Panel Decision for dispute CAC-ADREU-003444

Case number	**CAC-ADREU-003444**
Time of filing	**2006-10-19 11:23:21**
Domain names	**ocunet.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**Ursula Hahn**

Respondent

Organization / Name	**Zheng Qingying**

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 other legal proceedings which are pending or decided and which relate to the disputed domain name.

FACTUAL BACKGROUND

The Complainant is the proprietor of the “OcuNet” trademark registered at the German Patent and Trademark Office. The Respondent registered the “ocunet” domain name after the Complainant had not been assigned the domain name during the Sunrise Period

A. COMPLAINANT

The Complainant contends that the domain holder and Respondent has used neither the domain name, nor any name corresponding to this domain name in connection with the selling of goods or services, nor provably made any preparations to that effect, and that the domain holder is neither an undertaking, an organisation or a natural person that is generally known under the domain name. The Complainant further contends that the domain name will not be used in a legitimate and non-commercial or fair manner without misleading consumers, nor without harming the reputation of a name in which a right is recognised by national and/or Community law. The Complainant also asserts that the domain holder and Respondent registered the domain in bad faith a few minutes after it was released by the Register, with the purposed of preventing the Complainant from using the domain name. The domain holder and Respondent has also failed so far to use the domain name in a permissible manner for a web presence.

B. RESPONDENT

The Respondent has not exercised its option to submit a formal response to the complaint.

DISCUSSION AND FINDINGS

Pursuant to Article 22 (1) of Regulation (EC) No. 874/2004, alternative dispute resolution may be sought by anybody if registration of a domain name is speculative and/or abusive within the meaning of Article 21 (EC) No. 874/2004. For a registration to be speculative and/or abusive within the meaning of Article 21 (EC) No. 874/2004 requires that

• the domain name is identical or confusingly similar to another name in respect of which rights are recognised or established by national and/or Community law,

and

• the domain name has been registered by a domain holder who cannot assert any rights or legitimate interest in the domain name,

or

the domain name is registered or used in bad faith.

1. Domain name is identical or confusingly similar

The Complainant is the proprietor of trademark rights in respect of the “OcuNet” name. Aside from the top-level domain “(dot)eu”, the trademark is identical to the disputed “ocunet.eu” domain name. However, only the second-level domain is of relevance, because the top-level domain “(dot)eu” must be disregarded when comparing trademarks and domain names, due to its importance, acknowledged by the market, as an essential component of a domain name (see ADR Panel Decision No. 1693 – GASTROJOBS, ADR- Panel Decision No. 283 – LASTMINUTE). For this reason, the “ocunet” domain name and trademark are identical within the meaning of Article 21 (1) of Regulation (EC) No. 874/2004.

2. Right to or legitimate interest in the domain name

Another requirement for a speculative and/or abusive registration within the meaning of Article 21 of Regulation (EC) No. 874/2004 is that the holder of the domain and the Respondent can refer to having rights or legitimate interests of its own in the domain name.

The Complainant contends that the Respondent has used neither the domain name, nor any name corresponding to this domain name in connection with the selling of goods or services, nor provably made any preparations to that effect, and that the domain holder is neither an undertaking, an organisation or a natural person that is generally known under the domain name. The Complainant further contends that the domain name will not be used in a legitimate and non-commercial or fair manner without misleading consumers, nor without harming the reputation of a name in which a right is recognised by national and/or Community law.

It is questionable whether such an assertion is sufficient for the request for transfer to be heard. Since the domain name has not been used for a web presence by the Respondent, the Complainant is unable to state, never mind prove the “negative fact” of any unlawful and commercial or unfair use of the domain name, for example. The question to be asked, therefore, is whether alleviation of the burden of proof must apply to the Complainant due to its burden of proving “negative facts”, whereby a distinction must be made as to whether the positive facts of the case can be presented in such a specific manner that the absence of the negative fact can be concluded with sufficient certainty (specific negative facts), or whether the positive circumstances of the case must ultimately be presented in such density, in order to reliably conclude the negative facts (unspecific negative facts), that proof is almost impossible. Owing to the resultant difficulty of providing proof, a legislature body issuing laws or regulations will generally avoid making legal consequences dependent on negative facts of a case. If the legislature has nevertheless done so – as in the case of Article 21 (2) of Regulation (EC) No. 874/2004 –, the Complainant must essentially prove the negative facts, since otherwise the substantive law would be modified. In practice, however, having to prove negative facts, such as the unlawful or commercial or unfair use of a domain name when there is no web presence, raises considerable problems, such that the question is whether the general principle can also be applied in the context of Article 21 of Regulation (EC) No. 874/2004.

