



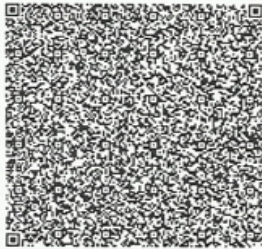
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Purchased by : ANKUR RAHEJA
Description of Document : Article 12 Award
Property Description : Not Applicable
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(Zero)
First Party : ANKUR RAHEJA
Second Party : Not Applicable
Stamp Duty Paid By : ANKUR RAHEJA
Stamp Duty Amount(Rs.) : 100
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INDRP ARBITRATION
THE NATIONAL INTERNET EXCHANGE OF INDIA [NIXI]

ADMINISTRATIVE PANEL DECISION
ACCURAY INCORPORATED V DR SANJAY MONGIA
SOLE ARBITRATOR: ANKUR RAHEJA, MCA FCS LLB

ANKUR RAHEJA

Statutory Alert:

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In the matter of:

Accuray Incorporated
1310, Chesapeake Terrace,
Sunnyvale CA 94089 USA

... Complainant

versus

Dr Sanjay Mongia
Mumbai, Maharashtra, Pin 456456

... Respondent

ARBITRATION AWARD

Dispute Domain Name: www.cyberknife.co.in

1. The Parties:

- 1.1.** The Complainant in this arbitration proceedings is: **Accuray Incorporated**, a Company having it's office at 1310, Chesapeake Terrace, Sunnyvale CA 94089 USA represented by Ms Alaleh Nouri, General Counsel, Accuray Incorporated, CA, USA.
- 1.2.** The Respondent in this arbitration proceeding is Dr Sanjay Mongia, Mumbai, Maharashtra, Pin 456456.

2. The Domain Name and the Registrar:

- 2.1. The Disputed Domain Name is <cyberknife.co.in>, created on 18th September 2009.
- 2.2. Domain Registrar is Webiq Domains Solutions Pvt. Ltd, Mumbai, India.

3. Procedural History:

- 3.1. Arbitrator received an email, inquiring if Nixi can avail of its services as an arbitrator for the dispute pertaining to the domain name <cyberknife.co.in>. Arbitrator confirmed availability and sent the signed Statement of Acceptance and Declaration of Impartiality and independence as required by rules.
- 3.2. The .IN Registry appointed Ankur Raheja as the sole Arbitrator on 07 October 2015 and Arbitrator received the hard copy of the Complaint along with Annexures on 08 October, 2015.
- 3.3. Arbitral Proceedings were commenced by Arbitrator on 10 October 2015 by issuance of a notice by email to the Respondent directing him to file his response to the Complaint by 26 October 2015.
- 3.4. In the same notice, the Complainant was also asked to provide soft copy of the Complaint to expedite the proceedings. But the Respondent informed on 23

October that he hasn't still received hard or soft copy of the Complaint and requested for another 15 days, after the copy of the Complaint is made available for the response.

3.5. Complainant was requested again to provide a soft copy of the Complaint along with Annexures to the Respondent, which was complied with on 24 October 2015. Therefore, a new timeline was provided for filing of the Response, as 07 November, 2015 to the Respondent.

3.6. Respondent filed response by 06th November 2015.

3.7. Further clarification/information was asked to be provided by the parties, further response was received on 20th and 24th November 2015 from Complainant and Respondent respectively.

3.8. No personal hearing was requested / granted / held.

3.9. The language of these proceedings is in English.

4. Factual Background:

4.1. The Complainant has been doing business and selling CYBERKNIFE product since 1993. Complainant is the owner of a registered trademark with the USPTO for CYBERKNIFE (reg no 74452587, registered on May 19, 1998) and also in

India, registered trademark "CYBERKNIFE" are in use by complainant Accuray Incorporated in connection with its ongoing business activities in India vide TM registration no 74452587 under class 10 and TM registration no 2003493 under class 9,10.

