

## **ADMINISTRATIVE PANEL DECISION**

Shenzhen Tairuo Technology Co., Ltd. v. E-YONG PTY. LTD  
Case No. DAU2023-0024

### **1. The Parties**

The Complainant is Shenzhen Tairuo Technology Co., Ltd., China, internally represented.

The Respondent is E-YONG PTY. LTD, E-YONG PTY. LTD, Australia.

### **2. The Domain Name and Registrar**

The disputed domain name <nreal.com.au> is registered with Tucows (Australia) Pty Ltd trading as OpenSRS (“the “Registrar”).

### **3. Procedural History**

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 12, 2023. On May 12, 2023, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On May 12, 2023, the Registrar transmitted by email to the Center its verification response disclosing registrant and contact information for the disputed domain name which differed from the named Respondent and contact information in the Complaint. The Center sent an email communication to the Complainant on May 22, 2023 providing the registrant and contact information disclosed by the Registrar, and inviting the Complainant to submit an amendment to the Complaint. The Complainant filed an amended Complaint on May 23, 2023.

The Center verified that the Complaint together with the amended Complaint satisfied the formal requirements of the .au Dispute Resolution Policy (the “Policy” or “.auDRP”), the Rules for .au Dispute Resolution Policy (the “Rules”), and the WIPO Supplemental Rules for .au Domain Name Dispute Resolution Policy (the “Supplemental Rules”).

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on June 1, 2023. In accordance with the Rules, paragraph 5(a), the due date for Response was June 21, 2023. The Respondent did not submit any response. Accordingly, the Center notified the Respondent’s default on June 23, 2023.

The Center appointed Staniforth Ricketson as the sole panelist in this matter on July 30, 2023. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

On August 1, 2023, the Center received a request from the Complainant for leave to file a further submission relating to a recent rebranding that had taken place on May 25 and after the filing of the Complaint. The Panel declined to exercise its discretion under the Rules to allow this further submission, and proceeded to make its decision based on the Complaint and the evidence filed in support (see further at 6 below).

#### **4. Factual Background**

In the absence of any Response from the Respondent (see further below), the following matters may be stated as uncontested. The Complainant, together with its affiliated companies, was founded in 2017, and since early 2019 has been producing and marketing light augmented (“AR”) glasses for consumers on a worldwide basis. According to the Complaint, the mission of the Complainant has been “to bring everyone in the world mixed reality experience at fingertips”.

The Complainant has had registered domains for <nreal.ai> and <nreal.cn> since 2017 (Complaint, Exhibit 3), and has used these websites as its official websites for overseas markets and China respectively, introducing itself to AR fans and promoting its Nreal AR glasses (Complaint, Exhibit 4). Since 2019, it has also had registered domain names for use in its Japanese and South Korean markets (<nreal.jp> and <nreal.kr>). There has also been considerable promotion of its AR products on social media sites, such as Twitter, Facebook, Instagram, WeChat, Sina Weibo, and so on (Complaint, Exhibits 5 and 6), and evidence has appended that indicates consumer purchases of these products that have occurred through online e-commerce platforms, such as Amazon and Tmall (Complaint, Exhibit 7) and local telecom operators such as Softbank, KDDI, Vodafone, docomo, EE, Deutsche Telekom, and so on (Complaint, Exhibit 8). In addition, there is evidence of high recognition of its “Nreal” products in the online environment (Google and Bing search results in Exhibit 9 of the Complaint and prizes awarded within the industry in Exhibit 10 of the Complaint).

Of most significance for the purposes of the present proceeding is the collection of registered trade marks for “nreal” that the Complainant has obtained across a number of jurisdictions since 2017 and up to the present. The jurisdictions covered to date are China (13), South Korea, the European Union, the United Kingdom, the United States of America, Japan (3), and Hong Kong (Complaint, Exhibit 13). These generally claim the word “nreal” in a simple stylised form, and are in respect of a wide range of products and not confined to glasses. There are further pending applications in the United States of America and Hong Kong (Complaint, Exhibit 14), although it does not appear that any application for registration has yet been made in Australia.

