



(Hong Kong Office)

**ADMINISTRATIVE PANEL DECISION**

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<b>Case No.</b>	<b>HK-1200468</b>
<b>Complainant:</b>	<b>LiFung Trinity Management (Singapore) Pte. Ltd.</b>
<b>Respondent:</b>	<b>Wallace Ching</b>

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**1. The Parties and Contested Domain Name**

The Complainant is LiFung Trinity Management (Singapore) Pte. Ltd., of 315 Outram Road, #14-08 Tan Boon Liat Building, Singapore 169074.

The Respondent is Wallace Ching, of KCAPL, 36 Conduit Road, Hong Kong.

The domain name at issue is <kentandcurwen.com> (**Domain Name**), registered by Respondent with 0101 Internet, Inc. (**Registrar**) of Rm 603, 6/F, Kin Wing Industrial Building, 33 Kin Wing Street, Tuen Mun, Hong Kong.

**2. Procedural History**

A complaint was submitted to the Hong Kong Office of the Asian Domain Name Dispute Resolution Centre (**Centre**) on 15 November 2012 pursuant to the Uniform Domain Name Dispute Resolution Policy for Domain Name Dispute Resolution approved by the Internet Corporation for Assigned Names and Numbers on 24 October 2009 (**Policy**), the Rules for Uniform Domain Name Dispute Resolution Policy effective from 1 March 2010 (**Rules**) and the Centre's Supplemental Rules effective from 26 July 2012 (**Supplemental Rules**). The complaint listed PrivacyProtect.org as the respondent.

On 19 November 2012 the Centre emailed the Registrar requesting verification in connection with the Domain Name. On 27 November 2012 the Registrar responded to the Centre by email indicating that:

- i. PrivacyProtect.org, a proxy service provider, was the registrant;
- ii. the Registrar had disabled the privacy service, with the result that the registrant of the Domain Name was Wallace Ching.

The Registrar provided the Centre with the Mr Wallace Ching's contact details.

By email dated 5 December 2012 the Centre notified the Complainant that as the registrant of the Domain Name was in fact Wallace Ching, the complaint was administratively defective.

The Complainant submitted a revised complaint (**Complaint**) on 6 December 2013 replacing PrivacyProtect.org with Wallace Ching as Respondent. The Centre verified that the Complaint satisfied the formal requirements of the Policy, the Rules and the Supplemental Rules. The Centre forwarded the Complaint to the Respondent and the proceedings commenced on 6 December 2012.

Pursuant paragraph 5(a) of the Rules the Response was due by 26 December 2012. Mr Jacky Ching responded to the Centre on 12 December 2012. On 31 December 2012 the Centre notified the Respondent that a response (within the meaning of paragraph 5(b) of the Rules and article 7 of the Supplemental Rules) had not been received. On 3 January 2013 an unsigned response form purportedly dated 12 December 2012 was sent to the Centre on behalf of the Respondent, by his authorised representative Jacky Ching, under cover of an email with the word “resent”.

The Centre appointed Darren FitzGerald as the sole Panelist in this matter on 8 January 2013. The Panel finds that it was properly constituted. The Panel submitted a statement of impartiality and independence, as required by the Centre, to ensure compliance with paragraph 7 of the Rules.

### **3. Factual background**

The Complainant is a company incorporated in Singapore. It is the owner of numerous trade mark registrations/has pending applications for registration for the trade mark “KENT & CURWEN” and other registered trade marks incorporating “KENT & CURWEN” or “KENT&CURWEN” (**Trade Marks**) in Argentina, Australia, Brazil, Canada, China, the European Union, Hong Kong, India, Indonesia, Japan, Malta, Korea, Thailand, Taiwan, the United Arab Emirates, the United Kingdom and the United States. The Complainant has provided printouts of official records of registration of the Trade Marks in Hong Kong, China, Macau, Singapore, the United States and the United Kingdom. The earliest registrations of the Trade Marks date from 14 January 1983.

Kent & Curwen is a men’s fashion brand. The Trade Marks are registered in respect of among other things, clothing, menswear, fashion accessories and leather goods. The Complainant has stated that it acquired worldwide rights to the Kent & Curwen brand including all goodwill and intellectual property associated with it by August 2008. The Complainant has further stated that it and its predecessors have used the Trade Marks continuously and extensively throughout the world in respect of such goods. The Complainant has provided evidence of use through extracts from the United Kingdom website of Kent & Curwen (<http://kentandcurwen.co.uk>) and copies of advertising materials, sales invoices, promotional events, shop lists and press clippings relating to the Kent & Curwen brand in Australia, China, Japan, Taiwan and the United States covering the period 2007 to 2012.

