



WIPO Arbitration and Mediation Center

ADMINISTRATIVE PANEL DECISION

PepsiCo, Inc. v. QWO

Case No. D2004-0865

1. The Parties

The Complainant is PepsiCo, Inc., Purchase, New York, United States of America, represented by Fross Zelnick Lehrman & Zissu, PC, United States of America.

The Respondent is QWO, C/O David Elliot, Eldorado Springs, Colorado, United States of America.

2. The Domain Name and Registrar

The disputed domain name <pepsico-afghanistan.com> is registered with Tucows Inc. (“Tucows”).

3. Procedural History

The Complaint was brought pursuant to the Uniform Domain Name Dispute Resolution Policy (the “Policy”), which was adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999, and approved on October 24, 1999, and in accordance with the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”) as approved on October 24, 1999, and by the World Intellectual Property Organization Supplemental Rules for Uniform Domain Name Dispute Resolution Policy in effect as of December 1, 1999 (the “Supplemental Rules”).

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) in e-mail form on October 20, 2004, and in hard-copy form on October 27, 2004, along with Exhibits A-L.

Pursuant to Paragraph 4(d) of the Policy, the Complainant selected the Center as the ICANN approved administrative dispute resolution service provider to administer this proceeding. Through the Complaint, the Complainant requested a single member panel.

After receiving the Complaint, the Center, in accordance with Paragraph 5 of the Supplemental Rules, determined whether that Complaint fully complied with the formal requirements of the Rules and the Supplemental Rules. In that regard, on October 21, 2004, the Center requested confirmation from the Registrar of information set forth in the Complaint relative to the disputed domain name; specifically, contact and registrant information for that domain name, as well as whether the Registrar received a copy of the Complaint from the Complainant. The Center also requested the Registrar to specify: (a) whether the Policy applies to each disputed domain name, (b) whether the registrant has submitted, in its registration agreement, to the jurisdiction at the location of the principal office of the registrar for court adjudication of disputes concerning or arising from the use of the domain name, (c) the language of the registration agreement, and (d) whether the domain name will remain “locked” during the proceeding.

Subsequently, on October 21 and 22, 2004, the Registrar provided its response to the Center through which the Registrar specified name and contact information pertinent to the disputed domain name, to the extent present in its WhoIS database, confirmed that Tucows is the registrar of that name, stated that: it had received a copy of the Complaint, the Policy applied to the disputed domain name, the language of the underlying registration agreement for the name is English and the name was then held in a “locked” status. The Registrar also informed the Center that the Respondent, through the registration agreements, had submitted to the jurisdiction at the location of the principal office of the Registrar for court adjudication of disputes concerning or arising from the use the disputed domain name.

On October 28, 2004, the Center notified the Respondent of the filing of the Complaint, including an indication that the Center was forwarding a complete copy of the Complaint, by courier, facsimile and e-mail (the latter two without the Exhibits), to the Respondent. Specifically, the Center separately provided its notice along with the Complaint, by e-mail, to the Respondent’s domain name registrant, technical, administrative and zone contacts as set forth in the WhoIS record for the disputed domain name. In addition and also on October 28, 2004, the Center forwarded a copy of the Complaint (without the annexes) to the Registrar. The Complaint, and its accompanying documents, and all subsequent communications associated therewith were provided in the preferred manners and to the addresses as mandated by paragraphs 2(a), 2(b) and 4(a) of the Rules.

Hence, the notification to the Respondent having occurred on October 28, 2004, under Paragraph 4(c) of the Policy, this administrative proceeding is deemed to have commenced on that date.

Having reviewed the Complaint and all preceding and succeeding correspondence between the Center and the Registrar, in detail, the Panel agrees with the determination of the Center that the Complaint and its handling met the requirements of the Rules and the Supplemental Rules.

The Respondent was then provided with a 20 calendar day period, expiring on November 17, 2004, to file its Response with the Center and serve a copy of the Response on the Complainant.

As of November 18, 2004, the Center had not received a substantive Response to the Complaint from the Respondent; hence, the Center, in an email letter dated November 18, 2004, notified the Complainant and Respondent of the default of the Respondent.

