Panel Decision for dispute CAC-ADREU-003376

Case number	CAC-ADREU-003376
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Domain names	kafka.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	Mediacop s.r.o.

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

None

FACTUAL BACKGROUND

On 17th October 2006 Mediacop s.r.o. (Czech Republic) (hereinafter referred to as 'the Complainant') filed a complaint at the Arbitration Centre for .eu Disputes requesting that the registration of the domain name kafka.eu be annulled and the domain name be attributed to the Complainant who is the next applicant in queue satisfying the registration criteria and exercising a prior right to the domain name.

The domain name kafka.eu was applied for on 9 February 2006 by Staatssekretariat voor Administrative Vereenvoudiging (Belgium) (hereinafter referred to as 'the Applicant') and on the 16 February 2006 by the Complainant. It was accordingly registered by the FOD Kanselarij van de Eerste Minister, Bart Van Herreweghe (Belgium) (hereinafter referred to as the Respondent) following the "first come, first served" principle set forth in art. 2 and (regarding the phased registration period) in art. 14 in fine of the Commission Regulation (EC) No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration (hereinafter referred to as 'the Regulation No. 874/2004') and allocated for use to the eligible party whose request had been received first, that is the Applicant.

A. COMPLAINANT

The Complainant claims to enjoy a "preferential right" to the registration of the domain name kafka.eu, basing on the previously obtained registration of the domain name kafkamuseum.cz.

The Complainant has also access to other rights to the name "Kafka" through their sole owner. The sole associate and owner of the Complainant, Mr Pawlowski, is also the sole associate and owner of the company COPA s.r.o., which bought an exhibition on Franz Kafka from the Institute of Contemporary Culture in Barcelona for a period of 10 years. The company COPA is the administrator of the Franz Kafka Museum in Prague as well. The Complainant states as well to have filed an application to register a national trademark "Franz Kafka Museum" in the Czech Republic.

Finally, the Complainant presents the opinion that the rights to the domain name kafka.eu should be awarded to a subject of the Czech Republic, as Franz Kafka was a Czech native, residing in Prague for a significant period of his life.

The Complainant argues that the decision by the Respondent to register the domain name in favour of the Applicant is contrary to article 10(2) of the Regulation (EC) No 874/2000. It is therefore demanded that this decision shall be annulled and the domain name shall be attributed to the Complainant, as its application is next in queue. The Complainant claims not only to satisfy all registration criteria, including having a prior right to kafka.eu, but also states that his prior rights are "preferential", compared to the Applicant's prior rights.

Therefore, in his opinion, the domain name should be transferred to the Complainant

B. RESPONDENT

The Respondent

In response to the Complainant, the Respondent provides the grounds on which the application by the Applicant was accepted. It is referred to article 10 (1) of the Regulation (EC) No 874/2000, 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 cited, moreover, article 14 of the Regulation (EC) No 874/2000 pursuant to which: "If the validation agent finds that prior rights exist regarding the application for a particular domain name that is first in line, he shall notify the Registry accordingly. This examination of each claim in chronological order of receipt shall be followed until a claim is found for which prior rights on the name in question are confirmed by a validation agent. The Registry shall register the domain name, on the first come first served basis, if it finds that the applicant has demonstrated a prior right in accordance with the procedure set out in the second, third and fourth paragraphs." Furthermore, the Respondent refers to article 14 of the Regulation (EC) No 874/2000 which says, 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.

Basing on the fact that the processing agent received the documentary evidence from the Applicant before the set deadline, the conclusion was drawn that the Applicant enjoys a prior right to the domain name kafka.eu. As his application was filed first, the Respondent, accepted it according to the "first come, first served" principle, and registered the domain name in question in favour of the Applicant.

Moreover, the Respondent claims to have no obligation to get engaged in the comparison of prior rights, submitted by various applicants for the same domain name. The Respondent's only requirement is to validate the application which was first submitted and supported with evidence that the Applicant is the holder of a prior right, pursuant to articles 10 and 14 of the Regulation (EC) No 874/2000. It is further referred to article 14 of the Regulation (EC) No 874/2000 which states that when the validation shows the Applicant is the holder of the claimed prior right, the validation agent has to cease its examination. Consequently, according to the Respondent, the rights of the subsequent applicants in the queue may only be examined if the validation agent finds out that the first applicant in the line is not the holder of a prior right.

Since this situation does not apply in this case, the Respondent argues being fully entitled to register the domain name kafka.eu in favour of the Applicant, basing on the rules set in the Regulation (EC) No 874/2000.

Furthermore, the Respondent points out that there is no such thing in the Regulation (EC) No 874/2000 as "best prior rights" or "superior prior rights". To confirm this thesis, several ADR decisions are quoted in which the Panel explains the notion of prior rights and its role in the Sunrise Period of the .eu domain name registration.

