

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. 8
(Final Ruling on Respondent's Motion to Dismiss)

Background

1. The Claimant, Namecheap, Inc. ("Namecheap" or "Claimant"), initiated this Independent Review Process ("IRP") against the Internet Corporation for Assigned Names and Numbers ("ICANN" or "Respondent"), which is responsible for overseeing the technical coordination of the Internet's domain name system on behalf of the internet community. Acting in that capacity, ICANN contracts with registry operators of top-level domains ("TLDs"), which represent the portion of a domain name to the right of the final dot, such as ".org" or ".com." Registry operators in turn contract with domain registrars and web hosting providers, such as the Claimant.

2. Namecheap's IRP request challenges the following actions by ICANN:

- i. ICANN's handling of an announcement by the .org registry operator (Public Interest Registry or "PIR") regarding a transfer of PIR's ownership to a for-profit company, Ethos Capital (the "change of control issue"); and
- ii. As stated by Namecheap in its IRP Request, "ICANN's decision to remove the provisions according to which the operators of .org, .info and .biz were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for

transferring a domain name registration from one ICANN-accredited registrar to another"¹ (the "price control issue").

3. Regarding the change of control issue, PIR has operated the .org generic top-level domain (gTLD) since 2003. On November 13, 2019, PIR announced that its parent organization had reached an agreement to sell PIR and all its assets to a private equity firm, Ethos Capital. The agreement with Ethos Capital provided that PIR would be converted from a not-for-profit corporation to a for-profit limited liability company. Per the registry agreement between ICANN and PIR, ICANN was required to either approve or withhold consent of any proposed change of control. On November 14, 2019, PIR submitted to ICANN a "Notice of Indirect Change of Control and Entity Conversion" seeking such approval. ICANN's deadline to act on the request was May 4, 2020.

4. Regarding the price control issue, prior to July 1, 2019, ICANN's registry agreements with the operators of the .org, .info and .biz registries established maximum annual price increases that the registry operators could charge to registrars (such as Namecheap) for domain registrations. Those agreements expired on June 30, 2019. They were replaced on that date with new registry agreements (the "2019 Registry Agreements") that are based on ICANN's base gTLD registry agreement, which does not include price controls (although ICANN indicates that the new agreements do include the same pricing protections afforded by the base gTLD registry agreement: thirty days' advance notice for price increases for initial domain name registrations; six months' advance notice of price increases for renewal domain name registrations; and the option for initial domain name registrations to renew for up to ten years).

5. On February 25, 2020, while approval of PIR's change of control was still pending, Namecheap submitted its IRP request seeking, *inter alia*, the following declarations:

- i. A declaration that, in order to comply with its Articles of Incorporation and Bylaws, ICANN must annul the decision that removed price caps in the .org, .info and .biz registry agreements;
- ii. A declaration that, in order to comply with its Articles of Incorporation and Bylaws, ICANN must ensure that .org remains dedicated to the non-profit sector by adopting measures such as requiring that .org be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service; and

¹ Namecheap's Request for IRP, ¶2.

- iii. A declaration that, in order to comply with its Articles of Incorporation and Bylaws, ICANN must ensure that price caps from legacy gTLDs can only be removed following policy development process that takes due account of the interests of the Internet user and with the involvement of the different stakeholders.²

6. Also on February 25, 2020, Claimant filed a request for the appointment of an emergency panelist and an order providing for interim measures of protection (the “Interim Request”), seeking to require ICANN to: (1) stay all actions that further the change of the control of the .org registry operator to a for-profit entity during the pendency of the IRP; and (2) take all actions that are necessary to prevent the .org registry operator from removing the price cap provision.

7. ICANN responded to the Interim Request on March 11, 2020, rejecting Namecheap’s claim on the merits and also maintaining that Namecheap lacked standing because it had not suffered any harm as a result of ICANN’s conduct and thus was not a proper “Claimant” under ICANN’s Bylaws.

8. On March 20, 2020, the Emergency Panelist, Gary L. Benton, issued a decision denying the Interim Request on the basis that “the balance of hardships with respect to the requested interim relief tips in favor of ICANN.”³ The Emergency Panelist made no ruling on the merits, stating: “In determining that interim relief is not appropriate at this time with respect to elimination of the price controls or the pending change of control review, it should be made clear that this decision does not resolve the merits to be fully addressed by the IRP Panel.”⁴ The Emergency Panelist denied ICANN’s request that the IPR proceeding be summarily dismissed for lack of standing, stating:

92. As alleged as to the price control provisions, as a Registrar of the .ORG gTLD, Namecheap is exposed to the risk of increased pricing for registry services. This is a harm that is directly and causally [sic] related to the alleged violation that ICANN has not followed proper procedures and has improperly consented to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm not occurred to date. The evidentiary support is implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap’s status as a Registrar for the .ORG gTLD. It makes no difference that Namecheap is not a party or third-party beneficiary to the Agreement. Namecheap faces a harm that it was not exposed to with the price controls in place.

