



January 28, 2011

ICANN Board  
The Government Advisory Committee  
Rod Beckstrom  
John Jeffrey  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292

Re: ICM Registry's Application for .XXX sTLD

Dear ICANN Board and GAC Members,

I am Diane Duke, the Executive Director for the Free Speech Coalition, the adult industry's trade association. I write on behalf of our members and the greater adult entertainment community in order to highlight our concerns about the extremely complex and difficult issues surrounding ICM Registry's proposed .XXX sTLD. For present purposes, I place our concerns primarily in the context of those raised by the Government Advisory Committee, since the long process of .XXX consideration now moves to consultations between the Board and the GAC, as required by ICANN's By-Laws.<sup>1</sup>

When it rejected ICM's .XXX sTLD proposal in 2007, the ICANN Board articulated five reasons, virtually all of which related to concerns which had been expressed by the GAC and others.<sup>2</sup> Each of these reasons remains at the heart of the controversy over the .XXX sTLD, both within the ICANN community and within the vast community of Internet users who will be directly affected by the proposal: potential members of the supposed "sponsored community." These concerns thus remain critical to the upcoming consultations between the Board and the GAC, and they remain for final consideration by the Board.

In rejecting ICM's application, the Board stated that the "ICM Application and the Revised Agreement ... do not resolve the issues raised by the GAC Communiqués," and that the "Board does not believe [the GAC's] public policy concerns can be credibly resolved with the mechanisms proposed by the applicant."<sup>3</sup> Nothing—including the intervening Independent Review Panel Declaration (about which I have more to say below)—has changed any of the sound determinations which the Board reached in connection with ICM's application three years ago. Indeed, as we see it, much of the intervening debate amply illustrates ICM's willingness to say whatever it needs to say to whomever it needs to say it to promote its business purposes, regardless of the consistency or the plausibility of the promises which it offers the many parties who are concerned about a .XXX sTLD.

### **Child Protection**

For instance, one concern expressed in the GAC's 2006 Wellington Communiqué was over ICM's vague promise to "Support the development of tools and programs to protect vulnerable members of the community."<sup>4</sup> In response to the GAC's concerns, ICM had stated that "ICM will donate \$10 per year per registration to fund IFFOR's policy development activities and to provide financial support for the work of online safety organizations, child pornography hotlines, and to sponsor the development of tools and technology to promote child safety and fight child pornography."<sup>5</sup> That may sound impressive, but it is

simply not what ICM says elsewhere. This is, of course the *same* ten dollars per year per registration which ICM's Stuart Lawley has described—and continues to describe—quite differently to the adult entertainment community. As recently as July, 2010, for example, Mr. Lawley posted the following statement on XBIZ.NET, an adult industry Internet bulletin board:

IFFOR will be tasked with setting the policies for .XXX. Details can be found on [www.iffor.org](http://www.iffor.org). This is an independent entity from ICM and will be funded through a contract with ICM to the tune of \$10 per registration per year. We estimate now that we will launch with between 300,000-500,000 names so that would translate to \$3-\$5 million a year for IFFOR. With annual operating costs of approximately \$500,000 per year, substantial monies will be available for IFFOR to donate, sponsor and fund whatever initiatives it feels appropriate. We envisage a range of initiatives being considered, including but not limited to: health and safety of Adult Industry workers, legal challenges facing the industry such as 2257, piracy, counterfeiting, onerous legislation etc, labeling initiatives, combating child abuse, parental awareness etc.<sup>6</sup>

Not only does child protection sink considerably on ICM's list of priorities when ICM addresses the adult entertainment community (and this observation alone may be quite telling), but it will have to compete with many other critical issues which are also quite likely to be considered very worthy of IFFOR's resources and attention. In any event, all final decisions concerning the level of support for child protection would be left to IFFOR "as it feels appropriate." But since ICM has been forced to assure the adult entertainment community that IFFOR will be "an independent entity from ICM," ICM has never quite explained how it can make advanced promises to ICANN on behalf of IFFOR.

