Decision for dispute CAC-UDRP-102378

Case number	CAC-UDRP-102378
Time of filing	2019-03-08 10:41:26
Domain names	PEPSIC0O.COM

Case administrator

Name	Šárka Glasslová (Case admin)

Complainant

Organization	PepsiCo, Inc.

Complainant representative

Organization	RiskIQ, Inc. c/o Jonathan Matkowsky

Respondent

Organization	Smith power production

OTHER LEGAL PROCEEDINGS

The Panel is not aware of other legal proceedings which are pending or decided and which relate to the disputed domain name.

IDENTIFICATION OF RIGHTS

The Complainant owns registrations for the mark 'PEPSICO with a device' covering various goods (e.g., US Reg. No. 3026568 registered on December 13, 2005; UK Reg. 992395 registered on May 19, 1972; EUTM Reg. No. 013357637 registered on March 13, 2015).

FACTUAL BACKGROUND

FACTS ASSERTED BY THE COMPLAINANT AND NOT CONTESTED BY THE RESPONDENT:

The Complainant is a leading global food and beverage company with brands that are respected household names throughout the world. The Complainant and its consolidated subsidiaries own numerous valuable trademarks essential to its worldwide businesses, including the flagship PEPSI brand which has been used for soft drinks since 1911 as a shortened version of the PEPSI-COLA mark that first denoted PepsiCo's soft drinks in 1898.

The Complainant owns registrations for the mark 'PEPSICO with a device' covering various goods (e.g., US Reg. No. 3026568 registered on December 13, 2005; UK Reg. 992395 registered on May 19, 1972; EUTM Reg. No. 013357637 registered on

March 13, 2015). There are over nine hundred active registrations for PEPSI-variant marks reflected in the WIPO Global Brand Database. PEPSI is registered since 1985 in the United States for a wide variety of goods and services from key chains to beach towels and clothing for use since at least the 1970s. E.g., U.S. Reg. No. 1,317,551. Other representative registrations include U.S. Reg. Nos. 824,150 and '151 for PEPSI and PEPSI-COLA, first used in 1898, and other registrations from the United Kingdom, European Union, and Canada made of record.

The disputed domain name was registered on February 15, 2019. The Respondent uses the disputed domain name in such a manner that enables one to create custom email accounts.

PARTIES CONTENTIONS

NO ADMINISTRATIVELY COMPLIANT RESPONSE HAS BEEN FILED.

RIGHTS

The Complainant has, to the satisfaction of the Panel, shown the disputed domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights (within the meaning of paragraph 4(a)(i) of the Policy).

NO RIGHTS OR LEGITIMATE INTERESTS

The Complainant has, to the satisfaction of the Panel, shown the Respondent to have no rights or legitimate interests in respect of the disputed domain name (within the meaning of paragraph 4(a)(ii) of the Policy).

BAD FAITH

The Complainant has, to the satisfaction of the Panel, shown the disputed domain name has been registered and is being used in bad faith (within the meaning of paragraph 4(a)(iii) of the Policy).

PROCEDURAL FACTORS

The Panel is satisfied that all procedural requirements under UDRP were met and there is no other reason why it would be inappropriate to provide a decision.

PRINCIPAL REASONS FOR THE DECISION

Paragraph 15(a) of the Rules instructs this Panel to "decide a complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

Paragraph 4(a) of the Policy requires that Complainant must prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

(1) the domain name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
(2) Respondent has no rights or legitimate interests in respect of the domain name; and
(3) the domain name has been registered and is being used in bad faith.

In view of the Respondent's failure to submit a response, the Panel shall decide this administrative proceeding on the basis of the Complainant's undisputed representations pursuant to paragraphs 5(f), 14(a) and 15(a) of the Rules and draw such inferences it considers appropriate pursuant to paragraph 14(b) of the Rules. The Panel is entitled to accept all reasonable allegations and inferences set forth in the Complaint as true unless the evidence is clearly contradictory. See Vertical Solutions Mgmt., Inc. v. webnet-marketing, inc., FA 95095 (FORUM July 31, 2000) (holding that the respondent’s failure to respond allows all reasonable inferences of fact in the allegations of the complaint to be deemed true); see also Talk City, Inc. v. Robertson, D2000-0009 (WIPO Feb. 29, 2000) (“In the absence of a response, it is appropriate to accept as true all allegations of the Complaint.”).

Rights

The Complainant contends that it is the owner of 'PEPSICO' in standard characters with a device (e.g., U.S Reg. 3026568, registered on December 13, 2005). The Panel notes that a trademark registration with the USPTO is sufficient to establish rights in that mark. As such, the Panel finds that the Complainant has established its rights in the mark 'PEPSICO with a device.'

