

9 May 2024

**(sent originally on 15 April 2024 with a different subject line that ICANN requested to be changed)**

ICANN

Attn: Board, Ms. Amy Stathos, Mr. John Jeffrey  
12025 Waterfront Drive, Suite 3000  
Los Angeles, CA 90094-2536, USA

**By email: [independentreview@icann.org](mailto:independentreview@icann.org)**

Dear Members of the ICANN Board,  
Dear Ms. Stathos and Mr. Jeffrey,

**Re: Namecheap's comments to the economic expert opinion prepared by Gregory K. Leonard**

We refer to the letter from the Chair of the BAMC to Namecheap, Inc. (Namecheap) of 5 March 2024, communicating an economic expert opinion, apparently prepared on 14 February 2024 by Gregory K. Leonard from Charles River Associates for ICANN (hereinafter the 'Leonard Opinion').

A first review of the Leonard Opinion shows that there are several reasons why ICANN should not rely on it in its decision-making, as the Leonard Opinion:

- does not comply with the IRP Panel's recommendation;
- lacks transparency;
- is biased and not analytical;
- does not use appropriate methodology to reach an informed decision;

- ignores important market developments;
- ignores likely reasons why the registry operators for .ORG and .INFO seem to have refrained temporarily from exercising their market power;
- downplays future risks;
- was made without a duty of care; and
- contrary to previous reports commissioned with Charles River Associates, is not sanctioned by Charles River Associates.

### **1. The Leonard Opinion fails to comply with the IRP Panel's recommendation**

In ¶500 of its Declaration, the IRP Panel found 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.'*

In ¶501 of its Declaration, the IRP Panel recommended 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.'*

The Leonard Opinion is not a formal and detailed study of the extent of market power of .ORG and .INFO and fails to address a number of points that Namecheap made about .ORG's special market power. For instance, the following points that Namecheap made about .ORG's special market power remain unaddressed:

- .ORG and .COM are both part of the original gTLDs that predate ICANN, in relation to which their respective registries hold considerable market power that they may exercise;

- The same characteristics that justify regulation of .COM are present in .ORG; on top of that, .ORG has a specific meaning and value to non-profit registrants with no good alternative independently owned TLDs available to such registrants;
- The Leonard Opinion ignores the fact that many registrants view new gTLDs as complementary, rather than substitutable to legacy gTLDs; the opinion overplays the availability and value of substitutes;
- The Leonard Opinion ignores indications that PIR has been exercising market power in relation to .ORG prior to ICANN's decision to remove the price controls and just like the draft opinion by Carlton, the Leonard Opinion fails to examine whether price caps should have been maintained, tightened, or relaxed;
- Just like the draft opinion by Carlton, the Leonard Opinion does not contain a proper cost-benefit analysis regarding the decision to remove price caps;
- Just like the draft opinion by Carlton, the Leonard Opinion contains not a single piece of evidence that the absence of price caps creates benefits, while recognizing the potential for the registries of .ORG and .INFO to exploit registrant switching costs by imposing an excessive increase in the wholesale renewal price;<sup>1</sup>
- While not contesting that .ORG may hold more market power than .COM, ICANN's expert agreed that .COM should remain regulated;
- .ORG's non-profit status does not prevent PIR from exercising its market power in relation to .ORG ;
- The Leonard Opinion ignores the risk that PIR could increase the prices for .ORG steeply in the future;
- The Leonard Opinion ignores Namecheap's criticism that the long-term registration and renewal option offers no adequate protection and fails to appropriately consider that uncontested evidence showing that only a tiny fraction of registrations is made for long periods (around 0.5% for 5-year registrations and renewals and 0.17% c.q. 0.13% for 10-year registrations c.q. 9-year renewals) despite upward price trends.<sup>2</sup>

In addition, the IRP Panel ruled that ICANN failed to address comments/concerns regarding:

- The legacy gTLDs first mover advantage (IRP Declaration, ¶¶291-302);
- .ORG's market power and the negative impact of removing price controls (IRP Declaration, ¶¶303-318);
- Switching costs (IRP Declaration, ¶¶319-322);
- The inadequacy of the base registry agreement's price protections as a substitute for price caps (IRP Declaration, ¶¶323-326);
- The need for appropriate market analysis (¶¶327-338).

