



हरियाणा HARYANA

L 865351

BEFORE THE NATIONAL INTERNET EXCHANGE OF INDIA

ARBITRATION AWARD

In The Matter Between

ACCOR

110 avenue France
75 013 Paris
France

Complainant

Versus.

MYRTLE SILVA

99 University Avenue 100008
Kingston, Ontario
Canada

Respondent

Harini Narayanan

1. The Parties

The Complainant is Accor of France represented in these proceedings by Nathalie Dreyfus of Dreyfus & associates.

The Respondent is Myrtle Silva of Ontario, Canada.

2. The Domain name, Registrar and Policy

The present Arbitration proceedings pertain to a dispute regarding the domain name <mgallery.in>. The registrar for the disputed domain name is Dynadot, LLC of United States of America.

The Arbitration proceeding is conducted in accordance with the Arbitration and Conciliation Act of 1996 (India), the .IN Domain Name Dispute Resolution Policy (the “INDRP Policy” or “Policy”), and the INDRP Rules of Procedure (the “Rules”).

3. Procedural History

The sole arbitrator appointed in the case is Mrs. Harini Narayanswamy. The Arbitrator has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, in compliance with the Rules.

The Arbitrator received the Complaint from the .IN registry on October 26, 2012 and on October 26, 2012 transmitted by email a notification of commencement of the arbitration proceedings to the Respondent. Under the

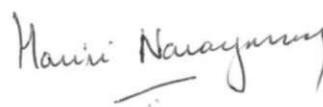
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INDRP Rules, copies of the said notification were sent to other interested parties to the dispute. The Respondent was given twenty-one days time from the date of the notification to file a response. The Respondent did not file any response in these proceedings. The Arbitrator now proceeds to determine the case on its merits.

Factual Background

The Complainant is a French group operating several hotel chains across the world. The Complainant uses the service mark M GALLERY, among others, in connection with its hotel services. The Complainant owns registered service marks for the M GALLERY mark. The details of some of these registered marks are: International trademark No.942082 protected in numerous countries, dated October 11, 2007 covering services in class 43 and international trademark No. 1089193, protected in numerous countries, dated July 25, 2011 in class 43. Indian trademark number 2180045 for M GALLERY dated July 25, 2011 in class 43.

The Complainant owns several domain names that incorporate its trademark M GALLERY, including <mgalleryhotels.com> and <mgallery.com>. The Respondent registered the disputed domain name <mgallery.in> on December 5, 2011.



The Parties Contentions

A. Complainant's Submissions

The Complainant states its group operates more than 4,200 hotels in 90 countries across the globe and has more than 50,000 hotel rooms ranging from economy to upscale. The group includes notable hotel chains such as SOFITEL, NOVOTEL, MERCURE and M GALLERY. The Complainant contends there are forty-five M GALLERY hotels in the world, fifteen of which are in Asia and Pacific. The Complainant states its group has nine hotels in India as of June 2011 with 1434 employees in these hotels and adds that Accor is well known in Canada where it operates 28 hotels and has 331 employees in its Canadian hotels.

The Complainant states that each M GALLERY hotel is unique and well known and are inspired by one of three themes: heritage, signature or serenity. Hotels under the heritage sign are historic buildings where walls recount the past. The signature hotels match an aesthetic universe, a style or a design of an architect who inspired its vision. Serenity hotels are set in a natural environment like a seaside, countryside, mountain or urban retreat. M GALLERY hotels can be found in most elegant places including China, Thailand Vietnam claims the Complainant and asserts that it communicates with its customers on the Internet through its websites bearing its trademarks: www.accorhotels.com, www.mgallery.com and www.accor.com to book hotel rooms.

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The Complainant states that the disputed domain name was previously registered in the name of Wang Linqun and has provided evidence to show that the disputed domain name was directed to a parking page. On February 16, 2012 the Complainant states it had sent a cease and desist letter by email and by registered letter to Wang Linqun requesting for the transfer of the disputed domain name based on its trademark rights. There was no reply from Wang Linqun for this communication but the Complainant states the website changed from a parking site to a photo album site with photos of flowers and landscapes and the registrant's name was changed to Wang Luofei. The Complainant states there was a further change of registrant and that Myrtle Silva is the current registrant of the disputed domain name.

