

उत्तर प्रदेश UTTAR PRADESH

BX 360668

**INDRP ARBITRATION
THE NATIONAL INTERNET EXCHANGE OF INDIA [NIXI]**

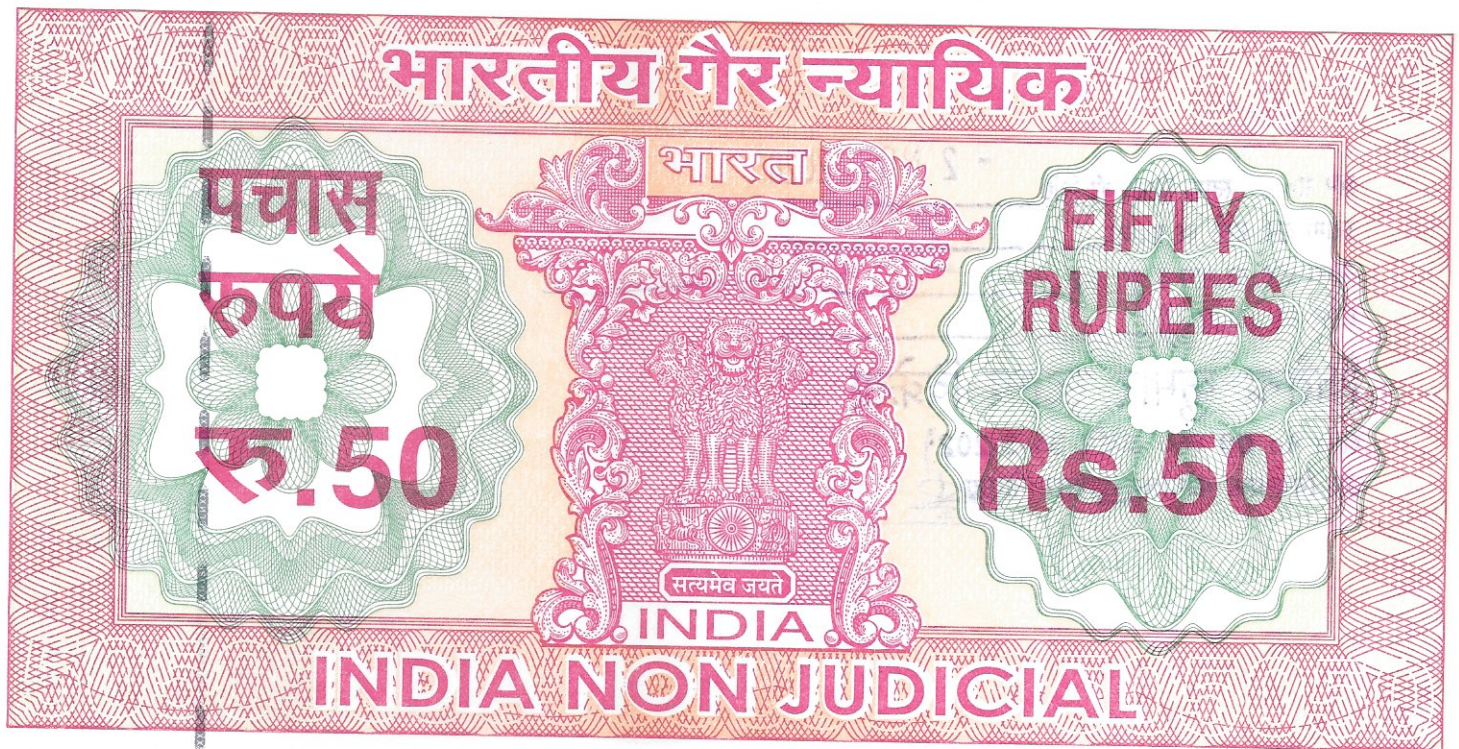
**ADMINISTRATIVE PANEL DECISION
SOLE ARBITRATOR: RODNEY D. RYDER**

**Trijicon, Inc.
v.
Triicon Products and Services**

INDRP CASE NUMBER -1272

ARBITRATION AWARD

Disputed Domain Name: www.triicon.in



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The Parties

The Complainant in this arbitration proceeding is Trijicon, Inc, having its office at 49385, Shafer Avenue, Wixom, Michigan 48393, United States of America; represented by Selvam and Selvam.

The Respondent in this arbitration proceeding is Triicon Products and Services 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.triicon.in. The said domain name is registered with Hosting Concepts B.V. d/b/a Openprovider.

