

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

Namecheap, Inc.

Claimant,

Case Number: 01-20-0000-6787

- and -

Internet Corporation for Assigned Names
and Numbers (ICANN)

Respondent.

PROCEDURAL ORDER NO. 12
(Relief Granted on Namecheap’s Motion to Compel and Motion for Sanctions)

Introduction

1. This Order sets forth the relief that the Panel has decided to grant in connection with the Motion to Compel and Motion for Sanctions filed by Claimant Namecheap, Inc. (“Namecheap” or “Claimant”) on 29 September 2021 (“Further Motion to Compel”). The Panel is issuing this Order on an expedited basis, so that additional documents will be produced promptly, and Namecheap will be able to submit its Pre-Hearing Brief and supporting materials by the revised deadline of 30 November 2021, without further extensions.

2. To facilitate expedited issuance and maintain the schedule, this Order is limited to the relief that the Panel has already decided to grant. The Panel will issue a separate order on the requests for relief that are not addressed in this Order. The Panel is not presently inclined to grant relief beyond that set forth herein, but does not exclude the possibility that it may do so in the course of preparing its separate order on the remaining requests or upon further review in the course of this Independent Review Process (“IRP”). In the meantime, the Parties should prepare their submissions on the assumption that no further relief will be granted.

Procedural Background

3. Respondent Internet Corporation for Assigned Names and Numbers (“ICANN” or “Respondent”) submitted its Response to Namecheap’s Further Motion to Compel on 14 October 2021 (“ICANN’s Response”).

4. A hearing on Namecheap’s Further Motion to Compel was conducted via Zoom videoconference on 19 October 2021, at 8:30 a.m. Pacific Time. The following individuals participated:

Flip J. Petillion (Petillion, Huizingen, Belgium), counsel for Namecheap
Jan Janssen (Petillion, Huizingen, Belgium), counsel for Namecheap
Jeffrey A. LeVee (Jones Day, Los Angeles, CA), counsel for ICANN
Kelly Watne (Jones Day, Los Angeles, CA), counsel for ICANN
Casandra Furey (Associate General Counsel, ICANN)
Glenn P. Hendrix, Chairman of the Independent Review Panel (the “Panel”)
Grant L. Kim, Panel Member
Christof Siefarth, Panel Member
Tom Simotas, International Centre for Dispute Resolution (“ICDR”)¹

5. Counsel for Namecheap and ICANN (collectively, the “Parties”) made presentations and responded to questions from the Panel. Namecheap’s counsel referred to presentation slides that were provided to the Panel and ICANN approximately 25 minutes before the hearing. ICANN’s counsel objected to the slides on the ground that some of them included new matter in the nature of an unauthorized reply brief. On 9 February 2021, following a prior dispute between the Parties regarding the use of presentation slides, the Panel issued the following guidance:

Parties may utilize PowerPoints during oral argument by counsel. Copies of the PowerPoint shall be provided to the Panel and opposing counsel in advance of the argument (even if only minutes prior). All evidence referenced in such PowerPoints shall refer to the relevant exhibit number so that the other party can ascertain whether the evidence is new to the record. Demonstrative exhibits are permissible, as long as they rely solely upon documents in the record.

In accordance with this guidance, the Panel decided to allow submission of the slides. The Panel is open to reconsidering the foregoing guidance prospectively upon the request of either party.

6. The hearing was adjourned at approximately 10:00 am Pacific Time. By agreement of the Parties, the hearing was recorded.

7. The Panel previously addressed document production disputes in Procedural Order No. 5 (which was issued on 24 December 2020, in response to the Parties’ cross motions to compel) and Procedural Order No. 7 (which was issued on 27 February 2021, and addressed Namecheap’s objection to ICANN’s ESI Protocol).

¹ Mr. Simotas participated only at the beginning of the hearing.

Namecheap's current motion is referred to here as its "Further Motion to Compel," to distinguish it from the prior motion to compel addressed in Procedural Order No. 5.

General Principles

8. As noted in paragraphs 8 to 13 of Procedural Order No. 5, three primary principles govern production of documents in this IRP. First, Rule 8 of the ICANN Interim Supplementary Procedures for ICANN Independent Review Process (the "IRP Procedures") authorizes the Panel to require a party to produce documents that are "reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine, or otherwise protected from disclosure by applicable law (including, without limitation, disclosures to competitors of the disclosing person, group or entity, of any competition-sensitive information of any kind)."