² *Id.* ¶ 58.

³ Decision on Request for Emergency Relief, ¶ 131.

⁴ *Id.* ¶ 130.

93. Likewise, as a result of the alleged violations of the change of control process, Namecheap is at risk of being exposed to decision-making by Ethos and PIR that potentially harms Namecheap's financial and other business interests. This is a harm that is directly and causally related to the alleged violation that ICANN has not followed proper procedure in consideration of the change of control request.

The Emergency Panelist expressly noted that his findings on standing solely related to the Interim Request and did not bind this IRP Panel.⁵

9. ICANN responded to Claimant's IRP Request on April 10, 2020. In addition to denying that ICANN had violated its Articles of Incorporation or Bylaws, ICANN renewed its standing argument.

10. On April 30, 2020, while this IRP proceeding was pending, the ICANN Board rejected PIR's proposed change of control.

ICANN's Motion to Dismiss

11. ICANN sought leave and obtained permission from the Panel in Procedural Order No. 3 to submit a motion to dismiss to renew its standing argument and, with respect to the change of control issue, present a new argument based on mootness.

12. On December 21, 2020, prior to the filing of ICANN's motion and pursuant to the schedule in Procedural Order No. 3, Namecheap, submitted its *prima facie* showing of standing together with two declarations and an expert report prepared by two economists, Dr. Frank Verboven and Dr. Gregor Langus. These experts stated that ICANN's removal of the price control provisions harms Namecheap "if there is a mere likelihood that price controls are effective in keeping future prices low compared to the level in the counterfactual without price control provisions." They further concluded that "there is indeed a significant likelihood that price controls would be effective in the future." The experts also opined that registries hold market power in relation to the .org., .info, and .biz gTLDs and that the price caps have been effective in keeping prices of these TLDs closer to competitive levels. The experts maintain that the removal of price caps will likely result in an increase in Namecheap's costs for registry services, which would harm Namecheap. They state that the mere expectation of an increase in registry prices is sufficient to show harm because it reduces Namecheap's expected profits and its net present value.⁶ The declaration of Namecheap's Chief

⁵ *Id.* ¶ 94.

⁶ Expert Report of Professor Dr. Frank Verboven and Dr. Gregor Langus, §§10, 49, 55, 78-80.

Operating Officer stated that ICANN's actions and inactions regarding the change of control requests result in "significant uncertainty and confusion and it is likely that Namecheap will need to incur additional costs to inform existing and potential registrants for .org, .info and .biz of these changes, promote other services to them, and/or offer other incentives to attract and retain the customers."⁷ Namecheap maintained that an increase in the uncertainty in the business environment harms market participants, including Namecheap.

13. ICANN filed its Motion to Dismiss on January 13, 2021 on the bases that:

- 1) Namecheap is not a proper "Claimant," as defined in ICANN's Bylaws, because it has not suffered an injury or harm that is directly and causally connected to the alleged violations by ICANN; and
- 2) The allegations in the IRP Request regarding a previously contemplated change of control of the registry operator of the .org domain (PIR) are moot because ICANN has since withheld its consent to that change of control.

14. The Motion was briefed by the parties, and on February 3, 2021, a hearing was conducted via Zoom videoconference. Jeffrey A. LeVee (Jones Day, Los Angeles, CA), argued the motion for ICANN. Flip J. Petillion and Jan Janssen (both with Petillion Huizingen, Belgium) argued for Namecheap. By agreement of the parties, the hearing was recorded.⁸

⁷ Declaration of Hillan Klein, ¶7.

⁸ On February 2, 2021, prior to the hearing, the Panel submitted the following questions to the parties:

- i. Are there any prior IRP decisions addressing standing?
- ii. The ICANN Bylaws state that "[t]o be materially affected, the Claimant must suffer an injury *or* harm that is directly and causally connected to the alleged violation." (Emphasis added). What significance, if any, should we assign the reference to both "injury" and "harm"?
- iii. Is "harm" different from "injury"? If so, how?
- iv. Namecheap has cited a dictionary definition of "harm" – "actual or potential ill effect or danger." Does ICANN wish to proffer a different definition?
- v. Both parties have cited U.S. court decisions. To what extent are the standards for establishing standing in U.S. courts actually relevant here as persuasive authority?
- vi. The cases cited by the parties note that the U.S. concept of standing is based in the "case or controversy" limitation on federal judicial authority in Article III of the U.S. Constitution. "In this way, '[t]he law of Article III standing ... serves to prevent the judicial process from being usurped the powers of the political branches.'" *See, e.g.,* RM 66; *see also* RLA-2 ("Derived from separation of powers principles, the law of standing 'serves to prevent the judicial process from being used to usurp the powers of the political branches ... To assure that judges avoid rendering impermissible advisory opinions, parties seeking to invoke federal judicial power must first establish their standing to do so.'). Should this Panel be guided by similar considerations? If so, on what basis?
- vii. The ICANN Bylaws refer to "relevant principles of international law" and "international arbitration norms." Do these have any application here? If so, how?

