Asian Domain Name Dispute Resolution Centre
- a charitable institution limited by guarantee registered in Hong Kong

ADNDRC

**(Hong Kong Office)**

**ADMINISTRATIVE PANEL DECISION**

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| **Case No.** | HK-1300520 |
| **Complainant:** | Tencent Technology (Shenzhen) Limited |
| **Respondent:** | Asia-Pacific Technology Group Co. Limited |
| **Disputed Domain Names:** | (1) qqvoice.com |
| | (2) qqvoice.net |
| | (3) qqvoice.org |

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## 1. THE PARTIES

The Complainant is Tencent Technology (Shenzhen) Limited, with principal place of business in Shenzhen, China. The authorized representative of the Complainant in the proceedings is Mr. Changjie Chen, Rouse Consultancy (Shanghai) Limited, 1101 Teem Tower, 208 Tianhe Road, Tianhe District, Guangzhou 510620, China.

The Respondents is Asia-Pacific Technology Group Co. Limited of Unit 503 5/F Silvercord Tower 230 Canton Road, Tsim Sha Tsui, Kowloon, Hong Kong. The authorized representative of the Complainant in the proceedings is Mr. Luo Mingjun of Deheng Law Offices, 12/F., Building B, Focus Place, 19 Financial Street, Beijing, 100033, China.

## 2. THE DISPUTED DOMAIN NAME AND THE REGISTRAR

The domain names are: (1) <qqvoice.com>; (2) <qqvoice.net>; and (3) <qqvoice.org>, registered with Online NIC, Inc., of 909 Marina Village Pkwy #236, Alameda 94501, United States (hereinafter, "the Registrar").

## 3. PROCEDURAL HISTORY

On 17 July 2013, the Complainant submitted a Complaint in English to the Hong Kong Office of Asian Domain Name Dispute Resolution Centre (ADNDRC). On 17 July 2013, the ADNDRC transmitted by email to the Registrar a request for registrar verification in

connection with the disputed domain name. On 22 July 2013, the Registrar acknowledged this notification by email, and provided the following information:

OnlineNIC, Inc. is the registrar for the disputed domain names;
(1) the registrant of the domain name is Asia-Pacific Technology Group Co. Limited/asiapacific;
(2) the language of the registration agreement for the domain name is English;
(3) the Uniform Domain Name Dispute Resolution Policy ("UDRP", hereinafter, "the Policy") and the Rules for UDRP (hereinafter, "the Rules") apply to the disputed domain name; and
(4) the domain names will remain locked during the pending proceeding.

The ADNDRC verified that the Complaint satisfied the formal requirements of the Policy, the Rules and the ADNDRC Supplemental Rules for UDRP (hereinafter, the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), the ADNDRC formally notified Respondent of the Complaint on 23 July 21013. The Respondent submitted a response to the ADNDRC for extend the response date to 20 August on 8 August 2013. The Complainant filed an objection to the Respondent's request with the ADNDRC on 12 August 2013, the Respondent subsequently submitted the response in Chinese to the ADNDRC on 12 August 2013.

The Complainant decided to have the Complaint decided by one panelist. On 21 August 2013, the ADNDRC appointed Dr. Timothy Sze as panelist in this matter. The Panel finds that it was properly constituted.

In accordance with the ADNDRC Rules, in the absence of exceptional circumstances as determined by the Panel in its sole discretion, the Panel shall forward its decision on the Complaint to the Provider within fifteen (15) business days of its appointment on or before 4 September 2013.

## 4. FACTUAL BACKGROUND

### A) The Complainant

The Complainant Tencent Technology (Shenzhen) Limited, established in November 1998 and headquartered in Shenzhen China, is one of the largest comprehensive Internet service providers in China, with annual business amount of RMB43,893 million (approx. USD6,983 million) in 2012.

The Complainant mainly provides mass media, entertainment, Internet and mobile phone value-added services and operates online advertising services. Its diverse services include social networks, web portals, e-commerce, and multiplayer online games, and the Complainant has developed very popular products such as Weixin for group and voice chatting, QZone, QQ Micro-Blog, QQ Game, QQ Music, and QQ Mail. The Complainant also operates the well-known instant messenger QQ and runs one of the largest web portals in China, QQ.com, which was listed as the Top 5 Largest Websites in 2005 (Annex 12).

The instant messenger QQ was released in 1999 aiming at building a comprehensive and multicultural online platform for Internet users. QQ enables its users to chat online (including video chatting), transmit voice instantly, send files online and offline and achieve other comprehensive communication functions. The largest Internet society was brought into existence by the Complainant in China through development of the aforementioned QQ platforms with success in meeting demands of Internet users in communication, news, entertainment, electronic business and so on.

QQ has become the most widely used instant messaging software in China since its release in 1999. The Complainant started to expand its business through Asia and the USA in 2009, and QQ software is launched in English, French and Japanese languages to meet needs of multilingual users. As of 31 December 2012, the Complainant has 798.2 million active QQ accounts, with a peak of 176.4 million simultaneous online users. QQ ranks No. 2 of global virtual communities with more than 100 million active users (Annex 13).

