Decision for dispute CAC-UDRP-103020

Case number	CAC-UDRP-103020
Time of filing	2020-04-22 09:38:31
Domain names	hellrockenergy.com

Case administrator

Name	Šárka Glasslová (Case admin)

Complainant

Organization	HELL ENERGY Magyarország Kft.

Complainant representative

Organization	Oppenheim Law Firm (Oppenheim Ugyvedi Iroda)

Respondent

Organization	Heaven Traders LLP

OTHER LEGAL PROCEEDINGS

There are several legal proceedings which, to varying degrees, relate to the disputed domain name. They are referred to later in this decision under the heading Procedural Factors. The Panel is not of the opinion that the existence of those proceedings justifies the Panel making an order Rule 18 that the present administrative proceeding should be suspended or terminated.

IDENTIFICATION OF RIGHTS

The Complainant is the registered proprietor of the European Union trademark number 014749253 for the word mark "HELL ENERGY" (hereinafter the “HELL ENERGY Trademark"). The HELL ENERGY Trademark was filed with the EUIPO on 20 October 2015 and granted on 23 December 2016. The HELL ENERGY Trademark is registered in Nice Class 32 for ‘energy drinks’.

The Complainant is also the registered proprietor for the Indian trade mark number 3618853 for the word mark “HELL” (hereinafter the “HELL Trademark”). The HELL Trademark was filed with the Indian IP Office on 23 August 2017 and granted on 20 February 2018. The HELL Trademark is registered in Nice Class 32 for ‘energy drinks’.

FACTUAL BACKGROUND

Complainant is a prominent Hungarian company engaged in the business of the manufacture and sale of energy drinks

under the brands Hell Energy and Hell. It has been in business since 2006 and has a global presence including in India. However, it has become concerned that Respondent, in India, has registered the domain name <hellrockenergy.com> and is using it to promote energy drinks on its website and has copied the colour, presentation and feel of the Complainant's website. The Complainant is concerned that this causes damage to the value of its trademark and has the potential to damage its business. Accordingly it has filed this Complaint with the objective of having the domain name transferred to itself.

PARTIES CONTENTIONS

PARTIES' CONTENTIONS:

COMPLAINANT.

The Complainant made the following contentions.

• The Complainant was established in Hungary in 2006, and has expanded rapidly since its creation. It now has a truly global presence and reaches almost 50 countries worldwide, including many throughout Europe. The Complainant manufactures and sells a range of energy drinks, all of which bear the 'HELL ENERGY' name.

• The Complainant is the registered proprietor of many trademarks including the term "HELL ENERGY" or "HELL" all around the word for Nice Class 32.

• Complainant is the registered proprietor for EU trade mark number 014749253 for the word mark 'HELL ENERGY' (hereinafter the "HELL ENERGY Trademark"). The HELL ENERGY Trademark was filed with the EUIPO on 20 October 2015 and granted on 23 December 2016. The HELL ENERGY Trademark is registered in Nice Class 32 for 'energy drinks'.

• Complainant is the registered proprietor for the Indian trade mark number 3618853 for the word mark "HELL" (hereinafter the "HELL Trademark"). The HELL Trademark was filed with the Indian IP Office on 23 August 2017 and granted on 20 February 2018. The HELL Trademark is registered in Nice Class 32 for 'energy drinks'.

• The Complaint is based on the EU Trademark no. 014749253 and the Indian Trademark no. 3618853.

• The domain name is confusingly similar to the Trademarks of the Complainant, as the contested domain name fully includes the HELL ENERGY and HELL Trademarks of the Complainant.
• The only minor difference between the HELL ENERGY Trademark and the contested domain is the term 'rock' between the terms 'HELL' and 'ENERGY', which shall not avoid the confusion.
• The HELL Trademark which is registered for energy drink goods also appears in the contested domain. The term 'rock' shall not avoid the confusion, as the distinctive element is the term 'HELL' whereas the 'energy' term is descriptive.

• The Respondent does not have any rights or legitimate interest in the domain name.

• Respondent has not been commonly known by the disputed domain name.

• Complainant has not authorized or licensed Respondent to use the any of the Complainant's trade marks.

• Respondent has not used, or made demonstrable preparations to use the disputed domain name in connection with a bona fide offering of goods or services. The website at the disputed domain name reproduced a webpage which was confusingly similar to the Complainant's websites (www.hellenergy.com and www.hellenergystore.com/) and trade marks. A bare perusal of the website which is available under the disputed domain name shows that Respondent in collusion has also illegally copied the look, feel and font style of the Complainant's website www.hellenergy.com in an identical red, white, grey and black colour scheme.

Such blatant imitation of Complainant's website amounts to violation of copyright laws by the Respondent, and the general public and trade would be bound to believe that the Respondent's website belongs to the Complainant.

Respondent intended to use the disputed domain names to take advantage of the reputation that the Complainant has built up worldwide by the "HELL ENERGY" brand as is seen from a comparison of the Complainant's and respondent's websites.

• Given the Complainant's submission that the Complainant has not authorized this use, and has no relationship with the Respondent, the Complainant believes there are no circumstances in which this reproduction could be legitimate.

• The domain name has been registered and is being used in bad faith.

• The Trademark has been protected since 20 October 2015, while the disputed domain name was only registered on 12 February, 2019.

• As shown above the Complainant has more than fifty trademarks registered all around the world related to the terms 'HELL' or 'HELL ENERGY' and has also many registered trademark indicating the decisive black and red colors of the products of the Complainant (e.g. the trademark of the logo, the devil's head, the packaging, the part of the packaging, etc.).
• The Complainant is the second largest soft-drink maker in Hungary after Coca-Cola, and has a 34% market share. Its success is not confined to Hungary. The Complainant has had great success throughout the European Union. In 2018 HELL ENERGY was in the Top 10 energy drinks brands in 8 different EU countries – Bulgaria, Croatia, Latvia, Lithuania, Cyprus, Greece, Romania and Slovakia.

• In 2018 the Complainant entered into a partnership with one of the biggest Hollywood action stars, Bruce Willis.

The reputation of the Complainant in a given mark is significant and the mark has strong similarities with (or is identical to) the disputed domain name, the likelihood of confusion with which is such that bad faith may be inferred (see, e.g., Verner Panton Design v. Fontana di Luce Corp, WIPO Case No. D2012-1909 and cases cited therein). Here, the Complainant believes that the Respondent sought to make use of the Complainant's substantial reputation and thus registered the disputed domain names in bad faith.

• The website at the disputed domain name closely reproduces the Complainant's website. The Respondent's website uses the Complainant's HELL ENERGY trade marks and featured confusingly similar graphical layout and colour scheme as that used by the Complainant. If a consumer found any of the Respondent's website, they likely would have believed that the website was operated by the Complainant.

• UDRP Panels have consistently held that the mere registration of a domain name that is confusingly similar to a famous or widely-known trademark by an unaffiliated entity can by itself create a presumption of bad faith (see case no. 102832, HYALEXOEXPANSCIENCE.COM).

RESPONDENT.

The Respondent made the following contentions.

1. REASON FOR DELAYED FILING OF THE RESPONSE:

• The Respondent received intimation about the complaint vide email dated 23.04.2020 and Respondent was given 20 days period thereafter to file the response by accessing the CAC website. However, despite various best efforts, the Respondent could not access the website of CAC; hence copy of the complaint was not available to the Respondent at all.

• Guidance was sought by the Respondent from the administration of CAC which too was delayed and after numerous efforts on part of the Respondent, the Respondent could access the website.