- 4.2. Whereas, the Respondent is a well-known neurological and Radio Surgeon based in India, qualified medical professional holding degrees of MS, MCH, FAIS, FICS (USA). Respondent treats patients by CyberKnife Radio Surgery, inter alia, at HCG centre at Bangalore and BLK centre at New Delhi.
- 4.3. On 5 July 2009, the Respondent was issued a letter titled: "Cyberknife Associate Consultant", which has been annexed by the Respondent in his response, wherein Bangalore based HCG Enterprises Ltd (Cancer Care Network) is thanking the Respondent for participating in a Cyberknife training program and invites him to join hands as a Cyberknife Associate Consultant, in accordance with the terms provided in attached agreement.
- 4.4. The Respondent registered the disputed Domain Name on 19 September 2009 [WHOIS records of the domain has been annexed by the Complainant]. While, Complainant has applied for the Trademarks in India in August 2010 but in USA, it was registered since 1998.

5. **Parties Contentions:**

- 5.1. The Disputed Domain Name is identical or confusingly similar to a trademark in which the Complainant has statutory/common law rights

Complainant:

- 5.1.1. **Complainant** states that the disputed domain name incorporates the CYBERKNIFE mark in its entirety and Respondent has merely added the country code top-level domain (ccTLD) “.co.in”. The ccTLD addition does not substantially diminish the similarity with Complainant’s mark and renders the domain confusingly similar to Complainant’s mark (Morgan Stanley vs Bharat Jain, INDRP Case No 156). Furthermore, INDRP has found that if a Trademark is incorporated in its entirety in a domain name, it is sufficient to establish that the domain is identical or confusingly similar to Complainant’s mark (Allied DOMEQ Spirits and Wine Limited vs Roberto Ferrari, INDRP Case No 070).

Respondent:

- 5.1.2. The Complaint is full of mollified allegations against a senior medical professional whose association has been previously sought by the Complainant themselves and their letter to this effect is on record.
- 5.1.3. The principal ground for Complaint is the alleged infringement of the Registered Trade Mark. It is evident from the annexures submitted by the Complainant that the Trademark application was made by the Complainant only on 04 August 2010 and the same was granted on 09

March 2012, while the domain name <cyberknife.co.in> was created in favour of the Respondent on 18 September 2009, almost a year before the date of Complainant's Trademark application.

- 5.1.4. Further, **Respondent** denies that the Domain Name is identical or confusingly similar to the registered trademark. Respondent states that the intellectual property right of the Complainant is for the products in class 99 and does not extend to the services provided with the use of their products. Further, words, ".co.in" adequately distinguishes them from the trademark.
- 5.1.5. The presence of Complainant is absolutely negligible in India. There are 5 of their equipments in whole of the Country and there is barely very few Surgeons who are aware or familiar with the same. It is therefore not a case well known brand being infringed and certainly not a case where the concept of any damage to reputation commercial exploitation of reputation of a well known brand can become applicable.
- 5.1.6. Respondent states that the website is only educational about the state of the art technology in health services and no attempt has been made to sell any product under Cyberknife or any other brand. The Complainant has made a wrong assumption that the website is to promote or sell products infringing their Intellectual Property Rights in the Trade mark. And there is significant distinction between the INDRP cases referred by

the Complainant, as in the referred matters Trademark was subsisting much prior to the creation of Domain Name and it was a clear case of commercially exploitation of well known brand for pecuniary advantage.

- 5.2. The Respondent has no rights or legitimate interests in respect of the disputed domain name

Complainant:

- 5.2.1. Complainant claims to hold the rights to the CYBERKNIFE trademark and has not assigned or granted rights in the mark to respondent and therefore respondent has no right in the disputed domain name. In previous dealing with Respondent, Respondent has claimed that he has rights in the disputed domain as a "Cyberknife Associate Consultant". Complainant has never entered in any agreement with the Respondent and Complainant, as the owner of the CYBERKNIFE mark, is the only party authorized to confer rights in the mark therefore any agreements entered into with other parties are irrelevant.
- 5.2.2. Respondent does not have any other rights or legitimate interest in the disputed domain name because Respondent is not commonly known by the disputed domain name, Respondent is not making bonafide sales and Respondent is not making a fair use of the disputed domain name.