According to latest China Instant Messaging Research Reports issued by the famous iResarch Consulting Group, QQ is the market leader of instant messaging and its market share far exceeds that of the No. 2 in the past years (respectively 7.6% in 2008-2009, 6.8% in 2009-2010, and 4.4% in 2010-2011):

| Year | Market Share | Annex |
|---|---|---|
| September to December 2006 | 94% | 14 |
| 2007-2008 | 95% | 15 |
| 2008-2009 | 78% | 16 |
| 2009-2010 | 76.2% | 17 |
| 2010-2011 | 87.6% | 18 |

The Complainant registered, among others, the following trademarks in China (Annex 4-8):

| Mark | No. | Class | Goods/Services | Validity Date |
|---|---|---|---|---|
| QQ | 1962825 | 38 | message sending; communications by telephone; cellular telephone communication; communications by computer terminals; transmission of computer aided messages and images; electronic mail; facsimile transmission; information about telecommunication; paging services (radios, telephones or other means of electronic communication) | 2003.02.28 - 2023.02.27 |
| QQ | 3058131 | 38 | Identical to the above trademark No.1962825 | 2003.04.28 - 2023.04.27 |
| QQ | 3508 | 38 | television broadcasting; message sending; communications by | 2005.01.07 - 2015.01.06 |

| | | | | |
|---|---|---|---|---|
| | 823 | | telephone; cellular telephone communication; communications by computer terminals; transmission of computer aided messages and images; electronic mail; facsimile transmission; information about telecommunication; paging services (radios, telephones or other means of electronic communication); electronic bulletin board services (telecommunications services); providing telecommunications connections to a global computer network; providing user access to a global computer network (service providers) | |
| QQ | 4665704 | 9 | telephone set; computer software; etc. | 2009.02.07-2019.02.06 |
| QQ 语音 | 3508797 | 38 | identical to the above trademark No.3508823 | 2005.01.07 - 2015.01.06 |

Meanwhile, the Complainant, via its affiliated overseas company, also holds the following trademarks (Annex 9-11):

| Mark | Country | No. | Class | Registration Date |
|---|---|---|---|---|
| QQ | South Africa | 2002/20306 | 38 | 2002.12.23 |
| QQ | Indonesia | 561736 | 38 | 2004.02.03 |
| QQ | United States of America | 2972934 | 38 | 2005.07.19 |

**B) The Respondent**

A preliminary question in this case concerns the identity of the appropriate Respondent or Respondents. The Complaint, filed with the ADNDRC according to the record of the WHOIS database of Domain Name <qqvoice.com>, the Respondent Asia-Pacific Technology Group Co. Limited is listed as the Registrant (Annex 2).

According to the record of the WHOIS database of Domain Names <qqvoice.net> and <qqvoice.org>, the Respondent asiapacific is listed as the Registrant (Annex 2).

Paragraph 3(c) of the Rules provides that a complaint may relate to more than one domain name, provided that the domain names are registered by the same domain-name holder. In this case, the Complainant finds that the Domain Names are registered by the same domain-name holder for the following reasons:

(i) Domain Name <qqvoice.com>, registered by the Respondent Asia-Pacific Technology Group Co. Limited, shares an identical email address yafengwangster@gmail.com and telephone number +852.35887903 to those of <qqvoice.org> registered by the Respondent asiapacific;

(ii) Domain Name <qqvoice.net> is redirected to a website under the Domain Name <qqvoice.com> (Annex 3).

For the above reasons, the Complainant is of the opinion that "Asia-Pacific Technology Group Co. Limited" and "asiapacific" is the same entity and the three Domain Names are registered by the same holder. The Complainant therefore requests consolidation of separate complaints; otherwise, it would place an unjustifiable economic burden on the Complainant to be required to initiate two separate administrative proceedings, and it would be a burden on the administrative process to require duplication of effort. See *Adobe Systems Incorporated v. Domain OZ*, WIPO Case No. D2000-0057; *Yahoo! Inc. and GeoCities v. Data Art Corp., et al*, WIPO Case No. D2000-0587.

In the present case, Asia-Pacific Technology Group Co. Limited, was duly identified by the Registrar as the holder of the domain names. Moreover, the legal representative of the Respondent has acknowledged receipt of the Complainant and has replied to the Complainant.

In light of the information above, the Panel recognized Asia-Pacific Technology Group Co. Limited as the sole Respondent.

## 5. PARTIES' CONTENTIONS

### A) Complainant's Contentions

#### (1) The Domain Names are identical with or confusingly similar to the Complainant's marks in which the Complainant has rights;

The Complainant contends that the disputed domain names <qqvoice.com>; <qqvoice.net>; and <qqvoice.org> are identical or confusingly similar to the Complainant's registered trademarks comprising of the words "QQ".

