Panel Decision for dispute CAC-ADREU-003257

Case number	**CAC-ADREU-003257**
Time of filing	**2006-10-03 14:14:23**
Domain names	**shopping.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**Axel Arnulf Pfennig**

Respondent

Organization / Name	**Online Shopping Limited, Michael Bahlitzanakis**

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 disputed domain name “SHOPPING” has already been the subject of a prior ADR .eu proceeding among the parties (ADR .eu Case No. 01652). In that case, the Complaint was denied.

FACTUAL BACKGROUND

The Complainant, a German citizen, is the owner of a German trademark “shopping” (No. 30650167) filed on August 16, 2006 and registered on September 15, 2006 (for further details about the Complainant see also ADR .eu Cases No. 01717 and No. 01804).

The disputed domain name “SHOPPING” was registered on March 8, 2006. It is now registered for the Respondent who acquired it on April 13, 2006 from the original owner (see ADR .eu Case No. 01652).

A. COMPLAINANT

The Complainant claims that the disputed domain name “SHOPPING” was registered and is being used in bad faith.

He further argues that the Respondent is not entitled to register .eu domains because he is not resident in the Community but in the United States of America. The Respondent appears to employ only a general mail forwarding service at the location of the address given in the registration details, from which his mails are forwarded to him in New York.

Accordingly, the Complainant requests the transfer of the domain name from the Respondent to the Complainant alternatively, the disputed domain name to be revoked.

B. RESPONDENT

The Respondent requests the Complaint to be denied. He additionally requests the Panel to state that the Complainant shall not be entitled to restart a proceeding against the disputed domain name in the future.

The Respondent argues that the Complainant does not have a prior right within the meaning of Article 21(1) of the Commission Regulation (EC) No 874/2004 (the “Regulation”). The Complainant only registered its German trademark “shopping” as a consequence of the decision in the first ADR-proceeding between the parties (ADR .eu Case No. 01652) dated August 9, 2006 and, therefore, after the disputed domain name had been registered and transferred to the Respondent.

DISCUSSION AND FINDINGS

1. According to Article 22 (11) of the Commission Regulation (EC) No 874/2004 an ADR procedure may be initiated by any party where

the registration is speculative or abusive within the meaning of Article 21 or the decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No. 733/2002.
In the present case, the Complaint has been brought against the Registrant, not the Registry. Therefore, the only question is whether the registration is speculative or abusive within the meaning of Article 21.

According to this disposition and Paragraph B 11 (d) (1) of the ADR.eu Alternative Dispute Resolution Rules (the "ADR Rules") the Complainant bears the burden of proving the following:

(i) 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 and; either

(ii) The domain name was registered by the Respondent without rights or legitimate interest in the name; or

(iii) The domain name was registered or is being used in bad faith.

2. The Panel considers that the Complainant has not proven the first requirement i.e. having a prior right recognized or established by the national law of a Member State and/or Community law:

Pursuant to Article 10(1) of the Regulation, a "right" as mentioned in Article 21 (1) has to be "prior" to the domain name registration. In the present case, the domain name was registered on March 8, 2006 and transferred to the Respondent on April 13, 2006. In contrast, the application for the German trademark "shopping" (No. 30650167), on which the Complaint is based, has only been filed on August 16, 2006. It was subsequently registered on September 15, 2006. Therefore, it is apparent that this trademark was filed and registered several months after the domain name was registered and transferred to the Respondent. Accordingly, this trademark clearly does not concede the Complainant a "prior right" in the sense of Articles 10 (1) and 21 (1) of the Regulation (see also ADR .eu Case No. 2422).

As a consequence, in the absence of any prior rights acquired by the Complainant, his Complaint must fall at the first hurdle. It is therefore not necessary for the Panel to examine whether the Respondent has rights or legitimate interest in the domain name or if the domain name was registered or is being used in bad faith.

3. Furthermore, the Panel is bound by the fact that the Complaint is brought against the Registrant but not against the Registry. According to Article 22 (11) of the Regulation in the case of such a procedure against a domain name holder, the ADR Panel shall decide that the domain name shall be revoked, if it finds that the registration is speculative or abusive as defined in Article 21 of the Regulation (see ADR .eu Case No. 01652). Consequently, the question of whether the Registrant fulfils the eligibility criteria for who can register a .eu domain name and, therefore, whether the registration is in line with Article 4 (2) (b) of Regulation 733/2002 does not fall within the scope of this proceeding.

4. However, the Panel does not consider that the Complaint has been brought in bad faith and constitutes an abuse of administrative proceeding pursuant to Paragraph B 12 (h) of the ADR-Rules. Indeed, the Complainant had already started an ADR.eu proceeding against the Respondent concerning the same domain name as in the present case (see ADR .eu Case No. 01652). However, the Complainant has pointed out in his Complaint that according to his opinion he had prior rights. Although, as exposed above, the Panel does not agree with this point of view, it does not see any evidence that the Complaint has been brought in bad faith and constitutes an abuse of administrative proceeding (see ADR.eu Case No. 01559).

Finally, the Respondent's claim that the Complainant shall not be entitled to restart a proceeding against the disputed domain name must fail as well. The Panel considers that there is no basis for such a claim in either Regulation 733/2002 or in 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	**Dr. Tobias Malte Müller, Mag. iur.**

DATE OF PANEL DECISION 2006-12-18

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

A trademark that was filed and registered several months after the domain name had been registered and transferred to the Respondent is no “prior right” in the sense of Articles 10 (1) and 21 (1) of the Regulation.

The question of whether a registration is in line with Article 4 (2) (b) of Regulation 733/2002 does not fall within the scope of a proceeding brought against the domain registrant but not against the Registry.

The Complaint has not been brought in bad faith and does not constitute an abuse of administrative proceeding pursuant to Paragraph B 12 (h) of the ADR-Rules.