



उत्तर प्रदेश UTTAR PRADESH

BA 238709

INDRP ARBITRATION
THE NATIONAL INTERNET EXCHANGE OF INDIA [NIXI]

ADMINISTRATIVE PANEL DECISION
SOLE ARBITRATOR: RODNEY D. RYDER

Dell Inc. v. Jack Sun

ARBITRATION AWARD

Disputed Domain Name: www.dellcloud.in

The Parties

The Complainant in this arbitration proceeding is Dell Inc., having its registered office at One Dell Way, Round Rock, Texas, United States of America; represented by Anand and Anand, India. The Respondent in this arbitration proceeding is Mr. Jack Sun, Domainjet Inc., 1800 Amphitheatre Parkway, Mountain View, California, United States of America as per the details given by the Whois database maintained by the National Internet Exchange of India [NIXI].

The Domain Name and Registrar

The disputed domain name is www.dellcloud.in. The Registrar with which the disputed domain name is registered is Directi Internet Solutions Pvt. Ltd., Mumbai, India.

Procedural History [Arbitration Proceedings]

This arbitration proceeding is in accordance with the .IN Domain Name Dispute Resolution Policy [INDRP], adopted by the National Internet Exchange of India ["NIXI"]. The INDRP Rules of Procedure [the Rules] were approved by NIXI on 28th June, 2005 in accordance with the Indian Arbitration and Conciliation Act, 1996. By registering the disputed domain name with the NIXI accredited Registrar, the Respondent agreed to the resolution of the disputes pursuant to the IN Dispute Resolution Policy and Rules framed thereunder.

According to the information provided by the National Internet Exchange of India ["NIXI"], the history of this proceeding is as follows:

In accordance with the Rules, 2(a) and 4(a), NIXI formally notified the Respondent of the Complaint, and appointed Rodney D. Ryder as the Sole Arbitrator for adjudicating upon the dispute in accordance with the Arbitration and Conciliation Act, 1996, and the Rules framed thereunder, .IN Domain Name Dispute Resolution Policy and the Rules framed thereunder. The Arbitrator submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by NIXI.

The request for submission with a complete set of documents was dispatched to the Respondent by the National Internet Exchange of India [NIXI]. A reminder was sent on February 1, 2012 by the Arbitrator. The Respondent did not reply.

Grounds for the administrative proceedings

1. The disputed domain name is identical or confusingly similar to a trademark in which the Complainant has statutory/common law rights.
2. The Respondent has no rights or legitimate interests in respect of the disputed domain name.
3. The disputed domain name has been registered or is/are being used in bad faith.

Parties Contentions

Complainant

The Complainant in his complaint, inter alia, contended as follows:

The Respondent's domain name is identical and confusingly similar to a name, trademark or service in which the Complainant has rights.



The Complainant, based on various Indian and international trademark registrations across various classes of the trademark 'DELL'. Based on the use of the said trademark[s] in India and other countries submitted that it is the sole proprietor of and has sole and exclusive rights to use the said trademark[s] 'DELL'.

The Complainant is the registered proprietor of the mark 'DELL' in India and several countries across the world. The Complainant submits that as the disputed domain name is 'www.dellcloud.in', the disputed domain name is clearly identical/confusingly similar to the Complainant's trademark and one of its services - 'Dell Cloud Computing Solutions' in which the Complainant has exclusive rights and legitimate interest.

Background of the Complainant and its statutory and common law rights Adoption:

The Complainant was founded in 1984 and began using the trademark 'DELL' from 1987. The Complainant is in the top 50 of the fortune 500 companies and is one of the major providers of computer systems with an approximate sale of 10,000 systems per day across 180 countries around the world. The Complainant also provides many services and facilities amongst which one is named as 'Dell Cloud Computing Solutions'. The Complainant started its business operation in India in 1993 and presently has exclusive stores all over the country. The Complainant also marks a huge internet presence with over 5000 domain names, majority of which include the trademark 'DELL' including <www.dellcloud.com>.

The Complainant further contends that the trademark "DELL" and other related formative marks have acquired global reputation and goodwill and are well known marks.

Statutory rights:

The Complainant is the owner of numerous trademarks relating to the brand 'DELL' and other formative marks in over 184 countries including United States of America and India: Trademarks in classes 2, 9, 36, 37 and 42 have been registered in India.