The Respondent is an individual apparently resident in Hong Kong.

The Respondent registered the Domain Name on 1 April 2009.

#### **4. Parties' Contentions**

##### **A. Complainant**

The Complainant's contentions may be summarised as follows.

Firstly, <kentandcurwen> is confusingly similar to the Complainant's mark "KENT & CURWEN".

The Respondent has no rights or legitimate interests in respect of the Domain Name. The Complainant has not authorised the Respondent to use any Trade Mark. There is no evidence that the Respondent has been commonly known by the Domain Name. The website of the of the Respondent (<http://www.kentandcurwen.com>) uses the Trade Mark "KENT & CURWEN" as well as content (history of the Kent & Curwen brand) and photos copied from Complainant's UK website and catalogues without authorisation. The Complainant has provided shots of pages on the Respondent's website and compared them to a shot from the Complainant's UK website and pictures in the Complainant's catalogues.

The Domain Name has been registered and is being used in bad faith. It is clear that the Respondent is trying to convey the idea that the Respondent's website is the official website or a website operated by the Kent & Curwen brand.

##### **B. Respondent**

The Respondent's email of 12 December 2012 and response form emailed 3 January 2013 have basically the same content. For convenience the Panel quotes from the response form:

"We are just holding the domain for our Chinese client in the form of consultant arrangement.

We have contacted our Chinese client, explained to them the complaint, and in our own way convinced them that this is probably the best course of action.

Hence, please give us the name or contact to transfer the domain to, and we will arrange with our domain registrar for the transfer asap on the basis that there would not be any cost or liabilities to our company."

#### **5. Findings**

##### **A. Procedural matters**

After the Registrar changed the registration to identify the Respondent as registrant, the Complaint was sent to the Respondent. Accordingly the requirements for service of the Complaint under paragraph 2(a) of the Rules have been satisfied: cf *Ohio Savings Bank v I&I Internet, Inc. and David Rosenbaum* WIPO Case No D2006-0881.

The Respondent's email of 12 December 2012 did not comply with the formal requirements in paragraph 5(b) of the Rules or article 7 of the Supplemental Rules. Among other things it did not deal respond specifically to the statements and allegations in the Complaint/was not in the prescribed form. Nevertheless, the Panel has a discretion to consider such a defective 'response' (cf. *Internet Opportunity Entertainment Limited v*

*Zubee.com Networks Inc.* WIPO Case No D2006-1086), which I decide to exercise in this case. This is a reflection of the powers of the Panel:

- i. to conduct the administrative proceeding in such manner as it considers appropriate (paragraph 10(a) of the Rules); and
- ii. to determine the admissibility of evidence (paragraph 10(c) of the Rules).

The response form, apart from being out of time, was incomplete and not signed. Perhaps it was not attached to Respondent's email to the Centre of 12 December 2012 in error. This is immaterial in the sense that the response form really only repeated the content of the 12 December email. The response form was submitted before the Panel was constituted. As with the Respondent's email of 12 December 2012, notwithstanding the lack of compliance with the Rules, the Panel has a discretion to consider it: *Talk City, Inc v Michael Robertson* WIPO No Case D2000-009. In the particular circumstances of this case, and in particular the fact that the response form's content is essentially the same as the Respondent's email of 12 December 2012, the Panel exercises its discretion in favour of considering the response form.

The Respondent's email of 12 December 2012 and response form have been taken into account by the Panel in the interests of ensuring the decision is based on all relevant information.

## **B. Complaint**

Notwithstanding the absence of a response which complies with the Rules, and indeed notwithstanding the Respondent's offer to transfer the Domain Name to the Complainant, the Panel must still make a decision based on the materials before it (paragraph 14(a) of the Rules).

As a further introductory matter, the Panel considers it immaterial to its decision whether or not the Respondent held the Domain Name for a third party (as indicated in the response form). As the holder of the Domain Name, for the purposes of the Rules/this proceeding Mr Wallace Ching is the Respondent.

The Policy provides at Paragraph 4(a) that 3 findings must be made in order for a Complainant to prevail:

- i. the Respondent's domain name must be identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
- ii. the Respondent has no rights or legitimate interests in respect of the domain name; and
- iii. the Respondent's domain name has been registered and is being used in bad faith.

## **A. Confusingly Similar**

The Panel finds that the Complainant has rights in the Trade Marks acquired through use registration and use which predate registration of the Domain Name by over 20 years.