Accordingly, pursuant to the Rules and Supplemental Rules, by e-mail letter dated November 29, 2004, the Center contacted the undersigned, Mr. Pete L. Michaelson, Esq., requesting his service as a Sole Panelist for this dispute. Subsequently, on the same day, Mr. Michaelson accepted and returned, by facsimile to the Center, a fully executed Statement of Acceptance and Declaration of Impartiality and Independence. The Center, through an e-mail letter dated November 30, 2004, notified the parties of the appointment of Mr. Michaelson as sole panelist.

Based on the deadline set forth in Paragraph 15 of the Rules, a decision was to be issued by the Panel to the Center on or before December 14, 2004.

This dispute concerns one domain name, specifically: <pepsico-afghanistan.com>.

The language of this proceeding is English.

4. Factual Background

A copy of the WhoIS registration records for the disputed domain name appears in Exhibit A to the Complaint. As indicated on these records, the Respondent registered the disputed domain name on January 18, 2004.

A. Complainant's "PEPSI" Marks

The Complainant owns numerous United States and foreign trademark registrations, for the marks "PEPSI" (including in Afghanistan) and "PEPSICO" (collectively the "PEPSI Marks") and on which this dispute is based. The Complainant has provided, in Exhibit H to the Complaint, evidence of representative examples of its US and counterpart foreign registrations for the mark "PEPSI", and, in Exhibit I, evidence of its various foreign registrations for the mark "PEPSICO". A small sample of the Complainant's US registrations for its "PEPSI" Marks is as follows:

- (a) PEPSI (block letters)
US registration 824,150; registered February 14, 1967; renewed

This mark was registered for use in connection with "soft drinks and syrups and concentrates for the preparation thereof" all in international class 15. This mark claims first use and first use in inter-state commerce dates of November 21, 1911.

- (b) PEPSI (block letters)
US registration 1,488,547; registered May 17, 1988

This mark was registered for use in connection with "clothing, namely sweatshirts, sweat bottoms, T-shirts, shirts, jeans, suspender jeans, jackets, pullovers and jerseys" all in international class 25. This mark claims first use and first use in inter-state commerce dates of October 31, 1986.

- (c) PEPSI (stylized)
US registration 2,100,417; registered September 23, 1997

This mark was registered for use in connection with "soft drinks" in international class 32. This mark claims first use and first use in inter-state commerce dates of November 30, 1996.

B. The Parties' Activities

For more than a century, the Complainant has continuously used the "PEPSI-COLA" name and mark, including its shortened version, "PEPSI", to identify one its brands of soft drinks and soft drink concentrates. The Complainant currently sells these drinks and concentrates in virtually all countries of the world.

The Complainant states that the mark "PEPSI" is one of the most famous marks in the world, with this mark being recognized across all geographical barriers, languages and cultures, and for various products even beyond soft drinks. In that regard, the Complainant has provided, in Exhibit C to the Complaint, a copy of page 128 from *The World's Greatest Brands* (© 1996, Interbrand Group, plc) indicating that the term "PEPSI" constitutes one of the most famous trademarks and brands in the world.

The mark "PEPSI-COLA" was first used in 1898 for soft drinks that were invented by Mr. Caleb Bradham in North Carolina, US. "PEPSI", the shortened version of the mark "PEPSI-COLA", was first used in 1911 in connection with soft drinks.

A 2003 valuation (a copy of which appears in Exhibit D to the Complaint) of the "PEPSI" brand and other brands conducted by *Business Week* and *Interbrand*, the latter being one of the world's largest branding companies, estimated the worth of the "PEPSI" brand to then be US \$11.78 billion and ranked this brand as the 23rd most valuable brand in the world. Further, an October 2001 study (a copy of which appears in Exhibit E) by AC Nielsen, a leading independent marketing information company, concluded that the "PEPSI" brand was the number two brand among the billion-dollar brands in the beverage category. Retail sales of the "PEPSI" soft drink alone in 2001 were over \$15 billion (a copy of the salient page of the Complainant's 2001 Annual Report appears in Exhibit F to the Complaint). Further, as indicated in *Brand Ranking Across 266 Categories in Grocery, Total U.S. – Food*, for the 52-week period ending November 5, 2000, as compiled by Information Resources, Inc. and a copy of which appears in Exhibit G, the "PEPSI-COLA" brand has then been ranked number 2 in the US food industry.