• Thus, communication with the administration of CAC took a considerable time and additional 5 days were granted to the Respondent on 21.05.2020 to file the response. The e-mail communication in this regard is attached herewith as ANNEXURE-1. The response was to be filed by 26th May, 2020. The Response is being filed within such period.

2. ENTIRE COMPLAINT IS ALL ABOUT THE MARKS HELL AND HELLROCK WHEREAS THERE IS NO IOTA OF COMPLAINT ABOUT DOMAIN NAME:

Respondent submits that the entire complaint made by the Complainant is all about the alleged phonetic or other similarity of the mark HELLROCK with HELL; whereas this Tribunal/Authority is only concerned with domain names.

There is already a dispute between the parties – the Complainant and the Respondent in the Delhi High Court in Delhi, India where the Complainant has complained about the use of the mark HELLROCK by the Respondent. The Delhi High court has considered the matter between the parties and has not granted any ex-parte injunction. The High Court is seized of the matter. However in order to hijack the dispute to a different venue the Complainant has filed the present complaint before this concerned Authority with malafides and in bad faith.

3. THE DOMAIN NAME 'HELLENERGY.COM" AND RESPONDENT'S DOMAIN WWW.HELLROCKENERGY.COM ARE DIFFERENT:

The Respondent's domain name HELLROCKenergy.com is entirely different visually, phonetically and otherwise from HELLenergy.com. A search on the internet or through independent search engines such domaintools.com for "hellrockenergy" would only throw up results leading to the website of the Respondent only. None of the search results show links that lead to the Complainant's website 'hellenergy.com'. No traffic is ever lead to the Respondent's website thinking that it is the complainant's website. At Annexure-2 are the search results from the internet and domaintools.com which show that there is no confusion between the domain of the Complainant and of the Respondent.

Thus, there is no evidence on record to show that Respondent targeted the Complainant's mark especially the mark HELL.

4. RESPONDENT SUBMITS THAT IT IS A PRIOR REGISTRANT IN INDIA – GOOD FAITH REGISTRATION

The mark HELLROCK was registered by Allied Spirits Private Limited in Class 32. The said mark was applied on or about 23.12.2015 and the same was granted under number 3138493 by the Trademark Registry, New Delhi. The said mark had now been acquired by the Respondent vide Deed of Assignment dated 30.05.19. A copy of the trademark registration certificate is attached as ANNEXURE-3. A copy of the Deed of Assignment is attached as ANNEXURE-4.

Thus, at the time of filing an application for trademark registration, the Respondent or its predecessors had no knowledge about the existence of the Complainant or any of its registered trademarks.

It is pertinent to note that in India, Complainant filed its trademark registration only on 23.08.2017 and the same was granted on 20.02.2018.

Therefore, the Respondent bonafidely adopted the mark, HELLROCK. The Respondent subsequently started its website hellrockenergy.com in February, 2019.

Thus, Respondent has been continuously using the mark HELLROCK prior to the Complainant. Complainant has entered the Indian market only in around 2016. Complainant has no registration for the mark HELLROCK.

The Respondent has been in continuous use of the said mark in India since 2015 in the field of energy drinks. The invoices depicting sale in 2015 and thereafter is attached herewith as ANNEXURE-5.

Hence, Complainant has no rights in the mark HELLROCK. This mark is owned by the Respondent.

5. DIFFERENCE IN THE MARKS HELL AND HELLROCK IS SIGNIFICANT, AND NOT JUST A DIFFERENCE OF A VOWEL OR SYLLABLE

The difference between the Complainant's mark and of the Respondent is quite significant. The Complainant's mark is HELL, the Respondent's mark is HELLROCK. The addition of the word "Rock" in the mark of the Respondent causes the consumers to make an additional effort and pronounce the word "ROCK". It leaves a different impression in the minds of the public and there is no scope for confusion.

Additionally, the Respondent's domain is hellrockenergy.com. The addition of the words "Rock" as well as "Energy" makes the Respondent's domain and the mark entirely different from the Complainant.

6. ADOPTION OF THE MARK "HELLROCK" WAS IN GOOD FAITH:

The Respondent's predecessors adopted the mark "HELLROCK" in 2015. At that time, in India, the Complainant was not present and their products were not sold in India. The Complainant had no presence in India at that time. The Respondent's predecessors had no knowledge of the Complainant's HELL or their products in 2015 at the time of adoption of the mark "HELLROCK". At ANNEXURE-6 is the Declaration of the Respondent's predecessors explaining how the mark HELLROCK came to be adopted.

As per the predecessors, they wanted to coin a mark in respect of energy drinks. They wanted to convey the idea to the public that the energy drink is very hard, so hard that it can hit you hard and make a person like a rock and give such energy that one can even conquer hell.

Thus, adoption by the Respondent and their predecessors was bonafide, without knowledge about the Complainant.

7. HELL IS A MARK COMMON TO THE TRADE

a) Hell is a common word found in the dictionary - any person may use the word or combine the word with other words to arrive at a new word. An extract of the meaning of the word in dictionary is annexed herewith as ANNEXURE-7.

b) There are many other marks existing using HELL as prefix or Suffix

ADDITIONAL EXPLANATIONS
A. HELL is common to trade
• The mark HELL adopted by the Complainant is a word pulled out from the common dictionary and Complainant has no exclusive rights in respect thereof. It is settled law that word from the common dictionary cannot be monopolized by any party.

• There are other marks using HELL either as a suffix or a prefix in the market like HELL KITCHEN; THE HELL BRAND; HELLBUNNY; HELL BEER; HELL BIER, HELL T-SHIRTS etc. The extract of websites using these marks is attached herewith as ANNEXURE-8.

• The colour red in combination with black, red and white, is common to the trade in case of energy and related drinks. Some of the drinks using these colours is Monster; Sting; Dragon Energy; Red Bull- Red Edition; Storm; Shunya. A chart depicting these products is attached herewith as ANNEXURE-9.

• Mark of Complainant and Respondent are substantially different in appearance, the Complainant uses the mark HELL whereas the Respondent uses the mark HELLROCK;

• The appearance of these marks are different on the products as well as evident from ANNEXURE-10;

• The mark of the Complainant HELL is substantially different from the mark of the Respondent HELLROCK. It is a settled law that a mark is supposed to be seen as a whole and in the present case the registered mark of the Respondent in no way can cause confusion to the public at large.

B. Different website of both parties
a) Respondent Operations are confined to the territory of India
b) No goodwill of Complainant in India

ADDITIONAL EXPLANATIONS
• It is being bought into the knowledge of the Panel that the websites of both the parties are different in entirety. The organization of the website is also different. A chart comparing both the websites is attached herewith as ANNEXURE-11.

• The Respondent has been selling its product in the Indian market under the mark HELLROCK prior to the Complainant and the people are well versed with the product of the Respondent in India.

• The Respondent does not sell its products in Hungry and it's business is only confined to India. Being prior to Complainant in Indian market, people are well versed with the brand HELLROCK and only associate Respondent with the same.

• The Complainant is new into the Indian market and enjoys no goodwill in India. The operations of the Complainant in the Indian market are by virtue of third parties.

• The Complainant does not even range amongst top 10 energy drinks worldwide. A printout of the website ranging top 10-30 energy drinks worldwide is attached herewith as ANNEXURE-12.

• It is being brought to the knowledge of the Panel that the Complainant filed a suit in around August, 2019 in Hungary against Jes & Ben and the Respondent herein alleging infringement of trademark as well as breach of distributor agreement. However, the Hungarian Court refused to grant any ex-parte injunction, due to lack of jurisdiction. The Order passed by the Hon'ble Court is attached herewith as ANNEXURE-13.

