

.hk Domain Name Dispute Resolution

ARBITRATION PANEL DECISION

Complainant: Vpower Engineering (Shenzhen) Ltd.
Respondent: VPOWER
Case Number: DHK-1500124
Disputed Domain Name: <vpower.hk>
Panel Member: Eugene Low

1. Parties and Disputed Domain Name

The Complainant in these proceedings is Vpower Engineering (Shenzhen) Ltd., whose address is C6/B7 Building, the North of Yanchuan Industrial Zone, Songang Road, Baoan District, Shenzhen City. The Complainant's authorised representative is Raymond Chan of Raymond Chan Solicitors, whose address is 5B, Empire Land Commercial Centre, 81-85 Lockhart Road, Wan Chai, Hong Kong.

The Respondent is VPOWER, whose address is unknown.

The Disputed Domain Name is <vpower.hk>, registered by the Respondent with Hong Kong Domain Name Registration Company Limited ("HKDNR"). The Disputed Domain Name was registered on 10 November 2008.

2. Procedural History

On 26 June 2015, the Complainant submitted a Complaint with the Hong Kong International Arbitration Centre ("HKIAC") pursuant to the Domain Name Dispute Resolution Policy for .hk and .香港 domain names, effective on 22 February 2011 (the "DNDRP" or "Policy"). On 26 June 2015, HKDNR, upon the request of HKIAC, confirmed that the Respondent was the registrant of the Disputed Domain Name. On 7 July 2015, HKIAC issued a notification of commencement of proceedings.

Upon the application of a Mr. Lam purportedly acting on behalf of the Respondent on 24 July and 31 July 2015, HKIAC extended the time for the filing of the Response to 10 August 2015. On 10 August 2015, HKIAC confirmed that it received the Response from the Respondent.

On 11 August 2015, HKIAC appointed Mr. Eugene Low as the sole Panelist.

2.1 Procedural issues

(i) Language of the proceedings

While applying for a time extension to file the Response, the said Mr. Lam also requested to be allowed to file the Response in Chinese language on the ground that his level of English was poor. The application was written in both English and Chinese languages. The Complainant objected to the time extension application but did not respond to the request to file the Response in Chinese language. The Response was eventually filed in Chinese language.

Paragraph 11 of the DNDRP Rules of Procedure provides that:

11. Language of the Arbitration Proceedings

- (a) Unless otherwise agreed by the Parties, the language of the arbitration proceedings shall be in English for English .hk domain name, and in Chinese for Chinese .hk domain name or .香港 domain name, subject always to the authority of the Arbitration Panel to determine otherwise, having regard to all the circumstances of the arbitration proceeding,
- (b) An Arbitration Panel may order that any documents submitted in a language other than the language of the arbitration proceeding shall be accompanied by a translation in whole or in part into the language of the arbitration proceeding.

The Panelist notices that the said Mr. Lam did not expressly ask for change of language of the proceedings. In light of that, the Panelist considers that the language of these proceedings should remain to be English language given that the Disputed Domain Name is an English .hk domain name. However, in the absence of any challenge by the Complainant against the filing of the Response written in Chinese, the Panelist exercises its discretion to allow the Response so filed – notwithstanding that, the Panelist has disregarded the said Response in reaching this Decision on another ground as explained in Paragraph 2.1(iii) below.

(ii) Procedural Order

On 17 August 2015, the Panelist issued a Procedural Order:

"The Panelist noticed that the Respondent in these proceedings is "VPOWER" but that in the Response dated 8 August 2015, the Respondent was named "LAM KA HUNG GARY". The Panelist invites the Respondent's submission on: (i) whether the Response dated 8 August 2015 was filed by "LAM KA HUNG GARY" on behalf of "VPOWER"; (ii) the legal status of "VPOWER", including any evidence of business or company registration.

The Panelist directs the Respondent to file such submissions, if any, within 3 days of the date of this Procedural Order, and the Complainant shall have 3 days thereafter to file a response."

The Respondent did not file any submission within the prescribed timeline. The Complainant however made submissions on 20 August 2015 saying that it had conducted a business registration search and no registration of the name "VPOWER" existed (the Panelist however notices that the said business registration search conducted was confined to the geographical scope of Hong Kong Island); and that the

name "VPOWER" "*may not represent any individual, partnership or any lawful entity at all, which brings into question the legality of the Respondent's registration of the subject domain in the first place*".

