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INDRP ARBITRATION
THE NATIONAL INTERNET EXCHANGE OF INDIA [NIXI]
ADMINISTRATIVE PANEL DECISION
SOLE ARBITRATOR: JAMES M.

Dell, Inc.
V.
Ayush Kumar

ARBITRATION AWARD
Disputed Domain Name: www.dellilaptopservicecenter.net.in

The Parties

The **Complainant** in this arbitration proceeding is*Dell Inc.*, is a Delawarecorporation having its principal place of business One Dell Way, Round Rock, Texas 78682, United States of America. The complainant is represented by the authorized representatives, Akhilesh Kumar Rai.

The **Respondent** in this arbitration proceeding is Mr. Ayush Kumar, located at Chittaranjan Avenue, West Bengal 700012, 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.delllaptopservicecenter.net.in. The Registrar with which the disputed domain name is registered is *GoDaddy.com (R101- AFIN)*

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 there under.

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 James Mukkattukavunkal as the Sole Arbitrator for adjudicating upon the dispute in accordance with the Arbitration and Conciliation Act, 1996, and the Rules framed there under, .IN Domain Name Dispute Resolution Policy and the Rules framed there under. The Arbitrator submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by NIXI.

The Information as to the handover of the case to the panel was notified to all concerned parties on 21stMay, 2018. Electronic copy of the complete set of documents was also sent to the Respondent on 4th May, 2018. The Respondent was requested to send in all such documents by 15th June, 2018. 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.

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

The complainant in this arbitration proceeding is *Dell Inc*, a company incorporated under the laws of Delaware, United States of America. The trademark "Dell" has been in continuous use by the complainant since 1988.

Statutory rights:
The Complainant contends that the trademark "Dell" and its variants in all forms of multiple classes have acquired global reputation and goodwill and are well known marks. The first trademark registration of the mark "Dell" is in the year 2002. The Complainant holds several domain name registrations incorporating the "Dell" trademark.

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. It is a well-established principle 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.

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.

Parties Contentions

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

Complainant

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

The Complainant submits that as the disputed domain name is 'delllaptopservicecenter.net.in', it is clearly identical/confusingly similar to the Complainant's trademarks – "Dell Portfolio – including 'Dell' among others"–in which the Complainant has exclusive rights and legitimate interest.

It has been proved by the Complainant that it has the intellectual property, particularly trademark rights, and other rights in the mark "Dell" by submitting substantial documents. 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 names.

A mere glance at the disputed domain name gives rise to enormous confusion as to its origin. The disputed domain name registered by the Respondent is identical to the Corporate as well as the trademark of the Complainant. The complainant enjoys statutory and common law proprietary rights over the trademark 'Dell' and the public identify the said trademark exclusively with the complainant and no one else. This panel comes to a conclusion that when a domain name contains a trademark in its entirety, the domain name is identical or at least confusingly similar to the trademark. [**Relevant Decisions**: *International Business Machines Corporation v. Zhu Xumei,* INDRP/646, (January 30, 2015);*Jaguar land Rover v. Yitao,* INDRP/641, (January 4, 2015)]

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."

Respondent
The Respondent has failed to respond to the Complainant's complaint and assertions. 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 the disputed domain name is identical with or deceptively similar to the Complainants' marks and its business. Accordingly, the Panel concludes that the Complainant has satisfied the first element required by Paragraph 4 of the INDRP.

II. <u>The Respondent has no rights or legitimate interests in respect of the disputed domain name</u>

Complainant
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.

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 cannot have any right or legitimate interest in the disputed domain name because the disputed domain name incorporates the 'Dell" mark, a mark in which the Complainant has the sole and exclusive right and that has become well known owing to the Complainant's efforts.

The Respondent is not authorized by the Complainant to use the domain name. In the absence of any license or permission from the Complainant to use any of its trademarks or to apply for or use any domain name incorporating those trademarks, it is clear that no actual or contemplated bonafide or legitimate use of the domain name could be claimed by the Respondent [**Relevant Decisions:***Statoil ASA v. Bright, AK, D2014-1463 (WIPOOctober 14, 2014)and Swiss Eco Patent S.A. v. Verdicchio Simon, D2014-1804 (WIPO November 21, 2014)*]

The registration of the disputed domain name by the Respondent is therefore a case of trademark infringement. The panel agrees with the contention of the Complainant that the Respondent's website of the disputed domain name infringes the right of the Complainant and the Respondent is in willful default thereof.

Respondent
The Respondent has failed to respond to the Complainant as noted above.

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

III. <u>The disputed domain name has been registered or is being used in bad faith.</u>

Complainant
It has been contended by the Complainant that the Respondent has registered 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 use of bad faith has to 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:

"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. Thus, the adoption of an identical trademark/domain name **[www.delllaptopservicecenter.net.in]** by the Respondent is very much in bad faith.