The Domain Name includes the Trade Mark “KENT&CURWEN in its entirety, save that “and” appears in place the ampersand “&” in the Trade Mark. The .com gTLD suffix is to be disregarded for the purpose of comparison. When read out the Trade Mark “KENT&CURWEN” and <kentandcurwen> sound exactly the same. Accordingly the Panel finds that the Domain Name is confusingly similar to the Trade Marks.

The Complainant has therefore satisfied the first of the 3 elements that is must establish.

## **B. Rights and Legitimate Interests**

The onus is on the Complainant to make out a *prima facie* case that the Respondent has no rights or legitimate interests in the Domain Name. If a *prima facie* case is made out, the burden shifts to the Respondent: *Croatia Airlines d.d v Modern Empire Internet Ltd* WIPO Case No D2003-0455.

The Panel finds that the Complainant has made out a *prima facie* case in view of the following considerations:

- i. the Respondent has used the Trade Mark “KENT&CURWEN” in the Domain Name with the simple substitution of “and” for “&”, thereby creating a confusing similarity between the Domain Name and that Trade Mark;
- ii. the Respondent has used the Domain Name for the Respondent’s website, which also displays the Trade Mark “KENT & CURWEN”, as well as content (history of the Kent & Curwen brand) and photos copied from Complainant’s UK website, which is likely to cause some Internet users to believe that the Respondent’s website is an official website of the Complainant;
- iii. the Respondent has engaged in these activities without the approval of the Complainant.

It is open to the Respondent to rebut this *prima facie* case, either by making out one of the ‘affirmative defences’ in paragraph 4(c) of the Policy or otherwise demonstrating that it has rights/legitimate interests in the Domain Name. There is however no rebuttal evidence at all.

The Panel therefore concludes that the *prima case* against the Respondent has not been rebutted.

The Complainant has therefore satisfied the second of the 3 elements that is must establish.

## **C. Bad Faith**

Paragraph 4(b) sets out 4 non-exclusive circumstances that amount to evidence of the registration and use of a domain name in bad faith. The only applicable circumstance here is that set out in 4(b)(iv), in respect of which 5 elements need to be satisfied:

- i. the domain name must be used;
- ii. intentionally to attempt to;
- iii. divert Internet users to the domain name holder's website or other online location;
- iv. for commercial gain;
- v. by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of the Respondent's website or location or of a product or service on the Respondent's website or location.

All 5 elements are established here.

Clearly the Respondent used the Domain Name (i).

There is a likelihood of confusion through display on the Respondent's website of Trade Mark "KENT & CURWEN" plus content (history of the Kent & Curwen brand) and photos copied from Complainant's UK website. This is likely to cause some Internet users to believe that the Respondent's website is an official website of the Complainant (v).

Given the (confusing) similarity between the Domain Name and the Trade Mark "KENT&CURWEN" and the content on the Respondent's website, objectively viewed the Respondent must have had an intention to attempt to divert Internet users to the Respondent's website (ii) and (iii).

Was this for all for the purpose of a commercial gain (iv)? There is no direct/positive evidence from the Complainant of any (attempt at) commercial gain on the part of the Respondent whether through sale of counterfeit Kent & Curwen-branded goods or otherwise. Nevertheless, it must follow from the Respondent creating what probably would have appeared to some Internet users as an official Kent & Curwen brand website, that registration/use of the Domain Name was intended for commercial gain in some shape or form – and I infer this.

The circumstances of bad faith are not limited to those in paragraph 4(b) of the Policy. The Panel may infer bad faith registration and use, where on the evidence the Respondent reasonably should have been aware of the Trade Marks at the time of registration of the Domain Name, actually or constructively: cf *Digi International Systems* NAF Case No FA124506 and *Veuve Cliquot Ponsardin v The Olygenix Group Co* WIPO Case No D2000-0163. In this case, the Panel infers actual and constructive notice of the Trade Marks, and ('opportunistic') bad faith, on the basis of the following considerations:

- i. the Trade Marks are well-known internationally and in Hong Kong, where the Registrar and the Respondent are domicile;
- ii. the Respondent's website refers to the Trade Mark "KENT & CURWEN" and copied content from the Complainant's website/catalogues;
- iii. there is no evidence of any connection between the name of the Respondent and the Domain Name; and
- iv. the lack of a formal response from the Respondent.

The Panel therefore finds that the requisite element of bad faith has been established.

**6. Decision**

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Domain Name be transferred to the Complainant.

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**Darren FitzGerald**  
Sole Panelist

Dated: 10 April 2013