The Complainant intensely advertises its products, globally, through advertisements in, e.g., international magazines, newspapers, television, radio, outdoor signs and point-of-purchase displays, and through sponsorship of major cultural and sporting events. The approximate annual worldwide advertising and promotional expenses incurred by the Complainant since 1991 in respect of soft drink beverages sold under the "PEPSI" Marks exceed US \$200 million. The Complainant's promotion and exploitation of its marks "PEPSI" and "PEPSICO" (the latter of which has been in use since 1965) and all related sales, advertising, and promotional activities have generated and continue to generate enormous sales of "PEPSI" branded products throughout the world.

The Complainant also owns and uses numerous Internet domain names based on either the term "PEPSI" or "PEPSICO", including, e.g., <pepsi.com>, <pepsico.com>, <pepsiworld.com>, <pepsibusiness.com>, <pepsiretail.com>, <pepsifountain.com>, <pepsivending.com>, <pepsicojobs.com> and, of particular relevance, <pepsicoafghanistan.com>.

Through an exclusive bottling agreement dated August 31, 1991, the Complainant appointed the Respondent to be its exclusive bottler in Afghanistan for various products of the Complainant. See Affidavit of Robert K. Biggart, Deputy General Counsel of the Complainant, a copy of which appears in Exhibit K to the Complaint

(the “Biggart affidavit”). Under the bottling arrangement, the Respondent acknowledged the Complainant’s ownership of its trademarks and that the Respondent had no rights or interest in any of those marks. Clause 3 of this agreement states, in relevant part (pertinent provisions appear in a redacted copy of the agreement provided in Exhibit 1 to the Biggart affidavit):

“The decision of the Company [PepsiCo, Inc.] on all matters concerning its Trademarks shall be final and conclusive on, and not subject to question by, the Bottler [QWO Joint Stock Company]. ...

“The Bottler recognizes the Company’s ownership of the Trademarks and will not take any action which will prejudice or harm said Trademarks, or the Company’s ownership thereof, in any way. ...

“Nothing herein contained shall be construed as conferring upon the Bottler any right or interest in the Trademarks, or in their registrations or in any designs, copyrights, patents, trade names, signs, emblems, insignia, symbols and slogans, or other marks, used in connection with the Beverage [known and sold under the marks ‘PEPSI-COLA’ and ‘PEPSI’].”

Further, the 1991 agreement conferred no rights on the Respondent conduct any advertising or promotions in any media that was not specifically approved in writing and in advance by Complainant. In that regard, clause 18 of the agreement states:

“In order to insure consistency of image the Bottler will use only such advertising strategies for the Beverage as the Seller may develop for that market. In that connection, the Bottler will use only advertising and promotion materials furnished or caused to be furnished by the Seller or approved by it in writing and will not advertise the Beverage in or through media or engage in promotions of the Beverage, not approved by the Seller in writing”

Subsequently, the bottling relationship terminated. Since 1991, the Respondent has not commenced or performed any commercial production or bottling of the Complainant’s products in Afghanistan. Eleven years later, in 2002, the Respondent contacted the Complainant in order to once again become a bottler of certain of the Complainant’s products in Afghanistan, and claimed, in part, that the prior bottling relationship still existed despite the fact that the parties had not conducted any business together for over eleven years. (See Biggart affidavit). The Complainant did not appoint the Respondent as a bottler in Afghanistan and specifically rejected the Respondent’s claim of any continuing relationship. The Complainant states that, as of October 14, 2004 (date of the affidavit), no bottling or other relationship has materialized between the parties. (See Biggart affidavit).

Currently, as indicated by a hard-copy of a home page provided in Exhibit L to the Complaint, the Respondent uses the disputed domain name to resolve to a web page that features the Complainant’s mark “PEPSICO” and a globe design, along with a bottle of “PEPSI”. That web pages states that the Respondent will “launch Pepsi as the number one soft drink in Afghanistan”.

5. Parties' Contentions

A. Complainant

(i) Identical or Confusingly Similar

The Complainant contends that the disputed domain name is confusingly similar to the Complainant's "PEPSI" Marks inasmuch as that name fully incorporates the Complainant's marks "PEPSI" and "PEPSICO".

