



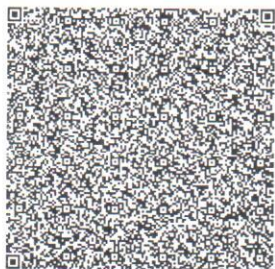
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Certificate No. : IN-DL35081285513277M
Certificate Issued Date : 19-Mar-2014 02:39 PM
Account Reference : IMPACC (IV)/ dl839203/ DELHI/ DL-DLH
Unique Doc. Reference : SUBIN-DL83920367497008660654M
Purchased by : SANJAY KUMAR SINGH Arbitrator
Description of Document : Article 12 Award
Property Description : na
Consideration Price (Rs.) : 0
(Zero)
First Party : SANJAY KUMAR SINGH Arbitrator
Second Party : Not Applicable
Stamp Duty Paid By : SANJAY KUMAR SINGH Arbitrator
Stamp Duty Amount(Rs.) : 100
(One Hundred only)



SH. SANJAY KUMAR SINGH, ARBITRATOR
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Please write or type below this line.

BEFORE SH. SANJAY KUMAR SINGH, ARBITRATOR.
AMERICAN DAIRY QUEEN CORPORATION --- COMPLAINANT
VS
Mr. Hua chen --- RESPONDENT

Sanjay Singh

Statutory Alert:

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BEFORE SHRI SANJAY KUMAR SINGH ARBITRATOR
IN DOMAIN NAME DISPUTE RESOLUTION POLICY (INDRP)

IN RE:

American Dairy Queen Corporation
7505, Metro Boulevard,
Edina, Minnesota, 55439-0286,
United States of America

Through its authorized representative

Lall & Sethi Advocates,
0-17, South Extension - 11,
New Delhi - 110049
E-mail: info@indiaip.com

COMPLAINANT

Versus

Mr. Hua Chen
35, ShangyeXincun,
Meicun Town, Wuxi,
Jiangsu, China
E-mail: hetloach@gmail.com

RESPONDENT

1. THE PARTIES:

THE COMPLAINANT:

The Complainant in this complaint is American Dairy Queen Corporation is among the largest manufacturer, marketer and distributor of fast foods, ice creams, desserts and beverages and milk products, confectionery, ice milk, ice blended coffee, other non- alcoholic carbonated and non-carbonated beverages, fruit based beverages and restaurant services in the world and is the owner of the world famous brand **DAIRY QUEEN** (word and logo) worldwide. It was established in the year 1940.

The Complainant has its principle place of business and corporate headquarters at 7505, Metro Boulevard, Edina, Minnesota, 55439-0286, United States of America. The Complainant's contact E-mail address is kerry.olson@idg.com.

The Complainant's authorized representative in the present proceeding are its

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attorneys, Lall & Sethi Advocates, of the address 0-17, South Extension - 11, New Delhi - 110049. The contact details are as follows: Telephone number: +91-11-4289-9999, Fax number: +91-11-4289-9900 and E-mail address is info@indiaip.com. The Complainant has preferred both, the material & electronic method for communications in the proceedings. The address of correspondence is Ms. Tia Malik of Lall & Sethi Advocates, of D-17, South Extension - 11, New Delhi - 110 049 on fax no. +91 11-4289-9999 and the email address is tmalik@indiaip.com.

The complainant has submitted that upon the information and belief, based upon the WHOIS search database available on the INDRP website and the CHECKDOMAIN database, the domain name, www.dairyqueen.in is owned by Mr. Hua Chen the "Respondent". As per complainant the administrative contact address for the Respondent in the Database is No: 35, ShangyeXincun, Meicun Town, Wuxi, Jiangsu, China. A telephone number +86.51083592121 has been provided. The registrant ID has also been provided as CR3998272.

2. The Domain Name and the Registrar

The complainant has submitted that dispute concerns the domain "www.dairyqueen.in" which was registered on April 09, 2009 according to the printouts from the Databases which the complainant has annexed as *Annexure C*.

The complainant has submitted that upon information and belief, the Sponsoring Registrar of the Disputed Domain Name is IN Registrar D.B.A. Gofraddy.com. LLC (R I I-AFIN), which is duly accredited with the .IN Registry and is listed on the website of the .IN Registry. The complainant has annexed a printout evidencing the same is as *Annexure D*. The website of the Sponsoring Registrar is <http://www.godaddy.com/>.