"QQ" is a brand name coined by the Complainant and exclusively associated with the Complainant. The Complainant enjoys rights in a number of QQ trademarks as stated above. The QQ trademarks enjoy very high and broad reputation in China, even all over the world after over ten years' use and continuous advertisement by the Complainant. The QQ trademark was recognized as well-known trademark by the China State Trademark Office in April 2009 (Annex 21). In September 2011, the Complainant was awarded the Trademark Innovation Award by the World Intellectual Property Organization and the China State Administration for Industry and Commerce (superior of China State Trademark Office) to commend the innovation, creativeness, strong distinctiveness and reputation of the Complainant's trademarks (Annex 22).

Previous UDRP decisions have established that suffix to a domain name (such as ".com", ".net" or ".org") is a must for incorporation of a domain name and does not function in identifying a domain name. "qqvoice", consisting of the Complainant's distinctive and well-known mark "QQ" and a generic word "voice", serves as the most prominent part of each of the Domain Names.

UDRP precedents have held that addition of merely generic wording to a trademark in a domain name would be sufficient to a finding of confusing similarity. See *Hoffmann-La Roche Inc. v. Wei-Chun Hsia,* WIPO Case No. D2008-0923, "*wrapping a well-known mark with merely descriptive or generic words is a doomed recipe for escaping a conclusion that the domain name is confusingly similar to the well-known mark*". See also *Oki Data Americas, Inc. v. ASD, Inc.,* WIPO Case No. D2001-0903, "*The fact that a domain name wholly incorporates a complainant's trademark is sufficient to establish identity or confusing similarity for the purpose of the Policy, despite the addition of other words to such marks*".

In addition, the mark QQ is a coined word and a highly distinctive mark which will attract Internet users' attention. Incorporation of the Complainant's QQ trademark in entirety in the Domain Names in itself establishes that the Domain Names are confusingly similar to the Complainant's trademark. See *EAuto, L.L.C. v. Triple S. Auto Parts d/b/a Kung Fu Yea Enterprises, Inc.,* WIPO Case No. D2000-0047, "*When a domain name incorporates, in its entirety, a distinctive mark, that creates sufficient similarity between the mark and the domain name to render it confusingly similar*".

Moreover, the word "voice" means "语音" in Chinese language, and combination of "qq" and "voice" hence corresponds to the exact Chinese translation of the Complainant's trademark "QQ 语音", which was registered on 7 January 2005 and predates registration of the Domain Names in 2009 and 2011 respectively. UUCall promoted on the corresponding websites falls within the goods/services scope of the Complainant's trademarks QQ and QQ 语音. The above further reinforces the confusion as to the affiliation between the Complainant and the Domain Names, and has caused *de facto* confusion. Search results of "QQVoice" via search engine GOOGLE include a number of posts enquiring the relationship between QQVoice/the Respondent and the Complainant (Annex 23).

The Domain Names <qqvoice.com>, <qqvoice.net> and <qqvoice.org> are therefore confusingly similar to the Complainant's trademarks.

**(2) Holder of the Domain Names has no rights or legitimate interests in respect of the Domain Names;**

It has been an accepted practice that mere registration does not establish rights or legitimate interests in a domain name so as to avoid the application of paragraph 4(a)(ii) of the Policy. See *Potomac Mills Limited Partnership v. Gambit Capital Management,* WIPO Case No. D2000-0062. The Respondent thus does not enjoy any rights or legitimate interests in the Domain Names merely because of its registration of the Domain Names.

QQVoice is neither a trade name nor brand name of the Respondent. The Respondent has never been licensed or authorized to use the trademark QQ or to use it to register domain names. To the best of the Complainant's knowledge, the Respondent does not hold any QQ trademarks or trademarks incorporating the letters "QQ" (Annex 24-25). Associated companies of the Respondent, including Guangzhou Hetai Information Technology Co., Ltd,

tried to register "QQVoice" as trademark with the China State Trademark Office, but both applications were rejected due to its similarity to the Complainant's trademark QQ (Annex 26-28). The Respondent thus does not have trademark right to the Domain Names.

The Respondent, being well aware of the Complainant's well known trademark QQ, still registered the Domain Names and used their corresponding websites to promote competitive products/services to the Complainant. Such acts preclude the Respondent from a *bona fide* offering of goods or services. See *Intel Corporation v. Ox90,* WIPO Case No. D2002-0010, "*Respondent was without doubt aware of Complainant's mark when it registered the disputed domain name, and has no basis to claim a bona fide offering of goods and services without notice of a dispute*".

The Domain Name <qqvoice.org> was registered in August 2011, and currently does not resolve to any active website. Passive holding of the Domain Name <qqvoice.org> does not constitute "legitimate non-commercial or fair use". See *Teachers Insurance and Annuity Association of America v. Wreaks Communications Group,* WIPO Case No. D2006-0483.

