

CANADIAN INTERNET REGISTRATION AUTHORITY

DOMAIN NAME DISPUTE RESOLUTION POLICY

COMPLAINT

Dispute Number: 00002
Domain Name: browneco.ca
Complainant: Browne & Co. Ltd./Lteé
Registrant: Bluebird Industries
Registrar: Tucows.com Co.
Panellist: Denis N. Magnusson
Service Provider: Resolution Canada Inc.

October 22, 2002

Decision

Browne & Co. Ltd. v. Bluebird Industries

Re: browneco.ca

PARTIES

The Complainant is Browne & Co. Ltd./Lteé, of 100 Esna Park Drive, Markham Ontario, L3R 1E3, represented by Aird & Berlis, LLP, Toronto, Ontario.

The Registrant is Bluebird Industries, P.O. Box 4000, Montreal, Quebec, H4E 1A4.¹

DISPUTED DOMAIN NAME AND REGISTRAR

The domain name in dispute is **browneco.ca**.

The Registrar of the domain name is Tucows.com Co.

The domain name was registered on December 14, 2000.

PANEL

The undersigned, acting as a one person Panel, certifies that he has acted independently and impartially and that to the best of his knowledge he has no conflict in serving as Panelist in this proceeding.

Denis N. Magnusson as Panelist.

¹ This is the address still listed with the Registrar for the Registrant of the domain name browneco.ca. It is not a functioning mailing address. The Provider has discovered that it had to direct mail to the Registrant, Bluebird Industries, at 4000 S. Patrick St., Montreal Quebec, H4E 1A4

SUMMARY OF DECISION

The Provider gave deemed actual Notice of the Complaint to the Registrant² which established the Date of the Commencement of Proceedings as August 28, 2002.³

No Response being received from the Registrant, the Panel decided the matter on the basis of the Complaint.⁴

The Complaint established that the Complainant used the Mark, the trade name Browne & Co. Ltd., since at least as early as 1991 and that the Complainant continued to use that trade name. Such use created a reputation attached to the trade name which caused the trade name to identify the Complainant's business when the trade name is used in the marketplace. Thus, the Complaint established that the Complainant had Rights in the Mark, acquired prior to the date of the registration of the domain name browneco.ca on September 14, 2000, and that the Complainant continues to have Rights in the Mark.⁵

The domain name browneco.ca greatly resembles the Mark, the trade name Browne & Co. Ltd., in appearance, in sound and in the ideas suggested by the Mark. This resemblance includes, when the reputation established by the Complainant's use of the Mark is taken into account, resemblance in the idea of pointing to the Complainant's business. Thus, the Complaint established that the domain name browneco.ca is Confusingly Similar to the Mark, the trade name Browne & Co. Ltd, such that the domain name is likely to be mistaken for the Mark.⁶

The Complaint established that the Complainant and Registrant are competitors in business. The Complaint established that the Registrant used the domain name to direct Internet users to the Registrant's business Internet site. Thus, the Complaint established that the Registrant registered the domain name in bad faith, primarily for the purpose of disrupting the business of the Complainant.⁷

The Complaint gave proof that that the Registrant has no legitimate interest, as described in paragraph 3.7, in the domain name browneco.ca⁸

The Panel finds for the Complainant and orders that the Registrant, Bluebird Industries Inc., transfer the domain name browneco.ca to the Complainant Browne & Co. Ltd./Ltée.

PROCEDURAL HISTORY

A. The Complaint

² Rules, paras. 4.3, 2.1, 2.6.

³ Rules, paras. 1.1, 4.4, 2.6.

⁴ Rules, para. 5.8.

⁵ Policy, para. 4.1(a), 3.2(a), 3.3(a), 3.5(c).

⁶ Policy, paras. 4.1(a), 3.4.

⁷ Policy, paras. 4.1(b), 3.7(c).

⁸ Policy, paras. 4.1(c), 3.6.

The Complainant submitted this Complaint on August 20, 2002 to the dispute resolution Provider, Resolutions Canada (“Provider”), in electronic form and in hard copies.

The Provider examined the form of the Complaint for compliance with the requirements of the Canadian Internet Registration Authority (“CIRA”) *Domain Name Dispute Resolution Policy* (“Policy”) and *Domain Name Dispute Resolution Rules* (“Rules”) and found the Complaint to be in compliance.

The Provider sent notice of the Complaint to the Registrant, in both official languages, electronically on August 28, 2002. Because of an error in the address of the Registrant as recorded in the Registrar’s records, the Provider was not able to deliver hard copies of the Complaint to the Respondent until September 10, 2002.

B. No Response

The Notice of Complaint sent to the Registrant stated that, in accordance with Rules, para. 5.1, the Registrant had 20 days “from the Date of Commencement of Proceeding on August 28, 2002” to file a Response with Resolution Canada⁹

No Response from the Registrant was received by the Provider.

C. The Panel

There being no Response received from the Registrant, the Complainant was offered the opportunity to convert from a three member Panel to a one member Panel, as permitted by Rules, para. 6.5. The Complainant chose to have a one member panel and the Provider selected the undersigned, Denis N. Magnusson, as the single member of the Panel.

The Provider gave notice of the appointment of the Panel to the Complainant, Registrant and Registrar on October 2, 2002 and forwarded the file for the proceeding to the Panel.

RELIEF SOUGHT

The Complainant requests that the domain name be transferred from the Registrant to the Complainant.

JURISDICTION

The CIRA Registration Agreement governing dot ca domain names provides in Article 3.1(a)(iv) that throughout the term of the registration agreement the Registrant shall comply with the CIRA Dispute Resolution Policy.

Under Policy, para. 3.1 the Registrant of the domain name browneco.ca must submit to this dispute resolution proceeding as

⁹ CIRA *Domain Name Dispute Resolution Rules*, Posted November 29, 2001, para. 1.3 sets out the rules for calculating time limits.

- a) the Complainant has asserted that the Registrant's dot-ca name is confusingly similar to a Mark in which the Complainant claims Rights prior to the date of the domain name registration,
- b) the Complainant has asserted that the Registrant has no legitimate interest in the domain name, and
- c) the Complainant has asserted that the Registrant has registered the domain name in bad faith.