15. In Procedural Order No. 6, issued on February 12, 2021, the Panel:
- Granted ICANN’s Motion to Dismiss Namecheap’s IRP request with respect to the change of control Issue, including the associated requests for declaratory relief, and
 - Denied ICANN’s Motion to Dismiss Namecheap’s IRP request with respect to the price control Issue, including the associated request for declaratory relief.

The Panel further noted that a subsequent order would follow detailing the Panel’s reasoning. This Order serves that purpose.⁹

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- viii. Namecheap has cited materials from ICANN’s Cross-Community Working Group on Accountability. Does ICANN have a view as to whether these materials should be relied upon by the Panel?
- ix. Namecheap notes that “If the intent was to exclude future harm – quod non – the Bylaws would read that a Claimant ‘must have suffered’ or ‘is suffering’ or ‘must have suffered and is suffering’ an injury or harm that has occurred.” The Bylaws do, however, state that a “‘Claimant’ includes a legal entity that ‘has been materially affected by a Dispute.’” (Emphasis added). Does this suggest that injury or harm must have already occurred? If not, why not?
- x. The U.S. cases cited by Namecheap provide that one element of standing is “redressability.” To the extent that element has any relevance here, precisely what remedy (or remedies) are being sought by Namecheap from the Panel with respect to Namecheap’s change of control claim? Precisely how is the change of control issue redressable by the Panel?
- xi. To ICANN, the Interim Supplementary Procedures provide that an IRP request must be filed “no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.” Could a registry operator eliminate any possibility of IRP review regarding the removal of price control provisions (either in this proceeding or future proceedings) by simply waiting 366 days to increase prices?
- xii. ICANN has asserted that the chance of control claim is moot, in addition to arguing that Namecheap lacks standing. How is mootness different from lack of standing? And what are Namecheap’s comments on mootness? One of the cases cited by Namecheap (RM 65) states that “there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness. Further, if mootness were simply ‘standing set in a time frame,’ the exception to mootness for acts that are ‘capable of repetition, yet evading review’ could not exist. Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum.” Do these principles have any application here?
- xiii. Is the test for standing different for a request for declaratory or injunctive relief, as opposed to a request for damages?

⁹ Namecheap submitted a Motion for Reconsideration of Procedural Order No. 6 on February 19, 2021. That Motion is addressed separately in Procedural Order No. 9, issued contemporaneously with this Order.

The Parties' Arguments

16. ICANN maintains that Namecheap's *prima facie* showing of standing "was devoid of any actual evidence or demonstrated harm to Namecheap. Instead, Namecheap provided two extremely short client affidavits, which amounted to six total pages but did not identify a single harm that Namecheap had suffered as a result of the conduct alleged in the IRP Request."¹⁰ ICANN dismisses Namecheap's expert report as merely "theor[izing] that Namecheap might – in the future – be harmed, albeit that the possible future harm is entirely speculative at this point."¹¹ ICANN observes that the affidavits and expert report submitted by Namecheap "employ the concept of 'may be injured' and 'potential' injury dozens of times," but "the Bylaws and the Interim Supplementary Procedures are clear that potential future harm is not sufficient for Namecheap to qualify as a Claimant."¹²

17. Further, even if potential future harm were sufficient to establish standing, ICANN contends, as to the price control issue, that Namecheap's affiants merely "speculate about lost registrations or renewals and increased costs."¹³ As to the change of control issue, ICANN maintains that not only does Namecheap lack standing, but its claim is moot because ICANN did not grant the request.¹⁴

18. Namecheap responds that future injury or harm is sufficient to meet the standing requirement, pointing, *inter alia*, to Section 4.3(p) of the Bylaws, which allows a claimant to request "interim relief" which "may include prospective relief" to prevent "[a] harm for which there will be no adequate remedy in the absence of such relief."¹⁵ Namecheap also notes that "as [Domain Name System] regulator, ICANN's decisions, actions and inactions are forward-looking and generate their effects prospectively."¹⁶ Namecheap cites a U.S. court decision – *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (RM 66) – for the proposition that "the risk of real harm" can support standing.¹⁷ Namecheap contends that a narrow definition of "claimant" status would be contrary to ICANN's commitment to "remain accountable to the Internet community through mechanisms defined in [the ICANN] Bylaws," including the IRP process.¹⁸

