

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. 7
(Ruling on Namecheap's Objection to ICANN's ESI Protocol)

Background

1. Procedural Order No. 5 directed the parties to meet and confer regarding ESI protocols and that the protocols address at least the following issues:

- The locations that will be searched for relevant ESI;
- The persons (custodians) likely to possess relevant ESI; and
- The methods to be used to collect ESI.

The Order further directed that party each party provide the other with the ESI protocols that it intended to use and set a deadline for objections.

2. For certain requests from Namecheap, Inc. ("Namecheap") to ICANN (*e.g.*, Request 1.r., 2.1. and 2.t.), the Panel limited ICANN's obligation to conduct an ESI search to the period of January 1, 2018 through November 18, 2019, but nonetheless required that ICANN conduct a reasonable inquiry to identify responsive documents and ESI outside that period. The Panel directed that such inquiry, at a minimum, include interviews with relevant ICANN staff.

Namecheap's Objection and ICANN's Response

3. On January 29, 2021, Namecheap submitted objections to ICANN's proposed search protocol. Namecheap objected that ICANN had agreed to perform only "two extremely narrow searches" for ESI. Namecheap acknowledged that some of

its search requests “might be too broad and could return an important number of unresponsive hits,” but noted that “if the pool of documents from a search turns out to be too large, the search can be narrowed down later.”

4. Namecheap also objected that ICANN had failed to provide “full transparency” about its interview inquiry, “so that Namecheap can be assured that ICANN will conduct a reasonably diligent and thorough inquiry to identify all relevant custodians likely to possess potentially relevant ESI” – including “shar[ing] the content of its interviews, so that Namecheap and the Panel can assess whether ICANN has indeed conducted a reasonable and thorough inquiry.”

5. ICANN responded that its ESI search protocol is reasonable and characterized its two proposed searches as “very broad.” ICANN also noted that it had offered to run searches across 19 custodians. ICANN objected to Namecheap’s proposed resolution that it “run Namecheap’s overbroad terms and then engage in some sort of post-processing narrowing of the subset through metadata or other obscure means,” characterizing it as “unworkable” and requiring additional oversight by the Panel.

6. Regarding the interview inquiries, ICANN argued that it “should not be required to disclose the interview questions it will ask ICANN staff (which reflect the work product and mental impressions of its attorneys about this IRP), or the responses given (communications that certainly will occur between in-house/external counsel and ICANN staff).” Namecheap in turn contends that ICANN’s assertion of attorney-client privilege to shield the contents of the interviews “is inappropriate, particularly in the context of ICANN’s commitment to openness and transparency.”

Ruling

- **Search Terms**

7. In the Panel’s experience, each party typically provides the other with a search term report generated by the processing or review tool for the search terms it intends to use and that reflects the number of hits on the various terms. Parties also typically consider testing additional search terms, modifying search terms, or other refinements in search strategy proposed by the other party, and to the extent that a modification or refinement proposed by the other party is rejected, disclose to the other party the rationale for the rejection so that the parties can meaningfully confer in good faith regarding the inclusion of the disputed proposed search.

8. It appears that the parties engaged in this process to a significant extent, but ICANN has not shared a search term report reflecting the number of hits on the various terms. The Panel directs that it do so as quickly as possible, ideally within the

next seven days. Following the exchange of such a report, the parties are directed to again meet and confer to agree on search terms – again, as quickly as possible, given the impending April 1 deadline for the exchange of documents. If the parties cannot agree on the search protocol, the Panel will resolve the issue.

9. As the parties meet and confer, they should consider that:
 - a. Any search protocol on which the parties manage to reach agreement – no matter how imperfect – will likely be better suited to both parties than one unilaterally imposed by the Panel.
 - b. Failure by the parties to reach an agreement, thus requiring a ruling by the Panel, will likely delay the proceedings and jeopardize the timing of the merits hearing.
 - c. A low number of “hits” on a search term or Boolean expression should not be considered determinative. A party is under no obligation to produce irrelevant documents, even if the burden of production is low.

10. Pending the outcome of the parties’ further meet-and-confer process, the Panel will not address the specific search terms or Boolean searches proposed by Namecheap, except as follows:

- a. The Panel agrees with ICANN that search terms related to the change of control issue are not appropriate following the Panel’s ruling on ICANN’s Motion to Dismiss, including the search terms, change of control, merger, acquisition, godaddy, Ethos, Donuts, and Becerra (although if relevant documents concerning the removal of price controls happen to mention these terms, they must be produced).
- b. Requiring that every search hit also be accompanied by a hit to one of the following terms – (“Registry Agreement!” OR “RA” OR “RAs” OR renew! OR “Base RA!” OR “Base Registry Agreement!” OR “Base gTLD Registry Agreement!”) – as proposed by ICANN, strikes the Panel as too narrow. It seems likely that some Boolean expressions containing some combination of at least a few of the other search terms agreed to by ICANN – without requiring that the terms “Registry Agreement” (or variants thereof) also be included – would yield relevant documents.
- c. The Panel agrees with ICANN that a search for standalone terms such as “fee!,” “price!” or “Section 7” would be overbroad. And a search for

