Panel Decision for dispute CAC-ADREU-003889

Case number	**CAC-ADREU-003889**
Time of filing	**2006-11-29 13:17:21**
Domain names	**wery.eu, verbiest.eu, vandenbulck.eu, deneuter.eu**

Case administrator

Name	**Tereza Bartošková**

Complainant

Organization / Name	**ULYS, M. Etienne WERY**

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

The Complainant in this case is the company ULYS, which consist of the following five partners:

Joost Verbeek,
Paul Van den Bulck,
Etienne Wery,
Thibault Verbiest and
Didier Deneuter.

These five persons applied in the so called Sunrise 2-period for the five domain names corresponding to each of the person's surname VERBEEK.EU, VANDENBULCK.EU, WERY.EU, VERBIEST.EU and DENEUTER.EU.

All the applicants applied for the respective domain names based on prior rights in the category "company name, trade name or business identifier". All the applications were ranked in first position for each domain name.

The applicants sent in each case documentary evidence to the validation agent in due time. The validation agents accepted the application for VERBEEK.EU but rejected the four other applications.

The Complainants (consisting of Paul Van den Bulck, Etienne Wery,
Thibault Verbiest and Didier Deneuter) request that EURid's (the Respondent's) decisions to refuse the four applications be annulled and that the domain names be transferred to each respective applicant.

Subsequent to the filing of respectively the Complaint and the Response a non-standard communication has taken place. It will be included in this decision as far as it is relevant to the case.

A. COMPLAINANT

The Complainants' main arguments are as follows:
• The Respondent wrongfully rejected the Complainants' applications, since the submitted documentation for prior rights was correct and submitted in due time.
• The Respondent has acted in a discriminatory way by rejecting the four applications, but accepting another application (from the fifth

partner of the same company – ULYS) which was roughly identical with the four other rejected applications.

The Complainants' submitted each the following documents as proof of their prior rights:

1. Copies of the company ULYS' letterhead with their names on it,
2. Copies of book covers and articles that the applicants authored, and
3. an attestation/official certificate from the Brussels Bar (Barreau de Bruxelles, Ordre Francais des Avocats) drafted in respectively French and Dutch.

In the view of the Complainants this documentary evidence satisfies the criteria set out in Regulation (EC) 874/2004 (hereinafter the Regulation) and the Sunrise Rules (hereinafter the Rules).

As evidence hereof the Complainants have referred to the fact that Mr. Verbeek's application was granted although it was substantiated by exactly the same documents as the others which were refused (except that each application was of course personalized).

This is according to the Complainant enough to accept the Complaint and annul the Respondent's decisions to reject the four other applications.

Furthermore, the Complainants assert that by treating the Applicants differently, the Respondent violated its most fundamental obligation; to observe transparent and non-discriminatory procedures, as laid down in e.g. Article 4 of Regulation (EC) 733/2002 and which also appears from the Regulation.

On these ground the Complainants allege that the Respondent's decisions to refuse the four applications conflict with the Regulations (EC) 733/2002 and 874/2004, cf. Article 22 of Regulation (EC) 874/2004.

By non-standard communication the Complainants have furthermore asserted the following arguments:

Delay of Response
The Complainants state that the Response was not submitted in due time within the time limit of thirty (30) working days from the notification of the Complaint to the Respondent.

Case no. 3828
The Complainant has drawn the Panel's attention to the decision in case no. 3828 (PARISHOTELS.EU).

From the Complainants' point of view this case supports their arguments with respect to the alleged discriminatory behaviour conducted by the Respondent. The Complainant refers to the Panel's ruling about the matter namely the sentence: "As the two domain name applications PARIS-HOTELS.EU and PARISHOTELS.EU were identical the Registry should have accepted both applications."

The Panel in this case refers to the obligation of the Registry (the Respondent) to observe transparent and non-discriminatory procedures, cf. Regulation (EC) 733/2002 Article 4(2)(b) and to comply with the general principle of equality of treatment.

Official register
In the reply to the Respondent's response the Complainants have drawn the Panel's attention to the issue of registration in an official register, cf. Section 16(5)(i).

