Panel Decision for dispute CAC-ADREU-005396

Case number	CAC-ADREU-005396
Time of filing	2009-04-10 09:10:52
Domain names	sligro.eu

Case administrator

Name	Josef Herian

Complainant

Organization / Name	Sligro Food Group Nederland B.V., Van Lieshout / Van der Veeken

Respondent

Organization / Name	W Schuurman, W Schuurman

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 related to the disputed domain name.

FACTUAL BACKGROUND

Based what has been brought forward by Complainant and has not been contested by Respondent, the following is relevant in relation to the Complainant and the Complaint.

Complainant is the Dutch company Sligro Food Group Nederland B.V, a private company with limited liability established in the Netherlands in 1972. Complainant is part of the Sligro Food Group (hereinafter: “Sligro”). The ultimate parent of Complainant is Sligro Food Group N.V. Sligro is active in the exploitation of retail- and wholesale of food and non-food products.

Sligro is very well-known in the relevant market. In addition, Sligro is well-known by the general public in the Netherlands. There are 44 cash and carry and 10 delivery-service wholesale outlets, located all across the Netherlands. Sligro is the market leader in the foodservice market.

Sligro is inter alia owner of the following SLIGRO trademarks: the Benelux word mark SLIGRO with registration number 0574958), the Benelux device mark with registration number 0734763, the Benelux word mark FEESTPAKKEN VAN SLIGRO, DAT PAKT ALTIJD GOED UIT with registration number 0578797 and the Benelux word mark EEN KERSTCADEAU VAN SLIGRO PAKT ALTIJD GOED UIT with registration number 0822076.

Complainant and/or companies belonging to the Sligro Food Group have been trading under the name SLIGRO uninterruptedly as of 1935.

The domain name <sligro.eu> shall hereafter also be referred to as “the Domain Name”. Over the years Sligro registered several domain names equivalent to and/or consisting of the word mark and the trade name both as gTLD and as ccTLD inter alia: <www.sligro.nl> (28/02/1997), <www.sligro.com> (24/01/1999), <www.sligro.org> (12/02/008), <www.sligro.net> (22/02/2001), <www.sligro.biz> (12/02/2007); and <www.sligrofoodgroup.nl> (09/01/2003), <www.sligrofoodgroup.com> (09/01/2003), <www.sligrofoodgroup.eu> (7/04/2007).

On 13 July 2007, Respondent registered the Domain Name. Respondent is a Dutch individual, not known to Complainant. There is no relation between Complainant and Respondent whatsoever and no relation between parties has ever existed.

Complainant argued that before entering in this ADR-procedure Complainant tried to settle this matter amicably. Around mid-February

2008 Complainant contacted Respondent requesting him to transfer the Domain Name to Complainant. Respondent agreed to transfer the Domain Name to Complainant. On 29 February 2008 Complainant sent a letter to Respondent in which a “form for changing the registered holder of a domain name” was included. However, Respondent did not react. On 23 May 2008, Complainant again contacted Respondent by telephone. Respondent indicated that he was too busy to deal with the matter and would react within a week. No reply came.

Complainant alleged that on 30 May 2008 Complainant sent the first registered cease and desist letter to Respondent, requesting Respondent to cease any infringement of Complainants trade marks and to transfer the Domain Name to Complainant. Complainant received a handwritten response from Respondent in which he indicated that this matter had again no priority for Respondent. On 20 January 2009 (the lawyers of) Complainant sent a second cease and desist letter to Respondent, requesting to voluntarily transfer the Domain Name to Complainant. In his handwritten reaction Respondent – more or less – intended to rebut that Respondent infringes the trade marks and trade name of Complainant. Again Respondent did not cooperate.

