



ASIAN DOMAIN NAME DISPUTE RESOLUTION CENTRE

— A charitable institution limited by guarantee registered in Hong Kong

IN THE MATTER OF

The Uniform Domain Name Dispute Resolution Policy, approved by the Internet Corporation for Assigned Names and Numbers (ICANN) on 24 October 1999 (the "Policy")

The Rules for Uniform Domain Name Dispute Resolution Policy, approved by ICANN on 30 October 2009 (the "Rules") and

The Asian Domain Name Dispute Resolution Centre ("ADNDRC") Supplemental Rules to the ICANN for the Policy and the Rules as effected on 28 February 2002 (the "Supplemental Rules")

Complainant: Cummins Inc.
Respondent: DG Lanshan Mechanical Electrical Equipment Co., Ltd.
Case Number: HK-1000286
Contested Domain Name: www.dgcummins.com
Panel Member: Peter Bullock

1. Parties and Contested Domain Name

The Complainant is Cummins Inc. with a registered address at 500 Jackson Street, Columbus, Indiana, United States. The Respondent is DG Lanshan Mechanical Electrical Equipment Co., Ltd with a registered address at Jinyinling Development Zone, Hengkeng Village, Liaobu Town, Dongguan City, Guangdong Province, China. The contested domain name is "dgcummins.com" which was created on 23 March 2005.

2. Procedural History

A Complaint in this matter was filed with the Hong Kong Office of Asian Domain Name Dispute Resolution Centre (ADNDRC) dated 31 March 2010. A Response from the Respondent was not received by the ADNDRC Hong Kong office within the required period of time.

On 17 May 2010, the Hong Kong office of the ADNDRC informed the parties by email that the panelist has been appointed from its own proposed list and served on the Respondent in a separate email, the complaint form and exhibits. Both emails were sent to the email address of the Complainant's authorised representative and the Respondent at tao@manlink.cn which is the Respondent's administrative email address listed under the whois search of the disputed domain name.

3. Factual Background

3.1 For Complainant

The Complainant is a corporation of complementary business units that design, manufacture, distribute and service engines and related technologies, including fuel systems, controls, air handling, filtration, emission solutions and electrical power generation systems. Headquartered in Columbus, Indiana, U.S., the Complainant established its Beijing Office in 1979.

The Complainant registered "CUMMINS" and "C CUMMINS" as its trademark in the United States as early as 1952. The Complainant has also obtained registration of the "CUMMINS" trademark in more than 116 countries and territories including China in International Classes 1, 4, 6, 7, 9, 12, 37, 39 and etc.

The Complainant has registered domain name "Cummins.com" in 1990 and its Chinese subsidiaries has registered domain names "Cummins.net", "Cummins.com.cn" and "Cummins.net.cn" from 2003 onwards.

The Respondent is a company incorporated in Dongguan, China and its business scope covers sales of diesel generator sets and its parts; services after the sales; sales of auto parts, constructing machinery parts and canned lubricant.

It is contended that the Respondent ceased business operations in January 2007. Its largest shareholder, Mr. Liu Zujun also owns 50% of the shares in a company named "Dongguan City Fleetguard Power Equipment Co., Ltd" (direct English translation of the Chinese name) with an English name of "Deston (Canada) Investment Ltd" (hereinafter referred to as "**Fleetguard**").

Fleetguard's registered address is at Fleetguard Building, Jinyinling Development Zone, Hengkeng Village, Liaobu Town, Dongguan City, China and its business scope consists of research and sales of generator equipment, electromechanical products, sales of auto parts and canned lubricant; industry investment; treatment of exhausted gas and noise; export and import of cargo and technology.

The disputed domain name "dgcummins.com" is registered by the Respondent but is currently operated by Fleetguard.

3.2 *For Respondent*

No Response was received from the Respondent.

4. **Parties' Contentions**

4.1 *For Complainant*

The Complainant contends that:

- The domain name "dgcummins.com" is confusingly similar to the trademark in which the Complainant has rights and would mislead the public that it is one of the district websites operated by the Complainant.
- The Respondent does not have any rights or legitimate interests in respect of the disputed domain name.
- The Respondent used the domain in bad faith by (i) offering to sell the domain name so as to obtain unjustified benefits; (ii) preventing the Complainant from reflecting its business via the corresponding domain name, which severely damaged the normal operation of the Complainant; (iii) disrupting the business of the Complainant; and (iv) intentionally attempting to attract Internet users to the disputed domain name by creating a likelihood of confusion with the Complainant's trademark.

4.2 For Respondent

No response was received from the Respondent.

5. Legal Findings

Paragraph 3(b)(ix) of the Rules directs that the Complainant must demonstrate each of the following:

- (i) that the domain name is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights; and
- (ii) why the Respondent (domain-name holder) should be considered as having no rights or legitimate interests in respect of the domain name that is the subject of the Complaint; and
- (iii) why the domain name should be considered as having been registered and being used in bad faith.

With regard to this dispute, a fundamental fact is that the Respondent failed to submit a defense or a response of any sort. As stipulated in Paragraph 5(e) of the Rules, "If a Respondent does not submit a response, in the absence of exceptional circumstances, the Panel shall decide the dispute based upon the complaint". In light of this stipulation, the Panel has no choice but to make the decision based primarily on the Complainant's contentions and the accompanying exhibits unless proven otherwise or that the Panel, based upon its professional experience, thinks that the Complainant's allegations are not logical or obviously contradictory to a prior judgment or any other enforceable decisions.

In absence of input from the Respondent, the Panel, so far as necessary, places reliance on the Complainant's investigation report on the Respondent and consequently due to the common shareholding of the Respondent and Fleetguard, the latter will be considered as an affiliate company of the Respondent.

