



ASIAN DOMAIN NAME DISPUTE RESOLUTION CENTRE (HONG KONG OFFICE)

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Decision Submission

[English](#)
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Version	
Decision ID	DE-0700115
Case ID	HK-0700124
Disputed Domain Name	www.KYMICO.com
Case Administrator	Dennis CAI
Submitted By	Anthony Wu
Participated Panelist	

Date of Decision 22-06-2007

Language Version : English

The Parties Information

Claimant	Kwang Yang Motor Co. Ltd
Respondent	Jeremy Cannas

Procedural History

On 4-4-2007, the Hong Kong Office of Asian Domain Name Dispute Resolution Centre (“ADNDRC”) received a hardcopy Complaint form in English filed by the Kwang Yang Motor Co., Ltd (the “Complainant”) pursuant to the Uniform Domain Name Dispute Resolution Policy (the “Policy”) adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on 24-10-1999. On 16-4-2007, the Hong Kong Office of ADNDRC received payment for Domain Name Dispute Complaint fee in connection with the case.

The Registrar, ONLINE SAS was notified of the Complaint on 18-4-2007. The Registrar was requested to confirm that the domain name at issue was registered by the Respondent with them. On 24-5-2007, the Registrar confirmed that the disputed domain name was registered with it by Respondent.

On 30-4-2007, the Hong Kong Office of ADNDRC by email notified the Respondent of the Complaint and provided copy of the Complaint to the Respondent the Respondent was asked to submit a Response to the Complaint within 20 calendar days.

On 23-5-2007, the Hong Kong Office of ADNDRC notified the parties that as no Response to the Complaint has been submitted by the Respondent within the required time, the Case Administrator will shortly appoint Panelist for the matter.

On 6-6-2007, the Hong Kong Office of ADNDRC appointed Mr Anthony Wu to serve as Panelist and notified the parties of the appointment. All documents submitted by the parties were sent to the Panelist by letter dated 6-6-2007.

Note: As the Complaint was lodged in English and that the Respondent did not file a Response, the Panel, pursuant to Paragraph 11 of the Rules for the Policy, decides to use English in writing out this the decision.

Factual Background

For Claimant

The Complainant, Kwang Yang Motor Co., Ltd., was established in 1963 and becomes a globally reputable entity renowned for its motor products and technical service. Along with the development of the Complainant, the KYMCO

brand also becomes a famous brand in the international market, which is the abbreviation of Kwang Yang Motor Co., Ltd.

The Complainant enjoys exceptionally high reputation in China and Taiwan Province and established its head office and three plants in Taiwan Province, as well as 4 plants in Mainland China. By virtue of the Complainant's long-term promotion campaign in Mainland China and Taiwan, the Chinese public becomes very familiar with the Complainant's "KYMCO" mark. In the decision on opposition against the trademark "KYMCO & Device" under (2001) Trademark Opposition No. 2848 issued by the China Trademark Office, the Complainant's trademark "KYMCO" was held to be of certain reputation and become well known among the customers.

At present, the Complainant's business presence also covers Asia, Europe, Oceania, America and Africa. The Complainant has agents in over dozens of countries. KYMCO has over the years been the frequent participator in worldwide motorcycle shows, including the Beijing and Guangzhou Motorcycle Show in China, the Cologne and Munich Motorcycle Show in Germany and the Milan Motorcycle Show in Italy. The Complainant sold 484,366 units of motorcycles in 2005. In the same year, the overall business turnover of the Complainant reached USD 754 million.

As early as in 1992, the Complainant registered KYMCO as its trademark in Taiwan. Up till now, the Complainant has obtained registration of KYMOC in more than 70 countries and territories, including in France and OHIM.

The Complainant's reputation is supported by a list of the awards conferred to the Complainant. The Complainant's agents in various countries also make great efforts to promote the KYMCO branded motors all over the world. In particular, the Complainant also enjoys high reputation in France and Europe due to its extensive promotion in Europe. The Complainant has numerous distributors in France, the domain name kymco.fr is registered and used by the Complainant to promote itself in France.

The Complainant provided the following selected trademark certificates:

1. Trademark: KYMCO Jurisdiction: France Registration No: 93476461 Class: 1,4, 12
Designated Goods: brake liquids; industrial oils and fats ; injection oils ; lubrication oils, brake oils ; oils for motors ; combustible oils. Automotive vehicles ; motorbicycles ; componets(constitutive parts) not included in other classes ; devices of locomotion by land, air, water or rail

Duration: December 31, 1993 to December 31, 2003

2. Trademark: KYMCO Jurisdiction: OHIM Registration No: 002869832 Class: 4, 7, 9, 11, 12, 37

Designated Goods: Vehicles; apparatus for locomotion by land, air or water ; parts and fittings for all the aforesaid goods ; machines and machine tools ; motors and engines (except for land vehicles) ,etc

Duration:September 6, 2005 to September 6, 2015

The Complainant has trademark registrations for "KYMCO" around the world.