Further, the Complainant contends that the addition of the country name "Afghanistan" to the "PEPSICO" name and mark is of no import as it suggests to Internet users that the name is related to the Complainant or to the Complainant's business in Afghanistan. Those users who seek the Complainant's website by forming a domain name containing the Complainant's name and/or its marks, ostensibly with respect to its activities in Afghanistan, would instead likely be directed to the Respondent's site, thus creating a likelihood of confusion.

Moreover, given the identity between the disputed domain name and the Complainant's "PEPSI" Marks coupled with the Complainant's ownership of the domain name <pepsicoafghanistan.com>, the Complainant states that likelihood of confusion must be presumed, citing *PepsiCo, Inc. v. Paul J. Swider*, WIPO Case No. D2002-0561 (August 9, 2002); and *Chernow Communications, Inc. v. Jonathan D. Kimball*, WIPO Case No. D2000-0119 (May 18, 2000) itself citing to *Shirmax Retail Ltd. v. CES Marketing Group, Inc.*, Case No. AF0104 (*eResolution*).

Hence, the Complainant believes that it has satisfied the confusing similarity/identity requirement in Paragraph 4(a)(i) of the Policy.

(ii) Rights or Legitimate Interests

The Complainant contends that the Respondent has no rights or legitimate interests in the disputed domain name pursuant to Paragraph 4(a)(ii) of the Policy.

Specifically, the Complainant states that there is currently no relationship between the parties which would give rise to any license, permission or other right by which the Respondent could own or use any domain name incorporating the "PEPSI" Marks. In that regard, any relationship which resulted from the 1991 bottling agreement has long since been terminated, with no ensuing relationship having taken its place. Though the Respondent contacted the Complainant in 2002 to resume some relationship inasmuch as the Respondent believed that the prior relationship existed to some extent, the Complainant fully rejected the Respondent's overtures and hence did not appoint the Respondent as its bottler in Afghanistan. No relationship currently exists between the parties. Therefore, since the Respondent's use of the "PEPSI" Marks, including within the disputed domain name, is unauthorized, then, so contends the Complainant, that use indicates the Respondent's lack of any legitimate interests in that name.

Furthermore, the Complainant contends that, for two reasons, the 1991 agreement, specifically with reference to clauses 3 and 18 thereof, never gave the Respondent any rights to register or use any domain name that incorporated the "PEPSI" Marks:

- (a) presumably [as the Panel surmises, though the Complainant fails to so specifically state] since the agreement was silent as to domain names and the Internet had yet to be commercialized and was largely unknown in 1991, any

such use of the “PEPSI” Marks within a domain name could not be inferred from the silence; and

- (b) the Respondent was fully aware at the time it registered and began using the disputed domain name in January 2004 that it had no right or basis to do so without first receiving express authorization of the Complainant -- which was never provided.

(iii) Registered and Used in Bad Faith

The Complainant contends that, for various reasons, the Respondent has registered and is now using the disputed domain name in bad faith.

Specifically, the Respondent has registered the name, without authorization, that is identical to Complainant’s “PEPSI” Marks is itself evidence of bad faith.

Furthermore, the Respondent’s unauthorized current use, through its website, of the disputed domain name to falsely claim a relationship with the Complainant, when in fact none exists, and, through doing so, misappropriate and exploit the Complainant’s goodwill and the fame of its “PEPSI” Marks for the Respondent’s own commercial gain evidences bad faith use. In fact, the Complainant contends that, given the fame and reputation of those marks -- of which the Respondent was clearly aware when it registered the name and dating back to the 1991 agreement and its prior relationship with the Complainant, the Respondent’s only motivation in having done so could only have been to exploit those marks for its benefit, hence constituting bad faith registration.

Therefore, the Complainant concludes that the Respondent’s conduct constitutes bad faith registration and use under Paragraph 4(a)(iii) of the Policy.

B. Respondent

The Respondent failed to file any Response to the allegations raised in the Complaint.

6. Discussion and Findings

In view of the lack of a Response filed by the Respondent as required under Paragraph 5 of the Rules, this proceeding has proceeded by way of default. Hence, under paragraphs 5(e), 14(a) and 15(a) of the Rules, the Panel is directed to decide this administrative proceeding on the basis of the Complainant’s undisputed representations. In that regard and apart from judging this proceeding through mere default of the Respondent, the Panel makes the following specific findings.