As an ultimate attempt to avoid this legal procedure, (a lawyer of) Complainant contacted Respondent to search for an amicable settlement. According to Complainant, Respondent indicated that he was willing to make a proposal for settlement in the (near) future, but after several reminders thereto by Complainant, Respondent did not revert. Given the pattern in Respondent’s behavior not to react at all notwithstanding promises to do so, and, given the risk that the Domain Name can be transferred to a (connected) third party and thereby complicating matters for Complainant, Complainant had no other option than to initiate this ADR-procedure.

A. COMPLAINANT

Complainant is of the opinion that:

A) the Domain Name is identical or confusingly similar to the name or names in respect of which Complainant has a right that is recognized or established by national and/or Community law, within the meaning of ADR Rule B1(b)(10)(i)(A); and
B) the Domain Name has been registered by the Respondent who has no rights or legitimate interest in respect of the Domain Name, within the meaning of ADR Rule B1(b)(10)(i)(B); and/or
C) the Domain Name has been registered or has or is being used in bad faith, within the meaning of ADR Rule B1(b)(10)(i)(C).

- ADR Rule B1(b)(10)(i)(A): Confusing Similarity
Complainant argued that it is accepted in ADR.eu case-law that trade marks and trade names are recognized and established rights under national and Community law.

As indicated above Complainant stated to be the owner of several trade mark registrations consisting of or containing the sign SLIGRO. Also Complainant and/or companies belonging to the Sligro Food Group have been trading under the name SLIGRO uninterruptedly as of 1935. Hence, Complainant stated that SLIGRO is a (well known) trade name in the Netherlands.

The domain name in dispute is <sligro.eu>. The suffix .eu may be excluded from consideration as being merely a functional component of a domain name. See Case No. 04990 “STAER”.

Hence, Complainant argued that the Domain Name is identical or confusingly similar to the name SLIGRO and the trade mark SLIGRO in respect of which Complainant has rights that are recognized or established by national and/or Community law.

- ADR Rule B1(b)(10)(i)(B): No Rights nor Legitimate Interest
It is accepted in ADR.eu case-law that Panels acknowledge that proving a negative circumstance – i.e. proving lack of rights or interests – is always more difficult than establishing a positive one. Accordingly, “it is sufficient that the Complainant shows prima facie case in order to shift the burden of proof on the Respondent”. See, Case No. 04990 “STAER”.

From an excerpt from the trade register of the Dutch Chamber of Commerce, Complainant stated that it appears that Respondent is a sole trader who trades under the name <NENSE>. He claims to offer security advice. At the time Complainant sent the first cease and desist letter up until date, Complainant argued that Respondent has never been generally known by the Domain Name as a natural person, nor as an undertaking, nor as an organization. Nor has he any other (registered) rights in the Domain Name. Respondent – as already indicated – is not connected to Complainant in any way, nor is he licensed to use the Domain Name.

Moreover, Complainant argued that Respondent has never used the Domain Name in connection with the offering of goods or services, nor has he made demonstrable preparations to do so. The website attached to the Domain Name is a so-called parking site. After a short while the Domain Name re-directs to the domain name and website of a third party. The Domain Name is factually used as a so-called ‘referral page’. This does not constitute legitimate use. See Case No. 05180 “HOTELSFORMULE1, FORMULE1HOTELS”. (Complainant

does not know what the (legal) relation between Respondent and the third party is.) Hence, Respondent does use the Domain Name at all.

Also, there is no indication that Respondent has ever used the Domain Name. The Alexa Internet Archive: Wayback Machine (available on: http://www.archive.org/web/web.php) has no track records of use of the Domain Name.

Hence, Complainant alleged that there is no reason whatsoever for Respondent to register this specific Domain Name, other than to benefit from the good reputation of Complainant and familiarity of the Domain Name by the public.

Based on the above Complainant considers that the Complaint has satisfied ADR Rule B1(b)(10)((i)(B).