As ICM itself has explained its plans for .XXX, child protection concerns will, in fact, compete with many others for a portion of the resources generated by the .XXX sTLD but allocated by an agency for whom ICM is in no position to speak—assuming that its many promises of IFFOR independence are accurate. At the very least, ICM's promise of "\$10 per year per registration" for child protection is either misleading or craftily vague. The adult entertainment community fully supports child Internet safety and parental involvement in filtering and in supervising children's use of the Internet. For its part, though, ICM is plainly being less than candid about the structure and operation of its proposed .XXX sTLD. Whether ICM is misleading ICANN, the adult industry, or both, its vague efforts to promise everyone everything cannot serve the sound development of the domain name space in the long run. Before anyone can rely upon ICM's representations—concerning child protection or anything else—those representations should be reduced to unambiguous and enforceable contract terms

Moreover, before leaving the topic of child safety, I note that many child advocate groups believe that a .XXX sTLD could do more harm than good. One such group is SafeKids.com, one of the oldest and most enduring web sites for Internet safety. Its creator, Larry Magid wrote: "As an Internet safety advocate, my concern about .xxx is that it could give parents a false sense of security. True, it would be very easy to configure browsers or filters to automatically block sites designated as .xxx, but since this is a voluntary program, there would be nothing to stop adult site operators from also using .com. It would be like setting up a red-light district in a community while also allowing adult entertainment establishments to operate in residential shopping centers."<sup>7</sup> He concludes: "I'm still not convinced that .xxx is in the best interest of child protection..."<sup>8</sup> ICM has never explained how a truly voluntary sTLD governed by an independent, private agency could ever accomplish child protection tasks. Child pornographers and those who would peddle adult materials to children would simply avoid .XXX and IFFOR just as they now avoid FSC and Internet sites operated by our members.

## Intellectual Property

Another concern raised by the GAC in the Wellington Communiqué is that ICM must, “Act to ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers drawing on best practices in the development of registration and eligibility rules.”<sup>9</sup> ICM has always promised that it would develop a mechanism to address this concern but has long remained vague about details. At Cartagena—some six years after first advancing its .XXX sTLD proposal—ICM finally outlined its proposal on this score. The proposal had been reduced to writing<sup>10</sup> and was distributed at a meeting which I attended in Cartagena. ICM’s Stuart Lawley also attended that meeting, as did a representative of Valideus, Ltd., the entity proposed by ICM to assist in carrying out what it calls its “sunrise” rights protection mechanism. Under that plan, holders of trademarks reflected in second-level domain names under other TLDs are afforded certain priorities and other rights. “The key innovation from ICM will be the opportunity extended to rights owners from outside the adult industry to reserve and therefore block names at the .xxx registry so that they cannot be used as conventional web addresses.”<sup>11</sup> Thus some, but by no means all, trademark holders are permitted to block all use of their second-level domain names within the .XXX TLD space. At the Cartagena meeting on the subject, the speaker<sup>12</sup> stated in answer to a specific question that adult entertainment producers would *not* be afforded the blocking rights formulated for “rights owners outside the adult industry.” ICM’s Stuart Lawley did not contradict or amend that answer in any way. This limitation on the “innovati[ve]” blocking right reveals ICM’s ultimate purpose to coerce all members of the “adult industry” into paying for trademarked second-level domain names which they already own and use, on pain of losing those names to others who will use them in the .XXX space.

Whatever the larger implications of this concern for the roll-out of thousands or tens of thousands of new gTLDs, they are particularly problematic here. Whether or not ICM’s Cartagena plan fully addresses the concerns of the GAC on intellectual property and related scores, it reveals deep and perhaps intrinsic flaws in ICM’s proposal for a .XXX sTLD. Indeed, it provides yet another example of ICM’s willingness to play fast and loose with its definition of the sponsored community and to say whatever it needs to whomever it needs to obtain the contract it seeks with ICANN. As with so many issues surrounding ICM’s .XXX proposal, the more ICM seeks to satisfy one set of stakeholders, the more it aggravates the legitimate concerns of others.