By virtue of the extensive sales and advertising in France and throughout the world under the KYMCO mark, the KYMCO mark has become well-known in Mainland China, Taiwan Province, France and among consumers all over the world.

The Complainant recently discovered that the Respondent had registered domain name KYMICO.com on April 28, 2005, much later than the Complainant's use of KYMCO mark, and constructed a website based on the disputed domain name, which is used for commercial purpose, namely, selling motor products with the prominent use of the KYMICO mark.

On the website of the Respondent, it alleges in the section of "Presentation" that "we are importer and deal directly with the manufacturers in China and in Taiwan...Moreover, our offices at Chang quin, GhangZou (China) as well as at Hong-kong allow us to assure the price and the availability of very attractive products to the consumer."

The Complainant has various affiliates in Mainland China and Taiwan province, and enjoys high reputation among the consuming public in Mainland China and Taiwan province. In particular, the Complainant has three subsidiaries in Changzhou City, China (see Exhibit 4), where the Respondent's offices are located. ("GhangZou" is not a right spelling of any existing Chinese placename and is obviously a misspelling of Changzhou City.) Therefore, the Respondent, as a dealer in the same industry with the Complainant, must know well of the Complainant as well as its trademark KYMCO.

For Respondent

The Respondent did not respond to the Complaint.

Parties' Contentions

Claimant

The Complainant's contentions are as follows:
Confusing similarity with the Complainant's registered trade mark

The Complainant owns valid trademark registrations of KYMCO in Mainland China, Taiwan Province, France, OHIM and other countries and territories.

The disputed domain name, KYMICO.com consists of KYMICO and “.com”, the top level domain identifier. KYMCO is the abbreviation of Kwang Yang Motor Co., which is distinctively associated with the Complainant, while KYMICO is only a minor variation of the famous trademark “KYMCO”. It is not difficult to come to a conclusion that KYMCO and KYMICO are confusingly similar in respect of general appearance, pronunciation and originality. (Telstra Corporation Limited v. Telsra com /Telecomunicaciones Serafin Rodriguez y Asociados WIPO Case No. D2003-0247, in which Telstra and Telsra are held confusingly similar). The Respondent's small change of one letter does not overcome a likelihood of confusion. (Ipsos S.A. v. LaPorte Holdings, WIPO Case No. D2005-0859)

Moreover, in Pomellato S.p.A. v. Richard Tonetti, WIPO Case No. D2000-0493, the addition of the generic top level domain (gTLD) “.com” was found to be irrelevant.

The Respondent either attempts to create a false association with Complainant, or attract users to its site or related sites by attracting traffic who make typo errors, which is called “typosquatting”. The similarity in the look of KYMCO and KYMICO does provide practical opportunity for the Respondent to make monetary gain from the Internet users who mistakenly type KYMICO.com rather than KYMCO.com. (Telstra Corporation Limited v. Telsra com /Telecomunicaciones Serafin Rodriguez y Asociados, WIPO Case No. D2003-0247)

No rights or legitimate interests of the Respondent

- The disputed domain name is created on April 28, 2005, which is much later than the Complainant's registration of KYMCO as a trademark.
- The Respondent alleges that it is the importer and deals with the manufacturer in China and Taiwan Province. However, there is no registration of KYMICO mark in Mainland China according to online search result on the China Trademark Office's official website.
- The Complainant is not affiliated in any way with Respondent and has never authorized Respondent to register or use the domain name at issue or the KYMCO mark.
- Respondent has no right or legitimate interest in the mark KYMCO or in the subject domain name as indicated by the Respondent's name or business.
- It takes more than domain name registration to obtain rights in the domain name.
- It is clear that a registrant has no rights or legitimate interests in respect of a domain name, where, as here, the domain consists of nothing more than a registered trademark of another, and is used for a web site that is completely unrelated to the trademark owner. See Segway LLC v. Chris Hoffman, WIPO Case No. D2005-002
- The Respondent apparently uses the disputed domain name for selling the motor products, which is in direct competition with the Complainant. On the Respondent's website, there is a significant sign of KYMICO, which will inevitably lead to consumer confusion between KYMCO and KYMICO. Thus the Respondent's offering of goods or service for commercial purpose can by no means be regarded as bona fide. See: Marriott International, Inc. v. Vladimir Kyznetsov, NAF Case No. FA0009000095648
- The Respondent cannot claim to be commonly known by the domain name. Nor can the Respondent claim to make a legitimate noncommercial or fair use of the domain name.
- The burden of proof shifts to the Respondent once Complainant makes a prima facie evidence showing that the

Respondent lacks rights or legitimate interests. See: Neusiedler Aktiengesellschaft v. Kulkarni, WIPO Case No. D2000-1769

To summarize, the Respondent is lack of rights or legitimate interests in respect of the disputed domain name.