- 5.2.3. Respondent, as a doctor, is an end user of Complainant's CyberKnife product. However, this does not give rise to any rights in Complainant's mark. Hundreds of medical personnel worldwide are involved in some way with the use of a CyberKnife product and receive no rights in Complainant's mark. Complainant's distributors, subsidiaries, and direct customers do receive a limited licence to use Complainant's mark in their domain names, however, Respondent has not been granted such a licence as an end user.
- 5.2.4. In previous dealings with the Respondent, Respondent has claimed that he is making fair use of the disputed domain to educate patients about available technology for treatment. However, complainant denies Respondent's claim of fair use of the domain on two grounds. First, the site makes repetitive use of general product descriptions and does not contain any commentary, opinions, or explanations from Respondent of/on Complainant's product. Therefore, there is no context giving rise to the belief that this site is for educational purposes.
- 5.2.5. Secondly, a claim of fair use for educational purposes cannot be found if there is commercial gain by respondent the domain <cyberknife.co.in> is clearly for self promotion of Respondent and represents possible commercial gain for Respondent. Complainant finds that the disputed domain is for the benefit and self promotion of the Respondent because the disputed domain primarily consists primarily of links to other sites

run by Complainant, links to Respondent's Twitter page, Respondent's blog and links to contact Respondent. The links to other sites run by respondent include <cyberknifeindia.net>. <gammaknife.in>, <gammaknifeonline.in> and <cyber-knife.ae>.

- 5.2.6. The lack of substance and the proliferation of Respondent's information demonstrate that the purpose of Respondent's site is not to educate internet users about radiosurgery, but to educate users about Respondent, Respondent's services and to attract the patients. In addition, Respondents states that he is a CyberKnife Associate Consultant. Complainant is not privy to the detail of this agreement however, if this Consulting agreement results in any referral or consultation fees, a commercial gain could be had by Respondent, if the disputed domain name has resulted in new patients for the Respondent.
- 5.2.7. Lastly, Respondent's position as an end user of the product automatically proves a commercial interest which eclipses Respondent's ability to make a fair use claim of education.

Respondent:

- 5.2.8. Whereas, **Respondent** denied the above and adds that he is a CyberKnife Associate Consultant and Complainant's equipments are used in carrying out operations and hence as end user Respondent has bonafide right and legitimate interest in the domain name. The letter

issued annexed is evident of the fact and it is denied that no agreement was entered between the parties.

5.2.9. Complainant has failed to understand that I am the END USER of the products in so far I use them in the conduct of medical surgeries. Further, Complainant has failed to appreciate that no attempt is made in the website to sell their or any other products. The grievance of the Complainant that I am not an authorized Distributor and hence the respondent is not making fair use of the disputed domain name is baseless in the circumstances explained.

5.2.10. About the fair use, is it not Respondent's duty as a doctor to suggest and educate a patient about treatment using cyberknife equipments. The Complainant is either absolutely ignorant or is deliberately trying to act as one. Who educates patients about treatment modalities - the Respondent would like to know from the Complainant - is it physicians and surgeons or a particular company or their Sales People ?

5.3. The disputed Domain Name has been registered or is being used in Bad Faith

Complainant:

5.3.1. The registration of a domain name based on an awareness of a complainant's trademark is recognised as bad faith registration under the INDRP Policy (Iego Juris V Robert Martin, INDRP/125, Feb 14, 2010).

The disputed domain was first registered with the USTPO in 1998 and registered in India in 2010 therefore indicating the Respondent had notice of the CYBERKNIFE mark and was intentionally infringing complainant's CYBERKNIFE mark. Furthermore, the disputed domain contains text and graphics of the CyberKnife product which serves as irrefutable evidence of Respondent's knowledge of Complainant's CYBERKNIFE mark.