---

<sup>1</sup> While the Leonard Opinion opines that concerns that existing registrants would be targeted for opportunistic price increases are unwarranted, his opinion is based entirely on speculation for which Leonard sought support in an out-of-context quote from an anonymous blogpost.

<sup>2</sup> Langus Report, para. 161, footnote 141.

If ICANN were to rely on the Leonard Opinion, ICANN would continue ignoring the arguments and concerns regarding (i) the legacy gTLDs first mover advantage, (ii) the inadequacy of the base registry agreement's price protections as a substitute for price caps, and (iii) the need for appropriate market analysis. The Leonard Opinion does not address these issues. While the Leonard Opinion discusses .ORG's market power and switching costs, this discussion does not present a substitute for an appropriate analysis. Without any explanation, the Leonard Opinion contradicts testimony that was provided by ICANN's own expert and fact witnesses, who acknowledged the existence of market power and switching costs. The Leonard Opinion ignores this evidence and replaces it by a superficial and non-transparent opinion, which, on top of that, is based on a flawed methodology and exhibits lack of care (*infra*).

Hence, the Leonard Opinion fails to properly examine the issues raised by the Price Cap Decision, such as whether the registries of .ORG and .INFO hold a sufficient market power that would make price caps desirable.

## **2. The Leonard Opinion lacks transparency**

In contrast with previous economic reports commissioned by ICANN, the Leonard Opinion does not reveal the questions that ICANN asked it to examine. Instead, the Leonard Opinion starts by presenting his conclusions. By presenting conclusions without the underlying questions, ICANN is not operating in an open and transparent manner. Without knowing the underlying questions, the Leonard Report is not appropriately assessable by a party that is not privy to the proceedings and the 'conclusions' risk being interpreted outside its relevant context. Without knowing the questions that were asked, it is impossible for any third party to assess the assumptions on which the 'conclusions' are based.

## **3. The Leonard Opinion is biased and not analytical**

In addition to their lack of an identified and valid basis, the conclusions in the Leonard Opinion are heavily unbalanced. They are presented as absolute truths with no room for nuance or doubt, which is irreconcilable with the scientific method one would expect from an independent economist. This approach is in sharp contrast with previous reports made by Charles River Associates, where it recognized the limitations of its arguments and encouraged ICANN to move slowly, '[r]ecognizing that it is difficult to pull back once regulations have been pulled back'.

#### **4. The Leonard Opinion does not use appropriate methodology that would allow the ICANN Board to reach an informed decision**

The IRP Panel recommended that ICANN retain an expert consultant to conduct a formal study on the extent of market power of .ORG and .INFO. ICANN's own expert, Dr. Carlton, testified that (i) to perform such a study, a very detailed analysis of the market would be needed to evaluate market power<sup>3</sup>, (ii) when one is trying to evaluate substitution possibilities, one can estimate demand curves and look at cross-elasticities of demand<sup>4</sup>, and (iii) that while he had not done a detailed study of which TLDs can be considered close substitutes for registrants that typically register their domain in .ORG, such as nonprofits, he was tempted to study that.<sup>5</sup>

The Leonard Opinion does not contain a formal study on the extent of market power of .ORG and .INFO. There is no detailed analysis of the market, no estimate of demand curves or analysis of cross-elasticities of demand, and no proper analysis of available close substitutes. Instead, the Leonard Opinion merely offers a number of conclusions, based on anecdotal data. There is no discussion of the questions to be examined, and no explanation about the methodology to be used for analyzing the extent of market power for .ORG and .INFO. The Leonard Opinion clearly does not qualify as the detailed study that Dr. Carlton was tempted to engage in.

In addition, the Leonard Opinion did not consider a counterfactual in which price caps would be getting tighter because of decreasing costs.