The complainant has submitted that the Disputed Domain Name is identical to Complainant's well-known and earlier trademark DAIRY QUEEN, domain name <http://www.dairyqueen.com> and corporate name American Dairy Queen Corporation.

The complainant has submitted that the Respondent has no rights or legitimate interests with respect to the disputed domain name.

The complainant has submitted that the Disputed Domain Name was registered

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and is being used in bad faith.

3. FACTUAL AND LEGAL BACKGROUNDS:

A. Complainant's right in trademarks:

1. The complainant has submitted that it is the owner of the trademark DAIRY QUEEN (word and device). The complainant has further submitted that it is also incorporated and trading under the name American Dairy Queen Corporation. The complainant has further submitted that it has the exclusive rights to use the aforesaid trademarks *inter alia* in respect of the goods and services for which the said trademarks are registered worldwide and in India.
2. The complainant has submitted that it is the registered proprietor of the trademark DAIRY QUEEN (word and device) in India the details of the same has been duly given by the complainant in para 13 of the complaint.
3. The complainant has submitted that in addition to it Complainant has registration of the trademark DAIRY QUEEN (word and device) in numerous jurisdictions around the world, *inter alia* in Australia, Canada, European community, and United States of America, New Zealand, United Kingdom, Hong Kong & Singapore.
4. The complainant has submitted that its use of well-known and prior trade mark/trade name has been extensive, exclusive and continuous all across the world. The complainant has further submitted that given the nature of the Complainant's use of its trade mark, anyone with access to a computer or a smart phone and an Internet connection, has access to the Complainant's web site wherein the Complainant's trademarks are featured.
5. The complainant has submitted that as a result of the Complainant's marketing and promotion of its goods and/or services under its trade mark /trade name DAIRY QUEEN, the same has gained worldwide recognition and goodwill and has become very well-known. Further, the Complainant's trade mark/ trade name has been firmly associated with the Complainant prior to the Respondent's registration of the Disputed Domain Name.
6. The complainant has submitted that it maintains a website at the domain <http://www.dairyqueen.com/>. The complainant has annexed copy of the home pages of this website as *Annexure E* and the said website was used and applied for registration long before the Respondents' registration of the

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Disputed Domain Name. The complainant has submitted that its trademarks are featured throughout the website, and the Complainant specifically claimed ownership of the trademarks thereon, on its "Visitor Agreement" page and the same has been attached by complainant as *Annexure F*.

7. The complainant has submitted that the trade mark DAIRY QUEEN has been extensively advertised and promoted on the internet *inter alia* through the Complainant's website<http://www.dairyqueen.com/>. The said website contains extensive information about the Complainant and the products marketed and sold under the trade mark DAIRY QUEEN. This information is accessible by any person from anywhere in the world. Attached as *Annexure G* are print outs from the said website. Needless to add, the said website can be accessed and is accessible from India.

8. The complainant has submitted that in light of the foregoing, it is evident that the Complainant has strong and prior rights in its trade mark, trade name and domain name, and is entitled to get protection from third party's act of cyber piracy *cybersquatting*, including from that of the Respondents.

B. The Disputed Domain Name is identical to the Complainant's mark:

1. The complainant has submitted that based upon the information from the WHOIS database, the Respondent registered the Disputed Domain Name on April 09, 2009. The complainant has annexed an extract of the Databases where the creation date is mentioned. The complainant has submitted that the Disputed Domain Name is identical to the Complainant's trademarks, trade name and domain name and the dominant and distinctive feature of the Disputed Domain Name is the incorporation of the Complainant's trademarks and trade name, as it is.

2. The complainant has submitted that at the time the respondent registered the disputed domain name www.dairyqueen , the complainant had already been using DAIRY QUEEN as their trademark, part of their above-mentioned trademark. Furthermore, at the time the Respondent registered the Disputed Domain Name, the Complainant's DAIRY QUEEN Trademarks had become well-known trademarks. The complainant has submitted that the Respondent

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cannot claim or show any rights to the Disputed Domain Name that are superior to the Complainant's rights in its DAIRY QUEEN (word and device) marks, as evidenced by the Complainant's prior and well-known use of the mark, neither, can the Respondent demonstrate that it was unaware of the Complainant's Mark at the time the Disputed Domain Name was registered. Since the Complainant's Mark is well-known and the Respondent has no rights in this mark, the only reason Respondent could have wanted to register a domain name, which so prominently features the Complainant's DAIRY QUEEN mark was with the intention to trade upon the fame of the Complainant's mark by selling the Disputed Domain Name for substantial commercial gain, in violation of Section 4(b) of the Policy. The Complainant has adduced sufficient proof by way of cogent documentary evidence to substantiate its prior rights in the forgoing paragraphs.

