Panel Decision for dispute CAC-ADREU-003042

Case number	**CAC-ADREU-003042**
Time of filing	**2006-09-14 14:47:35**
Domain names	**wewalka.eu**

Case administrator

Name	**Tomáš Paulík**

Complainant

Organization / Name	**Wewalka GmbH Nfg KG, Anton Gsellmann**

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

Nihil

FACTUAL BACKGROUND

The Complainant requests the transfer of the domain name <wewalka>, although the application form for the disputed domain states “Peter Klatik” in the name field and “Null” in the organisation field. The Complainant did not formally apply for the phased registration period.
The application was received by the Respondent on February 7th, 2006; the deadline for the submission of documentary evidence was March 19th, 2006.
Europe Registry, Mr. John Preston, is mentioned as technical contact of the application (Registrar).
On February 9th and 17th, 2006, Mr. Peter Klatik sent an email to its technical contact requesting a change of the applicant Peter Klatik, Null, Boehler 207, 2601 Sollenau, Oesterreich into Wewalka GmbH Nfg KG Boehler 207, 2601 Sollenau, Oesterreich.
On August 3rd, 2006 the application was rejected by the Respondent, because the documentary evidence submitted did not sufficiently prove the right claimed.

A. COMPLAINANT

The authorized employee who was entrusted with the application (Mr. Peter Klatik) made a mistake: In the application form he wrote "Null" under the word "applicant" which means "Zero". He did not point out that he was only authorized by the complainant to announce him for the disputed domain name.
Two days after he had applied for the domain at issue he realized the mistake and sent an email to the „register“ telling that he was not the domain holder, respectively he claimed the domain for the use of his boss. He repeated this message on 17/2/2006.
On 3/8/2006, he received the message that the application was rejected. This rejection was not appropriately considered and without foundation.
Although there are no rules permitting any corrections during the procedure, neither in the ADR-Rules nor in the Regulations 874/2004 and 733/2002 EC, it is however part of the Common Law that during the pending application corrections must be accepted.
Another argument is that the emails 17/2/2006 and 7/2/7006 were sent to the only known email address. Other addresses were unknown; respectively it was impossible to find other corresponding email addresses.
Only after the rejection, other addresses were located. It was also impossible to contact Mr. Preston, whose name was given on the EURid-application forms. A mail to Mr. Preston by the lawyer of the complainant remained unanswered as well.
This way of proceeding violates the principles of transparency and fair trial.

The Complainant may therefore request the transfer of the domain name at issue.

B. RESPONDENT

1. GROUNDS ON WHICH THE RESPONDENT REJECTED THE APPLICATION FOR THE DOMAIN NAME WEWALKA BY KLATIK PETER
Article 10 (1) of Commission Regulation (EC) No 874/2004 of April 28th, 2004 (hereafter "the Regulation") states that only holders of prior rights which are recognised or established by national or Community law shall be eligible to apply to register domain names during a period of phased registration before general registration of .eu domain starts.

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 21 (2) of the Sunrise Rules states that the validation agent shall examine whether an applicant has a prior right to the name exclusively on the basis of a prima facie review of the first set of documentary evidence it has received.
Klatik Peter (hereafter "the Applicant") applied for the domain name WEWALKA on February 7th, 2006, but failed to submit the documentary evidence within the deadline, which resulted in a rejection of his application.
The Applicant applied a second time for the domain name WEWALKA on February 20th, 2006.
The documentary evidence was received by the processing agent on March 10th, 2006, which was before the April 1st, 2006 deadline. The documentary evidence established that the company "Wewalka GmbH Nfg. KG" is a duly registered company in Austria.
The documentary evidence did not establish that the Applicant is the holder or the licensee of the company name relied upon as prior right.
The Validation agent concluded from its examination of the documentary evidence that the Applicant was not the owner of the company name "Wewalka GmbH Nfg. KG".
Therefore, the Respondent rejected the Complainant's application.

2. COMPLAINANT'S CONTENTIONS
"Wewalka GmbH Nfg. KG" (hereafter "the Complainant") argues that the application should have been made under its name, but was mistakenly made under the name of the Applicant.
Although this is not clear from the complaint, it appears that the Complainant tried to correct this mistake by sending emails to its registrar (Europe Registry).
The Complainant also argues that it is part of "Common Law" that pending application must be corrected. The Complainant requests that the Panel to attribute the domain name to the Complainant.