19. Namecheap also cites U.S. court decisions involving "procedural injury" – where "agencies undertake actions without affording the statutory procedures

¹⁰ ICANN's Motion to Dismiss at 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ Namecheap's Response to Motion to Dismiss at 3-4.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 8, citing ICANN Bylaws, §§1.2(a)(vi) and §4.3(a)(i)-(iii).

due to the plaintiff – for example, when an agency promulgates a rule without addressing substantive comments submitted by the plaintiff on that rule.”¹⁹ Namecheap argues that “[p]revailing on a procedural claim does not necessarily prevent the agency from undertaking the same action. But the successful claim does reduce the probability that the agency will promulgate the same rule; the comments may lead the agency to promulgate a different rule. Thus, the relevant injury that is redressed in a procedural claim is the increased probability of harm.”²⁰

20. As to the change of control issue, Namecheap argues that “ICANN is not transparent about its deliberations regarding changes of control,” which “makes it impossible to make reliable business projections and to stay abreast of important market developments. This generates uncertainty and affects Namecheap’s ability to compete effectively, compared to a situation where ICANN’s decision-making process is transparent.”²¹ Namecheap acknowledges that ICANN ultimately did not approve the change of control, but states that this “misses the point” because “[t]he fact that ICANN withheld its consent is no excuse for refusing to provide full transparency with respect to the actions surrounding the proposed acquisition and ICANN’s approval process.”²²

The Standard for Assessing Standing

21. The ICANN Bylaws provide that the “IRP Panel shall have the authority to ... [s]ummarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious.”²³ The Bylaws further state that only a “Claimant” can initiate an IRP proceeding and define that term as an entity “that has been materially affected by a Dispute,” meaning that it “must suffer an injury or harm that is directly and causally connected to the alleged violation” of ICANN’s Articles of Incorporation or Bylaws.²⁴ A “Dispute” is defined as a claim that ICANN action or inaction “violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that . . . exceeded the scope of the Mission.”²⁵

22. In addition to the ICANN Bylaws, the International Centre for Dispute Resolution’s Interim Supplementary Procedures for ICANN Independent Review Process (the “IRP Procedures”) govern this proceeding. The IRP Procedures add

¹⁹ *Id.* at 5, citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–97 (2009) (RM 63); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992)) (RM 64).

²⁰ *Id.* citing *Spokeo*, 126 S.Ct. at 1549.

²¹ *Id.* at 10.

²² *Id.* at 11.

²³ Bylaws, §4.3(o).

²⁴ Bylaws, § 4.3(b).

²⁵ *Id.*

nothing here, however, as they simply provide the same definition of “Claimant” and “Dispute” as the Bylaws.²⁶

23. Prior IRP panel decisions must be considered by the Panel in rendering decisions.²⁷ But both parties have confirmed that there are no prior IRP decisions addressing standing or mootness.²⁸

24. The parties previously stipulated that California law is the substantive law governing this Independent Review,²⁹ but even if standing principles were deemed a matter of substantive law, neither party referred to California law in their written submissions or oral argument.

25. Both parties cited U.S. federal court decisions in their written submissions (six by Namecheap; three by ICANN), but neither party considers such decisions binding. ICANN describes them as simply being “useful in providing analysis that courts undertake in similar situations.”³⁰ ICANN noted at the hearing that the drafters of the ICANN Bylaws would have been familiar with the concepts in those cases while crafting ICANN’s standing provisions. Despite extensively citing U.S. cases in its written submissions, Namecheap argued at the hearing that the IRP standing standards are less strict than those in U.S. courts. Namecheap observed that the concept of standing in U.S. courts is founded on the “case or controversy” requirement in Article III of the U.S. Constitution and associated separation of powers concerns. Namecheap maintained that these considerations are not present in IRP proceedings.

26. The Panel generally agrees that U.S. federal court decisions have limited utility here, given the constitutional underpinning of U.S. standing doctrine. Nevertheless, as discussed below, the Panel concludes that some of the “separation of powers” concerns driving U.S. standing principles are also present in the ICANN scheme of governance.

27. Article III of the ICANN Articles of Incorporation provides that ICANN “shall ... carry[] out its activities in conformity with relevant principles of international law and international conventions.”³¹ But neither party referred to international law in their written submissions. Following questioning by the Panel, Namecheap argued during the hearing that the Panel should consider the Articles on Responsibility of

²⁶ IRP Procedures, Rule 1.

