Panel Decision for dispute CAC-ADREU-003949

Case number	CAC-ADREU-003949
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Domain names	acl.eu

Case administrator

Name	Tereza Bartošková

Complainant

Organization / Name	Alexis Coussement Lumières, Alexis Coussement

Respondent

Organization / Name	OVIDIO LIMITED, OVIDIO LIMITED

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 legal proceedings related to the disputed domain name.

FACTUAL BACKGROUND

A complaint is lodged on December 7, 2006 by Alexis Coussement Lumières, owner of a French trademark registration for ACL dated November 8, 2005 and is directed against Ovidio Ltd, which registered the domain name ACL.EU on November 7, 2006.

In response to the Complainant's claims that it has no legitimate interest in the domain name for it simply parks the same, the Respondent explains that it uses descriptive domain names in the framework of a business model named "Direct Navigation", the purpose of which is to ease internet users' searches on the Internet. The Respondent asserts that ACL is a generic acronym which it uses in its descriptive meaning.

On March 1st, 2007, the Panel has invited the parties to provide further explanations and arguments ; the Respondent filed a supplementary memorandum on March 10, 2007. The Complainant did not.

A. COMPLAINANT

The Complainants explains that it owns a French trademark registration for ACL filed on November 8, 2005 and granted on April 14, 2006, and that it has developed its business under the name ACL for about 10 years.

Its first applications to register the domain name ACL.EU dated January 9, 2006 and February 7, 2006 were rejected respectively because earlier rights had not been substantiated on time, then because it was grounded upon a pending trademark application.

When the Complainant filed a third application on November 7, 2006 for the said domain once its trademark application had matured into registration, it discovered that the Respondent had registered the domain name ACL.EU.

The Complainant considers that the registration of the disputed domain name is detrimental to its rights in that :

- the Respondent has no right or legitimate interest in the domain name ;
- the term ACL is not generic ;
- the Respondent uses the domain name in bad faith as 1) it directs the same to a web site in which no page or link contains the name ACL, 2) it simply parks the domain name on the SEDO platform in order to benefit from financially sponsored links.

The Complainant cites earlier ADR cases, namely Case No. 02381 Haji GmbH vs. Ovidio Ltd. and Case 02123 Unibail Holding SA vs.

Ovidio Ltd which both ruled against the Respondent.

The Complainant has not replied to the Panel's invitation to file additional arguments or observations against the Respondent's response and to explain the reason why it thought that the Respondent had its trademark in mind when it registered the disputed domain name.

B. RESPONDENT

The Respondent explains what its business is and emphasizes that it does not register domain names for sale and does not park its domain names ; it organizes so-called "Direct Navigation".

It states that it does not offer its domain names for sale and that it has engaged into policy of respecting third parties'IP rights, in particular trademark rights.

The Respondent further justifies the registration of the disputed domain name by the fact that the acronym ACL is descriptive as its stands as an abbreviation for "Anterior Cruciate Ligament" as well as "Access Control List".

The Respondent emphasizes that the Complainant does not supply evidence that it uses the name ACL since 1997 and points out that the trademark rights of the Complainant over the name ACL are limited to a very limited scope of business.

The Respondent requests that the documents filed by the Complainant but which have not been translated into English are found not admissible.

It also sustains that the Complainant has failed to prove its case, namely its earlier rights in the name ACL and the violation thereof.

The Respondent asserts that it has a legitimate interest in the disputed domain name because it uses the name ACL in its descriptive meaning.

The Respondent asserts that its domain name-related web page is not the one filed by the Complainant in support of its Complaint, and thus implies that the document upon which the Complainant relies would have been tampered.

Finally, the Respondent states in its complaint that the ADR cases 2381 and 2123 which the Complainant relies upon have in fact been reversed and nullified by a National Court.

But in the supplemental response filed by the Respondent, upon request of the Panelist, it specifies that in fact, an action is pending before a Cyprus Court and that the ADR cases 2381 and 2123 have not been reversed or nullified.

DISCUSSION AND FINDINGS

The Panel is to decide, in view of the facts and arguments of the parties, whether the conditions of article 21 of Reg. No. 874/2004 are satisfied to decide whether the disputed domain name should be transferred to the Complainant or not.

ON THE EARLIER TRADEMARK RIGHTS ISSUE

Article 21. Reg. No. 874/2004
"A registered domain name shall be subject to revocation […]
where that 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, such as the rights mentioned in Article 10(1)"

The Panel finds that the trademark rights vested in the name ACL in France claimed by the Complainant are clearly substantiated. The Complainant owns a registration granted by the French Trademark Office for the wordmark ACL, protected in relation with lighting equipment. In relation with such goods, the term ACL appears fanciful and distinctive in the Panel's opinion.

The fact that the disputed domain name is identical to the Complainant's trademark is indisputable.

