Panel Decision for dispute CAC-ADREU-003361

Case number	CAC-ADREU-003361
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Domain names	mor.eu, morcosmetics.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	MOR COSMETICS, MR DEON BOYCE IURETIGH

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

No legal proceedings have been issued or terminated in connection with the disputed domain name.

FACTUAL BACKGROUND

The Respondent rejected the application by DEON IURETIGH for the domain names mor and morcosmetics.
The Applicant claimed a prior right in the form of an unregistered trademark protected in the United Kindgom.
The validation agent concluded from the documentary evidence submitted by the Applicant that the Applicant did not demonstrate that he was the holder of the claimed prior rights.
The Complainant claims that he is the holder of the Community trademark “MOR” (Nr 003287381). The Complainant requests the Panel to annul the Respondent's decision and to attribute the domain names MOR and MORCOSMETICS to the Complainant.

A. COMPLAINANT

MOR COSMETICS, MR. DEON IURETIGH - the Applicant - applied for the domain names MOR and MORCOSMETICS on 7 February 2006.
Mor Cosmetics is the Australian company mentioned in the documentary evidence. MR. DEON IURETIGH is an individual – natural person. Both of them are acting as the Complainant.
The Complainant claims that it is the holder of the Community trademark “MOR” (Nr 003287381). Therefore mor.eu & morcosmetics.eu should have been granted from EURid.
The Complainant requests the Panel to annul the Respondent's decision and to attribute the domain names MOR and MORCOSMETICS to the Complainant.

B. RESPONDENT

MOR COSMETICS, MR. DEON IURETIGH - the Applicant - applied for the domain names MOR and MORCOSMETICS on 7 February 2006.
Mor Cosmetics is the Australian company mentioned in the documentary evidence. MR. DEON IURETIGH is an individual – natural person. Both are acting as the Complainant.
The Applicant claimed a prior right in the form of an unregistered trademark protected in the United Kindgom.
The validation agent received the documentary evidence on 14 March 2006, which was before the 19 March 2006 deadline and concluded from the documentary evidence that the Applicant did not demonstrate that it was the holder of the claimed prior rights.
The Respondent argues that the Regulation and the Sunrise Rules clearly and certainly provide that the burden of proof was with the Applicant to demonstrate that it is the holder of the claimed prior right. The documentary evidence received by the validation agent in this case does not establish the claimed prior rights (i.e. unregistered trademarks protected in the United Kingdom).
Furthermore, the name of the Applicant is different from the name of the company mentioned in the documentary evidence and the Applicant failed to submit official documents explaining why and how it is entitled to rely on documents which, in the face of the documentary evidence, belongs to someone else.

Finally, the domain names may not be attributed to the Complainant. First the Complainant did not apply for the domain names. Second, the Complainant, being a company established outside of the European Union, is not eligible to register .eu domain names. Therefore, the Respondent rejected the Applicant's application in compliance with to the Regulation and Sunrise Rules.

DISCUSSION AND FINDINGS

A.
MOR COSMETICS, MR. DEON IURETIGH - the Applicant - applied for the domain names MOR and MORCOSMETICS on 7 February 2006.
The Panel finds that the name of the Applicant consists of two different parts, MOR COSMETICS, which is the Australian company - MOR Cosmetics Pty Ltd and from the name of the individual - MR. DEON IURETIGH.
Because of the inexplicit designation of the Applicant the Panel had to clarify beforehand - following the Article 12 Reg 874/2004 and Sec 3 (1) (i) of the Sunrise Rules - who is the Applicant in this case.
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".
Section 2.3 of the .eu Domain Name WHOIS Policy, entitled Identifying Natural Persons and Legal Persons, repeats the same rule: " If the 'Company' field is completed, it is assumed that the company is the Registrant".
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.
By the WHOIS database, it was clearly established and the Panel find that in the present case, the individual requesting the registration of the domain names - DEON IURETIGH - decided not to fill out the company field and so clearly intended to apply in his own name.

To this regard the Panel finds that the Applicant is an individual DEON IURETIGH.

Similarly was decided in ADR 810 (AHOLD), in ADR 2268 (EBSOFT), in ADR 2350 (PUBLICARE), in ADR 551 (VIVENDI), 1232 (MCE), 1699 (FRISIA), 1625 (TELEDRIVE), 294 (COLT), 2075 (E-MOTION), 1627 (PLANETINTERNET), 1614 (TELENET), 2124 (EXPOSIUM), 1242 (APONET), ADR 2881 (MRLODGE), and 1299 (4CE).

B.
Because 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 the period of phased registration (Article 10 (1) of the Regulation) the Panel had to examine whether the Applicant showed evidence of such a prior right.

The Complainant insists that MOR Cosmetics holds the registered trademark No.003287381 for the MOR mark in the European Community and therefore domain names mor.eu and morcosmetics.eu should have been granted from EURid.
By the WHOIS database, it was established, that the Applicant claimed a prior right in the form of an unregistered trademark protected in the United Kingdom.

The Panel finds that the validation agent received the documentary evidence on 14 March 2006, which was before the 19 March 2006 deadline.