• Additionally, Complainant filed law suit against the Respondent in India in the High Court of Delhi – being CS (Comm) 43/2020. Copy of the law suit is attached as ANNEXURE-14. This fact is suppressed in the present complaint.

• In this law suit which is filed in the Delhi High court, the Complainant seeks to restrain and injunct the Respondent from using the mark HELLROCK. The Delhi High court having considered the matter, has not granted any injunction against the Respondent. Relevant orders passed by the Delhi High court are attached herewith as ANNEXURE- 15.

• Therefore two courts (Hungary court as well as Delhi High Court) have not thought it fit to grant injunction and restrain the use of the mark HELLROCK. The present complaint is merely to scuttle the proceedings in Delhi High court. The present complaint is filed in bad faith and ulterior motives to prejudice the Hon'ble High court.

THE RESPONDENT MADE A FURTHER SUBMISSION AS FOLLOWS

1. REASON FOR FILING THE APPLICATION:
• The Respondent is trying to draw the attention of the Tribunal to certain very important facts that have occurred prior to the filing of the present Complaint.
• One of them is the filing of a suit before Hon'ble Delhi High Court, India on 23rd Jan 2020 on the same subject matter with same contentions as of this Complaint filed before this Hon'ble Panel.
• The law suit in India was filed prior to the filing of dispute before this Hon'ble Tribunal/Panel ; the next date before the Hon'ble Court is 17.06.2020;
• The Hon'ble Court had the occasion to consider the matter and did not grant any ex-parte injunction ; however the matter is kept for hearing on merits on June 17, 2020
• The main issue before the Hon'ble Delhi Court is whether the mark HELL and HELLROCK are confusingly similar or not

which is also the issue before this tribunal/panel;
• The decision of this Tribunal is likely to have an effect and prejudice the hearing before the Hon'ble Court;
• As per Rule 18 of the Uniform Domain Name Resolution Policy Rules, 2015, the Hon'ble Panel presiding over the complaint has certain discretionary powers to suspend or terminate the proceeding and resume the same when the decision from the High Court has been received.

APPLICATION BEFORE THE CZECH DOMAIN NAME DISPUTES TRIBUNAL SEEKING DIRECTIONS TO SUSPEND/TERMINATE THE PROCEEDINGS IN CASE NO- 103020

The Respondent herein submits as under:
1. That the Complainant has filed the present complaint before the this Tribunal/Panel on 20.04.2020 for transfer of domain name of the Respondent hellrockenergy.com in their favour and alleging that the trademark HELLROCK and domain name of the Respondent is confusingly similar to that of the Complainant i.e to HELL.
2. That the Complainant has filed a suit before the Hon'ble Delhi High Court on 23.01.2020 alleging infringement of their trademark 'HELL', passing off, seeking damages and other reliefs. A copy of the suit plaint filed is annexed herewith as ANNEXURE-1.
3. That the said suit is pending adjudication before the Hon'ble High Court and was listed before the Hon'ble Court for hearing on 17.04.2020. However due to the outbreak of COVID-19 pandemic and suspension of functioning of the Court the matter is adjourned to 17th June, 2020. It is pertinent to note that no ex-parte injunction has been granted against the Respondent in the said suit.
4. That while the suit is pending, the Complainant has initiated parallel proceedings before the CAC, Hungary on 20.04.2020 without disclosing the filing of the said suit at the Delhi High Court. At the very least, the Complainant should have come clean and disclosed the filing of the suit in Delhi India and the fact that no ex-parte injunction was granted. It is mandatory to do so in view of Rule 18 of the UDRP Rules 2015.
5. That Rule 18 of Uniform Domain Name Resolution Policy Rules, 2015 states as follows:
".....18 (a) In the event of any legal proceedings initiated prior to or during an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, the Panel shall have the discretion to decide whether to suspend or terminate the administrative proceeding, or to proceed to a decision.

(b) In the event that a Party initiates any legal proceedings during the Pendency of an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, it shall promptly notify the Panel and the Provider..."
6. It is being brought to the knowledge of the Panel that the Complainant filed a suit in around August, 2019 in Hungary against Jes & Ben and the Respondent herein alleging infringement of trademark as well as breach of distributor agreement. However, the Hungarian Court refused to grant any ex-parte injunction, due to lack of jurisdiction. The Order passed by the Hon'ble Court is attached herewith as ANNEXURE- 2.

7. Reasons why this UDRP dispute cannot be evaluated separately from the ongoing court proceeding:
a. The law suit before the Delhi High court was filed prior to the initiation of the present Complaint [the UDRP dispute was filed only on 20.04.2020 whereas the lawsuit in the Delhi High court was filed on 23rd Jan 2020; - the law suit is prior and senior to the present Complaint;
b. The main issue to be decided by the High Court in the law suit and to be decided by this Tribunal/Panel are the same – whether the mark HELLLROCK is deceptively similar or confusingly similar to the mark 'HELL';
c. The court proceeding is slated to be heard on June 17th, 2020 which is very close on heels and would not take too much time for conclusion; The Copy of the Orders passed by the Hon'ble High Court in the said suit is annexed herewith as ANNEXURE-3.
d. Any order passed by this Tribunal would have an impact and adversely affect the ability of the Respondent to get appropriate remedies in the court;
e. No prejudice would be caused to the Complainant since they already have initiated law suits for deciding whether the mark of the Respondent HELLROCK is confusingly similar to their mark HELL

• Thereby, in accordance with Rule 18 of UDRP Rules, 2015, the Respondent most humbly prays that this Hon'ble Panel be pleased to :
(a) Suspend/ terminate the proceedings in the present Complaint;
(b) Pass any other order deems fit and proper in the circumstances.

THE COMPLAINANT MADE A SUBMISSION ON MAY 31, 2020 ON THE APPLICATION BY THE RESPONDENT FOR AN EXTENSION OF TIME TO FILE THE RESPONSE , THE MERITS OF THE UDRP PROCEEDING AND WHETHER THE PROCEEDING SHOULD BE SUSPENDED OR TERMINATED PENDING THE DISPOSITION OF CERTAIN COURT PROCEEDINGS AS FOLLOWS

Time extension

The Respondent received the Complaint on 23 April, 2020 and the Respondent was given 20 days period thereafter to file the response by accessing the CAC website (based on section 5 (a) of the Rules). The respective administration of the CAC2 provided clear information how to access the Complaint. The 20-day-long deadline expired on 13 May, 2020. The Respondent contacted first the respective CAC only on 9 May, 2020 claiming that they were unable to access the portal. The administration of the CAC continuously provided clear help to the Respondent, while the Respondent did not follow the respective instructions. We are of the view that the Respondent were trying to prolongated the proceeding as much as possible and deliberately accusing the administration of the CAC of noncompliance.

The section 5 (b) of the Rules states that "[t]he Respondent may expressly request an additional four (4) calendar days in which to respond to the complaint (…)". We would like to point out that the Respondent did not follow the Rules as the Respondent did not expressly request the additional four (4) days, they prolongated the proceeding and filed the nonstandard communication right after 33 days.

Based on the above, we are of the view that the Respondent filed the response in bad faith clearly over the given deadline, by not complaining with the respective suggestions of the administration of CAC. We kindly request the honorable Panel not to take into consideration the response due to late filing.

III. Comments on merits

We expressly request the respective Panel to let us file a counter-response after reading the Respondent's response. The said response contains several misleading facts related to the circumstances of registering the contested domain and to the relationship of the parties, which are all crucial when delivering a decision on the merits. The information are relevant when determining the bad faith at the time of registering the contested domain.
[8]. Related to the main statement of the Respondent, that the Respondent's predecessors had no knowledge of the Complainant's trademarks, we would like to put an emphasis on the fact that the prior domain names of the Claimant i.e. www.hellenergy.com registered on June 11, 2006 and www.hellenergystore.com registered on October 01, 2013, both of which were registered and operational before the Respondent's domain name www.hellrockenergy.com which was registered only on February 12, 2019. In any case, either in domain name registration as well as use of trade mark, Hell energy is prior to the Respondent or its predecessors.

