

ADMINISTRATIVE PANEL DECISION

Terry David Bezer, Darren David Tyrrell, and Perran Helyes v.
Xanana Nasyidah
Case No. D2022-1608

1. The Parties

The Complainants are Terry David Bezer, United States of America (“United States”), Darren David Tyrrell, and Perran Helyes, United Kingdom, represented by Howes Percival LLP, United Kingdom.

The Respondent is Xanana Nasyidah, Indonesia.

2. The Domain Name and Registrar

The disputed domain name <thatsnotmetal.net> is registered with GoDaddy.com, LLC, (the “Registrar”).

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the “Center”) on May 4, 2022. On May 4, 2022, the Center transmitted by email to the Registrar a request for registrar verification in connection with the disputed domain name. On May 5, 2022, the Registrar transmitted by email to the Center its verification response:

- (a) confirming it is the Registrar for the disputed domain name;
- (b) disclosing registrant and contact information for the disputed domain name which differed from the named Respondent and contact information in the Complaint;
- (c) confirming the language of the registration agreement is English; and
- (d) confirming that the registration agreement included an acknowledgement that the disputed domain names were registered subject to the Uniform Domain Name Dispute Resolution Policy (the “Policy” or “UDRP”).

The Center sent an email communication to the Complainants on May 5, 2022, providing the registrant and contact information disclosed by the Registrar, and inviting the Complainants to submit an amendment to the Complaint. The Complainants filed an amendment to the Complaint the same day.

The Center verified that the Complaint together with the amendment to the Complaint satisfied the formal requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy" or "UDRP"), the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2 and 4, the Center formally notified the Respondent of the Complaint, and the proceedings commenced on May 18, 2022. The Center attempted a second notification of the Complaint to the Respondent's email address confirmed by the Registrar on May 23, 2022, as it was initially denied by the Respondent's email server. In accordance with the Rules, paragraph 5, the due date for Response was June 7, 2022. The Respondent did not submit any response. Accordingly, the Center notified the Respondent's default on June 9, 2022.

The Center appointed Warwick A. Rothnie as the sole panelist in this matter on June 20, 2022. 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.

4. Factual Background

The First Complainant resides in California in the United States. From about September 2015 until October 16, 2020, he operated a business of presenting a podcast *That's Not Metal*. The First Complainant incorporated a company, That's Not Metal Limited, in England in the United Kingdom to handle administrative matters in connection with this business. The company's involvement, however, ceased in about November 2018.

The Third Complainant took over the operation of the podcast in October 2020. Since then, the Third Complainant has been the lead presenter on the podcast. (Following the transfer of the podcast to the Third Complainant, the First Complainant's company was dissolved as an inactive company.)

The *That's Not Metal* podcast is available through the major services including Spotify, Apple Podcasts, and Deezer. It bills itself as "Your favourite rock & metal podcast bringing you all the latest news, opinions, honest reviews and laughs every Friday. 100% passion, 100% honesty, 100% of the time".

According to an article published in the *Independent* newspaper on the United Kingdom on November 26, 2015, the first episode debuted at No. 1 in the iTunes Music Podcast Chart and No. 11 in the British iTunes Podcast Chart. Within 10 weeks of launch there were more than 10,000 listeners each week.

There have now been 384 weekly episodes of the podcast. According to the Complaint, the podcast's Patreon account has some 200 monthly subscribers paying on average GBP 5 per month. It is also claimed in the Complaint that the podcast generates on average GBP 800 per month through advertising fees and Patreon subscriptions. The podcast has received 444 ratings on its Apple Podcasts page. Currently, the Apple Podcasts page lists 30 ratings with a score of 4.9 out of 5. The podcast is also promoted through *That's Not Metal* pages on Facebook with 11,464 followers, Twitter with 3,955 followers, and Instagram with 3,077 followers.

The First Complainant registered the disputed domain name on September 24, 2015. From that date, it was used to host a website promoting the podcast. The website also offered for sale merchandise associated with the podcast such as branded t-shirts, branded beanies, *That's Not Metal* albums or playlists, and annual subscription bundles.

On or about September 25, 2020, the First Complainant ceased to be the registrant of the disputed domain name. According to the Complaint, the email from the Registrar notifying that renewal was due went to a junk folder and as a result the registration was not renewed inadvertently.

At some point after that expiry the Respondent became the registrant. The disputed domain name now resolves to a website offering gambling services online. The website is in Indonesian. The Panel notes that the last capture by the Wayback Machine of the website at the disputed domain name promoting the podcast is dated October 24, 2020. The first capture promoting gambling services in Indonesian is dated January 22, 2021. There were no intervening captures.

The Second Complainant “is the owner of an AWS Organisation”. The First Complainant’s account with this “AWS Organisation”, was associated with the First Complainant’s wife’s email account and was used in connection with the administration of the podcast’s services. The Second Complainant also helped the First Complainant and his company build a podcast app used in connection with the *That’s Not Metal* podcast and also provided ongoing technical assistance.