The Complainants stress that they are not subjects to registration in the Belgium register mentioned by the Respondent. The only registration in a public and official register a lawyer might provide in Belgium is registration in the Bar. Therefore the registration in the Brussels Bar Association - in the Complainants' view – is the only and correct place of registration in accordance with section 16(5)(i) of the Rules.

B. RESPONDENT

The Respondent's main arguments are as follows:
• The submitted documents from the Complainants were not proof of a prior right. The Complainants have therefore submitted insufficient evidence proving rights to the names and the Respondent rightfully rejected the applications.
• The Respondent has not acted in a discriminatory way by rejecting four applications and accepting one. The Validation agent made a mistake by accepting one application, but that mistake does not establish discriminatory behaviour.
• Even if the documentary evidence was deemed sufficient to establish the claimed prior right, the applications should still have been

rejected because the alleged trade names do not consist of the complete names of the domain names applied for, cf. Article 10(2) of the Regulation (e.g. Paul Van den Bulck could have applied for paulvandenbulck.eu and not vandenbulck.eu).

In accordance with Article 14 of the Regulation the applicants shall submit documentary evidence showing that he or she is the holder of the prior right claimed to the name in question.

The burden of proof is on the applicants to substantiate that they are the holders of the claimed prior rights, and the relevant question is therefore not whether or not the Complainants are holders of prior rights, but whether this is demonstrated by the submitted documentary evidence, cf. case no. 1886 (GBG.EU).

The Applicants claim to be holders of prior rights to "company name, trade name or business identifier" and therefore they need to prove the existence of the claimed rights in accordance with sections 16(4) and 16(5) of the Rules.

The documents did not contain a certificate of incorporation as required under section 16(4) to establish proof of prior right to a "company name". Neither did the documents contain an abstract from the official register for trade names (the Respondent has referred to such a potential register in the Response), cf. section 16(5)(i) of the Rules.

In the Respondent's view the validation agent did correctly find that the Applicants did not meet the burden of proof to establish the claimed prior rights and therefore the Respondent correctly rejected the four applications.

The Respondent refuses to have acted in a discriminatory way by having rejected four applications but accepted one.

If the documentary evidence submitted by Mr. Verbeek was similar to the documentary evidence filed with the four domain names subject to this proceeding, the Respondent made a mistake by accepting this application.

The legality of the Respondent's decision may not be assessed based on previous applications dealt with by the validation agent, which is clearly stated in section 22(4) of the Rules and which is also reinforced by the reasoning followed by the Court of First Instance in the Case T-123/04 (Cargo Partner AG v. OHIM).

On these grounds the Respondent requests that the Complaint be denied by the Panel.

By non-standard communication the Respondent has further assessed the following statements:

Case no. 3828 (PARISHOTELS.EU)
Article 4 of the Regulation (EC) 733/2002 does not concern the relation between one specific decision and another decision but the general procedures of the Registry.

The Respondent refers to several previous ADR decisions which in the Respondent's view confirm that two conflicting decisions does not automatically have as a consequence that the procedures of the Respondent are discriminatory.

Prior decisions cannot serve as precedents and force the Respondent to duplicate its errors. The Panel is not bound by earlier decisions but only by the Regulation.

Section 16(5)(ii)
The Respondent has finally stressed that if for any reason the Complainants were unable to provide the appropriate documents, they should then have provided documentary evidence as referred to in section 12(3) of the Sunrise Rules, cf. section 16(5)(ii) of the Rules.

However, the Complainants did not submit such documentary evidence.

DISCUSSION AND FINDINGS

Initial the Panel notes that the Complaint is filed by the company ULYS. The Panel considers ULYS as acting on behalf of the four Applicants whose applications were rejected (the Complainants) (ADR Rules Section B.1.a).

With regard to the alleged delay of the Response the Case Administrator has clarified this issue by non-standard communication and has informed that due to the Respondent's failure to electronically confirm the reception of the Complaint (within five days) it had to be delivered by postal service, cf. the ADR Rules A 2(b). This extent the time limit with 12 days, in accordance with the ADR Rules A 2(e)(3). The total time-limit for submitting the Response is pursuant to these provisions seventeen days (12 + 5) days, plus thirty (30) working

days.