APPLICABLE LAW

Rules, para. 12.1 requires the Panel to apply the laws of Ontario or, if the Registrant is domiciled in Quebec, the laws of Quebec . . . and in any event, the laws of Canada applicable The Complainant has submitted that “the Complaint should be resolved in a manner consistent with Canadian trade mark law.”¹⁰

The non-working mailing address listed with the Registrar for the Registrant includes Montreal, Quebec in that address. The Provider, while not able to mail hard copies to that address, managed to find an apparently working courier address, also in Montreal, to which the hard copy Notice was sent. No acknowledgement of the Notice, nor any Response to the Complaint has been received from the Registrant. The Panel could speculate that the Registrant's domicile is Quebec, but in the circumstances, particularly the lack of any acknowledgement of, or Response to the Complaint, that would be speculation. In the circumstances, particularly as the Complainant is domiciled in Ontario, the Panel will apply the law of Ontario, should there be any difference in applying the law of Ontario in comparison to the law of Quebec.¹¹

RULINGS ON PROCEDURAL MATTERS

A. Effective Notice of Complaint to Registrant

1. Policy Requires Actual Receipt of Notice

Rules, para. 4.3 requires the Provider promptly to send the Complaint to the Registrant in the manner prescribed in Rules, para. 2.1. Rules, para. 2.1 requires the Provider “to use whatever reasonably available means are likely to give actual notice to the Registrant [emphasis added].”

Further, Rules, para. 1.1(c) defines “Date of Commencement of a Proceeding” as “the date on which the Provider gives the Parties notice of the Proceeding pursuant to paragraph 4.4. [emphasis added].” Paragraph 4.4, subtitled “Notice of Commencement of

¹⁰ Complaint, para. 30.

¹¹ The laws of Canada appear to be applicable in the form of s. 7 of the *Trade-Marks Act*, RSC 1985, c T-13, notably s. 7(b). That provision generally simply restates the common law (of Ontario) of passing off. While 7(e) has been found beyond the federal power to legislate as being a matter of provincial property and civil rights jurisdiction, s. 7(b) has survived such challenges. *Asbjorn Horgard A/S v. Gibbs/Nortac Industries Ltd.* [1987] F.C.J. No. 245; 14 C.P.R. (3d) 548 (FCA).

Proceeding”, refers to “the actual or deemed receipt of the Complaint by the Registrant [emphasis added].”

2. Policy Deems Receipt of Notice

The Rules also determine whether and when a Notice has been actually received by a Registrant.

Rules, para. 2.6 provides that when a communication is sent to an apparently functioning address, that communication will be deemed to have been actually received by the Registrant under the condition stipulated for each of the modes: facsimile, post, courier or electronic. Further, Rules, para. 2.6 provides that when more than one mode of communication is used which might result in different deemed dates of receipt under para. 2.6, the earliest date upon which a communication is deemed to be received under para. 2.6 will govern.

3. Notice Can Be Sent Either Electronically or Hard Copy

Rules, para. 2.1 states clearly that all that is required is that actual notice be delivered by any one reasonably available means, without restricting the choice of means. The Rules, para. 2.1 does refer to delivery of notices by electronic means and by specific hard copy means, namely facsimile, post and courier.

A quick reading of Rules, para. 2.1 might lead to the conclusion that to gain the benefit of deemed receipt of a notice, the notice must be delivered both by electronic and by hard copy means. However, Rules, paras. 2.1 and 2.6 indicate clearly that all that is required is actual notice by any one reasonable means, and that notice sent to one of the apparently functioning electronic or hard copy addresses will be deemed to be received under the conditions noted in para. 2.6. However, as was done in this case, forwarding both electronic and hard copy notices is a good practice, which ought to be followed as far as possible by Providers.

While not relevant in this proceeding, the Rules also make provision for deemed receipt of a notice when the Provider has difficulty in discovering any apparently functioning address for the Registrant. Rules, para. 2.1 provides that if the Provider makes best efforts to deliver the Notice to both hard copy addresses and electronic addresses recorded with the Registrar, Notice will be deemed to have been given.

4. Date of Commencement of Proceeding

Rules, para. 1.1(c) defines the Date of Commencement of Proceeding as “the date on which the Provider gives the Parties notice of the Proceeding pursuant to para. 4.4.” Para. 4.4 defines this date as the date of the actual or deemed receipt of the notice by the Registrant pursuant to para. 2.6.

The Date of Commencement of Proceeding is important, in part, because the Rules give the Registrant 20 days, measured from that date, within which to file a Response to the Complaint. A Registrant’s failure to file a Response within that time limit will result in the Complaint being decided on the basis of the Complaint alone. Ensuring that the Date

of Commencement of Proceeding has been appropriately determined under the Rules will be essential to ensuring that the Registrant has been dealt with fairly under the Rules with respect to having notice and having the stipulated time within which to file a Response.

5. Rules on Notice and Date of Commencement Applied to This Proceeding

The Panel has devoted some attention to the Rules governing Notice and the Date of Commencement of Proceeding as the facts might raise questions about the Provider's compliance with the Notice and Date of Commencement rules.

Electronic notice was sent to the Registrant on August 28, 2002. There was no acknowledgement received by the Provider from the Registrant that such notice was actually received on that date or at all. The hard copy notice was not able to be delivered until September 10, 2002, 13 days later. The Registrant did not acknowledge receipt of the hard copy. In the electronic notice, the Provider had stated that the Date of Commencement of Proceeding was August 28, 2002, the date upon which the electronic notice was sent.

Rules, para. 2.6(c) provides that an electronic communication will be deemed to have been received on the date of its transmission, August 28, 2002 in this proceeding, if a "record of transmission, which includes the contents of the email and the date of transmission, is verifiable". Such a verifiable record of transmission is in the possession of the Provider.

The Provider also attempted to send hard copies of the Complaint to the Registrant. Since no facsimile address nor useable courier address was listed with the Registrar for the Registrant, the Provider was prepared to use the postal address listed with the Registrar promptly to deliver hard copies of the Complaint to the Registrant. However, that address was not a valid mailing address. Consequently, the hard copies were not delivered until a working hard copy address could be identified. The hard copies were not delivered to the Registrant, by courier, until September 10, 2002. The courier copies would be deemed to have been received by the Registrant under Rules, para. 2.6(b), as the date marked on the courier receipt.

Rule 2.6 also provides that "where the communication is sent by more than one means, the earliest date on which the communication is deemed to be received will be deemed to be the date of receipt." The electronic communication being deemed to be received on August 28, 2002, that is the deemed date of receipt of Notice of Complaint.