The dispute domain name was registered on September 17, 2022 (Whois lookup in Exhibit 1 to the Complaint). This postdates the Complainant’s registered trade marks.

#### **5. Parties’ Contentions**

##### **A. Complainant**

The Complainant asserts that the disputed domain name is identical to a trade mark in which it has rights within the meaning of paragraph 4(a)(i) of the Policy. So far as the question of “rights” is concerned, it points to its various domain name registrations, its presence and recognition online, and, above all, its registrations for the mark “nreal” in various jurisdictions (see paragraph 4 above). On the question of identity or substantial identity, it argues that the disputed domain wholly incorporates the registered trade marks, noting that the additional country code Top-Level Domain (“ccTLD”) “.com.au” is to be disregarded in making this comparison, referring here to *Financial Group Pty Limited v Basketball Times Pty Ltd*, WIPO Case No [DAU2004-0001](#).

The Complainant argues further that the Respondent has no rights or legitimate interests in respect of the domain name as per paragraph 4(a)(ii) of the Policy. It notes first that the disputed domain name was

registered after the various trade mark registrations of the Complainant. It notes further that the Complainant is not affiliated in any way with the Respondent and has never authorised the Respondent to register or use its domain names or marks for the purposes of reselling or distributing its products. While the Respondent is an enterprise established in Australia, it has only one registered trade mark of its own in Australia ("Reg No 1724880 for "G GEAR FORCE") and has never applied for registration or registered any trade mark related to "nreal" (Complaint, Exhibit 15). There is also no evidence that the Respondent is commonly known by the disputed domain name or any similar name.

More generally, the Complainant argues that the Respondent has not made any legitimate or *bona fide* use of the disputed domain. While it appears that the Respondent is offering "nreal" glasses and products on a website operated under the disputed name, the Complainant argues that this is done in such a way as to confuse consumers that this is a website associated with the Complainant, which is not the case.

The material relied upon here relates also to the question of bad faith registration and use under paragraph 4(a)(iii) of the Policy (see further below), but is referred to here in support of the Respondent's assertion that the Respondent's offering of goods for commercial purposes can by no means be regarded as *bona fide*. The Complainant refers here to the earlier panel decision in *Oki Data Americas, Inc v ASD, Inc*, WIPO Case No. [D2001-0903](#) to the effect that, even if the Respondent is an unauthorised reseller of the Complainant's goods, this can still be an illegitimate use of the disputed domain if the Respondent has not disclosed its true relationship with the owner of the mark prior to notice of the dispute and must not sought to "corner the market" in domain names reflecting that trade mark: see also *Philip Morris Incorporated v. Alex Tsypkin*, WIPO Case No. [D2002-0946](#), where the reseller was actually unauthorised. Applying these *Oki Data* principles, the Complainant submits that the Respondent has failed to satisfy the requirements of paragraph 4(a)(ii) of the Policy, noting further that the Respondent cannot plausibly assert that it did not intentionally adopt its website presentation under the disputed domain so as to benefit from the goodwill attaching to the Complainant's "nreal" mark. Finally, the Complainant notes that the burden of proof shifts to the Respondent once the Complainant makes a *prima facie* case that the Respondent lacks rights or legitimate interests for the purposes of paragraph 4(a)(iii) of the Policy, citing here in support *Neusiedler Aktiengesellschaft v Kulkarni*, WIPO Case No. [D2000-1769](#).

As to the third requirement of paragraph 4(a)(iii) of the Policy – registration or use of the disputed domain name in bad faith – the Complainant refers to a number of matters here: the use of identical stylised Nreal logos on the Respondent's home page; the sale of exactly the same products as those of the Complainant on the Respondent's homepage to which the disputed domain name resolves; the use of photos and videos on the Respondent's website which appear to be derived from those published on the Complainant's website and e-commerce platforms; and attempts generally to imitate the Complainant's official websites, including introducing itself as "Nreal AU" which appears to ape the names of the Complainant's subsidiaries such as "Nreal US", "Nreal Japan" and "Nreal Korea" (Complaint, Exhibits 17, 18).