Technically, the Procedural Order only allows the Complainant to file a response in respect of any submissions made by the Respondent. In the absence of any submissions by the Respondent, the Complainant was not entitled to make submissions on the Procedural Order. On this basis, the Panelist is entitled to disregard the Complainant's submissions. Having said that, Paragraph 12 of the DNDRP Rules of Procedure gives the Panelist the power to request further statements or documents from one or both of the parties. Taking into account that the Complainant's further submissions are largely based on public information (i.e. business registration records), the Panelist exercises its discretion to accept the filing of such further submissions.

(iii) Deficiency of the Response

As stated in the Procedural Order, the Panelist notices that the Respondent in these proceedings is "VPOWER" but that in the Response dated 8 August 2015, the Respondent was named "LAM KA HUNG GARY". In the absence of any satisfactory explanation or evidence by the Respondent on the discrepancy and relationship between the two, the Panelist is unable to conclude that the Response was duly filed on behalf of the Respondent. Hence, the Panelist has disregarded the Response in reaching the Decision.

3. Factual Background

For the Complainant

The following paragraphs are extracted from the Complaint:

The Complainant's group is a leading independent power provider (IPP), offering fast track short to medium term power supply in Greater China and Southern Asia. Since 1995, the Complainant's group has been designing, manufacturing and selling generator sets, offering system integration, O&M and EPC services to growing economies and businesses around the world.

Today, the Complainant's group invests in fast track mobilized power plants, available under fixed term Power Purchase Agreements or other financing structures including Built-Own-Operation and Built-Own-Transfer, complete with full project development capabilities. In the past 15 years, over 15,000 units have been deployed, providing an aggregated capacity of over 2GW of power in the past 3 years.

The Complainant's group is headquartered in Hong Kong, China with offices in Indonesia, Singapore and China, and is currently the largest independent power provider using high and medium speed gas and diesel engines based in China.

The Complainant's group is recognized and endorsed by industrial leaders, and has OEM certifications with Komatsu Japan, Cummins USA & China, MTU Germany and China, Sunfull & License CSR-MAN & Mitsubishi China, Newage Stamford / AVK Germany, UK and China, Leroy Somer France & China, CSR Ziyang Sunfull China, CNR Yonge China and Fenxi Siemens China.

The Complainant's group has been awarded ISO-9001:2000 Quality Management System Certificate by the British BSI, the TLC Product Certificate by the Ministry of Information Industry of PRC, and certified for CE Mark by EU. VPower has also entered into a Global Strategic Relationship with MTU and Rolls-Royce, winning the recognitions as a key partner in the power generation industry.

The Complainant's group speaks at and participate in industry conference and events including Power Gen Asia and Electric, Power and Renewable Energy in Thailand and Indonesia.

The Complainant exhibits to the Complaint lists of trade marks and domain names which are owned by the Complainant and its affiliated companies (which are summarised below in this Decision).

For the Respondent

For the reasons stated in Paragraph 2.1(iii) above, the Panelist has disregarded the Response in reaching the Decision.

4. Parties' Contentions

The Complainant

The following paragraphs are extracted from the Complaint:

- (a) The domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights. The Complainant is in the business of designing, manufacturing and marketing electricity generating equipment, with its primary business location in Shenzhen, Guangdong, China and Hong Kong SAR. The Complainant has used its trade marks on its products for many years. As its primary website used in its business for many years, the Complainant operates www.vpower.cn, www.vpower.com and www.vpower.com.hk
- (b) 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. Respondent has recently begun operating a website at the offending domain, which resolves to the homepage [Exhibit D to the Complaint]. The homepage of the offending website starts by confusingly identifying itself as "VPOWER". At the top of homepage of the offending website, the Respondent uses a confusing similar and disparaging logo to the logo used by the Complainant. Due to similarity between www.vpower.cn, www.vpower.com, www.vpower.com.hk and www.vpower.hk, the offending domain name is likely to cause confusion, to cause mistake, and to deceive as

to the affiliation, connection, or association of the Respondent with the Complainant. The content of the website of the offending domain name is likely to cause confusion, to cause mistake, and to deceive as to the origin, sponsorship, or approval of the Respondent's comments or commercial activities by the Complainant. The Respondent's use of the offending domain name would confuse customers and prospective customers of the Complainant who mistype vpower.hk or who otherwise show initial interest confusion in mistakenly going to the Respondent's website. [Printouts of the Complainant's websites of www.vpower.cn, www.vpower.com and www.vpower.com.hk are attached as Exhibit E to the Complaint].

- (c) The domain name should be considered as having been registered and being used in bad faith. By using the domain name, Respondent has intentionally attempted to attract, possibly for commercial gain, Internet users to Respondent's website, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of Respondent's website or comments. The "VPOWER" name at the top of the homepage and the text of the homepage demonstrate that Respondent is attempting to confuse Internet users.