“fee!” AND one other phrase, regardless of location, may also be overbroad. The Panel tends to agree that the search proposed in Paragraph 11 of Namecheap’s Reply – “pric! w/5 (cap! OR control!)’; ‘maximum w/5 (fee! OR pric!)” – might not be unreasonable, subject to the number of hits revealed by the search term report.

- **Interview Inquiries**

11. With regard to the interview inquiries, the Panel concludes that the content of ICANN counsel’s interviews of ICANN staff is protected by the attorney work product doctrine and attorney-client privilege.

12. In evaluating privilege, the Panel looks in this instance to California law. *See Afiliias v. ICANN*, ICDR Case No. 01-18-0004-2702, Procedural Order No. 4 (June 12, 2020), ¶ 33 (Ex. R-18) (noting that ICANN “is an organization incorporated under the laws of California and the communications and documents at issue ... were created by or concern legal advice from California attorneys. In such circumstances, the Panel is of the opinion that the law of California, as supplemented by U.S. federal law, applies to the issues arising from the Application, and it is on the basis of that law that it has determined these issues.”); *see also* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (2nd ed.), at 2383-2385 (“There is substantial support for the proposition that national rules of privilege governing the conduct of legal advisors (or other advisors) – rather than international standards – must be applied”).

13. The Panel is unaware of any California authority directly addressing whether attorney interviews of ESI custodians employed by the attorney’s client are privileged or subject to attorney work product protection, perhaps because this is seldom disputed. Courts from other U.S. jurisdictions have recognized privilege in this context, although there is authority that the mere fact that the custodian was interviewed and the length of the interview are not privileged. *See, e.g.*, 4 N.Y.P.RAC., COM. LITIG. IN N.Y. STATE COURTS, *Technology-assisted review – Keyword searches*, § 30:39, n. 10 (5th ed.) (“Although counsel may object to the witness testifying about the substance of the interview on the ground that those communications are privileged, the fact that the custodian was interviewed and the length of the interview is not privileged. A brief interview might suggest ... [that the] process was given short shrift.”).

14. Namecheap cites *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 149 (RM 75), for the proposition that “ICANN’s unwarranted invocation of privilege amounts to a violation of ICANN’s Bylaws.” But *Dot Registry* is inapposite. In that case, the IRP panel was considering whether ICANN’s Board Governance Committee (“BGC”) exercised independent judgment in reaching a decision. Because ICANN had shielded most of

the information considered by the BGC based on litigation privileges, the IRP panel was left with “no real evidence of an independent deliberative process at the BGC (other than the pro forma meeting minutes),” which were insufficient to establish that BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them.” *Dot Registry*, ¶ 149. Nevertheless, the panel did not question that “ICANN is ... free to assert attorney-client and litigation work-product privileges in this proceeding.” *Id.* at ¶ 149.

15. The transparency provisions in the Articles of Incorporation and Bylaws – although robust – do not go so far as to trump attorney-client privilege or the work product doctrine. Claims of attorney-client privilege and attorney work product protection are explicitly recognized in the Interim Supplementary Procedures for ICANN Independent Review Process, Rule 8, which allows IRP panels to order a party to produce “documents [...] [that] are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law.” (emphasis added). Thus, it appears that the Panel’s authority to order disclosure would not permit compelling the production of privileged material, even if the Panel were inclined to do so.¹ As stated in *Afilias v. ICANN*, ICANN’s “accountability for its staff’s conduct and its commitment to transparency under its Bylaws” does not “somehow imply a waiver of its right to invoke privilege.” ICDR Case No. 01-18-0004-2702, Procedural Order No. 4, ¶ 40.

16. ICANN has provided assurances that its counsel will diligently perform the interview inquiries to identify relevant documents. The Panel finds no basis at this time to look behind those assurances. Accordingly, Namecheap’s request for the contents and substance of interviews of ICANN employees by ICANN counsel is denied. However, ICANN shall, on or before March 8, 2021, provide the name and title of each interviewee and the approximate length of each interview.

As at Los Angeles, California, USA
February 27, 2021

FOR THE PANEL:



Glenn P. Hendrix
Chair

¹ Further, Rule 8 of the Interim Supplemental Procedures provides that “[w]here such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.” Requiring that only ICANN produce privileged or work product-protected materials would run afoul of that Rule.