

18 January 2023

Internet Corporation for Assigned Names and Numbers (ICANN)
Attn: Ms. Tripti Sinha (Chair) and the Members of the Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Via email through counsel

Dear Ms. Sinha and Members of the ICANN Board,

Re: Namecheap v. ICANN – ICDR Case No. 01-20-0000-6787

We write on behalf of Namecheap Inc. regarding the recent final declaration in the independent review proceedings between Namecheap and ICANN. ICANN publicly posted about this declaration on 5 January 2023, stating that it is in the process of reviewing and evaluating the final declaration and announcing that the Board will consider the declaration as soon as feasible.¹

Namecheap is concerned about this blogpost for at least three reasons: the announcement (i) reads as one-sided and downplays the many violations that the Panel has found, (ii) wrongfully gives the impression that the Panel's recommendations are permissive rather than mandatory,

¹ See <https://www.icann.org/en/announcements/details/icann-receives-final-declaration-in-the-namecheap-independent-review-process-05-01-2023-en>.

and (iii) states that the ICANN *organization* is reviewing and evaluating the final declaration, whereas such review should be performed by the ICANN *Board* itself.

The latter issue is rather ironic, as the Panel found that the ICANN *Board* must analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decision-making process to ensure that similar violations do not occur in the future. While the Panel recognized that the ICANN staff may assist with the decision-making process, it is clear from this and previous IRP declarations that the required act must be performed as a result of specific instructions provided by the ICANN Board. Simply rubberstamping staff recommendations is specifically not permissible.

Moreover, while the Panel limited itself to recommending, not ordering, remedial action, the Panel's recommendations themselves are not permissive. Indeed, the Panel has declared that ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated the Articles of Incorporation and Bylaws. The ICANN Board cannot, and should not, accept that such violations remain unaddressed. While the Panel recognized that, in theory, the ICANN Board has the option to reject compliance, it warned that the ICANN Board should not choose that option, especially since Namecheap is authorized "to enforce compliance in a court of competent jurisdiction."

With its recommendations, the Panel has informed the ICANN Board how it could ensure compliance with its Articles of Incorporation and Bylaws. Specifically, the Panel recommended that the ICANN Board consider taking the following actions:

- "First, **decisions as to how to implement the Panel's rulings** in this IRP **should be made by the ICANN Board**. The ICANN staff may of course assist with the decisionmaking process, but the Board should make the ultimate decisions. This is consistent with Section 4.3(x)(ii), which states that the Board shall consider its response to IRP Panel decisions at the Board's next meeting, if feasible, **and shall accept or reject compliance with the decision on the public record based on an expressed rationale.**"
- "Second, given that the violations and concerns are procedural in nature, the ICANN Board **should consider creating and implementing a process to conduct further analysis of whether including price caps in the Registry Agreements for .ORG and .INFO is in the global public interest**. That process should **encourage participation of diverse stakeholders and directly and fully consider and respond to the primary concerns raised**. The process should be conducted in an open and transparent manner that **avoids the violations found by the Panel.**"

- “Third, ... the Panel finds that the evidence that price controls should be retained is much stronger for .ORG than for .INFO, given that .ORG is an original gTLD with a much larger number of DUMs, and serves a special market focused on not-for-profit organizations. Thus, while the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, **the measures for .ORG may be stronger and more extensive than for .INFO.**”

- “Fourth, the Panel recommends that the Board **consider whether to retain an expert consultant to conduct a study on issues raised** by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable. ICANN has already done considerable work on this subject, although that work does not include a formal study of the extent of market power of .ORG and .INFO. In particular, ICANN submitted reports and testimony from an expert economist and also obtained a draft opinion from the same expert before making the Price Cap Decision, although that opinion was provided to only two ICANN employees. The Panel’s view is that those reports are not complete as they do not analyze a number of points that Namecheap made about .ORG’s special market power. Nevertheless, the expert reports provide a foundation for additional analysis. **If the Board decides not to conduct further expert analysis, it should explain the reasons for that decision.**”

- “Fifth, if the Board concludes that some form of price controls for .ORG and/or .INFO are in the global public interest, the Panel recommends that ICANN **seek to amend the 2019 Registry Agreements to include appropriate price controls.** The registry operator of .ORG has publicly represented that it will not raise prices unreasonably, so it presumably would be willing to agree to some form of price controls. The registry operator for .INFO may also be willing to agree to price controls, given that prices do not appear to have increased by more than what would have been allowed under the prior price control provisions.”

- “Sixth, the ICANN Board may wish to **consider approaching the registry operators for .ORG and .INFO** about agreeing to some form of price controls, even before evaluating whether price caps are needed and taking the other measures noted above. If the registry operators are willing to agree to amend their registry agreement, that may moot the need to implement the other measures above.”

- “Seventh, the Panel recommends that the Board **consider revisions to ICANN’s decisionmaking process to reduce the risk of similar procedural violations in the future.** For example, the Board could adopt guidelines for determining what decisions involve

policy matters for the Board to decide, or what are the issues on which public comments should be obtained.”

Namecheap expects that the ICANN Board comply with these recommendations and remedy the clearly identified violations of the ICANN Articles of Incorporation and Bylaws. If the ICANN Board were to reject compliance with these recommendations, that would mean that the ICANN Board deliberately elects to violate the Articles of Incorporation and Bylaws. Such action would be incompatible with the reasonable business judgment that is expected from the Board.

Finally, whereas the Panel’s recommendations only refer to .ORG and .INFO, Namecheap submits that the ICANN Board should also consider .BIZ. While the Panel determined that the claim pertaining to .BIZ was time barred, its reasoning as to .ORG and .INFO is equally applicable to the .BIZ TLD. Given ICANN’s mission as a non-profit entity set up for the public benefit, it stands to reason that its consideration should extend to .BIZ, irrespective of whether the legal claim is time-barred or not.

In sum, we respectfully reiterate that the IRP ruling sets forth the appropriate methodology of compliance with its Bylaws and procedures by ICANN. Omitting to do so would not only run contrary to the IRP decision but could constitute a violation of ICANN’s Bylaws and imperil its active status as a tax-exempt non-profit entity. Consequently, ICANN’s very existence is dependent upon a faithful compliance with its Bylaws, as delineated by IRP decision.

The present letter is sent without prejudice. Namecheap further reserves all of its rights and remedies in all available fora whether within or outside of the United States of America in regards to this matter.

Yours sincerely,


Flip Petillion


Jan Janssen