Rules, para. 2.6 does qualify the provisions on deemed receipt of communications sent to apparently functioning electronic and hard copy addresses by the qualification "except as otherwise decided . . . by a Panel". That qualification would permit a Panel to relieve against unfairness, in some exceptional cases, caused by Rules, para. 2.6 deeming actual receipt of notice. Such exceptional circumstances did not occur in this proceeding.¹²

¹² An example of exceptional circumstances might be a case in which receipt of the schedules attached to a Notice were judged to be critical in the particular circumstances to the Registrant receiving adequate notice, but when it might not be possible to attach the schedules to the electronic notice. If, in such hypothetical

Thus, the Notice of Complaint is deemed to have been received, and the Date of Commencement of the Proceeding has been properly set, both as of August 28, 2002.

B. Effect of Failure of Registrant to File a Response

Rules, para. 5.8 deals with proceedings, such as this one, in which the Registrant has failed to file a Response:

5.8 No Reponse If Registrant does not submit a Response within the period for submission of a Response, the Panel shall decide the Proceeding on the basis of the Complaint.

The Complaint states that the Complainant has used the trade name “Browne & Co. Ltd.” in association with the business of selling and distributing glassware and cookware since at least as early as 1991. The Complaint also states that the Complainant has used the trademark “Browne” in association with the wares glassware and cookware since at least as early as 1991.

The Complainant has tendered copies of printed business materials as evidence of its use of these Marks. This print evidence included: a business card of one of its officers, company letterhead, company purchase order forms, company fax cover sheets, product brochures and a print-out from its web site, operated under the domain name “browneco.com”. Each of these exhibits features the trade name “Browne & Co. Ltd.” and many of them feature use of the trademark “Browne”.

Since no Response has been filed by the Registrant, the Panel is required to decide the case “on the basis of the Complaint”. This requirement does not preclude the Panel from assessing the integrity and credibility of the evidence as disclosed in the Complaint. In these Proceedings the Panel finds no reason to discount the evidence and the submissions on facts as contained in the Complaint.

FINDINGS & DISCUSSION

A. Requirements for Complainant to Succeed Under the Policy

Policy, para. 4.1 sets out the requirements for the Complainant to succeed in this proceeding.

case, an electronic notice was sent to an apparently functioning address, but a hard copy was deliverable only long after the deemed date of receipt of the electronic notice, a Panel might rule that Notice ought not to be deemed actually received until the hard copy notice with the attached schedules had been deemed delivered under para. 2.6. In this proceeding receipt of the schedules is, on the face of the Complaint, not essential to the receipt of adequate Notice of the Complaint. Further, the Complainant and Registrant had been in a business relationship of some duration prior to the making of the Complaint, the effect of which would have been to give the Registrant prior actual knowledge of much of the material referred to in the Schedules.

The Complainant must prove two things to the usual standard of proof in non-criminal law matters in Canadian law, that is, on the balance of probabilities:

a) that the domain name **browneco.ca** is confusingly similar to one of the Complainant's Marks, namely the trade name **Browne & Co. Ltd.** or the unregistered trademark **Browne**, in which the Complainant had Rights prior to the registration of the domain name **browneco.ca** by the Respondent, that is, prior to December 14, 2000. (Policy para. 3.3 sets out the circumstances in which a person has Rights in a Mark.)

b) that the Registrant has registered the domain name **browneco.ca** in bad faith as described in Policy para. 3.7

Further the Complainant must provide some evidence:

c) that the Registrant has no legitimate interest, as described in Policy para. 3.7, in the domain name **browneco.ca**.

B. Complainant's Marks: Trade name and Trademark

To succeed in this proceeding the Complainant must first show on the balance of probabilities (Policy, para. 3.1(a)),

that the Registrant's domain name is confusingly similar to a Mark in which the Complainant had Rights prior to the date of the registration of the domain name and continues to have such Rights [emphasis added].

Policy, para. 3.2(a) defines "Mark" as including a "trade-mark" or a "trade name".

The Complainant has alleged that the registered domain name is confusingly similar to two Marks, the trade name Browne & Co. Ltd. and the trademark Browne, in both of which the Complainant claims Rights which antedate the registration of the domain name. To succeed in this Proceeding, the Complainant need show that domain name is confusingly similar to only one of the trade name or the trade-mark.

In this proceeding the Panel has focused first on the Complaint with respect to its claimed Mark, the trade name Browne & Co. Ltd.¹³

The Policy does not expressly define "trade name". However, a conventional definition of "trade name" is offered in the federal *Trade-Marks Act*:

"trade-name" means the name under which any business is carried on, whether or not it is the name of a corporation, a partnership or an individual;¹⁴

¹³ If the Complainant is found to have Rights in that trade name which antedate the registration of the domain name, and if the domain name is found to be confusingly similar to that trade name, it will be unnecessary to consider the Complainant's rights in the trademark and the issue of confusing similarity between the domain name and trademark.

¹⁴ *Trade-Marks Act*, R.S.C., 1985, c. T-13, s. 2.

C. Does the Complainant Have Rights in the Trade Name “Browne & Co. Ltd.”?

Incorporation laws require the incorporators to select a corporation name which is formally allocated to the corporation upon incorporation.¹⁵ The Complaint states that the Complainant is a corporation incorporated under the laws of Ontario.¹⁶

Policy, para. 3.2(a) indicates that Rights in a Mark in the form of a trade name are not acquired merely through the formal legal adoption of a business name, such as the recognition of a corporation name under a provincial or the federal business corporation statutes. Para. 3.2(a) defines “Mark” as including a trade name, only:

that has been used in Canada by a person . . . for the purpose of distinguishing the . . . business of that person . . . from the . . . business of another person.”

CIRA Policy, para. 3.5, states that

a Mark is deemed to be . . . used in association with . . . a business, if the Mark is displayed in the operating, advertising or promoting of the business.

The Policy requirement that in order for trade name rights to inhere in a business name, a business name must have been actually used as a trade name, and not merely be formally adopted or approved as a business name, accurately reflects the history and current state of Canadian business name and trade name law. As the business name in issue in this proceeding is a corporation name, this discussion deals exclusively with the relationship among corporation name, trade name and domain name law.

Historically, under incorporation law the registration of a corporation name merely precluded another incorporator from registering another corporation, under that same incorporation statute, under that same name.¹⁷ Historically and currently, registration of a

¹⁵ *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 8(2). If the incorporators fail to select a name, the incorporation statute prescribes that the corporation be allocated a “number name”.

