PROCEDURAL HISTORY

The Complaint was filed with CPR on July 12, 2002 and, after review for administrative compliance, served on the Respondent on July 15, 2002. The Respondent did not file a Response on or before August 4, 2002. I was appointed Arbitrator pursuant to the Uniform Domain Name Dispute Resolution Policy (“UDRP”) and Rules promulgated by the Internet Corporation for Domain Names and Numbers (ICANN). Upon the written submitted record including the Complaint and its attached Exhibits A-1, I find as follows:

FINDINGS

Respondent’s registered domain name, bolliger-mabillard.com, was registered with Server Central Network on October 17, 2000. In registering the name, Respondent agreed to submit to this forum to resolve any dispute concerning the domain name, pursuant to the UDRP.

The UDRP provides, at Paragraph 4(a), that each of three findings must be made for a Complainant to prevail:

i. Respondent’s domain name is identical or confusingly similar to a trademark or service mark in which complainant has rights; and

ii. Respondent has no rights or legitimate interests in respect of the domain name; and

iii. Respondent’s domain name has been registered and is being used in bad faith.

DEFAULT RULING: The Complaint was served by CPR on Respondent pursuant to ICANN procedures. The correspondence was addressed to Respondent at the address he provided to the Registrar, Server Central Network. When the response date passed, CPR advised Respondent that the time for filing his response had lapsed and that the proceedings would continue based on the allegations contained in the Complaint. On the date of this ruling, Respondent remains in default. Despite the fact that this default award is rendered without the benefit of Respondent’s response to the allegations in the verified Complaint, I enter findings showing that Complainant has presented a prima facie case of its entitlement to the
remedy of transfer of Respondent’s registered domain name, bolliger-mabillard.com.

**IDENTITY/CONFUSING SIMILARITY:** Complainant alleges that the domain name, bolliger-mabillard.com, is identical or confusingly similar to Complainant’s trademark, Bolliger & Mabillard, which applies to roller coasters.

From the Complaint and the exhibits appended to it, it is clear that Complainant uses the mark, Bolliger & Mabillard, as a tradename for its business. That business involves the design of roller coasters in the United States and elsewhere around the world. It further appears that Complainant’s business has been accorded certain renown within this field and that, as a consequence, its tradename has become closely associated with the roller coasters it designs. On the record, Complainant has adequately demonstrated a protectible interest in this trade identity.

It further appears from the record that Complainant uses the name, Bolliger & Mabillard, as a service mark for its business. Once again, the exhibits to the Complaint evidence the use of the mark in connection with Complainant’s services as a consulting engineering firm in the design of roller coasters. On the record, Complainant has adequately demonstrated a protectible interest in this service mark.

On the other hand, the record is bereft of evidence that Complainant has used the mark as a trademark. Despite Complainant’s assertions of trademark rights, nothing in the exhibits shows the use of the mark on goods in circumstances where a consumer would associate the mark as the source of those very goods, distinct from their design. While this in no way diminishes Complainant’s other trade identity rights, it affects the analysis of confusion or the likelihood of it.2

Complainant makes much of what it alleges to be several instances of actual confusion. Its evidence for the proposition comes from Respondent’s website and particularly chat threads posted on it. In a few instances, chatroom commentators can be characterized as Complainant does, believing they are communicating directly with Complainant. This evidence, though, intrinsically is weak. Moreover, from the point of view of trademark analysis, it fails to support the proposition of actual confusion on the part of consumers of the goods (viz., roller coasters) or of Complainant’s services (viz., designing roller coasters).

Nevertheless, the registered domain name and Complainant’s tradename are identical. That suffices on the facts of this case. Respondent, because he is in default, has failed to rebut the well-pleaded averments stated in the Complaint. Consequently, Complainant has adequately met its burden on this issue.

**RIGHTS AND LEGITIMATE INTERESTS:** Complainant alleges that Respondent has no rights or legitimate interests respecting the domain name at issue. As support for its allegation, Complainant states:

Respondent has no legitimate interest in the domain name www.bolliger-mabillard.com because: 1) Respondent, as an individual or business, has never been commonly known by the name “Bolliger and Mabillard” in connection with the business of roller coasters; 2) Respondent registered www.bolliger-mabillard.com to make illegitimate commercial use of Bolliger and Mabillard’s trademark/name with the intent for commercial gain and/or to misleadingly divert consumers to said domain name; and 3) when Respondent registered the domain name www.bolliger-mabillard.com/, Respondent was well aware of Bolliger and Mabillard’s rights and history of use of the “Bolliger & Mabillard” trademark/name in connection with its roller coasters.

Complaint at 5. Respondent, on the other hand, fails by default to rebut these allegations.

UDRP Paragraph 4(c) provides that Respondent’s rights or legitimate interests in a domain name may be demonstrated, without limitation, by showing that (a) before notice to Respondent of the dispute, Respondent has used, or made demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or (b) Respondent has been commonly known by the domain name; or (c) Respondent is making legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

The UDRP frames this issue from a Respondent’s vantage, that he demonstrate his legitimate interests in the disputed domain name. The UDRP suggests several exemplary or illustrative ways a Respondent might do so. The UDRP does not require the Complainant to adduce evidence to prove the negative—that Respondent lacks such rights or interests.

Because Respondent is in default, I take as proven the well-pleaded averments in the Complaint that Respondent lacks rights or legitimate interests in the mark underlying the domain name or the domain name itself.
BAD FAITH: In support of the contention of Respondent’s bad faith registration and use of the disputed domain name, Complainant states:

Respondent, by using the domain name www.bolliger-mabillard.com, has intentionally attempted to attract, for commercial gain, Internet users to said web site, by creating a likelihood of confusion with Bolliger and Mabillard’s, Complainant’s, trademark/name as to the source, sponsorship, affiliation, and/or endorsement of said web site and/or of a product or service on said web site.