ON THE LEGITIMATE INTEREST ISSUE

Article 21. Reg. No. 874/2004

"A registered domain name shall be subject to revocation […] where it:
(a) has been registered by its holder without rights or legitimate interest in the name;"

In this respect, the Panel observes that there is no element in any of the documents filed by the parties which would evidence that : prior to any notice of an alternative dispute resolution (ADR) procedure, the Respondent has used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so; or that : the Respondent has been commonly known by the domain name, even in the absence of a right recognised or established by national and/or Community law, in the meaning of Article 21.2 of Reg. No. 874/2004.

The Respondent does rely upon paragraph c) of aforesaid provision to sustain that it has a legitimate interest in the disputed domain name, namely that it is making a fair use of the name ACL in its descriptive meaning.

It has been established by the Respondent that indeed, the name ACL has at least two descriptive meanings ; it is an acronym for “Anterior Cruciate Ligament” and for “Access Control List”, respectively commonly used in the medical and computer networks fields.

The question is to determine whether the Respondent, at the time when the Complaint was filed, was making a legitimate use of a descriptive term, namely whether it was using the domain name “acl.eu” in relation with a web site dedicated to the subject matters of “Anterior Cruciate Ligament” or “Access Control List”.

The Complaint was filed with the Centre on December 7, 2006. In support thereof, the Complainant produces the print out of a web page dated December 4, 2006 which describes as follows :
- the URL address at the right upper corner is : http://www.sedoparking.com/acl.eu
- the first line at the top of the page is formed with a series of hyperlinks formed with French names : “voyage, musique, ordinateurs, jeu, promotion, internet, saint ?; shopping, finance, erotique” corresponding to the following categories : travel, music, computers, game, sales, internet, saint ?, shopping, finance, erotic.
- the second line is occupied by the domain name ACL.EU in large characters ;
- underneath the domain name is a menu list of various sponsored links towards Hewlett Packard, SFR (a French mobile phone company), AlJazeera (a TV channel), Cisco (telecommunication networks), Olfeo (anti-spam services), E-Bay (online auction sales, in particular in the present case for the sale of “Converse” brand shoes), etc.
- in the right down corner of the page is another menu entitled AUTRES LIENS (other links) followed by the same categories as in the first line.

The Panel must observe that none of the links contained in this web page relates to “Anterior Cruciate Ligament”, namely one of the ligament of the knee, or to “Access Control List”, namely systems for enabling or disenabling computer networks user to access to certain data.

Even if some of the links are directed to web sites operated by companies involved in the business of computers, none appears to be specifically dedicated to the very and specific topic of “Access Control List”.

According to this web page, it rather appears to the Panel that the disputed domain name was simply parked on the web site www.sedoparking.com, thus enabling the domain name holder to collect a financial remuneration proportional to the number of connections to the parking website and activated sponsored links operated through the parked domain name.

The Panel is well aware that the Respondent denies parking its domain names and explains that it is involved in the business of so-called Direct Navigation which is legitimate per se, and which consists in making searches on the internet easier and quicker by directing internet users to a web page and links dedicated to one specific subject matter, as described by the corresponding domain name.

The Panel tends to concurs with this general statement and acknowledges that such a business is not reprehensible as such as long as it focuses on generic or descriptive domain names and does not interfere with third parties’ rights.

But it must be observed that in the case at issue, the use of the domain name as evidenced by the documents filed in support of the Complaint does not seem to be consistent with the business model which the Respondent describes.

The Respondent accuses the Complainant to ground its Complaint on a fake web page and claims that the genuine web page to which the disputed domain name is directed is in fact different.

It submits thus a different web page, quite comparable to that lodged by the Complainant, but in which the URL is no longer that of SEDO

but rather http://www.ecl.eu, and most of all in which the sponsored links are all dedicated to anterior cruciate ligament and knee injury.

The Panel however observes that this page :

- is not dated ;
- is a copy-paste of a screen image and not a print-out of a web page ;
- shows the URL http://www.ecl.eu in the search zone of the Internet Explorer browser only, and not at the bottom of the page as usually when a web page is printed.

Even though it is a rule that Panelists must only decide cases in light of the documents submitted by the parties and it does not belong to Panelists to conduct their own investigations, the Panel has to determine which of the two pages filed by the parties is the genuine one, or more exactly the one which was on line at the time when the Complaint was filed.

The Panel therefore has checked the domain name www.ecl.eu on its own computer terminal on March 30, 2007.

The accessed page is different from that submitted by the Complainant.

It is almost identical to the page filed by the Complainant : the graphics, heading and the listed general categories at the top of the page are the same. It is only the sponsored links which are slightly different : some refer to computer companies (but not specifically dedicated to so-called "Access Control List"), other refer to photo lenses, oil capsules, military and police training centers, etc.

None of those links relate at any moment to web pages or contents dedicated to “Anterior Cruciate Ligament” or knee injuries, or to “Access Control List” or systems for enabling or disenabling computer networks user to access to certain data.