The Complainant further contends that the disputed domain name is confusingly similar to its mark 'PEPSICO' on the grounds that i) the disputed domain name contains sufficiently recognizable aspects of the PEPSI and PEPSICO marks, which are highly distinctive and these characters have no other meaning in the context of the disputed domain name, or sufficient to avoid confusing similarity to the Pepsi and Pepsico marks; 2) where the relevant trademark is recognizable within the disputed domain name, the addition of meaningless characters does not prevent a finding of confusing similarity under the first element; 3) it has been well-established that entering the numeral "0" within a mark is insufficient to defeat analysis under Policy paragraph 4(a)(i); and 4) the disputed domain name incorporates the entirety of the PEPSI mark, and differs from the trademark PEPSICO simply by the addition to the trademark of the numeral “0”, "an addition so trivial that nothing of distinction turns on it."

The Panel agrees with the Complainant, and thus it finds that the disputed domain name is confusingly similar to the Complainant's trademark 'PEPSICO with a device.'

No rights or legitimate interests

Complainant must first make a prima facie case that Respondent lacks rights and legitimate interests in the disputed domain name under Policy paragraph 4(a)(ii), then the burden shifts to Respondent to show it does have rights or legitimate interests. See Croatia Airlines d. d. v. Modern Empire Internet Ltd., WIPO Case No. D2003-0455 (the 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 Respondent carries the burden of demonstrating rights or legitimate interests in the domain name. If the Respondent fails to do so, the Complainant is deemed to have satisfied paragraph 4(a) (ii) of the UDRP). See also Advanced International Marketing Corporation v. AA-1 Corp, FA 780200 (FORUM Nov. 2, 2011) (finding that a complainant must offer some evidence to make its prima facie case and satisfy Policy paragraph 4(a)(ii).

The Complainant contends that Respondent has no right or legitimate interest in respect of the disputed domain name for the reasons that 1) the Respondent’s use of the disputed domain name cannot be considered “fair” as it falsely suggests affiliation with the Complainant; 2) the Respondent is not licensed or otherwise authorized to use its mark in any way, and the Complainant has not given the Respondent permission to use its mark in a domain name; 3) the pertinent WHOIS information does not resemble the disputed domain name, and thus the Respondent is not commonly known by the disputed domain name to have demonstrated that it has rights to or legitimate interests under Policy paragraph 4(c)(ii); 4) according to the Whois record, the Respondent registered the disputed domain name through a reseller, Squarespace which offers its customers the opportunity to integrate a custom domain name with Google's G Suite, which allows one to create email addresses for the custom domain name; and 5) the Respondent clearly has no legitimate interest in using this disputed domain name in such a manner that enables him to create custom email accounts, presumably for financial gain, that would likely receive communications intended for the Complainant or deceive recipients into thinking communications received from those accounts are managed and controlled by the Complainant.

The Panel finds that the Complainant has made out a prima facie case that arises from the considerations above. All of these matters go to make out the prima facie case against the Respondent. As the Respondent has not filed a Response or attempted by any other means to rebut the prima facie case against it, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name.

Bad faith

The Complainant contends that the Respondent has registered the disputed domain name and is using it in bad faith. The Complainant contends that 1) the mere registration of a domain name incorporating a misspelling of a famous or widely-

known trademark by an unaffiliated entity creates a presumption of bad faith because it may be inferred that the Respondent, at the time it registered the domain name, knew of Complainant's exclusive rights in the famous and well-known PepsiCo names and marks; 2) the Respondent's registration and use of the confusingly similar disputed domain name is the Respondent's attempt to intentionally attract, for commercial gain, Internet users to its website or other on-line location and is thus evidence of Respondent's bad faith pursuant to Policy paragraph 4(b)(iv); 3) the disputed domain name operates by creating a likelihood of confusion with the Complainant's trademark as to the source, sponsorship, affiliation or endorsement of the Respondent's website or on-line location per Policy paragraph 4(b); and 4) given the fame of PEPSI and PEPSI-COLA, and the PEPSICO name and mark, it may be presumed that the Respondent intended to commercially exploit the trademark significance to set up MX records specifically to enable custom email accounts on the disputed domain name that would inevitably result in misdirected communications to the Respondent intended for the Complainant, and/or emails that confuse recipients into thinking they were sent from an email account that is under the Complainant's management and control.

The Panel agrees with the Complainant and finds that the above constitutes bad faith registration and use of the disputed domain name, and thus the element of paragraph 4(a)(iii) of the Policy has been satisfied.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

AND THE DISPUTED DOMAIN NAME(S) IS (ARE) TO BE

1. **PEPSIC0O.COM**: Transferred

PANELLISTS

Name	**Mr. Ho-Hyun Nahm, Esq.**

DATE OF PANEL DECISION 2019-04-14

Publish the Decision