3. The complainant has submitted and relied on Yahoo! Inc. v. Akash Arora & Anr. (1999 PTC (19)210 Delhi) where Delhi High Court granted relief to Yahoo! Inc. on its petition seeking injunctive relief against the defendants who were attempting to use the domain name 'yahooindia.com' for internet related services. Yahoo! Inc., which was the owner of the trade mark "Yahoo" as well as the domain name <yahoo.com>, contended that by adopting the deceptively similar domain name, the defendants had copied the source code of the plaintiff's prior created website. Moreover, the defendant's domain name could be perceived as being another one of the Plaintiffs.
4. The complainant has submitted that in light of the foregoing, Internet users are likely to believe that the Disputed Domain Name is related to, associated with, or authorized by the Complainant. The complainant has submitted that considering that Complainant already uses the website <http://www.dairyqueen.com/> print outs of which has been annexed by the complainant as Annexure H, the internet users would be confused into thinking that the Respondent enjoys authorization of the Complainant to do business in India or is in fact their Indian website considering that the country code top-level domain name in the disputed domain name is ".IN". The complainant has further submitted that it is precisely because of this association with Complainant's Mark that Respondent saw the value in the Disputed Domain

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Name and registered it. The Complainant has submitted that it has satisfied the first ground of the Policy, that the Disputed Domain Name is identical or confusingly similar to Complainant's Mark.

C. NO LEGITIMATE INTEREST:

1. The complainant has submitted that the Respondent can demonstrate no legitimate interest in the Disputed Domain Name. The complainant has contended that the Respondent registered the Disputed Domain Name after Complainant had established rights in the DAIRY QUEEN Trademark/ trade name through extensive use and registration in various countries. As per Complainant its trademarks are so well known and recognized that there can be no legitimate use by the Respondent. The complainant has placed reliance on *Guerlain S.A. v. PeiKang*, WIPO Case No. D2000-0055 where it was held that bad faith is found where a domain name "is so obviously connected with such a well-known product that its very use by someone with no connection with the product suggests opportunistic bad faith". The complainant has also placed reliance on *Veuve Clicquot Ponsardin v. The Polygenix Group Co.*, WIPO Case No. D2000-0163. In *Charles Jourdan Holding AG v. AAIM*, WIPO Case No. D2000-0403 where it was held that "... given the relative notoriety of the Complainant's mark as well as the ease for any user of the Internet to assess on its own whether or not the registration and use of a domain name is likely to encroach on another's rights, the Panel is of the opinion that Respondent acquired the Domain Name primarily for the purpose of selling, renting, or otherwise transferring the Domain Name registration to the Complainant or to a competitor of the Complainant, for valuable consideration in excess of his out-of-pocket costs directly related to the Domain Name, an act which constitutes bad faith pursuant to paragraph 6 (i) of the Policy".
2. The complainant has furthermore submitted that there exists no relationship between the Complainant and the Respondent that would give rise to any license, permission, or authorization by which the Respondent could own or use the Disputed Domain Name, which is identical or confusingly similar to the Complainant's Mark. The complainant has contended that the Respondent is not commonly known by the Disputed,

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Domain Name and is not making legitimate non-commercial or fair use of the Disputed Domain Name Respondent's only purpose in registering the Disputed Domain Name was to offer to sell the Disputed Domain Name for commercial gain. The complainant has also placed reliance on the Caravan Club v. Mrgsale, NAF Claim Number: FA0007000095314 (thecaravanclub.com; registration of a well-known trademark by a party with no connection to the owner of the trademark and no authorization and no legitimate purpose to utilize the mark reveals bad faith); CBS Broadcasting Inc. v. Worldwide Webs, Inc., WIPO Case No. D2000-0834 ILOVELUCY.COM; Respondent sought to profit from the mere registration of the Complainant's trademark and service mark as a domain name, which constituted bad faith within the meaning of paragraph 6(i) of the policy and where domain name was transferred. The complainant has submitted that Respondent has no rights or legitimate interest in the Disputed Domain Name.