The Complainant argues that the disputed domain name is identical or confusingly similar to its trademark M GALLERY as it comprises of the entire trademark. The Complainant argues the Respondent has no rights or legitimate interests in the disputed domain name as it is not used in connection with a *bona fide* offering of goods or services, but misleads Internet users for commercial gain and the Respondent is not making any legitimate non-commercial fair use of the disputed domain name.

The Complainant argues that the disputed domain name was registered in bad faith, as the Respondent ought to have known of the Complainant's mark M GALLERY at the time of registration, as there are 14 Accor hotels in Beijing, and ONE M GALLERY hotel in China, where the registrant resides. Given the distinctiveness of the mark, it is likely that the disputed domain name was registered to attract Internet users based on the fame of the mark. The Complainant further argues that even if the Respondent was

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unaware of the mark, a simple Internet search would have revealed the Complainant's rights in the mark. The Complainant adds the Respondent has the responsibility to ascertain whether any third party rights are infringed prior to registration of the domain name. The Complainant further argues that the term "mgallery" is a fanciful term that has no meaning in any language, and it is impossible that someone would come up with a word or term identical to a well-known trademark. The Complainant contends that the Respondent's bad faith is evident from the circumstances described and requests for the transfer of the disputed domain name.

Respondent's Submissions

The Respondent did not respond in the proceedings.

Discussion and Findings

Under the .IN Policy, the registrant of the domain name is required to submit to a mandatory arbitration proceeding in the event that a complaint is filed in the .IN Registry, in compliance with the .IN Policy and the INDRP Rules. The .IN Policy, Paragraph 4 requires the Complainant, to establish the following three elements:

- (i) The domain name is identical or confusingly similar to a name, trademark or service mark in which the Complainant has rights, and
- (ii) The Respondent has no rights or legitimate interests in respect of the domain name; and

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- (iii) The Respondent's domain name has been registered or is being used in bad faith.

Identical or Confusingly Similar

The first element requires the Complainant to prove that the domain name registered by the Respondent is identical or confusingly similar to a mark in which the Complainant has rights.

Trademark registration is considered *prima facie* evidence of rights in a mark. The Complainant has demonstrated its rights in the trademark M GALLERY by submitting details of its internationally registered trademarks and its Indian trademark registration for the M GALLERY mark. The documents filed by the Complainant also show that it has used the mark extensively in numerous countries around the world. Based on all the evidence on record, the Arbitrator is satisfied that the Complainant has established its rights in the trademark M GALLERY in these proceedings.

The disputed domain name clearly incorporates the M GALLERY mark in its entirety; this is adequate to find that the disputed domain name is identical or confusingly similar to the mark. See *Indian Hotels Company Limited v. Mr. Sanjay Jha*, INDRP case 148 Sept 27, 2010 <gingerhotels.co.in>. (A domain name that entirely incorporates a complainant's mark is sufficient to establish the confusing similarity of the disputed domain name with the mark.) The top-level domain extension such as .com, .org or .in do not affect the confusing similarity of the domain name with the trademark and can be disregarded in the analysis of confusing

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similarity in domain name cases. See *Emirates v. Chella Goundappan*, INDRP Case No. 372 dated August 13, 2012. (<emirates.in>)

For the reasons discussed, the Arbitrator finds that the Complainant has satisfied the first element under paragraph 4 of the Policy, that the disputed domain name registered by the Respondent is identical or confusingly similar to a mark in which the Complainant has rights.

Rights and Legitimate Interests

The second element requires the Complainant to show that the Respondent lacks rights and legitimate interests in the disputed domain name. It is sufficient for the Complainant to put forward a *prima facie* case regarding the Respondent's lack of rights and legitimate interests.

The burden of proving rights or legitimate interests in the disputed domain name rests with the Respondent. Paragraph 7 of the Policy, provides the Respondent (registrant) with circumstances that the registrant could rely on to establish his or her rights in the domain name. These briefly are: (i) if before notice of the dispute, the registrant had used or made demonstrable preparations to use the domain name in connection with a *bona fide* offering of goods or services or (ii) the registrant (as an individual, business organization) has been commonly known by the domain name, or (iii) The registrant is making legitimate, non commercial or fair use of the domain name without intent for commercial gain.

