Panel Decision for dispute CAC-ADREU-003590

Case number	**CAC-ADREU-003590**
Time of filing	**2006-10-26 12:04:37**
Domain names	**brochier.eu**

Case administrator

Name	**Tomáš Paulík**

Complainant

Organization / Name	**Stefan Oliver Wolf**

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, concluded or pending, which have rendered or will render a decision on the domain name in dispute.

FACTUAL BACKGROUND

1. Preliminary issue: Identification of the Complainant

The original complaint was filed in the name of Mr. Stefan Oliver Wolf. Nonetheless on a non-standard communication issued on October 26, 2006, Mr. Wolf clarified that the actual complainant was a company named Hans Bochier Holdings Limited. Such a communicatino did indicate that Mr. Wolf was acting as the legal representative of the said company in the development of the present proceeding.

Therefore, any reference made in the present to the Complainant must be understood as made for identifying Hans Bochier Holdings Limited.

2. History of the Request for Registration

2.1. On February 9, 2006 the Complainant -using the name filed a request for the registration of the domain name <BROCHIER.EU>, within the so-called Sunrise Registration Period.

2.2. On February 17, 2006, the Respondent received from the Complainant documentary evidence relating to its request of the disputed domain name. According to such evidence, the Complainant’s application was based on the company name "Hans Brochier Holdings Limited" protected in the United Kingdom. In order to prove so, the Respondent filed a c ertificate of incorporation dated November 23, 2005 statting that the company Hans Brochier Holdings Limited was incorporated as a United Kingdom limited company on February 12, 2003.

2.3. After having revised Complainant’s documentary evidences, the Respondent denied the Complainant’s application for the registration of the disputed domain name. In the corresponding notification to the Complainant, the Respondent based its decision on the fact that the Complainant had not been able to prove that the claimed company name was protected as required by Section 12.3 of the Sunrise rules. In addition, the Respondent indicated that such company name did not consist of the complete name of the applied domain name.

3. History of the ADR Proceeding

3.1. On October 23, 2006, the Complainant filed before the Czech Arbitration Court (hereinafter, the “Court”) a complaint (hereinafter, the “Complaint”) in English and selected this language as the one to apply in the present dispute-resolution proceeding.

3.2. On October 26, 2006, the Court verified the payment of the fees corresponding to this proceeding, issued an official acknowledgement of receipt of the Complaint, and required EURid to confirm the exactness of the technical information provided in the Complaint.

3.3. After reviewing the Complaint, the Court required the Respondent to amend it in order to make it fulfill the rules applying thereof. On November 10, 2006 the Court received an amended version of the Complaint which did already fulfill the above-mentioned requirements. Consequently, on November 14, 2006 the Court verified that the Complaint did not contain any administrative deficiency and, therefore, proceeded to notify the Respondent of the formal commencement of the proceeding. In this notification, the Respondent was granted a 30 working days for filing its response to the Complaint (hereinafter, the “Response”).

3.4. On December 28, 2006, the Respondent filed its Response before the Court which, after verifying it was not affected by any administrative deficiency, formally accepted it on December 29, 2006.

3.5. On January 2, 2007, the Court invited Mr. Albert Agustinoy Guilayn (hereinafter, the “Panel”) to serve as the panel charged with deciding on the dispute at the center of this proceeding.

3.6. On January 5, 2007, the Panel filed before the Court his statement of acceptance and declaration of impartiality and independence in order to decide on the dispute of this proceeding. Thus, on January 8, 2007 the Court notified the appointment of the Panel, indicating that a decision should be provided by January 28, 2007.

A. COMPLAINANT

The Complainant contends that it is the predecessor of Hans Brochier GmbH & co. KG which holds a German trademark registration based on the name "Brochier". The shares of the said company were sold in December 2004 to the firm Aubach Capital Partners, Ltd. As a consequence of such a purchase a new company named Hans Brochier Holdings Limited was incorporated under the United Kingdom law. This new resulting company does only develop its activities in Germany and, as a consequence, the company was registered in the trade register of Nürnberg.

During the development of this proceeding, the Complainant has also filed the following supplementary documents:

- A non-standard communication dated October 26, 2006 enclosing a letter from a German attorney confirming that Hans Brochier Holdings Limited is the legal successor of Hans Brochier GmbH & Co. with respect to all assets of the said entity. A translation in English of the above-mentioned letter was send by the Complainant by means of a non-standard comunication dated January 22, 2007; and

- A non-standard communication dated January 17, 2007 including a copy of the registration data referred to German trademark no. 2040859 "Brochier".