In particular, ICM’s Cartagena sunrise document makes clear that ICM will draw a sharp distinction between “rights owners from outside the adult industry” and rights owners within it. In justifying *this* distinction, the Cartagena .XXX Sunrise document expressly states that “.xxx is a Sponsored Community domain for members of the adult entertainment industry...”<sup>13</sup> Yet ICM never successfully made any showing of support with the “adult entertainment industry” as a *whole*. On the contrary, I am confident that the members of the ICANN Board and the GAC representatives recall and continue to recognize the outpouring of widespread *opposition* to ICM and its plans from that broad community. In any event, the IRP Declaration does not address any claim of such broad community support on ICM’s part.<sup>14</sup> To the extent that ICM maintains the authority to treat *all* members of the adult industry—as opposed to a voluntary, self-selected *subset* of that community—differently than others, it must be required to make the requisite showing of support among that broader community. On the other hand, if ICM is content with its original formulation of the sponsored community as those adult industry members who have “determined that a system of self-identification would be beneficial and...have voluntarily agreed to comply with all IFFOR Policies and Best Practices Guidelines...,”<sup>15</sup> then it must make its policy distinctions and operate .XXX accordingly. Doing so requires affording members of the adult industry who are not prepared to consent to IFFOR’s jurisdiction and other .XXX limitations as outside the sponsored community

and thus entitled to the same blocking rights as “rights owners outside the adult industry.” Indeed the anti-discrimination guarantees established by ICANN’s By-Laws,<sup>16</sup> local law, and the international law requirement of good faith—upon which ICM itself has relied<sup>17</sup>—would seem to require as much.

It would set the most egregious precedent and impose a most profound injustice if ICANN were to effectively authorize ICM to extract ongoing registration payments from unwilling producers of adult entertainment but not from others. Like others, adult industry professionals are concerned about how much it would cost them to protect their trademarked brand names and their established Internet traffic should the .XXX sTLD be approved. Like others, too, the adult industry has been hit hard by the worldwide recession, and many of these businesses presently lack the capital to invest in, for some, thousands of .XXX versions of their second-level domain names. I do not claim that the adult industry ‘invented’ the Internet. But it is quite fair to recall here that it did its part—perhaps more than its share—to popularize it. And it continues to account for a considerable portion of Internet traffic and payments to registrars. We are legitimate stakeholders just as everyone else, with a claim to fairness from ICANN and its delegates. No one from within the adult industry ever asked ICANN for any special rights; and the Free Speech Coalition and others have been keen to distance ourselves from ICM’s claims for such special rights for us. But I do feel every right to object to what would constitute a most unfair and discriminatory treatment of the adult industry—not always a popular group in this world—if ICANN were to authorize ICM’s use of the discriminatory Cartagena sunrise rights protection plan.

I am aware that, scarcely a week after Cartagena, ICM’s Stuart Lawley suggested to a reporter working within the adult industry that certain conditional blocking rights *would* be afforded to nonconsenting adult industry members.<sup>18</sup> Since that suggestion flatly contradicts the answer given to that question in Cartagena—an answer which Mr. Lawley heard but did not dispute—ICM has, at the very least, perpetuated serious confusion over a critical point, even at this *very* late date. This underscores the need, which we have previously stressed, for ICM to clearly and unambiguously detail its many promised policy resolutions and reduce them to binding contractual obligations *before* ICANN authorizes it to operate the .XXX sTLD. ICM has had years to do so, but it has failed to take any serious step toward articulating critical policies in enforceable detail. I suspect that this is because ICM well knows—just as we do—that serious devils lie in those details and that ICM’s promises to please everyone in the global porn wars will evaporate as soon as the relevant policies leave the realm of pleasant but meaningless generality.

### **Law Enforcement Compliance Issues and ICANN Oversight**

These last considerations also implicate another concern previously articulated both by the Board and by the GAC. In rejecting ICM’s .XXX sTLD application in 2007, the ICANN Board quite properly recognized that the “ICM Application raises significant law enforcement compliance issues because of countries’ varying laws relating to content and practices”<sup>19</sup> concerning sexually oriented expression. For its part, the GAC had observed that “with the revised proposed ICANN-ICM Registry agreement, [ICANN] could be moving towards assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate.”<sup>20</sup> Indeed, the experience with that revised agreement demonstrated that more ICANN sought and obtained ICM assurances regarding one set of government concerns, the more it risked being drawn into the intractable conflicts over the dissemination of some of the most controversial content over the Internet.<sup>21</sup> This is an inescapable feature of ICM’s proposal because a single .XXX sTLD will inevitably draw the world’s attention and focus controversy upon the regulation of a particular sponsored and restricted TLD. The Board agreed that “under the revised agreement there are credible scenarios that lead to circumstances in which ICANN would be

forced to assume an ongoing management and oversight role regarding content on the internet, which is inconsistent with its technical mandate.”<sup>22</sup>