5.3.2. Further evidence of Bad Faith use is evidenced by Respondent's violation of Para 3 of the INDRP policy, which states Respondent will not use the domain in violation of any applicable laws or regulations. Respondent took text verbatim from complainant's website and reproduced it on the disputed domain's site without complainant's consent. Respondent's unauthorized use of this text violates Complainant's Trademark and Copyright in the text. In previous dealing with Respondent, Respondent has claimed that the reproduction of the text was to ensure the accuracy of technological information, however complainant rebuts this statement. The language is the most general of overviews detailing the CyberKnife System and could have easily been expressed by Respondent. Furthermore, the language "offers new hope to patients worldwide" is not technical in any sense and its use cannot be validated in anyway by Respondent.

5.3.3. Lastly, by using the disputed domain name, Respondent has intentionally attempted to attract, possible for commercial gain, internet users to Respondent's website, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of Respondent's website or comments. Confusion is created by the identical nature of Complainant's mark and Respondent's domain name and the use of verbiage from Complainant's legitimate site, <cyberknife.com>. Internet users who conduct a web search for Complainant's CYBERKNIFE product who enter Complainant's domain name incorrectly can easily be directed to this site because they believe it to be hosted by Complainant.

5.3.4. Lastly, Respondent's use of the disputed domain should be considered bad faith use as it interrupts the business practices of Complainant. Complainant monitors use of its mark and even authorized licences are held to limitations on use of Complainant's mark in their domain names. Complainant use its own websites and websites of its licencees to engage in advertising and marketing practices to promote the CyberKnife product and the locations at which the CyberKnife can be found. Every time an internet user is rerouted to respondent's site is frustrating Complainant's marketing practices.

Respondent:

5.3.5. It is denied that the Domain has been registered and being used in bad faith. There is no infringement of the Trademark and in case Complainant feels their Trademark is infringed, the remedy for them is to bring about infringement action. Respondent feels this is not to settle Trademark infringement issues. Moreover, it may be noted that the registration date of the domain name is September 18, 2009, whereas the registration date of the Complainants TM in India is 09th March 2012 wef August 2010.

5.3.6. Respondent admits that small part of the text is reproduced verbatim from the Complainant's website but it is done only to ensure accuracy of information about the technology. In India, Doctor treating him is under obligation to provide all the pertinent information before operation and any inaccuracy in the information could lead to breach of trust and deficiency in service and consequent litigation.

5.3.7. The Complainant has alleged Bad Faith use as it interrupts business practice of the Complainant, it is frivolous allegation. The Complainant must be fully aware that their business can grow only if more patients are treated by doctors using their equipments. The business will not grow until CyberKnife is recommending by doctors such as the Respondent, therefore how this can be considered as Bad Faith.

5.3.8. The Respondent states that at present patient information about the Cyberknife Radio surgery is very minimal in India and the site in dispute is purely for information and knowledge of the Patients about availability of the technology for treatment. The Respondent further states that the Complainant is deliberately not appreciating that the Respondent is a practicing Doctor and that in his capacity as such he treats patient using their equipments and that he is not a manufacturer or dealer or salesman selling equipments using their Trademark.

5.3.9. Respondent further denies that internet users who conduct a web search could believe the disputed website to be of the Complainant. And adds it is questioning the intellect or competence of the web users which is unwarranted, to prove the point Respondent has annexed Google search result for the keywords "CyberKnife", which produced different web results of websites having the said keyword as a part of the Domain Name, while no reference can be found for the disputed Domain Name "CyberKnife.co.in" in the first 20 results.

6. Additional Information:

Firstly, the clarification was sought from parties as to the matter before National Arbitrational Forum, as only .IN Registry has jurisdiction to deal with domain disputed related to .IN Domain Name. The Respondent had already stated as a preliminary objection, as follows:

6.1. The Complainant has resorted to multiple judicial action for the same alleged grievance, previously Complainant had filed Complaint before the National Arbitrational Forum (NAF), for the same Domain name for the said Domain Name. NAF found the same to be non-maintainable and the Complainant later withdrew the complaint. The present complaint filed after a year is a fit case of res judicata and complainant be restrained from multiple actions for the same alleged grievance.

