

## Special Characters in Sunrise Periods

by Massimo Cimoli

This article will focus on art.11 of Reg.874/2004 and on the different ways in which this provision has been read and applied by the Arbitrators of the Czech Arbitration Court. It will be divided into three parts like a sandwich, in which the first part or slice of bread will be dedicated to the rationale of sunrise periods and particularly to the .eu sunrise period. The other slice of bread will be represented by the Final Conclusions in which some thoughts on future art.11-like provisions will be presented, but the core of this article, i.e. the beef, would certainly be represented by the conflicting views and interpretation given to art.11 in the case law of the ADR Czech Arbitration Courts.

First of all, it seems necessary to explain what a sunrise period is and to briefly state its past applications in relation to other GTLDs and CCTLDs.

In general, the term **Sunrise Period** refers to the period of time at the launch of a new top-level domain or second-level domain during which only the intellectual property owners may register a domain name identical to their rights (such as a trademark or a geographical indication or a title of a book or an unregistered trademark or a trade name) without having to compete with possible applicants from the public at large.

From different perspectives, the Sunrise period mechanism has been criticized by sections of the internet communities because it gives the possibility only to trademark owners of registering generic domain names identical to trademarks that are valid because they refer to a field in which the generic nature of the term did not arise. For example, CAT as an abbreviation of CATERPILLAR is a domain name registered by the famous US company that had precedent over feline aficionados.

However, in the world we are living in, domainers, cyber-squatters or porno-squatters are like predators who are waiting for the right moment to attack their prey and to register domain names left unprotected by their proprietors. On this rapacity they have built fortunes with no risks, law costs and, above all, without having rendered to society any social or public advantage. Their activities, targeting registered trademarks and other third parties' intellectual property rights, have social costs and do not create legitimate economic added value.

If one reads the WIPO Report issued this year on the trend on Domain names: "Cybersquatting Remains on the Rise with further Risk to Trademarks from New Registration Practice, Geneva, March 12, 2007 WIPO/PR/2007/479, quite a worrying scenario is underlined.

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In this report some of the main problems are clearly indicated: *“The number of cybersquatting disputes filed with the World Intellectual Property Organization (WIPO) in 2006 increased by 25% as compared to 2005. In a related development, the evolution of the domain name registration system is causing growing concern for trademark owners, in particular some of the effects of the use of computer software to automatically register expired domain names and their ‘parking’ on pay-per-click portal sites, the option to register names free-of-charge for a five-day ‘tasting’ period, the proliferation of new registrars, and the establishment of new generic Top Level Domains (gTLDs). The combined result of these developments is to create greater opportunities for the mass, often anonymous, registration of domain names without specific consideration of third-party intellectual property rights.”*

Provided that this is true, and it is certainly true, then it is a must to reinforce, at least, preventive measures before any new launch of new GTLDs or CCTLDs. As in the past, the opening of a new “empty” domain name space, like the .eu domain name system, always attracts unauthorised registrations of valuable “real estate”. In any newly established domain name, as was the case for .INFO, around 80% of all registrants held domain name registrations in other gTLDs. This means that 80% of those owners might have done well without that new domain name system. Of course, this is not the case with domainers and cybersquatters to whom any gTLD means new business.

Sunrise period provisions are preventive mechanisms which certainly may help to avoid or at least reduce the impact of unauthorised registrations. It was pointed out by the WIPO Arbitration and Mediation Center in its “New Generic Top-Level Domains: Intellectual Property Considerations”(see <http://www.wipo.int/amc/en/domains/reports/newgtld-ip/index.html>) that has identified the following protection models:

*(i) Watch services, possibly combined with preferential options to initiate a dispute resolution procedure against abusive registrations (this mechanism was adopted on the occasion of the .BIZ launch);*

*(ii) Defensive registrations, possibly combined with a preferential registration period (.NAME had such a kind of preventive mechanism);*

*(iii) Exclusion mechanisms, as suggested in the First WIPO Report. (It could work only for well-known trademarks, and it is not easy to assess when a mark is well known).*

*(iv) Sunrise mechanisms that allow right-holders to register domain names corresponding to their IP rights before the general public.*