9. Second, Article 21 of the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules") authorizes the Panel to require production of documents in a party's possession that are "not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case."² Article 21 further states that the Panel and the Parties "should endeavor to avoid unnecessary delay and expense while at the same time avoiding surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly."

10. Third, the ICANN Bylaws emphasize that ICANN should operate in an "open and transparent manner" and shall be "accountable to the community." *See, e.g.,* ICANN By-Laws, Arts. 3.1, 4.1.

Relief Granted

11. Some of the relief sought by Namecheap is broad and general in nature, while other relief concerns specific documents. Having considered the Parties' oral and written arguments and reviewed the supporting documents submitted by the Parties,³ the Panel grants the following specific relief.

² The Panel is referring to the 2014 version of the ICDR Rules. The ICDR Rules were amended in 2021. Since the 2014 version of the Rules was in effect when this IRP began, that version of the Rules applies here, as stated in Article 1(1) of both versions of the ICDR Rules. The Panel invites the Parties to comment if they disagree, although in this particular instance, it does not appear that the version of the Rules affects the outcome, as the 2021 version includes a similar provision in Article 24.

³ The supporting documents submitted by Namecheap include Annexes 38-89 to its Further Motion to Compel. The supporting documents submitted by ICANN include

Attachments to Email Chains with Registry Operators for .ORG, .INFO, and .BIZ

12. ICANN has produced a limited number of emails that it exchanged in 2018 and 2019 with the registry operators for .ORG (PIR), .INFO (Afilias), and .BIZ (Neustar). Those emails concern renewal of the Registry Agreement with each operator and include references to potential removal of the price control provisions of the then-current Registry Agreement.

13. Namecheap requests an order requiring ICANN to produce attachments to these emails that ICANN did not produce. ICANN opposes production on the ground that the attachments do not refer to potential removal of price control provisions and are thus not responsive to Namecheap's document requests. Namecheap replies that the attachments should be produced because they are part of a responsive email chain.

14. The Panel agrees with Namecheap that attachments to the emails with the .ORG, .BIZ, and .INFO registry operators should be produced, given that the attachments are part of the emails. While the Panel does not doubt ICANN's representation that the attachments do not refer to price controls, Namecheap's request for the attachments is reasonable, given the lack of any burden on ICANN and the fact that the cover emails do refer to price controls. ICANN has not asserted that the attachments are privileged or extremely confidential, and any confidentiality concerns can be addressed through the Stipulated Protective Order in this case. Indeed, ICANN has designated the emails as "Highly Confidential - Outside Attorneys' Eyes Only." The Panel has no reason to doubt that Namecheap will scrupulously respect that designation.

15. The documents to be produced specifically include the attachments to the emails submitted by Namecheap as Annex 69, Annex 72 (earliest email in the chain), Annex 75 (most recent email), Annex 79 (most recent email), and Annex 80. As to Annex 79, the Panel agrees with Namecheap that procedures for registry operators to provide notice of price increases could conceivably be relevant to the issues in this IRP (but expresses no view as to whether the attachments to Annex 79 will ultimately prove to be relevant here). As to Annex 80, the second page of the email (ICANN-NC-015371) refers to 31 July and 3 August 2017 documents and says "both docs attached," but it is not clear whether those documents were actually attached. Those documents appear to be potentially relevant, however, so ICANN shall produce them regardless of whether they were actually attached to the email.

Exhibits R-19 to R-27 to its Response, and the Affidavit of Russell Weinstein, who is ICANN's Vice President of Global Domains Division Accounts and Services and who managed the negotiations in 2018 and 2019 with the .ORG, .BIZ, and .INFO registry operators.

16. The Panel is not aware of any other attachments that were not produced, but ICANN is ordered to produce any other attachments to the emails discussed in paragraphs 50 to 67 of Namecheap's Further Motion to Compel, to the extent that such other attachments exist and have not already been produced.⁴

17. The Panel also grants Namecheap's request to order ICANN to produce the email of 28 January 2019 that is mentioned in the oldest email in the Annex 70 email chain. ICANN states that it has located the 28 January email and that it is not responsive and does not refer to price control provisions. But even if the 28 January 2018 email does not specifically refer to price controls, it may provide relevant context to the Annex 70 email chain (which does refer to price controls), and there is no burden in producing an email that ICANN has already located.

Notes of Phone Calls with Registry Operators

18. Namecheap has complained that ICANN did not produce any documents reflecting the content of its phone conferences with registry operators regarding renewal of the Registry Agreements for .ORG, .BIZ, and .INFO, such as agendas or meeting minutes. ICANN replied that it conducted a reasonable search and produced any responsive documents that it found. ICANN noted that those phone conferences were not recorded (which would be contrary to California law, unless both Parties consented). ICANN also noted that the registry operators had no reason to object to removal of price controls, so such controls were not the focus of the renewal negotiations, especially since price controls had already been removed from the Base Registry Agreement that was the basis for negotiations.