3. RESPONSE
3.1 The Sunrise Rules as an integral part of the body of law dealing with the application of domain names under the .eu TLD
Although the Regulation provides for certain rules that must be applied by the validation agent in the application procedure, they do not provide in an exhaustive framework. Additional rules are needed.
The Sunrise Rules contain many rules that further clarify the intention of the Regulation which are of great importance in the validation agent's assessment of a domain name application. With regard to the validity and the importance of these Sunrise Rules, article 5 (3) of Regulation N° 733/2002 states that "Before starting registration operations, the Registry shall adopt the initial registration policy for the .eu TLD in consultation with the Commission and other interested parties. The Registry shall implement in the registration policy the public policy rules adopted pursuant to paragraph 1".
The Sunrise Rules are essential for the application procedure. Indeed, millions of applications have been submitted on a very short term and the validation can only be managed if strict rules are complied with. An automated process can only be managed when strict rules are applied. Before submitting an application it is important that the applicant acquaints itself with these rules. Moreover, so as to make the application procedure more transparent to the applicants, article 12 (1) 3 of the Regulation states that the additional framework rules, such as the Sunrise Rules, must be published on the Respondent's website.
Finally, the cover letter which every applicant must sign clearly states that: "The Rules, including the special terms that relate to the phased registration period, apply and have been read and approved without reservation by the Applicant". Therefore, any applicant is bound by the Sunrise Rules. The Sunrise Rules have been amply applied by several Panels in many .eu domain name arbitration cases, such as case n° 00210 (BINGO), 00127 (BPW), 00293 (POOL), etc.

3.2 The Applicant for the domain name WEWALKA is " Klatik Peter " and not the Complainant ("Wewalka GmbH Nfg. KG ")
A request for the application of a domain name made during the Sunrise Period must contain the information listed in section 3 (1) of the Sunrise Rules. In particular, section 3 (1) i of the Sunrise Rules states that: "where no name of a company or organisation is specified, the individual requesting registration of the Domain Name is considered the Applicant; if the name of the company or the organisation is specified, then the company or organisation is considered the Applicant; ". Thus, the general rule is that the individual requesting the registration is considered the applicant. Only if the individual requesting the registration specifies a company in the application form, the actual applicant will be the company and the natural person will only be considered as the contact person within the company.
In the present case, the individual requesting the registration of the WEWALKA domain name ("Klatik Peter") decided not to fill out the company field (or to write NULL, which is even stronger), thereby making an absolutely clear decision that it intended to apply in its own name.
To that regard, the Respondent refers to the decision in ADR 192 (ATOLL), where the Panel explained that: ""Those requesting to register a .eu Domain Name are required to provide certain information through an accredited .eu Registrar. In respect of the name of the Registrant there are two fields: The first is 'Name' and the second is 'Company'. Both fields may be completed or just the 'Name' field. If only the first field is completed, it is assumed that the registration is in the name of a private individual (natural person). If the 'Company' field is completed, it is assumed that the company is the Registrant".

3.3 The burden of proof was with to Applicant to show that it is the holder or the licensee of a prior right
Article 10 (1) of 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. 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.
It is therefore of crucial importance 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 burden of proof was thus on the Complainant to substantiate that it is the holder or the licensee of a prior right (see for example cases 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS)).
As the panel clearly summed up in case ADR 1886 (GBG), "According 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 is " Klatik Peter ", as clearly indicated in the WHOIS database. The documentary evidence established that the company "Wewalka GmbH Nfg. KG" is a duly registered company in Austria. The documentary evidence did not establish that the company name had been licensed or otherwise transferred to the Applicant.
Therefore, the Respondent correctly rejected the Complainant's application, pursuant to the Regulation and the Sunrise Rules, because the Complainant failed to meet its burden of proof.