Details of the disputed domain name

The dispute concerns the domain name www.triicon.in. The said domain name was registered on May 11, 2020. The particulars of the said domain name are as follows:

<u>Registrant Name:</u>	Abed Wahed
<u>Registrant Organization:</u>	Triicon Products and Services
<u>Registrant Address:</u>	F-303, Ajmera Stone Park, Neeladri Road, E.City, P, Bengaluru, Karnataka 560100 India
<u>Registrant Email:</u>	abedwahed@gmail.com

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.

In this matter, the arbitration proceedings commenced on September 21, 2020. A copy of the complaint with the annexures was sent to the Respondent by NIXI through an e-mail dated September 21, 2020. Thereafter, the Panel sent an e-mail dated September 21, 2020 to the Respondent requesting for submission of a response to the complaint by October 12, 2020. The Respondent did not file a response or seek an extension.

Grounds for the administrative proceedings

1. The disputed domain name is identical or confusingly similar to a trademark in which the Complainant[s] 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 their complaint, inter alia, contended as follows:

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

The Complainant, based on the corporate name, business, common law rights and trademark registrations for the trademark 'Trijicon' and related variations, and based on the use of the said trademark in United States of America and other countries, submitted that they are the lawful owner of the trademark 'Trijicon'.

The Complainant further submitted that as the disputed domain name is 'www.triicon.in', the disputed domain name is clearly identical/confusingly similar to the Complainant's trademark in which the Complainant has exclusive rights and legitimate interest.

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

The Complainant is in the field of providing precision aiming solutions under the brand 'Trijicon' for law enforcement, military, and private individuals since 1981. The Complainant provides riflescopes, red dot sights, electro optics, iron sights and other systems under the 'Trijicon' brand.

The Complainant has operations all over the world, including Canada, Austria, Belgium, Singapore, United Arab Emirates, United States of America as well as India. Specifically, in the USA, the Complainant is a contractor for the US military and has associations with government, state and local law enforcement agencies for supplying its products and services.

Their primary website of the complainant is: <www.trijicon.com>.

Statutory rights:

The Complainant has registrations for the mark 'Trijicon' and related variants in several jurisdictions including Australia, Brazil, Canada and United States of America etc. Particularly in India, the Complainant's mark 'Trijicon' is registered in classes 9 and 13.

Respondent

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

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 Panel finds that the Respondent has been given a fair opportunity to present his case.



The 'Rules' under 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 the 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.

The issues involved in the dispute

The Complainant in their complaint have 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[s] 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."

Discussion and Findings

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 they have intellectual property, particularly trademark rights, and other rights in the mark 'Trijicon' by submitting substantial documents. There is thus no doubt that the Complainant has rights in the 'Trijicon' mark.

According to paragraph 3 of the INDRP, it is the responsibility of the Respondent to find out before registration that the domain name it 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 addition of the top-level domain ".in" is irrelevant in determining whether the disputed domain name is confusingly similar to the Complainant's mark. It is well established that the specific top level domain, such as ".com", ".net", ".in", ".co.in", ".org.in" etc. does not affect the domain name for the purpose of determining whether it is identical or confusingly similar [Relevant Decisions: *Magnum Piering, Inc. v. TheMudjackers and Garwood S. Wilson, Sr.*, WIPO Case No. D2000-1525; *Rollerblade, Inc. v. Chris McCrady*, WIPO Case No. D2000-0429; *Aon PLC and Ors. v. Guanrui*, INDRP/633].

Thus, the main question before the Panel is that whether the word 'Triicon' is identical or confusingly similar to the Complainant's 'Trijicon' mark. In the case of *Kaviraj Pandit Durga Dutt Sharma vs Navaratna Pharmaceutical [1965 AIR 980]*, regularly relied on by courts in trademark infringement cases, the Hon'ble Supreme Court had held:

"...where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the, plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiffs registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered."

"The persons who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the subject of consideration. The resemblance may be phonetic, visual or in the basic idea represented by the plaintiffs mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant. The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence led before it as regards the usage of the trade."

Additionally, in *Forest Laboratories, Inc. v. Natural Products Solutions LLC* Case No. D2011-1032 and *Forest Laboratories, Inc. v. Clark Grace* Case No. D2011-1006, the WIPO Panel stated:

"Typosquatting involves the intentional rearrangement or change of one or a few letters in a mark to make a nonsensical but close imitation, deliberately intended to catch a tired or careless typist's search for the mark owner's website. Usually the added or substituted letter or addition involves a character immediately adjacent to the replaced one, see, e.g., Amazon.com, Inc. v. Steven Newman a/k/a Jill Wasserstein a/k/a Pluto Newman, WIPO Case No. D2006-0517; always the variant makes no sense standing on its own. That is not so in these proceedings. Here, the Respondent chose the domain names because they are (exactly) the name of his own product."