- ADR Rule B1(b)(10)(i)(C): Bad Faith
It is accepted in ADR.eu case-law that – in most cases – it is impossible for a Complainant to demonstrate with absolute certainty the existence of bad faith of a Respondent. “This is why Panels usually require the Complainant to make reasonable demonstration rather than to bring absolute evidence”. See (recently) Case No. 05293 “SAMPOLIFE”.
Complainant stated that it is a fact that Complainant is well-known under the name “Sligro”, certainly in the area where Respondent lives and trades. The fact that Respondent knows Sligro is undisputed. In fact, Respondent is a customer of Sligro. Complainant shows Respondent’s registration in Sligro’s (internal) customer information system. Respondent received mailings from Sligro, and made purchases at several Sligro outlets before he registered the Domain Name. Also, Respondent registered the Domain Name (much) later than Complainants registered its trade marks, and, much more later than Complainant obtained rights in the trade name Sligro Food Group. Under these circumstances it must be that Respondent was aware of (the existence of) Complainant at the time of registration of the Domain Name. In any event, it would be a general custom to examine whether there are earlier rights in a (domain) name before proceeding with the registration thereof. It is unlikely that Respondent registered the Domain Name by pure coincidence. Now Respondent must – or should have – be aware of the fact that Complainant had rights in the Domain Name, and, Respondent is not in any way connected to Complainant, this indicates that Respondent has registered the Domain Name in bad faith. See also Case No. 05293 “SAMPOLIFE”.

Complainant argued that it is well-known by its name. Furthermore, Complainant stated that Respondent (apparently) registered this specific Domain Name to benefit from this well-known name and to attract visitors – seeking Complainant – to Respondent’s Domain Name. A substantial number of visitors seeking the website of Complainant might be misled into believing that the Complainant is somehow linked to the goods and/or services offered – or that will be offered – via the Domain Name. This creates so-called “initial interest confusion” and/or a “likelihood of confusion” with a domain name on which a right is recognized. It (potentially) creates the false impression that there is a commercial link between Complainant and Respondent and dilutes the distinctiveness of the trade marks to the (future) advantage of Respondent. This is detrimental to Complainant’s rights and reputation. The use of “initial interest confusion” to direct traffic to a website to the advantage of a third party is also abusive.

Also the fact that - at the time Complainant sent the first cease and desist letter up until date - Respondent did not make any demonstrable preparations to use the Domain Name is in itself an element of assuming bad faith of the Respondent, according to Complainant. See Case No. 05810 “Case No. 05293 “SAMPOLIFE”, referring to Case No. 00596 “RESTAURANTS”.

Based on the above Complainant considers that the Complaint has satisfied ADR Rule B1(b)(10)(i)(C).

For the reasons indicated above Complainant asserts that Respondent has registered the Domain Name:
A) that is identical or confusingly similar to the name or names in respect of which Complainant has a right that is recognized or established by national and/or Community law; and
B) that has been registered by the Respondent who has no rights or legitimate interest in respect of the Domain name; and
C) that has been registered or has or is being used in bad faith.

Complainant is also of the opinion that it has substantiated its assertions with sufficient evidence to prove to the Panel that Complainant’s assertions are correct. According to Complainant the requested remedy can be granted.

B. RESPONDENT

Respondent did submit a Response within the given deadline, but the Response had some serious deficiencies. Respondent only stated that, because of his other priorities, he was not able to give a reaction. Subsequently, Respondent received a Notification of Defeciencies from the Czech Arbitration Court because of the deficiencies in the Response. Respondent did not comply with the deadline as indicated in the Notification of Deficiencies in Response, so Respondent was in default.

On 24 August, the Czech Arbitration Court received a letter of Respondent. In this letter Respondent stated that he is willing to transfer the Domain Name to Complainant. The Panel requested Complainant to inform it whether it wishes a postponent of one week to see whether a settlement between the Parties could be achieved. Complainant informed the Panel that it did not wish a postponement of this procedure to settle the matter.