In the current case, no plausible explanation exists to suggest the possibility of any circumstances of the type specified in paragraph 4(c) of the Policy, or of any other circumstances giving rise to a right to or legitimate interest of the Respondent in the Domain Names. The Respondent's passive holding of the Domain Name <qqvoice.org> and its use of the Domain Names <qqvoice.com> and <qqvoice.net> is not a *bona fide* use pursuant to paragraph 4(c) of the Policy, and there is no indication that the Respondent has been commonly known by the Domain Names.

In all, the Respondent has no rights or legitimate interests in the Domain Names. It is well-established by previous UDRP decisions that once a complainant establishes a *prima facie* case that a respondent lacks rights or legitimate interests in a domain name, the burden of production shifts to the respondent. See *Croatia Airlines d.d. v. Modern Empire Internet Ltd,* WIPO Case No. D2003-0455.

**(3) The Domain Names have been registered or are being used in bad faith.**

As previously stated in this Complaint, the Complainant enjoys very high reputation in China and abroad. The Complainant finds it inconceivable that the Respondent, engaged in similar and competitive business to the Complainant, would not have had actual notice of the mark QQ at the time of registering the Domain Names. Furthermore, the Respondent registered three domain names incorporating the Complainant's distinctive marks, and it is inconceivable that the Respondent did not know the mark QQ. See *Accor, SoLuxury HMC v. Jim Green, WIPO Case No.* D2011-1773, "*It is obvious that Respondent had Complainant's marks in mind when registering the Domain Names. It would be a coincidence of epic proportions if Respondent had somehow registered five Domain Names…*"

The Respondent was clearly aware of the Complainant's prior rights to the mark QQ. A QQ number (1745212343) is listed as contact of the Respondent on www.qqvoice.com and the Respondent is using QQ Micro-Blog to serve customers and promote business (Annex 29). The Respondent knows very well of the Complainant and is actively using the Complainant's products including QQ and QQ Micro-Blog.

As the Panel decides in *Skype Limited v. Xiaochu Li,* WIPO Case No. D2005-0996, if a trademark is a coined word with no meaning or connection with the goods or services sold

under it, a respondent could not be using the mark in a descriptive sense, and a respondent must provide plausible explanations in his choice of the disputed domain names which are confusingly similar to the mark. In the absence of contrary evidence from the respondent, the mark is not one that traders could legitimately adopt other than for the purpose of creating an impression of an association with the complainant.

No Plausible explanation exists as to why the Respondent selected the mark QQ as part of the Domain Names other than to exploit the goodwill of the Complainant and its trademark to make illegitimate interests. Despite contact by the Complainant via the cease and desist letter (Annex 30), the Respondent has never provided any evidence to justify its registration and use of the Domain Names, and bad faith registration could be inferred. See *Paule Ka v. Paula Korenek*, WIPO Case No. D2003-0453, "*The Respondent knew she was using a commercial name (protected as a trademark) because she copied it … That knowledge is sufficient to constitute bad faith registration under the Policy, even if the Respondent asserts that she did not think she was infringing any rights. Ignorance of the law is no excuse*". See also *Government Employees Insurance Company v. Gonzalez*, WIPO Case No. D2011-1130, "*What does show bad faith, however, is the very domain name itself… Complainant's mark is 'distinctive and not an everyday word or phrase… a coined term that is today known primarily as an identifier of Complainant's products and services. There is, or could be, no contention that Respondent selected the disputed domain name for its value as a generic term or random combination of letters*".

The Respondent's use of the Domain Names <qqvoice.com> and <qqvoice.net> has caused *de facto* confusion and misidentification as to the affiliation of UUCall/QQVoice to the Complainant. The Respondent's purpose of registering the Domain Names is to trade on the fame of the Complainant's well-known trademark QQ, in order to attract, for commercial gain, Internet users to visit the corresponding websites under the Domain Names, by creating a likelihood of confusion with the Complainant and its trademark QQ as to the source of UUCall/QQVoice and also its affiliation with the Complainant. This conclusion was reached by the Panel in *Allied Building Products Corp v. Alliedbuildingproducts.com c/o Whois Identity Shield*, WIPO Case No. D2006-0833, "*it is therefore a reasonable inference from this that the Respondent knew of the Complainant's business and wanted to exploit the name to divert Internet traffic from it, probably to benefit from pay-by-click arrangements with alternative suppliers*".

The Respondent, by using the Domain Names to offer competitive products, is trying to profit from the diversion of Internet users by confusion between the Domain Names and the Complainant's mark QQ, and disrupts business of the Complainant. Such use constitutes bad faith. See *Paule Ka v. Paula Korenek*, WIPO Case No. D2003-0453, "*in cases of a very strong or notorious mark when competitive products or services are concerned…a finding of good faith use may be precluded*". Also in *Research in Motion Limited v. Dustin Picov*, WIPO Case No. D2001-0492, the Panel found that "*the Domain Name is so obviously connected with the Complainant and its services that its very use by someone with no connection to the Complainant suggests 'opportunistic bad faith'*."