With regard to the mentioned provisions and the Case Administrator's statement, the Panel finds that the Response was submitted in due time.

The Panel must hereafter consider whether or not the Respondent rightfully rejected the applications on the ground that the documentary evidence was insufficient.

All the Complainants applied for the respective domain names based on prior right to "company name, trade name or business identifier". They submitted documentary evidence consisting of in each case:

1) copies of the lawfirm ULYS' letterhead with their names on it and with mention of their quality of partner (associé/vennoot) of the lawfirm,
2) copies of book covers and articles that the applicants authored, and
3) an attestation (official certificate issued by the Brussels Bar) merely confirming that the named person is qualified to act as an attorney.

Consequently, the question will be whether these documents comply with the requirements, which in this respect are listed in the Sunrise Rules section 16.

Since the disputed domain names consist of each of the applicants' surname and are not official incorporated or registered as company names, the Panel finds it irrelevant to consider if the Complainants have proven prior rights to the names under the category of company names pursuant to section 16(1), see also section 16(2).

In this case the Panel must consider whether or not the Complainants have provided documentary evidence for trade names or business identifiers, which are regulated by the provisions in section 16(2) or 16(3) and 16(5).

Section 16(5) of the Rules states that:
"Unless otherwise provided in Annex 1 hereto, it is sufficient to submit the following documentary evidence, for trade names and business identifiers referred to in section 16(2) respectively 16(3):

(i) where it is obligatory and/or possible to register the relevant trade name or business identifier in an official register (where such register exists in the member state where the business is located):

a. an extract from that official register, mentioning the date on which the trade name was registered; and
b. proof of public use of the trade name or business identifier…"

(ii) where registration is not obligatory, the Documentary Evidence referred to in Section 12(3) hereof.

Section 12(3) states:
…
(i) an affidavit signed by a competent authority, legal practitioner, or professional representative, accompanied by documentation supporting the affidavit or
(ii) a relevant final judgment …

The Respondent argues that it is possible to register trade names in Belgium and have submitted evidence hereof in the form of a link to such a register.

The Complainants, however, refuse that it is possible for them – as attorneys - to be registered in this register and that the relevant register in this case is the Brussels Bar Association in which they are all registered.

Based on the provided material the Panel does not find that it has been established that the Complainants could/should have registered their names as trade names in the register referred to by the Respondent.

Therefore, it is relevant to consider whether the provided attestation from the Bar Association is sufficient documentation to consider the names as a trade name or business identifier.

In the Panel's view it is very doubtful whether this is the case. The attestations are drafted in French and Dutch, but the Complainants have provided a rough translation of the most relevant parts hereof. The attestations are merely certificates from the Brussels Bar Association confirming that the named person is qualified to act as an attorney.The purpose of such a register does not seem to be to protect trade names.

Moreover it results from the letterhead provided by the Complainants that the trade name or business identifier of the lawfirm of they are all partners is "Ulys" and not their respective names. The Complainants have the burden of proof to provide the necessary documentation. The Panel does not find that the Complainants have demonstrated the necessary prove according to Section 16 (5) and 12 (3) that their respective names have to be considered and protected as business identifier.

Nevertheless, this has in fact no relevance, since the Complainants have applied for domain names corresponding to their surnames, and not their full names (which are listed in the provided documentation from the Bar Association).

Article 10(2) of the Regulation states that registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists.

Accordingly, even if the documentary evidence would be deemed sufficient to establish the claimed prior rights, the applications should under all circumstances have been rejected, because the alleged trade names do not consist of the complete names of the domain names applied for.

The Complainants should thus have applied for the domain names: PAULVANDENBULCK.EU, ETIENNEWERY.EU, THIBAULTVERBIEST.EU and DIDIERDENEUTER.EU. This has not been done.

For the sake of order the Panel also notes, that the Complainants have not provided any documentation pursuant to section 16(5)(ii) which requires the following:

"(ii) where registration is not obligatory, the documentary evidence referred to in section 12(3) hereof."

