WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

Lagardère Active Broadcast and Europe 2 Communication
v. Anatol France and Mr. Philippe Boulicaut

Case No. DTV2002-0006

1. The Parties

The Complainants are Lagardère Active Broadcast, 28, rue François 1er, 75008 Paris, France and Europe 2 Communication, 26bis, rue François 1er, 75008 Paris, France.

The Respondents are Anatol France, 211 Web Street, Malibu, CA 90265, United States of America ("USA"), and Mr. Philippe Boulicaut, 970, Palm Av., West Hollywood, CA 90069, USA.

2. The Domain Name and Registrar

The domain name at issue is <europe2.tv> ("Domain Name").

The registrar is "SRS Plus" a subsidiary of The .tv Corporation International, 1100 Glendon Av., 8th Floor, LA, CA 90024, USA ("the Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") by e-mail on July 26, 2002, and hardcopies were received by the Center on July 29, 2002. The Center acknowledged receipt of the Complaint on July 26, 2002.

On the same day, the Center sent to the Registrar a request for verification of registration data. On August 2, 2002, the .tv Corporation informed the Center that it is the Registrar and that "Anatol France" is the Registrant as well as the administrative, technical and billing contact.

The Center verified that the Complaint satisfied the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy ("Supplemental Rules") and that payment was properly made. The Panel is satisfied that this is the case.

The Center received on July 30, 2002, and August 2, 2002, communications from the Respondent Mr. Boulicaut, addressed to Complainants' Counsel, by which he informed Complainants that he would be ready to transfer the Domain Name without any compensation.

On August 7, 2002, the Complainant was properly notified in accordance with paragraph 2(a) of the Rules and the administrative proceedings commenced. Since no response was received from the Respondents within the time limit set, the Center sent on August 28, 2002, a notification of default to the Respondents.

On September 3, 2002, the Center notified the parties that an Administrative Panel, composed of a single member, Dr. Thomas Legler, had been appointed and that the Panelist had duly submitted a Statement of Acceptance and Declaration of Impartiality and Independence to the Center.

No further submissions were received by the Center or the Panel.

4. Factual Background

A. Complainant

The first Complainant is Lagardère Active Broadcast, a French Sàrl, with registered offices in Monaco and the second Complainant is Europe 2 Communication, a French société en nom collectif, which is a subsidiary of Lagardère Active Broadcast **(Complainants' Exhibits 1 and 2).**

The Complainants allege - without proof -, that Lagardère Active Broadcast has been operating for years under the Name "Europe 1 Communication".

The Complainants further state that Lagardère Active Broadcast, broadcast several notorious radio programs, such as Europe 1, RFM and Europe 2. The company owns many trademarks in this field of activity. The Complainants further indicate that the radio program "Europe 2" is a very well known radio station in France and is also known as a sponsor for numerous cultural and musical events.

The Complainant Lagardère Active Broadcast alleges that it is the owner of the French and international trademark registrations "Europe 2" (word marks and logos for various classes, amongst others for radio and television programs) since 1987. The Complainants claim to be also the holder of the websites <europe2.com> and <europe2.fr>.

B. Respondents

The Respondent Mr. Boulicaut registered the Domain Name on September 28, 2000. Later on he seems to have transferred the Domain Name to a company called "Anatol France" that obviously does not exist **(Complainants' Exhibits 17 and 18).** However, Mr. Boulicaut seems still to be the person interested in the Domain Name, since he was the sender of two communications to the Center on July 30 and August 2, 2002, both being also sent in the name of "Anatol France".

5. Parties' Contentions

A. Complainants

The Complainants submit that the Domain Name is identical or confusingly similar to the Complainants' various trademarks. They further state that the Respondents have no rights or legitimate interest in respect of the Domain Name, since Mr. Boulicaut would not be the owner of any trademark including the term "Europe 2" and since he would have no activity on the island of Tuvalu or any link to the field of television for which the suffix ".tv" stands. Furthermore, Mr. Boulicaut and later the company "Anatol France" have not used the Domain Name since its reservation, consequently the Respondents cannot have any legitimate interest in the registration of the Domain Name.