Respondent

The Respondent failed to reply to the notice regarding the complaint.

Discussion and Findings

The Respondent does not have any relationship with the business of the Complainant or any legitimate interest in the mark/brand 'DELL'. Moreover, the Complainant has neither given any license nor authorized the Respondent to use the Complainant's mark.

The disputed domain name contains the entirety of the Complainant's trademark and the generic term 'CLOUD'. The complainant operates a service with the name of 'Dell Cloud Computing Solutions' and has a registered domain name <www.dellcloud.com>. It is well established that the specific top level domain, such as ".com", ".net" or ".co.in", does not affect the domain name for the purpose of determining whether it is identical or confusingly similar [Relevant decisions: *Magnum Piering, Inc. v. The Mudjackers and Garwood S. Wilson, Sr.*, WIPO Case No. D2000-1525; *Rollerblade, Inc. v. Chris McCrady*, WIPO Case No. D2000-0429].

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It is a well established principle that that once a complainant makes a prima facie case showing that a respondent lacks rights to the domain name at issue, the respondent must come forward with the proof that it has some legitimate interest in the domain name to rebut this presumption.

The Respondent's Default

The INDRP Rules of Procedure require under Rule 8(b) that the arbitrator must ensure that each party is given a fair opportunity to present its case. Rule 8(b) reads as follows

"In all cases, the Arbitrator shall ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case."

Rule 11(a) empowers the arbitrator to proceed with an ex parte decision in case any party does not comply with the time limits or fails to reply against the complaint. Rule 11(a) reads as follows:

" In the event that a Party, in the absence of exceptional circumstances as determined by the Arbitrator in its sole discretion, does not comply with any of the time periods established by these Rules of Procedure or the Arbitrator, the Arbitrator shall proceed to decide the Complaint in accordance with law."

The Respondent was given notice of this administrative proceeding in accordance with the Rules. The .IN Registry discharged its responsibility under Rules paragraph 2(a) to employ reasonably available means calculated to achieve actual notice to the Respondent of the Complaint.

As previously indicated; the Respondent failed to file any reply to the Complaint and has not sought to answer the Complainant's assertions, evidence or contentions in any manner. The Arbitrator finds that the Respondent has been given a fair opportunity to present his case.

The 'Rules' paragraph 12(a) provides that the Arbitrator shall decide the Complaint on the basis of the statements and documents submitted in accordance with the INDRP and any law that the Arbitrator deems fit to be applicable. In accordance with Rules paragraph 12, the Arbitrator may draw such inferences as are appropriate from the Respondent's failure to reply to the Complainant's assertions and evidence or to otherwise contest the Complaint. In the circumstances, the Arbitrator's decision is based upon the Complainant's assertions and evidence and inferences drawn from the Respondent's failure to reply.

The issues involved in the dispute

The Complainant in its complaint has invoked paragraph 4 of the INDRP which reads:

"Types of Disputes -

Any Person who considers that a registered domain name conflicts with his legitimate rights or interests may file a Complaint to the .IN Registry on the following premises:

- (i) the Respondent's domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights;*
- (ii) the Respondent has no rights or legitimate interests in respect of the domain name; and*
- (iii) the Respondent's domain name has been registered or is being used in bad faith.*

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The Respondent is required to submit to a mandatory Arbitration proceeding in the event that a Complainant files a complaint to the .IN Registry, in compliance with this Policy and Rules thereunder."

According to paragraph 4 of the INDRP, there are 3 essential elements of a domain name dispute which are being discussed hereunder in the light of the facts and circumstances of this case.

The Respondent's domain name is identical and confusingly similar to a name, trademark or service in which the Complainant has rights.

It has been proved by the Complainant that it has intellectual property, particularly trademark rights, and other rights in the mark 'DELL' by submitting substantial documents. The disputed domain name contains Complainant's 'DELL' Trademark in its entirety with the generic term 'CLOUD'. The mark is being used by the Complainant in relation to its business with the name of 'Dell Cloud Computing Solutions'. The mark has been highly publicized and advertised by the Complainant in both the electronic and print media; both in India and globally and the disputed domain name is similar to that of the complainant's mark, services and domain name <www.dellcloud.com>.

