Panel Decision for dispute CAC-ADREU-003211

Case number	**CAC-ADREU-003211**
Time of filing	**2006-10-02 11:14:08**
Domain names	**schaper.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**METRO AG, Eileen Hudson**

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 concerning the disputed domain name.

FACTUAL BACKGROUND

The Complainant in this proceeding is Metro AG based in Duesseldorf, Germany. The Respondent in this proceeding is EURid. The disputed domain name is “schaper”.
On 22nd March 2006 the Friedrich Schaper Notstrom- und BHKW-Technik GmbH based in Hemmingen, Germany, applied for the domain name “schaper”. The processing agent received the documentary evidence on 27th April 2006 which was before the 1st May 2006 deadline. The documentary evidence included an affidavit signed by a german legal practitioner stating that “Schaper” is used as a business identifier by Friedrich Schaper Notstrom- und BHKW-Technik GmbH and meets the criteria of Sec. 5 (2) of the German Trade Mark Act. The documentary evidence also included further documents such as invoices and an extract from the german companies register.
The validation agent accepted the application of Friedrich Schaper Notstrom- und BHKW-Technik GmbH on the basis of the documentary evidence.
The Complainant request EURid´s decision to be annulled. The Respondent requests the Complaint to be rejected.

A. COMPLAINANT

The Complainant challenges the decision by EURid on the following grounds:
The Complainant refers to Chapter I Sec. 2.1 (ii) and Chapter V Sec. 10 of the Sunrise Rules and claims that the domain name applied for and the company name have to be identical. The Complainant refers to the name Friedrich Schaper Notstrom- und BHKW-Technik GmbH under which the company is incorporated and argues that this name obviously is different from the name “schaper”.
According to the Complainant “Schaper” is not an exclusive trade name used by the applicant but a name used by several companies and persons throughout Germany.
Furthermore the Complainant refers to Chapter V Sec. 19 of the Sunrise Rules stating that the complete name for which the prior right exists as manifested in the documentary evidence is the basis for a registration of a domain name. The Complainant concludes that the applicant could claim prior rights for “Friedrich Schaper Notstrom- und BHKW-Technik”, “Friedrichschaper” or “Rainerschaper” but not for “Schaper”.
The Complainant request EURid´s decision to be annulled.

B. RESPONDENT

The Respondent has brought the following arguments before the Panel:

1. Grounds on which the Respondent has accepted the application by Friedrich Schaper Notstrom- und BHKW-Technik GmbH

The Respondent refers to Article 10 (1) of Commission Regulation 874/2004 which 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. The Respondent also refers to Article 14 of Commission Regulation 874/2004 and that 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.
Furthermore the Respondent refers to various parts of the Sunrise Rules:
Section 16 (3) of the Sunrise Rules states that: "Since trade names are protected in all member states of the European Union, it is sufficient to provide the Validation Agent with the Documentary Evidence referred to in Section 16.5 below.".
Section 16 (5) of the Sunrise Rules states that: "Unless otherwise provided in Annex 1 hereto, it is sufficient to submit the following Documentary Evidence for trade names and business identifiers referred to in Section 16(2) respectively 16(3): (…) (ii)where registration is not obligatory, the Documentary Evidence referred to in Section 12(3) hereof. (…)".
Section 12 (3) of the Sunrise Rules states that:" If, under the law of the relevant member state, the existence of the Prior Right claimed is subject to certain conditions relating to the name being famous, well known, publicly or generally known, have a certain reputation, goodwill or use, or the like, the Applicant must furthermore submit (i) an affidavit signed by a competent authority, legal practitioner, or professional representative, accompanied by documentation supporting the affidavit (…) stating that the name for which a Prior Right is claimed meets the conditions provided for in the law (including relevant court decisions, scholarly works and such conditions as may be mentioned in Annex 1 (if any) of the relevant member state in relation to the type of Prior Right concerned. ".
The Respondent notes that the documentary evidence received by the validation agent consisted of an affidavit signed by a legal practitioner in Germany stating that the name for which the prior right is claimed meets the conditions provided for protection of trade names under German law. The Respondents notes that other documents (invoices, certificate of company registration) were also included in the documentary evidence.
According to the Respondent the validation agent concluded from a prima facie review of the documentary evidence that the Applicant was the holder of a prior right and therefore accepted the Applicant's application.

2. Complainant´s contentions and response
The Respondent notes that the Applicant relied on its trade name and not on its company name as argued by the Complainant.
According to the Respondent whether or not the domain name applied for constitutes the complete name of the Applicant's company name is not relevant for the present case, because the Applicant claimed a trade name – not a company name - as a priority right.
The Respondent notes that the Complainant does not dispute the fact that the Applicant is indeed the holder of a trade name "Schaper".
The Registry agrees with the Complainant that there might be other holders of prior rights on the name Schaper (e.g. in the form of a trade name, a family name, a trademark or in another form) but notes that the Commission Regulation does not require the Applicants to be the only holders of a prior right on a specific name.
The Respondent adresses Article 14 of Commission Regulation 874/2004 which states that: "If the Registry receives more than one claim for the same domain during the phased registration period, applications shall be dealt with in strict chronological order".
In conclusion the Registry finds that since the Applicant was the first applicant to demonstrate its prior right on the trade name "SCHAPER", the Registry correctly accepted the Applicant's application.
The Respondent requests the Complaint to be rejected.