None of this is to say that ICANN, the GAC, or anyone else ever expected ICM itself to fully enforce the relevant laws worldwide. These considerations arose only because of *ICM’s own* undertakings (on behalf of IFORR) to regulate .XXX to promote those laws. In particular, ICM began by promising—at least very generally—to advance law enforcement and other public policy goals and to “contribute to making the Internet a more family-friendly environment.”<sup>23</sup> After a presentation on November 29, 2005,<sup>24</sup> ICM left the GAC with the understanding that it had promised to “Take appropriate measures to restrict access to illegal and offensive content...”;<sup>25</sup> and ICM later asserted that it had reduced that promise to an enforceable contractual obligation.<sup>26</sup> But coherent regulation of .XXX consistent with all of the laws worldwide (including, of course, freedom of speech guarantees) is simply not possible. *This* is the fundamental point already recognized by both the Board and the GAC. It is not, in fact, a point of disagreement between the two; and so far as the recognition of sharply differing protections and prohibitions of sexually oriented expression around the world goes, FSC has no trouble concurring as well.

No better or more timely illustration of the varying contours of national law on this subject can be found than an incident that was reported during the Cartagena conference. A man who had long ago emigrated from Iran to Canada and who, while living in Canada, had reportedly facilitated adult websites (which were perfectly legal there and in many other parts of the world) had been arrested by Iranian officials upon his return to Iran to visit his sick father. On December 4, 2010, while all of us were gathering in Cartagena, Columbia, he was sentenced to death in Iran for exercising his rights in Canada.<sup>27</sup> When ICM promises to take “measures” to “restrict access to illegal...content,” it seems frighteningly oblivious to the fact that neither it nor IFORR can regulate .XXX consistently with both Iranian law and the free expression protections entrenched in Section 2(b) of the Canadian Charter of Rights and Freedoms. These problems, of course, become even worse as ICM and IFORR further undertake—as they apparently did during the November 29, 2005 presentation to the GAC—to regulate “offensive” content worldwide as well. Similar difficulties arise to the extent that ICM promises to, “Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be...”<sup>28</sup> We cannot overemphasize the chill which would settle over the Internet if ICANN’s delegates—ICM and IFORR—were to offer up identification details about website developers, operators, or end users in, for example, Canada to law enforcement authorities in distant lands even when the websites are fully protected by constitutionally entrenched free expression guarantees in Canada.

The very fact that ICM has entertained such promises indicates its astonishing naiveté concerning the legal protections and restrictions—to say nothing of the raging controversies—relating to sexually oriented expression around the world. Its promises here, as elsewhere, to please both the regulators (and would-be regulators) and the producers of online adult entertainment are patently implausible. ICANN cannot accept them at face value without seriously risking being drawn into controversies which it can and should avoid. This is precisely why the Board has already recognized that ICM’s .XXX sTLD proposal would likely “obligat[e] ICANN to acquire a responsibility related to content and conduct.”<sup>29</sup> But ICANN’s mission is narrowly focused and technical in nature. Should ICANN approve ICM’s application for a .XXX sTLD, ICANN would have dramatically exceeded its responsibility and jurisdiction by delegating regulatory authority and Internet content control to any entity—let alone one as controversial as IFFOR. Any shift of ICANN’s focus away from its technical responsibilities to content-based regulation not only compromises ICANN as an organization, but also threatens the security and stability of the Internet as a whole. Domains using .XXX would very likely be blocked by censorious regimes, a scenario that could eventually lead to cascading technical difficulties in the domain name space and ultimately to alternate

domain name systems being set up, thus fragmenting the Internet. If ICANN ventures into highly controversial and politicized content-based subject matter, it not only will find itself woefully lacking in the resources it will need to address these issues, but also it will lose the independence and credibility that comes with serving a strictly technical and essentially non-political role.