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Paragraph 7 (i) of the Policy clearly states that the Respondent's use or demonstrable preparations to the use the domain name must be in connection with a *bona fide* offering of goods or services the Respondent. There is nothing on record in the present case to suggest that the Respondent has used the disputed domain name in connection with a *bona fide* offering of goods or services. The Complainant has submitted evidence that shows the Respondent had initially used the domain name with a link farm website to redirect Internet users. Furthermore, the evidence shows that after the receipt of a cease and desist letter from the Complainant, the Respondent has changed the website to a site displaying photographs and has transferred the disputed domain name to other registrants. Such actions are known to be characteristic behavior pattern of respondents in cyber squatting cases, due to the respondent's lack of rights or legitimate interest in the domain name.

The safe harbor provisions under paragraph 7 (ii) and 7 (iii) do not apply to the present case, as the Respondent is Myrtle Silva and is not commonly known by the disputed domain name. Further from the preponderance of evidence presented in these proceedings, clearly the Respondent has not used the disputed domain name for any legitimate non-commercial fair use purposes.

The Respondent has not responded or rebutted the Complainant's contentions about its prior rights in the M GALLERY mark and the allegations that the Complainant has not authorized the Respondent to register or use the domain name incorporating its mark. Accordingly, for the reasons discussed, the Arbitrator finds the Complainant has made a *prima facie* case that the Respondent lacks rights and legitimate interests in

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the disputed domain name and has satisfied the second element under paragraph 4 of the Policy.

Bad Faith

Under the INDRP Policy the Complainant is required to establish that the domain name was registered or is being used in bad faith.

The Complainant has asserted that the Respondent has registered the disputed domain name in bad faith, as the Respondent ought to have been aware of the Complainant's prior rights in the mark at the time of registration of the disputed domain name. The Complainant has also argued that the Respondent has intentionally registered the disputed domain name with the intention of imitating the M GALLERY mark in order to exploit its fame.

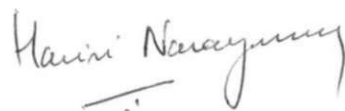
The Arbitrator finds there is merit in the Complainant's arguments as the evidence on record shows that the Complainant has adopted and used the mark M GALLERY extensively in several jurisdictions and its registered marks bear testimony to this fact. Further it is notable that the mark, as argued by the Complainant is a fanciful term that has no meaning other than the Complainant's mark, and as such the Arbitrator recognizes that use of the term in the disputed domain name indicates the Respondent's intention to exploit the Complainant's mark.

Given these facts and circumstances, it can be reasonably inferred that the registration of the disputed domain name by the Respondent was done with

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knowledge of the Complainant's rights in the mark to intentionally attract Internet users to its website, which is indicative of registration of the disputed domain name in bad faith under the INDRP Policy. Under Paragraph 6 (iii) of the Policy, if the registrant of the domain name in dispute, has used the domain name to intentionally attract Internet users to the Registrant's website or other online location by creating a likelihood of confusion with the trademark of another, it is considered evidence of bad faith. The Arbitrator finds the circumstances here suggest that the Respondent seeks to use the Complainant's mark in the manner mentioned under Paragraph 6 (iii) of the Policy, namely to attract Internet traffic to the Respondent's website, which is considered bad faith registration and use of the disputed domain name under the Policy.

The Arbitrator notes the Complainant has made attempts to resolve the dispute with the Respondent by directly communicating with the Respondent prior to filing the dispute. The Respondent has however has not replied to the communications, but has transferred the disputed domain name when put on notice. Transferring the domain name when a respondent is put on notice in a bid to evade action is termed as "cyber flight". See *McAfee Inc. v. Chen Shenglu*, INDRP Case No. 029, January 12, 2007 (where it was observed that "cyber-flying" is a phenomenon where a registrant of a domain name when named as a respondent in a domain name dispute systematically transfers the domain name to a different registrant in a bid to disrupt the proceedings) and has been recognized as showing bad faith on the part of the respondent.



The Arbitrator finds the Complainant has satisfied the third element under paragraph 4 of the Policy, that the Respondent registered the disputed domain name in bad faith.

Decision

The Complainant has established the disputed domain name is identical or confusingly similar to a mark in which it has rights, the Respondent has no rights or legitimate interests in the disputed domain name and the disputed domain name has been registered or is being used in bad faith. The Complainant has successfully established the three grounds required under the Policy to succeed in these proceedings.

For the reasons discussed, it is ordered that the disputed domain name: <mgallery.in> be transferred to the Complainant.



Harini Narayanswamy (Arbitrator)

Date: December 26, 2012