Further, it has been previously decided under the INDRP that incorporating a well known trademark in its entirety is sufficient to establish the identical and confusingly similar nature.

According to the INDRP paragraph 3 it is the responsibility of the Respondent to find out before registration that the domain name he is going to register does not violate the rights of any proprietor/brand owner.

Paragraph 3 of the INDRP is reproduced below:

"The Respondent's Representations -

By applying to register a domain name, or by asking a Registrar to maintain or renew a domain name registration, the Respondent represents and warrants that:

- the statements that the Respondent made in the Respondent's Application Form for Registration of Domain Name are complete and accurate;*
- to the Respondent's knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party;*
- the Respondent is not registering the domain name for an unlawful purpose; and*
- the Respondent will not knowingly use the domain name in violation of any applicable laws or regulations.*

It is the Respondent's responsibility to determine whether the Respondent's domain name registration infringes or violates someone else's rights."

The Respondent has failed in his responsibility discussed above and in the light of the pleadings and documents filed by the Complainant; The Panel comes to the conclusion that

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the disputed domain name is identical with or deceptively similar to the Complainants' 'DELL' marks and its business 'Dell Cloud Computing Solutions'. Accordingly, the Panel concludes that the Complainant has satisfied the first element required by Paragraph 4 of the INDRP.

The Respondent has no rights or legitimate interests in respect of the disputed domain name

The second element that the Complainant needs to prove and as is required by paragraph 4(ii) of the INDRP is that the Respondent has no legitimate right or interests in the disputed domain name.

The Complainant has never assigned, granted, licensed, sold, transferred or in any way authorised the Respondent to register or use the 'DELL' Trademark or its business' name.

Once the Complainant makes a prima facie case showing that the Respondent does not have any rights or legitimate interest in the domain name, the evidentiary burden shifts to the Respondent to rebut the contention by providing evidence of its rights or interests in the domain name.

The Respondent has not rebutted the contentions of the Complainant and has not produced any documents or submissions to show his interest in protecting his own right and interest in the domain name. Further, the Respondent has not used the domain name or a name corresponding to the disputed domain name in connection with a bonafide offer of goods or services. Further, the Respondent is not commonly known by the disputed domain name and has not made any legitimate non-commercial or fair use of the disputed domain name, instead has registered several domain names identical or confusingly similar to the Complainant's mark 'DELL'.

Further, the Respondent has been using the disputed domain name to confuse the internet users by directing them to a parking page containing pay per click advertisements and third party links, majority of which direct to products or services offered by the Complainant's competitors.

Such behaviour constitutes evidence that the Respondent has no right or legitimate interest in respect of the disputed domain name www.dellcloud.in.

For these reasons, the Arbitrator finds that the Respondent has no rights or legitimate interests in the disputed domain name.

The disputed domain name has been registered or is being used in bad faith.

It has been contended by the Complainant that the Respondent has registered and has used the disputed domain name in bad faith. The language of the INDRP paragraph 4(iii) is clear enough, and requires that either bad faith registration or bad faith use be proved.

Paragraph 6 of the INDRP provides that the following circumstances are deemed to be evidence that a Respondent has registered and used a domain name in bad faith:

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"Circumstances indicating that the Respondent has registered or has acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of the complainant, for valuable consideration in excess of its documented out-of-pocket costs directly related to the domain name; or

the Respondent has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the Respondent has engaged in a pattern of such conduct; or

by using the domain name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its Website or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation or endorsement of its Website or location or of a product or service on its Website or location."

From the circumstances of the case and from the evidences put before the Panel by the Complainant, the Panel is of the opinion that the Respondent had no previous connection with the disputed domain name and any use of the disputed domain name by the Respondent, would result in confusion and deception of the trade, consumers and public, who would assume a connection or association between the Complainant and the Respondent.

It appears that the Respondent has been using the disputed domain name to direct internet users to a 'parking page' which contains several pay per click advertisements and third party links of websites offering goods and services in direct competition with the Complainant. In the view of the Panel, such activity is evident of the fact that the Respondent is using the disputed domain name <www.dellcloud.in> in bad faith.