²⁷ Bylaws, Art. 4.3(g); IRP Procedures, Rule 13(d).

²⁸ The parties advised that the issue of standing arose in one prior case—*Manwin Licensing International v. ICANN*, ICDR Case No. 50 117 T 00812 11—but the matter settled prior to a ruling.

²⁹ Procedural Order No. 1, ¶ 13.

³⁰ ICANN Motion to Dismiss, at 14, n. 50.

³¹ See also ICANN Bylaws, Art. 1, § 1.2(a) (ICANN “must ... carry[] out its activities in conformity with relevant principles of international law and international conventions”).

States for Internationally Wrongful Acts (“ARSIWA”), which were adopted by the International Law Commission (“ILC”) to codify principles of customary international law regarding state responsibility.³² ARSIWA addresses standing in Articles 42 and 48. The former affords standing to an “injured State” or “a group of States including that State, or the international community as a whole” if “the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”³³ Namecheap relies on the other article addressing standing – Article 48 – which provides that: “Any State other than an injured State is entitled to invoke the responsibility of another State [...] if: (a) [t]he obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) [t]he obligation breached is owed to the international community as a whole.”³⁴ Namecheap does not argue that the ARSIWA standards are binding here. (Indeed, they are not binding anywhere, essentially constituting only “soft law” principles.)³⁵ But Namecheap nonetheless suggests that ARSIWA demonstrates that customary international law does not require that a claimant be injured if the obligation breached is owed to the international community as a whole.

28. The Panel declines to assign any weight to the ARSIWA principles. ARSIWA “deal[s] only with the responsibility of States”³⁶ There is perhaps a colorable case to be made that ICANN is a parastatal entity of some sort.³⁷ ICANN is a public benefit corporation created by the U.S. government, and as stated in its Articles of

The ILC is comprised of 34 legal experts elected by the United Nations General Assembly every five years. They are tasked with seeking to develop and codify international law.

³² Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”), Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp No 10, p 43, UN Doc A/56/10 (2001).

³⁴ ARSIWA, Art. 48.

³⁵ Pavel Šturma, *The International Law Commission Between Codification, Progressive Development, or a Search for a New Role*, 13 FIU LAW REV. 1125, 1131 (2019) (“ARSIWA still remains in a non-binding form”).

³⁶ *Id.*, ILC Report, at 34.

³⁷ The concept of a “State” under ARSIWA extends to “persons or entities exercising elements of governmental authority” where “[t]he conduct of a person or entity which is not an organ of the State ..., but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.” ARSIWA, Art. 5. The ILC indicates that this “is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.” *Id.*, ILC Report at 34. The ILC states that such parastatal entities “may include public corporations, semipublic entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.” *Id.* at 35.

Incorporation, ICANN “pursue[s] the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet.”³⁸ But the Panel need not decide that issue because ARSIWA contemplates that *both* sides of a proceeding be states (or a collection of states).³⁹ Namecheap obviously is not a state and is not empowered by the law of any state to exercise functions of a public character normally exercised by state organs. It is a private corporation and does not have the same prerogatives as a state in protecting the collective interests of a community at large.

29. The IRP is a creation of ICANN’s Bylaws. ICANN has established its own special rules for standing in those Bylaws. Accordingly, in deciding ICANN’s motion, the Panel has referred primarily to the Bylaws in rendering this decision – including not only the provision specifically addressing standing, but also the overall accountability regime established in the Bylaws and the role of IRP proceedings within that regime.

Analysis

The Change of Control Issue

30. The Panel concludes that Namecheap is not a “Claimant” for purposes of bringing an IRP proceeding with respect to the once-contemplated change of control of PIR. For “Claimant” status, Namecheap must be “materially affected” – meaning that it “must suffer an injury or harm that is directly and causally connected to the alleged violation” of ICANN’s Articles or Bylaws.⁴⁰ For the reasons stated below, the Panel finds that it is not. Having decided to dismiss the change of control request for lack of standing, the Panel need not reach the issue of mootness.

31. Namecheap urged ICANN not to consent to the change of control request, and that is what ICANN did (although ICANN indicates that Namecheap’s IRP request was not the basis for that decision). There is no cognizable harm from ICANN’s decision to do what Namecheap urged it to do. Namecheap’s experts opined that the proposed acquisition of PIR by Ethos Capital “presented a risk of an increase in input costs for Namecheap ... because, if consummated, the acquisition could have enhanced an incentive for PIR to increase the price for registry services in relation to .org.”⁴¹ Whatever “risk of an increase in input costs” might have occurred, the transaction was not consummated because ICANN withheld its consent from the change of control request.