According to the Complaint, the First Complainant’s wife’s email account “was linked to the Second Complainant’s AWS account”. In some way, the Complaint alleges, the Respondent was able to access the First Complainant’s wife’s email account and somehow incurred USD 25,503.94 in charges on the Second Complainant’s account with AWS which the Second Complainant is liable for but did not authorise.

5. Discussion and Findings

No response has been filed. The Complaint and Written Notice have been sent, however, to the Respondent at the electronic and physical coordinates confirmed as correct by the Registrar in accordance with paragraph 2(a) of the Rules. The courier attempting delivery of the Written Notice was unable to complete delivery. Bearing in mind the duty of the holder of a domain name to provide and keep up to date correct WhoIs details, therefore, the Panel finds that the Respondent has been given a fair opportunity to present his or its case.

When a respondent has defaulted, paragraph 14(a) of the Rules requires the Panel to proceed to a decision on the Complaint in the absence of exceptional circumstances. Accordingly, paragraph 15(a) of the Rules 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.

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:

- (i) the disputed domain name is identical or confusingly similar to a trademark 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 and is being used in bad faith.

A. Consolidation

The Complainants have requested consolidation of their complaints against the Respondent into the one Complaint.

Paragraph 10(e) of the Rules authorises the Panel to consolidate multiple domain name disputes on request by a Party. Subject to the overriding requirements of fairness and equality of treatment (Rules paragraph 10(b)), panels typically allow consolidation where the complainants have a common grievance against a respondent or the conduct of the respondent affects the Complainants in similar fashion and consolidation

would be procedurally efficient. See e.g. WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition ("[WIPO Overview 3.0](#)"), section 4.11.1.

As discussed in section 5B below, the Panel finds that the First Complainant had rights in the name *That's Not Metal* as an unregistered or common law trademark and those rights were transferred to the Third Complainant who has been providing the podcast since October 2020. The Third Complainant therefore has standing.

Strictly speaking, the First Complainant does not appear to have an ownership interest in the trademark following the transfer to the Third Complainant. However, the loss of the disputed domain name appears to have occurred before or at around the time of the transfer and so at a time when the First Complainant was the owner of the trademark and, in any event, the First Complainant and his development and use of the trademark is clearly closely connected with the Third Respondent's rights. Accordingly, the Panel considers it appropriate to include the First Complainant in the proceeding.

On the matters alleged in the Complaint, the Second Complainant has suffered a serious loss in terms of incurring indebtedness to AWS. That alleged loss flows from apparently unauthorised use of the AWS services for which the Second Complainant has been charged. The evidence, however, does not indicate that the Second Complainant has any rights or interests as such in the trademark *That's Not Metal*. Accordingly, while having a seemingly related grievance the Second Complainant's complaint against the Respondent appears to be more general but does not appear to arise under the Policy. As a result, the Panel does not consider it necessary to join the Second Complainant in the proceeding.

B. Identical or Confusingly Similar

The first element that a complainant must establish is that the disputed domain name is identical with, or confusingly similar to, the complainant's trademark rights.

There are two parts to this inquiry: the complainant must demonstrate that it has rights in a trademark at the date the complaint was filed and, if so, the disputed domain name must be shown to be identical or confusingly similar to the trademark.

For the first part of the inquiry, there is no requirement that the trademark be registered. An unregistered trademark will suffice for the purposes of the Policy provided the Complainant has demonstrated a sufficient reputation in the trademark with a relevant public. See e.g. [WIPO Overview 3.0](#), section 1.3. The acquisition of the required reputation must be demonstrated by evidence, not merely assertion. As the [WIPO Overview 3.0](#), section 1.3 states in part:

"Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (e.g., consumer, industry, media) recognition, and (v) consumer surveys."

Section 1.3 of [WIPO Overview 3.0](#) further notes in addition that the rise of Internet commerce means that sufficient recognition can be achieved relatively rapidly. It can also be important to take into account the nature of the Complainant's goods and services as well as the type and scope of market activities.

Having regard to the continuous operation of the podcast since September 2015, its significant impact at launch and the steady and consistent paying membership, especially bearing in mind, the service is a podcast, the Panel finds that a sufficient reputation has been demonstrated in the podcast *That's Not Metal* that it qualifies as an unregistered trademark for the purposes of the Policy.

There is, as noted above, a question of who owns it. On the basis of the information in the Complaint, the owner of *That's Not Metal* as an unregistered or common law trademark appears to have been the First Complainant until he transferred the business to the Third Complainant. While the precise terms of the

transfer have not been revealed, it is apparent that the Third Complainant has continued on the podcast business under the name *That's Not Metal* since that date.

At least the Third Complainant therefore is the owner of *That's Not Metal* as a trademark and has standing to bring the Complaint.

The second stage of this inquiry simply requires a visual and aural comparison of the disputed domain name to the proven trademarks. This test is narrower than and thus different to the question of “likelihood of confusion” under trademark law. Therefore, questions such as the scope of the trademark rights, the geographical location of the respective parties and other considerations that may be relevant to an assessment of infringement under trademark law are not relevant at this stage. Such matters, if relevant, may fall for consideration under the other elements of the Policy, e.g. [WIPO Overview 3.0](#), section 1.7.

