Panel Decision for dispute CAC-ADREU-004284

Case number	CAC-ADREU-004284
Time of filing	2007-04-04 13:14:34
Domain names	hry.eu

Case administrator

Name	Tereza Bartošková

Complainant

Organization / Name	HRY

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 the 6th April 2006, the Complainant filed an application for the registration of the domain name 'hry.eu' with the Respondent. The application was filed in accordance with the Commission Regulation (EC) 874/2004 of 28 April 2004 ("Public Policy Rules") and the .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period ("the Sunrise Rules").

The Complainant's application concerning the registration of the domain name 'hry.eu' was rejected by the Respondent.

The Complainant submitted their Complaint under the .eu Alternative Dispute Resolution Rules ("ADR Rules) by email on the 14th February 2007. On the 16th February 2007, the ADR Centre notified the Complainant that the fees had not been paid and on the 26th March 2007, the Centre informed the Complainant that their Complaint had been cancelled due to the expiration of the deadline to pay the fees specified in Paragraph A6 (a) of the ADR Rules. On the 4th April 2007, the Centre issued a Defective Complaint decision ordering the continuation of the Complaint and on the same day the Centre acknowledged receipt of the Complaint as well as that the payment was performed on the 9th March 2007, but the Centre was unable at the time to identify the payment.

On the 10th April 2007, the Centre declared the commencement of the ADR Proceeding and on the 8th May 2007, the Respondent submitted their Response.

Pursuant to Article 4 of the ADR Rules, the ADR Centre contacted the undersigned individual requesting his services as a sole Panellist. The Panellist signed his Declaration of Impartiality and Independence on the 9th May 2007 and the same day the Centre proceeded in notifying the parties of the identity of the Panellist and instructed the Panellist to forward his decision to the Centre by the 8th June 2007.

On the 14th May 2007, the case file was transmitted to the Panel. On the 14th and 29th May 2007 respectively, the Complainant answered to some issues raised in the Response in the form of a Non-Standard Communication.

A. COMPLAINANT

On the 6th April 2006, the Complainant filed an application for the registration of the domain name 'hry.eu'. On the 18th April 2006, the Complainant provided the Respondent with the Certificate of the Complainant's Incorporation with the Ministry of the Interior of the Czech Republic, dated 29/03/2006, with the incorporation kept on file under reference number VS/1-1/63 707/06-E, Business ID. No. 270

25 446, documenting the Complainant's Prior Right to the disputed domain name.

According to this Certificate, the Complainant submitted to the Ministry of the Interior of the Czech Republic an application for the incorporation of HRY, an organisation of employers with its registered office at Wenzigova 20, Prague 2 by virtue of which, pursuant to Section 9a of the Act, No. 83/1990, Coll. on association of citizens, as amended, the Complainant became a legal entity with full legal capacity on the 25th March 2006, the day following the day of the incorporation application being served.

According to the Complainant, on the 31st October 2006, the Respondent informed them that the application for the registration of the domain name 'hry.eu' had been rejected on the basis that the documentary evidence received did not satisfy the requirement of establishing prior rights on the domain name.

On the 6th December 2006, the Complainant's authorised representative received a notification from the Ministry of the Interior of the Czech Republic concerning the Legal Capacity of Trade-Union and Employer Organisations. (This notification specifies the conditions under which trade-union organisations and employer organisations become legal entities and what are the certificates the Ministry of the Interior issues to demonstrate this).

On the 5th January 2007, the Respondent informed the Complainant that the result of the internal review process was that the application for the registration of the domain name had been rejected. Accordingly, the Respondent advised the Complainant that the 40-day period for initiating an ADR procedure had started.

The Complainant asserts that the Respondent's decision rejecting the Complainant's application for the registration of the domain name 'hry.eu' was made contrary to the .eu Sunrise Rules and the Respondent's reasoning is inconsistent with both the .eu Sunrise Rules and the laws of the Czech Republic concerning the establishment, incorporation and existence of a legal entity.
The Complainant further argues that according to the Czech Republic's legislation at the time the application was filed, the Complainant was a legal entity with full legal capacity. Moreover, since that was the case, the Complainant had prior rights on the domain name, they fully complied with the .eu Sunrise Registration Period Rules and since the 'first-come, first-served' rule was applicable, the fact that the Respondent rejected the application for the registration of the domain name 'hry.eu' was incorrect.