B. RESPONDENT

The Respondent contends that its decision rejecting the Complainant's application for registering the disputed domain name was based on the fact that, according to the documentary elements provided to it by the Respondent, the Complainant did not prove that it held a genuine prior right as required by Regulation (EC) No. 874/2004, dated April 28, 2004 (hereinafter, "Regulation 874/2007").

In connection with this point, the Respondent indicates that when the original application for registration of the disputed domain name the Complainant did not file any document which could deem that the alleged trade name -which bases the application of the registration of the disputed domain name- did fulfill the requirements set out by Regulation 874/2004 and the Sunrise Rules. The Respondent considers that all documentary evidence necessary for assessing whether or not, under the Sunrise Period, the applicant for a given domain name is entitled to register the domain name had been actually provided by the applicant itself, who holds such a burden. The Respondent indicates that section 21(2) of the rules applying to the Sunrise Period clearly states that the validation agent (and, hence, the Respondent) shall examine whether an applicant has a prior right to the requested domain name exclusively on the basis of a prima facie review of the set of documentary evidences it has received.

Taking into account such a rule, the Respondent contends that the documentary evidence submitted by the Complainant should stand on its own and prove that the Complainant was actually entitled to register the disputed domain name; that it held a genuine prior right to

it. The Respondent indicates that the filing made by the Complainant did not contain any document showing that the trade name alleged by the Complainant for supporting its application did fulfill the conditions set out by the applicable rules.

In addition, the Respondent indicates that should the said trade name be accepted as a prior right (which is not the case) it would not allow the Respondent to register the disputed domain name but merely a domain name corresponding to the name "Hans Brochier Holdings" which is the complete name for which the Complainant is registered.

DISCUSSION AND FINDINGS

As a point of departure, the Panel deems necessary to note that the object of this proceeding is to find out whether the Respondent's decision -rejecting the Complainant's application for the registration of the disputed domain name within the Sunrise Period- constitutes an infringement of Regulation 874/2004. This is to say, the core question posed in the present proceeding is to determine whether or not the Respondent's decision, denying the Complainant's application, constituted a breach of the said Regulation or any other set of rules applying to .EU domain names.

In this sense, it is important to note that the above-mentioned question is closely related to the provision of evidences by the Complainant in connection with its prior right to the disputed domain name, according to the conditions and timeframe foreseen by Regulation 874/2004 and the rules applying to the Sunrise Period. As a matter of fact, the registration of domain names during the Sunrise Period is an exception to the general 'first-come, first-served' principle. Therefore, such an exception must be strictly applied fulfilling the regulatory framework set forth by Regulation 874/2004. As a consequence of the above, in this proceeding the Respondent's behaviour must be analyzed taking into account the evidences provided at the moment of filing its application.

Moreover, given the particular nature (and the specific regime foreseen by Annex 1 of Regulation 874/2004 and Section 12.3 of the Sunrise Rules) of a trade name as alleged by the Complainant, the Respondent should have been provided by the Complainant with the following two evidences in order to be entitled to claim the acceptance of its application:

- An affidavit signed by a competent authority, legal practitioner or professional representative, accompanied by documentation supporting the affidavit, or

- A relevant final judgment by a court or an arbitration decision of an official alternative dispute resolution entity competent in at least one of the member States of the EU.

In both cases such filed documents should clearly state that the name for which a prior right was claimed by the Complainant met the conditions set out by the applicable law in relation to such a type of prior right. As previously indicated, the concerned prior right was based on a commercial name under the law of the United Kingdom. Therefore, the evidences filed by Complainant should have allowed a prima facie recognition by the Respondent –as indicated by Section 21.2 of the Sunrise Rules- of the existence of rights by the Complainant in passing-off in connection with the alleged commercial name. In this sense, previous ADR decisions (see, for example decisions in ADR 3226 (CARAVANCLUB) and in ADR 2957 (GAYROMEO) have already indicated that, in cases where a trade name protected under passing-off rights is alleged, mere registration extracts are not enough.

In accordance with the above-described requirements, the documentation filed in connection with the trade name alleged by the Respondent in order to prove the existence of a prior right was insufficient to allow the Respondent to allow a prima facie recognition of the existence of such a prior right as required by Regulation 874/2004 and the Sunrise Rules.