3.4 The Respondent and the validation agent were under no obligation to investigate into the circumstance of the application
As already explained, pursuant to article 14 of the Regulation, it is up to the applicant to submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question.
Section 21.2. of the Sunrise Rules 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".
Section 21.3. of the Sunrise Rules states 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".
Section 21.3. of the Sunrise Rules does not impose any obligation for the Validation agent to conduct its own investigation: it is a mere possibility that the Respondent can use "in its sole discretion". This is supported by the consideration that the Regulation places the burden of proof on the applicant to show that it is the holder of a prior right (see supra. 3.1.). No obligation for the validation agent may therefore be derived from Section 21 (3), since of this provision does not state that the validation agent is obliged to conduct its own investigations, but merely that the validation agent is permitted in its sole discretion, to conduct its own investigations (see for example case 1483 (SUNOCO), ISL (219), 551 (VIVENDI) and 843 (STARFISH), 127 (BPW), 1323 (7X4MED), 501 (LODE, PROCARE), etc.).
The Registry/validation agent cannot be expected and/or forced to speculate whether the Applicant is a holder of the prior right claimed, and therefore correctly rejected the Complainant's application. (see case 1443 (URBIS)).
In ADR 1695 (VANDIJK), the Panel also explained the practical reasons behind the strictly legal reasons: "Other applicants for .eu domain names have invested the effort (and the costs) to diligently comply with the requirements of the Sunrise Rules, while the Complainant has not. If the validation agent would have been obliged (and not merely entitled) to investigate further in cases like the present one, this would have increased the already substantial verification costs (both in time and in money) for the phased registration period, which would have benefited a few (like the Complainant) to the disadvantage of most other applicants who have submitted their applications and documentary evidence in full compliance with the Sunrise Rules".

3.5 Mistakes made by the Applicant's registrar may not be attributed to the Respondent and/or the validation agent
The Complainant seems to be arguing that it contacted the Respondent to correct its application and that such corrections should have been accepted pursuant to "Common Law".
The Respondent first argues that such right to make corrections to a pending application is not permitted by the Regulation or the Sunrise Rules, because this would be contrary to the principle of first-come, first-served. Second, the Respondent notes that the Applicant did not even alert the Respondent about the error in its application. The documents submitted by the Complainant clearly show that the Applicant tried to contact its registrar (Europe Registry, at billing@europeregistry.com). The letter sent by the Complainant's attorney was also sent to John Preston, Europe Registry. The Respondent (i.e. the Registry) may not be held responsible for negligence or mistakes made by the registrars (such as Europe Registry)
Section 5.3 of the Sunrise Rules states that "The Registry, Validation Agents and the Government Validation Points are not party to the agreement between the Applicant and his Registrar or to the agreement between the Applicant and his Document Handling Agent and therefore cannot incur any obligation or liability under these agreements".
The Respondent insists on the clear language of section 5.3. of the Sunrise Rules and on the fact that the mistake which the Complainant attributes to its registrar may not create any obligation on behalf of the Respondent.
In case 393 (4M), the Panel explained that " The relationship between the complainant and his registrar regarding registration services is governed by a separate contract to which the respondent is not a party. Such an opinion is also supported by the wording of Section 5 (3) of Sunrise Rules as the respondent states.".
In the case Nr. 984 (ISABELLA), the Panel decided that: "As to the supposed mistake by the Complainant's Registrar, the Sunrise Rules, Section 5(3) make it clear that EURid is not a party to the agreement between an Applicant and its Registrar, and that EURid does not incur any liability. The .eu Domain Name Registration Policy, Section 6, also puts responsibility on the Registrar to enter information directly into the systems of EURid, provided the Applicant has furnished all the necessary information to the Registrar. In the circumstances, the Panel agrees with the suggestion of the Panel in 4M that any default by the Registrar should be taken up as between the Applicant and the Registrar, and is not a reason for overturning EURid's decision".
In the case 2756 (TECNO-CENTER), the Panel decided that "the Panel solely wishes to stress that the respondent cannot be requested to modify its practice in “sympathy” for the domain name applicant, further to an error committed by the registrar. The Registrar acts on behalf of the candidate

and the candidate is responsible of any mistakes contained in its request (Article 8.6 of the Sunrise Rules). It is up to the Complainant to bring an action against the registrar, if deemed justified".
The Respondent also refers to the decision ADR 2046 (POSTBANK).