The Complainants are also of the opinion that the Domain Name was registered and is being used in bad faith, based on the following assumptions. Mr. Boulicaut being French it could not be a matter of chance that he chose the Domain Name <europe2.tv>. Although "Europe 2" is a radio station, it is well known that radio and television are two very close means of telecommunication and many radio stations are extending their activity also to the field of television. Mr. Boulicaut also wanted to sell the Domain Name <europe 2.tv> to Lagardère Active Broadcast and has signed an agreement to transfer it on March 13, 2001 **(Complainants' Exhibit 13).** Then as soon as he understood that the Complainants would not pay more than his out of pocket costs, he showed himself less cooperative and did anything possible to delay the transfer. Contrary to his commitment he never communicated to the Complainants his login and password, necessary for the transfer of the Domain Name **(Complainants' Exhibit 15**).

The Complainants also see bad faith in the fact that he finally did not transfer the Domain Name to the Complainants, but to a non-existant company called "Anatol France" **(Complainants' Exhibits 16, 17 and 18).** There is no doubt for the Complainants that Mr. Boulicaut and "Anatol France" would be the same entity, since the login of "Anatol France" ("diracotcha") appears on some personal web pages of Mr. Boulicaut **(Complainants' Exhibit 19).**

Moreover "Anatol France" did not answer mail that it received from the Complainants' Counsel, dated January 16, 2002 **(Complainants' Exhibit 20).** By its silence, "Anatol France" has demonstrated that it did not want to create and use a website under the Domain Name. Its silence should therefore be considered as bad faith, pursuant to *Société Performances contre M. Michel Elkouby*, WIPO Case No. DTV2001-0015.

B. Respondents

Despite the Center's invitation to the Respondents to file a Response, the Respondents failed to do so. The Center however received two e-mails on July 30, 2002, and on August 2, 2002, from Mr. Boulicaut and "Anatol France". Both mails were addressed to the Complainants' counsel, were signed by Mr. Boulicaut and contained in French the message that the Respondents did not act with the intention to cause any damage to any person or company. Pursuant to Mr. Boulicaut, the Domain Name has never been used and no damage has therefore been caused to the Complainants. Furthermore, Mr. Boulicaut reiterated that he would be ready to transfer the Domain Name without requesting any indemnity, under the condition that the Complainants would fully discharge him and "Anatol France" and would not sue him under any title. He would be ready to simultaneously transfer the password for the transfer of the Domain Name.

The second mail refers to a letter of July 31, 2002, from Complainants' counsel to Mr. Boulicaut in which the latter confirms his approval to transfer the Domain Name. Mr. Boulicaut furthermore indicates that he would only communicate the password once the parties had exchanged an original written agreement.

The Panel notes that these communications do not constitute a formally correct Response since they were not communicated to the Center in the form provided for by the Rules nor in the language of the procedure. However, the Panel has taken these elements into consideration when taking its decision.

Nevertheless, since neither the Center nor the Panel have received from the Complainants or the Respondents the information that the Respondents really have transferred the Domain Name (and supplied the password necessary to carry out the transfer), the Panel assumes that the case is still contentious.

6. Discussion and Findings

Paragraph 4(a) of the Policy lists three elements that the Complainants must prove to merit a finding that the Domain Name be transferred to the Complainants:

(i) The Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainants have rights; and

(ii) the Respondents have no rights or legitimate interests in respect of the Domain Name; and

(iii) The Domain Name has been registered and is being used in bad faith.

A. Confusing Similarity with a Mark in which the Complainants have Rights

The first element which the Complainants must prove is that the Domain Name is identical or confusingly similar to the Complainants' marks. The Complainants set out that Lagardère Active Broadcast is the holder of many trademarks with the name "Europe 2". However, the Administrative Panel notes from the evidence submitted that most of the trademark registrations were made in the name of "Europe 1 Communication" and not in the name of Lagardère Active Broadcast or the second Complainant "Europe 2 Communication". The Complainants explain the link between Lagardère Active Broadcast and "Europe 1 Communication" with the fact that the first was incorporated on August 19, 1968, but has been operating for years under the name of "Europe 1 Communication". However, there is no evidence submitted to the Panel which corroborates this legal link. The same argument is valid for the website under the Domain Name <europe 2.com> which is not registered in the name of Lagardère Active Broadcast or "Europe 2 Communication", but in favour of an entity called "Grollier Interactive Europe".

However, the Complainants submitted one French trademark which is the "Europe 2" logo, registered in classes 9, 14, 16, 18, 25, 28, 34, 35, 38, 41 and 42 (**Complainants' Exhibit 10**). Also the website under the Domain Name <europe 2.fr> has been registered by one of the Complainants. Consequently, the Panel is satisfied that the Complainants are holders of at least one trademark with the name "Europe 2".