A. Identical or Confusingly Similar

The Panel finds that confusion is likely to arise as a result of the Respondent’s use of the disputed domain name.

There is simply no question whatsoever that the “PEPSI” Marks, particularly the mark “PEPSI”, is clearly one of the most visible and recognized marks the world over and, consequently, has certainly achieved fame throughout the world. In fact, given the continuous usage of the mark by the Complainant and its predecessors beginning since 1911 -- now some 93+ years, coupled with the Complainant’s extensive

world-wide promotional activities over those years which continue to the present, this Panel can safely take judicial notice that there is likely to be relatively few places in this world where the mark “PEPSI” is not widely recognized, certainly in conjunction with the Complainant’s soft drinks.

In essence, the Panel finds that confusion unquestionably and inevitably arises as a result of the Respondents’ use of the disputed domain name as an addresses of its website. The Panel can not conceive of any situation where confusion would not likely arise out of the Respondents’ use of that name, particularly, as here, with the very same products with which the Complainant is known and its bottlers provide under license with the Complainant, or a transfer of that name to a third-party not affiliated with either the Complainant or the Respondent but for use with a website offering the very same or similar soft-drink products.

Specifically, first, the insertion of a hyphen between two portions of a domain name, such as “pepsico” and “afghanistan” to form <pepsico-afghanistant.com> as contrasted with a non-hyphenated version <pepsicoafghanistan.com> is so de minimus a variation as to have absolutely no effect on ameliorating user confusion. If one form of any such domain name is sufficiently similar to a mark, then the other form is just as similar as well. Accordingly, the Panel will ignore all such hyphens in its analysis. See, e.g., *Cable News Network LP, LLP v. Elie Khouri d/b/a Channel News Network et al* FA117876 (Nat. Arb. Forum December 16, 2002); *Southwest Airlines Co. v. TRN*, WIPO Case No. D2002-0893 (November 18, 2002) and *MPL Communications, Limited and MPL Communications, Inc. v. LOVEARTH.net*, FA 097086 (Nat. Arb. Forum, June 4, 2001).

Further, in the Panel’s view, forming a domain name, such as the disputed domain name here, by appending a country name (here Afghanistan) to a complainant’s mark (here being “PEPSICO”) is completely insufficient to dispel user confusion from inevitably occurring. In fact, doing so very likely exacerbates rather than ameliorates the confusion. The simple reason is that, given well-known and widely followed naming conventions in forming domain names, Internet users in a given country or who have an interest in that country and desire to reach a website of a corporation or other entity operating in that country would likely think to construct a domain name by simply appending the name of the country to the name or mark associated with that corporation or entity followed by the general commercial gTLD “.com”. Consequently, it stands to reason that Internet users in or having an interest in Afghanistan and who seek to reach the Complainant’s site for information on its “PEPSI” or “PEPSICO” branded products in Afghanistan would, as a first measure, instinctively form a domain name containing either “Pepsi” or “Pepsico” followed by “Afghanistan” and ending in “.com”, and possibly hyphenating the name or not. Not surprisingly, the Respondent has formed the disputed domain name in precisely that way and did so clearly to cause and then commercially benefit from whatever user confusion would inevitably result there from.

See, e.g., *AT&T Corp. v. WorldclassMedia.com*, WIPO Case No. D2000-0553 (July 28, 2000) where the panel found confusing similarity to the mark AT&T by domain names formed by including a geographic descriptor following the term ATT. See also *America Online, Inc. v. Dolphin@Heart*, WIPO Case No. D2000-0713 (August 24, 2000) in which the panel there held: “The addition of the name of a place to a service mark, such as the addition of ‘France’ to ‘AOL’ is a common method for specifying the location of business services provided under the service mark. The addition of a place name generally does not alter the underlying mark to which it is added.” The panel then concluded: “A consumer or user of the Internet viewing the

address ‘www.aolfrance.com’ is likely to assume that Complainant is the sponsor of or associated with the website identified by the disputed domain name, particularly in light of the fact that Complainant routinely uses its ‘AOL’ service mark in combination with country names in its advertisements on the Internet.” See also *Cable News Network cited supra*, where the panel, including this Panel, found confusion likely to occur between the mark “CNN” and a wide number of domain names that each included this mark followed by a different country name. For similar holdings, see, *Wal-Mart Stores, Inc. v. Walmarket Canada*, WIPO Case No. D2000-0150 (May 2, 2000) and *Cellular One Group v. Paul Brien*, WIPO Case No. D2000-0028 (March 10, 2000).