The Sunrise mechanism is probably the most effective of all but, as the WIPO report put it, two basic conditions have to be met: Firstly, it would be advisable to require that a certain mark had been applied for before a certain date, provided that it was registered prior to the start of the Sunrise period. **Secondly, the domain name has to be identical to the textual or word elements of the trademark registration.**

Despite this, holders of marks consisting of generic terms that could be registered because of their distinctive ornamental or scriptural features, were able to secure domain names corresponding to the non-distinctive word elements of their mark, although these elements did not enjoy trademark protection as such. This is why the First WIPO Report was in favour of a Sunrise mechanism limited to registered marks, and suggested considering the limitation even further to word marks. These suggestions were not followed by the .eu Legislator.

Identity or identicality (as rendered in the .eu regulations) is one of the pillars of any sunrise mechanism. In fact, in relation to .INFO, it was stated that "Identity will be deemed to exist also where there is a space between the textual or word elements of the mark (e.g., service mark) and a hyphen is used or the elements are combined in the Domain Name (e.g., service-mark.info or servicemark.info). In all other respects, the Domain Name must be identical to the textual or word elements of the mark.

The .info experience shows that Sunrise mechanisms should include some form of up-front verification. The possibility of filing applications before the general public constitutes a significant advantage that should not be made available in a manner that can easily be abused. Widespread abuse would undermine the legitimacy of the Sunrise option as a means to protect legitimate owners of intellectual property rights.

This is the path that the .eu Legislator has followed. In fact, the whereas (16) of **EC Regulation 733/2002** contains the following:

*"The adoption of a public policy addressing speculative and abusive registration of domain names should provide that holders of prior rights recognised or established by national and/or Community law and public bodies will benefit from a specific period of time (a 'sunrise period') during which the registration of their domain names is exclusively reserved to such holders of prior rights recognised or established by national and/or Community law and public bodies."*

In the whereas 12 of EC Regulation 874/2004 COMMISSION REGULATION (EC) No 874/2004 of 28 April 2004 (laying down public policy rules concerning the implementation and functions of the .eu Top

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Level Domain and the principles governing registration) the said principles are even more expressly rendered:

*“In order to safeguard prior rights recognised by Community or national law, a procedure for phased registration should be put in place. Phased registration should take place in two phases, with the aim of ensuring that holders of prior rights have appropriate opportunities to register the names on which they hold prior rights. The Registry should ensure that validation of the rights is performed by appointed validation agents. On the basis of evidence provided by the applicants, validation agents should assess the right which is claimed for a particular name. Allocation of that name should then take place on a first-come, first-served basis if there are two or more applicants for a domain name, each having a prior right.”*

Therefore, the EU Legislator opted for two sunrise periods or phased registrations on the basis of two ranges of prior rights and also provided for the institution of a Validation Agency to control those rights in compliance with the Regulations. It is exactly what WIPO suggested after its experience of the launch of several more domain names: from .BIZ to .NAME from .INFO to .ORG

In view of the above background, we are ready for the beef.

ART.11 of Reg.874/2004 on Special characters.

This is the text of the **Special characters** provision:

*As far as the registration of complete names is concerned, where such names comprise a space between the textual or word elements, identity shall be deemed to exist between such complete names and the same names written with a hyphen between the word elements or combined in one word in the domain name applied for.*

*Where the name for which prior rights is claimed contains special characters, spaces, or punctuations, these shall be eliminated entirely from the corresponding domain name, replaced with hyphens, or, if possible, rewritten.*

*Special character and punctuations as referred to in the second paragraph shall include the following:*

*~ @ # \$ % ^ & \* ( ) + = < > { } [ ] | \ / : ; ' , . ?*

*Without prejudice to the third paragraph of Article 6, if the prior right name contains letters which have additional elements that cannot be reproduced in ASCII code, such as ä, ê or ñ, the letters concerned shall be reproduced without these elements (such as a, e, n), or shall be replaced by conventionally accepted spellings (such as ae). In all other*

*respects, the domain name shall be identical to the textual or word elements of the prior right name.*

Two conflicting positions in the relevant Case Law.

Two ways of interpreting art.11 arise in the case law before the Czech Arbitration Court. I will describe the two positions, and apologise for being partisan (having being a Panellist in a few cases) in clearly opting for one of them.