The preamble to Regulation (EC) No. 874/2004 does not provide any basis for answering the question of how the burden of proof is to be allocated. Article 22 (10) of Regulation (EC) No. 874/2004 provides no assistance either, because the failure of a Respondent to file a formal response cannot automatically mean the recognition of claims lodged by the Complainant, but can only be assessed by the Panel as acknowledgement. Although the Complainant bears the burden of proof pursuant to B 11 (d) of the ADR Rules, it is questionable whether the Panel can apply such far-reaching ADR rules. According to Article 22 (5) of Regulation (EC) No. 874/2004, the Panel can only issue rules for the submission of complaints and responses, i.e. only with regard to technical issues, but cannot issue rules concerning the burden of proof. For this reason, the ADR Rules are of no relevance here, because the ADR Rules are unable, without doubt, to go beyond the provisions of Article 22 (10) of Regulation (EC) No. 874/2004. The same applies in respect of Article B 12 (g) (2) of the ADR Rules, according to which the Panel shall issue an interim decision and suspend proceedings if a Complainant fails to provide proof.

A common line for allocation of the burden of proof cannot be derived, either, from the Panel Decisions to date.

According to various ADR Panel Decisions, for example No. 01852 – AIRIS, the Respondent has the burden of proof concerning a right to or legitimate interest in registration of a domain name. According to ADR 00568 – SPAM, the Respondent shall at least have the duty to explain its intentions or motives for registering the domain name, in such a way that the assertions made by the Complainant are at least partially refuted.

In ADR Panel Decision No. 910 – REIFEN, reference is made to Article 21 (1) (a) of Regulation (EC) No. 874/2004 and to B 12 (g) (2) of the ADR Rules, which in the view of the Panelist places the burden of proof on the Complainant in an impermissible manner. According

to ADR Panel Decision No. 1250 – VOCA, also, it is the Complainant who bears the entire burden of proof:

“Therefore, in light of the aforementioned provisions, it is clear that the burden of proving that a domain name registration is speculative or abusive lies with the Complainant, in that the Complainant needs to invoke the relevant grounds and present the Panel with the necessary evidence in order to make out Complainant’s case. In this context, it is imperative to examine, whether the Complainant has proven, firstly, that the disputed domain name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/or Community law and, secondly, that the domain name has been registered by the Respondent without rights or legitimate interest in the name or the domain name has been registered or is being used in bad faith.

It is only if these requirements are satisfied as set out by the relevant provisions that the Complainant may be granted the remedy requested, i.e. the transfer of the disputed domain name.”

ADR Panel Decision No. 2781 – Koeln2010 – refers to UDRP Case No. D2002-0856:

“As mentioned above in section 3, the Respondent has not filed a Response and is therefore in default. In those circumstances when the Respondent has no obvious connection with the disputed Domain Names, the prima facie showing by the Complainant that the Respondent has no right or legitimate interest is sufficient to shift the burden of proof to the Respondent to demonstrate that such a right of legitimate interest exist. WIPO Case No. D2002-0273 <sachsen-anhalt>; WIPO Case No. D2002-0521 <volvovehicles.com>”.

In ADR Panel Decision No. 2888 – GERMANWINGS – it is likewise argued:

“The Complaint has asserted that the Respondent does not have rights or legitimate interest in the name. Again, the burden of proof is on the Complainant. However, as recognised in various previous ADR decisions, proving a negative is impossible. To shift the burden of proof the Complainant has to put forward a prima facie case that the Respondent does not have rights or legitimate interest (see for example ADR decisions 982 and 1250).”

According to these decisions, therefore, the burden of proof lies either with the Respondent or the Complainant, whereby the Complainant is granted partial alleviation from that burden when the Complainant can substantiate or put forward a prima facie case that the Respondent cannot base its case on the provisions in Article 21 (2) a)-c) of Regulation (EC) No. 874/2004. In addition to the decisions that explicitly address how the burden of proof is to be allocated, there are many decisions that tacitly assume an alleviation of the burden of proof for the Complainant.