3.6 New information submitted by the Complainant for the first time in the present proceedings may not be used to assess the validity of the Respondent's decision
In its complaint, the Complainant explains that it made a mistake in its application (or that its registrar made the mistake) and that it intended to apply for the domain name in its own name.
This information may not serve as a basis to asses whether the Complainant is the holder of a prior right, since this information was not documented in the documents received within the end of 40 days period set forth by article 14 the Regulation. Furthermore, the Respondent wishes to stress that article 22 (1) b of the Regulation states that a decision taken by the Respondent may only be annulled when it conflicts with the Regulation. Therefore, only the documentary evidence which the Respondent was able to examine at the time of validation of the application should be considered by the Panel to assess the validity of the Respondent's decision (see notably cases Nr. 294 (COLT), Nr. 954 (GMP), Nr. 01549 (EPAGES) and Nr. 1674 (EBAGS)).
This verification is the only task for the Panel in these proceedings, which may not in any case serve as a “second chance” or an additional round providing applicants an option to remedy their imperfect original application that was rejected during the Sunrise Period (see cases Nr. 551 (VIVENDI) and Nr. 810 (AHOLD)). In other words, as decided in case Nr. 1194 (INSURESUPERMARKET), "[t]he ADR procedure is not intended to correct domain name applicants’ mistakes". The information that was not received by the validation agent during the 40 days period, which means that the Respondent could not use this information in taking its decision, should not be used to assess the validity of the Respondent's decision.

3.7 Attribution of the domain name to the Complainant
For the sake of completeness, the Respondent notes that the domain name WEWALKA could never be attributed to the Complainant (Wewalka GmbH Nfg. KG), as the Complainant requests, because the Complainant did not even apply for the domain name.
The Respondent wishes to remind that pursuant to article 11 (c) of the ADR Rules, two conditions need to be met before the Panel may order the transfer of a domain name:
The Complainant must be the next applicant in the queue for the domain name concerned; the Respondent must decide that the Complainant satisfies all registration criteria set out in the Regulation.
In ADR 2592 (TANOS), the Panel decided that : "Following Rec 11 Reg 874/2004 (first-come-first served) and Sec 11 (c) ADR Rules that a transfer-decision against the Registry only is available with regard to Complainants, who are the next applicant in the queue for the domain name, the requested remedy (“transfer” to Tanos GmbH) at the case in hand is not lawful. If the Panel would accept this remedy, it would act against the general Regulations-principle “first-come-first-served” but also Art 22 (11) Reg 874/2004 would be disrupted, because Tanos GmbH does not fulfil the general eligibility criteria set out in Art 4 (2) (b) Reg 733/2002 – Tanos GmbH did not even apply for the domain name at issue".

3.8 Conclusion
The Regulation and the Sunrise Rules give holders of prior rights the opportunity to demonstrate their prior rights during the phased registration, which is an exception to the basic principle of first-come first-served.
In order to benefit from this opportunity to demonstrate its prior rights, the applicant must comply with the strict procedure laid out by the Regulation for dealing with the thousands of applications received during the phased registration and making sure that these applications are substantiated.
The Applicant in the present case did not seize this opportunity, because its application did not correctly fulfil the substantial requirements.
Any right given to the Complainant to correct its defective application at this stage of the procedure would clearly be in breach of the Regulation and the Sunrise Rules, as expressed among others by the Panels in ADR 706 (AUTOWELT) and 1710 (PARLOPHONE, EMI, EMIMUSIC, EMIRECORDS, ANGEL, THERAFT).
As the Panel in case n° 219 (ISL) stated: "One could argue that sympathy is overruled by the applicable Regulations serving among other purposes the (cost-effective) functionality of the phased registration and the principles hereof".
In case n° 1627 ("PLANETINTERNET"), the Panel agreed with the Panel in ISL and further explained that "the Regulations and the Sunrise Rules were clearly drafted to ensure a fair distribution of .eu domain names during the phased period and if an applicant fails to fulfil its primary obligations, then, even where such failure is due to an oversight or genuine mistake, the application must be rejected by the validation agent".
Since the Respondent correctly decided to reject the Applicant's application, pursuant to the Regulation, Respondent's decision may not be annulled and the domain name WEWALKA may not be granted to the Applicant.

For these reasons, the complaint must be rejected.

DISCUSSION AND FINDINGS

1. Legal Framework
The Panel wants to stress the following legal aspects:

1.1 Following the European Council Meeting in Lisbon on March 23rd and 24th, 2000, the creation of the .eu Top Level Domain was one of the targets to accelerate electronic commerce in the e-Europe initiative. The Regulation (EC) No 733/2002 on the implementation of the .eu Top Level Domain and the Regulation (EC) No 874/2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration set up the framework on this aspect.