According to this provision the Complainants could have submitted documentary evidence containing of an affidavit signed by a competent authority, legal practitioner or professional representative accompanied by documentation supporting the affidavit or a relevant final judgment. This under the precondition that the name is famous, well known ect., cf. section 12(3).

Such documentation has not been provided.

With regard to the alleged discriminatory behaviour from the Respondent the Panel finds that a mistake made by the validation agent/Respondent is not something that other applicants alone can base their claims on.

By alleging discriminatory behaviour the Complainants have the burden of proof that the Respondent's intention was to discriminate the Applicants. Such intent has not been proven. On the contrary, it seems to be due to an unfortunate and criticisable mistake that the applied domain names have been treated differently.

In the referred ADR decision in case no. 3828 (PARISHOTELS.EU) the Panel found that EURid had made a mistake by rejecting the application for the domain name PARISHOTELS.EU, and found that EURid had violated its obligation to observe transparent and non-discriminatory procedures, cf. Article 4(2)(b) of Regulation (EC) 733/2002. The Panel therefore annulled an incorrect decision.

Case no. 3828 is fundamentally different from this case since in this case the Respondent's decisions to reject the applications are in conformity with the applicable law, hereunder namely the Regulation. This was not the case in no. 3828. If the Panel complied with the Complainants' request it would in fact make a decision that would not comply with the Regulation.

It is the Panel's clear opinion that one mistake does not justify committing four new mistakes.

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	Enrique Batalla

DATE OF PANEL DECISION 2007-03-19

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Five persons from the company ULYS applied in the Sunrise 2-period for the domain names corresponding to each of the person's surname based on prior rights in the category "company name, trade name or business identi-fier".

The submitted documentary evidence consisted of roughly identical material, which was personalized for each application.

The Respondent (EURid) accepted the application for one domain name but rejected the four other applications.

The four Complainants' filed a Complaint with the following main arguments:
• The Respondent wrongfully rejected the Complainants' applications, since the submitted documentation for prior rights was correct and submitted in due time.
• The Respondent has acted in a discriminatory way by rejecting the four applications, but accepting another application (from the fifth partner of the same company – ULYS) which was roughly identical with the four other rejected applications.

The Respondent responded with the following main arguments:
• The submitted documents from the Complainants were not proof of a prior right and the Respondent rightfully rejected the applications.
• The Respondent did not act in a discriminatory way by rejecting four applications and accepting one. The Validation agent made a mistake by accepting one application, but that mistake does not establish discriminatory behaviour.
• Even if the documentary evidence was deemed sufficient to establish the claimed prior right, the applications should still have been rejected because the alleged trade names did not consist of the complete names of the domain names applied for, cf. Article 10(2) of the Regulation.

The Complainants submitted documentary evidence consisting of in each case:

1) copies of the company ULYS' letterhead with their names on it,
2) copies of book covers and articles that the applicants authored, and
3) an attestation (official certificate issued by the Brussels Bar).

The Panel examined if these documents fulfilled the requirements of section 16 of the Rules, namely whether or not the submitted attestation complied with section 16(5)(i) which requires submission of an extract from an official register in which it is obligatory and/or possible for the Complainants to register in.

The parties disagreed whether or not registration in the Bar Association was correct and sufficient in accordance with section 16(5)(i) of the Rules.

The Panel did not find that the Complainants had demonstrated the necessary prove according to Section 16 (5) and 12 (3) that their respective names were to be considered and protected as business identifier.

Moreover, the Complainants had applied for domain names corresponding to their surnames, and not their full names (which were listed in the provided documentation from the Bar Association).

Article 10(2) of the Regulation states that registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists.

Accordingly, even if the documentary evidence had been deemed sufficient to establish the claimed prior rights, the applications should under all circumstances have been rejected, because the alleged trade names did not consist of the complete names of the domain names applied for.

By alleging discriminatory behaviour the Complainants have the burden of proof that the Respondent's intention was to discriminate the

Applicants. Such intent was not proven.

On these grounds the Panel denied the Complaint.