### **Sponsored Community Support**

The final reason why the ICANN Board and the GAC have opposed the establishment of a .XXX sTLD is that ICM never established sufficient support for its plan within an appropriate sponsored community.<sup>30</sup> After the Independent Review Panel issued its Declaration in *ICM v. ICANN*,<sup>31</sup> this issue is undoubtedly more nuanced than it was when the Board freely and properly determined in 2007 that “ICM’s Application and the Revised Agreement fail to meet, among other things, the Sponsored Community criteria of the RFP specification.”<sup>32</sup> I want to address some of those nuances in what follows.

The general conclusion that ICM never established sufficient sponsored community support could reflect one or more of several distinct considerations. For instance, one could conclude—on purely moral grounds—that the worldwide set of online adult entertainment providers is simply not an appropriate community with a legitimate claim to a string in the domain name system. For its part, the Free Speech Coalition has never taken this position. Our concerns about ICM’s current proposal have focused on the fact that .XXX would stand *alone*—at least for a time—as the sole TLD specifically devoted to sexually oriented expression and that it would be a *sponsored* TLD inviting, on both of these scores, the attention of those in this world who are opposed to the communication of sexual expression among consenting adults. Nor do we understand the ICANN Board to have taken a position intrinsically hostile to adult entertainment. We fully expect that, with the roll-out of thousands of new gTLDs, many will reference sexual expression in some way, and FSC would have few problems if .XXX were among a large group of sexually oriented gTLDs. More likely, the Board and the GAC focused upon a distinct and somewhat disturbing feature of the sponsored community identified by ICM: that it is self-defining and purely prospective. That is, the Board may well have anticipated that the sTLD round would produce proposals concerning preexisting communities which were defined by factors independent of their relation to the sTLD. Indeed those sorts of groups would avoid the self-fulfilling support claim which necessarily accompanies a self-identified community definition. Whatever the Board may have expected, it is unquestionably fair to say that a majority of the Independent Review Panel rejected these considerations. According to the IRP majority, ICANN should not reject ICM’s application for purely moral reasons or because it addresses a self-selecting community, however artificial that community may seem.<sup>33</sup>

But that conclusion—even if it were binding on the Board and the GAC—leaves many other matters to be considered, even with respect to sponsored community support. There remains, for instance, the simple truth of the facts on the ground. I am confident that the ICANN Board remains aware of the widespread fierce opposition to ICM’s .XXX sTLD proposal among the adult entertainment industry throughout the world, so I will not belabor that point here. Whether the IRP was made fully aware of the depth and breadth of that opposition is unclear. On the one hand, ICM argues that, by definition, all of this opposition remains irrelevant since ICM effectively defines all but its closest friends and supporters out of the relevant “sponsored community.” Even under these circumstances, I submit, there remains room for the ICANN Board to consider whether the self-designating and self-fulfilling community predicted by ICM will be of sufficient size and coherence to warrant an sTLD of its own in light of the ferocious opposition among potential members of that community.

On the other hand, the IRP referred on several occasions to ICM's reference to "pre-reservations" as part of its showing of sponsored community support.<sup>34</sup> Indeed, prior to the Lisbon conference, ICM responded to the Board's request for information by citing those pre-reservations as evidence for sponsored community support.<sup>35</sup> But there is no indication at all that the IRP was aware that, in gathering those very pre-reservations, ICM had expressly promised the adult industry that they would *not* be used as any part of a showing of support for its proposal.<sup>36</sup> The IRP thus could not have been aware of the fact that almost all of the pre-reservations amounted to defensive registrations by reluctant website operators who saw no other choice but to protect their second-level domain names through ICM's make-shift process. It is difficult to dismiss ICM's assurance to the adult entertainment community as anything but an outright lie and part of a most Machiavellian effort to manipulate ICANN processes. In any event, ICM gathered these pre-reservations without offering or even revealing the blocking rights which it now (at least for the moment) proposes to extend to the adult industry and to others.<sup>37</sup> ICM knew full well that, in gathering the pre-reservations it was taking advantage of defensive registrations by reluctant content providers rather than demonstrating any genuine support—let alone enthusiasm—for ICM, IFORR, or a .XXX sTLD.