1.2 Art 5 (3) Reg 733/2002 and Art 12 Reg 874/2004 set out principles for the phased registration. Following these principles the Registry shall publish a detailed description of all the technical and administrative measures that it shall use to ensure a proper, fair and technically sound administration of the phased registration period. The Sunrise Rules give this detailed description – especially Sec 3 (1) specifies for instance that if the name of the company or the organisation is specified when applying for registration in the phased period, then the company or organisation is considered as applicant, if no organisation/company is specified, than the individual requesting for registration is considered as applicant. It is the Panels view, that this rule is within the scope of the EC-Regulations to ensure proper, fair and a sound technical administration of the registration procedure for the registration of a domain name in the phased period.

1.3 Art 22 (1) (b) Reg 874/2004 states, that an ADR procedure may be initiated by any party where a decision taken by the Registry conflicts with this Regulation or Reg 733/2002. Hence, a violation against the Sunrise Rules per se, is not sufficient to make out a successful case against the Registry [see for example Cases 1047 (festool.eu), 1071 (essence.eu), 1310 (astrodata.eu), 1481 (wisdom.eu), 1539 (setra.eu), 1674 (ebags.eu), 2145 (cvc.eu) and 2362 (petit-forestier.eu)].

1.4 Following Art 10 (1) Reg 874/2004 holders of prior rights shall be eligible to domain names during a period of phased registration before general registration of .eu domain starts. Art 10 (2) Reg 874/2004 stresses the point that the registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists.

1.5 Art 14 Reg 874/2004 states, that all claims for prior rights under Art 10 (1) and (2) must be verifiable by documentary evidence that he or she is the holder of the prior right claimed. This evidence, moreover, shall be submitted to a validation agent indicated by the registry in such a way that it shall be received by the validation agent within forty days from the submission of the application. If the documentary evidence has not been received by this deadline, the application for the domain name shall be rejected.

1.6 Art 13 Reg 874/2004 defines validation agents as legal persons established within the territory of the Community with appropriate expertise. Art 14 Reg 874/2004 moreover sets out, that the validation agent shall examine whether the applicant that is first in line to be assessed has submitted the documentary evidence before 40 days after submission of the application. If the documentary evidence has not been received in time or if the validation agent finds that the documentary evidence does not substantiate a prior right, he shall notify the registry of this. Following Recital 12 Reg 874/2004 the validation agent should assess the right which is claimed for a particular name on the basis of evidence provided by the applicants.

1.7 Art 4 (2) (d) and Art 5 Reg 733/2002 as well as Art 22 Reg 874/2004 oblige the registry to implement an extra-judicial settlement of conflicts policy. The .eu Alternative Dispute Resolution Rules (ADR Rules) stresses the point (page 2), that the interpretation and application of the ADR-Rules will be done in the light of the EU legal framework which will prevail in case of conflict. Under Sec 11 (c) ADR Rules it is stated, that the main remedy where the Respondent is the Registry shall be the annulment of the disputed decision taken by the Registry. However, the Panel may decide in appropriate cases that the domain name in question related to the phased period shall be transferred, revoked or attributed but only if the Complainant is the next applicant in the queue for the domain name concerned.

1.8 It is a general principle set out by the EC-Regulations (esp Recital 11 Reg 874/2004), that the principle of first-come-first-served should be the basis for resolving a dispute between holders of prior rights during the phased registration.

2. Panel ruling
2.1 This Panel wants to stress the point, that following Art 22 (11) Reg 874/2004 the ADR Panel shall decide whether the decision at hand taken by the Registry conflicts with Reg 733/2002 or Reg 874/2004. ADR Decisions grounded merely on the Sunrise Rules are outside the Panels jurisdiction. The relevant rules for scrutinizing the Registry decisions are therefore the above cited EC-Regulations.

2.2 It is the Panels view, that for showing prior rights, the applicant has to submit documentary evidence to show that he is the holder of the prior right claimed on the name in question within forty days from the submission of the application to the indicated validation agent. Although the applicant is allowed to submit additional evidence, this only is true, if the additional evidence will be submitted within the forty day period since the submission of the application. This view is also supported by the first-come-first-served principle as well as the fact, that the registration shall be fair, non-discriminatory and transparent.
Under Art 10 (2) Reg 874/2004 it is also stated that the registration shall consist of the complete name for which the prior right exists, as written in the documentation.