Bad Faith

The Respondent's bad faith registration and use can be evidenced by the following:

- The Respondent is the importer and deal directly with the manufacturers in China and in Taiwan province. Due to the global reputation of KYMCO mark and its significant presence in China and Taiwan province, the Respondent must know well of the Complainant and its KYMCO mark.
- Since the Respondent is in the same industry as the Complainant as indicated by the Respondent's website, it is reasonable to infer that the Respondent should have been aware of the Complainant's famous mark "KYMCO". (Jupiters Limited v. Aaron Hall, WIPO Case No. D2000-0574; Croatia Airlines d.d. v. Modern Empire Internet Ltd., WIPO Case No. D2003-0455: "The Panel is of the opinion that Respondent must have been aware of Complainant's trademark rights at the time of registration of the disputed domain name, the more since Respondent appears to have developed activities in the same field as Complainant.")
- The Respondent's bad faith is also evidenced by the fact that a number of Complainant's agents in France have been promoting the Complainant's products under KYMCO mark for a long time. (See Europet Benelux, B.V. v. Theers Theerskulchai, ANDRC Case No. HK-0200006: "Panels have found constructive knowledge where the Respondent is in the same community as Complainant and should be aware of Complainant's existence and marks ... In this case, while Complainant is located in another country, Complainant's agent, having the mark as part of its business name, is located in Respondent's country of residence and is marketing goods in Respondent's country of residence under the EUROPET trademark.")
- The Respondent's registration and use of the disputed domain name shall be regarded as the evidence of bad faith on condition that the Respondent must know well of the existence of KYMCO mark. (Victoria's Secret er al v. Atchinson Investments Ltd Case. No. FA0101000096496) "There is a legal presumption of bad faith, when, Respondent should have been aware of Complainant's famous and distinctive trademark". See Phat Fashions LLC v. Kevin Kruger, NAF Case. No. FA0012000096193
- KYMCO is the abbreviation of the Complainant's company name, Kwang Yang Motor Co., Ltd., and the domain name KYMICO.com in question is so obviously connected with the Complainants, that use by someone with no connection with the Complainants shall be regarded as evidence of bad faith. See Deutsche Bank AG v. Diego-Arturo Bruckner, WIPO Case No. D2000-0277 ("[T]he domain name is so obviously connected with the Complainant and its services that its very use by someone with no connection with the Complainant suggests opportunistic bad faith).
- If the Respondent conducts a quick trademark search, it will be aware of the Complainant's prior registration of KYMCO in both France and OHIM. Therefore, it is appropriate to infer that the Respondent has constructive notice of the Complainant's registration of KYMCO mark, which is much earlier than the registration of the disputed domain name. (Kate Spade, LLC v. Darmstadter Designs, WIPO Case No. D2001-1384)
- The disputed domain name incorporates a common typing mistake (typosquatting) of the Complainant's KYMCO mark. See Société Française du Radiotéléphone - SFR v. LaPorte Holdings, WIPO Case No. D2004-0926.
- Registration of a domain name that is confusingly similar or identical to a famous trademark by any entity, which has no relationship to that mark, is itself sufficient evidence of bad faith registration and use. (See Centurion Bank of Punjab Limited v. West Coast Consulting, LLC, WIPO Case No. D2005-1319)
- The Internet users attempting to visit the Complainant's website will be directed to the Respondent's website either because they in error type kymico.com or they are confused by the Respondent's promotion of kymico.com. An Internet user entering that name in a web browser will find that it is not associated with the Complainant's business. Since the Respondent and Complainant are competitors in the same market, the Respondent's use of the disputed domain name will directly cause loss to the Complainant by diverting the Internet traffic and disrupting the business of the Complainant as stipulated by 4b(iii) of the Policy. (Express Messenger Systems, Inc. v. Golden State Overnight Delivery Service, Inc., WIPO Case No. D2001-0063)
- By utilizing the confusingly similarity between KYMCO and KYMICO, the Respondent has intentionally attempted to attract Internet users to visit its website for commercial gain. (Talk City, Inc. v. Michael Robertson, WIPO Case No. D2000-0009) The Complainant also relies on Croatia Airlines d.d. v. Modern Empire Internet Ltd., WIPO Case No.