In light of the above, the Complainant submits that the Complainant's conduct falls within the example of bad faith registration and use provided in the example in paragraph 4(b)(iv) of the Policy, "where the Respondent, by using the domain name, has intentionally attempted to attract, for commercial gain, Internet users to its website, by creating a likelihood of confusion with the Complainant's mark". It argues further that the circumstances outlined in paragraph 4(b)(ii) and (iii) are also present, namely that the Respondent, by using the domain name, has registered the disputed name to prevent the Complainant from reflecting its mark in a corresponding domain name, or the registration was done primarily to disrupt the business or activities of another person in Australia. In this regard, it points to the identity between the Complainant's trade mark and the disputed domain name, and argues that "Nreal" is a coined word, making it not unlikely that it was adopted for the purpose of interfering with the Complainant using the mark in a corresponding domain name within the Australian market. It therefore submits that the Respondent's conduct in registering and using the disputed domain falls within the requirements of paragraph 4(a)(iii) of the Policy, and requests cancellation of the disputed domain name.

## **B. Respondent**

The Respondent has not submitted any response to the Complaint. This has clear implications for the resolution of the proceeding, which are discussed further below.

## **6. Discussion and Findings**

Paragraph 4(a) of the Policy provides that in order to divest the Respondent of the disputed domain name, the Complainant must demonstrate each of the following (these are cumulative requirements):

- (i) the disputed domain name is identical or confusingly similar to a name, trade mark or service mark in which the Complainant has rights; and
- (ii) the Respondent has no rights or legitimate interests in respect of the disputed domain name; and
- (iii) the disputed domain name has been registered or subsequently used in bad faith.

When a respondent has defaulted and in the absence of exceptional circumstances, paragraph 14(a) of the Rules requires the Panel to proceed to a decision on the Complaint. Paragraph 15(a) of the Rules then requires the Panel to decide the dispute on the basis of the statements and documents that have been submitted and any rules and principles of law deemed applicable. Limited factual research of publicly available online resources may also be conducted by the Panel to confirm or elaborate upon matters alleged by the parties.

### **A. Identical or Confusingly Similar**

There are two parts to the inquiry required under paragraph 4(a)(i) of the Policy: the Complainant must demonstrate that it has rights in a name, trade mark or service mark and, if so, the disputed domain name must be identical or confusingly similar to that name, trade mark or service trade mark.

In relation to the first part of this inquiry, the Panel finds that the Complainant clearly has established its “rights” in a trade mark through its exhibiting of the various “nreal” trade marks registered in China and other countries. For the purposes of the Policy, it does not matter that there is no corresponding Australian registration. Furthermore, the various domain name registrations of the Complainant that incorporate the mark “nreal” and the evidence of consumer dealings by Australians with those websites might also suffice for the purposes of showing the existence of relevant goodwill or reputation in Australia in the event that the Complainant sought to rely upon its rights in an unregistered mark that might be protected by the action of passing off in Australia (it has not made this claim, and it is therefore unnecessary to consider it for the purposes of this proceeding). It may also be noted that the Panel, in making its own online inquiries of publicly available resources, has observed that the Complainant’s “nreal” domain names now resolve to websites offering its products under the logo “Real, formerly Nreal”, suggesting that the Complainant is now seeking to use “Xreal” to market and distribute its products. This apparent change is not mentioned in the Complaint, but was the subject of a request by the Complainant to make a further submission explaining this “rebranding” that had occurred after the filing of the Complaint. As noted above, this request was refused by the Panel, and was unnecessary in the circumstances, given that the Complaint relates to the Complainant’s rights in the mark “nreal” which is obviously still extant and in which it clearly has “rights”. It is against this mark that the comparison for the purposes of paragraph 4(a)(i) of the Policy must be made. It may also be noted that the change of name on the Complainant’s websites appears to have been made only very recently, and that the evidence provided by it in the present Complaint concerns actions by the Respondent in relation to its “nreal” websites prior to these changes (this is relevant to the next two requirements of the Policy under paragraphs 4(a)(ii) and (iii) and is considered further below).