2.3 From the wording of Art 10 and 14 Reg 874/2004 it is clear, that the evidence that shows the prior right claimed must be a documentary evidence and must show that the applicant is the holder of the prior right claimed on the name in question. With regard to Art 13 Reg 874/2004 the validation agent has to have appropriate expertise. However, he shall examine applications in the order in which the application was received at the Registry and with regard to the submitted documentary evidences. It is moreover in the validation agents sole discretion (Art 21 (3) Sunrise Rules) to do further investigation. It is however the Panels view that with respect to the fact that the validation agent shall have appropriate expertise it has also the duty to examine the application and the supported documents materially. This duty only goes to the extend, that it shall verify/conform obvious errors between the application and the documentary evidence (e.g. the applicant indicated the wrong right or country at the cover letter – iura novit curia); but this shall not amount to verifying/confirming a difference in legal forms regarding the applicant and the evidence documentation - that would be against Art 10 and 14 Reg 874/2004 and the principle first-come-first-served.

2.4 Following Art 12 Reg 874/2004 the Registry has to publish a detailed description of all the technical and administrative measures that it shall use for ensuring a fair, transparent and technical sound administration of the phased registration period. This description is laid down in the Sunrise Rules – for ensuring these principles the Sunrise Rules, inter alia, state in Sec 3 (1) (i) that the Registry shall be provided with the full name of the applicant; where no name of a company or organisation is specified, the individual requesting registration of the Domain Name is considered the applicant; if the name of the company or the organisation is specified, then the company or organisation is considered as the applicant. This approach also is taken by national registries to facilitate the registration process and is not only coherent with the Sunrise Rules but also intended by the relevant EC-Regulations.
In the case at hand, Mr. Peter Klatik was stated in the application field and did not refer to the name of the holder of the „Wewalka“ mark in the “organisation” field of the application form – on the contrary: He even insert in the „organisation“ field „Null“ which even intensifies the pretended intention of Mr. Peter Klatik being the Applicant.
The Registry therefore considered Mr. Klatik as applicant with the consequence of bearing the burden of proof showing that he is the holder or licensee of a prior right.

2.5 Finally the Panel wants to stress the point, that (on the contrary to the Complainants contentions) Mr. Peter Klatik sent the emails from February 9th and 17th, 2006 to his Registrar and not to the Respondent. Without prejudice and independent on the fact whether the Registrar could have corrected the mistake made by Mr. Klatik or not, Sunrise Rules, Section 5(3) make it clear that the Respondent is not a party to the agreement between an Applicant and its Registrar, and that the Respondent does not incur any liability.

2.6 Following Rec 11 Reg 874/2004 (fist-come-first served) and Sec 11 (c) ADR Rules that a transfer-decision against the Registry only is available with regard to Complainants, who are the next applicant in the queue for the domain name, the requested remedy (“transfer” to Wewalka GmbH Nfg KG, Anton Gsellmann) at the case in hand is not lawful.
If the Panel would accept this remedy, it would not only act against the general Regulations principle “first-come-first-served” but also Art 22 (11) Reg 874/2004 would be disrupted, because Wewalka GmbH Nfg KG, Anton Gsellmann does not fulfil the general eligibility criteria set out in Art 4 (2) (b) Reg 733/2002. Wewalka GmbH Nfg KG, Anton Gsellmann did not even apply for the domain name at issue.

3. For all the above mentioned reasons, the complaint is not justified.

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	**Peter Burgstaller**

DATE OF PANEL DECISION 2006-12-08

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

For challenging a decision taken by the Registry the decision has to conflict with the EC-Regulations 733/2002 or 874/2004; violations against the Sunrise Rules per se are not sufficient.
The cited EC-Regulations moreover set out the principle "first-come-first-served" as well as the fact that the registration shall be fair, non-discriminatory and transparent. The applicant therefore has to submit documentary evidence to show that he is the holder of the prior rights claimed within 40 days since the submission of the application. Additional evidence after the 40 days shall not be taken into consideration.
The validation agent has to have appropriate expertise; he therefore has the duty to examine the application and the supported documents materially, but only to the extend that he shall verify/conform obvious errors between the application and the documentary evidence. Further investigations are in his sole discretion, but always within the scope of the principles set out in the EC-Regulation especially the "first-come-first-served-principle".
A transfer-decision against the Registry only is available to whom is the next applicant in the queue for the domain name and fulfils the general eligibility criteria set out in Art 4 (2) (b) Reg 733/2002.
The Registry may not be held responsible or liable for mistakes or negligence made by Registrars.