D2003-0455 that the Respondent has in fact knowingly incorporated the Complainant's trade mark to attract Internet users by creating a likelihood of confusion with Complainant's trademark as to the source, sponsorship, affiliation or endorsement of Respondent's website with the intent of commercial gain. Moreover, the fact that Respondent also sells motor products and is thus likely to benefit of diverting (potential) customers of Complainant to its own website is the clear evidence of bad faith.

To summarize, the Complainant has proved the three elements prescribed by 4a of the Policy.

Respondent

The Respondent did not respond to the Complaint.

Findings

The Policy applies to this dispute. By accepting the ownership of the Disputed Domain Name, the Respondent accepted the Policy adopted by the Registrar.

Paragraph 4(a) of the Policy directs that the Complainant must prove each of the following:

(i) That the domain name of the Respondent is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;

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

(iii) That the domain name has been registered and is being used in bad faith.

Identical / Confusingly Similar

The Complainant has the burden of proving that the domain name in dispute is identical to or confusingly similar to the "kymco" mark. The Respondent's failure to respond does not relieve this burden or its burden of proof over either of the other two elements of Paragraph 4(a) of the Policy. However, the failure to deny any of the Complainant's allegations and evidence does entitle the Panel to take the Complainant's allegations and evidence as true and to draw appropriate inferences.

The Panel accepts the evidence of the Complainant that by virtue of the registration of the mark in France and elsewhere it has rights over the trademark of "kymco" as detailed by the Complainant.

"Confusingly similar turns on the inherent distinctiveness of the trademark, the extent of use of the trademark, the extent of time the trademark has been in use, the nature of the wares, services and business, the similarity in sound, appearance and idea suggested by the trademark and the domain name, among other factors." The Panel is in full agreement with the contention by the Complainant. KYMICO is only a minor variation of the famous trademark "KYMCO" and it is not difficult to come to a conclusion that KYMCO and KYMICO are confusingly similar in respect of general appearance, pronunciation and originality.

The Panel is satisfied that the requirements of Paragraph 4(a)(i) are met with.

Rights and Legitimate Interests

Paragraph 4(c) of the Policy requires the Complainant to prove that the Respondent has no right or legitimate interest in the disputed domain name. However, it is consensus view among Panelists that if the Complainant makes out a prima facie case that the Respondent has no rights or legitimate interests, and the Respondent fails to show one of the three circumstances under Paragraph 4(c) of the Policy, then the Respondent may lack a legitimate interest in the domain name. See *Société pour l'Œuvre et la Mémoire d'Antoine de Saint Exupéry - Succession Saint Exupéry - D'Agay v. Perlegos Properties*, Case No. D2005-1085.

The Panel finds that a prima facie case has been made out by the Complainant. The Complainant clearly has a world wide reputation over its trademark and the Respondent being in the same trade and same community (France) ought to have known of the trade at the time that he registered the disputed domain name. The Complainant did not authorise the Respondent to use the mark and the burden of going forward with the evidence shifts to the Respondent. The Respondent is uniquely in the position of adducing evidence on his rights or legitimate interests in the disputed domain name. The Respondent has elected not to respond, and this Panel may therefore treat Complainant's assertions as true and the evidence adduced as uncontested. Under the circumstances, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name. The requirements under Paragraph 4(b)(ii) are met with by the Complainant.

Bad Faith

It is provided under Paragraph 4 (b) of the Policy that:

“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 website or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your website or location or of a product or service on your website or location.”

The onus of proof is on the Complainant to satisfy the Panel that one of the circumstances exists or otherwise there is bad faith in the registration and use of the domain name in dispute.

For the reasons as set out in the Complainant's contention, the Panel is satisfied that on the evidence adduced by the Complainant it has been shown that the registration and use of the dispute domain name by the Respondent is caught by the circumstance as set out in sub-paragraph (iv). The Panel's finding is fortified by the absence of response from the Respondent. Paragraph 14(b) of the Rules provides that, in the absence of exceptional circumstances, a Panel shall draw such inferences as it considers appropriate from the failure of a party to comply with a provision or requirement of the Rules. See *Société pour l' Oeuvre et la Mémoire d' Antoine de Saint Exupéry - Succession Saint Exupéry - D' Agay v. Perlegos Properties*, Case No. D2005-1085.

The Panel finds no exceptional circumstances for the Respondent's failure to submit a response. The Panel draws the inference that the Respondent does not deny the facts which the Complainant asserts and accepts the evidence adduced by the Complainant.

As a result, the requirements under Paragraph 4(a)(iii) are with.

Status

www.KYMICO.com

Domain Name Transfer

Decision

It is the finding of the Panel that all requirements of paragraph 4(a) are proved by the Complainant. In paragraph 9 of the Complaint, Complainant sought to have the domain name in question transferred to it. Having regard to circumstances of the case, the Panel believes that it is appropriate to transfer the domain name kymico.com to the Complainant and so orders.