When the Complainant became aware of the Respondent's registration of the Domain Names, it immediately sent a cease and desist letter to the Respondent on 22 August 2011, requesting the Respondent to stop using QQVoice and the Domain Names. The Respondent however did not respond to the letter but changed the name of QQVoice to 云话. Failure of the Respondent to comply with the Complainant's demands is indicative of bad faith use. See *DeFelsko Corporation v. Michael Kennedy*, WIPO Case No. D2012-1283, "*the response to the 'cease*

*and desist' letter of posting a blog, instead of attempting to vindicate his conduct, has all the hallmarks of bad faith*".

Meanwhile, passive holding of the Domain Name <qqvoice.org> can be recognized as use in bad faith according to a number of UDRP cases. See *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Case No. D2000-0003 and *Ingersoll-Rand Co. v. Frank Gully, d/b/a Advcomren*, WIPO Case No. D2000-0021. The Respondent's registration of the three QQVoice domain names prevents the Complainant from reflecting its trademark QQ in the Domain Names.

Moreover, the Respondent, without explicit or implied consent from the Complainant, is using a mark QQVoice which is similar to the Complaint's registered trademark QQ on its products and corresponding websites, which constitutes trademark infringement pursuant to the P.R.C. Trademark Law (Annex 31). The Respondent's registration of the Domain Names incorporating a well-known trademark and use of them to divert traffic and mislead Internet users is indicative of bad faith in accordance to the governing judicial interpretations (Annex 32-33). Infringing acts of the Respondent suggest bad faith and have precludes it from a *bona fide* registration and use of the Domain Names.

To sum up, the Domain Names have been registered and are being used in bad faith by the Respondent.

**B) Respondent**

The Respondent denies all of the contentions raised by the Complainant in the Complaint. The Respondent's contentions may be summarized as follows:

一、 亚太科技使用 qqvoice 作为域名，未引起网络用户对其与腾讯商标的混淆。

1．亚太科技所推出的软件"云话"的功能属于网络电话服务，腾讯公司本身在网络电话软件的开发以及相关服务市场上并无太大建树，也鲜有自行开发网络电话软件并进行宣传、推广与营销的行为。因此，QQ 产品及商标即使有着很高的影响力，却与网络电话服务领域并无太大关联。相反，亚太科技的云话软件自 2004 年就已经推向市场，截止目前已经在网络电话市场中积累了相当的影响力与商誉。就网络电话市场而言，腾讯公司及 QQ 软件、商标的影响力与亚太科技及云话软件相比，实际上处于劣势。
2． 腾讯在申诉中指出，亚太科技所持有的域名中完整包含了腾讯拥有的注册商标 QQ，足以导致混淆。腾讯认为"QQ"属于创新词，因此拥有独特的含义。但是根据腾讯公司所持有的商标显示，其所持有的全部商标均为大写的"QQ"，这种对大写字母 QQ 所享有的商标并不能延伸至小写字母"qq"，更不能经行扩展到包含有两个 q 的全部字母组合。即使 QQ 真的因腾讯的长期使用含有了独特的意义，也并不代表 qq 同样具有类似含义。亚太科技注册的域名为 qqvoice.com，从外观上与腾讯公司的注册商标并无相似之处，仅仅是在字母的使用上同样包含了两个 q，且为小写字母。qq 仅为 2 个特定英文字母的重复，可以表达众多含义，由于域名只能由英文组成，因此将 2 个英文字母 q 重叠并用于域名中的情况并不少见。无论从任何角度，也不能认定 qqvoice.com 这一域名中包含了腾讯的注册商标"QQ"。如果单单由于一个该域名中含有两个 q 就认定其含有腾讯的注册商标，不仅毫无根据，且与常理不符。

3. 在百度及其他主要搜索引擎搜索 qqvoice，均会在搜索结果靠前位置显示“QQVoice 网络电话（原 UUCall）”字样。另外，“云话”软件的 Logo 系亚太科技自主设计，在所有方面与 QQ 商标不存在相似之处，这一 Logo 以最显著的方式表现在 qqvoice.com 的主页中。基于这两点，qqvoice 完全不存在与 QQ 商标及相关软件混淆的可能。
4. 商标和域名具有不同的作用和内涵。商标是用于区别商品或服务的标识，使用在相同或相似的商品或服务上，并只能用于特定的商品或服务上。如我国商标法规定，注册商标专用权，以核准注册的商标和核定使用的商品为限。域名是用于解决 IP 地址对应的一种方法，是为了方便人们使用因特网而创设的，它并不直接与商品或服务相联系，且不能离开因特网而独立存在。因此，腾讯公司以其商品和商标的知名度来推断云话利用了其知名度侵犯了其权利，是没有合理合法的依据的。