#### **5. The Leonard Opinion ignores important market developments**

The Leonard Opinion maintains that .ORG and .INFO face competition from other TLDs and that 'a registrant has over 1500 TLDs (including both gTLDs and ccTLDs) from which it can chose'. While there are indeed over 1.500 TLDs, there are much fewer viable alternatives to .INFO and there may be none for .ORG for many registrants, given the special semantic meaning of this TLD. Moreover, there are much fewer than 1.500 independent TLD operators, whereas important consolidation of registries has taken place in recent years. E.g., Identity Digital, the registry operator of .INFO, operates a portfolio of 275 gTLDs<sup>6</sup> and it offers back-end services to many more, including .ORG. Many TLDs, including all .BRAND

---

<sup>3</sup> Transcripts Day V, p. 61.

<sup>4</sup> Transcripts Day V, pp. 61, 65, 68, 69, 71-72

<sup>5</sup> Transcripts Day V, pp. 67, 69.

<sup>6</sup> <https://www.identity.digital/tld-portfolio> (accessed 2 April 2024).

TLDs, are not available for general registration. Even if an alternative TLD existed for registrants, it may be operated by the same registry. For instance, all TLDs that are semantically similar to .ORG are operated by PIR. TLDs that are operated by the same registry offer no competitive alternative and, as shown by Langus, many registrants view registrations in other TLDs as complements rather than alternatives.

Based solely on a handful of anecdotal data points and completely ignoring the consolidation of registries that has taken place in recent years, Leonard concludes that there are multiple TLDs that would effectively constrain the registries for .INFO and .ORG in their potential attempts to exercise market power in relation to these TLDs.

In 2006, the ICANN Board recognized the need to examine *'whether the domain registration market is one market or whether each TLD functions as a separate market'*, and relatedly *'whether registrations in different TLDs are substitutable'*.<sup>7</sup> There are no signs that ICANN ever commissioned or engaged in such study. Yet, the Leonard report seems to treat the DNS space as one single market, where all TLDs are substitutable. The available evidence – with special purpose TLDs having eligibility requirements and special semantic meanings – shows that this is not true.

## **6. The Leonard Opinion ignores likely reasons why .ORG and .INFO seem to have refrained temporarily from exercising their market power**

The Leonard Report emphasizes that, in recent years .ORG and .INFO have not been raising prices above the previous price caps. However, the Leonard Report fails to comprehensively examine the likely reasons as to why .ORG and .INFO seem to have refrained temporarily from exercising their market power.

As Namecheap explained, and as Dr. Carlton acknowledged, there is a psychological effect of price caps.<sup>8</sup> When an economic regulator, such as ICANN, has the possibility to revise, reinstate or strengthen price caps, a registry operator may refrain from raising prices during the pendency of proceedings. Dr. Carlton acknowledged that PIR may not have raised prices from 2016 onwards and during the pendency of the proceedings initiated by Namecheap for

---

<sup>7</sup> ICANN, *Minutes of the Special Meeting of the Board of 18 October 2006*, <https://www.icann.org/resources/board-material/minutes-2006-10-18-en>.

<sup>8</sup> Transcripts Day V, p. 120, where Dr. Carlton acknowledged the .ORG operator may have been scared to raise prices.

this reason.<sup>9</sup> This psychological effect may have been even more intense following the Board's resolution regarding an economic study following the IRP Declaration. The operators of .ORG and .INFO knew that their behavior would be under heightened scrutiny. Not raising price caps during this period of heightened scrutiny would be a small price to pay for having a removal of the price caps in combination with a presumptive renewal clause in the contract.

The Leonard Opinion fails to address this.

## **7. The Leonard Opinion downplays future risks**

As Dr. Langus testified, a steep price increase in any given year is plausible.<sup>10</sup> The fact that .ORG did not raise prices between 2016 and 2019 (or even today) and that .INFO has been continuing to adjust its prices in line with the price caps, does not tell anything about the ability and the risk that .ORG and .INFO might raise prices above 10% in any given year in the foreseeable future.<sup>11</sup> This risk has only increased for at least two reasons:

*First*, the Leonard Opinion submits that .ORG did not increase its registration price after June 2019. In recent years, the price would not have kept pace with inflation, according to Leonard. The fact that .ORG has not been raising prices while under scrutiny, only increases the risk that .ORG will carry out steep price increases in any given year to raise its margins once it is no longer under scrutiny as it has been doing consistently before deregulation. A similar dynamic is likely for .INFO which, according to Leonard, raised prices to a smaller magnitude, compared to the exceptionally high inflation rate in recent years, after the price control provision was lifted.