In view of the foregoing, the starting point for assessing the legal aspect of proof is Article 21 of Regulation (EC) No. 874/2004, which makes entitlement to transfer of the domain dependent on negative facts, and that according to Article 22 (10) of Regulation (EC) No. 874/2004, the failure of the Respondent to respond does not necessarily result in the Complainant’s claim being recognised. Instead, the Panel may consider such failure as grounds for accepting such claims. However, thought must also be given to the fact that providing proof that will totally convince the Panel may be successfully achieved in the rarest of cases. If strictly applied, this provision harbours the risk of Article 20 of Regulation (EC) No. 874/2004 being “dead law”. To prevent the norm established by Article 20 of Regulation (EC) No. 874/2004 being emptied of effective content, there are many grounds for providing at least some alleviation of the burden of proof in favour of a Complainant. However, alleviating the burden of proof based on presentation of a prima facie case is not a path that can be taken. According to general legal principles, prima facie evidence is possible only when certain facts are undisputed or fully proved, and a certain cause or consequence can be concluded, based on general experience of life, due to a typical sequence of events. This instrument of alleviating the burden of proof thus requires that a typical sequence of events exists in the specific case that indicates, based on experience of life, a certain cause or consequence and appears so normal and customary that the special individual circumstances in the particular case lose any significance (see ADR Panel Decision No. 2733 – HOTEL ADLON). When a domain name is registered in respect of which another person can appeal to an earlier right, there is no typical or typifiable sequence of events underlying the registration, according to which the registrant always has no right or legitimate interest in the domain name. This ensues, in particular, from Article 21 (2) c of Regulation (EG) No. 874/2004, according to which a legitimate and non-commercial or fair use of an identical domain name is possible when such use neither misleads consumers nor harms the reputation of the holder of a right.

However, the “negativa non sunt probanda” paroemia derived from Roman law (“negative facts are not proof”) does not provide any further assistance here, because Article 20 of Regulation (EC) No. 874/2004 has priority as regulatory law and the burden of proof can only be allocated in a divergent manner by the Panelist under specific conditions as further development of the law. But: “Law” is not identical to the totality of written laws. Compared to positive legislation, there may in certain circumstances be more law with its source in the constitutional legal systems in the Member States. Norms are also and always situated in the context of the social relations and societal/political ideas on which they are intended to have an effect. Therefore, in certain circumstances the content of legislation can

and must change with such relations and ideas. However, this only applies when living conditions and legal thinking have undergone deep-rooted changes between their initial establishment and subsequent application. This is far from being the case with Regulation (EC) No. 874/2004, so the Panelist cannot ignore the unamended wording of the Regulation with a reference to material notions of justice, and reverse the burden of proof in favour of the Complainant by freely applying the norm.

Therefore, only a reduction in the standard of proof can lead to a reasonable and appropriate solution. In the case of a lowered standard of proof, the requirement that the Panel be convinced of a truth is replaced by a judgement based on likelihood, linked to lower requirements regarding the burden of substantiation. For the Complainant, it is then sufficient to state and prove important, clear and congruent facts that are not invalidated by counter-indices, and which render it predominantly likely that the domain holder und Respondent cannot refer to its having rights or legitimate interests of its own in the domain name, whereby it is not necessary to establish this beyond a doubt. Indices suggesting that such rights or own legitimate interests in a domain name may exist can be, for example,

the registration of many trademarks that are not related to the business objects of the domain holder (ADR Panel Decision No. 1369 – OLYMPICS);

the absence of any web presence under the domain name, given that domain holders usually advertise for their goods and services or publish their personal profile under a domain name (ADR Panel Decision No. 2831 – SABANCI);

the statement “our website is under construction”, with a reference to the domain holder’s company, the name of which is not the domain name and/or which does not sell goods or services bearing the domain name or related name (similar to ADR Panel Decision No. 2035 – WAREMA; No. 1375 – RABBIN);

a link to third-party presences on the Internet (ADR Panel Decision No. 2727 – STAEDTLER);

a link to its own Internet presence under a different domain name for which no demonstrable link exists to the registered domain name (ADR Panel Decision No. 2596 – STUDIO79, DWBH).

Indirect facts can and must, therefore, be acceptable as evidence, since it is impossible to prove the facts in a direct manner. However, the indices must be suitable for drawing logical conclusions about the immediate facts of the case. Nor can it be overlooked that, as in any court proceedings, the parties have a duty towards each other in an ADR procedure to assist in elucidating the facts of the case (see also Article 22 (2) of Regulation 874/2004). If either party acts in breach of said duty, either by making an incomplete response or failing to respond, the obligation on the Panelist to clarify the facts of the matter is also reduced. This can likewise lead to a reduction in the standard of proof.