The Complainant Responded to the clarification sought as follows:

6.2. The Respondent claims that Complainant has resorted to multiple judicial actions for the same alleged grievance, it is denied. Complainant submitted two sites, cyberknifeindia.net and cyberknife.co.in, to the National Arbitration Forum for a domain dispute. The NAF rejected the jurisdiction for <cyberknife.co.in> and did not proceed to arbitration as to the Disputed Domain. NAF arbitrator stated as follows:

"Remove the Domain Name <cyberknife.co.in> from the Complaint (all references to this domain name must be removed). We are not authorized to administer disputed of this nature."

NAF is not authorized to hear the dispute for <.co.in> domains. Complainant moved forward with the National Arbitrational Forum against the Respondent for ONLY <cyberknifeindia.net>. They did not infact reject Complainant's claim

for the other domain but merely noted they do not have jurisdiction which we have now submitted current complaint before you. *[Proper documents have been Annexed in support by the Complainant]*

Secondly, matter as to status of the Respondent as a "Cyberknife Associate Consultant" was also sought to be clarified by the parties, to which following responses were received:

- 6.3. Complainant stated that the Respondent also claims himself he is a CyberKnife Associate Consultant as recognized by the attached CyberKnife letter. However, the letter submitted is from an entity called HCG Enterprises in Bangalore and is not from Complainant, or any of its Subsidiary entities. Complainant has not authorized HCG Enterprises to engage consultants on Complainant's behalf. Complainant also has not authorized HCG enterprises the use of any trademark licences in Bangalore, India. Therefore, HCG had no authority to grant Respondent rights under an Associate Consultant Position of Complainant and Complainant never entered into an agreement with Respondent directly.
- 6.4. Whereas, Respondent states I have submitted a copy of the Letter issued by the HCG who, I have every reason to believe, have the official backing of Complainant. The Complainant for the sake of denial are disowning the same. Respondent further submits that Complainant is company which makes Cyberknife machines. Physician enter in agreement with hospitals globally for patient care services and not with pharma / instrument / ancillary product

making companies. In a patient's treatment, many machines are needed of different companies and the physician will not make contracts with all these companies as it would be futile. Accordingly, as there was no need therefore no such direct agreement exists with the Complainant.

7. Discussions and Findings

- 7.1. The Arbitrator has reviewed the Complaint and the Response along with all the documents filed before it by either party.
- 7.2. The Arbitrator finds that the Arbitral Tribunal has been properly constituted.
- 7.3. Complainant has been doing business and selling the CYBERKNIFE products since 1993 and has treatment Centers all around the world including India. Complainant owns global Domain Name CyberKnife.com since 1999.
- 7.4. Complainant had first registered "CYBERKNIFE" as Trademark in USA in the year 1998 and applied for Trademark registration in India in 2010.
- 7.5. No doubt, that the disputed domain name is confusingly similar to Complainant's Trademark as it consist of Complainant's mark in its entirety. It is well established that "if a well known trademark is incorporated in its entirety, it may be sufficient to establish that a domain name is identical or confusingly similar to Complainant's registered mark." [ITC Limited V Travel India (INDRP

Case No. 065) - bristol.in; Allied DOMEQ Spirits and Wine Limited v Roberto Ferrari, (INDRP Case No. 071) - ballantines.in].

- 7.6. The extensions such as '.co.in' in a disputed domain name does not affect a finding of similarity. In numerous INDRP matters, it has been held that the addition of the country top level domain ".co.in" in the disputed domain does not avoid a determination that the domain name is identical or confusingly similar to the Complainant's mark [The Hershey Company V. Rimi Sen (INDRP/289) - Hersheys.co.in and Morgan Stanley vs Bharat Jain, (INDRP/156) - MorganStanleyBank.co.in]. Also, it is technically required for the operation of a domain name, and thus it is without legal significance in an inquiry of similarity.
- 7.7. The Complainant holds right to the CYBERKNIFE Trademark and denies granting any the rights in the Trademark to the Respondent. Whereas, the Respondent being an end user of the product, claims to provide through the use of the Disputed Domain name, the educational information about the radiosurgery technique.
- 7.8. The Complainant submits that the site makes repetitive use of general product descriptions and does not contain any commentary, opinions, or explanations from Respondent of/on Complainant's product. Therefore, there is no context giving rise to the belief that this site is for educational purposes. Respondent took text verbatim from complaint's website and reproduced it on the Disputed Domain's site without complainant's consent. Respondents unauthorized use of

this text violates Complainant's intellectual property rights. And the purpose of Respondent's site is not to educate internet users about radiosurgery, but to educate users about Respondent, Respondent's services and to attract the patients.

