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INDRP ARBITRATION

THE NATIONAL INTERNET EXCHANGE OF INDIA [NIXI]

ADMINISTRATIVE PANEL DECISION
SOLE ARBITRATOR: JAMES M.

Alstom
V.
Doublefist Limited

ARBITRATION AWARD
Disputed Domain Name: www.alstom.co.in

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The Parties

The **Complainant** in this arbitration proceeding is *Alstom.*, is a French corporation having its principal place of business at 48 rue Albert Dhalenne, 93400, Saint-Ouen, France. The complainant is represented by the authorized representatives, Mr. Raja Pannir Selvam.

The **Respondent** in this arbitration proceeding is Double fist Limited, located at No. 33, Tongji East Road, Chancheng District, FoShan City, Guangdong Province, Chinaas 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.alstom.co.in. The Registrar with which the disputed domain name is registered is *Dynadot LLC.*

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 request for submission with a complete set of documents was dispatched to the Respondent by the Arbitrator on 11th May, 2020. Electronic copy of the complete set of documents was also sent to the Respondent on 11th May, 2020. The Respondent was requested to send in all such documents by 23rd July, 2020. The extra time given to the Respondent and delay in decision is due to the Covid 19 Pandemic. However, despite the extra time given, the Respondent did not reply till date.

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 *Alstom.*, incorporated under the laws of France. The company has been operating the *'Alstom" (Alstom Portfolio)* mark since 1998 in the field of rail infrastructure services all over the world. Since its inception it has emerged as a Fortune 500 company. Also the complainant has been running the domain name alstom.com since 1998. Furthermore, the complainant hastrademark registrations in its name. It also hosts various domain names incorporating the Alstom Portfolio.

Statutory rights:
The Complainant contends that the trademark *"Alstom"* and its variants in all forms of multiple classes have acquired global reputation and goodwill and are well known marks. The Complainant holds several domain name registrations incorporating the *"Alstom"* trademark. Also the complainant has registered trademark as well under various classes across the globe including India from the year 1998.

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 *"Alstom"*. Moreover, the Complainant has neither given any license nor authorized the Respondent to use the Complainant's mark. Also 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 disputed domain name in question is "www.alstom.co.in"

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.

The panel 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 replies to the Complainant's assertions and evidence or to otherwise contest the Complaint or otherwise to not to contest the complaint. In the circumstances, the Arbitrator's decision is based upon the Complainant's assertions, evidence and inferences only as the Respondent has not replied.

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

Complainant

The Complainant, based on various international trademark registrations across various classes owns the trademark *"Alstom trademark Portfolio"*. Based on the use of the said trademark internationally, it is the sole proprietor having sole and exclusive rights to use the said trademark *"Alstom trademark Portfolio"*.

The Complainant submits that as the disputed domain name is *'www.alstom.co.in'*, it incorporates the *"Alstom"/"Alstom Services"* mark in its entirety and clearly identical/confusingly similar to the Complainant's registered mark *"Alstom"/"Alstom Services"* in which the Complainant has exclusive rights and legitimate interest.

It has been proved by the Complainant that it has trademark rights and other rights in the mark *"Alstom"/"Alstom Services"* by submitting substantial documents. The mark has been highly publicized, advertised by the Complainant in both the electronic media and print media. Furthermore the same has been done globally.

The complainant has painstakingly built up an admirable reputation globally for itself and has invested substantial amounts of resources in advertising its products under the trademark *"Alstom"/"Alstom Services"*. The *"Alstom"/"Alstom Services"* mark is distinctive and has gained fame in the years it has been used. It has become widely popular and accepted among the relevant class of users because of its quality and kind of services it provides. The complainant has adopted, conceived and used the mark and the domain name for a considerable time and now the mark has become exclusively associated with the complainant.

The goodwill and reputation of the *"Alstom"/"Alstom Services"* mark and the non-distinctiveness of the added terms ('.in') will cause the users into mistakenly believe that it originates from, is associated with or is sponsored by the complainant.

Therefore, the panel agrees that the mark *"Alstom"/"Alstom Services"* is used and known extensively as complainants mark. And using it in any another form will mislead the public and will cause unfair advantage. [**Relevant Decisions**: *Aktiegesellschaft v. Hybo Hindustan*, 1994 PTC 287; *HONDA case*, 2004(28) PTC 332 and *TATA case* 2003 (27) PTC 422] A mere glance at the disputed domain name gives rise to enormous confusion in the minds of users because of it being mark being widely used among the relevant class of users. [**Relevant Decisions**: *Ferrero S.p.A. v. Jacques Stade*, Case No. DBZ2003-0002 (WIPO August 25, 2003); and *Ferrari S.p.A. v. American Entertainment Group, Inc*, Case No. D2004-0673 (WIPO October 10, 2004)]

The disputed domain name registered by the Respondent is identical to the trademark of the Complainant.