³⁸ ICANN Articles of Incorporation, Art. II.

³⁹ ARSIWA, Articles 42 and 48.

⁴⁰ Bylaws, Art. 4, § 4.3(b).

⁴¹ Expert Report of Professor Dr. Frank Verboven and Dr. Gregor Langus, §97.

32. Namecheap argues that its claims “relate to the non-transparent process; not the outcomes of such process.”⁴² It further maintains that “[i]rrespective of the outcome, lack of transparency increases the level of systemic risk in Namecheap’s business environment.”⁴³ But the Panel does not view an alleged procedural violation in a process that ultimately yielded the very outcome sought by Namecheap as constituting “injury or harm.” Even in the U.S. “procedural injury” cases cited by Namecheap, the alleged procedural violation actually culminated in the adverse decision that the claimant was seeking to overturn.⁴⁴ That did not happen here.

33. Namecheap also notes that while ICANN withheld its consent to PIR’s change of control, it did so without prejudice to PIR to submit further change of control requests, leaving Namecheap subject to the possibility of a *future* change of control.⁴⁵ But even if the uncertainty flowing from that possibility constituted “harm or injury” for purposes of establishing standing – a question that the Panel need not reach here – such uncertainty is not “directly and causally connected” to any alleged *past or continuing* violation of ICANN’s Articles or Bylaws. Rather, it flows from the possibility that ICANN *might* approve a change of control request in the future, despite having rejected such a request in the past. Harm or injury flowing from possible future violations by the ICANN Board regarding change of control requests that are not presently pending and that may never occur does not confer standing.

34. While there may indeed be change of control requests in the future, Namecheap is free to file new IRPs to challenge them. These future requests should be assessed based on the specific facts associated with the specific change of control at issue. They should not be prejudged by this Panel in the abstract.⁴⁶

⁴² Namecheap’s Response to Motion to Dismiss, at 11.

⁴³ *Id.*

⁴⁴ *See Id.* at 5, citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–97 (2009) (RM 63) (which involved a challenge to timber management regulations adopted by the U.S. Forest Service) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (RM 64) (which involved a challenge to a regulation jointly adopted by the Department of Interior and Department of Commerce limiting the geographic scope of the Endangered Species Act). Further, in both cases, the Court *denied* standing based on procedural injuries. In *Summers*, the Court expressly held that “deprivation of a procedural right without some concrete interest that is affected by the deprivation” was insufficient to create standing. 555 U.S. at 498. Thus, these cases are actually *contrary* to Namecheap’s position here.

⁴⁵ Namecheap’s Response to Motion to Dismiss, at 11.

⁴⁶ In responding to ICANN’s motion to dismiss, Namecheap raised the issue of the acquisition of the .biz registry business by GoDaddy, Inc. and the acquisition of the .info registry operator (Afilias, Inc.) by Donuts Inc., stating that these acquisitions could increase Namecheap’s costs or otherwise harm its profits. To be clear, the Panel will not issue a ruling on the propriety of these acquisitions, both of which occurred after the filing of Namecheap’s IRP Request, and neither of which is mentioned in the IRP Request or in any amendments to the Request. To the extent that Namecheap seeks any relief with respect to these acquisitions, it must do so in a different proceeding. Any determinations regarding standing in such a proceeding are properly within the purview of the IRP panel in that proceeding, if such a proceeding is commenced.

35. Implicit in the requirement that a claimant establish “injury or harm that is directly and causally connected to the alleged violation” is a requirement that such injury or harm be remediable by the IRP panel. Here, the relief sought by Namecheap is setting boundaries on ICANN’s authority to approve future changes of control. Specifically, Namecheap asks that the Panel:

Declare that, in order to comply with its Articles of Incorporation and Bylaws, ICANN must ensure that .org remains dedicated to the non-profit sector by adopting measures such as requiring that .org be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service.⁴⁷

To the extent that a requirement that “.org be operated by a non-profit entity that charges registry fees that remain as low as feasible” is an existing standard for assessing changes of control, it would be redundant for the IRP Panel to restate it. To the extent that this would establish a new standard, ordering such redress would not constitute adjudication – applying existing standards to a set of facts, which is the Panel’s proper role – but rather standard setting or rulemaking – in effect, legislating. The Panel does not understand its role to encompass establishing new rules for future change of control requests. That is properly the role of ICANN and its Board, which have the benefit of the ICANN policy-making processes, which are designed to solicit input from multiple stakeholders, “including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities.”⁴⁸ Any standard prospectively requiring that “.org be operated by a non-profit entity that charges registry fees that remain as low as feasible” should be established through those processes, not by this Panel.