Hence, this Panel concludes that the resulting confusion would undoubtedly cause Internet users intending to access a website for the Complainant’s Afghanistan operations, but instead who reach a website through the disputed domain name, to think that an affiliation of some sort exists between the Complainant and the Respondent, when, in fact, no such relationship exists at all. See, also, e.g., *Lockheed Martin Corporation v. Deborah Teramani*, WIPO Case No. D2004-0836 (December 1, 2004); *Register.com, Inc. v. Wolfgang Reile a/k/a RWG Internet et al* FA208576 (Nat. Arb. Forum January 27, 2004); *Caesars World, Inc. and Park Place Entertainment Corporation v. Japan Nippon*, WIPO Case No. D2003-0615 (September 30, 2003); *Leiner Health Servs. Corp. v. ESJ Nutritional Prods.*, FA 173362 (Nat. Arb. Forum September 16, 2003); *Am. Family Life Assurance Co. of Columbus v. defaultdata.com*, FA 123896 (Nat. Arb. Forum October 14, 2002); *AT&T Corp. v. Roman Abreu d/b/a Smartalk Wireless*, WIPO Case No. D2002-0605 (September 11, 2002); *Pfizer Inc., supra*; *L.F.P., Inc. v. B and J Props.*, FA 109697 (Nat. Arb. Forum May 30, 2002); *Peter Frampton v. Frampton Enterprises, Inc.*, WIPO Case No. D2002-0141 (April 17, 2002); *Spence-Chapin Servs. to Families and Children v. Wynman*, FA 100492 (Nat. Arb. Forum December 10, 2001); *MPL Communications v. LOVEARTH.net, supra*; *Meijer, Inc. v. Porksandwich Web Servs.*, FA 97186 (Nat. Arb. Forum July 6, 2001); *MPL Communications v. IWebAddress.com*, FA 97092 (Nat. Arb. Forum June 4, 2001); *American Home Products Corporation v. Ben Malgioglio*, WIPO Case No. D2000-1602 (February 19, 2001); *Surface Protection Industries, Inc. v. The Webposters a/k/a Mark’s Paint Store, Inc.*, WIPO Case No. D2000-1613 (February 5, 2001); *Dollar Fin. Group, Inc. v. VQM NET*, FA 96101 (Nat. Arb. Forum January 25, 2001); *eBay Inc., v. G L Liadis Computing, Ltd. and John L. Liadis d/b/a G L Liadis Computing Ltd.*, WIPO Case No. D2000-1463 (January 10, 2001); *Treeforms, Inc. v. Cayne Indus. Sales Corp.*, FA 95856 (Nat. Arb. Forum December 18, 2000); see also *Pep Boys Manny, Moe and Jack of CA v. E-Commerce Today, Ltd.*, AF-0145 (eResolution May 3, 2000).

Therefore, the Panel finds that the disputed domain name sufficiently resembles the Complainant’s “PEPSI” Marks as to cause confusion; hence, the Complainant has shown sufficient similarity between its marks and the disputed domain name under Paragraph 4(a)(i) of the Policy.

B. Rights or Legitimate Interests

The Panel believes that the Respondent has yet to provide any basis that would legitimize any claim she has to the disputed domain name and moreover is extremely unlikely to ever be in such a position to legitimately make such a claim.

The simple reason is that the disputed domain name contains the Complainant’s marks “PEPSI” and “PEPSICO” under which Complainant provides various products, including its “PEPSI” branded soft drink for which it is renown. The 1991 bottling

agreement under which the Complainant authorized the Respondent to use these marks has long since terminated.