We may identify the first line of interpretation by reference to the two leading cases: Barcelona and Live (although they both annulled Eurid's decisions, they are rather different) and the second line of interpretation by reference to the Oxford leading case.

On the whole, the total number of decisions concerning art. 11 is 35 (counting only ex-parte cases, i.e. where the Respondent was Eurid), 18 of which annulled the Eurid's decisions while 16 decided to deny the Complaints. Then, there are 4 other *inter-partes* cases which 3 of them have adopted the Barcelona/Live line of interpretation. In total, there are 21 against and 17 in favour of Eurid's position on art.11 (these data were taken from [www.adreu.eurid.eu](http://www.adreu.eurid.eu) and from its Categorization section).

Of course, decisions depend on facts and thus there are decisions which have denied Complaints but are not necessarily in line with the OXFORD decision and, on the other hand, there are findings which annulled Eurid's decisions which are too severe and not in line with the LIVE case).

The above-mentioned statistics only prove that, contrary to what is usually maintained by Validation Agents, the majority of the decisions were against the Eurid Validation assessments (at the same time, the only decision on art. 11 taken by a Court in Europe, so far, was in favour of Eurid : it is the Benelux Case 136/24/07 - Court of First Instance of Brussels of 8 June 2007 - TOPEU.COM S.R.O vs Eurid) (see Ecta Flash of 16 July 2007 <http://www.ecta.org/upload/Flash-16-07.pdf> ).

In the following pages, four cases will be briefly analysed to show the different positions from the case law.

The Barcelona case

Case 00398 of 23<sup>rd</sup> of March 2006 - \_Ajuntament de Barcelona vs. EURid

(see <http://www.adreu.eurid.eu/adr/decisions>)

It is the leading case because it was one of the first cases to decide on the issue at hand.

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As with many geographical marks, Barcelona was registered by a Dutch company on the basis of its Benelux registration 0780458 for BARC & ELONA. The same Dutch company also filed trademarks such as AMST & ERDAM; ATH & ENS; BIRM & INGHAM; BEL & ARUS; BO & SNIA and so on in order to be able to register domain names without the ampersand.

In assessing art.11, the Panellist stressed the importance of the wording of paragraph two and, in particular, the words “if possible”.

*“The word “or” suggests that the applicant has an unfettered choice as to which of the 3 courses it should follow, whereas the words “if possible” tend to suggest that, if it is possible to re-write the name, that course should be followed. The Complainant has given a number of examples where brand owners have rewritten their name in this way of which the best is probably barnesandnoble.com. These, of course, are only illustrative of solutions which third parties have chosen to adopt.*

*If the Article were construed in a manner which gave an Applicant an unfettered choice, it could lead to some surprising results. For example, the owner of a trademark for B&A&R&C&E&L&O&N&A could have chosen to use it as the basis of a sunrise application for BARCELONA.eu. It should be presumed that the words “if possible” are not otiose. They must be intended to affect the meaning of a phrase which would otherwise give the applicant an entirely free hand, by requiring it to rewrite the name to deal with special characters where that is possible. The position as to what is possible may depend on the Prior Right and the particular special character under consideration but it is considered that it was possible on these facts to rewrite the name and that, on these facts, the Prior Rights should have been rewritten as BARCANDELONA. Accordingly, it is not considered that the Respondent’s decision in this respect was in accordance with the Regulations.”*

Paragraph 2 of art.11 points out three choices which are not equal. In the Barcelona case the Panellist stressed the importance of “if possible” and implicitly underlined a list of priorities in which the “re-writing” solution is to be preferred if possible and then the other two solutions: replacement with a hyphen or elimination.

Of course, one could object that it is always possible to re-write the definition of any special character, but the Barcelona decision sticks to the particular circumstances of the case without offering any other hint. Probably, the limitation implicit in the “if possible” clause could be explained with reference to the identity rule. And this, in fact, was the main element of the second case.

The LIVE decision

Case 00265 of 13th of March 2006 - Microsoft B.V vs. Eurid -  
(see <http://www.adreu.eurid.eu/adr/decisions>)

In this case the difference between the first paragraph and second paragraph of art 11 is stressed and, above all, the importance of the identity principle.