In undertaking that comparison, it is permissible in the present circumstances to disregard the generic Top-Level Domain (“gTLD”) component as a functional aspect of the domain name system. [WIPO Overview 3.0](#), section 1.11.

Disregarding the “.net” gTLD, the disputed domain name consists of the Complainants’ trademark (apart from the insignificant omission of the apostrophe). The Complainants’ trademark remains visually and aurally recognisable within the disputed domain name.

Accordingly, the Panel finds that the Complainants have established that the disputed domain name is identical with the Complainants’ trademark and the requirement under the first limb of the Policy is satisfied.

C. Rights or Legitimate Interests

The second requirement the Complainants must prove is that the Respondent has no rights or legitimate interests in the disputed domain name.

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

- (i) before any notice to [the Respondent] of the dispute, [the Respondent’s] use of, or demonstrable preparations to use, the [disputed] domain name or a name corresponding to the [disputed] domain name in connection with a *bona fide* offering of goods or services; or
- (ii) [the Respondent] (as an individual, business, or other organization) has been commonly known by the [disputed] domain name, even if [the Respondent] has acquired no trademark or service mark rights; or
- (iii) [the Respondent] is making a legitimate noncommercial or fair use of the [disputed] domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

These are illustrative only and are not an exhaustive listing of the situations in which a respondent can show rights or legitimate interests in a domain name.

The onus of proving this requirement, like each element, falls on the Complainants. Panels have recognized the difficulties inherent in proving a negative, however, especially in circumstances where much of the relevant information is in, or likely to be in, the possession of the respondent. Accordingly, it is usually sufficient for a complainant to raise a *prima facie* case against the respondent under this head and an evidential burden will shift to the respondent to rebut that *prima facie* case. The ultimate burden of proof, however, remains with the Complainant. See e.g., [WIPO Overview 3.0](#), section 2.1.

It is apparent from the circumstances by which the First Complainant ceased to be the holder of the disputed domain name that the Complainants have not authorised the Respondent to use the disputed domain name. Nor is the Respondent affiliated with any of the Complainants.

The disputed domain name is not derived from the Respondent's name. Nor is there any suggestion of some other name by which the Respondent is commonly known from which the disputed domain name could be derived. From the available record, the Respondent does not appear to hold any trademarks for the disputed domain name.

The phrase "That's Not Metal" is a grammatical expression in English. However, it has no obvious or direct application to the gambling services which the Respondent is apparently providing.

These matters, taken together, are sufficient to establish a *prima facie* case under the Policy that the Respondent has no rights or legitimate interests in the disputed domain name. The basis on which the Respondent has adopted the disputed domain name, therefore, calls for explanation or justification. The Respondent, however, has not sought to rebut that *prima facie* case nor advance any claimed entitlement. Accordingly, the Panel finds the Complainants have established the second requirement under the Policy also.

D. Registered and Used in Bad Faith

Under the third requirement of the Policy, the complainant must establish that the disputed domain name has been both registered and used in bad faith by the respondent. These are conjunctive requirements; both must be satisfied for a successful complaint. See *e.g. Burn World-Wide, Ltd. d/b/a BGT Partners v. Banta Global Turnkey Ltd* WIPO Case No. [D2010-0470](#).

Generally speaking, a finding that a domain name has been registered and is being used in bad faith requires an inference to be drawn that the respondent in question has registered and is using the domain name to take unfair advantage of its significance as a trademark owned by (usually) the complainant.

In the present case, the Complainants rely on the circumstances by which the First Complainant lost the registration of the disputed domain name. In addition, the Complainants point out the already mentioned fact that the expression "That's Not Metal" is wholly unrelated to the Respondent's gambling services and indeed is in a completely different language to the Respondent's website. Accordingly, the Complainants contend that the Respondent has adopted their trademark with the intention of attracting traffic to the Respondent's gambling website by creating a likelihood of confusion about association with the podcast. The Complainants also point to the intentional unauthorised use of the Second Complainant's AWS account, incurring over USD 25,000 in unpaid fees, as further exposing the Respondent's bad faith.

As the term "That's Not Metal" does not have any meaning or connection with the Respondent's gambling services, which are provided in Indonesian in any event, it appears that the Respondent has adopted the disputed domain name because of its trademark significance. In circumstances where the Respondent has not sought to claim, let alone establish, that he or she has rights or legitimate interests in the disputed domain name, therefore, the Panel finds the Respondent has registered it in bad faith.

The use of the disputed domain name in a manner calculated to mislead the public about an association or connection with the Complainants and their trademark in connection with the Respondent's gambling services is also use in bad faith. That conclusion is reinforced by the undisputed allegations about unauthorised use of the First Complainant's wife's email account and incurring of over USD 25,000 in unauthorised AWS fees.

Accordingly, the Complainant has established all three requirements under the Policy.

6. Decision

For the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the disputed domain name, <thatsnotmetal.net>, be transferred to the Complainant.

/Warwick A. Rothnie/

Warwick A. Rothnie

Sole Panelist

Date: July 4, 2022