¹⁶ Complaint, para. 4, *re* Canadian Presence Requirements. An on-line search through ONCORP Direct shows an active Ontario corporation: Corp. No.: 000969859, Corporate Name: Browne & Co. Limited, Incorporation Date: 1991-12-31. A Corporation Profile Report for this Corporation secured on-line through ONCORP Direct indicates a registered office address for this corporation which is identical to that given in the Complaint for the Complainant. The date of incorporation also coincides with the Complainant’s statement that it has used the trade name in association with its business at least as early as 1991, Complaint, para. 9.

¹⁷ Historically, the processes for selecting and securing approval of a corporation name were focused simply on securing a name that was not identical to a corporation name that was already in use for a corporation under the jurisdiction of incorporation. In the early 1970’s reforms spearheaded by then federal Assistant Deputy Minister for Corporate Affairs, Consumer & Corporate Affairs Canada, John L. Howard, Q.C., led to better integration of business name selection into the established framework of trade name and trademark rights long protected by passing off and trademark law. The most obvious manifestations of this integration are the expanded criteria for the denial of selected corporation names reflecting others’ existing trade name and trademark rights. The criteria are enforced by the requirement for a NUANS search as a condition for securing approval of a selected corporation name for a new corporation under federal incorporation law, and under the incorporation laws of most Canadian provinces. The NUANS search is intended to identify trade names and trademarks already in use and thus likely to be subject to already acquired rights which may be confusingly similar to the particular name proposed for a new business

corporation name does not ensure that the corporation can actually use its registered name free of liability to any other business entity already using the same or a similar name.¹⁸ Any conflict among business names in use is dealt with under the law of passing off and/or registered trademarks, both of which, in effect, trump corporation name registration with respect to actual use of the corporation name.

Under the law of passing off, a corporation will be unable to claim any rights to preclude another business from using the same or a similar name unless that corporation has actually used its name in business activity.¹⁹ Passing off does not protect the name itself. Passing off protects the business reputation, among customers and others dealing with the business, which has come to be attached to the name through the actual use of that name by the business in business activity. Thus, such actual use of the business name is an essential threshold which must be crossed before any rights inhere in the business name to exclude others from using the same or a similar business name. It is this requirement, reflecting passing off law, which appears to have been incorporated in the Policy, paras. 3.1(a), 3.2(a), 3.3(a) and 3.5(c)

The Complainant states that it has used the trade name Browne & Co. Ltd. in association with its business since at least as early as 1991.²⁰ The Complainant has submitted examples of the Complainant's use of the trade name Browne & Co. Ltd. in the form of copies of a business card of one of its officers, company letterhead, purchase orders, fax cover sheets, product brochures and a print-out from the Complainant's web site operated under the domain name browneco.com. Each of these examples includes the name "Browne & Co. Ltd."²¹. Complainant's claim and evidence of its use of the trade name Browne & Co. Ltd. is not contradicted by any Response from the Registrant.

The Panel concludes that the Complainant has shown that it has used the trade name Browne & Co. Ltd. since at least 1991, and that it continues to use that trade name as required by Policy, paras. 3.1, 3.2 and 3.5. Thus, the panel concludes that the Complainant has shown that it had Rights in the trade name Browne & Co. Ltd. prior to the date of the domain name registration, December 14, 2000, and that the Complainant continues to have Rights in such trade name.

D. Confusingly Similar

corporation. If such confusingly similar trade name or trademark already in use is discovered, the incorporator must select another name.

¹⁸ Other business entities using names within the jurisdiction, and so acquiring rights in such names within the jurisdiction, would include local partnerships and sole proprietorships, and often partnerships, sole proprietorships and corporations which had been formed or incorporated under the laws of another jurisdiction but which are also doing business within the jurisdiction.

¹⁹ See Fox, Harold, G., *The Canadian Law of Trade Marks and Unfair Competition*, 3rd Ed., p. 576: "A trade name, in order to be protected, must have been actually adopted and used by the plaintiff in his business, for there is no absolute right to the protection of a name apart from a trade or business.", citing cases including *Gattuso et al. v. Gattuso Corp. Ltd.*, [1968] 2 Ex. C.R. 609, 56 C.P.R. 109, 39 Fox Pat. C. 124. See also *Hearthside Inc. v. Brooks Manufacturing Co. Inc.* (1979), 55 CPR (2d) 157 (TMOB) and *Huk-A-Poo Sportswear Inc. v. Destro Enterprises Ltd* (1979), 46 CPR (2d) 147 (TMOB).

²⁰ Complaint, para. 9.

²¹ Complaint, para. 10, Schedules B, C, D, E, F, G, H, I, J, K, L, M, and N.

1. The Policy Requirement

Policy, para. 3.1(a) and 4.1(a) require the Complainant to establish that:
the Registrant's [browneco.ca] domain name is Confusingly Similar to a Mark [the trade name "Browne & Co. Ltd." in which the Complainant had Rights [emphasis added].

Policy, para. 3.4 states that
a domain name is Confusingly Similar to a Mark if the domain name so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely to be mistaken for the Mark.

2. Interpretation of "Confusingly Similar"

a) Introduction

The test "confusingly similar" is, in part, the same language that appears in the corresponding provision of the ICANN Uniform Domain Name Dispute Resolution Policy, which uses the test "identical or confusingly similar".²² The separate words "confusing" and "similar" have a long history in common law²³ countries' trademark, trade name and passing off law.

b) "Similar"

With the enactment of trademark registration statutes beginning in the 19th century, it was common to set the test of another's infringement of a business's rights in a trademark in terms of whether:

- the alleged infringer's mark or name was "similar" to the complainant's mark or name, and
- whether the alleged infringer had used its mark in association with products or a business that were "similar" to the complainant's products or business.²⁴

Tests of infringement of trademark or trade name rights which were framed in terms of the sameness or the degree of similarity of the complainant's and alleged infringer's marks or names caused the courts to focus on a comparison of the marks themselves. This comparison was often made completely detached from the actual or likely effect of the use of the two marks in communicating messages to the public about the products or

²² Para. 4(a)(i). The test in that paragraph is "identical or confusingly similar".

²³ "Common law" in the sense of countries, the legal heritage of which is traced to England, e.g., Canada (outside Quebec), the United States, Australia, New Zealand, and whose laws are pronounced in English.