二、 亚太科技对 qqvoice 域名享有合法权利和利益。

腾讯认为亚太科技对所持有的争议域名并不拥有权利或合法利益。腾讯认为亚太科技虽然持有争议域名，但并不当然拥有权利或合法利益，并举出相关判例加以佐证。这种观点无论从逻辑上还是实际上都存在严重错误。
1. qqvoice.com 域名系从第三方手中通过支付合理对价合法够得，qqvoice.net/qqvoice.org 域名系通过合法程序，支付合理对价在正规供应商处注册，相关全部过程不存在任何违法之处，依法律、法理、商事习惯均应系争议域名完整的权利及合法利益所有人。
2. 亚太科技自 2011 年 7 月 26 日以来，正常、合理使用争议域名，并在域名指向的网站上提供正规、诚信的服务，其各种行为均符合所在地区的法律规定，从任何角度都不能否认亚太科技对争议域名的合法权益。
3. 亚太科技在使用争议域名之前，就已经发布公告，向其用户及公众表明争议域名与其拥有的域名 uucall.com 之间的转换关系，绝不存在任何以争议域名误导、欺骗用户的意图。

三、 亚太科技公司在网络电话领域使用 qqvoice 域名不存在恶意。

1. 腾讯指出，亚太科技使用争议域名，目的是希望用户对该域名产生误认，误以为其产品系腾讯公司的产品，并起到吸引用户的目的。而根据亚太科技提供的证据材料可知，自使用争议域名以来，亚太科技自身花费了大量资金（2011 年 7 月 26 日至今花费 1000 多万元，其中 350 万元左右已提供合同及发票）用作自身产品云话的宣传，并始终仅专注于网络电话软件方面的推广与营销。正如上所述，腾讯在网络电话市场中并无太大建树，而亚太科技的软件云话则是网络电话软件中的佼佼者。所谓“亚太科技使用争议域名来使用户误以为产品系腾讯所开发”，无疑是在说一个行业中的领先者，利用了一个甚至并未涉足该行业的企业的行业内声誉，而这种论断，是根本站不住脚的，也是与事实完全不符的。
2. 腾讯指出了亚太科技许多其他方面的行为，用以证明亚太科技存在恶意。腾讯以其发出的函件并未被理会为由，主张亚太科技存在恶意。但实际上，亚太科技所使用的域名与腾讯公司毫无关联，没有义务对腾讯发出的函件予以理会，更无理由仅因对方毫无根据的主张而停止对域名的使用。腾讯以亚太科技消极持有 qqvoice.org 域名为由，认为亚太科技对争议域名的持有与消极持有，阻碍了 QQ 商标在域名中的显示。而事实上，亚太科技注册 qqvoice.org 域名但未使用，其目的正是在于为了避免自身的特定字母组合构成的域名被他人恶意使用，属于合法注册的防御性域名，完全没有阻止任何人的任何商标出现在域名中的意思。并且，腾讯公司所有产品或服务，其域名均

为 xxx.qq.com（例如 mail.qq.com/music.qq.com/game.qq.com 等）。qqvoice 这一特定字母组合构成的域名，根本无法造成对 QQ 商标在域名中显示的障碍。

## 6. DISCUSSION AND FINDINGS

Before engaging in the threefold discussion of paragraph 4(a) of the Policy, the Panel will need to address some preliminary issues.

### A) Preliminary Issues

#### 1) Language of the Proceedings

According to Article 11 (a) of the Rules, "*[u]nless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Panel to determine otherwise, having regard to the circumstances of the administrative proceeding.*" In the present case, the language of the registration contract is English. The Respondent has submitted its Response in Chinese, the Complainant would raise no objection. The Panel has reviewed and considered the Respondent's Chinese-language Response with the same effect as if the Response had been submitted in English.

Nevertheless, a large number of evidence provided by the parties is in Chinese. This raises the issue of the admissibility of such evidence. According to Article 10 (d) of the Rules, "*[t]he Panel shall determine the admissibility, relevance, materiality and weight of the evidence.*" Article 11 (b) of the Rules also provides that "*[t]he Panel may order that any documents submitted in languages other than the language of the administrative proceeding be accompanied by a translation in whole or in part into the language of the administrative proceeding*". In the present case, the Panel can read and understand Chinese perfectly. Thus, the Panel considers that evidence provided in Chinese is admissible.

#### 2) Applicable Law

According to Article 15 (a) of the Rules, "*[a] Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable*."

In the present case:

- the Respondent is registered in Hong Kong, with its principal business originated from Mainland China;
- as it is stated in the Complaint, the Complainant has its headquarter in Shenzhen, China; and
- both parties perform the essential of their economic activities in China.

Thus the Panel considers that, beyond the policy, it shall take into consideration principles of Chinese law.

## B) Findings

The ICANN Uniform Domain Name Dispute Resolution Policy provides, at Paragraph 4(a), that each of three findings must be made in order for a Complainant to prevail:

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

### 1) Identical or Confusingly Similar

The first element that the Complainant must establish is that the disputed domain names are identical with or confusingly similar to the Complainant's trademark rights. There are two parts to this inquiry: the Complainant must demonstrate that it has rights in a trademark and, if so, the disputed domain names must be shown to be identical or confusingly similar to the trademark.