DISCUSSION AND FINDINGS

1. Main arguments of Complaint
The Complainant has filed a very brief Complaint. The whole text of the Complaint consists of three sections only. However the Complainant refers to several passages of the Sunrise Rules and argues that the Registry has failed to apply these rule when accepting the application of Friedrich Schaper Notstrom- und BHKW-Technik. It is therefore the Panel´s opinion that the minimum requirements of a Complaint have been fulfilled by the Complainant.
The Complaint´s main argument is that the full company named of the applicant is “Friedrich Schaper Notstrom- und BHKW-Technik” so that in accordance with Chapter I Section 2.1 (ii) and Chapter V Section 10 of the Sunrise Rules the applicant could not claim prior rights for “Schaper”. Beside the question of the full company name the Complainant argues that “Schaper” is not an exclusive trade name used by the applicant but a name used by several companies and persons throughout Germany.

2. Basis of the application
The Complainant´s argument concerning the full company name of the applicant seems to base on a false interpretation of the application in concern. The application was not based on a company name as a priority right but on a trade name as a priority right.
The applicant had indicated in his application that it was not a company name but a trade name on which the application was based. This was indicated on the cover sheet presented to the registry and by the documentary evidence. Also the whois-register shows that the applicant has indicated a “Company name / Trade name / Business Identifiers” as a prior right.
Therefore the Complainant´s main argument concerning the registered company name is of no relevance.

Also the Complainant´s second argument that “Schaper” is not an exclusive trade name used by the applicant but a name used by several companies and persons throughout Germany is of no relevance. The Panel is not aware how many companies in Europe do use “Schaper” as a trade name or business identifier. But it is clear from the Commission Regulation that in a case of multiple applications based on a prior right such as a trade name or any other prior right the principle of “first come first served” has to be applied. This principle is manifested in (10) of Commission Regulation 874/2004 and Article 14 of Commission Regulation 874/2004. So even if there would have been several applications for the domain name “Schaper” all being based on a priority right for the trade name “Schaper” the Registry would have decided correctly in granting the domain name to the very first applicant in the queue who has sufficiently proven his priority right.
As the applicant Friedrich Schaper Notstrom- und BHKW-Technik was the first to apply for this domain name the Respondent correctly dealt with this application. There is no basis in the Commission Regulation or the Sunrise Rules for the Registry to reject an application only because in theory other companies might also be the holder of a priority right for the disputed domain name.

3. Documentary evidence processed to the Validation Agent
For the sake of completeness the Panel has taken the documentary evidence presented by Friedrich Schaper Notstrom- und BHKW-Technik into account. The applicant has filed an affidavit signed by a legal practitioner in Germany to the validation agent stating that the name for which the prior right is claimed meets the conditions provided for protection of trade names under German law. Further documents (invoices, certificate of company registration) were also included in the documentary evidence.
The Complainant has not disputed that the applicant has sufficiently proven that the application was based on a trade name protected under german law. Therefore it is not up to the Panel to fully investigate the basis of the application. As the documentary evidence was not disputed by the Complainant there is no ground for the Panel to doubt that the priority right was sufficiently proven.
In case where an affidavit is the main part of the documentary evidence it would be up to the Complainant to specifically argue in detail why he finds that the priority right has not been sufficiently proven and why specifically the Registry should have rejected the application. In the absence of a substantive challenge of the affidavit the Panel finds that it is sufficient if the Repondent can show that prima vista the priority right is proven by the affidavit.
The applicant claims priority rights for a trade name. According to Section 12 (3) and 16 (5) of the Sunrise Rules trade names must be proven by an affidavit signed by a competent authority, legal practitioner or professional representative, accompanied by documentation supporting the affidavit stating that the name for which a prior right is claimed meets the conditions provided by the law (including relevant court decisions) of the relevant member states in relation to the type of prior right concerned.
The affidavit prima vista does fulfil these requirements. The affidavit is signed by a german legal practitioner stating all relevant facts as required in Section 12 (3) of the Sunrise Rules. The affidavit also includes references to the relevant sections of the german Trade Mark Law and relevant court decision. Finally the affidavit is supported by further documents (invoices, company letters) supporting the statements made in the affidavit.
Regarding all this the Panel finds that prima vista the affidavit has sufficiently proven the priority right on which the domain name application was based on and in the absence of an substantiated challenge by the Complainant there is no ground to doubt the priority right.
In conclusion the Panel finds the decision by the Registry in accordance with Article 10, 14 of Commission Regulation 874/2004.

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	**Volker Herrmann**

DATE OF PANEL DECISION 2006-12-14

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Registry has granted the domain name “schaper” to the german company Friedrich Schaper Notstrom- und BHKW-Technik GmbH. The application of this company was based on the priority right for the trade name “Schaper”. The documentary evidence included an affidavit and further documents showing that “Schaper” is used as a trade name by this company.
The Complainant, Metro AG based in Duesseldorf, Germany, challenged this decision on the ground that “Schaper” is not the full company name of Friedrich Schaper Notstrom- und BHKW-Technik GmbH and not an exclusive trade name but a name used by several persons and companies.
As the application was not based on the priority right for a company name as the Complainant obviously thought the Complaint was of

no legal substance in this concern.
The Panel found that in case where an affidavit is the main part of the documentary evidence it is up to the Complainant to specifically argue in detail why he finds that the priority right not been sufficiently proven and why specifically the Registry should have rejected the application.
In the absence of a substantive challenge of the affidavit the Panel finds that it is sufficient if the Repondent can show that prima vista the priority right is proven by the affidavit. As the affidavit prima vista stated all relevant facts as required in Section 12 (3) of the Sunrise Rules the Panel found that the Registry acted in accordance with Article 10, 14 of Commission Regulation 874/2004 by accepting the application.
In conclusion the Panel denied the Complaint.