The contested domain name was registered on Feb 12, 2019 in the name of Magical Dreams Production Pvt. Ltd. whose managing director is Mr. Harpreet Sachdeva, who was at that time also director of Jes & Ben Groupo Pvt. Ltd. which was the exclusive distributor of the Complainant in India from October 04, 2017. The exclusive distributorship contract with Jes & Ben Groupo Pvt. Ltd. through Mr. Harpreet Sachdeva was terminated only on March 25, 2019. Therefore, at the time of registering the impugned domain name, Mr. Harpreet Sachdeva was still a distributor for the client in India. Therefore, the contested domain name was registered in bad faith and with malafides and in violation of the legal rights of the Complainant.

Please also find attached herewith as Annex 7 the Whois results dated January 09, 2020 retrieved from www.whois.com wherein the registrant organization for the domain name www.hellrockenergy.com was stated to be Magical Dreams Production Pvt. Ltd., and the online status page of the said company as retrieved from the records of the Ministry of

Corporate Affairs (MCA) showing Harpreet Sachdeva as one of its directors, as Annex 8. Most of the other Whois websites did not reveal the registrant details of the domain name and were privacy protected. As we had agreed not to involve Mr. Harpreet Sachdeva in the suit against Heaven Traders LLP & Others before the Delhi High Court, we did not file the said Whois result from www.whois.com and instead filed a privacy protected Whois result retrieved from www.whois.net not mentioning the names of the registrant. Please find attached herewith as Annex 9 the Whois result from www.whois.net as filed in the Court.

Please see below our para-wise comments on the response:
Para No. in the Response Statement made by the Respondent The comment of the Complainant
Para 2
"The Delhi High court has considered the matter between the parties and has not granted any ex-parte injunction."
The orders of the Delhi High Court in the suit CS(COMM) 43/2020 filed by Hell Energy against Heaven Traders LLP and Others, which are filed as Annexure-15 by the Respondent in the UDRP complaint, speak for themselves. The said suit along with injunction application I.A. No. 1004/2020 came up for first hearing on January 24, 2020. However, as the counsel for Heaven Traders LLP appeared before the Court on the very first date of hearing without receiving any notice, the Delhi High Court could not hear the submissions of Plaintiff (Complainant herein) on the application for ex parte ad interim injunction without hearing the arguments from both sides, and granted time to the Defendants (Respondent herein) to file their reply at least two days before the next date of hearing (February 10, 2020) i.e. at least by February 08, 2020.

On February 10, 2020, the Defendant Counsel sought further time to file the written statement and reply, and the Court directed them to file the same within three weeks. However, even till date, the Defendants/ Respondent have not filed their reply or written statement before the Court.

Accordingly, there was no occasion for the Delhi High Court to hear any submissions on the application for ex parte ad interim injunction or to even consider the matter. The said I.A. No. 1004/2020 is still pending disposal and upon hearing the parties, the Court will pass an order therein.

Therefore, it is premature for Heaven Traders to make the above statement and it is completely incorrect and portrayed in a manner to falsely imply that the Delhi High Court has refused to grant ex-parte injunction to the Plaintiff after considering the application in detail.

Para 3

"A search on the internet or through independent search engines such domaintools.com for "hellrockenergy" would only throw up results leading to the website of the Respondent only. None of the search results show links that lead to the Complainant's website 'hellenergy.com'. No traffic is ever lead to the Respondent's website thinking that it is the complainant's website. At Annexure-2 are the search results from the internet and
1. "Hell" and "rock" are two separate words and there is every likelihood that customers and general public will use the search term "hell rock energy" without any space in between the words and "Hell" is the essential feature of the trade mark "Hell energy" as well as "Hellrock/ Hell rock energy" as it is the primary word or the pre-fix, and in speech and memory, the primary word plays the most vital role.
2. On conducting an internet search for "hell rock energy drinks" the search results show many links related to Complainant's Hell Energy Drinks including its own website www.hellenergy.com. The Google search results are attached herewith as Annex 10 and the links pertaining to Hell Energy drinks are highlighted for your reference and perusal.
domaintools.com which show that there is no confusion between the domain of the Complainant and of the Respondent."

Para 4

"Respondent has relied upon the invoices for "continuous use" of the trade mark 'Hellrock'. These are the same copies of invoices filed by Heaven Traders in the suit CS(COMM) 43/2020 before the Delhi High Court."
1. The invoices filed by the Respondent for the years 2015-2017 and 2019 depicting sale of their product HELLROCK energy drinks are forged and fabricated documents.

2. The sole copy of invoice in the name of Heaven Traders LLP is dated November 28, 2019 and is numbered as invoice no. 2. Therefore, even arguendo, assuming that the said invoice is genuine, it is clear that Heaven Traders LLP issued only its second invoice for sale of “Hellrock” energy drinks as late as November 28, 2019. Therefore, Respondent’s use of the mark “HELLROCK” can be said to be from only November 2019. It would thus be an incorrect statement that the Respondent i.e. Heaven Traders LLP has been in continuous use of the mark “HELLROCK” in India since 2015.
3. Indeed, we agree with you that the said invoices (if at all genuine) appear to have been sold by Heaven Traders to a sub-distributor due to the large quantities of the drinks (1000 crates) mentioned on the invoice, but do not prove that the goods actually reached consumers. Although, we may mention that the sale to the sub-distributor/ dealer will also amount to use in commerce.
4. Respondent’s predecessor i.e. Allied Spirits Pvt. Ltd. had filed the application for the TM registration no. 3138493 dated December 23, 2015 for “HELLROCK”(Annexure 3 of Respondent’s documents) with a user claim from December 17, 2015. Copy of the Application as filed by Allied and as obtained from the Indian TM Registry website is attached herewith as Annex 11 for your perusal and reference. That means that the said mark was used in commerce earliest on December 17, 2015. However, the earliest invoice filed by Respondent is Invoice no. 24 dated December 29, 2015 issued by Allied. Respondent should be asked to produce the invoice dated December 17, 2015 to show commercial use of the mark from the claimed user date.

It is our allegation that these invoices are forged and there was no sale of Hellrock energy drinks prior to November 2019. The application for trade mark registration claiming use since December 17, 2015 is false, and the trade mark registration is wrongly obtained. The Complainant has filed rectification proceedings against the said registration which is likely to succeed.

5. As the user claim for the TM registration no. 3138493 dated December 23, 2015 is December 17, 2015, therefore, as on the date of filing the application i.e. December 23, 2015, the Applicant i.e. Allied Spirits was already using the mark HELLROCK in commerce for purportedly selling energy drinks in India. However, the said Applicant did not file the application for the packaging of the can as was being used by them at that time, and instead filed the application only for the word mark “HELLROCK”. There is no description of how the mark was used on the energy drink cans from December 17, 2015 and there is no mention of all the details of the mark as was being originally used either in the TM Application or in the Response to the domain complaint.

6. Even the new trade mark filings for the marks “Hellrock” word per se and the packaging by Allied Spirits and Heaven Traders in 2019 are on Proposed To Be Used basis, which means that the packaging or even the word mark was not in use prior to at least the application dates of the said trademarks i.e. May 31, 2019. Details are given below:
The Claimant has opposed the aforesaid TM application and is likely to succeed in the same.