36. While not bound by the decision of the Emergency Panelist, it bears noting that this Panel’s decision is not inconsistent with the Emergency Panelist’s conclusion that Namecheap had standing to pursue the IRP at the time the Emergency Panelist rendered his decision. The Emergency Panelist held that Namecheap had standing because it was then “at risk of being exposed to decision-making by Ethos and PIR that potentially harms Namecheap’s financial and other business interests.” Subsequent to the Emergency Panelist’s decision, consent to the PIR-Ethos transaction was denied.⁴⁹

⁴⁷ Namecheap’s Request for IRP, ¶58.

⁴⁸ ICANN Bylaws, §1.2(a)(iv).

⁴⁹ Decision on Request for Emergency Relief, ¶ 93.

The Price Control Issue

37. The price control issue is quite different from the change of control issue in that ICANN did approve the removal of the price control provisions in the 2019 Registry Agreements.

38. The Panel concurs with the Emergency Panelist's common sense ruling on standing with respect to the price control issue:

[A]s a Registrar of the .ORG gTLD, Namecheap is exposed to the risk of increased pricing for registry services. This is a harm that is directly and causally related to the alleged violation that ICANN has not followed proper procedures and has improperly consented to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm not occurred to date. The evidentiary support is implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap's status as a Registrar for the .ORG gTLD. It makes no difference that Namecheap is not a party or third-party beneficiary to the Agreement. Namecheap faces a harm that it was not exposed to with the price controls in place.⁵⁰

39. ICANN notes that notwithstanding the removal of the price control provisions, prices have not, in fact, increased in the 20 months since the 2019 Registry Agreements were executed and that Namecheap merely argues that "removal of the price controls *may* increase registry prices."⁵¹ ICANN highlights the language in the Bylaws defining a "Claimant" as an entity that "*has been* materially affected by a Dispute," arguing that the harm (in this instance, price increases) must have already occurred.

40. Use of the term "has been" could be interpreted to mean that the harm must have already occurred. However, considering the IRP provisions in their entirety and the role of IRPs in the ICANN accountability scheme, any such interpretation would be untenable. Denying IRP review of significant ICANN actions that create a real risk of adverse impacts in the future that are the natural and expected consequence of an ICANN action or inaction would be contrary to the following purposes of IRPs, as stated in the Bylaws:

⁵⁰ *Id.* ¶92.

⁵¹ ICANN's Motion to Dismiss at 13, quoting Expert Report of Professor Dr. Frank Verboven and Dr. Gregor Langus, §56 (emphasis added).

- i. Ensur[ing] that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- ii. Empower[ing] the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).
- iii. Ensur[ing] that ICANN is accountable to the global Internet community and Claimants.
- ...
- vii. Secur[ing] the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.⁵²

Notably, the Bylaws provide that “[t]his Section 4.3 [concerning IRPs] shall be construed, implemented, and administered in a manner consistent with [the foregoing] Purposes of the IRP.”⁵³ This means that the standing requirement in Section 4.3 — including the meaning of “materially affected” — must also be construed and implemented in a manner consistent with those purposes.

41. A narrow reading of the standing requirement — requiring that injury or harm must have already occurred — would be at odds with ensuring that ICANN complies with its Articles of Incorporation and Bylaws, empowering the global Internet community and claimants to enforce compliance with the Articles of Incorporation and Bylaws, and ensuring that ICANN is accountable to the global Internet community and claimants. As noted by Namecheap, ICANN’s actions are forward-looking, and they generate their effects prospectively. Indeed, the Bylaws expressly permit a claimant to request “interim relief” which “may include prospective relief” to prevent “[a] harm for which there will be no adequate remedy in the absence of such relief.”⁵⁴ Almost by definition, such prospective relief will be directed to future harm.

42. Further, the IRP Procedures provide that an IRP request must be filed “no more than 120 days after a Claimant becomes aware of the material effect of the action or inaction giving rise to the Dispute; provided, however, that a statement of a Dispute may not be filed more than twelve (12) months from the date of such action or inaction.”⁵⁵ Under ICANN’s interpretation, a registry operator could eliminate any possibility of IRP review regarding the removal of price control provisions (either in this proceeding or future proceedings) by simply waiting 366 days to increase prices. Indeed, as Namecheap pointed out during the hearing, the registry operators may well

⁵² ICANN Bylaws, § 4.3(a).

⁵³ *Id.*

⁵⁴ Bylaws, §4.3(p). The ICANN standards for standing are the same for interim and permanent relief.

⁵⁵ IRP Procedures, Rule 4.

be waiting until the outcome of this proceeding to raise prices. Thus, interpreting the “materially affected” requirement to exclude review of ICANN’s decision to remove price controls would effectively insulate the elimination of price controls from independent review at any time. That would be inconsistent with the goal stated in the ICANN Articles of Incorporation and Bylaws of ensuring transparency and independent review of significant ICANN decisions.

