Decision for dispute CAC-UDRP-102380

Case number	CAC-UDRP-102380
Time of filing	2019-03-08 14:39:32
Domain names	PEPSICCO.COM

Case administrator

Name	Šárka Glasslová (Case admin)

Complainant

Organization	Pepsico, Inc.

Complainant representative

Organization	RiskIQ, Inc. c/o Jonathan Matkowsky

Respondent

Name	Allen Othman

OTHER LEGAL PROCEEDINGS

The Complainant has declared that there are no other legal proceedings, pending or decided, which relate to the disputed domain name. The Panel is not aware of any such proceedings.

IDENTIFICATION OF RIGHTS

The Complainant (which has as its corporate name PepsiCo) has identified a very large number of relevant rights and provided an Annex running to 194 pages in support. In particular, the US mark no. 3026568 (figurative mark with word element PEPSICO, various classes, dating from 2005), and EUTM no. 013357637 (figurative mark with word element PEPSICO, various classes, dating from 2014) are relevant, as are long-held marks for text such as PEPSI (e.g. UK mark no. 1103657, for non-alcoholic drinks, dating from 1978) or PEPSI-COLA (US mark no. 824151, for soft drinks, first used in commerce 1898).

FACTUAL BACKGROUND

The Complainant is a corporation with its seat in New York, USA. It operates in the food and beverage sector, in the US and globally, and has been in business since the late 19th century. It is the proprietor of a large number of trade marks in the US and in various other jurisdictions.

The Respondent is an individual, with an address in California, USA, who registered the disputed domain name on 24 April 2018.

PARTIES CONTENTIONS

No administratively compliant response has been filed. The CAC could not determine whether the written notice of the Complaint was delivered to the Respondent. An e-mail sent to the WHOIS contact was successfully delivered. The CAC received a telephone call purporting to be from the Respondent but no administratively compliant communications followed. The Panel therefore proceeds on the basis of non-participation and draws such inferences as it deems fit.

The Complainant submits that the disputed domain name is confusingly similar to its trademark, being an obvious misspelling of its company name and one of its many trade marks. It contends that the Respondent has no rights or legitimate interests in respect of said domain name, and that it was registered in bad faith (with full knowledge of the Complainant's famous marks) and is being used in bad faith (through its use in email addresses). It seeks the transfer of the disputed domain name to itself.

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).

Disregarding the gTLD .com, in accordance with usual practice under the UDRP, the only difference between the Complainant's mark and the disputed domain name <pepsicco.com> is the addition of the letter ‘c’ within the string ‘PEPSICO’ in order to form ‘PEPSICCO’. The Panel does not find that the string ‘pepsicco’ has any particular meaning beyond its similarity with ‘pepsico’. The Complaint proposes that this is a case of 'typosquatting', citing a range of cases where panels have found confusing similarity in respect of other close variants of its mark (including a 2018 decision by a Panel at this Provider, CAC Case No. 101999 PepsiCo, Inc. v Fundacion Comercio Electronico <mypepsicoo.com>, where, inter alia, an additional 'o’ was inserted in the text ‘’PEPSICO’).

The Panel notes that the present dispute can be understood as falling within the sixth example of typosquatting found in the WIPO Jurisprudential Overview, version 3.0, para 1.9 ('addition or interspersion of other terms or numbers').

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).

The Complainant has confirmed that the Respondent is not related to it, has no business connection with it, nor has received any licence, authorisation, or permission to make use of the mark in any way.

The Respondent has not participated in the proceedings, and so made no case as to rights or legitimate interests. Moreover, the Respondent has provided the contact details ‘Allen Othman’, which is not connected to the disputed domain name at all. (The Complainant contends that even this name is false; this point is considered further under bad faith, below).

There is no further information on the website at the disputed domain name that could conceivably provide a basis for a finding of rights or legitimate interests. The only text displayed is, as noted below, an 'under construction' message.

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).

The Complainant's mark is very well-known. The company has been operating under various brands and marks for over a century, and its core brand ‘PEPSI’ is found to be one of the leading global brands; the Complainant has provided ample evidence of this in a series of Annexes. The Panel cannot imagine a situation where a registrant would identify text such as that in the disputed domain name, and register such a domain name, without knowledge of the Complainant's fame, name, and activities.