The Complainant owns trade mark registrations for or incorporating "QQ" in South Africa, Indonesia, and United State, including in the People's Republic of China ("PRC"). The Panel finds that the Complainant has rights in the <QQ> mark acquired through registration. The <QQ> (Chinese trade mark registration number: 3508823 et al) and <QQ 语音> (trade mark registration number: 3508797) marks has been registered in various class in China, and the Compliant has a widespread reputation in Internet, media and telecommunication industry in the world.

The disputed domain names <qqvoice.com> , <qqvoice.net> & <qqvoice.org> comprises the <QQ> mark in its entirety, the domain extension, in this case <.com>, <.net> and <.org>, should be disregarded. (*Rohde & Schwarz GmbH & Co. HG v. Pertshire Marketing, Ltd* WIPO Case No. D2006-0762).

<qqvoice>, consisting of the Complainant's <QQ> mark and a generic word "voice" <语音>, the Panel accept that addition of merely generic wording to a trademark in a domain name would be sufficient to a finding of confusing similarity. See *Hoffmann-La Roche Inc. v. Wei-Chun Hsia*, WIPO Case No. D2008-0923, "*wrapping a well-known mark with merely descriptive or generic words is a doomed recipe for escaping a conclusion that the domain name is confusingly similar to the well-known mark*". See also *Oki Data Americas, Inc. v. ASD, Inc.*, WIPO Case No. D2001-0903, "*The fact that a domain name wholly incorporates a complainant's trademark is sufficient to establish identity or confusing similarity for the purpose of the Policy, despite the addition of other words to such marks*".

The Panel accept the Complainant's contention, that the mark <QQ> is a coined word and a highly distinctive mark which will attract Internet users' attention. Incorporation of the Complainant's <QQ> trademark in entirety in the Domain Names in itself establishes that the Domain Names are confusingly similar to the Complainant's trademark. See *EAuto, L.L.C. v. Triple S. Auto Parts d/b/a Kung Fu Yea Enterprises, Inc.*, WIPO Case No. D2000-0047, "*When a domain name incorporates, in its entirety, a distinctive mark, that creates sufficient similarity between the mark and the domain name to render it confusingly similar*".

The Panel also finds, that the word "voice" means "语音" in Chinese language, and combination of <QQ> and <voice> hence corresponds to the exact Chinese translation of the

Complainant's trademark <QQ 语音>, which was registered on 7 January 2005 and predates registration of the Domain Names in 2009 and 2011 respectively. UUCall promoted by the Respondent on the corresponding websites falls within the goods/services scope of the Complainant's trademarks <QQ> and <QQ 语音>.

Accordingly, the Panel finds that the Complainant has satisfied the first condition under paragraph 4(a)(i) of the Policy.

**2) Rights or Legitimate Interests**

The second element of a claim of abusive domain name registration and use is that the respondent has no rights or legitimate interests in respect of the domain name (Policy, paragraph 4(a)(ii)). The Policy enumerates several ways in which a 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 organization) 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, paragraph 4(c))*

As is well established now, these are illustrative only and are not an exhaustive listing of the situations in which a respondent can show rights or legitimate interests in a domain name.

Further, the onus of proving this requirement, like each element, falls on the Complainant.

The Panel has recognized the difficulties inherent in disproving a negative, however, especially in circumstances where much of the relevant information is in, or likely to be in, the possession of the Respondent. Accordingly, it is usually sufficient for a complainant to raise a *prima facie* case against the respondent under this head and an evidential burden will shift to the respondent to rebut that *prima facie* case (see, e.g., WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition ("WIPO Overview 2.0"), paragraph 2.1.).

In this case, the Complainant states that it has not authorized the Respondent to use its trademarks <QQ> and/or <QQ 语音>.

The Panel considers that the Complainant has made the requisite *prima facie* showing in this case. The burden of coming forward with evidence of rights or a legitimate interest thus shifts to the Respondent.

The Respondent asserts that the disputed domain names were owned by the Respondent, the relevant registration fees were duly paid, and registered properly at the Registrar since 26 July

2011. The disputed domain names has been used and operated by the Respondent in according to the local laws and regulations. The Respondent is entitled to use the domain names to offer services consistent with their ongoing business as <uucall.com>, an IP phone provider.

For the reasons stated above, the Panel has recognized that mere registration of a domain name, even one that is comprised of a confirmed dictionary word or phrase (which may be generic with respect to certain goods or services), may not of itself confer rights or legitimate interests in the domain name. Normally, in order to find rights or legitimate interests in a domain name based on the generic or dictionary meaning of a word or phrase contained therein, the domain name would need to be genuinely used or at least demonstrably intended for such use in connection with the relied-upon meaning (and not, for example, to trade off third-party rights in such word or phrase)" (WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition ("WIPO Overview 2.0"), paragraph 2.2.). In the present case, the Respondent hasn't shown that he makes a genuine use of <qqvoice.com> since this domain name is used in connection with the services provided by the Complainant.

The Respondent has not used or made preparations to use the domain names in connection with a bona fide offering of goods and services.