Based on the facts of the present matter and the evidence provided before the Panel, it is the Panel's opinion that the marks 'Triicon' and 'Trijicon' are not identical or confusingly similar in the present setting. The disputed domain name and the Complainant's mark are neither phonetically nor visually similar and the present matter is not a case of typosquatting.

The Panel does not agree with the Complainant's contention that the absence of the letter 'J' in the disputed domain name is minor or negligible and that it does not alleviate the fact that the domain name is deceptively similar to the Complainant's mark 'Trijicon'. In fact, the absence of the letter 'J' in the disputed domain name is the main reason which makes the domain name and the Complainant's mark entirely different.

While the Panel accepts the Complainant's contention that its mark and the corresponding business is famous, it is unable to accept that the disputed domain name is identical or confusingly similar to the Complainant's 'Trijicon' mark.

The Complainant has thus failed in establishing the first element required by Paragraph 4 of the INDRP.

Since the INDRP requires that all 3 elements provided in Paragraph 4 of the Policy have to be established in order for the Complainant to succeed in its complaint, the Panel is aware that it is not necessary for it to address the remaining 2 elements of Paragraph 4. Nonetheless, the Panel shall analyse the remaining 2 elements as well so as to provide a detailed decision addressing the issues raised by the Complainant in its complaint.

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 rights or legitimate interests in the disputed domain name.

It is to be noted that the Respondent has not rebutted the contentions of the Complainant and has not produced any documents or submissions to show its interest in protecting its own right and interest in the domain name. This being said, the absence of a response in this case does not necessarily mean the Respondent's acceptance of the submissions made by the Complainant.

While the Complainant has submitted that the Respondent is engaging in 'criminal fraud' and 'phishing' through the disputed domain name, it has failed to provide any evidence which could establish this. The Complainant has based these assumptions on the fact that as per the MX records of the disputed domain name, e-mail ids have been set-up on the domain name; and that additionally there is no operational website on the domain name.

In the Panel's opinion, the mere fact that e-mail ids have been set-up by the Respondent on the disputed domain name does not establish in any way that such e-mail ids [if any] are being used to impersonate the Complainant. Additionally, the absence of a website on the domain name in this case does not necessarily mean that the Respondent does not have any rights or legitimate interests in the domain name – especially considering the fact that the



domain name was registered in May 2020, and that it is perfectly reasonable for registrants to take a few months or more for developing their website.

Thus in the absence of any demonstrable evidence which could have indicated the Respondent's lack of rights or legitimate interests in the domain name, the Panel finds that the Complainant has failed to establish 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:


"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 evidence put forth before the Panel by the Complainant, the Panel is of the opinion that the Respondent has in no manner attempted to encash on the goodwill and reputation of the Complainant and their mark 'Trijicon'. The submission made by the Complainant that the Respondent is using the disputed domain name for e-mails does not help establish the Respondent's bad faith. The Complainant has not submitted any evidence which would indicate that the Respondent's use, if any, of such e-mails is detrimental to the Complainant. There is no evidence that the Respondent is using the e-mails to impersonate the Complainant or to engage in a 'spear-phishing campaign' – as submitted by the Complainant.

The Respondent has not tried to portray an association with the Complainant and their brand; and has not contacted the Complainant to 'sell' the domain name. None of the elements essential for a 'bad faith' finding are present in this matter. Furthermore, the Panel is of the opinion that the use of the disputed domain name by the Respondent, would not result in confusion with the Complainant or their mark 'Trijicon'.



Accordingly, the Panel finds that none of the three conditions provided in Para 6 of the INDRP are proved in the circumstances of this case and thus the registration and/or use of the impugned domain name by the Respondent is not in bad faith.

Decision

For the purposes of this Policy, and based on the evidence put forth before it, the Panel finds that the domain name is not identical or confusingly similar to the Complainant's trademark 'Trijicon'. Moreover, the Complainant has not been able to establish that the Respondent has no rights or legitimate interests in the domain name and that the domain name was registered or used in bad faith by the Respondent. The Complainant has thus failed to prove the grounds provided in Para 4 of the Policy.

While the Panel notes that the Complainant's trademark 'Trijicon' is a famous and popular mark, the Panel has ruled on the specific aspect of the impugned domain name –within the limited confines of the Policy.

The Panel, in accordance with the INDRP Policy and Rules, hereby denies the complaint; and directs that the disputed domain name [www.triicon.in] remain with the Respondent.



Rodney D. Ryder
Sole Arbitrator

Date: November 5, 2020