The Panel accepts the Complainant's submission that the Respondent’s registration and use of the disputed domain name is an attempt to intentionally attract, for commercial gain, Internet users to its website or other on-line location, which is one of the examples set out at paragraph 4(b) of the Policy.

There is limited evidence of how the disputed domain name is being 'used'. The disputed domain name was registered on 24 April 2018. The Complainant included in an Annex a screenshot of a holding page from March 2019, containing the text ‘We’re under construction. Please check back for an update soon’; the Provider’s own subsequent check of the website in order to search for contact details, and the Panel’s own consultation of the website, led to the same result.

This Respondent must have been aware of the Complainant's rights when it registered the disputed domain name, in light of its very well-known and famous nature. In the present case, the combination of the passive holding with the very close similarity between the disputed domain name and the Complainant's mark makes a finding of bad faith a real possibility.

Moreover, the Panel notes the Complainant’s evidence that the disputed domain name is being used for the generation of custom email addresses. It is noted in the WIPO Jurisprudential Overview, version 3.0, at paragraph 3.4, that bad faith regarding the use of a domain name can be found in relation to uses other than websites, such as where a Respondent uses a domain name 'to send deceptive emails, e.g., to obtain sensitive or confidential personal information from prospective job applicants, or to solicit payment of fraudulent invoices by the complainant’s actual or prospective customers.'

The Complainant submits, fairly, that the preparatory steps in relation to email addresses could enable the inappropriate sending or receipt of email communications purporting to emanate from, or intending to be received by, the Complainant. These preparatory steps (configuring ‘MX’ or mail exchange records) have considered in relation to ‘use’ for the purposes of the Policy by other Panels, which the present Panel has considered of its own motion. See for instance FORUM FA1210001467014 Standard Bank of South Africa v mark gersper; WIPO AMC Case No. D2018-0285 Covanta Energy Corporation v. Domains By Proxy, LLC / Peter Allen, Covantaholdingcorporation; WIPO AMC Case No. D2018-0563, Statoil ASA v. Registration Private, Domains By Proxy, LLC / Eldar Saetre. The Panel notes too the very recent decision, in favour of the Complainant, of another Panel concerning the same Complainant and similar facts (including the configuration of MX records), CAC Case 102378 PepsiCo, Inc. v Smith power production.

For completeness, the Panel also notes the contentions of the Complainant regarding the contact information provided by the Respondent (which was disclosed to it during the proceedings, as a proxy service was initially used. The Complainant submits that this contact information is false, as it pertains to the real address and telephone number of a construction industry business and the name of its CEO, and an email address associated with a different firm in the hospitality industry. The Panel has not investigated the accuracy of these details any further but notes at least a prima facie case of false contact information (initially masked by proxy), which could only strengthen the case regarding bad faith (see a long line of decisions going back to e.g. WIPO AMC Case No. D2000-1196, Euromarket Designs, Inc. d/b/a Crate & Barrel v. Namesnet).

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.

The Panel notes that Annexes should be relevant to the case before a Panel and presented in a useful fashion; one Annex on this occasion was a PDF of the full text of the UDRP itself, which Panels can safely be assumed to refer to in each and every case without it needing to be introduced as case-specific evidence, while another was nearly two hundred pages of (unindexed) trade mark records.

PRINCIPAL REASONS FOR THE DECISION

In the absence of any Response from the Respondent, or any other information indicating the contrary, the Panel concludes that the Respondent has no rights or legitimate interests in respect of the disputed domain name. On the other hand, it is clear that the Complainant has rights in respect of the trade mark and company name PEPSICO, and that the disputed domain name is confusingly similar to this mark. In light of the evidence presented by the Complainant, the Panel finds that

the disputed domain name was registered and is being used in bad faith, including through its use in association with the configuration of email accounts (MX records). The requirements for the acceptance of a Complaint under paragraph 4 of the Policy have therefore been met.

FOR ALL THE REASONS STATED ABOVE, THE COMPLAINT IS

Accepted

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

1. **PEPSICCO.COM**: Transferred

PANELLISTS

Name	**Prof Daithi Mac Sithigh**

DATE OF PANEL DECISION 2019-04-23

Publish the Decision