

## **ADMINISTRATIVE PANEL DECISION**

Marley Engineered Products LLC (MEP) v. 江华 (Jiang Hua)  
Case No. D2023-0857

### **1. The Parties**

The Complainant is Marley Engineered Products LLC (MEP), United States of America (“United States”), represented by Womble Bond Dickinson (US) LLP, United States.

The Respondent is 江华 (Jiang Hua), China.

### **2. The Domain Name and Registrar**

The disputed domain name <qmarkea.com> (the “Domain Name”) is registered with Xin Net Technology Corp. (北京新网数码信息技术有限公司) (the “Registrar”).

### **3. Procedural History**

The Complaint in English was filed with the WIPO Arbitration and Mediation Center (the “Center”) on February 24, 2023. On February 27, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On March 2, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the Domain Name which differed from the named Respondent (Redacted for Privacy) and contact information in the Complaint. The Center sent an email communication to the Complainant on March 2, 2023, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amendment to the Complaint in English on March 4, 2023.

On March 2, 2023, the Center sent an email in English and Chinese to the Parties regarding the language of the proceeding. The Complainant confirmed its request that English be the language of the proceeding on March 4, 2023. The Respondent did not comment on the language of the proceeding.

The Center verified that the Complaint together with the amendment to the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”), the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent in English and Chinese of the Complaint, and the proceedings commenced on March 8, 2023. In accordance with the

Rules, paragraph 5, the due date for Response was March 28, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on March 29, 2023.

The Center appointed Karen Fong as the sole panelist in this matter on April 21, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

#### **4. Factual Background**

The Complainant was founded in 2004, and headquartered in the United States. It is an engineered products manufacturer, and markets and supplies heating and ventilation products and parts to industrial and commercial customers throughout the United States. Some of its products are marketed and sold under the brand QMARK. The Complainant has trade mark registrations for QMARK and Q MARK in the United States under trade mark registration numbers 1453124 (registered since August 18, 1987) and 1447356 (registered since July 14, 1987), respectively (individually and collectively, the "Trade Mark"). The Complainant also owns and uses a logo style version of the Trade Mark in relation to its goods and services (the "Logo").

The Respondent, who appears to be based in China, registered the Domain Name on November 26, 2014. The Domain Name was connected to a website (the "Website") which purports to be a company based in the United States at the Complainant's address (as stated in the "About Us" section of the Website) offering for sale the Complainant's QMARK products. The Website mimicked the Complainant's website in many respects including displaying the logo and other brands belonging to the Complainant prominently. The Website is no longer active.

#### **5. Parties' Contentions**

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

The Complainant contends that the Domain Name is confusingly similar to the Trade Mark, that the Respondent has no rights or legitimate interests with respect to the Domain Name, and that the Domain Name has been registered and is being used in bad faith. The Complainant requests transfer of the Domain Name to the Complainant.

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

The Respondent did not reply to the Complainant's contentions.

#### **6. Discussion and Findings**

##### **A. General**

According to paragraph 4(a) of the Policy, for this Complaint to succeed in relation to the Domain Name, the Complainant must prove each of the following, namely that:

- (i) The Domain Name is identical or confusingly similar to a trade mark or service mark in which the Complainant has rights; and
- (ii) The Respondent has no rights or legitimate interests in respect of the Domain Name; and
- (iii) The Domain Name was registered and is being used in bad faith.

## **B. Language of the Proceeding**

The Rules, paragraph 11(a), provide that unless otherwise agreed by the parties or specified otherwise in the registration agreement, the language of the 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. According to the information received from the Registrar, the language of the Registration Agreement for the Domain Name is Chinese.

The Complainant submits that the language of the proceeding should be English for the Domain Name consists of Latin characters, the Website presented entirely in English, and the Complainant may be disadvantaged having to conduct the proceedings in Chinese.

In exercising its discretion to use a language other than that of the Registration Agreement, the Panel has to exercise such discretion judicially in the spirit of fairness and justice to both Parties, taking into account all relevant circumstances of the case, including matters such as the Parties' ability to understand and use the proposed language, time, and costs.

The Panel accepts the Complainant's submissions regarding the language of the proceeding. The Panel also notes that the Website was in the English language indicating that the Respondent is familiar with English. The Respondent has not challenged the Complainant's request and in fact has failed to file a Response in either Chinese or English. The Panel is also mindful of the need to ensure the proceeding is conducted in a timely and cost effective manner. In this case, the Complainant may be unduly disadvantaged by having to conduct the proceeding in Chinese. The Panel notes that all of the communications from the Center to the Parties were transmitted in both Chinese and English. In view of all the circumstances, the Panel determines that English be the language of the proceeding.

## **C. Identical or Confusingly Similar**

The Panel is satisfied that the Complainant has established that it has rights to the Trade Mark.

The standing (or threshold) test for confusing similarity involves a reasoned but relatively straightforward comparison between the trade mark and the domain name to determine whether the domain name is confusingly similar to the trade mark. The test involves a side-by-side comparison of the domain name and the textual components of the relevant trade mark to assess whether the mark is recognizable within the domain name.

In this case, the Domain Name contains the Complainant's Trade Mark in its entirety with the addition of two letters "e" and "a" after the Trade Mark. The addition of these letters does not prevent a finding of confusing similarity. For the purposes of assessing identity or confusing similarity under paragraph 4(a)(i) of the Policy, it is permissible for the Panel to ignore the generic Top-Level Domain ("gTLD") which in this case is ".com". It is viewed as a standard registration requirement (section 1.11.1 of the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)").