Further, the Respondent seems to be in the business of registering domain names related to famous marks for commercial gain, as is evident by the annexure/list provided by the Complainant. Moreover, the Respondent's act of registering several different domain names related to the Complainant's mark 'DELL' and subsequent attempt(s) of selling them back to the Complainant indicates bad faith on part of the Respondent.

The domain name is deceptively similar to the trademark of the Complainant and will lead to confusion with the Complainant's mark 'DELL' and its various services, as to the source, sponsorship, affiliation or endorsement of the Respondent's website or location or of a product or service on the registrant's website or location.

The Panel is therefore prepared to accept that the Complainant's 'DELL' trademark and corresponding business is well-known and has developed a significant global reputation. With regard to Famous Names, successive UDRP panels have found bad faith registration because Complainant's name was famous at the time of registration: *WIPO/D2000-0310 [choyongpil.net]*. On bad faith registration and use [generally], panels have noted: "Registration of a well-known trademark by a party with no connection to the owner of the trademark and no authorization and no legitimate purpose to utilize the mark reveals bad

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faith": NAF/FA95314 [*thecaravanclub.com*], WIPO/D2000-0808 [very use of domain name by Respondent who had no connection whatsoever with Complainant's mark and product suggests opportunistic bad faith - *4icq.com*].

Thus, all the three conditions given in paragraph 6 of the Rules are proved in the circumstances of this case and thus the registration of the impugned domain name by the Respondent/Registrant is a registration in bad faith.

Decision

The following circumstances are material to the issue in the present case:

- (i) the Complainants' trademark has a strong reputation and is widely known on a global basis;
- (ii) the Respondent has provided no evidence whatsoever of any actual or contemplated good faith use of the disputed Domain Name;
- (iii) taking into account the nature of the disputed domain name and in particular the .in extension alongside the Complainant's mark, which would inevitably associate the disputed domain name closely with the Complainant's group of domains and companies in the minds of consumers, all plausible actual or contemplated active use of the disputed Domain Name by the Respondent is and would be illegitimate. Use by the Respondent as such would amount to passing off, an infringement of consumer protection legislation, or an infringement of the Complainant's rights under trademark law.

The Respondent failed to comply with Para 3 of the INDRP which requires that it is the responsibility of the Respondent to ensure before the registration of the impugned domain name by him that the domain name registration does not infringe or violate someone else's rights. The Respondent should have exercised reasonable efforts to ensure there was no encroachment on any third party rights. [Relevant decisions: *Salmi Oy v. PACWEBS* WIPO Case No. D2009-0040; *Graco Children's Products Inc. v. Oakwood Services Inc.* WIPO Case No. D2009-0813; *Artemides Holdings Pty Ltd v. Gregory Ricks* WIPO Case No. D2008-1254; *Ville de Paris v. Jeff Walter* WIPO Case No. D2009-1278].

The Complainant has given sufficient evidence to prove extensive global trademark rights on the disputed domain name. Further, the Respondent's adoption and registration of the disputed domain name is dishonest and malafide.

While the overall burden of proof rests with the Complainant, panels have recognized that this could result in the often impossible task of proving a negative, requiring information that is often primarily within the knowledge of the Respondent. Therefore a complainant is required to make out a *prima facie* case that the Respondent lacks rights or legitimate interests. Once such *prima facie* case is made, Respondent carries the burden of demonstrating rights or legitimate interests in the domain name. Thus it is clear that the Respondent is using the disputed domain name in bad faith and has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name.

[Relevant decisions: *Lego Juris AS v. Robert Martin* INDRP/125; *Societe Air France v. DNS Admin* INDRP/075; *Kelemata SPA v. Mr Bassarab Dungaciu* WIPO D2003-0849; *Croatia*

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Airlines d.d. v. Modern Empire Internet Ltd. WIPO D2003-0455; Uniroyal Engineered Products, Inc. v. Nauga Network Services WIPO D2000-0503; Microsoft Corporation v. Chun Man Kam INDRP/119]

The Respondent's registration and use of the domain name [www.dellcloud.in] is abusive and in bad faith. The Respondent has no rights or legitimate interests in respect of the domain name. In accordance with Policy and Rules, the Panel directs that the disputed domain name [www.dellcloud.in] be transferred from the Respondent to the Complainant; with a request to NIXI to monitor the transfer.

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Rodney D. Ryder
Sole Arbitrator

Date: February 18, 2012