The Respondent was never commonly known as "QQ." A Google search turns up no results relating to the Respondent. On the other hand, Google results turn up many hits related to the Complainant, who owns the trademark in "QQ".

There is similarly no evidence that the Respondent is making a legitimate non-commercial or fair use of the domain names without intent for commercial gain.

Accordingly, the Panel finds that the Complainant has satisfied the second condition under paragraph 4(a)(ii) of the Policy.

**3) Registered and Used in Bad Faith**

Under the third requirement of the Policy, the Complainant must establish that the disputed domain names has been both registered and is being used in bad faith by the Respondents.

***i) Registration in Bad Faith***

The Complainant submits that the domain name has been registered by the Respondent in bad faith on various grounds.

First, the Complainant contends that the Respondent's registration of the domain name was motivated solely to take advantage of the Complainant's reputation in the <QQ> / <QQ 语音> trademarks and thereby make undue profits. The prerequisite of this assertion is that the Respondent had knowledge of the Complainant, its <QQ> / <QQ 语音> trademarks and its rights in the disputed domain names. As stated earlier, the Respondent acquired the domain names in July 2011. At that time, the Respondent probably knew the existence of the Complainant and its <QQ> trademarks.

According to the material provided by the Complainant, that a QQ number (1745212343) is listed as contact of the Respondent on www.qqvoice.com and the Respondent is using QQ Micro-Blog to serve customers and promote business. The Panel finds the Respondent knows the Complainant and is using the Complainant's products including QQ and QQ Micro-Blog.

Moreover, this Panel already found that the domain names were confusingly similar to the <QQ> trademarks. Furthermore, at the time the Respondent acquired the domain name in July 2011, he/she should been aware of the <QQ> trademarks, which was first released in 1999, registered in 2003, which was before the Respondent has started its <uucall.com> services in 2004. The Respondent could not have acquired the domain names for the generic and suggestive value of the domain name. This Panel is of the view that the Complainant has established that the Respondent has chosen to acquire the domain name to create confusion with Complainants' trademarks.

***ii) Use in Bad Faith***

The Panel has observed that the Respondent, by using the Domain Names to offer competitive products, is trying to profit from the diversion of Internet users by confusion between the Domain Names and the Complainant's mark QQ, and disrupts business of the Complainant. Such use constitutes bad faith. See *Paule Ka v. Paula Korenek*, WIPO Case No. D2003-0453, "*in cases of a very strong or notorious mark when competitive products or services are concerned…a finding of good faith use may be precluded*". Also in *Research in Motion Limited v. Dustin Picov*, WIPO Case No. D2001-0492, the Panel found that "*the Domain Name is so obviously connected with the Complainant and its services that its very use by someone with no connection to the Complainant suggests 'opportunistic bad faith'*."

Meanwhile, passive holding of the Domain Name <qqvoice.org> can be recognized as use in bad faith according to a number of UDRP cases. See *Telstra Corporation Limited v. Nuclear Marshmallows*, WIPO Case No. D2000-0003 and *Ingersoll-Rand Co. v. Frank Gully, d/b/a Advcomren*, WIPO Case No. D2000-0021. The Respondent's registration of the three QQVoice domain names prevents the Complainant from reflecting its trademark QQ in the Domain Names.

This Panel is of the view that the Respondent's use of the domain names has misled consumers to believe that the disputed domain names and its operation were somehow sponsored or affiliated with the Complainant. Such a conduct falls within Article 4(b)(iv) of the Policy:

"*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*".

In the circumstances of the present case, after having carefully considered the Complainant's submissions, the Panel finds that the Complainant:
- has proved on the balance of probabilities that the domain names were registered in bad faith;
- has demonstrated that the domain names were used in bad faith.

In summary, the Respondent, by choosing to register and use the disputed domain names, which are confusingly similar to the Complainant's well-known trademarks, intended to ride on the goodwill of the Complainant's trademarks in an attempt to exploit, for commercial gain, internet users destined for the Complainant. In the absence of evidence to the contrary and rebuttal from the Respondent, the choice of the disputed domain names and the conduct of the

Respondent to which the disputed domain names resolves is indicative of registration and use of the disputed domain names in bad faith.

The Panel therefore holds that this is sufficient to establish bad faith under paragraph 4(a) (iii) of the Policy.

## 7. DECISION

On the basis of the foregoing considerations, the Panel decides that:

The disputed domain names are identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and the Respondent has no rights or legitimate interests in respect of the domain names; and the domain names has been registered and is being used in bad faith.

Accordingly, pursuant to paragraph 4(a) of the Policy and 15 of the Rules, the Panel decides that the Disputed Domain Names <qqvoice.com>, <qqvoice.net> & <qqvoice.org> should be transferred to the Complainant.

专家组裁定投诉人的投诉成立，被投诉人应将争议域名<qqvoice.com>, <qqvoice.net> 以及<qqvoice.org>转移给投诉人。

**Dr. Timothy Sze**
(Sole Panelist)

Dated: 4 September, 2013