19. Given the representation by ICANN's counsel and the sworn declaration by Mr. Weinstein that most negotiations with registry operators were by phone or email, the Panel is not inclined to order ICANN to conduct further searches, with one exception. During the hearing, the Panel understood ICANN's counsel to say that they had confirmed with ICANN personnel that there were no other responsive communications related to phone conferences with registry operators, but they had not specifically asked about handwritten notes. ICANN is hereby directed to ask all ICANN personnel who participated in phone conferences in 2018 or 2019 with registry operators regarding renewal of the Registry Agreements for .ORG, .BIZ, and .INFO whether they have any handwritten notes of those conferences. If so, ICANN shall produce such handwritten notes. If not, ICANN shall certify that no such notes exist.

⁴ Namecheap has suggested that some other emails with registry operators include attachments, such as Annex 71. Based on the Panel's review, those emails do not appear to include attachments. However, ICANN should produce any attachments that do exist.

Unredacted Versions of Documents Related to .COM Registry Agreement

20. Namecheap has requested that ICANN be ordered to produce unredacted versions of the documents submitted as Annex 76, which Namecheap describes as heavily redacted versions of documents related to price control provisions in the Registry Agreement for .COM.⁵

21. ICANN has replied that the redacted portions are not only non-responsive, but they also contain highly sensitive information about its negotiations with Verisign, which is the registry operator for .COM. ICANN also noted that these documents are subject to a confidentiality agreement with Verisign. ICANN offered to produce unredacted versions for *in camera* review by the Panel.

22. The Panel recognizes that this IRP concerns price controls in the Registry Agreements for .ORG, .BIZ, and .INFO (not price caps for .COM), that information about the .COM Registry Agreement negotiations may be commercially sensitive, and that U.S. governmental involvement with the .COM domain may be a distinguishing factor. Nevertheless, a document by ICANN concerning price controls generally could conceivably be relevant, and the Annex 76 documents are so heavily redacted that it is difficult to determine the context of the few non-redacted portions. Accordingly, the Panel accepts ICANN's offer to allow *in camera* review of an unredacted version of the Annex 76 documents. The Panel will issue a further order after it completes such review.

Native Versions of Annex 82 and 83 Spreadsheets

23. Namecheap has requested that ICANN produce native versions of spreadsheets submitted as Annexes 82 and 83 that include metadata showing the dates that they were created and last modified. At the hearing, ICANN stated that it did not object to this request. Accordingly, ICANN is ordered to produce these spreadsheets in native format with metadata showing the dates they were created and last modified.

Conclusion

24. For the reasons set forth above, ICANN is hereby ordered to produce the following documents on or before October 29, 2021:

⁵ Namecheap also requests that ICANN "reconsider" its designation of the Annex 76 documents as "Highly Confidential," but has not asked the Panel to reclassify these documents, pursuant to the procedures in Section 5 of the Stipulated Protective Order. Accordingly, there is no need for the Panel to issue a ruling on this issue.

- A. All attachments to any of the emails in the email chains discussed in paragraphs 50 to 67 of Namecheap's Further Motion to Compel that have not already been produced, specifically including (but not limited to), the Annex 69, 72, 75, 79, and 80 emails;
- B. The email of 28 January 2019 that is mentioned in the oldest email in the Annex 70 email chain; and
- C. Native versions of the spreadsheets submitted as Annexes 82 and 83 that include metadata showing the dates that they were created and last modified.

25. ICANN is further ordered to certify on or before 29 October 2021, that it has asked all ICANN personnel who participated in phone conferences in 2018 or 2019 with registry operators regarding renewal of the Registry Agreements for .ORG, .BIZ, and .INFO if they have any handwritten notes of those conferences, and to state whether any such notes exist. If such notes exist, ICANN shall produce such notes on or before 5 November 2021.

26. ICANN is ordered to provide unredacted versions of the Annex 76 documents to the Panel for *in camera* review on or before 27 October 2021. The Panel will issue a further order concerning those documents after it completes such review.

27. The Panel will issue a separate order concerning the items requested in Namecheap's Further Motion to Compel that are not addressed herein.

**As at Los Angeles, California, USA
22 October 2021**

FOR THE PANEL:



**Glenn P. Hendrix
Chair**