²⁴ For example, Canadian trademark legislation, enacted in 1932, which preceded the current form of the trademark statute, provided that a business with rights in a trademark or trade name could prevent others from using the same or a "similar" mark on the same or "similar" wares as the first business. *The Unfair Competition Act, 1932*, S.C. 1932, c. 38, ss. 3(c), 5, 7, 8, 10. Canadian trademark legislation prior to the 1932 Act used the synonym of similar, "imitation", in particular in prohibiting the use of any "fraudulent imitation" of a mark or name in which rights already existed, *The Trade Mark and Design Act*, RSC 1927, c. 201, s. 19, and predecessor acts.

businesses in association with which the marks were used.²⁵ There was a tendency to assess and to compare the two marks, at the most basic level, simply as two particular sequences of letters of the alphabet. At a second level, the courts would assess and compare the two marks for the resemblance in meanings denoted and connoted by any words in the two marks. Such second level assessments could involve consultation of dictionaries, encyclopedias and other reference sources. However, even when the comparisons were expanded to include meanings, the comparisons continued to be applied largely to the two marks in the abstract (for example, as two words written down on a piece of paper before the judge), and apart from the actual business and market context of the use the two marks.

c) “Confusingly”

Very early in the evolution of trademark, trade name and passing off law, the courts identified and named the nature of the wrong committed in a passing off or trademark infringement case as the defendant causing “confusion”, typically through the use of a “confusing” mark or name.

The steps in this identification began with the recognition that the interest that the complainant was seeking to protect was the capacity of a mark or name, used by him and for which he had created a reputation in the marketplace, to identify his products and his business for his customers and for others in the market.

The next step was to recognize that the wrong complained of was the defendant’s attempt to “pass off” his products or business as the products or business of the complainant. The defendant often did this by using, in association with the defendant’s product or business in the marketplace, a mark or name that was the same as or was similar to the complainant’s mark or name. The effect, or likely effect, was that customers of the complainant, who identified the complainant’s business and products by the reputation attached to the complainant’s mark or name, would be “confused” into thinking that the defendant’s products or business were the complainant’s products or business.

Thus, statute-based tests of trademark infringement which continued to be framed in the form of “was the defendant’s mark *the same as or similar to* the complainant’s mark” did not focus on the real interests at stake in trademark and trade name infringement cases. Such tests risk over-inclusion and under-inclusion in relation to the real interests at issue. Over-inclusion occurred in cases in which the complainant’s and defendant’s marks were the same or very similar, but were actually used in circumstances in which confusion of customers in the marketplace was unlikely. Under-inclusion occurred in cases in which the complainant’s and defendant’s marks were dissimilar, but were actually used in circumstances in which confusion of customers in the marketplace was likely.²⁶

²⁵ *Report of The Trade Mark Law Revision Committee*, Jan 20, 1953, Ottawa: Queen’s Printer, 1953, s. 19, “The Ambit of Protection Accorded to Trade Marks”.

²⁶ That a later user’s use of even an *identical* mark may not, in the appropriate factual circumstances, constitute an infringement of the prior mark user’s rights, reflects the most fundamental principle of passing off, trademark and trade name law as stated by James, L.J. in **Error! Main Document Only.** *Singer Mfg. Co. v. Loog*, (1880) 18 Ch. D. 395 at 412. “No man is entitled to represent his goods as being the

The current Canadian trademark statute, reflecting these insights, does not frame the chief test of trademark infringement in terms of the sameness or even the similarity of marks. Rather, the test is framed simply in terms of the likelihood, in all the actual circumstances, of causing “confusion”.²⁷ The sameness or similarity of marks becomes simply one, non-decisive, factor to be considered only to the extent relevant in the particular circumstances in reaching the decision on the real question: is there a likelihood of confusion in marketplace.²⁸

d) “Confusingly Similar”

The Panel has noted that the test in Policy, para. 4.1(a) which requires the Complainant to prove that the domain name is “confusingly similar” to the Complainant’s Mark, is partly the same as the test in the analogous provision in the ICANN UDRP, which uses the test “identical or confusingly similar”.²⁹ What should we make of the fact that the Canadian Policy has dropped the term “identical or”?

The Panel concludes that the dropping of the term “identical” reflects an intention to make clear that the similarity of the domain name and the Mark is not the crux of the test. The Canadian Policy test does retain the word “similar”, but does modify it by the word “confusingly”. While the ICANN UDRP also uses the phrase “confusingly similar”, as the Canadian Policy uses only that phrase, dropping the UDRP’s reference to “identical”, the effect is to put a clear focus on the meaning of the key adverb “confusingly” – it is not every instance of mere similarity that matters³⁰, but only those instances of similarity that can justify the adverb “confusingly” that matter.

However, the Canadian Policy contains a definition of “confusingly similar” in Policy, para. 3.4:

A domain name is “Confusing Similar” to a Mark if the domain name so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely to be mistaken for the Mark.³¹

goods of another man; and no man is permitted to use any mark, sign or symbol, device or means [with that effect] [However,] . . . there is no such thing as a monopoly or a property in the nature of a copyright or the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods, always subject to [his not making] . . . a false representation that his goods are the goods of another person” [emphasis added].

²⁷ *Trade-Marks Act*, RSC 1985, c. T-13, s. 20.

²⁸ *Trade-Marks Act*, *supra*, s. 6(5)(e).

²⁹ ICANN, UDRP, 1999, para. 4(a)(i). <http://www.icann.org/dndr/udrp/policy.htm>

³⁰ Identical domain name and Mark would be the paradigm case of similarity, but the Canadian Policy does not bring identical domain names and Marks automatically within the test as does the UDRP.

³¹ The ICANN UDRP has no similar definition. The Canadian Policy definition appears to have been copied from the *Trade-Marks Act*, s. 6(5)(e), which in that Act suggests one of 5 non-exclusive factors to be used in assessing whether “confusion” exists or is likely to exist in any trademark or trade name dispute. The Panel does not see this legislative history as intended to exclude any factor which is expressly included elsewhere in s.6, *e.g.*, in s. 6(5)(a) of the Act, “the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known”; when such factors are included by a normal reading of the language in the Policy.

The focus in this definition, on the resemblance of the domain name to the Mark in appearance, sound or ideas suggested by them, might seem to refer us back to a simple test of similarity of domain name and mark. However, the Panel concludes that this is not the intention behind Policy para. 3.4. If the Policy drafters' purpose had been to incorporate a test focused merely on similarity of domain name and Mark, there would have been no reason for including the modifier "confusingly" before similar, nor any logic in the deletion of "identical or" in adapting the Canadian test from the analogous provision in the UDRP.