On perusal of the disputed domain name the panel found that the Respondent has used the disputed domain name to intentionally attract internet website users to its website or the on-line location by creating a likelihood of confusion with the complainants "Dell" Trade Mark as to source, sponsorship or affiliation or endorsement of the website 'www.delllaptopservicecenter.net.in'.[Relevant Cases: *Maher Mohammad Najib Mikati v. Domain Privacy Service FBO Registrant / Kaleb Jacob Mikati, Mikati Associates, D2014-1960 (WIPO, December 22, 2014Woolworths Limited v. Mucahid Saki,D2014-0952 (WIPO July 24, 2014); The Coco-Cola Company v. Ma Ying Jo, WIPO Case No. D2012-1823*]

It is also a well settled principle that the registration of a domain name that incorporates a well-known mark by an entity that has no relationship to the mark is evidence of bad faith. [**Relevant Decision**: *The Ritz Carlton Hotel Company LLC v. Nelton! Brands Inc.,* INDRP/250 (December 30, 2011)]

The Respondent's registration of the domain name meets the bad faith elements set forth in the INDRP. Since the trademarks of the Complainant have been registered around the globe countries and many domain names registered with the trademark "Dell" leads to the conclusion that the marks apart from being a registered mark has also acquired secondary meaning through usage of the mark, such that consumers would identify the said mark with the complainant and no one else thereby supporting the assumption that the Respondent must have had actual knowledge of the trademarks prior to registering the disputed domain name. There cannot be any doubt from the evidences put before this panel that the Complainant's marks are well known and that the Respondent intended to capitalize on that confusion. Therefore the panel comes to the conclusion that the registration is in bad faith. By registering the disputed domain name with actual knowledge of the Complainant's trademark, which was further reinforced by the chain of events above, the Respondent acted in bad faith by breaching its service agreement with the registrar because the

Respondent registered a domain name that infringes upon the Intellectual Property rights of another entity, which in the present scenario is the Complainant. [**Relevant Decision:***Swarovski Aktiengesellschaft v. WhoisGuard, Inc. / Person, Johnny D.,D2013-1450, (WIPO October 2, 2013); zingametall BVBA v. Mister Alexey Navalny INDRP/639(January 21, 2015)]*

Respondent
The Respondent has failed to respond to the Complainant as noted above.

Consequently it is established that the disputed domain name was registered in bad faith as well as used 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 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 or in other words 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].

It is Registrant's/Respondent's duty under para. 3 of the .IN Dispute Resolution Policy to warrant and prove to the contrary that:

"(a) the Registrant/Respondent has accurately and completely made the Application Form for registration of the domain name;

(b) to the Registrant's knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party;

(c) the Registrant is not registering the domain name for an unlawful purpose; and

(d) the Registrant will not knowingly use the domain name in violation of any applicable laws or regulations.

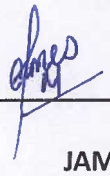
It is the Registrant's responsibility to determine whether the Registrant's domain name registration infringes or violates someone else's rights."

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**: PJS International S.A. v. Xianwang INDRP/616 (September 1, 2014); Mozilla Foundation v. Mr. Chandan INDRP/642 (January 15, 2015); Mr. Marcus Angell v. Mr. Mohit Mehta INDRP/621 (September 22, 2014); Walcom Co. Ltd v. Liheng INDRP/634 (November 24, 2014) ; AB Electrolux v. GaoGou of Yerect INDRP/630 (October 19, 2014) Kelemata SPA v. Mr Bassarab Dungaciu WIPO D2003-0849; Croatia 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; D2012-0466 WIPO Luigi Lavazza S.p.A. v. Noori net; D2008-1474 WIPO Serta Inc. v. Charles Dawson; Guerlain S.A. v. Peikang, D2000-0055 (WIPO March 21, 2000]; Univ of Houston Sys, v. Salvia Corp., FA 637920(Nat. Arb. Forum March 21st 2006); Red Hat, Inc. v. Haecke, FA 726010 (Nat. Arb. Forum July 24th 2006; Lockheed Martin Corporation v. Steely Black, INDRP/183 (January 5, 2011), Revlon Consumer Products Corporation of New York v. Ye Genrong, et al, D2010-1586 WIPO November 22, 2010]*

The Respondent's registration and use of the domain name [www.delllaptopservicecenter.net.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.delllaptopservicecenter.net.in] be transferred from the Respondent to the Complainant; with a request to NIXI to monitor the transfer.



JAMES M.
Sole Arbitrator
Date: 28 June, 2018