It therefore clearly appears to the Panel that the Respondent’s accusation that the Complainant would have tampered the web page now turns again the Respondent.

The Panel is now convinced that the Respondent has either submitted a “constructed web page” in support of its Response or modified for a short period of time its web site, in an attempt to justify that it is making a fair use of the name ACL in its descriptive meaning.

The truth is that, at the time when the Complaint was lodged, and again at the date when the Panel examined the case, the Respondent was using the disputed domain name in the framework of a parking scheme, totally unrelated to the descriptive meanings of the acronym ACL, rather than in the context of a legitimate “Direct Navigation” model.

The Panel concludes not only that the Respondent has no legitimate interest in the domain name, but besides that it has used fraudulent manoeuvres to deceive the ADR Centre.

ON THE BAD FAITH ISSUE

Article 21. Reg. No. 874/2004
"A registered domain name shall be subject to revocation […]
… where it:
(b) has been registered or is being used in bad faith."

In the Panel’s opinion, the above-described misleading behaviour reveals that the Respondent has not registered the domain in good faith with a genuine intent to make a legitimate use of the same, namely for supporting an effective offer of information, goods or services related to so-called “ACL” (Anterior Crucial Ligament or Access Control list).

Contrary to what the Respondent asserts, it has simply parked the domain name ACL.EU for commercial gain with a view to misleadingly attracting internet users, supposedly interested in Anterior Crucial Ligament or Access Control List, to a parking web page which is not in fact related to said topics.

Earlier ADR cases 2123 and 2381 have already been ruled against the Respondent on the very same grounds, thus revealing a pattern of conduct of the Respondent.

In this respect also, the Panel notices that the Respondent has again attempted to distort the truth.

In its first Response, the Respondent asserted that the two above cases have been nullified by a Cyprus Court, and when requested to justify so by the Panel, the Respondent changed its version of the facts and admitted that recourses were simply pending against said cases.

Finally, the Panel finds that the Respondent has used the domain in bad faith.

Upon receipt of the Complaint, the Respondent became aware that trademark rights vested in the name ACL were claimed.

Yet, contrary to its so-called “Trademark Policy”, the Respondent refrained from granting back the domain name to the Complainant, but rather undertook to modify its web page in an attempt to justify that it was a making a legitimate use of the name ACL in its descriptive meaning.

This is constitutive of use in bad faith.

The Panel may accept that the Respondent did not have the Complainant’s mark in mind when it registered the disputed domain name, but it clearly transpires from the facts of the case that the Respondent not only did not register the domain name in good faith or with a legitimate interest, and besides artificially attempted to “create” a good faith use of the domain name after having become aware of the Complainant’s legitimate rights over the name ACL.

On the other hand, the Complainant has evidenced that it has a right and legitimate interest in the disputed domain name.

The Panel finds that the Complainant satisfies the general eligibility criteria for registration set out in Paragraph 4(2)(b) of Regulation (EC) No 733/2002.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that

the domain name ACL be transferred to the Complainant.

PANELISTS

Name	**William Lobelson**

DATE OF PANEL DECISION 2007-04-03

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant grounds its action upon a French trademark registration for ACL filed prior to the disputed domain name and alleges that the Respondent has no legitimate interest in, and does not make a bona fide use of the domain name ACL.EU for the same is only parked in a miscellaneous sponsored links web page.

The Respondent replies that the domain name is not parked, but rather legitimately used in the framework of a so-called Direct Navigation business : the acronym ACL being generic for “Anterior Cruciate Ligament” and “Access Control List”, the domain name ACL.EU would point towards a portal web page dedicated to the subject matters of knee injuries and computer networks access data technology.

But it appears from the documents supplied by the parties in support of their respective arguments that at the time when the Complaint was lodged, the disputed domain name was not used as described by the Respondent, but was simply parked on a SEDO web page which contained no link dedicated to the topics of “Anterior Cruciate Ligament” or “Access Control List”.

The Respondent thus fails to substantiate its assertions and does not prove a legitimate interest in the domain name.

The Respondent is also found as acting in bad faith, in particular in view of its attempts to distort the truth of the facts : it contends that earlier ADR cases ruled against him would have been cancelled, but is later forced admit that this is not the case when requested by the Panel to substantiate its contentions, and most of all it relies upon a web page which appears to have been constructed after the filing of

the Complaint and for the sole purpose of misleadingly supporting its argument that the disputed domain name is used legitimately in its descriptive meaning.

Whereas the Respondent was not making a bona fide use of the disputed domain name at the time when the Complaint was lodged, and rather than acknowledging the earlier trademark rights of the Complainant, it used fraudulent manoeuvres to artificially create an apparent fair use of the disputed domain name.

The Complainant on the other hand has established that it owns trademark rights in the name ACL, and it is eligible to hold the domain name ACL.EU.

The Panel orders the transfer of the domain name to the Complainant.