In our view, this is deception pure and simple. We suspect that ICM's other support data is equally shoddy or deceptive. Even now, ICM resists our efforts—through ICANN's Documentary Information Disclosure Policy processes—to assess its showing of support,<sup>38</sup> no doubt because it is well aware that FSC is in a much better position than the IRP or, with respect, ICANN itself to critically assess that showing. Any support claim predicated or accepted—even in part—upon ICM's pre-reservations must now be reassessed in light of how many of the pre-registrants would opt to stay entirely out of ICM's sponsored community and exercise the blocking rights revealed by ICM only at this very late date. Similarly, any evidence of support which ICM has refused to subject—under any circumstance—to a knowledgeable critique must be viewed with the utmost suspicion. These considerations alone provide reason enough to depart from the IRP majority's conclusions, even as they concern the issue of ICM's showing of sponsored community support.

### **ICANN, the GAC, and the IRP**

FSC appreciates the Board's need to consult fully with the GAC pursuant to the ICANN Bylaws. We deeply appreciate, too, ICANN's strong inclination to accept the results of its independent review process. But even if all of the IRP majority's findings and conclusions concerning ICM's showing of sponsored community support—the only substantive issue which the IRP reached definitively—are fully accepted, the Board's *other* reasons—all of them shared to some extent by the GAC—remain in place; and they plainly suffice to support continued rejection of ICM's .XXX sTLD application. Thus—at least apart from the question of sponsored community support—the ICANN Board does not face any conflict between the GAC and the Declaration entered by the IRP majority. Because the Board has never before faced even an apparent conflict of this kind, I close with some observations concerning ICANN's processes and the IRP Declaration in *ICM v. ICANN*.

To begin with, it is important to recall that the IRP Declaration was not unanimous. One of the three jurists dissented in the belief that the ICANN Board should receive—as ICANN surely will in any lawsuit challenging its denial of ICM's application—a review deferential to its right to make independent policy decisions.<sup>39</sup> In fact, the only unanimous decision of the full three-jurist panel was that "the holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award."<sup>40</sup> On the other hand, the ICANN Bylaws provide that "The advice of the Governmental Advisory Commit-

tee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”<sup>41</sup> As we have stressed from the outset, ICM’s .XXX sTLD application presents very substantial public policy issues. While FSC and the GAC (or some of its members) may disagree over the substantive policies involved, the GAC has also long stressed the presence of public policy issues.<sup>42</sup> The Board, too, has recognized the dangerous policy grounds onto which the .XXX sTLD might pull ICANN.<sup>43</sup> No one seriously doubts that these public policy provisions apply here.

In Cartagena, the Board and the GAC agreed to meet for a consultation about .XXX. Yet just one hour after the Board meeting had adjourned ICANN Board Chair Peter Dengate Thrush stated in an interview about the resolutions, “It looks as if we are about to depart from GAC advice.”<sup>44</sup> The Board Chair went on to state “provided we give the Government Advisory Committee reasons about why we are not taking their advice, we are free to move forward on the path the community has chosen.”<sup>45</sup> Even apart from the question of what “community” the Board Chair was invoking, these comments hardly reflect the spirit called for by the requirement that “the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.” We trust that the ICANN Board will do more than merely ‘go through the motions’ as it moves into consultations with the GAC. Moreover, these remarks are particularly startling since—comparing the Board’s 2007 rejection of ICM’s application with the GAC’s constant positions on the issues involved—there is no real dispute between the Board and the GAC!

Nor does the IRP Declaration—even if it were mandatory—require that the Board change the position which it deliberately and carefully adopted in 2007, in full agreement with the GAC’s positions then and now. Even if the IRP had the authority to order the ICANN Board to reverse its position and approve the ICM application, it would *not* have done so. This is because the IRP jurists were plainly wise and careful enough to realize (as others may not) that the panel majority had reached a determination (essentially reversing the ICANN Board) on *only one* of the five independent reasons which the Board had articulated for rejecting ICM’s application. That leaves four reasons standing! Even the panel majority recognized this and undertook to state its position on the remaining reasons. But when it did so, in paragraph 151, it did not reach factual findings or legal conclusions.<sup>46</sup> It did not determine—in contrast to its ruling concerning the showing of sponsored community support—that the Board had acted contrary to the rules which bind it.<sup>47</sup> Rather, it noted that the Board *would have* violated those rules to the extent that it imposed upon ICM the burden of actually enforcing the laws worldwide respecting sexually oriented expression.<sup>48</sup> But as I noted above,<sup>49</sup> no one has done *that*. The Board and the GAC—and, for that matter FSC—have considered only the promises which ICM itself advanced. When ICM complained to the IRP that it was placed in an impossible bind by conflicting laws throughout the world<sup>50</sup>—a bind not imposed upon users of sexually oriented second-level domain names—it had only itself to blame for the promises it had made.