In considering the Complainant’s assertion that the domain holder has used neither the domain name nor any other name corresponding to the domain name, and that the Respondent does not operate a web presence under the domain name that has been checked by the Panel, and in consideration of the reduction in the standard of proof, the Complainant has therefore provided sufficient indices in the present procedure, in the view of the Panel, of its own rights, or that the Respondent does not have any legitimate interest of its own to the domain name.

3. Registration or use in bad faith

Bad faith within the meaning of Article 21 (3) a) of Regulation 874/2004 may be demonstrated where circumstances indicate that the domain name was registered primarily for the purpose of

(...) selling, renting or otherwise transferring the domain name to the holder of a name in respect of which a right is recognised or established by national and/or Community law(Article 21 (3) a of Regulation (EC) No. 874/2004); or

the domain name was registered to prevent the holder of such a name in respect of which a right is recognised or established by national and/or Community law, or a public body, from reflecting this name in a corresponding domain name (Article 21 (3) b of Regulation (EC) No. 874/2004);
or
the domain name was registered primarily for the purpose of disrupting the professional activities of a competitor (Article 21 (3) c of Regulation (EC) No. 874/2004); or

the domain name was intentionally used to attract Internet users, for commercial gain, to the website or other online location of a domain holder, by creating a likelihood of confusion with a name on which a right is recognised or established by national and/or Community law or with the name of a public body, such likelihood arising as to the source, sponsorship, affiliation or endorsement of the website or location or of a product or service on the website or location of the holder of a domain name (Article 21 (3) d of Regulation (EC) No. 874/2004); or

the domain name registered is a personal name for which no demonstrable link exists between the domain name holder and the domain name registered (Article 21 (3) e of Regulation (EC) No. 874/2004).

An offer to the Complainant to acquire the domain name has not been presented, nor is such an offer evident. There are also no indications that the domain holder has registered the domain in order to prevent the Complainant from using the domain name. Merely registering a free domain name – even minutes after it was released by the Register – does not constitute action in bad faith; this is because anyone resident in the European Union may request registration of a free domain name at any time through accredited registrars after the phased registration (see Article 3 of Regulation (EC) No. 874/2004). Furthermore, no circumstances have been presented, or are self-evident, which indicate that the Respondent registered the domain name with the intention of preventing the holder of a similar or identical name from using the domain name.

One cannot conclude, from the fact that the domain name has not been used so far for a web presence, that the domain name has not been used at all, since the domain name can be used for other Internet services, such as eMail, even without a web presence. Whether such use is being or has been made is doubtful given the failure of the Respondent to respond within the ADR procedure. However, the Complainant has not questioned such use, or even disputed such use with a plea of ignorance, so when assessing whether the domain name was registered in bad faith, the Panel must proceed on the assumption that the domain name is being used in same other manner, particularly since the two-year deadline pursuant to Article 21 (3) b) ii) of Regulation (EC) No. 874/2004, within which a domain name must have been used, has not yet expired. Although the Respondent has not declared its intention, pursuant to Article 21 (3) b) iii) of Regulation (EC) No. 874/2004, to use the domain name in a relevant way, the absence of such a declaration does not signify that the Complainant is exempted from its burden of proof pursuant to Article 21 (3) b) ii) of Regulation (EC) No. 874/2004. Article 21 (3) b) iii) of Regulation (EC) No. 874/2004 only provides the Respondent with an option to oppose the Complaint and does not lead to a reversal of the burden of proof in favour of the Complainant.

The Complainant has also failed to submit any evidence indicating that the domain name was primarily registered in order to disrupt the professional activities of a competitor. There are no indications that the domain holder and Respondent competes with the Complainant or with OcuNet GmbH & Co. KG, which the Complainant has obviously allowed to use its trademark. It is therefore irrelevant whether use of the trademark by OcuNet GmbH & Co. KG must be taken into account under Article 21 (3) c) of Regulation (EC) No. 874/2004 in favour of the Complainant, similar to the way third-party use is taken into consideration when establishing use of a trademark within the meaning of Article 10 of the Trademark Directive. In the latter, allowing third-party use of the trademark substitutes for the lack of identity between trademark proprietor and trademark user in the context of sanctions for non-use.