(1) Identical / Confusingly Similar

The Complainant analysed the components of the disputed domain name by breaking it down to three components – "dg", "cummins" and ".com" and contended that "dg" is an abbreviation of "Dong Guan" where the Respondent is located and bears no distinctiveness.

Although the Panel does not necessarily accept the Complainant's contention that "dg" is an abbreviation of "Dong Guan", the Panel accepts the Complainant's contention that "dg" bears no distinctiveness as it can be an abbreviation of words other than "Dong Guan".

The Complainant contended that the "cummins" component of the disputed domain name is identical to the Complainant's registered trademark. The Panel accepts this contention.

The Complainant relied on *Pomellato S.p.A. v. Richard Tonetti*, WIPO Case No. D2000-0493 and contended that the addition of the generic top level domain (gLTD) ".com" is irrelevant. The Panel accepts the Complainant's contention.

There is no evidence (such as consumer surveys) to substantiate the Complainant's contention that the public are misled to believe that the disputed domain name is one of the district websites operated by the Complainant. However, the goods offered by Fleetguard on the disputed domain name website include power generation machines and filters, which overlap with the Complainant's business unit of Power Generation and Components.

When the disputed domain name is considered in context, the Panel finds that on the basis of the facts and matters submitted by the Complainant, the disputed domain name is confusingly similar to the Complainant's registered trademark "CUMMINS".

(2) Rights and Legitimate Interests

The Policy at Paragraph 4(c) enumerates several ways in which the Respondent may demonstrate rights or legitimate interests:

"Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii)

(i) before any notice to you 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 (as an individual, business, or other organisation) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are making a legitimate noncommercial 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." (Policy, para. 4(c))

The Complainant contended that it is not affiliated in any way with the Respondent and has never authorised the Respondent to register or use the Complainant's trademark "CUMMINS" by any means. Although no further evidence is adduced to support this claim, the Panel finds that besides the Respondent's obvious ownership of the disputed domain name, it does not have any other rights and legitimate interests over the use disputed domain name website.

The Complainant adduced evidence of Fleetguard's use and control over the disputed domain name website and lack of rights or legitimate interests in the disputed domain name. As mentioned above, the goods offered by Fleetguard on the disputed domain name website include power generation machines and filters, which overlap with the Complainant's business unit of Power Generation and Components. The Complainant also adduced evidence that the "CUMMINS generator sets" was referred to in the roll down menu of the disputed domain name website under the heading "Products World".

The Complainant relied on *Neusiedler Aktiengesellschaft v. Kulkarni*, WIPO Case No. D2000-1769, and contended that the burden of proof shifts to the Respondent once the Complainant shows prima facie evidence that the Respondent lacks rights or legitimate interests. The Panel agrees with the burden of proof issue raised by the Complainant.

Considering both the Respondent's and Fleetguard's acts as a whole and given that the Respondent did not provide any defense or contradicting materials, the Panel finds that the Respondent had fallen foul of Paragraphs 4(c)(i) and (iii) of the Policy and the Respondent has no right or legitimate interest over the disputed domain name.

(3) Bad Faith

The Policy at Paragraph 4(b) enumerates several circumstances which shall be considered as evidence of the Respondent's 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." (Policy, para 4(b))

The Complainant contended that Fleetguard had offered to assign the disputed domain name to the Complainant at a price of USD50,000.00 after the Complainant's agent served a Cease & Desist Letter to Fleetguard on 15 December 2009. As Fleetguard is only an affiliated company of the Respondent, it is unclear from the evidence available, whether it in fact has the legal capacity to sell or assign the disputed domain name to others. In any event, for the purpose of public policy as explained above, the Panel accepts the Complainant's contention that such action shall constitute "sell the domain name so as to obtain unjustified benefits" under Paragraph 4(b)(i) of the Policy

The Complainant also contended that the Respondent's registration of the disputed domain has prevented the Complainant from reflecting its business via the corresponding domain name (in satisfaction of Paragraph 4(b)(ii) of the Policy) and that as the parties are competitors in the same market, the Respondent's use of the disputed domain name will divert the Internet traffic and disrupt the business of the Complainant (in satisfaction of Paragraph 4(b)(iii) of the Policy). The Panel accepts the Complainant's contentions.

The Complainant placed reliance on *Croatia Airlines d.d. v. Modern Empire Internet Ltd.*, WIPO Case No. D2003-0455 and contended that the Respondent had in fact knowingly incorporated the Complainant's trademark to attract Internet users by creating a likelihood of confusion with the Complainant's trademark as to the source, sponsorship, affiliation or endorsement of Respondent's website with the intent of commercial gain (in satisfaction of Paragraph 4(b)(iv) of the Policy). The Panel accepts the Complainant's contentions in this regard.

Based on all of the above findings and comments, the Panel finds that the Complainant has satisfied all conditions provided in Paragraph 4(a)(i), (ii) and (iii) of the Policy, hence its claims shall be held.

Status

www.dgcummins.com

Domain Name Transfer

6. Decision

In light of all the foregoing findings and in accordance with Paragraphs 4(a) of the Policy and 5(e) of the Rules, the Panel holds that the disputed domain name "dgcummins.com" is confusingly similar to the Complainant's registered trademark "CUMMINS"; the Respondent has no right or legitimate interest with regard to the disputed domain name; and the domain name was registered and subsequently used in bad faith.

Finally, the Panel decides the domain name "dgcummins.com" be transferred to the Complainant.

Dated: 24th May 2010

Hong Kong

Peter Bullock