*"In the former it is the legislator itself that made an authentic interpretation. It states that in case of trademarks comprising words separated by a space or by a hyphen this separation does not prejudice the identity with domain name written as a one word. Therefore, in these cases there is no choice, identity is there and a domain name has to be accepted."*

In the second paragraph, such an automatic application of the identity principle was not provided by the Legislator. That article offers three possible solutions which are not equal, but have to follow if they maintain the identity principle. This means that the three options are to be chosen in order to prefer the best solution in the light of the identity between the trademark and the relevant domain name.

Therefore, it would be possible not to re-write a special character if the trademark comprises two clearly identifiable names divided by that special character: BARNES & NOBLE could be considered identical to cover domain names such as barnesnoble.eu or barnesandnoble.eu or barnes-noble.eu. In all of these cases, anybody could easily identify and recognise the two distinctive elements.

On the other hand, BARC & ELONA do not mean anything and are not recognised as autonomous and independent verbal elements. In this case the only possible solution to respect the identity rule could have been to register the domain name as BARCANDELONA or BARCUNDELNOA or BARCEELONA and so on.

In the LIVE case the decision refers to the Court of Justice's trademark cases to give hints on how identity should be defined. It is held that:

*"This identity should carefully assess: What does identity mean? In any dictionary, one can find that identity means: "The quality or condition of being exactly the same; identicalness, oneness, sameness, selfsameness. Therefore, the "exact sameness of the things compared" needs to be stressed. It seems to me that only a strict interpretation is consistent with the legal rationale of the sunrise provisions."*

If the possibility to eliminate the special character were a mere choice left to the applicant, the identity principle cited in paragraph 1 of art. 11

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would not have any reason at all. It could have been enough for the Legislator to establish that any applicant with trademarks comprising special characters could have chosen to delete them or replace them with a hyphen or have them re-written. There is no reason to have two paragraphs in which, in the first, the legislator states that in a specific case, i.e. a trademark comprising names divided by a space, identity is maintained if a domain name is written with a hyphen or all in one word.

The second paragraph, therefore, refers to different cases: when there are names with special characters, space (evidently not between two separate names) or punctuations, identity is not maintained by deleting those special characters, space or punctuations (otherwise, we would be in the same situation governed by paragraph 1), but a choice of the possible best solution is given in order to comply with the basic principle of the sunrise period: identity between trademarks and claimed domain names.

As stated in the LIVE case *“The issue of identity was very clearly explained by the Advocate General, Mr. Jacobs, in his Opinion of 17 January 2002 in the European Court of Justice Case: C-291/00 between S.A S.A. Société LTJ Diffusion vs. SA SADAS. In relation to art. 4 (1) and 581) (a), he declared that “in principle, any difference, whether it might be viewed as adding, removing or modifying any element, must involve loss of identity. And further “yet there may be slight differences between trade marks so that the two are not rigorously identical, but nonetheless remain difficult to distinguish from one another”. “In practical terms, if a trademark is composed of two names with autonomous meanings and recognition by an average person of their individuality, then keeping or eliminating the “&” character does not alter the identity rule. Procter & Gamble or ProcterGamble.eu are recognised as the same; on the contrary, LI&VE and LIVE.eu are different enough to be considered not identical.”*

In fact, the .eu regulation requirement in this sense is well expressed by Article 10.2: **“The registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists.”**

Why didn't the provision at issue expressly state also in the second paragraph that the identity should have been assessed in each particular case following those criteria? This question was crucial in the rationale of the next case and in all the decisions of the (as we call it) second line of interpretation.

The OXFORD decision

Case 01867 of 19th of June 2006 - The Chancellor Masters & Scholars of the University of Oxford, t/a Oxford University Press, Ms Jo Marks vs Eurid-

(see <http://www.adreu.eurid.eu/adr/decisions>)

In this case, a textual interpretation of art.11 was chosen, by considering the three options offered by the second paragraph – all equally applicable at the applicant’s discretion.

Contrary to the position taken in the above decisions, the Panelist in this case opted for a different approach. He points out that there is no obligation upon the applicant or upon the Validation Agent to “examine” or to “assess” or, even worse, to “interpret” a provision of the regulation. The rationale behind the system was that one of an “absolute idea of an uncompromised automated process”.

