

हरियाणा HARYANA

L 865352

BEFORE THE NATIONAL INTERNET EXCHANGE OF INDIA

ARBITRATION AWARD

In The Matter Between

MONSTER ENERGY COMPANY

A Delaware Corporation
550 Monica Circle, Suite 201
Corona, CA 92880
USA

Complainant

Versus.

DARIUSZ HERMAN

Himbelsstr
Neukirchen, Bavaria 92259
Germany

Respondent

Herman

1. The Parties

The Complainant is Monster Energy Company represented in this Arbitration proceeding by Knobbe Martens Olson & Bear LLP of United States of America.

The Respondent is Dariusz Herman of Germany.

2. The Domain name, Registrar and Policy

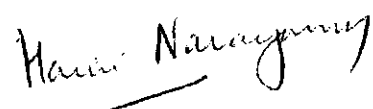
The present Arbitration proceeding pertains to a dispute regarding the domain name <monsterenergy.in>. The registrar for the disputed domain name is Internext GmbH of Germany.

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 January 22, 2013 and on January 22, 2013 transmitted by email a notification of

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commencement of the arbitration proceedings to the Respondent. Under the 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 in the business of beverages and uses the trademark MONSTER ENERGY in connection with its business. It owns several registered trademarks for the mark and has provided a list of its registered marks in several jurisdictions. The Complainant has prevailed in previous domain name cases related to its trademark and cites National Arbitration Forum decisions and in particular refers to the case: *Hansen Beverage Company d/b/a Monster Beverage Company v. Huang Shouhai*, 1408871 (Nat. Arb. Forum Nov. 7, 2011) as evidence of recognition of its mark being a famous mark.

The Complainant operates websites from the domain names: <monsterenergy.com> that was registered on August 19, 2003 and <monsterarmy.com> registered on July 27, 2004. The Respondent registered the disputed domain name <monsterenergy.in> on October 4, 2008.

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The Parties Contentions

A. Complainant's Submissions

The Complainant contends the hallmark of its business is in designing, and developing beverages and its products are well known throughout the world due to its extensive marketing and selling. The Complainant states it was formerly known as Hansen Beverage Company and on January 5, 2012 it changed its name to Monster Energy Company.

The Complainant states the MONSTER ENERGY line of beverages was launched in 2002 and its retail sales for the product exceed one billion cans per year and that the estimated monetary value of its retail sales is more than USD three billion per year. It alleges that it has expanded its range of products over the years and sells its products in the United States of America, in other countries and through the Internet. The beverage is sold to athletes and the military. Since 2002, the Complainant states it has continually used and promoted the MONSTER ENERGY mark along with the claw icon for its beverages and on t- shirts, pants, and sweatshirts among other items. The Complainant states it has sponsored the Las Vegas Mono Rail, music festivals, and musicians, besides it distributes point of sale promotional material. The Complainant states it has spent over 1.39 billion USD in promoting its mark since 2002 and the mark has become a distinctive identifier of the Complainant and its products. The MONSTER ENERGY mark also has a significant presence in social media networks like Face Book and You Tube and has been the subject of extensive media and press coverage in leading international magazines asserts the Complainant.

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The Complainant states it maintains an amateur sponsorship program called “The Monster Army”, that has received applications from more than 325,000 amateur athletes in various extreme sports to be accepted as part of the Monster Army through the Monster Army Website. The Complainant states that the reputation and goodwill in the MONSTER ENERGY mark is well earned and is a result of its continuous efforts and immense investments.

The Complainant states the Respondent has registered a domain name that is identical and confusingly similar to its MONSTER ENERGY mark as it incorporates its mark in entirety and the ccTLD “.in” does not add any distinguishing element to avoid a likelihood of confusing similarity. The Complainant states it has shown prior adoption and use of the MONSTER ENERGY trademark since 2002 and that it has prior registered rights in the mark in several countries including India and the USA.

The Complainant argues that the circumstance of the case show the Respondent has no rights or legitimate interests in the disputed domain name. The Respondent does not use the disputed domain name in connection with a *bona fide* offering of goods or services. The Respondent is not known by the name and has not used a name or a trademark corresponding to the disputed domain name and but uses the disputed domain name to benefit from the goodwill associated with the Complainant’s mark, which is not considered a *bona fide* offering of goods or services under the INDRP Policy. The Complainant states it has not authorized the Respondent to use its mark in any manner.

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The Complainant argues that the disputed domain name was registered for bad faith purposes of selling it to the Complainant and the Respondent has no legitimate interests in the Complainant's mark but to derive profit from Pay- Per -Click links. The use of the mark in this manner creates a likelihood of confusion in the minds of the public and is bad faith use under the Policy argues the Complainant. The Complainant further argues that the Respondent has acted in bad faith, as the registration of the disputed domain name ought to have been done with knowledge of the Complainant's prior rights in the MONSTER ENERGY mark 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

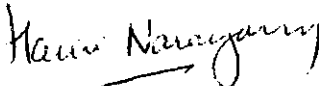
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- (ii) The Respondent has no rights or legitimate interests in respect of the domain name; and
- (iii) The Respondent's domain name has been registered or is being used in bad faith.