Original Applicant Kriti Karki trading as Heaven Traders LLP Applcn. Application Trade Mark User Original Applicant
Application Date Trade Mark
Allied Spirits Pvt. Ltd.
March 26, 2019
Application No. User Claim
4128986
Proposed to Be Used

on No. Date Claim
4193780
May 31, 2019
HELLROCK
Proposed to Be Used
4193781
May 31, 2019
HellRock Red Gold Device
Proposed to Be Used

Copies of the said TM application forms are attached as Annex 12.
7. There has been no print advertisement or any news of the Respondent's launch of Hellrock energy drinks from 2015-2019.
Para 5
The difference between the Complainant's mark and of the Respondent is quite significant…. The addition of the word "Rock" in the mark of the Respondent causes the consumers to make an additional effort and pronounce the word "ROCK". It leaves a different impression in the minds of the public and there is no scope for confusion.

For the limited purpose of the domain name issue, our response for para 3 above including the Google search results may be used here as well. Therefore, there is every scope of confusion in the kinds of the public, especially as the look and feel and colour scheme of Red, Black and White used on the Respondent's website is identical to the look and feel and colour scheme used in Complainant's prior website. Below screenshots may be referred to in this regard:-
COMPLAINANT'S WEBSITE – HELLENERGY.COM (LANDING PAGE)
RESPONDENTS' WEBSITE – HELLROCKENERGY.COM (LANDING PAGE)

8. From a bare perusal of the two screenshots of the landing pages of the respective websites, it is clear that the Respondent has copied even the mark "HELL" in red colour on the left top corner of its website, in the identical manner as the Complainant, creating a false impression that the Respondent's website belongs to the Complainant. Therefore, any unwary consumer who accidentally lands on the website of the Respondent will be misled and deceived into believing that the Respondent's website belongs to the Complainant.
Para 6
The Respondent's predecessors had no knowledge of the Complainant's HELL or their products in 2015 at the time of adoption of the mark "HELLROCK".
Besides the fact that the domain name www.hellrockenergy.com was registered by Mr. Harpreet Sachdeva through Magical Dreams Production Pvt. Ltd. on February 12, 2019 when he was also acting as exclusive distributor for the Complainant through Jes & Ben Groupo Pvt. Ltd., the Complainant refer to the fact that upon inspecting the records of the Indian Ministry of Corporate Affairs for Allied Spirits Pvt. Ltd., the Complainant learnt that one of its directors is Ms. Kriti Karki i.e. who is also the proprietor/ partner of the Respondent, Heaven Traders LLP, along with Mr. Harpreet Sachdeva (director of Jes & Ben i.e. former exclusive distributor of the Complainant) who was one of the directors of Allied Spirits until March 01, 2019. Therefore, there is no doubt that these parties are all connected and acting in connivance with each other to misuse the Complainant's prior registered and reputed trade mark HELL/ HELL Energy and domain name.

Para 7
HELL IS A MARK COMMON TO THE TRADE … There are other marks using HELL either as a suffix or a prefix in the market like HELL KITCHEN; THE HELL
The Complainant's domain names www.hellenergy.com was registered on June 11, 2006 and www.hellenergystore.com was registered on October 01, 2013 both of which are prior to the Respondent's domain name registered on February 12, 2019.
Respondent is making false allegations of trademark HELL being a common suffix or prefix in the market as all the trademarks mentioned by

9. BRAND; HELLBUNNY; HELL BEER; HELL BIER, HELL T-SHIRTS etc.
the Respondent like Hell Kitchen, The Hell Brand, Helbunny etc. are not at all pertaining to energy drinks, rather are widespread across different trades and classes and therefore the Complainant's registered trademark HELL as registered under class 32 of Nice classification, has no relevance attached to the afore mentioned trademarks owing to sheer difference of the trade and markets. In any case, the dispute concerns with the domain name registration and not a trade mark infringement dispute. The said defense can only be taken in a trade mark infringement suit.
Para 7 – additional explanations
The colour red in combination with black, red and white, is common to the trade in case of energy and related drinks. Some of the drinks using these colours is Monster; Sting; Dragon Energy; Red Bull- Red Edition; Storm; Shunya.
It is necessary to point out that this statement of Respondent has no relation to the domain name complaint. For the UDRP

complaint, only the domain name and the rival websites are to be seen.
None of the other brands mentioned by the Respondent such as Monster, Sting, Dragon Energy, Red Bull, Storm or Shunya, have a website that is identical to the look and feel of the Complainant's website in conjunction with usage of the Complainant's registered trade mark "HELL" and also the deceptively similar domain name www.hellrockenergy.com. All these factors together evidences the bad faith and malafide registration of the domain name by the Respondent.
Complaint is filed basis its earlier domain names and registered trade marks.
Additional Explanations (Page 4)
The Complainant filed a suit in around August, 2019 in
Hungary against Jes & Ben and the Respondent herein alleging infringement of trademark as well as breach of distributor agreement. However, the Hungarian Court refused to grant any ex-parte injunction, due to lack of jurisdiction. The Order passed by the Hon'ble Court is attached herewith as ANNEXURE-13.
After termination of the exclusive distributorship contract between the Complainant and Jes & Ben, Jes & Ben filed a suit before the Delhi High Court (CS (COMM) 257/ 2019) against the said termination. As there was an arbitration clause in the said exclusive distributorship contract, the Complainant filed an application for dismissal of the said suit on the ground that the subject matter of the suit is covered by the arbitration clause. The said application of the Complainant was allowed by the Delhi High Court vide judgment dated September 23, 2019 (attached for reference as Annex 13) and the suit was dismissed with cost.
In the Hungary Court, the issue of continued use of the Complainant's trade marks by Jes & Ben despite termination of distributorship contract came up, and the Hungary Court was of the view that the issue of trade mark infringement is not a subject matter of arbitration and is to be decided by the concerned Indian court under the Indian Trade Marks Act, 1999. The said judgment (Annexure-13 as filed by Respondent) of the Hungary court is self

10.explanatory.
No suit was filed by the Complainant against the Respondent in Hungary. The Respondent was not a party and has no relation to the case before the Hungarian Court. Therefore, it is precluded from making these baseless submission to which it has no nexus.
Subsequently, the Complainant filed the suit for trade mark infringement against Jes & Ben in the Delhi High Court in New Delhi, India, and also obtained the ex parte ad interim injunction order dated January 08, 2020 (attached for reference as Annex 14) restraining Jes & Ben and its directors and anybody acting with them directly or indirectly, from using or infringing the registered trade mark 'HELL' of the Complainant or any other similar trade mark.
Additional Explanations (Page 4)
Therefore two courts (Hungary court as well as Delhi High Court) have not thought it fit to grant injunction and restrain the use of the mark HELLROCK. The present complaint is merely to scuttle the proceedings in Delhi High court. The present complaint is filed in bad faith and ulterior motives to prejudice the Hon'ble High court.
Our responses for para 2 and Additional Explanation hereinabove may be referred here.
[12.] Based on the above, in case the honorable Panel decides to take into account the late filed response of the Respondent, The Complainant kindly ask to take into consideration the facts stated in the present counter-response.
[13.] The Complainant hereby requests the Administrative Panel appointed in this administrative proceeding that <hellrockenergy.com> be transferred to the Complainant.
[14.] The proceedings ongoing between the Complainant and the Respondent are about trademark infringement and cancellation of the Respondent's trademarks. The
11.Complainant is of the view that the present domain dispute can be decided based on the earlier domain names of the Complainant, therefore the honorable Panel can decide on the merits of the case.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the disputed domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights (within the meaning of paragraph 4(a)(i)of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the disputed domain name (within the meaning of paragraph 4(a)(ii) of the Policy).