He stated the following: *In the Panel view, the Respondent was not unreasonable when it decided to validate the Parknet application, notably because the elimination of the special character is indeed one of the possibilities created by article 11 and because the elimination of the “&” symbol is as good as another solution for that trademark.*

However, the following was recognised with reference to the CRUX decision:

*“Neither can the Panel accept the position of Eurid of absolute non-intervention in the verification of the transliteration. This is going much too far. Even in the limited scope of article 11, Eurid (and/or the verification agent) also has obligations.*

*Eurid’s general duty in the verification process has been expressed in 00642 (CRUX):*

*“Under Sunrise Rules, Article 21.3, the validation agent may, at his own discretion, conduct investigation into the circumstances of the respective application.*

*The Panel appreciates the high number of application received and processed by the Respondent, and the Panel also understands the tendency of the Respondent to apply those automated processes as mentioned in the Respondent’s response to the Complaint. The respective legal provisions cited above put the Respondent under clear legal obligation to examine the application (Art. 14 of the Regulation*

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874/2004) and to assess the respective right of the applicant (recital 12 of the Regulation 874/2004.

*In the opinion of the Panel, these obligations to “examine” and to “assess” are clearly in conflict with the absolute idea of an uncompromised automated process.”*

In other words, this line of thought could be represented by this sentence: if Eurid (and its Validation Agent) had to refuse one of the three options listed in art11 in some specific cases, the Regulation (or, at the very least, the Sunrise Rules) should have said so. In the lack of clear guidelines, the provision has to be interpreted by broadly applying a sort of “favour registrandi” principle.

#### The FEE decision

Case 01317 of 25th May 2006 -\_Fédération des Experts Comptables Européens (FEE), Mr Henri Olivier vs. Eurid)  
(<http://www.adreu.eurid.eu/adr/decisions>)

In this decision, the paradox of following the Oxford rationale while at the same time dismissing any possible request for identity between the trademark and its domain name is clear.

The Complainant disputed the registration of the domain name FEE.eu because it was obtained (during the sunrise period) on the basis of the registered trade mark “F&E”. The Complaint claimed that the domain name could be rewritten to result in either FANDE.EU or FETE.EU, but not FEE.EU.

In this case, the paradox of the OXFORD rationale is clear. Certainly, FEE is a totally different word (with a specific meaning in English perceived by many Europeans and even by non-English speaking citizens) from F & E. It is, in fact, a totally different word also as regards phonetic pronunciation, as one existing word where the division between the letter F and the second letter E was totally lost.

Under a trademark comparison assessment, certainly almost everybody would accept that the two marks like those would not be identical and probably neither confusingly similar. However, by applying the OXFORD rationale and art. 11 literally, the Complaint was denied and the owner of the trademark F& E managed to obtain the domain name FEE.eu.

The crucial points of the decision are the following:

*Article 11 of the Commission Regulation (EC) No 874/2004 of 28 April 2004 (“Public Policy Rules”) states that where the name for which prior*

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*rights are claimed contains special characters, such as an ampersand ("&"), these shall be eliminated entirely from the corresponding domain name, replaced with hyphens, or, if possible, rewritten.*

*The standard meaning of an ampersand is "AND" in English, but there is no rule limiting an Applicant to rewrite the special character in a particular language (ADR decision No 01239 PESA). According ADR decision No 00394 FRANKFURT, the ampersand can be rewritten by a "corresponding word in another language". In this case, the Applicant decided to rewrite the ampersand (see below) which is the most logical way how this special character could be eliminated from the respective trademark.*

*The disputed domain name FEE.EU was registered by Traffic Web Holding BV on the basis of national trade mark "F&E" registered in Netherlands. As mentioned above, the Applicant transcribed the ampersand used in the trademark and did not choose to eliminate it nor replace with a hyphen. The Applicant used "E" as the transcription of the ampersand. The word "E" is an Italian or Portuguese translation of English word "AND". As there is no limitation on the language used for the transcription of a special character in the Public Policy Rules, the way of transcription depends on the Applicant's decision only, provided that such transcription uses an existing word from a real language. The fact that ampersand is usually translated as "AND" or "ET" cannot prevent its translation to other languages even if such translation leads to "one-character" word as "E". Therefore, the Applicant's transcription of the ampersand leading to registration of disputed domain name FEE.EU is a correct way to register a domain name based on the "F&E" trade mark.*

In this case it is quite clear that the identity principle did not enter that evaluation at all. Is this correct if one considers the rationale of the phased registration or, indeed, of any sunrise mechanism applied in past experiences? Of course, the question is rhetorical, but it is useful to close our sandwich with the final slice of bread and thus to bite the final conclusions.