DISCUSSION AND FINDINGS

Regulation No. 874/2004 stipulates in its art. 10(1) that applying for the registration of a domain name during the phased registration period is accessible only to holders of prior rights, recognised or established by national and/or Community law and public bodies. The applicant is obliged to enclose documentary evidence of the prior right. The applicant, basing its application on a prior right and supplying the processing agent with the required documentary evidence within the set time limit, is therefore an eligible party in the meaning of art. 10 (1).

The Regulation 874/2004 uses the notion of "prior right" which, as stated by the Panel in ADR 945 (CWI), should be understood as concerning "any right, of the kinds defined in article 10 of the Regulation 874/2004, already existing at the moment where the phased registration period or sunrise period initiated". A prior right holder is pursuant to article 14 of the Regulation 874/2004 able to apply for sunrise registration. A situation is obviously possible, when several companies have a prior right to a domain name.

However, as stated by the Panel in several decisions, the concept of "prior right" does not imply any comparison between different prior rights based either on the moment of their acquisition or on their strength, understood in whatsoever way. Therefore, according to the provisions of the Regulation 874/2004 there is no such a thing as a "preferential prior right" or a "superior prior right".

In a situation where several companies enjoy a prior right, the general rule of "first come, first serve" applies, taking into account only the date of the applications. As the Panel decided in ADR 1720 (BL), "Article 14 of the Regulation 874/2004 provides 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.' Moreover, Article 14 of the Regulation 874/2004 and Section 2.1. of the Sunrise Rules, provides that the "first come, first served" principle also applies during the Sunrise Period."

Similarly, in ADR 1320 (VDV), the Panel also states that: "the rationale behind the phased registration according to the Regulation 874/2004 is not to grant the domain name to the Applicant who holds an earlier right to a trademark within the Community corresponding to that name. Accordingly, the task of these ADR proceedings is not to determine whose trademark right first came into existence. As a result of the aforementioned, the Panel unambiguously concludes that the date of acquisition of prior rights within the meaning of Article 10 (1) of the Regulation 874/2004 is entirely irrelevant for granting of .eu domain names for which applications were filed during the phased registration period". Accordingly, the strength of the prior right, measured by the number of rights that the applicants possesses, the nationality of the applicant, is entirely irrelevant for the granting of .eu domain names.

Concluding, the fact that the Complainant is entitled to several rights to the name Franz Kafka and is a Czech company, is of none importance for the registration of the domain name kafka.eu. On the basis of the "first come, first served" rule, by applying for the registration later than the Applicant, the Complainant lost his priority, and thus his application was disregarded by the Respondent.

Basing on the aforementioned reasons, it should be stated that the Respondent acted in accordance with the provisions of the Regulation 874/2004 when accepting the Applicant's application. It also needs to be stressed that the Compliant can not be regarded as an eligible party in the meaning of art. 10 (2) of the Regulation No 874/2004. On the basis of the aforementioned provision, 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. This principle is further developed and explained by the 'Sunrise Rules', which state that it is not possible to obtain a registration of a domain name comprising part of the complete name for which the prior right exists.

The prior right claimed by the Complainant is based on the registration of the domain name kafkamuseum.cz. Thus, the word 'kafka' constitutes only a part of the domain name registered in favour of the Complainant and is as such inadmissible for registration as a domain name in the phased registration period. The same applies to the national trademark "Franz Kafka Museum" for which the Complainant applied.

Given the legal and factual circumstances of this Case, the Complaint must be denied.

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	**Mariusz Kondrat**

DATE OF PANEL DECISION 2007-03-15

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant requested a declaration that EURid's decision to register the domain name for the Applicant is non-compliant with art. 10(2) of the Regulation No 874/2004. He claimed to enjoy a "preferential right" to the domain name, basing on the previous registration of the domain name kafkamuseum.cz and an application for a national trademark "Franz Kafka Museum".

The Respondent provided grounds on which the application by the Applicant was accepted. It was further referred to article 10(1) and article 14 of the Regulation 874/2004. Basing on these articles, applications for domain names could be submitted by the holders of prior rights (recognised or established by national or Community law) during the period of phased registrations. In case of multiple applications, the "first come, first served" principle applied.

The Panel decided to deny the Complaint on the base of legal and factual circumstances. The Complainant claims to have a "preferential right". This notion is, however, not known to the provisions of the Regulation No 874/2004. The only criterion set, is basing on the chronological order of the applications. Therefore, the Applicant's application submitted on 9 February 2006 shall be accepted and the Complainant's application submitted one week later shall be disregarded.