It has to be noted that the paragraph no. 4 of the INDRP policy starts with following words , "*Any person who considers that a registered domain name conflicts with his legitimate rights or interest may files complain to the in registry on follow premises*." This is a positive assertion and sentence. Further paragraph 4(i) also constitutes a positive assertion and sentence. Paragraph 4(iii) and paragraph no.6, which is supplementary/explanation to it, also have positive assertions/sentences. *The above clearly indicates that the onus of proving the contents of para no.4 (1) and 4(iii) are upon complainant. To succeed he must prove them.*

The panel notes that all the proofs given by the complainant has proven his trademark in *"Alstom"/"Alstom Services"*.

This panel holds that a trademark has to be considered in its entirety. It has been held 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**: *Sony Ericsson Mobile Communications AB v Salvatore Morelli*, INDRP/030; *Orange Brand Services Limited v PRS*

Reddy, INDRP/644; *International Business Machines Corporation v. Zhu Xumei,* INDRP/646, (January 30, 2015)*; Jaguar land Rover v. Yitao,* INDRP/641, (January 4, 2015)]

The panel while following the rule of law is of the opinion that while considering the trademark *"Alstom"/"Alstom Services"* in its entirety, the domain name www.alstom.co.in is identical or confusingly similar to the trademark of the complainant.

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 panel also would like to note that disputed domain name was registered on December 10, 2018, many years after the complainants established rights in the *"Alstom"/"Alstom Service"* trademark.

Respondent

The respondent has not replied to the complainants contentions.

Therefore, the Panel comes to the conclusion that the disputed domain name is identical 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 *'Alstom"/"Alstom Services'* mark; a mark in which the Complainant has the sole and exclusive right and that has become known globally owing to the Complainant's efforts.

The panel would like to notice that the disputed domain name www.alstom.co.in is pending for deletion or renewal when trying to access the website. Such a use in no circumstances can be termed as a legitimate use.

The panel agrees that Respondent is not authorized by the Complainant to use its trademark. In the present case then 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)*]

Respondent

The respondent has not replied to the complainants contentions.

For these reasons, the Panel holds that the complainant has proved that the respondent does not have any rights or legitimate interests or is infringing the trademark of the complainant 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 complainant 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 in trade, consumers and public, who would assume a connection or association between the Complainant and the Respondent. It must also be noted that the registration of the domain name www.alstom.co.in by the Complainant was a constructive notice to the Respondent on the Complainant's rights in the "*Alstom trademark Portfolio*" and domain name. Thus, the adoption of an identical trademark/domain name *[www.alstom.co.in]* by the Respondent is very much in bad faith.

There is no content in the disputed website and it is not accessible to anyone. It is an accepted fact that whatever will be shown on the website is under the control of the website owner. Hence, this shows that the respondent has no intention of using the said website and would disallow a registered user of the domain name no use of its hard earned goodwill or reputation.

It is a well laid down principle that if on perusal of the disputed domain name the panel finds 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 "*Alstom trademark Portfolio*" as to source, sponsorship or affiliation or endorsement of the website www.alstom.co.in, then the assumption would be that the Respondent is deriving a financial benefit and an unfair profit from the goodwill of the complainants brand. [Relevant Cases: Satyam Infoway Ltd. V Siffynet Solutions (P) Ltd. 2004 (6) SCC 145; Maher Mohammad Najib Mikati v. Domain Privacy Service FBO Registrant / Kaleb Jacob Mikati, Mikati Associates, D2014-1960 (WIPO, December 22, 2014 Woolworths 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 are being used from 1998, it goes to show 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 and have been registered from as early as 1998 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, 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)]*

Therefore the panel comes to the conclusion that the registration is in bad faith.

Respondent

The respondent has not replied to the complainants contentions.

Consequently it is established that the disputed domain name was registered in bad faith or 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, 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].

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.alstom.co.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.alstom.co.in] be transferred from the Respondent to the Complainant; with a request to NIXI to monitor the transfer.

JAMES M.
Sole Arbitrator
Date: July 24, 2020