### Final Conclusions

Perhaps it is true what Stanley Fish established in his theory of "Reader-Response Criticism." That is to say, the idea that in the act of reading, the reader "creates" the meaning of the text.

The interpretive act is the mediator between the thing we seek to understand and our grasp of its meaning. Interpretation makes understanding possible. (See STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 1980).

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Certainly, art. 11 offers readers the chance to create their texts. And this is the only assumption that the supporters of both lines of interpretation might share. Art. 11 could have been rendered clearer and more complete in order to avoid misunderstanding and misinterpretation.

It seems that a textual interpretation (or literal interpretation) was not sufficient because it justified derailments from one of the main general principles of the sunrise periods: **the domain name has to be identical to the textual or word elements of the trademark registration.**

This principle (as described above) was introduced in the .info sunrise mechanism and, at the same time, it was provided by the EU legislator thanks to art.10 and 11.1 of reg.874/2004.

The main principle has to be used like a magnifying glass through which the interpreter should read all the other provisions. Therefore, if the interpretation results in a substantial deviation from one of the main principles of the system, then it means that the applied interpretation cannot be followed.

It would be peculiar to recognise that the identity principle is comprised in the first paragraph of art.11, which also gives a few options for adapting the trademark to the domain name rules and some physical constraints avoiding violation of the identity rule, while the same principle is not applicable in the second paragraph, concerning more delicate cases, which introduce options that are intended to be freely left to the applicant's discretion! This contradiction was not solved by followers of the Oxford rationale in the FEE case, and has proved the consequential abandonment of the identity rule.

It is self-evident that even in the cases covered by the second paragraph, the principle of identity has to be maintained and preserved as it was in the past WIPO experience of sunrise periods, and also in order to respect the rationale of the entire .eu sunrise or phased registration mechanism.

The Validation Agents have rightly refused many applications because there was no identity between the trademark claimed and the requested domain name. In the same way, they should have applied the same strict assessment also in relation to trademarks with special characters. The three options of paragraph 2 would have been sufficient to give directions to the registrants in order to apply the right solution on the only condition to comply with the identity rule.

As far as future sunrise period mechanisms are concerned, it would be important to consider the .eu experience.

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The two phased registrations have worked quite well and perhaps each term could be extended to six months because, in some cases, especially for unregistered trademarks, gathering the right evidence of use in a couple of months is not as easy as it might seem.

Further thoughts should be given to the descriptive or generic terms registered in composite and distinctive trademarks. In this sense, it may be worth considering the WIPO proposal that only a registered word mark could benefit from the sunrise mechanism or we may think of assessing the distinctive verbal elements included in composite trademarks.

The second option should be preferred, but it raises the question of a Validation body with sound experience in the assessment of distinctiveness (one may immediately think of the OHIM or of any other European National Office). Of course, in this context the descriptiveness or genericness of a term should be evaluated in itself without any reference to the goods or services covered in the trademark registration.

Therefore, art.11 could be slightly changed in order to accommodate the identity principle (comprised both in the first and in the third paragraph) also in relation to the second paragraph. It could be enough to add the following sentence: “ opting for one of these solutions which may prove to be more appropriate in order to maintain the identity principle”.

Paragraph 3 gives clear indications to be followed in cases concerning ä, è or ñ and ends with a sweeping clause: *In all other respects, the domain name shall be identical to the textual or word elements of the prior right name.*

If, in the sunrise periods, one wishes to register a domain name in Cyrillic script, it should have the relevant trademark expressed in that language. No translation would be admissible.

Also, in the last sentence of paragraph 3 we find, in a sort of squaring of the circle, a re-affirmation of the identity rule : *it should be identical to the verbal or word text of the mark.*

This confirms the opinion accepted in this article.

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