Though the Complainant concedes that the Respondent believes that the prior bottling relationship between it and the Complainant still exists to some degree, the Respondent simply failed to file a response, let alone one which would support its assertion, hence implicitly supporting and lending sufficient credence to the Complainant's statement that whatever relationship previously existed between the parties has long since been terminated. Inasmuch as the Complainant expressly rejected the Respondent's entreaties to revive any such relationship, then, it stands to reason that whatever authorization the Complainant had previously provided to the Respondent to use the "PEPSI" Marks also terminated as well. Consequently, any use which the Respondent currently makes of the Complainant's "PEPSI" Marks, including the registration and use of the disputed domain name, in conjunction with the specific goods which the Complainant provides under those marks would directly violate the exclusive trademark rights now residing in the Complainant. See, e.g., *Lockheed, Register.com, Leiner Health Servs., AT&T, MPL Communications* FA 97086 and FA 97092, and *Treeforms*, all cited *supra*.

The Respondent's apparent intent of opportunistic use, which at its essence relies on instigating and exacerbating user confusion and hence at the very least tarnishing the Complainant's marks and its reputation therein, can not and will not constitute *bona fide* commercial or fair use sufficient to legitimize any rights and interests the Respondent might have in the disputed domain name. See, e.g., *Register.com; Leiner Health Servs. Corp.*, and *Frampton*, all cited *supra*.

Moreover, there is absolutely no evidence of record that the Respondent itself, apart from the prior relationship it had with the Complainant -- now terminated many years ago, has ever been commonly known by the disputed domain name. Nor, in fact, in view of the fame inherent in the "PEPSI" Marks, could the Respondent ever likely have attained such common recognition, at least in conjunction with any of the goods offered by the Complainant, without infringing on the exclusive trademark rights of the Complainant.

Accordingly, the Panel is not persuaded that the Respondent has any rights or legitimate interests or, based on current facts provided to the Panel, is likely to acquire any rights or legitimate interests in the disputed domain name under any provision of Paragraph 4(c) of the Policy.

Thus, the Panel finds that the Respondent has no rights or legitimate interests in the disputed domain name within Paragraph 4(a)(ii) of the Policy.

C. Registered and Used in Bad Faith

The Panel firmly believes that the Respondent's actions in registering and using the disputed domain name constitute bad faith registration and use.

As discussed above, it is totally inconceivable to this Panel that the Respondent was unaware of the Complainant's "PEPSI" Marks when the former registered the disputed domain name on January 18, 2004. In fact, not only did the Respondent have express knowledge of these marks and the total lack of any rights which it had in those marks, the Respondent acted in total disregard of that knowledge in an effort to create and then opportunistically exploit, for its own pecuniary benefit, the inevitable user confusion that would flow from its actions.

Specifically, through the prior 1991 bottling agreement between it and the Complainant and with reference to clause 3 thereof, the Respondent not only recognized the Complainant's complete ownership of these marks but explicitly agreed that the Respondent had no right or interest whatsoever in any of these marks. Nevertheless, and in spite of having express knowledge of the Complainant's ongoing trademark rights, the Respondent registered the disputed domain name, which included the Complainant's marks "PEPSI" and "PEPSICO", and then used that name in conjunction with a website through which the Respondent claimed to be a future source of the Complainant's products when, in fact, the Respondent had absolutely no basis to make such a claim.

If the Respondent did not intend to opportunistically exploit the Complainant's "PEPSI" Marks for its own pecuniary benefit when it registered the disputed domain name and then used that name to address its own website through which the Respondent illicitly promoted itself as a source of the Complainant's soft-drink product, then what other intention could the Respondent possibly have had in doing so? None which this Panel is aware.

Such opportunistic exploitation constitutes bad faith in and of itself under Paragraph 4(a)(iii) and more particularly the general provision of Paragraph 4(b) of the Policy. See, e.g., *Lockheed* and *Register.com*, both cited *supra*.

Thus, the Panel concludes that the Complainant has provided sufficient proof of its allegations to establish a *prima facie* case under Paragraph 4(a) of the Policy upon which the relief it now seeks can be granted.

7. Decision

Accordingly, under Paragraphs 4(i) of the Policy and 15 of the Rules, the Panel now grants the relief sought by the Complainant.

The disputed domain name, <pepsico-afghanistan.com>, is ordered transferred to the Complainant.

Peter L. Michaelson, Esq.
Sole Panelist

Dated: December 13, 2004