In response to this Nonstandard Communication, Respondent sent again a letter to the Arbitration Court on 28 August 2009. In this letter Respondent explains that he has registered the Domain Name to use it for his company. Respondent mentioned that the Domain Name was reserved because of its Dutch abbreviation “Samen Langdurig Investeren Groep R... O...” and “eu” because of the fact that Respondent has colleagues in the Netherlands, Belgium and Germany who work together in safety at work. Furthermore, Respondent argued that his priorities are his family, work and study not responding and signing letters without a question or explanation from third parties

DISCUSSION AND FINDINGS

Pursuant to article 22 (10) of the Regulation (EC) No. 874/2004 of 28 April 2004 and Paragraph B10 (a) of the ADR Rules, in a situation where Respondent fails to respond within the given deadlines, this may be considered as grounds to accept the claims of the Complaint. In this case the Panel has the opinion that the Response, although it was solely a deficient Response and a “repaired” Response has been submitted far after the given deadline, is still deficient. Because of the fact that Respondent did not comply with any of the time periods established by the ADR Rules, the Panel shall proceed to a decision on the Complaint only and may consider this failure to comply as grounds to accept the claims of the other party.

The foregoing does not mean, whenever a Respondent fails to respond, a Complaint should be upheld. Therefore, Complainant is still required to demonstrate that the provisions of article 21 (1) of the Regulation (EC) No. 874/2004 and Parahraph B11 (d) of the ADR Rules are satisfied. The Complaint was filed pursuant to Article 22 (1) (a) of the Regulation EC No. 874/2004, which provides that an ADR procedure may be initiated by any party where the registration of a domain name is speculative or abusive within the meaning of Article 21 of the Regulation (EC) No. 874/2004.

Accordingly, the Panelist’s decision, as mentioned before, has to be based on the provision of Article 21 (1) of the Regulation (EC) No. 874/2004. The domain name has therefore to be transferred if the domain name:
i. 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
ii. has been registered by its holder without rights or legitimate interests in the domain name; and/or
iii. has been registered or is being used in bad faith.

- Identity or confusingly similarity

Complainant has provided an extract of the commercial register of the relevant Dutch Chamber of Commerce and several extracts of the Benelux trade mark register. These extracts show that Complainant is registered with the Dutch Chamber of Commerce and that Complainant is the owner of several Benelux trade mark registrations. As Respondent did not submit any relevant and serious Response, the Panel accepts that the name SLIGRO is used by Complainant and that Complainant is the owner of the trade marks registations. Therefore, Complainants has rights to the trade name SLIGRO FOOD GROUP and the trade marks.

The disputed domain name <sligro.eu> is confusingly similar to the most significant part of the trade name, namely Sligro and the Domain Name is identical to the Benelux word mark SLIGRO. It is well-established that the specific top level of a domain name <.eu> does not affect the domain name for the purpose of determining whether it is identical or confusingly similar pursuant to Article 21 (1) of the Regulation (EC) No. 874/2004.

The Panel thus finds that the Domain Name is confusingly similar to the trade name Sligro and identical to the Benelux trade mark SLIGRO of Complainant and therefore, the first provision of Article 21 (1) of the Regulation (EC) No. 874/2004 is satisfied.

- Right to or legitimate interest in the domain name

Article 21 (1) (a) of the Regulation (EC) No. 874/2004 requires Complainant to prove that Respondent has no rights or legitimate interests in the disputed domain name. However, as it is often an impossible task of proving a negative circumstance, requiring information that is often within the knowledge of Respondent, it is the Panel’s view that if Respondent has no rights or legitimate interests and Respondent fails to show one of the circumstances under Article 21 (2) of the Regulation (EC) No. 874/2004, then Respondent may lack a legitimate interest in the domain name.