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 provided a lengthy list showing the details of its numerous trademark registrations for the MONSTER ENERGY trademark in several countries. Proprietary rights in a complainant's trademark or service mark can also be garnered from prior adoption, use and registration in countries other than India for the purposes of INDRP proceedings. See *McAfee v. Chen Shengulu*, INDRP Case No. 29 (January 12, 2007). The Complainant has submitted that its mark has acquired extensive goodwill and reputation internationally and has referred to third party recognition of its mark and to articles published in international magazines such as Forbes, Fortune, Newsweek and Business Week featuring write-ups about its products and its mark. The Arbitrator also notes that National Arbitration Forum decisions have recognized the Complainant's mark is a famous trademark. Based on the evidence on record, the Arbitrator is convinced that the Complainant has established its rights in the trademark MONSTER ENERGY in these proceedings.

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The disputed domain name clearly incorporates the MONSTER ENERGY mark in its entirety without any additions or deletions; this is adequate to find the disputed domain name is identical or confusingly similar to the mark. See *Indian Hotels Company Limited v. Mr. Sanjay Jha*, INDRP case 148 (September 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.) Also See *Tenneco Inc. v. Tony Lee* INDRP Case No 130 (March 5, 2010).

As argued by the Complainant, country code top level (ccTLD) domain extensions such as ".in" or ".co.in" does not significantly influence the confusing similarity of the domain name with the trademark. 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 to a mark in which the Complainant has proven rights.

Rights and Legitimate Interests

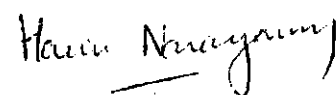
The second element under the Policy requires the Complainant to show that the Respondent lacks rights and legitimate interests in the disputed domain name. The submissions made by the Complainant arguing that the Respondent lacks rights in the disputed domain name are: (i) the Respondent

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is not known by the disputed domain name (ii) the Respondent has no trademark or other rights corresponding to the disputed domain name (iii) the Respondent does not use the disputed domain name in connection with a *bona fide* offering of goods or services or made any demonstrable preparations towards this.

As correctly argued by the Complainant, under the INDRP Policy, once the Complainant has made a *prima facie* case of the Respondent's lack of rights, the burden of proving rights or legitimate interests in the disputed domain name shifts to the Respondent. Under paragraph 7 of the INDRP Policy, the Respondent can establish rights in the domain name if the Respondent is able to establish any of these circumstances: (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.

Paragraph 7 (i) of the Policy categorically 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 by the Respondent. From the material on record there is no indication 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 the Respondent had used the disputed domain name to post sponsored links to redirect Internet users to other third party sites, including sites that are competitors for the

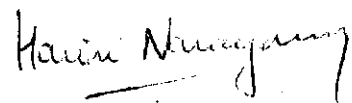


Complainant's products. Use of the dispute domain name in this manner is typically associated with cyber squatting behavior and suggests the Respondent's lack of rights or legitimate interest in the disputed domain name.

The Complainant has asserted that it has not licensed, authorized or given consent to the Respondent to use its trademark in any manner. The website connected to the disputed domain name contains sponsored listings and there is no indication from the given material that the disputed domain name is being used in a manner that could be considered non-commercial fair use, but as discussed, the disputed domain names is being used to redirect unsuspecting Internet users looking for the Complainant or information related to the Complainant's products to other websites. Given these circumstances and the fact that the website connected to the disputes domain name function as a link farm that redirects Internet traffic to other third party sites, the Arbitrator finds there is no *bona fide* use of the disputed domain name by the Respondent.

The Respondent has not attempted to refute the Complainant's submissions by filing a response in these proceedings. In the absence of a rebuttal from the Respondent the Panel finds that the Complainant has established a *prima facie* case.

Accordingly, based on all the evidence on record, the Arbitrator finds the Respondent lacks rights and legitimate interests in 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 in bad faith or that it 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 MONSTER ENERGY mark in order to exploit its fame and goodwill associated with the mark.

The Arbitrator finds there is merit in the Complainant's arguments given its established rights in the mark. Further, the fact that the Respondent is currently using the disputed domain name for placing sponsored links to other third party sites indicates the Respondent's intention to exploit the Complainant's mark. Such use of the disputed domain name is considered evidence of bad faith registration and use under the INDRP. See *AB Electrolux v. Ruo Chang*. <electrolux-professional.co.in> INDRP Case No. 333 April 2, 2012.

The Complainant has clearly demonstrated its exclusive right in the mark by prior adoption, use and registration and shown that it has popularized the MONSTER ENERGY trademark from the year 2002. Under these circumstances it can be reasonably inferred that the Respondent has no

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reason to adopt a name that is identical to the Complainant's mark except to derive advantage from the goodwill and reputation associated with the mark.

Under these facts and circumstances, the registration of the disputed domain name appears to be done with the intention of attracting Internet users to the Respondent's website by creating a likelihood of confusion with the Complainant's trademark, 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 registration and use. The Arbitrator finds the circumstances in the present suggest that the Respondent has used 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 by creating a likelihood with the Complainant's mark as to the source, sponsorship, affiliation or endorsement of its website, which is considered bad faith registration and use of the disputed domain name as understood under the Policy.

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

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Decision

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



Harini Narayanswamy

(Arbitrator)

Date: March 22, 2013