Regarding the similarity, there is no doubt that the Domain Name is identical with the trademark "Europe 2" in which the Complainants have rights. Hence the Complainants have proven the first element of the Policy.

B. Legitimate Rights or Interests in Respect of the Domain Name

The second element which the Complainants are required to prove is that the Respondents have no right or legitimate interests in respect of the Domain Name.

As pointed out before, the Respondents did not file a formal response submitting proof of rights or a legitimate interest in respect of the Domain Name. Furthermore there is no fact showing that any of the two Respondents is known under the name "Europe 2". As indicated in one of the Respondents' communications copied to the Center, they did not and have no plans to use the Domain Name or a name corresponding to the Domain Name in dispute in connection with a *bona fide* offering of goods or services.

Consequently, the Complainants have proven that the Respondents have no right or legitimate interest in respect to the Domain Name.

C. Registration and Use in Bad Faith

For a Complainant to succeed, the Panel must be satisfied that the Domain Name has been registered and is being used in bad faith.

An analysis of the facts shows that the Respondents did not attempt to sell the Domain Name to the Complainants for a price exceeding their out of pocket expenses. In his last communication to Complainants' counsel, Mr. Boulicaut even offered the transfer of the Domain Name for free. However, there are other indications leading the Panel to the conclusion that Respondents' behavior shows bad faith.

Indeed, "Europe 2" is a famous radio station in France. The Panel is of the opinion that the Respondents must have been aware of Complainants' rights in the "Europe 2" trademark when they registered the Domain Name and of the possible interest that the Complainants would have in the Domain Name <europe 2.tv>. Therefore, Respondents must have realized that by registering that Domain Name, they create a likelihood of confusion with the trademark "Europe 2", as the public, in particular in France, may assume that the Domain Name is owned by an entity affiliated with the Complainants. Furthermore, neither Mr. Boulicaut nor its entity "Anatol France", which is clearly linked to Mr. Boulicaut himself as the facts show, have explained any interest in having the Domain Name.

The Respondents have moreover not demonstrated any link to the radio or television business or to the territory of the island of Tuvalu. In this context, the Panel notes that users will generally not understand the generic top level domain ".tv" as reference to Tuvalu, rather as the common abbreviation for television and that it is well known that the radio and television business are nowadays closely linked.

In his communication to the Complainants' counsel of August 2, 2002, Mr. Boulicaut indicated that the Respondents did not act with the intention of causing any damage to any person or company, that the Domain Name has never been used and no damage has therefore been caused to the Complainants.

The Panel does not share this opinion. It may be recalled in this context that Mr. Boulicaut signed a written agreement on March 13, 2001, by which he undertook to

transfer the Domain Name **(Complaints' Exhibit 13).** When the Complainants asked for the password and login to execute such transfer, communication with the Respondents ceased for several months until, in the framework of this administrative proceeding, the Respondents again indicated in their emails of July 30, 2002, and August 2, 2002, that they would be prepared to transfer the Domain Name. However, also at this stage there is a clear indication that Respondents are not seriously prepared to carry out such transfer, since they again asked for an original written agreement to be exchanged before communicating the password for the transfer. Moreover, neither the Center nor the Panel have received from the Complainants or the Respondents the information that the Respondents have meanwhile really transferred the Domain Name. The Panel therefore draws the conclusion that the Respondents do not really have the will to transfer the Domain Name.

The fact that the Respondents did not make use of the Domain Name by setting up a website does not discharge them. Indeed as many previous Panels have held referring to the "Telstra case" (*Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Case No. D2000-0003), the passive holding of a domain name may amount to evidence of registration and use of a domain name in bad faith, particularly if there are other circumstances, as in the present case, supporting such judgment.

One more aspect of bad faith is the fact that, after having signed the Transfer Agreement, Mr. Boulicaut transferred the Domain Name to the obviously non-existant company "Anatol France" indicating an incorrect address.

All these elements lead the Panel to the conclusion that the Respondents registered and used the Domain Name in bad faith.

7. Decision

In the light of the foregoing, the Panel concludes and decides that the Domain Name <europe 2.tv> shall be transferred to the Complainants.

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Dr. Thomas Legler
Sole Panelist

Date : September 17, 2002