The Panel concludes that the definition of "confusingly similar" in Policy para. 3.4 may reflect a view that the adoption and use of a domain name takes place in constrained factual circumstances relative to the many complex market circumstances that have to be considered in trademark and trade name disputes as such. Necessarily, the issue being addressed by the Policy is the scope for confusion (in, or analogous to confusion in the classic trademark sense) when the Internet user engages or encounters the domain name. The context in which this Internet domain name encounter occurs involves an Internet user, essentially alone at his or her computer, viewing a computer screen, and focusing on the entry or viewing of a set of letters and/or numbers which constitute the domain name and which letters likely comprise a word or words. For example, the user engages the domain name when entering that domain name into the address bar of an Internet browser or entering the key terms of a domain name into an Internet search engine. Thus, in defining "confusingly similar", the definition in Policy para. 3.4 focuses on the qualities of the domain name itself relative to the Mark. This focus may be further justified by the limited purpose of this type of proceeding: all that is at stake in this proceeding is whether the domain name itself should remain registered for its present Registrant, and not larger issues of how the Registrant ought to be permitted to present its business in the marketplace in the face of claims of likely confusion by the Complainant. Any Complainant in such proceedings retains the right to pursue its rights and remedies for these larger issues in the courts.

That said, the Panel reminds itself again that the Policy itself makes confusion, within the context set in para. 3.4, the issue. The language of the Policy makes that clear. The test is *confusingly* similar, and in defining what constitutes confusingly similar, the definition in para. 3.4 does this in reference to "Marks", the essence of which, as "trademarks" and "trade names", is the identification of products and businesses in the marketplace, and the abuse of which necessarily involves misrepresentations of the identity of products and businesses, *i.e.*, confusion.

e) Relation to Finding Domain Name Confusing of Inclusion of Inherently Non-Distinctive Trade name

The Complainant asserts that it has Rights in the trade name "Browne & Co. Ltd.", which it has used in association with its business of the sale and distribution of glassware, cookware and kitchenware since at least as early as 1991.

This trade name is composed of three elements, “Browne”, “Co.” and “Ltd.”, each of which would not be seen as very “distinctive” under passing off law applying to trade names. Combining the three elements into the name does not confer much additional distinctiveness on the entire name. Only two of these elements are relevant to the issue of confusion in these proceedings, “Browne” and “Co”.

“Distinctive” in passing off or trademark law is the capacity of a mark or name used in the marketplace to point to one, particular product source or business, and so the capacity to distinguish those products or the business from the products of other businesses or from other businesses.

The element “Browne”, which appears in the Complainant’s trade name, is a term that would appear to English-speaking Canadians, and to many French-speaking Canadians, to be a personal surname or family name.³² Canadians would see the term “Browne”, in itself, as pointing to any of the many individuals and families bearing that surname, and it would not in itself tend to point the public exclusively to the Complainant. Thus, in passing off law applied to trade names, the mere appearance of the element “Browne” both in a trade name of a Complainant and in the domain name of a defendant would not lead automatically to the finding that the defendant’s trade name is confusing with the complainant’s trade name.

“Co.” or “co” is an abbreviation for “company”.³³ “Company” could mean either “a group of persons” or a “business enterprise, a firm”.³⁴ In such uses the element “co” is not likely to be uniquely or primarily identified with the Complainant and its trade name, but will be recognized by ordinary Canadians as being a component of many actual or possible trade names. Thus, the mere use of “co” as part of both a complainant’s and a defendant’s trade names is not likely to cause the public to find the defendant’s trade name “confusing” with the complainant’s trade name.

Similarly, “Ltd.” is a shortened form of “Limited”, which indicates that the business is incorporated.³⁵ All Ontario corporations must include one of the prescribed terms indicating incorporated status, of which Ltd. is one of these terms.³⁶ Thus, the mere use of “Ltd.” as part of a business name is not going to found a conclusion that the name is “confusing” with another trade name in which Ltd. also appears.

³² A search of Canada 411 for the Surname “Browne” for the Province of Ontario results in a list of 500 listed Brownes.

<http://canada411.sympatico.ca/english/presults.asp?SR=&MEM=2304&lastname=Browne&firstname=&citytown=&province=ON>

A search of Canada 411 for the Surname “Browne” for the Province of Quebec results in a list of 58 Brownes.

<http://canada411.sympatico.ca/english/presults.asp?SR=&MEM=2304&lastname=Browne&firstname=&citytown=&province=QC>

³³ *American Heritage Dictionary Talking Dictionary*, Version 4.0, Softkey International, 1995.

³⁴ *Ibid.*

³⁵ “Limited” refers to the limited liability of corporation shareholders for the debts of a corporation.

³⁶ *Business Corporations Act*, RSO 1990, c. B.16, s. 10.

Combining these three particular terms into the trade name “Brown & Co. Ltd.”, does not create a significantly more distinctive trade name in the combination.

Where, if at all, does the factor of lack of inherent distinctiveness of the Mark enter in the Policy with respect to the Complainant establishing Rights in a Mark (the trade name Browne & Co. Ltd.) and in establishing that the Registrant’s domain name (browneco.ca) is so confusingly similar that the domain name is likely to be mistaken for the Mark?

In passing off law applied to trademarks and in registered trademark law, the inherent lack of distinctiveness of a mark tends to be considered at the threshold question of whether the complainant can establish any rights in the mark. If a mark is inherently not distinctive, the complainant must adduce evidence of distinctiveness acquired through use, of what is referred to as evidence of a “secondary meaning” for the mark. Once the complainant has moved past that threshold, however, the descriptiveness or other inherent non-distinctiveness of the mark may still play a role in limiting the scope of protection for the mark – that is, the courts may be less inclined to see a likelihood of confusion in particular cases where the defendant has incorporated the same inherently non-distinctive element in its trademark.

The same analysis applies to passing off law as applied to trade names. However, for trade names there has been some tendency for the courts to be more ready to recognize at least some acquired distinctiveness in the use of a trade name with inherently not distinctive elements, such as an element which is a personal name or surname.³⁷ However, the inherent non-distinctiveness may play a somewhat greater role in limiting the scope of protection for such trade names, through the courts’ greater caution in finding a likelihood of confusion when the defendant incorporates the same non-distinctive element in its trade name.

In this proceeding the choice of stage at which the inherent non-distinctiveness of the Mark is considered – whether at the Rights stage or the Confusingly Similar stage, or both – is not material. At either stage such inherent lack of distinctiveness would be considered under Policy para. 4.1(a) for which the Complainant bears the burden of proof to the standard of the balance of probabilities.