B. RESPONDENT

The Respondent asserts that the Complainant carries the burden of proof in establishing that they held prior rights during the period of phased registration. (Articles 10(1) and 14 of the Regulation 874/2004) According to the Respondent, the documentary evidence received did not demonstrate that the Complainant was the holder of a valid prior right at the time of the application for the registration of the domain name 'hry.eu'. Therefore, the Complainant failed to meet their burden of proof in demonstrating that they held prior rights on the disputed domain name.

Moreover, the Respondent argues that, according to section 11.3 of the Sunrise Rules, the applicant is required to demonstrate that the claimed prior right is valid at the time of the application, which means that it must be "in full force and effect". Furthermore, section 21.2 of the Sunrise Rules also makes clear that the Validation Agent is only requested to review the application on the basis of the documents received. The documentary evidence submitted by the Complainant consisted of a letter from the Czech Ministry of the Interior stating that the Complainant delivered to the Ministry of the Interior a proposal for recording of a company that would be called 'HRY'. The Respondent provides this letter for the consideration of the Panel, translated into English.

Finally, the Respondent refers to the ADR decision 04281, concerning the domain name 'DOTACE' to support their assertions. According to the Respondent, this case had similar facts and similar issues to clarify.

DISCUSSION AND FINDINGS

The Complaint is filed against the Registry for its decision to reject the Complainant's application to register the disputed domain name 'hry.eu' made during the Sunrise Registration Period.

Paragraph B11(d) of the ADR Rules states that "The Panel shall issue a decision granting the remedies requested under the Procedural Rules in the event that the Complainant proves […] (2) In ADR Proceedings where the Respondent is the Registry that the decision taken by the Registry conflicts with the European Union Regulations". Article 14 of the Public Policy Rules on "Validation and Registration of application received during phased registrations" states that "[…] 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".

In this case, the Panel is requested to evaluate whether the decision of the Registry to deny registration of the domain name 'hry.eu' to the Complainant was in accordance with the EU Regulations.

The main issue in this case is whether the Complainant had prior rights when they applied to register the disputed domain name 'hry.eu', therefore, whether they are entitled to the domain name.

Section 11.3 of the .eu Sunrise Period states that "The Applicant must be the holder (or licensee, where applicable) of the Prior Right claimed no later than the date on which the Application is received by the Registry, on which date the Prior Right must be valid, which means that it must be in full force and effect".

First of all, it has to be mentioned that the annexes that the Complainant attached in their Complaint can not be used as evidence by the Panel, because they are in Czech and the official language of the proceedings is English. Therefore, this panel can initially evaluate whether the Complainant is in the possession of prior rights based on the translated documentation that the Respondent provides in their response. A quick reading of this document indeed indicates that the Respondent was initially correct in establishing that the Complainant lacks prior rights on the disputed domain name 'hry.eu'. The certificate indicates that the appropriate authority (Ministry of the Interior) acknowledged receipt of "a proposal for recording of HRY", which, if translated literally, it does not indicate that the company was formed at the time the Complainant applied to be registered (24/03/2007).

However, there are two issues that need to be taken into consideration at this stage. First of all, a translation occasionally fails to adhere and reflect the actual wording of a document and the intention of the participating actors. And, second, countries use different terminology and understanding when it comes to their national laws. In relation to this second point, the Complainant in a Non-Standard Communication, dated 14/05/2007, provides a more detailed explanation with respect to when an organisation of employers is formed under Czech law. More precisely, according to Section 9a of the 83/1990 Act, Coll., on association of citizens, as amended by the 300/1990 Act, Coll., a trade-union organisation and an employer organisation become legal entities as of the day following the day on which the competent ministry receives the application for its incorporation. In order to document this, the Ministry of the Interior issues a certificate of the application for incorporation indicating other identification data, such as name, address, registered office, reference and identification numbers of trade-union organisation or employer organisation. Similarly, once the company is formed and has acquired legal personality, it is listed in the Czech Statistical Office.

The Panel conducted their own search in the database of the Czech Statistical Office and there is a listing of the company HRY, ID No. 27025446, with the same address as that of the Complainant. This indicates that the Complainant was correct in asserting that they became a legal entity with full legal capacity on the 25th March 2007, i.e. the day following the day of the incorporation of the application being served, successfully meeting the conditions of Czech law. Therefore, since the Complainant was a formed legal entity under Czech law on that day, they also had prior rights on that name.