Complainant alleged that Respondent has never been generally known by the name Sligro as a natural person, nor as an undertaking, nor as an organization. Nor has Respondent any other (registered) rights in the name. Respondent is also not connected to Complainant in any way. Furthermore, Complainant has submitted supporting evidence that Respondent never used the Domain Name with the offering of goods and services nor has he made demonstrable preparations to do so. The website attached to the Domain Name is a so called parking site and after a short while, the Domain Name redirects to the domain name and website of a third party. The website related to the Domain Name is factually used as a so-called “referral page”. This does not constitute a legitimate use. Hence, Respondent does not use the Domain Name at all.

In the absence of a proper and timely Response from Respondent to the claims of Complainant, the Panel finds that Complainant has made a sufficient prima facie showing that Respondent has no rights or legitimate interests in the Domain Name. Nevertheless, Respondent explained in his Response, which was prima facie not credible, why he has registered the Domain Name, but this statement was not substantiated by Respondent.

The Panel therefore accepts Complainants’contention that Respondent has no rights or legitimate interests in the Domain Name and the the requirements of Article 21 (1) (a) of the Regulation (EC) No. 874/2004 is also satisfied.

- Bad faith registration and use.

The above finding that Respondent does not have any rights or legitimate interests in the Domain Name is enough to satisfy the requirements of Article 21 (1) of the Regulation (EC) No. 874/2004. However, for completeness, the Panel also considers whether the Domain Name was registered or is being used in bad faith.

Complainant argued that Respondent must or should have been aware of the fact that Complainant has rights in the name Sligro as this name is well-known in the Netherlands. Complainant submitted evidence that Respondent is even a customer of Sligro. Furthermore, Complainant stated that Respondent has registered the Domain Name to attract visitors to Respondent’s Domain Name and website. Complainant argued that the Domain Name was intentionally used by Respondent for commercial gain to Respondent’s website by creating a likelihood of confusion with the name and trade marks of Complainant. The name and trade marks of Complainant have a right that is recognized by national and Community law.

The Panel finds that Complainant has sufficient showed that the Domain Name has been registered and is being used in bad faith by Respondent.

The Panel therefore accepts Complainants’contention that Respondent has registered and used the Domain Name in bad faith and the the requirements of Article 21 (1) (a) of the Regulation (EC) No. 874/2004 is also satisfied.

DECISION

As Complainant is a private company with limited liability established in the Netherlands, it satisfies the general eligibility criteria for registration of the domain name set out in Paragraph 4 (2) (b) of Regulation (EC) No. 733/2002.

For all the foregoing reasons, in accordance with Paragraph B12(b) of the ADR Rules, the Panel orders the domain name <sligro.eu> to be transferred to Complainant.

PANELISTS

Name	**Willem J.H. Leppink**

DATE OF PANEL DECISION 2009-08-31

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

Complainant, a company specialized in the foodservice market, SligroFood Group Nederland B.V., requested the domain name <sligro.eu> to be transferred to Complainant on the grounds that Complainant had prior rights (trade name and trade mark rights) pursuant to Article 21 (1) of the Regulation (EC) No. 874/2004 and that Respondent had no rights or legitimate interest in the domain name and had acted in bad faith, in accordance with Article 21 (1) (a) (b) of the Regulation (EC) No. 874/2004.

The Panel has the opinion that Complainant has demonstrated that the domain name <sligro.eu> is confusingly similar to the trade name SLIGRO FOOD GROUP and identical to the Benelux word mark SLIGRO pursuant to Article 21 (1) of the Regulation (EC) No.

874/2004.

Respondent has submitted a deficient Response. The second Response filed by Respondent was not within the given deadline. Therefore, the Panel has the opinion that Respondent has not disputed the factual information that Complainant has provided in the Complaint.

The Panel found subsequently, that Complainant has demonstrated prima facie that Respondent has registered the Domain name without rights or legitimate interests. Finally, the Panel accepted Complainants'contention that Respondent has registered and used the Domain Name in bad faith.

Based on the foregoing the Panel ordered the domain name <sligro.eu> to be transferred to Complainant.