The Respondent

For the reasons stated in Paragraph 2.1(iii) above, the Panelist has disregarded the Response in reaching the Decision.

5. Findings

According to Paragraph 4a of the Policy, the Complainant has the burden of proving that:-

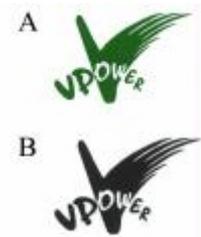
- (i) the Disputed Domain Name is identical or confusingly similar to a trade mark or service mark in Hong Kong in which the Complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the Disputed Domain Name; and
- (iii) the Disputed Domain Name has been registered and is being used in bad faith; and
- (iv) if the Disputed Domain Name is registered by an individual person, the Registrant does not meet the registration requirements for that individual category of domain name.

Ground (iv) is not applicable here and the Complaint also made no submissions on this ground.

Ground (1) Identical/confusing similarity

The Complainant has not clearly identified "*a trade mark or service mark in Hong Kong in which the Complainant has rights*". From the Complainant's exhibited trade

mark and domain name lists, the Panelist notices the following trade marks and domain names held in the name of the Complainant:-



- (i) (Hong Kong Trade Mark Registration No. 302365812; Class 7; registration date: 3 September 2012)



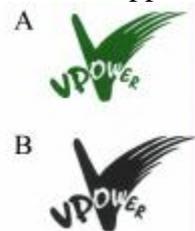
- (ii) (Hong Kong Trade Mark Application No. 302738368; Class 7; filing date: 16 September 2013) [Application Opposed]

- (iii) VPOWER (PRC Trade Mark Registration No. 7446615; Class 7; registration date: 21 December 2010).

- (iv) Domain name registration for "vpower.cn" (registration date: 29 July 2004).

The Complainant also referred to a number of other trade marks and domain names apparently held in the names of the Complainant's affiliated companies. However, the Complainant has not explained or showed how those trade mark registrations and domain names held in the names of the Complainant's affiliated companies would amount to or be relevant to "a trade mark or service mark in Hong Kong in which the Complainant has rights". The Panelist would also like to point out that ownership of a domain name incorporating the trade mark in question per se does not prove or constitute the requisite rights to that trade mark in Hong Kong.

While the Complaint is far from satisfactory, the Panelist considers that a reasonable inference can be drawn from the Complaint that the Complainant claims to have rights in the mark "VPOWER" in Hong Kong. This can be supported by its Hong



Kong Trade Mark Registration No. 302365812 for . The Panelist finds that the Disputed Domain Name (with the generic ".hk" suffix disregarded) is identical or confusingly similar to this mark. Accordingly, Ground (1) is satisfied.

Ground (2) Respondent has no rights or legitimate interests

It is well established that under this Ground, the burden of proof shall be effectively shifted to the Respondent once the Complainant has made out a prima facie case.

The Panelist considers that the Complainant has only barely made out a prima facie case here. The Respondent's name is "VPOWER" and this prima facie falls under Paragraph 4(d)(ii) of the Policy which stipulates that the Panelist can find for the Respondent under this Ground if the registrant has been commonly known by the domain name, even if the registrant has acquired no trade mark or service mark rights in Hong Kong. As the Complaint also shows that the domain name is being used for a website for the offering of goods, Paragraph 4(d)(i) (use of the domain name in connection with a bona fide offering of goods or services in Hong Kong) may also come into play.

In the Complaint, the Complainant asserted that the Respondent should be considered as having no rights or legitimate interests in respect of the Disputed Domain Name. The Complainant's supporting grounds seem to be that: (i) the Respondent *"has recently begun operating a website at the offending domain, which resolves to the homepage"* [Exhibit D to the Complaint]; and (ii) *"the homepage of the offending website starts by confusingly identifying itself as "VPOWER". At the top of homepage of the offending website, the Respondent uses a confusing similar and disparaging logo to the logo used by the Complainant"*.

The Panelist is unable to give much weight to the Complainant's arguments. First, the Complainant gave no evidence as to how "recently" the Respondent has been running the said website (on the contrary, the WHOIS record shows that the Disputed Domain Name was registered on 10 November 2008). Furthermore, the Panelist fails to see how "confusing" the Respondent's website is. Based on the materials submitted by the Complainant, the Panelist cannot see any logo on the Respondent's website as complained by the Complainant. On the contrary, the website printout seems to suggest that the Respondent's website is being used in connection with the offering of certain battery goods.

