use the domain name. The E-Mail has not been answered by the Respondent.
The Complainant requests the transfer of the domain name.

B. RESPONDENT

The Respondent has filed its responds via the online arbitration platform only. No hardcopy of the Response was filed to the Arbitration Court. Therefore the Arbitration Court issued a Notification of Deficiencies in the Response to the Respondent on 12th December 2006.

In this notification the Arbitration Court informed the Respondent that according to the ADR rules the Respondent is obliged to hand in 1 signed original and 3 copies of the Response including 4 sets of all annexes. The Arbitration Court granted a deadline of 7 days for the Respondent to do so.
As the Respondent did not react to the Notification and no hardcopy was received by the Arbitration Court a Notification of Repondent´s Default was issued on 20th December 2006. This Notification has not been challenged by the Respondent.
In its electronic only response the Respondent has brought the following arguments before the Panel:
The Respondent denies to have acted in bad faith as the date of publication of the trademark was after the registration of the domain terxon.eu and the trademark was not known to public at that time.
According to the Respondent the trademark of the Complainant has not been published and cannot have been aware to the Respondent at the time of registration of the domain. The Respondent claims that it registered the domain name to build up a website.
The Respondent claims that there is no evidence to proof that the Respondent has any intention to harm the Complainant.
With respect to the E-Mail send by the Complainant the Respondent claims that the E-Mail was received but was put into the spam box.
The Respondent requests the Complaint to be rejected.

DISCUSSION AND FINDINGS

(1) According to Article 21 (1) of Commission Regulation 874/2004 a registered domain name shall be subject to revocation, using an appropriate extra-judicial or judicial procedure, where that name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/or Community law, such as the rights mentioned in Article 10(1), and where it:

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

(2) First the Complainant has to prove to that domain name “terxon.eu” is identical or confusingly similar to a name in respect of which a right is recognised by nation or Community law.
The Complainant is the owner of the Community word mark no. 004438222 “TERXON”. As the domain name is “terxon.eu” the only distinguishing element is the generic top level domain “.eu”. It is established very well in a long series of precedents both in ADR and UDRP cases that, in determing identity or confusing similarity, any generic top level domain is excluded from consideration (e.g. Ruby´s Diner, Inc. vs. Joseph W. Popow, WIPO Case No. D2001-0868). The domain name “terxon.eu” is therefore identical to the Complainant´s word mark “TERXON”.
Therefore the Complainant has satisfied the first requirement of Article 21 (1) of Commission Regulation 874/ 2004.

(3) The Complainant has also demonstrated prima facie that the Respondent has registered the domain name without rights or legitimate interest.
According to Article (21) (2) of Commission Regulation 874/2004 a legitimate interest may be demonstrated where

(a) prior to any notice of an alternative dispute resolution (ADR) procedure, the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the offering of goods and services or has made demonstrable preparation to do so;
(b) the holder of a domain name, being an undertaking, organisation or natural person, has been commonly known by the domain name, even in the absence of a right recognised or established by national and/or Community law;
(c) the holder of a domain name is making a legitimate and non-commercial or fair use of the domain name, without intent to mislead consumers or harm the reputation of a name on which a right is recognised or established by national and /or Community law.

With respect to these provisions the Complainant has demonstrated prima facie that the Respondent has not used the domain name “terxon.eu” or a name corresponding to the domain name in connection with offering of goods and services and no preparations to do so are visible (Article 21 (2) (a)). The Complainant has also shown that the Respondent is not known by the domain name “terxon.eu” (Article 21 (2) (b)). Finally the Complainant has demonstrated prima facie that the Respondent is not making a legitimate and non-commercial use of “terxon.eu” (Article 21 (2) (c)).

(4) The Respondent has brought no substantial response against the prima facie case demonstrated by the Complainant before the Panel.
The Respondent has failed to file a Response in accordance with the ADR Rules. No hardcopy of the response was filed to the Arbitration Court as required in Sec. B 3 (b) (1) of the ADR Rules. Even after being notified by the Arbitration Court and a deadline was set to amend the Response the Respondent failed to file a hardcopy. Consequently after being notified of this default the Respondent did not challenge this notification.
Sec. B 10 (a) of the ADR rules provides that in the event that a Party does not comply with any of the time periods established by these

ADR Rules or the Panel, the Panel shall proceed to a decision on the Complaint and may consider this failure to comply as grounds to accept the claims of the other Party.
The Panel is aware that the ADR proceedings are being conducted mainly via the online platform of the Arbitration Court. However even the most modern form of online arbitration proceedings does require that the parties may not only file electronic documents to the Arbitration Court. Any communication and evidence has also to be filed in hardcopy so that the authenticity of the evidence is ensured. The ADR Rules are very clear in this respect and the formal requirements set by the Rules have not been fulfilled by the Respondent. The Panel therefore finds the Response inadmissible.

(5) As the Complainant has prima facie shown that the Respondent has registered the domain name without rights or legitimate interest and the Response is inadmissible the Panel finds the requirements of Article 21 (1), (2) of Commission Regulation 874/ 2004 being proven by the Complainant.
Although the Response is inadmissible in this case the Panel finds – for the sake of completeness – that the Respondent has not provided any information to the Panel and has presented not a single piece of evidence that would suggest its legitimate use or even any demonstrable preparations for such a legitimate use.
As the Complainant needs to show either a lack of rights or legitimate interest on the side of the Respondent or a case of bad faith and with regard to the above finding on rights and legitimate interests it is not necessary in this case to consider the Complainant's assertions in relation to bad faith registration or use.

DECISION

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

the domain name TERXON be transferred to the Complainant.

PANELISTS

Name	**Volker Herrmann**

DATE OF PANEL DECISION 2007-01-21

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant in this proceeding is Security Center GmbH & Co. KG based in Affing, Germany. The Complainant is the owner of the Community word mark No. 00443822 "TERXON". The Respondent in this proceeding is Zheng Qingying based in London, Great Britain. The disputed domain name is "terxon".
The domain name "terxon.eu" is identical to the Complainant´s word mark "TERXON" (Article 21 (1) Commission Regulation 874/2004).
The Complainant was able to demonstrate a prima facie case that the Respondent has registered the domain name without rights or legitimate interest (Article 21 (1) (a) Commission Regulation 874/2004).
The Respondent has failed to file a Response in accordance with the ADR Rules. No hardcopy of the response was filed to the Arbitration Court as required in Sec. B 3 (b) (1) of the ADR Rules. Even after being notified by the Arbitration Court and a deadline was set to amend the Response the Respondent failed to file a hardcopy. Therefore the Panel found the Response inadmissible.
The Respondent has not provided any information to the Panel and has presented not a single piece of evidence that would suggest its legitimate use or even any demonstrable preparations for such a legitimate use.
In conclusion the Panel ordered the transfer of the Domain Name to the Complainant.