³⁷ This is true at least for non-distinctive elements which are surnames or personal names, at least of those forming the “business name”, and geographic names, at least of the location in which the business is located. There is more uncertainty about whether this approach prevails for non-distinctive elements which are descriptive of the business, e.g., of the products offered by the business. George A. Rolston and George M. Ader, *A New Law of Corporate Names* (1961), 37 CPR 55 at notes 15, 16 and 17. In part this may reflect the courts’ tolerance of the common practice of persons adopting business names which contain these inherently non-distinctive elements. In earlier Canadian corporation naming practice, some provincial regulators encouraged the adoption of such names, presumably because they offered greater transparency to the persons behind a corporation, its location, and its actual business. The irony was that the regulators were encouraging the adoption of names that would be more difficult, and sometimes impossible to protect under trade name law, and the incorporation law offered no protection except against another incorporation under the same name in the same jurisdiction. This bizarre practice generally halted with the Howard-inspired corporation naming approach referred to in note 15, above. *Note 15 is a reference to the Ontario statute*

Below in these reasons, the Panel considers whether the Registrant has a legitimate interest in the use of its domain name under Policy, para. 3.6. That list of legitimate interests reflect some of the same factors, for example, inclusion of terms which are descriptive of products or the use of a name or surname, as may be considered under inherent non-distinctiveness. Does the inclusion in the Policy of these factors under the Registrant's legitimate interest "defences" suggest that consideration of some of the same general factors should be precluded at the earlier stages of establishment of Rights in the Complainant's Mark or in establishing Confusing Similarity between the Complainant's Mark the Registrant's domain name?

The Panel concludes that there is no such preclusion inherent in the appearance of para. 3.6 in the Policy. The Policy incorporates passing off and trademark principles by making the fundamental test of the invasion of the Complainant's rights when the Respondent's domain name is "*confusingly* similar" to the Complainant's Mark. Inherent distinctiveness has been a fundamental factor in assessing confusion issues in trademark and trade name cases. Further, Policy, para. 3.4 in defining "confusingly similar" directs the Panel to consider, among other factors, the resemblance of the domain name in the "ideas suggested" by the Mark. Product descriptiveness or being a surname are ideas suggested by the Mark or domain name, and are thus within consideration at the stages of findings on Rights in the Mark and / or findings on Confusingly Similar.

**f) "Secondary Meaning" Established By Use of Trade Name:
Overcomes Inherent Non-Distinctiveness**

Under passing off and trademark law, when a trader adopts and uses a trade name or trademark which is inherently not distinctive, the trader may, through use, establish a reputation associated with the mark or name which points to that particular trader as the source of products the trader puts on the market in association with that mark. Such an acquired reputation or acquired distinctiveness is referred to as the "secondary meaning" of the inherently not distinctive term.

Policy, para. 3.2(a) indicates that in considering the Complainant's trade name, we are to consider the trade name as actually used by the Complainant for the purpose of distinguishing the Complainant's business from the business of other persons. Thus, in determining the likelihood of confusion occurring between the Registrant's domain name and the Complainant's trade name, we are to take account of the reputation or goodwill associated with the Complainant's trade name that such use of the trade name can generate among the public who deal or might deal with the Complainant's business.

The Complaint indicates that the Complainant has used the trade name in association with its business of the distribution of glassware and cookware since at least as early as 1991 and that the Complainant continues to use the trade name. The Complainant has submitted copies of printed material showing its use of the trade name. There being no Response from the Registrant, the Panel is to decide the case on the basis of the Complaint. The Panel infers from the Complaint that the Complainant has established a reputation or goodwill in association with its trade name Browne & Co. Ltd. through its use of such trade name. Although the trade name "Browne & Co. Ltd." may not be

inherently distinctive, the description and evidence of the Complainant's use of the trade name in the Complaint justifies the inference that the Complainant has established that distinctiveness in the form of "secondary meaning" that has been developed by the Complainant for such trade name.

g) "Confusingly Similar" Applied in This Case

The Complainant has established that there is distinctiveness or secondary meaning attached to its trade name, Browne & Co. Thus, that trade name when used in the marketplace points the relevant members of the public to the Complainant's business. The Respondent's domain name, browneco.ca, greatly resembles the Complainant's trade name in appearance, in sound, and in the ideas suggested by the trade name. The resemblance is such that the Panel concludes that the domain name is likely to be mistaken for the trade name. This means that the relevant group of Internet users are likely to associate the Registrant's domain name, browneco.ca, with the Complainant's business, known to them by the trade name Browne & Co. Ltd.

E. Priority of Rights

The Complaint states that the Complainant began using the trade name Browne & Co Ltd. commencing at least as early as 1991. The Complaint states that the Complainant continues to use the trade name.

The Panel concludes that the Complainant had acquired Rights in its trade name prior to the date of registration of the Registrant's domain name and that the Complainant continues to have such Rights.

REGISTRATION OF THE DOMAIN NAME IN BAD FAITH

Policy, para. 4.1(b) requires the Complainant to establish on the balance of probabilities that the Registrant has registered the domain name in bad faith, as defined in Policy, para. 3.7.

Policy, para. 3.7 states that a Registrant will be considered to have registered the domain name in bad faith if, and only if the Registrant registered the domain name for one of the purposes stipulated in parts a), b) or c) of para. 3.7.

The Complainant was known to its present and potential customers by its trade name Browne & Co. Ltd. That identity was also expressed in the Complainant's web site under the domain name browneco.com, registered in 1998.

The domain name in issue, browneco.ca, greatly resembles the Mark, the trade name Browne & Co. Ltd., and the domain name was confusingly similar to the trade name of the Complainant.

Internet users who were customers or would-be customers of the Complainant, being familiar with the Complainant's trade name Browne & Co. Ltd., might readily be confused into believing that the domain name "browneco.ca" would connect them with a web site of the Complainant. The Complaint establishes that at least as late as April 4, 2002, such customers or would-be customers of the Complainant would find themselves directed to the Registrant's website. The effect would be to disrupt the business of the Complainant.

The Registrant and the Complainant are competitors in business. The Registrant conducts business under the name Bluebird Industries. The domain name "browneco.ca" has no apparent connection to the business activities of Bluebird Industries. The Registrant should readily understand that its use of the confusing domain name browneco.ca would mislead customers or would-be customers of the Complainant in directing them not to a web site of the Complainant, but to the web site of one of the Complainant's competitors, the Registrant. It is a reasonable inference that the Registrant acquired the domain name registration "primarily for the purpose of disrupting the business of the Complainant", as stated in CIRA Policy, para. 3.7(c).