Although no apparent connection exists between the domain holder and the registered domain name, the name “ocunet” is not used by the Complainant, either. Instead, the registered domain name forms part of the company name of OcuNet GmbH & Co. KG. It is therefore questionable whether the Complainant can base its case at all on bad faith within the meaning of Article 21 (3) e of Regulation (EC) No. 874/2004. According to Article 22 (1) of Regulation (EC) No. 874/2004, an alternative dispute resolution procedure may be sought by anybody if registration of a domain name is speculative or abusive within the meaning of Article 22 (EC) No. 874/2004, so the crucial point is not whether the Complainant has own rights to the name of the limited partnership or not. Regulation (EC) No. 874/2004 also and explicitly permits an action popularis or citizen action to be lodged in the public interest against any domain registration that is speculative or abusive within the meaning of Article 22 of Regulation (EC) No. 874/2004. However, such an action can only request revocation of the registration, not transfer of the domain name, since an actio popularis expresses a public interest in revocation when grounds for such revocation exist.

In view of the foregoing, the Complainant has neither discharged its burden of proof that the Respondent acted in bad faith in registering the domain name, nor has the Complainant gained entitlement to transfer of the domain name on the grounds of bad faith.

4. Alternative relationship between the “right to or legitimate interest in the domain name” and “registration or use in bad faith”

Given that registration is deemed speculative and/or abusive within the meaning of Article 21 of Regulation (EC) No. 874/2004 when the Respondent cannot refer to having either rights to or a legitimate interest in the domain name or registration or use is in bad faith, the Complainant may request transfer of the domain name because, in the view of the Panel, it has made adequate submissions in the

present procedure, considering the indicated reduction in the standard of proof, that the Respondent has no rights to or any legitimate interest in the domain name.

DECISION

For all the foregoing reasons the Panel orders that

the domain name OCUNET be transferred to the Complainant.

PANELISTS

Name	**Dr. Lambert Grosskopf, LL.M.Eur.**

DATE OF PANEL DECISION 2007-01-12

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

1. Complainants bear the burden of proof:
1.1 that an earlier right and the domain name are identical or confusingly similar and
1.2.1 that the domain holder and Respondent cannot claim a right or legitimate interest of its own in the domain name
or
1.2 .1 that registration or use of the domain name is in bad faith.

2. Prima facie evidence that the domain holder and Respondent cannot claim a right or legitimate interest of its own in the domain name is possible, according to general legal principle, only when certain facts are undisputed or fully proved, and a certain cause or consequence can be concluded, based on general experience of life, due to a typical sequence of events. This instrument of alleviating the burden of proof thus requires that a typical sequence of events exists in the specific case that indicates, based on experience of life, a certain cause or consequence and appears so normal and customary that the special individual circumstances in the particular case lose any significance. When a domain name is registered in respect of which another person can appeal to an earlier right, there is no typical or typifiable sequence of events underlying the registration according to which the registrant always has no right or legitimate interest in the domain name. This ensues, in particular, from Article 21 (2) c of Regulation (EG) Nr. 874/2004, according to which a legitimate and non-commercial or fair use of an identical domain name is possible when such use neither misleads consumers nor harms the reputation of the holder of a right.

3. The “negativa non sunt probanda” (“negative facts are not proof”) paroemia derived from Roman law cannot be applied by the Panelist, because Article 20 of Regulation (EC) No. 874/2004 has priority as legislation and because the Panelist may only alleviate the burden of proof in deviation therefrom, as further development of the law, if living conditions and legal thinking have undergone deep-rooted changes – which is far from being the case with Regulation (EC) No. 874/2004. For this reason, the Panelist cannot ignore the unamended wording of the Regulation with a reference to material notions of justice, and reverse the burden of proof in favour of the Complainant by freely applying the norm.

4. In order to discharge the burden of proving negative facts as specified in Article 20 of Regulation (EC) No. 874/2004, a Complainant need only submit important, clear and congruent facts that are not invalidated by counter-indices, and which render it predominantly likely that the domain holder und Respondent cannot refer to its having rights or legitimate interests of its own in the domain name, whereby it is not necessary to establish this beyond a doubt (reduction of the standard of proof).

5. Regulation (EC) No. 874/2004 also and explicitly permits an action popularis or citizen action to be lodged in the public interest against any domain registration that is speculative or abusive within the meaning of Article 22 of Regulation (EC) No. 874/2004. However, such an action can only request revocation of the registration, not transfer of the domain name, since an actio popularis expresses a public interest in revocation when grounds for such revocation exist.

6. Merely registering a free domain name – even minutes after it was released by the Register – does not constitute action in bad faith; this is because anyone resident in the European Union may request registration of a free domain name at any time through accredited registrars after the phased registration.