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Respondent’s bad-faith registration of the domain name www.bolliger-mabillard.com is also evident by Respondent’s disregard of the “Registration Agreement” and “Terms of Service” agreed to by Respondent in connection with the registration of the domain name with Server Central, the Registrar. Specifically, Section 6 (c) of the “Registration Agreement” sets forth:

Your Obligations Relating to the Account Information. In the event that, in registering the domain name, you are providing information about or on behalf of a third party, you hereby represent that you have (a) provided notice to that third party of the disclosure and use of that party's information as set forth in this Agreement, and (b) that you have obtained that third party's express consent to the disclosure and use of that party's information as set forth in this Agreement. By registering a name or applying for services you also represent that the statements in its application are true and you also represent that the Domain Name is not being registered for any unlawful purpose.

Under this section, Respondent was required to notify Bolliger and Mabillard of the intent to disclose and use Bolliger and Mabillard’s name and information on the website. Moreover, Respondent was required to obtain Bolliger and Mabillard’s express consent to do so. . . .

Complaint at 6-7(underlining added for emphasis). Respondent’s default leaves these allegations unrebutted.

Paragraph 4(b) of the UDRP provides that indications of bad faith include, without limitation, (a) registration for the purposes of selling, renting or transferring the domain name to the Complainant for value in excess of Respondent’s cost; (b) a pattern of registration in order to prevent Complainant from reflecting the mark in a corresponding domain name; (c) registration for the primary purpose of disrupting the business of a competitor; or (d) an intentional attempt to attract, for commercial gain, Internet users to Respondent’s web site by creating a likelihood of confusion with Complainant’s mark as to the source, sponsorship, affiliation or endorsement of Respondent’s web site or location, or of a product or service on Respondent’s web site or location.

Complainant confines its allegation of bad faith registration and use to activities within the scope of element (d). There is no evidence of record from which one could conclude bad faith arising from any of elements (a)-(c).

Complainant stresses the link on Respondent’s website labeled “Shop” as evidence of his commercial avarice and, hence, proof of bad faith in registering and maintaining the domain name. Under the shopping banner, Respondent offers for sale a number of video products and games related to roller coasters, or the sort of items a roller coaster enthusiast might find appealing. However, clicking on the link takes the visitor directly to Amazon.com where the purchase transaction takes place. It does not appear from the record that Respondent receives direct financial benefit from these sales while any indirect benefit would seem too tenuous to be accorded much weight.

Complainant also asserts that visitors to Respondent’s website may be confused as to its sponsorship or endorsement by, or other affiliation with, the Complainant or its business. However, the website visitor is advised adequately that the site is the “unofficial” source of “B-M information.” See, e.g., Exhibit F. Most visitors would interpret this as a disclaimer of sponsorship, endorsement or affiliation.

Despite these shortcomings in the arguments, nothing prevents Respondent from changing his practices any time in the future. Because of Respondent’s lack of interest in these proceedings—his choice not to participate in the resolution of the dispute—Complainant should not be required to wait and see if it is harmed as it patiently acquires more persuasive evidence of Respondent’s bad faith.
I am also mindful that Respondent has not complied with the terms of service quoted above. While this alone may be insufficient to prove bad faith in securing the registration in the first instance, it tends to tip the scale in favor of the party sought to be protected by the restriction imposed at the time of registration. Had Respondent lived up to his representation and complied with his promise to obtain permission from Complainant in order “to provide [on the website] information about” it, perhaps these proceedings could have been avoided altogether. Accordingly, I accept as proven Complainant’s unrebuted averments that Respondent did register and use the domain name in bad faith, as that term is defined in the ICANN Policy.

CONCLUSION

In light of my findings above that (a) the registered domain name is identical to Complainant’s protected mark; (b) Respondent does not have rights or legitimate interests with respect to the domain name at issue; and (c) Respondent did register and use the domain name in bad faith, as that term is defined in the ICANN Policy, I find in favor of the Complainant. I do so only on the thinnest of grounds as a consequence of Respondent’s default. Complainant has not been particularly diligent in policing its rights, having waited over 18 months to file its Complaint. Complainant was not particularly industrious in protecting its internet interests, failing to secure even the most basic domain name protection for years after it was able to do so and the prudence of such an action was apparent to all. Thus, while the Complaint evokes a sense of commercial sympathy for Complainant’s predicament, the equities do not weigh heavily in its favor. Nevertheless, Respondent has defaulted and Complainant is entitled to a ruling under the UDRP. That ruling must favor Complainant on this record.

REMEDY

Complainant’s request to transfer the domain name bolliger-mabillard.com is hereby GRANTED. The domain name shall be transferred to Complainant, Bolliger & Mabillard Consulting Engineers, Inc.

Signature of Arbitrator Date: August 16, 2002

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1 I have also navigated through Respondent’s website to observe it as would a first time visitor.
2 Unlike tradenames, and to a lesser extent service marks, surnames are usually accorded little, sometimes no, trademark protection. Only with a strong showing of secondary meaning can surnames function as trademarks the law will protect. In this case, however, the compound surname, Bolliger-Mabillard, creates both a sense of uniqueness not found in the usual surname situation (e.g., Ford) and a realization that Respondent reasonably could not have had anything in mind other than Complainant’s firm when registering the disputed domain name.