*Second*, Identity Digital is now the registry operator of .INFO and the back-end registry operator of .ORG. Identity Digital is owned by Ethos Capital, *i.e.*, the company that attempted to acquire .ORG shortly after the lifting of the price caps. While ICANN ultimately disapproved the acquisition of .ORG by Ethos Capital, Ethos Capital appears to have found a way to work around it. As the back-end registry operator of .ORG, it has the potential to increase prices for its back-end registry services to .ORG. It cannot be excluded that .ORG, Identity Digital, and Ethos Capital have agreed to a deal which has the effects of their desired acquisition, but circumventing ICANN's oversight on the change of control. The Leonard Opinion ignores this risk, which ICANN should have investigated.

---

<sup>9</sup> Transcripts Day V, pp. 119-120.

<sup>10</sup> See Transcripts Day V, p. 114.

<sup>11</sup> See Transcripts Day V, pp. 131-132.

## **8. The Leonard Opinion was made without a duty of care**

The Leonard Opinion contains an important disclaimer stating:

*'Any opinion expressed herein shall not amount to any form of guarantee that the author or Charles River Associates has determined or predicted future events or circumstances and no such reliance may be inferred or implied. The author and Charles River Associates accept **no duty of care** or liability of any kind whatsoever to any party, and no responsibility for damages, if any, suffered by any party as a result of decisions made, or not made, or actions taken, or not taken, based on this report.'*

In other words, the Leonard Opinion acknowledges that it did not exercise a duty of care in making the report.

The lack of any duty of care is also apparent when examining the sources referred to in the Leonard Opinion. In making the argument that some existing .ORG and .INFO registrants would not face significant costs to switch to another TLD, Leonard refers to an anonymous blogpost on RockContent. RockContent presents itself as a platform where businesses can hire writers, editors, content strategists, designers, illustrators, and animators to create content for their brand.<sup>12</sup> The blogpost referred to in the Leonard Report mentions the following author: 'Rock Content Writer, Content writer, Human crafted content'. Because of the anonymity and the purpose of RockContent, no valid conclusions can be drawn from the blogpost to which Leonard refers.

Moreover, the blogpost simply acknowledges the possibility to change a website's top-level domain. It does not acknowledge the absence of switching costs. The opposite is true, as the blogpost mentions in bold that it is '*a good idea to set up a URL redirect from your old domain to your new one*'. In other words, it is recommended that the registrant keeps their previous domain for an unspecified amount of time, potentially forever, thereby acknowledging the observation that TLDs are often viewed as complements rather than substitutes.

Hence, the Leonard Opinion was made without due care and failed to rebut the existence of significant switching costs, as established by Prof. Dr. Verboven and Dr. Langus.<sup>13</sup>

---

<sup>12</sup> <https://rockcontent.com>.

<sup>13</sup> Verboven and Langus Report II, paras. 124-131; Langus Report III, paras. 135-140.



**9. The Leonard Opinion was not sanctioned by Charles River Associates**

Finally, the Leonard Opinion has not been signed and, contrary to a previous report commissioned by ICANN, was not sanctioned by Charles River Associates. In a disclaimer, the Leonard Opinion states:

*'The views expressed herein are the views and opinions of the author and do not reflect or represent the views of Charles River Associates.'*

In view of the lack of adequate methodology, the disregard of relevant evidence, and the failure to exercise due care, it is not surprising that Charles River Associates elected not to be associated with the Leonard Opinion. The Leonard Opinion must be taken for what it is: an unsubstantiated opinion by a single individual made without any duty of care.

\*

In view of the above, ICANN should ignore the 'findings' of the Leonard Opinion, hire a competent and independent expert to make a proper formal study on the market power of .ORG and .INFO as recommended by the Panel, and reinstate price caps in the .ORG, .INFO and possibly .BIZ TLDs. A decision by the Board, in accordance with ¶503 of the IRP Declaration, to reinstate the price caps and install appropriate price control provisions with the registry operators, may moot the need to commission a formal economic study.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,

  
Flip Petillion

  
Jan Janssen\*