One question that should be addressed at this point is why the Complainant did not provide this full clarification along with more documents when they applied for the domain name 'hry.eu'. The Validation Agent is not obliged to conduct his/her own research and their decision is only based on the submitted documentation at the time of the domain name application. The Validation Agent was correct in rejecting the application of the Complainant due to insufficient evidence on their behalf establishing prior rights on the disputed domain name. However, in light of the clarification that the Complainant provided the Panel on their Non-Standard Communication, the new information demonstrate that the Complainant was indeed in possession of prior rights. The essence of the Sunrise Period is to provide an advantage to trade mark owners and companies to register their names as domain names. The Complainant falls within this category, since, under Czech law, at the time of the domain name application, they were a formed company acting in full legal capacity. Similarly, the essence of the Policy is also to rectify the mistakes that the Registry has done and to provide the owners of prior rights the possibility of registering the domain name that they are entitled to. For these reasons the Panel orders transfer of the domain name to the Complainant.

The Panel accepts that this case is similar to some others (ADR04288, ADR04290, ADR04289, ADR04293, ADR04281, ADR20329), which reached different conclusions. First of all, these decisions do not have any binding force upon the Panel and the Panel is not obliged to use them as precedent.

Indeed, it is not the obligation of the Validation Agent to further examine whether the Complainant possessed prior rights at the time of application and its evaluation should purely be based on the submitted documents. The Regulation(EC 874/2004) states that the Complainant carries the onus to prove that they have established prior rights at the time of the domain name application. The documentary evidence submitted to the Respondent was indeed insufficient to make the Registry realise that the Complainant was in possession of prior rights. Therefore, the Respondent was initially correct in rejecting the application for the registration of the domain name.

The Panel does agree with the interpretation of the ADR1886: “According to the Procedure laid out in the Regulation the relevant question is thus not whether the Complainant is the holder of a prior right, but whether the Complainant demonstrated to the validation agent that it is the holder of a prior right. if an application fails to submit all documents which show that it is the owner of a prior right the application must be rejected”. Such an assertion is nowhere to be found in the Regulation or the Policy itself. On the contrary, the essence of this Policy is, amongst other things, to rectify the mistakes, omissions or misunderstandings that the Registry has made during the Sunrise Registration Period. It is meant to go beyond the scope of the process followed by the Validation Agent and the Panel will occasionally be required to proceed to their own research. This is highly important especially in light of the differences in terminology and procedure between the laws of the various States. The divergence between the laws across the European Union necessitates a closer and more careful approach towards the issues of trade marks and company names.

In this specific case the Panel considered that it was his responsibility to conduct his own research in order to examine whether the Complainant had prior rights and deserved transfer of the domain name. Czech law (Section 9a of the 83/1990 Act, Coll., on association of citizens, as amended by the 300/1990 Act, Coll) makes clear that the day after the day of the incorporation of the company and as long as the company is listed in the Statistical Czech Office, the company is then considered as a legal entity acting in full legal capacity. This means that the company holder from this point onwards is able to start claiming prior rights. Moreover, the Panel agrees that the initial rejection for the registration of the domain name was correct, but the Complainant seeks to get the domain name in question. In light of the evidence that the Complainant provided to the Panel and the Panel’s own research, it is considered only fair to acknowledge the Complainant as the holder of prior rights in the name HRY under Czech law.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12 (b) and (c) of the Rules, the Panel orders that the domain name HRY be transferred to the Complainant.

PANELISTS

Name	**Konstantinos Komaitis**

DATE OF PANEL DECISION 2007-06-05

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

On the 6th April 2006, the Complainant filed an application for the registration of the domain name ‘hry.eu’ with the Respondent. The application was filed in accordance with the Commission Regulation (EC) 874/2004 of 28 April 2004 (“Public Policy Rules”) and the .eu Registration Policy and Terms and Conditions for Domain Name Applications made during the Phased Registration Period (“the Sunrise Rules”). The Complainant’s application concerning the registration of the domain name ‘hry.eu’ was rejected by the Respondent. According to the Respondent, the documentary evidence received did not demonstrate that the Complainant was the holder of a valid prior right at the time of the application for the registration of the domain name ‘hry.eu’.

The Panel finds that the Complainant had prior rights at the time of the application for the domain name ‘hry.eu’, since under Czech law they were an established legal entity acting in full capacity.