The submitted documentary evidence for the two applications was identical and consisted of:

- an affidavit signed by Gary Richard Allwood (an attorney from Australia), stating that he represents MOR Cosmetics Pty Ltd and that he is aware that MOR has an application pending for the registration of a trademark pursuant to the intellectual property laws governing and applicable in the European Union;
- a printout from the OHIM database showing that the Community trademark “MOR” (Nr 003287381) has been registered on 12 August 2005 to the Australian company MOR Cosmetics Pty Ltd; and
- a certificate of registration and an abstract from the Australian business register showing that the company MOR Cosmetics Pty Ltd is registered as an Australian company (Nr 096 765 481).

To this regard the Panel finds that the name of the Applicant is different from the name of the company mentioned in the documentary evidence.

It is absolutely clear that the Complainant bears burden of proof and if it is holder of a prior right or not.
The documentary evidence submitted by the Applicant did not demonstrate the claimed prior rights.
The submitted documentary evidence for the two applications does not even mentioned the name of the Applicant - DEON IURETIGH –

as a holder of prior rights which are recognised or established by national or Community law (pursuant to Articles 10 (1) and 14 of the Regulation).
The Applicant did not submit any official documents substantiating that it is the same person as or the legal successor to the person indicated in the Documentary Evidence as being the holder of the Prior Right (pursuant to Section 20.3. of the Sunrise Rules).
The Complainant did not show either an affidavit signed by a competent authority or a relevant final judgement by a court or an arbitration stating that the unregistered trade mark meets the conditions provided for in the law of the United Kingdom (pursuant to Section 12.3 of the Sunrise Rules). As far as unregistered trademarks protected in the United Kingdom are concerned, Annex 1 to the Sunrise Rules states that trade names may serve as prior rights "only to the extent that rights in passing off exist" and requires documentary evidence as referred to in Section 12(3) of the Sunrise Rules.
The validation agent could not pursuant Anex 1 to Sunrise Rules validate the existence of a protected prior right on the basis of prima facie review of the documentation (pursuant to Sections 12(3)(i), 21(2)of the Sunrise Rules)
The validation agent concluded from the submitted documentary evidence that the Applicant did not demonstrate that it was the holder of the claimed prior rights.

The burden of proof was thus on the Applicant to substantiate that he is the holder of a prior right recognised or established by national or Community law (see for example decisions in ADR 127 (BPW), 219 (ISL), 294 (COLT), 551 (VIVENDI), 984 (ISABELLA), 843 (STARFISH), 1931 (DIEHL, DIEHLCONTROLS), 2350 (PUBLICARE), 2881 (MRLODGE), etc.).

The Panel is of the opinion that the Complainant failed to meet its burden of proof to establish the claimed prior rights pursuant to the Regulation and Sunrise Rules and his complaint has to be rejected.

C.
Further - if the Complainant contended the attribution of the domain names to the Complainant - the Panel points out regardless of the above mentioned valid reasons for the rejection of the complaint that the Complainant – the company MOR Cosmetics Pty Ltd - is not the next applicant in the line for the domain names (Section 27 (1) and Section B.11 (c) of the ADR Rules). Moreover the Complainant is registered as an Australian company and there is no evidence showing that the Complainant has its principal place of business within the European community. The Complainant does not meet conditions pursuant to the Article 4 (2) (b) of the Regulation EC 733/2002. The Complainant is therefore not eligible to apply for. EU domain names (pursuant to Article 14 of the Regulation and section 12.3).

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	**Vladimir Bulinsky**

DATE OF PANEL DECISION 2007-02-07

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

MOR C1SMETICS, MR. DEON IURETIGH - the Applicant - applied for the domain names MOR and MORCOSMETICS on 7 February 2006. Mor Cosmetics is the Australian company mentioned in the documentary evidence. MR. DEON IURETIGH is an individual – natural person.
Because the general rule is that the individual requesting the registration is considered the applicant, MR. DEON IURETIGH (hereafter “the Applicant”) claimed a prior right in the form of an unregistered trademark protected in the United Kindgom.
By the WHOIS database, it was clearly established and the Panel find that in the present case, the individual requesting the registration of the domain names - DEON IURETIGH - decided not to fill out the company field and so clearly intended to apply in his own name.
The validation agent received the documentary evidence on 14 March 2006, which was before the 19 March 2006 deadline.
The documentary evidence for the two applications is identical and consisted of:
an affidavit signed by Gary Richard Allwood (an attorney from Australia), stating that it represents MOR Cosmetics Pty Ltd and that he is aware that MOR has an application pending for the registration of a trademark pursuant to the intellectual property laws governing and applicable in the European Union ;
a printout from the OHIM database showing that the Community trademark “MOR” (Nr 003287381) has been registered on 12 August

2005 to the Australian company MOR Cosmetics Pty Ltd; and
a certificate of registration and an abstract from the Australian business register showing that the company MOR Cosmetics Pty Ltd is registered as an Australian company (Nr 096 765 481).
The validation agent concluded from the documentary evidence that the Applicant did not demonstrate that he was the holder of the claimed prior rights.

Therefore, the Respondent rejected the Applicant's application in compliance with the Regulation and Sunrise Rules and the Complaint was denied.