D. BAD FAITH REGISTRATION AND USE:

1. The complainant has submitted that it is apparent that both at the time of registration and continuing to the present, the Respondent has sought to profit from an unauthorized association with the Complainant's Mark. The complainant has further submitted that it is clear upon viewing the content of the web site at the Disputed Domain Name that the Respondent registered the Disputed Domain Name for purposes of selling it.
2. The complainant has submitted that in Playboy Enterprises International, Inc. v. Hector Rodriguez, WIPO Case No. D2000-1 0 16 (playboychannel.com and playboynetwork.com), it was said that "People, who manifest an intent to traffic in domain names that incorporate well-known or famous trademarks, as the Respondent does here, simply do not expend their efforts with the sole intention of relinquishing those domain names for just their out-of-pocket registration costs. The goal of their efforts, simply put, is an expectation of receiving an adequate reward, i.e. sufficient profit, from this trafficking. The complainant has submitted that bad faith use of the Disputed Domain Name is quite clear in this case, given the content on the Respondent's web site and his intent to sell the Disputed Domain Name.
3. The complainant has submitted that given the fame of the Complainant's

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Mark as a trademark, trade name and domain name, it is not possible to conceive any use by the Respondent of the Disputed Domain Name that would not constitute an infringement of the Complainant's rights in its Trade Mark. The complainant has placed reliance on *Veuve Clicquot Ponsardin v. The Polygenix Group Co.*, WIPO Case No. D2000-0163 at Section 6 where it was held that Mere registration by Respondent of the Disputed Domain Name is thus further evidence of Respondent's bad faith.

4. The complainant has submitted that the activities of the Respondent rise to the level of a bad faith usurpation of the recognition and fame of the Complainant's Mark to improperly benefit Respondent financially, in violation of applicable trademark and unfair competition laws. The complainant has further submitted that these activities demonstrate bad faith registration and use of the Disputed Domain Name in violation of the Policy under paragraph 6 which promulgates that bad faith can be found where there is evidence of:
 - a. circumstances indicating that Respondent has registered or Respondent has 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 the Complainant, for valuable consideration in excess of Respondent's documented out-of-pocket costs directly related to the domain name; or
 - b. Respondent has 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 Respondent has engaged in a pattern of such conduct; or
 - c. By using the domain name, the respondent has intentionally attempted to attract Internet users to the Respondent's website or other on-line location, by creating a likelihood of confusion with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the [Respondent's] website or location or of a product or service on the Registrant's web site or location.

The complainant has submitted that the facts provided above make it clear

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that the Respondent was and is taking advantage of the goodwill and fame of the Complainant's well-known trademark/ trade name for its own substantial commercial profit and gain.

4. The complainant has submitted that Respondent registered and has used the domain name in bad faith as defined under paragraph 6(iii) of the Policy. The complainant has submitted that no content has been put on the website <http://dairyqueen.in/>. When internet users log onto the disputed domain name <http://dairyqueen.in/>, clicking anywhere on the site leads them to a totally different page which does not reflect and nowhere closely relates to the Respondent business or website. The complainant has further submitted that only some sponsored listing are being reflected on the website <http://dairyqueen.in/>. The complainant has submitted that this evidences the fact that the Respondent is using the disputed domain name in "bad faith" with the intention of diverting traffic by attracting internet users for commercial gain to its website by creating a likelihood of confusion with the Complainant's well-known mark as to the source, sponsorship, affiliation or endorsement of its web site and the services on them.
5. The complainant has submitted that in addition to the above, the Complainant's trademark is being used on the impugned website, which clearly shows that the Respondent is trying to ride on the goodwill of the Complainant and take undue gains from the same. Screen shots of the same have been attached as *Annexure I*.
6. The complainant has relied on *Bennett Coleman & Co Ltd v. Steven S. Lalwani* (Case No. D 2000-0014) and *Bennett Coleman & Co Ltd v. Long Distance Telephone Company* (Case No. D 2000-0015) decided by WIPO, the Complainant, publisher of the daily newspaper "The Economic Times" and "The Times of India" held domain names, <economictimes.com> and <timesofindia.com> for publication of their respective newspapers. The two respondents had registered the sites <theeconomictimes.com> and <thetimesofindia.com> and the Complainant contended that this was use