- 7.9. The preliminary objection raised by the Respondent as to Res Judicata is also not applicable in the circumstances of the case, the views expressed in this regard by the Complainant are upheld, based upon the additional documents submitted as to the proceedings before National Arbitrational Forum (NAF Claim Number: FA1409001582340).
- 7.10. Respondent claims that he has right in the disputed domain as a CyberKnife Associate Consultant. But Complainant is the only party authorized to do the same, who denies granting any such rights. Further, the Respondent has not provided any evidence that the organization, HCG CyberKnife Centre which has appointed him as a "Cyberknife Associate Consultant" has any rights or legitimate interest in the CYBERKNIFE mark or the domain name either and Complainant denies that it has any such rights.
- 7.11. The Respondent had no right to adopt Complainants distinctive trademark CYBERKNIFE as the main element in the disputed domain name. The Respondent's use of the Domain Name is the promotion of his surgery services too, rather than education or any other fair use, as the information could have been made available otherwise through a generalized domain name containing

relevant keywords like radiosurgery, or any combination thereof. The current use of the Disputed Domain could not be held as a bonafide use.

- 7.12. Though the Respondent is not making any sale directly but the website upon the disputed domain has been surely setup with the main objective of self promotion of Respondent's profession, as it contains links to other Respondent's websites as well, related to GammaKnife, which is a competitor to the Complainant's CyberKnife.
- 7.13. The letter referred and annexed by Respondent is issued by HCG center and not by the Complainant. Further, is not accompanied with the signed agreement referred therein, while Complainant has denied Complainant having authorized HCG Enterprises to engage consultants on Complainant's behalf or to make use of any trademark licences in India.
- 7.14. Further, aforesaid letter was issued by HCG to the Respondent on 05 July 2009, while he registered alleged Domain on 18 September 2009, which clearly shows that the Respondent had the knowledge of the Complainant's Trademark before he registered the Domain Name. Though the Trademarks in India were applied later but that does not help the Respondent either. It has been held that "Registration of Domain Name that is identical to a trademark, with actual knowledge of the trademark holder's rights, is strong evidence that the domain name was registered in bad faith" [ITC Limited v Travel India, INDRP/065 - bristol.in].

- 7.15. By using the disputed domain name, the Respondent has intentionally attempted to attract Internet users to the said website, by creating a likelihood of confusion with the Complainant's Trademark as to the source, sponsorship, affiliation, or endorsement of the said website and of a product or service on the Respondent's website. It has been held that "where a domain name is found to have been registered with an intention to attract Internet users by exploiting the fame of a well-known trademark, it constitutes bad faith registration". [Lego Juris V Robert Martin, INDRP/125 - lego.co.in]
- 7.16. Lastly, very rightly, the Complainant points out that in terms of INDRP Rules of procedure, the Registrant represents that the registration of the Domain Name will not infringe upon or otherwise violate the rights of any third party but the Respondent failed to do so.
- 7.17. Therefore, the Arbitrator concludes that the Complainant has established all the three essential elements to maintain its complaint being that the disputed domain name is identical or confusingly similar to its Trademark CYBERKNIFE; the Respondent has no rights or legitimate interests in respect of the disputed domain name; the Disputed Domain Name was registered or is being used in bad faith.

8. Decision

- 8.1. For all foregoing reasons, the Complaint is allowed.
- 8.2. It is hereby ordered in accordance with INDRP policy that the disputed domain name <cyberknife.co.in> be transferred to the Complainant.
- 8.3. The parties shall bear their own costs.



Ankur Raheja, MCA FCS LLB

Sole Arbitrator, NIXI, India

Date: 5th December 2015

Place: New Delhi