Having found that the Complainant has relevant rights in a trade mark for the purposes of paragraph 4(a)(i)

of the Policy, the Panel has no difficulty in concluding that the disputed domain name is identical to the Complainant's mark. The mark "nreal" is wholly incorporated in the disputed name, and the Complainant is correct in submitting that ".com.au" is to be disregarded in making the required comparison: see also *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd*, WIPO Case No. [DAU2002-0001](#)<sup>1</sup>.

The Panel therefore finds that the Complainant has satisfied the requirements of paragraph 4(a)(i) of the Policy.

## **B. Rights or Legitimate Interests**

Paragraph 4(c) of the Policy provides that the following circumstances may be situations in which a respondent has rights or legitimate interests in a disputed domain name:

- (i) before any notice to you of the dispute, your use of, or 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
- (ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trade mark or service mark rights; or
- (iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue.

This is an illustrative list only of the situations in which a respondent can show rights or legitimate interests in a domain name.

The Complainant bears the onus of proving this requirement of the Policy, as is the case for each of the other elements listed in paragraph 4(a) of the Policy. However, unlike paragraph 4(a)(i) where the matters to be shown are very much within the knowledge and control of the Complainant, Panels have consistently recognized the difficulties that arise where a party has to prove a negative, particularly in situations where much of the relevant information is in, or is likely to be in, the possession of the respondent, rather than the complainant. This is obviously the case with paragraph 4(a)(ii). In general, then, it is usually enough for a complainant to state a *prima facie* case against the respondent under this head, with the evidential burden then shifting to the respondent to rebut that case. See further the [WIPO Overview 3.0](#), section 2.1, and the cases cited therein (see *GlobalCenter Pty Ltd v. Global Domain Hosting Pty Ltd*, WIPO Case No. [DAU2002-0001](#); *Wal-Mart Stores, Inc. v. WalMart Careers, Inc.*, WIPO Case No. [D2012-0285](#); *AW Faber-Castell (Aust) Pty Ltd. v. Pen City Pty Ltd. / Atf Diblasi Jones Unit Trust*, WIPO Case No. [DAU2013-0018](#); *OSRAM GmbH. v. Mohammed Rafi/Domain Admin, Privacy Protection Service INC d/b/a PrivacyProtect.org*, WIPO Case No. [D2015-1149](#)).

In the present case, there has been no Response and accordingly there is no evidence before the Panel of any basis which might show independent rights or legitimate interests on the part of the Respondent. The Complainant has clearly not authorized the Respondent to register or use the disputed domain name or any domain name containing the "nreal" trade mark and there is no association or affiliation between the Complainant and the Respondent. The Panel also accepts the submissions of the Complainant that there is no evidence that the Respondent is a known reseller or distributor of the Complainant or of one of its affiliated companies or that it (the Respondent) is commonly known by the disputed domain name or any similar name. Accordingly, none of the circumstances referred to in paragraph 4(c)(i) or (ii) arise.

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<sup>1</sup> "Given the similarities between the Policy and the Uniform Domain Name Dispute Resolution Policy (the "UDRP"), the Panel will refer to cases decided under both the Policy and the UDRP and notably WIPO Overview 3.0, as relevant to this proceeding."

However, there is evidence submitted by the Complainant to the effect that the Respondent has used the disputed domain name to resolve to a website that offers products identical to or similar to those offered by the Complainant. It is unclear whether these are the genuine products made and distributed by the Complainant but it may be noted that the appearance of the Respondent's website is identical to that of the Complainant's "official" websites and even appears to use the same images and labels associated with the Complainant's products. The Panel has also noted, through its own online investigation, that the disputed domain no longer resolves to any website, indicating that the Respondent is no longer using it. The question then is whether this past use could be regarded as a legitimate or *bona fide* use of the disputed domain name. It is certainly not a "legitimate noncommercial or fair use" of the disputed domain name that might fall within the scope of paragraph 4(c)(iii), but the list of circumstances in paragraph 4(c) is not exhaustive, meaning that there may be other legitimate uses of the disputed domain name where the use in question has a commercial aspect. In theory, this might extend to sales and distribution of a complainant's products by an unauthorised, rather than an authorised, reseller of those products. Previous panels have recognised this possibility, but have also articulated criteria that should be applied here in order to find that the use is *bona fide*. Thus, in the *Oki Data* case (*Oki Data America Inc v ASD Inc*, WIPO Case No [D2001-0903](#)) relied on by the Complainant, the panel held that a reseller, distributor or service provider using a domain name containing the complainant's trade mark to undertake sales or provide repair or other services relating to those goods could be making a *bona fide* offering of goods and services and thus have a legitimate interest in the disputed domain, if the following requirements are satisfied:

- (i) the respondent must actually be offering the goods or services at issue;
- (ii) the respondent must use the site to sell only the trademarked goods or services;
- (iii) the site must accurately and prominently disclose the registrant's relationship with the trademark holder; and
- (iv) the respondent must not try to "corner the market" in domain names that reflect the trademark.

See further the [WIPO Overview 3.0](#), para 2.81, and the other panel decisions noted there.

On the assumption that the first two of these criteria might be satisfied in the present proceeding, that is, that the Respondent is, or was, offering the Complainant's products for sale on its website and no other products, this cannot be the case so far as the second two (parts (iii) and (iv)) are concerned. There is no indication on the Respondent's website of its relationship with the Complainant and the imitation of the Complainant's websites strongly suggests that the Respondent's registration and use of the disputed domain name was an attempt to "corner the market" in domain names that reflect the Complainant's mark (Complaint, Exhibits 18 and 19). In particular, the use of the name "Nreal AU" on the Respondent's website misleadingly suggested an official affiliation with the Complainant as it follows the same pattern of names such as "Nreal US", "Nreal Japan", etc that were adopted by the Complainant's national subsidiaries. In the absence of any Response by the Respondent, the Panel concludes that there is a *prima facie* case here that the Respondent was not making a *bona fide* use of the disputed domain name, and, more generally, a *prima facie* case that the Respondent has no rights or legitimate interests in the disputed domain name for the purposes of paragraph 4(a)(iii) of the Policy.

### **C. Registered or Subsequently Used in Bad Faith**

Under paragraph 4(a)(iii) of the Policy, the Complainant must establish that the disputed domain name has been either registered or subsequently used in bad faith by the Respondent (these are disjunctive, rather than conjunctive, requirements). Paragraph 4(b) of the Policy then provides the following, non-limiting, list of circumstances which, if present, will be evidence of such registration or use of a domain name in bad faith:

- (i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to another person for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or
- (ii) you have registered the domain name in order to prevent the owner of a name, trade mark or service mark from reflecting that name or mark in a corresponding domain name; or
- (iii) you have registered the domain name primarily for the purpose of disrupting the business or activities of another person; or
- (iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to a website or other online location, by creating a likelihood of confusion with the complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of that website or location or of a product or service on that website or location; or
- (v) if any of your representations or warranties as to eligibility or third party rights given on application or renewal are, or subsequently become, false or misleading in any manner.

Much of the evidence relied upon by the Complainant under paragraph 4(a)(ii) is also relevant to the question of bad faith registration and use of the disputed domain name under paragraph 4(a)(iii). In particular, the circumstances outlined in paragraph 4(b)(ii), (iii) and (iv) appear to be present. In this regard, it is relevant to take account of the evidence provided by the Complainant of its widespread promotion and distribution of AR glasses under the mark "nreal" prior to the registration of the disputed domain, and the evidence of the close identity between the Respondent's websites and those of the Complainant, as well as the use of the name "Nreal AU", which would mislead consumers into believing that they are visiting the Complainant's website.

In view of the evidence, the Panel concludes that the Complainant has made a case of bad faith registration and use of the disputed domain name falling within the circumstances outlined in paragraph 4(b)(ii)-(iv), and further that it has met the requirement of paragraph 4(a)(iii) of the Policy.

## **7. Decision**

For all the foregoing reasons, in accordance with Paragraphs 4 of the Policy and 15 of the Rules, the Panel orders that the domain name <nreal.com.au> be cancelled.

*/Staniforth Ricketson/*

**Staniforth Ricketson**

Sole Panelist

Date: August 13, 2023