43. It makes little sense to wait until after prices have actually increased to review ICANN’s decision to remove price controls. Delay increases the risk that it may be too late to unring the bell. All stakeholders, including ICANN, share an interest in such challenges being resolved promptly, so that there will be clarity as to whether that decision remains in effect.

44. It bears emphasis that the purpose of price controls is to limit the prices that can be charged. Conversely, removal of price controls serves no purpose other than making it possible for prices to be increased without restrictions. Thus, the risk of future increases in prices cannot be deemed to be speculative or indirect. Rather, it is the natural and expected consequence of removing price controls, even if this risk has not yet materialized.

45. Namecheap’s economics experts opined *inter alia* that:

The removal of price control provisions (price caps) will increase registry prices for .ORG, .INFO or .BIZ (and therefore Namecheap’s cost in relation to resale of these TLDs) if the price caps have been and could remain effective.⁵⁶

[R]egistries operating .ORG, .INFO or .BIZ TLDs have significant market power that creates potential for high prices. Moreover, the evidence also suggests that the price controls were effective in keeping registry prices below the levels that would have prevailed in the counterfactual without price control provisions.⁵⁷

⁵⁶ Expert Report of Professor Dr. Frank Verboven and Dr. Gregor Langus, §8.

⁵⁷ *Id.* §9. As to the registry operators’ market power, the experts further explain that “each TLD, including .ORG, .INFO or .BIZ, is operated by a single registry by an exclusive appointment by ICANN. Therefore, there is no actual or potential competition for registry services in relation to each specific TLD. The only competitive pressure on registry services of a given TLD could potentially come from competition between different TLDs.” *Id.* §57. On the point that price controls have been effective in keeping prices lower than they would have been absent price control provisions, the experts note that the wholesale price for .biz registrations increased in 2019 and 2020 by 10%, which was the maximum annual increase allowed by the price control provisions. The same occurred for .info registrations in 2017, 2018 and 2020, and for .org registrations in 2015 and 2016. *Id.* §§68-69.

... Given that registries operating the concerned TLDs hold significant market power, there is every reason to believe that the price controls that ICANN has removed could be effective in the future, and that Namecheap is harmed by the removal.⁵⁸

46. In addition, Namecheap's Chief Operating Officer submitted a sworn declaration stating that Namecheap's business intelligence team "projected a decline in domain name registration, renewal and other revenue for Namecheap as a result of the removal of the price control provisions."⁵⁹

47. ICANN challenges this evidence on several grounds, including that the expert reports largely rely on economic theory, observing while that Namecheap "is one of the largest Internet registrars in the world" and presumably "has considerable data regarding trends for registry pricing and the number of registrations for the .ORG, .INFO, and .BIZ TLDs," the experts' analysis did not include any data specific to Namecheap.⁶⁰ It also observes that Namecheap failed to share the projections performed by its business intelligence unit.

48. ICANN's critiques go to the weight of Namecheap's evidence, but the Panel need not (and is not in a position to) make findings at this stage of the proceeding whether Namecheap's factual allegations are well-founded or true. The Panel simply finds that they are sufficient to make out a *prima facie* case for standing such that the case may proceed.

Order

49. For the reasons stated above:

- The Panel GRANTS ICANN's motion to dismiss Namecheap's IRP request with respect to the change of control issue, including Namecheap's request for a declaration that "that, in order to comply with its Articles of Incorporation and Bylaws, ICANN must ensure that .org remains dedicated to the non-profit sector by adopting measures such as requiring that .org be operated by a non-profit entity."
- The Panel DENIES ICANN's motion to dismiss Namecheap's IRP request with respect to the price control issue. This matter will proceed to consideration of Namecheap's request for a declaration that ICANN must annul the decision that removed price caps in the .org, .info and .biz registry

⁵⁸ *Id.* §10.

⁵⁹ Declaration of Hillan Klein, ¶5.

⁶⁰ ICANN Motion to Dismiss, at 3.

agreements. The Panel will also consider Namecheap's request for a declaration that ICANN must ensure that price caps from legacy gTLDs can only be removed following policy development process that takes due account of the interests of the Internet user and with the involvement of the different stakeholders. The Panel will consider Namecheap's request for a declaration that "registry fees ... remain as low as feasible consistent with the maintenance of good quality service" within the context of the removal of price caps (not in the context of regulating changes of control).

As at Los Angeles, California, USA
March 10 2021



Glenn P. Hendrix, Chair



Grant L. Kim



Christof Siefarth