The Panel finds that the Domain Name is confusingly similar to a trade mark in which the Complainant has rights, and that the requirements of paragraph 4(a)(i) of the Policy therefore are fulfilled.

## **D. Rights or Legitimate Interests**

Pursuant to paragraph 4(c) of the Policy, a respondent may establish rights or legitimate interests in the domain name by demonstrating any of the following:

- (i) before any notice to it of the dispute, the respondent's 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) the respondent has been commonly known by the domain name, even if it has acquired no trade mark or service mark rights; or
- (iii) the respondent is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain, to misleadingly divert consumers, or to tarnish the trade mark or service mark at issue.

Although the Policy addresses ways in which a respondent may demonstrate rights or legitimate interests in a domain name, it is well established that, as it is put in section 2.1 of the [WIPO Overview 3.0](#), that a complainant is required to make out a *prima facie* case that the respondent lacks rights or legitimate interests. Once such *prima facie* case is made, the burden of production shifts to the respondent to come forward with appropriate allegations or evidence demonstrating rights or legitimate interests in the domain name. If the respondent does not come forward with such allegations and evidence of relevant rights or legitimate interests, the panel weighs all the evidence, with the burden of proof always remaining on the complainant.

The Complainant contends that there is no evidence that the Respondent is commonly known by the Domain Name nor has any trade mark rights to the Trade Mark. Further, it has not authorised, licensed, sponsored, or otherwise permitted the Respondent to use the Trade Mark in the Domain Name or for any other purpose. The use of the Complainant's Logo, address, and offer for sale of goods which appear to bear the Trade Mark on the Website suggests a connection, sponsorship, or endorsement by the Complainant, when this is not the case, and as such cannot be considered legitimate noncommercial use or fair use. Moreover, the lack of any clarifying statement as to the Website's affiliation, or lack thereof, to the Complainant further reinforces the Panel's finding that such use cannot constitute fair use. Generally, the act of impersonating can never confer rights or legitimate interests on a respondent. (See section 2.13 of the [WIPO Overview 3.0](#)).

The Panel finds that the Complainant has made out a *prima facie* case, a case calling for an answer from the Respondent. The Respondent has not provided any explanation of its rights or legitimate interests in relation to the Domain Name, and the Panel is unable to conceive of any basis upon which the Respondent could sensibly be said to have any rights or legitimate interests in respect of the Domain Name.

The Panel finds that the Respondent has no rights or legitimate interests in respect of the Domain Name.

#### **E. Registered and Used in Bad Faith**

To succeed under the Policy, the Complainant must show that the Domain Name has been registered and is being used in bad faith.

The Panel is satisfied that the Respondent was aware of the Trade Mark when it registered the Domain Name. The Trade Mark was registered long before the registration of the Domain Name. The very incorporation of the Trade Mark in the Domain Name, the display of the logo and other brands belonging to the Complainant on the Website as well as using the Complainant's address as its own confirm the Respondent's awareness of the Trade Mark. It is therefore implausible that the Respondent was unaware of the Complainant when it registered the Domain Name. The Panel is satisfied that the Respondent was aware of the Trade Mark when it registered the Domain Name given the reputation of the Trade Mark and the fact that it has no common dictionary significance other than that of the Trade Mark. It is therefore implausible that the Respondent was unaware of the Complainant when it registered the Domain Name.

In the [WIPO Overview 3.0](#), section 3.2.2 states as follows:

"Noting the near instantaneous and global reach of the Internet and search engines, and particularly in circumstances where the complainant's mark is widely known (including in its sector) or highly specific and a respondent cannot credibly claim to have been unaware of the mark (particularly in the case of domainers), panels have been prepared to infer that the respondent knew, or have found that the respondent should

have known, that its registration would be identical or confusingly similar to a complainant's mark. Further factors including the nature of the domain name, the chosen top-level domain, any use of the domain name, or any respondent pattern, may obviate a respondent's claim not to have been aware of the complainant's mark."

The fact that there is a clear absence of rights or legitimate interests coupled with the Respondent's choice of the Domain Name (clearly targeting the Complainant's Trade Mark) is also a significant factor to consider (as stated in section 3.2.1 of the [WIPO Overview 3.0](#)). The Domain Name falls into the category stated above and the Panel finds that registration was in bad faith.

The Panel also finds that the actual use of the Domain Name is in bad faith. The content of the Website was calculated to give the impression that it has been authorized by or connected to the Complainant when this is not the case. The Website was set up to deliberately mislead Internet users that it is connected to, authorised by, or affiliated with the Complainant. From the above, the Panel concludes that the Respondent intentionally attempted to attract, for commercial gain, by misleading Internet users into believing that the Respondent's Website is and the products sold on it are those of, or authorised, or endorsed by the Complainant.

The Panel therefore concludes that the Domain Name was registered and has been used in bad faith under paragraph 4(b)(iv) of the Policy.

In all the circumstances, the Panel finds that the Complainant has fulfilled the requirements of paragraph 4(a)(iii) of the Policy.

## **7. Decision**

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

*/Karen Fong/*

**Karen Fong**

Sole Panelist

Date: May 3, 2023