BAD FAITH

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the disputed domain name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy).

PROCEDURAL FACTORS

APPLICATION FOR EXTENSION OF TIME TO FILE RESPONSE

Pursuant to a request from the Respondent, on May 21, 2020 the Panel issued a Procedural Order by which the Respondent was given until May 26, 2020 to submit its contentions on why it had not filed its Response in time and then addressing whatever it wanted to submit on the merits of the dispute.

The Respondent complied with this Order and on May 26, 2020 filed a communication in which it set out its reasons for delay in filing the Response. In brief, its position is that it had some difficulties communicating with the Czech Arbitration Court.

The Complainant opposed the request.

The Panel has had access to the use made of the Court's email and communication facilities by the Respondent and finds that the Court performed all of its functions properly.

However, the Panel finds that in the circumstances and in the interests of achieving finality in this proceeding as soon as practicable, the proper course is to allow the Respondent adequate time to file its Response, which it has now done and to order that the Response now filed should be taken in all respects as a compliant Response in this proceeding. The Panel so orders.

As to other procedural matters, the Panel is satisfied that all procedural requirements under the UDRP were met and there is no other reason why it would be inappropriate to provide a decision.

APPLICATION TO SUSPEND OR TERMINATE THE PROCEEDING

On May 26, 2020 the Respondent made an application that was in effect a motion to terminate or suspend this proceeding because there is on foot in the High Court of Delhi at New Delhi, India, a court proceeding. The Respondent submitted:

“There is already a dispute between the parties – the Complainant and the Respondent in the Delhi High Court in Delhi, India where the Complainant has complained about the use of the mark HELLROCK by the Respondent. The Delhi High court has considered the matter between the parties and has not granted any ex-parte injunction. The High Court is seized of the matter. However in order to hijack the dispute to a different venue the Complainant has filed the present complaint before this concerned Authority with malafides and in bad faith.”

In the proceeding referred to, the present Complainant is not complaining “about the use of the mark HELLROCK by the Respondent.” It is complaining about the use of the Complainant’s HELL ENERGY and HELL trademarks.

On May 29, 2020 the Respondent made a further submission to the Panel on this issue.

The Panel will not set out the detail of the submission except to say that it referred again to the Indian proceeding. It went on to say the following:

“ It is being brought to the knowledge of the Panel that the Complainant filed a suit in around August, 2019 in Hungary against Jes & Ben and the Respondent herein alleging infringement of trademark as well as breach of distributor agreement. However, the Hungarian Court refused to grant any ex-parte injunction, due to lack of jurisdiction. The Order passed by the Hon’ble Court is attached herewith as ANNEXURE- 2.”

The submission ended with the following prayer:

" Thereby, in accordance with Rule 18 of UDRP Rules, 2015, the Respondent most humbly prays that this Hon'ble Panel be pleased to :
(a) Suspend/ terminate the proceedings in the present Complaint;
(b) Pass any other order deems fit and proper in the circumstances."

The Complainant has opposed this request. In the course of a detailed submission which the Panel will not set out here in view of the complexities of several proceedings that have been undertaken, the Complainant states that the proceeding in the Hungarian Court is in fact not against the present Respondent and concerns allegations about the company Jes & Ben, the former distributor of the Complainant. It is clear, therefore that on the evidence before the Panel, there is no reason for suspending or terminating the present UDRP proceeding.

The Indian proceeding is different. In that action the Plaintiff is the present Complainant and the Defendants are the present Respondent, Allied (mentioned later in this decision, and the former owner of the Respondent's HELLROCK trademark), a director of Allied and another individual. The action is basically a trademark case alleging breach of the Complainant's HELL ENERGY and HELL trademarks and breach of copyright, among other causes of action. It certainly touches on the matters involved in the present proceeding. Indeed, it seeks among other relief the transfer of the disputed domain name, presumably to the present Complainant.

However, the Panel's assessment of the various proceedings is that it can separate them from the narrower issues in the present proceeding and deal with them without embarrassment or inconvenience and without in any way obstructing the Indian court proceedings which are yet to come to trial.

The Panel undoubtedly has a discretion whether to make the order sought by the Respondent. Rule 18(a) provides:
".....18 (a) In the event of any legal proceedings initiated prior to or during an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, the Panel shall have the discretion to decide whether to suspend or terminate the administrative proceeding, or to proceed to a decision."

Clearly that discretion has to be exercised judicially. The way in which it should be exercised that has been the subject of discussion in several UDRP decisions. The Panel is of the view that the opinion expressed in Tiara Hotels & Resorts LLC v. John Pepin, WIPO Case No. D2009-0041 (March 10, 2009) is a very useful discussion of the factors that should be taken into account. Accordingly, the Panel takes account of the fact that proceeding with the UDRP proceeding and achieving a result and an order of one sort or another will avoid the possible delay that may come from the court proceedings; it may encourage settlement; and also the Respondent has applied to file its Response out of time and has played an active part in the proceeding. Moreover, the Panel is of the view that no injustice could be done to either party or any party in the Indian proceeding by dealing with the UDRP case forthwith.

Accordingly, having regard to all the circumstances, the Panel exercises its discretion under Rule 18(a) by deciding not to suspend or terminate the proceeding but to proceed to a decision and it so orders.

PRINCIPAL REASONS FOR THE DECISION

Pursuant to paragraph 4(a) of the Policy, in order to obtain the transfer of the Disputed domain name, the Complainant has to demonstrate that:

(i) The Disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant

has rights; and

(ii) The Respondent has no rights or legitimate interests in respect of the Disputed domain name; and

(iii) The Disputed Domain name has been registered and is being used in bad faith.

The Panel will now proceed to examine each of those requirements in turn.

Identical or Confusingly Similar

The first question that arises is whether the Complainant has rights in a trademark or service mark on which it may rely in this proceeding.

The Complainant has adduced evidence, which the Panel accepts, that it is the registered owner of the following two trademarks that are the basis of its case in this proceeding. They are:

(a) the EU trademark number 014749253 for the word mark “HELL ENERGY” (hereinafter the “HELL ENERGY Trademark"). The HELL ENERGY Trademark was filed with EUIPO on 20 October 2015 and granted on 23 December 2016. The HELL ENERGY Trademark is registered in Nice Class 32 for “energy drinks”.

(b) the Indian trademark number 3618853 for the word mark “HELL” (hereinafter the “HELL Trademark”). The HELL Trademark was filed with the Indian IP Office on 23 August 2017 and granted on 20 February 2018. The HELL Trademark is registered in Nice Class 32 for ‘energy drinks’ and as such has rights in that trademark.

The Panel also finds that the Complainant has rights in those two trademarks.

The next question that arises is whether the disputed domain name <hellrockenergy.com> is identical or confusingly similar to the HELL ENERGY or the HELL trademark or confusingly similar to either of those trademarks.

It is apparent that the domain name is not identical to either of the trademarks as it consists of three words, whereas the trademarks consist respectively of two and one words. But the domain name is, in the opinion of the Panel confusingly similar to the HELL ENERGY trademark. That is so for the following reasons.

First, the domain name includes the entirety of the HELL ENERGY trademark. This indicates that there is a degree of similarity between the two expressions, as the trademark is recognisable in the domain name.

Secondly, the objective observer would notice that the trademark had been included in the domain name, giving rise to the probability that the domain name is invoking the HELL ENERGY trademark and that it has some connection with it.

Thirdly, the word added to the trademark, namely “rock” is a generic word. The general disposition of panelists in UDRP cases, with which the Panel agrees, is that where a generic word has been added to a trademark, the domain name may well be confusingly similar to the corresponding trademark in the minds of internet users.