The Panel concludes that the Registrant did register the domain name in bad faith, as described in Policy, para. 3.7

NO LEGITIMATE INTEREST FOR THE REGISTRANT IN THE DOMAIN NAME

Introduction

Despite the Registrant's domain name being confusingly similar to the trade name in which the Complainant had Rights prior to the registration of the domain name, the Registrant may be permitted to retain and to use the domain name if the Registrant has a "legitimate interest" in the domain name.

"Legitimate interest" is confined in Policy, para. 3.1(b) and 3.6 to a specific list of interests shown to have prevailed before the Registrant has received notice of the Complaint.

The Panel has examined each of the six categories of legitimate interest listed in Policy para. 3.6 and has concluded that in these proceedings it cannot be shown that the Registrant has a legitimate interest in the domain name.

A. Domain Name a Mark in Which Registrant Has Rights

Policy, para. 3.6(a) indicates that the Registrant has a legitimate interest in the domain name if:

the domain name is a Mark, the Registrant used the Mark in good faith, and the Registrant had Rights in the Mark.

Is the Registrant's domain name a Mark, as defined in CIRA Policy para. 3.2? As noted above a Mark includes either a trade-mark or a trade name that has been used to distinguish the user's products or business from those of others. On the evidence submitted, it appears that the Registrant's domain name, browneco.ca, is a trademark or trade name only to the extent that a domain name in itself can be a trademark or a trade name. The Complainant's evidence indicates that the Registrant did use browneco.ca as an active domain name, at least until April 4, 2002³⁸. The Complainant states that the browneco.ca domain name was used by the registrant to redirect Internet users to its own website, found under at this domain address: <http://www.bluebird.ca/>.

Did the Registrant use this Mark, the domain name brownco.ca, in good faith? Under the heading Registration of Domain Name in Bad Faith, above, the Panel concluded that the Registrant registered the domain name in bad faith in circumstances which caused the Panel to conclude here that the Registrant had not used the Mark, browneco.ca, in good faith as required by Policy para. 3.6(a).

If the Registrant had used the Mark in good faith, there would remain the question of whether the Registrant had Rights in the Mark, the domain name browneco.ca. Policy para. 3.3(a) states that a person, here the Registrant, has Rights in a Mark, here the Mark browneco.ca, where the Mark is a trademark or trade name, here assuming that a domain name such as browneco.ca can be at least a trademark if not a trade name, and that trademark or trade name has been used by that person (the Registrant). Policy, para. 3.5(c) states that a Mark is used in association with a business if the Mark is displayed in the operating, advertising or promoting of the business. Did the Registrant so use the Mark, the domain name browneco.ca, when it used the domain name to direct Internet users to its website? If the Registrant uses its website to sell services, the Registrant might be viewed as using the Mark in association with services as defined in para. 3.5(b). If the Registrant used its web site to sell wares, then the use of the domain name might constitute use of the Mark in association with such wares under the rubric of the Mark (domain name) being used "at the time of transfer of property in the wares . . . in any other manner so associated with the wares that notice of the association is then given to the person to whom the property . . . is transferred." Without deciding those questions the Panel concludes that in any case the Registrant would not have had Rights in the Mark, the domain name browneco.ca, as required by Policy, para. 3.6(a). Since a Mark, as expressly defined by Policy 3.2(a), can be only a "trade-mark" or a "trade name", the ordinary jurisprudence regarding what constitutes a trademark or trade name, and how businesses acquire rights in trademarks and trade names should be applied, at least to the extent that such jurisprudence is not contrary to the express terms of the Policy, and to the extent that such jurisprudence can be applied consistently with the spirit of the Policy and Rules.

In this case, the conclusions drawn from the evidence submitted about the Complainant having established a reputation or goodwill (secondary meaning) in association with its trade name Browne & Co. Ltd., and the conclusion that the use of the domain name browneco.ca by the Registrant would cause confusion with the Complainant's trade

³⁸ Complaint para. 14, Schedule T.

name, means that in ordinary passing off jurisprudence, the Complainant could legally restrain the Registrant's use of the domain name as a trade name. In that sense, the Registrant did not have Rights in the Mark, the domain name browneco.ca.

Thus, the Registrant does not have a legitimate interest in the domain name under Policy para. 3.6(a).

B. Use of a Clearly Descriptive Domain Name

Under Policy para. 3.6(b), a Registrant is deemed to have a legitimate interest in a domain name used in association with wares, services or a business, if the domain name is clearly descriptive of the character or quality of the wares, services or business; of the conditions of production of the wares, the performance of the services or the operation of the business; or of the place of origin of the wares, services or business. The Registrant's business is as a manufacturer and importer of metal products and as a manufacturer of cookware. The domain name browneco.ca is not clearly descriptive of the Registrant's wares or business in any of the senses stipulated in para. 3.6(b). Thus, the Registrant could not have a legitimate interest in the domain name under para. 3.6(b). As such, the issue does not arise of whether the Registrant's use of the domain name could, in any sense, be seen as use in good faith, as para. 3.6(b) also requires for the Registrant to be found having a legitimate interest in the domain name.

C. Use of a Generic Name Domain Name

Similarly, the Registrant cannot claim a legitimate interest in the domain name under CIRA Policy, para. 3.6(c) as the domain name browneco.ca is not the generic name of the wares or business in association with which the Registrant has used the domain name.

D. Use for Non-Commercial Criticism

The Registrant has not used the domain name for non-commercial activity as the domain name was used to direct Internet users to the Registrant's website, a site which serves the Registrant's business and commercial purposes. Thus, the Registrant has no legitimate interest in the domain name under CIRA Policy, para. 3.6(d), which applies to the non-commercial use of the domain name for criticism, review or news reporting.

E. Use of Registrant's Name or Surname

The Registrant is Bluebird Industries. The domain name, browneco.ca, is not the legal name of the Registrant, nor is it a name, surname or other reference by which the Registrant was commonly identified. Thus, the Registrant has no legitimate interest in the domain name under CIRA Policy, para. 3.6(e).

F. Use of Name of Geographic Location

Finally, the domain name is not the geographical name of the location of the Registrant's business, making Policy para. 3.6(f) inapplicable in finding that the Registrant has a legitimate interest in the domain name.

Conclusion: No Legitimate Interest

In conclusion, the Registrant has no legitimate interest in the domain name, browneco.ca.

FINAL DECISION AND REMEDY

The Panel finds for the Complainant and orders that the Registrant, Bluebird Industries Inc., transfer the domain name Browneco.ca to the Complainant Browne & Co. Ltd./Ltée.

Signed, October 22, 2002

Denis N. Magnusson
Sole Panelist