Indeed, as agreed by both the Complainant and the Respondent, the original filing of the Complainant only contained a certification of incorporation stating that Hans Brochier Holdings Limited was incorporated as a UK company on February 12, 2003. No other documentary evidences (such as, for example, a license-agreement relating to the registered “Brochier” German trademark, held by the Complainant’s apparent “predecessor”, the German company named Hans Brochier GmbH & Co. KG).

Taking into account the exceptional regime applying under the Sunrise Period to trade names as the one alleged by the Complainant, the Panel considers that, taking into account the documents originally filed by the Complainant, there exist significant doubts on such documents being considered as convincing enough in order to state that the Complainant must be considered as holding passing-off rights on the alleged trade name. The Panel does not practise under United Kingdom law but considers that, taking into account the criteria set out by Regulation 874/2004, the Sunrise Period Rules and precedent ADR decisions, the Complainant did not originally file convincing and strong evidences on its rights on a UK tradename in such a way that it could be considered as “prior right” as foreseen under regulation 874/2004. Such a conclusion is reinforced by the fact that, as recognized by the Complainant itself, it does not develop any activity in the United Kingdom but focuses them in Germany.

Having stated so, the following issue to be posed is which degree of diligence and care should be required of the Respondent in connection with the evaluation of the applications filed during the Sunrise Period. Such an issue has been recurrently analyzed by a large number of previous decisions (for example, decisions in Case ADR 249 (COLT); Case ADR 954 (GMP); Case ADR 1549 (EPAGES); Case 1674 (EBAGS); or Case ADR 2124 (EXPOSIUM). In this respect, the panels have persistently considered –as above- that, given the large amount of applications filed during the Sunrise Period and the limited amount of time and resources of the Respondent in order to decide on such applications, only a prima facie revision could be reasonably required from the Respondent.

This reasoning leads the Panel to consider that any analysis of such filings should be strictly based on the documentation filed by the applicant, without the Respondent being obliged to pursue further investigations in case the said documentation was insufficient in order to prove the actual holding of a prior right on the requested domain name by the applicant. Many decisions (for example, decisions on Case ADR 551 (VIVENDI); Case ADR 810 (AHOLD); or Case ADR 1194 (INSURESUPERMARKET) have even taken a step further by indicating that proceedings as the present one cannot be a “second chance” for applicants which have provided incorrect or incomplete documentation on the alleged prior rights. Therefore, any analysis on this type of issues should be strictly limited to the documentation originally filed with the corresponding application before the Respondent.

Taking into account the above-described arguments, it seems clear that the analysis to be applied in this case should be limited to the documentation filed in the original application for registration of the disputed domain name. In this respect, and taking into account the evidence provided by the parties, it seems clear to the Panel that, when evaluating the said application, the Respondent was unable to find that the Complainant held a valid prior right, as no concrete documentation proving the holding of passing-off rights (as recognised under United Kingdom law) on the alleged trade name had been included by the Complainant in its application. Having practiced a reasonable and sufficient analysis, the Respondent was, therefore, forced to deny the Complainant’s application due to the lack of coherence between the request and the filed documentation.

These conclusions do not change after considering the documents filed by the Complainant by means of non-standard communications. Indeed, as indicated above, in order to judge the vallidity of the decision adopted by the Respondent the Panel must only consider the documents that were provided to it by the Complainant. These documents were not supplied by the Complainant when it filed its application before the Respondent so, according to the criteria described above by the Panel, they should not change the previously indicated conclusions.

Given the above-described circumstances, the Panel must consider the decision adopted by the Respondent as valid and did not infringe upon Regulation 874/2004 or any other applicable regulation. Taking into account such a conclusion, the Panel does not deem necessary to analyze the other issues posed by the parties in the corresponding writs.

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	**Albert Agustinoy**

DATE OF PANEL DECISION 2007-01-28

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant applied for the domain name ”brochier.eu” during the Sunrise period. The claimed prior right was the company name “Hans Brochier Holdings”. To prove the existence of the prior right the Complainant submitted a company-registration certificate. The Respondent refused the application on the grounds that the submitted material did not establish the claimed prior right, that is to say, the company name. The Panel concluded that in this case the registration certificate provided by the Complainant was insufficient proof of the existence of the company name.