It is also now well established that the addition of a generic top level domain, such as “.com” in the present case, cannot negate confusing similarity that is otherwise present, as it is in the present case.

Accordingly, the disputed domain name is confusingly similar to the Complainant’s HELL ENERGY trademark and the Complainant has thus shown the first of the three elements that it must establish.

It is therefore not necessary to decide if the domain name is confusingly similar to the Complainant's HELL trademark, as is confusingly similar to the HELL ENERGY trademark.

Rights or Legitimate Interests

Under paragraph 4(a)(ii) of the Policy, the Complainant has the burden of establishing that the Respondent has no rights or legitimate interests in respect of the disputed domain name.

But by virtue of paragraph 4(c) of the Policy, it is open to a respondent to establish its rights or legitimate interests in a domain name, among other circumstances, by showing any of the following elements:

"(i) before any notice to you [respondent] of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
(ii) you [respondent] (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or
(iii) you [respondent] are making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue."

Thus, if a respondent proves any of these elements or indeed anything else that shows that it has a right or legitimate interest in the domain name, the complainant will have failed to discharge its onus and the complaint will fail.

It is also well-established that a complainant is required to make out a prima facie case that the respondent lacks rights or legitimate interests and that when such a prima facie case is made out, the respondent carries the burden of rebutting it and demonstrating that the respondent has rights or legitimate interests in the domain name. If the respondent cannot do so, a complainant is deemed to have satisfied paragraph 4(a)(ii) of the UDRP.

The Panel, after considering all of the evidence, finds that the Complainant has made out a prima facie case that the Respondent has no rights or legitimate interests in the domain name.

That prima facie case is made out from the following considerations.

(a) the Respondent has registered the disputed domain name that includes the HELL ENERGY trademark of the Complainant and used it in its domain name;

(b) the Complainant uses and has used the HELL ENERGY trademark to promote its Hell Energy brand of energy drinks;

(c) the Respondent registered the disputed domain name on February 12, 2019;

(d) the domain name resolves to a website where the Respondent promotes its HELL ROCK brand of energy drinks;

(e) the Complainant has established that it has not authorized or licensed the Respondent to use any of its trade marks.

To put it as concisely as possible, the Respondent has registered a domain name that includes the Complainant's HELL ENERGY trademark. Such a situation has long been regarded by UDRP panelists as showing, at least prima facie, that the registrant, in this proceeding the Respondent, had no right to register the domain name and no legitimate interest in it.

As the Complainant has made out a prima facie case, the onus of proof is now on the Respondent to rebut the prima facie case. In other words, the Respondent must show some good reason to justify having registered a domain name that includes the Complainant's trademark. The Panel will now examine the evidence to see whether the Respondent has discharged that onus.

The Respondent's case seems to be basically that it has a right and legitimate interest in the domain name because it registered the domain name on February 12, 2019 and that by that date it had a trademark for HELLROCK that justified its registration of the domain name and legitimizes it. That can be the only significance of the Respondent's arguments around the HELLROCK trademark. The Panel puts it in that way because the Respondent concludes those arguments by submitting

as follows: “Hence, Complainant has no rights in the mark HELLROCK. This mark is owned by the Respondent.”

But that is not an issue in this proceeding. So far as the Panel is aware, the Complainant is not claiming that it has any rights in the HELLROCK trademark. Nor is it doubted that the Respondent owns the HELLROCK trademark. The issue is whether the Respondent has a right or legitimate interest in the disputed domain name. Accordingly, the only relevance of the HELLROCK trademark can be whether it throws any light on whether the Respondent had the right to register the disputed domain name and whether it is legitimate.

Accordingly, the only relevant submission that the Panel can detect on this major issue is whether the HELLROCK trademark, and the Respondent’s acquisition of it, helps the Respondent’s case that it has a right or legitimate interest in the domain name. The Panel therefore assumes that the Respondent’s submission is that its acquisition and ownership of the HELLROCK trademark gives it a right and legitimate interest in the domain name.

It is certainly true that the domain name was registered on February 12, 2019 and presumably the significance of the date when the Respondent acquired the trademark HELLROCK is that it gave the Respondent some right to register the domain name at the time it did so. The trademark that the Respondent is referring to is an Indian trademark that was not originally registered by the Respondent but by a company named Allied Spirits Private Limited (“Allied"). Allied applied for the mark on or about December 23, 2015 and it was granted to Allied as registration number 3138493 by the Trademark Registry, New Delhi. The mark was acquired by the Respondent by a Deed of Assignment dated May 30, 2019 between Allied and the Respondent. A copy of the trademark registration certificate and a copy of the Deed of Assignment were adduced in evidence by the Respondent.

The Respondent therefore seems to be arguing that it had every right to register the domain name because it had a trademark and the domain name reflected that trademark.

This argument is often used in UDRP proceedings and can be a persuasive one, as the domain name in such cases is merely reflecting the registrant's company or business or name or even its own personal name. Moreover, such a view is often relied on as an example of the defence to a UDRP claim set out in paragraph 4(c) (ii) of the Policy, namely that the registrant was commonly known "by the domain name." In such a case, a trademark for HELL ROCK ENERGY may show that the owner was commonly known "by the domain name", i.e. was commonly known as <hellrockenergy.com>. Of course, such an argument will stand up only if the facts support it and that is where the argument in the present case breaks down.

There are two reasons why in the present case, the panel is not persuaded on the balance of probabilities that the argument is valid.

First, it is true that on May 30, 2019 the Respondent had had the HELLROCK trademark assigned to it. The Panel has looked at that assignment and on its face the assignment took place on that date. However, it is not correct to say, as the Respondent seems to submit, that by the time it registered the domain name the trademark was a justification for doing so. The domain name was registered on February 12, 2019 and by that date the Respondent did not have any interest in a trademark for HELLROCK, or at least not so far as the evidence goes. It acquired that interest on May 30, 2019 under the assignment and not before.

Accordingly, if the Respondent is basing its right to the domain name on the trademark transferred to it by Allied, which must be the only reason for giving this evidence, that argument has no substance because the Respondent had no interest in the trademark on the date it registered the domain name.

More importantly, the trademark, even if the Respondent owned it by the day it registered the domain name, would not justify the Respondent registering the domain name. The Respondent's trademark is not HELL ROCK ENERGY, but HELLROCK and the domain name is therefore not a reflection of the trademark.

Indeed, adding the word "energy” to the trademark suggests to the Panel that the Respondent was going out of its way to announce to the world that the “hell rock” of the domain name was to be associated in the public mind with "energy", which

brings it closer to the Complainant's EU trademark HELL ENERGY. In other words, unless there is some good reason to the contrary, it looks as if the Respondent wanted to adopt a word that came from the Complainant's HELL ENERGY trademark.

Accordingly, what has happened here is that the Respondent has registered the domain name on February 12, 2019. On that date, Respondent did not have a trademark that would have justified registering the domain name. The Complainant, however, did have a trademark, its European Union trademark for HELL ENERGY which it had had since 2016 and , as the Panel has already held, the domain name incorporated that trade mark and is confusingly similar to it.

Accordingly, the argument that the Respondent was entitled to register the domain name because of its HELLROCK trademark is not accepted.

The Respondent also argued that it had continuously used the HELLROCK trademark since 2015 in the field of energy drinks. In support of this submission it tendered a series of invoices. The Panel finds that those invoices are of limited probative value. Moreover, the submission that it had used the trademark since 2015 is not made out. The Respondent had not acquired the HELLROCK trademark until May 30, 2019.