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of identical marks in which it had prior rights. Moreover, the site <thetimesofindia.com> redirected traffic to the site <indiaheadlines.com> while the site <theeconomictimes.com> redirected traffic to <ifindyourperfectmate.com> without having any legitimate interests in respect of the domain names. Hence, the Complainant alleged that the respective respondents' registrations and use of the domain names was in "bad faith" in the sense that their use amounted to an attempt, intentionally attract, for commercial gain, internet users to their websites by creating a likelihood of confusion with the complainant's marks as to the source, sponsorship, affiliation or endorsement of those websites and the services offered thereon. The Administrative Panel held that it is not a sufficient answer to suggest that defendant will dispel any misleading first impression by use of a different design of the web site. The Panel further held that the necessary implication is that the domains were specifically selected in order to take advantage of the Complainant's very considerable reputation in the two titles of its publications by misleading internet users into believing that the respondent's sites came from or were associated with the Complainant. The Panel ordered that the two domain names be transferred to the Complainant. The complainant has annexed the copies of all the above mentioned cases as *Annexure J*.

The complainant has submitted that the domain name be transferred to it.

AWARD

1. This arbitral proceeding commenced in accordance with IN Dispute Resolution Policy (INDRP) and rules framed there under.
2. The complainant submitted his complaint in the registry of NIXI against the respondent in respect to the respondent's Domain name "**www.dairyqueen.in**"
3. I was appointed as Sole Arbitrator in the matter by NIXI.
4. The complainant submitted the said complaint under In Domain Name Dispute Resolution Policy (INDRP).
5. A copy of complaint was sent to me by the NIXI for arbitration in accordance with Dispute Resolution Policy (INDRP). The copy of the complaint along with annexures/exhibits was forwarded to me and to the respondent by .In

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Registry of NIXI. NIXI has informed through e- mail dated 26th March 2014 that it had sent the hard copy of the complaint with annexure to the respondent Hua Chen, China through blue dart courier vide consignment no. 9224451552. The courier agency has sent an email on 25th March 2014 that the courier has been undelivered with endorsement address incomplete, cannot deliver.

6. On 21-02-2014, I informed the respective parties to the complaint, about my appointment as an arbitrator. Accordingly, I called up on the parties to file their counter/ reply and rejoinder with the supportive document/evidence within *SEVEN* days from receipt of the notice.
7. On 01-03-2014, I again called up on the parties to file their counter/ reply and rejoinder with the supportive document/evidence within *FIVE* days from receipt of the notice failing which the award would be passed ex-parte on the merits of the complaint.
8. On 16-04-2014, I again called up on the parties to file their counter/ reply and rejoinder with the supportive document/evidence within *Three* days from receipt of the notice failing which the award would be passed ex-parte on the merits of the complaint and it was duly stated that no further opportunity shall be granted.

However the respondent did not file any reply to the complaint nor did he file any supportive document /evidence despite the notices duly served on the respondent at his e-mail address.

In view of above facts of the complaint, law of the land and the case laws as discussed above it is clear that the complainant has made positive assertions that respondent has no legitimate right in domain name and the respondent has no trademark on the domain name. The complainant has made positive assertions regarding the fact that respondent has got registered the disputed domain name in the .IN Registry for which the respondent has no right or trademark. As such in above circumstance it is clear that the complainant has prima facie discharged the initial onus cast upon him. The respondent has not come forward in spite of repeated notices to file any reply / counter or to provide any positive, cogent and specific evidence that it is known or recognized by domain name. The

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respondent has neither put forth and has not provided such evidence. Thus the conclusion is that respondent has no right or legitimate interest in the domain name. The domain name www.dairyqueen.in is identical and confusingly similar to Complainants' trademark **DAIRY QUEEN**. The Respondent has adopted virtually identical domain name to that of the complainant. Respondent was and is taking advantage of the goodwill and fame of the Complainant's well-known trademark/ trade name for its own substantial commercial profit and gain. The complainant has established that it has right in the trademark and further the respondent has got registered his domain name 'www.dairyqueen.in' in bad faith. In the facts and circumstance stated above the award is hereby passed as per law of the land and the case laws discussed in the foregoing paragraphs.

RELIEF

In view of above facts of the complaint, law of the land and the case laws discussed above I hold that the domain name of the respondent is identical and confusingly similar to trademark of complainant. The respondent also does not have right or legitimate interest in the domain name. He has got it registered in bad faith, as such he is not entitled to retain the domain name. The complainant is entitled for transfer of domain name "www.dairyqueen.in" to him, as it has established its bonafide rights in trademark. Hence I direct that the Domain name be transferred to the complainant by the registry.

No order as to costs.

Delhi

Date: 05-05-2014.



(Sanjay Kumar Singh)

Arbitrator