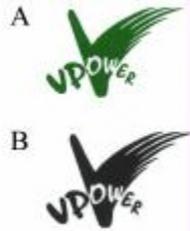
Notwithstanding the above, the failure by the Respondent to file submissions on its legal status and on its relationship between the said Mr. Lam as directed in the Procedural Order is rather critical in the Panelist's opinion. The Panelist's concern is not so much about whether the Respondent has any business registration in Hong Kong or whether it is legally trading in Hong Kong, as the Complainant submitted, because these matters are outside the scope of the Policy (and in any event, a ".hk" domain name can be registered by a foreign individual or entity). The Panelist's concern is that there appears to be at least some doubt as to the Respondent's status and there is no evidence or submission on whether or not "VPOWER" is a trade name or trade mark of the Respondent (in this regard, the Complainant's point that the Respondent appears to have no business registration search in Hong Kong does at least raise some doubt, notwithstanding the incompleteness of the Complainant's search as mentioned in Paragraph 2.1(ii) above). In the absence of the Respondent's submissions, the Panelist is unable to conclude that the Respondent has rights or legitimate interests in the Disputed Domain Name.

Ground (2) is satisfied.

Ground (3) Registration and use in bad faith

The Panelist considers that the Complainant has failed to establish this Ground. The reasons are as follows:-

- (a) The Disputed Domain Name was registered on 10 November 2008 whereas



the Complainant's trade mark in Hong Kong was registered on 3 September 2012. None of the trade mark applications or registrations referred to by the Complainant preceded the registration of the Disputed Domain Name. Nor did the Complainant adduce any evidence to attempt to show or prove any unregistered rights in its trade mark in Hong Kong prior to the registration of the Disputed Domain Name; the Complainant only made a bare assertion that "*the Complainant has used its trade marks on its products for many years*".

For the three domain names referred to by the Complainant, the Complainant fails to explain or prove their relevance – as stated above, ownership of a domain name per se does not prove or constitute the requisite rights to that trade mark in Hong Kong:-

- (i) "vpower.com.hk" (registration date: 17 August 2000) is held in the name of "VPOWER ENGINEERING (CHINA) LIMITED". No printouts or other evidence of use have been adduced. The registration date is also earlier than the date of incorporation of the Complainant (27 November 2003) and no explanation was given as to what rights the Complainant has in respect of this domain name.
- (ii) "vpower.cn" (registration date: 29 July 2004) is held in the name of the Complainant. However, this domain name/website appears to be targeting Mainland China and no evidence was adduced as to its use or goodwill in Hong Kong.
- (iii) "vpower.com" (registration date: 12 September 1997) is claimed to be registered by the "Vpower Group" based in Canada. No evidence was adduced as to its use or goodwill in Hong Kong. The registration date is also earlier than the date of incorporation of the Complainant (27 November 2003) and no explanation was given as to what rights the Complainant has in respect of this domain name.

Based on the materials available to the Panelist, the Panelist concludes that this is a case where the Disputed Domain Name was registered before the Complainant has acquired rights to a trade mark or service mark in Hong Kong. While this conclusion by itself does not preclude a finding of bad faith under this Ground, in such circumstances it would generally require stronger evidence to prove that the domain name was registered in bad faith (e.g. see "WIPO Overview 2.0") because normally the registrant could not have contemplated the complainant's then non-existent rights. To overcome this, the complainant would have to adduce clear evidence to show that at the time of registration of the domain name, the registrant was somehow aware of the complainant and such rights to a trade mark or service mark that the complainant is going to acquire. The Panelist considers that the Complaint has fallen far short of that and has made no or little attempt to demonstrate or prove the Respondent's pre-registration knowledge, if any.

- (b) While the Complaint can be dismissed on the ground that the Complainant has failed to prove registration in bad faith, for completeness the Panelist would also like to point out that the Complainant also fails to prove that the Disputed Domain Name is being used in bad faith.

The Complainant asserted that "by using the domain name, Respondent has intentionally attempted to attract, possibly for commercial gain, Internet users to Respondent's website, by creating a likelihood of confusion with the Complainant's mark as to the source, sponsorship, affiliation, or endorsement of Respondent's website or comments. The "VPOWER" name at the top of the homepage and the text of the homepage demonstrate that Respondent is attempting to confuse Internet users."

However, the Panelist considers that such arguments are bare assertions without any evidence in support. The Panelist looked at the printout of the Respondent's website as produced in the Complaint and was unable to locate any confusing name or text as alleged by the Complainant. For example, the Panelist could not find any "VPOWER" name at all *"at the top of the homepage"* as asserted by the Complainant. No guidance to the Panelist has been given by the Complainant as to what is considered confusing and where the comparison should be drawn between.

6. Conclusions

The Complainant has failed to prove all required elements under the Policy. The Complaint is dismissed.

Eugene Low

Dated: 28 August 2015