The Respondent seems to make an additional argument to satisfy the legitimacy of its registration. It says that at the time of filing an application for trademark registration, the Respondent or its predecessors had no knowledge about the existence of the Complainant or any of its registered trademarks. The Panel is not sure what trademark application the Respondent is referring to. In any event, the question here is whether the Respondent knew of the Complainant and its trademarks at the time that it, the Respondent, registered the disputed domain name. The Panel finds on the evidence that it is more likely than not that the Respondent did know of the Complainant and its trademarks when it registered the disputed domain name. This is partly because the Complainant's second submission puts it that:

"the prior domain names of the Claimant i.e. www.hellenergy.com registered on June 11, 2006 and www.hellenergystore.com registered on October 01, 2013, both of which were registered and operational before the Respondent's domain name www.hellrockenergy.com which was registered only on February 12, 2019. In any case, either in domain name registration as well as use of trademark, Hell energy is prior to the Respondent or its predecessors."

Moreover, the Complainant further submitted:

"The contested domain name was registered on Feb 12, 2019 in the name of Magical Dreams Production Pvt. Ltd. whose managing director is Mr. Harpreet Sachdeva, who was at that time also director of Jes & Ben Groupo Pvt. Ltd. which was the exclusive distributor of the Complainant in India from October 04, 2017. The exclusive distributorship contract with Jes & Ben Groupo Pvt. Ltd. through Mr. Harpreet Sachdeva was terminated only on March 25, 2019. Therefore, at the time of registering the impugned domain name, Mr. Harpreet Sachdeva was still a distributor for the client in India. Therefore, the contested domain name was registered in bad faith and with malafides and in violation of the legal rights of the Complainant."

These and other aspects of the evidence indicate to the Panel that in all probability the Respondent knew of the Complainant, its trademarks and its activities, that it had them very much in mind when it registered the domain name and that it did so to promote its own interests to the prejudice of the Complainant and trading on the name of the Complainant.

After all, the Complainant had been in the energy drinks business since the year 2006; it had acquired an international presence in that business as is shown by its own website at www.hellenergy.com, which is in evidence; the Respondent must have been close to the energy drinks market at the time immediately preceding its acquisition of the HELLROCK trademark on May 30, 2019 and it is hard to believe that it did not know, by then, that the Complainant was seeking an Indian presence in view of the fact that the Complainant had registered its HELL trademark, in India, on February 20, 2018. The Panel is therefore inclined to the view that in all probability the Respondent knew of the Complainant, that its name was Hell Energy, that its products were known as Hell Energy, that it was internationally active, and that it had expressed interest in opening in India. Accordingly, it is more probable than not that, when the Respondent registered the domain name, it intended to include the Complainant's name, trademark and brand in its own domain name and that it was therefore

targeting the Complainant.

The Respondent also advanced another argument, namely that :

"HELL IS A MARK COMMON TO THE TRADE

a) Hell is a common word found in the dictionary - any person may use the word or combine the word with other words to arrive at a new word. An extract of the meaning of the word in dictionary is annexed herewith as ANNEXURE-7.

b) There are many other marks existing using HELL as prefix or Suffix."

That argument is sometimes put and on appropriate facts it can give rise to a defence. But it could not succeed in the present case as it is necessary to look at the entire domain name. In their entirety, the words going to make up the domain name include the Complainant's HELL ENERGY trademark and it is around that trademark that the dispute must be resolved. As the Panel has shown, the domain name is confusingly similar to the Complainant's trademark and the Respondent has not been able to show how it had the right to include the Complainant's trademark in its domain name or how it had a legitimate interest in doing so.

Finally, the Panel has given careful consideration to all of the arguments advanced by the Respondent. Having done so the Panel finds that the grounds relied on by the Respondent to show that it has a right or legitimate interest in the disputed domain name have not been made out. Nor could the Respondent bring itself within any of the criteria specified in the Policy as grounds on which a right or legitimate interest may be shown.

The Panel therefore finds that the Respondent has not rebutted the prima facie case against it and does not have a right or legitimate interest in the disputed domain name.

The Complainant has therefore shown the second of the three elements that it must establish.

BAD FAITH

It is clear that to establish bad faith for the purposes of the Policy, Complainant must show that the disputed domain name was registered in bad faith and has been used in bad faith. It is also clear that the criteria set out in Policy paragraph 4(b) for establishing bad faith are not exclusive, but that Complainants in UDRP proceedings may also rely on conduct that is bad faith within the generally accepted meaning of that expression.

The criteria referred to, taken from the Policy, are:
“b. Evidence of Registration and Use in Bad Faith. For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) circumstances indicating that you have registered or you have 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 that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or

(ii) you have 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 you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site 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 your web site or location or of a product or service on your web site or location."

Having regard to those principles, the Panel finds that the disputed domain name was registered and used in bad faith.

In particular, the Panel finds that the facts of the case bring it within the provisions of paragraph 4(b) (iii) and with the objective of creating a situation where paragraph 4(b) (iv) would be activated. That is so for the following reasons.

As will have already been seen from the earlier parts of this decision, the Panel does not accept the principal contentions of the Respondent and it does not accept that the evidence supports those contentions. In substance, the Panel finds that the Respondent was well and truly aware when it registered the domain name, that the Complainant was established in the energy drinks market internationally and that it had trademarks, domain names and websites, including its EU trademark for HELL ENERGY, registered since 23 December 2016, that supported its activities, and including a trademark that had been registered in India since February 20, 2018.

The Respondent then set about arranging its own entry into the same industry and with that objective in mind registered a domain name that incorporated the Complainant's trademark and specifically included the word "energy' in the domain name to invoke the notion that the domain name was related to HELL ENERGY drinks. It then set up its website that was heavily influenced by the structure and presentation of the Complainant's website, including its color and feel.
The Panel is particularly struck by the submission of the Complainant cited earlier in this decision, namely that:

"The contested domain name was registered on Feb 12, 2019 in the name of Magical Dreams Production Pvt. Ltd. whose managing director is Mr. Harpreet Sachdeva, who was at that time also director of Jes & Ben Groupo Pvt. Ltd. which was the exclusive distributor of the Complainant in India from October 04, 2017. The exclusive distributorship contract with Jes & Ben Groupo Pvt. Ltd. through Mr. Harpreet Sachdeva was terminated only on March 25, 2019. Therefore, at the time of registering the impugned domain name, Mr. Harpreet Sachdeva was still a distributor for the client in India. Therefore, the contested domain name was registered in bad faith and with malafides and in violation of the legal rights of the Complainant."

The Panel agrees with that submission.

The facts show that the Respondent was minded to disrupt the Complainant's business in the course of establishing its own business. By that means it intended to create a likelihood of confusion with the complainant's HELL ENERGY trademark as to the products and services offered on that site. In other words it wanted to trade on the Complainant's name and to that end got up a website that internet users would think was the Complainant's site or a site that existed with the knowledge and consent of the Complainant.

The Panel therefore finds that the facts bring the case within the provisions of paragraph 4(b) (iii) and (iv) of the Policy.

In addition and having regard to the totality of the evidence, the Panel finds that, in view of the Respondent's registration of the disputed domain name using the HELL ENERGY mark and in view of the conduct that the Respondent has engaged in when using the disputed domain name, the Respondent registered and used it in bad faith within the generally accepted meaning of that expression.

The Respondent therefore registered and used the domain name in bad faith.

Complainant has thus made out the third of the three elements that it must establish.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

1. **HELLROCKENERGY.COM**: Transferred

PANELLISTS

Name	**The Hon. Neil Brown, QC**

DATE OF PANEL DECISION 2020-06-02

Publish the Decision