I believe that the IRP jurists wisely recognized this and left room for the possibility—indeed the likelihood—that the Board’s law enforcement and public policy concerns were, at bottom, a profound recognition of what FSC has been saying all along: ICM’s promises to please all sides in the global porn wars are too good to be true. When things fail to go as smoothly as ICM predicts—a “credible scenario” if ever there was one—ICANN could be drawn into endless and intractable controversies which are no part of its proper function. The Government of Canada has wisely warned against this eventuality;<sup>51</sup> and both



the GAC<sup>52</sup> and this Board<sup>53</sup> have previously resolved to avoid it. For its part, ICM obviously concludes that it is worth the risk, because, whatever happens, it can make a lot of money. But the GAC speaks for other interests, as does FSC. The ICANN Board must recognize these latter interests, too, and serve still others as well.

The IRP Declaration is entitled to profound respect. But it is also more deliberately nuanced than many have realized. It is not a sign of due respect to ignore those subtleties. It is surely not a consequence of that respect to claim that the Declaration compels a conclusion (approval of ICM's application) which every one of the seasoned panel jurists plainly and deliberately stopped short of directing—or even recommending. These jurists plainly know how to direct a result when appropriate. But even the panel majority—for both procedural and substantive reasons, as I have indicated—decided to do otherwise. It carefully left the ICANN Board free to continue to reject ICM's .XXX sTLD application so long as it does not do so because of ICM's showing, or lack thereof, of sponsored community support or because it expects ICM to engage in law enforcement efforts not expected of other parties similarly situated. This leaves plenty of public policy reasons—long advanced both by the GAC and FSC, and many of which I have reiterated here—why ICM's .XXX sTLD is a bad, indeed a dangerous idea. After consulting with the GAC, the ICANN Board should continue to say no to ICM and the dangers posed by its reckless proposal. FSC again urges ICANN to reject ICM's application once and for all.

Sincerely,

Diane Duke  
Executive Director

References follow (with one attachment):

- <sup>1</sup> Meeting of ICANN Board, Cartagena, December 10, 2010,  
<http://icann.org/en/minutes/resolutions-10dec10-en.htm#4>  
ICANN Bylaws Art. XI § 2(1)(h)-(k),  
<http://icann.org/en/general/bylaws.htm#XI>
- <sup>2</sup> Meeting of ICANN Board, Lisbon, March 28, 2007,  
[http://www.icann.org/en/minutes/resolutions-30mar07.htm#\\_Toc36876524](http://www.icann.org/en/minutes/resolutions-30mar07.htm#_Toc36876524)
- <sup>3</sup> Ibid
- <sup>4</sup> Final Communiqué, Government Advisory Committee, March 28, 2006, at page 3,  
[http://gac.icann.org/system/files/GAC\\_25\\_Wellington\\_Communique.pdf](http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf)
- <sup>5</sup> ICM Overview: The .XXX Registry and Children,  
<http://www.icann.org/en/tlds/agreements/xxx/child-safety-05jan07.htm>
- <sup>6</sup> ICM, .XXX—What does it mean for me, the Adult /entertainment provider?  
July 8, 2010 (Comment no. 57, at page 21)  
<http://www.freespeechcoalition.com/images/pdf/XBIZ.net%20Thread.pdf>
- <sup>7</sup> Larry Magid, Net oversight board to consider .xxx domains, March 10, 2010,  
<http://www.safekids.com/2010/03/>
- <sup>8</sup> Ibid
- <sup>9</sup> Final Communiqué, Government Advisory Committee, March 28, 2006, at page 4,  
[http://gac.icann.org/system/files/GAC\\_25\\_Wellington\\_Communique.pdf](http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf)
- <sup>10</sup> A copy of the written one-page handout entitled “Sunrise for .xxx: Initial Rights Protection Mechanisms Under the New .xxx TLD,” is attached to this letter because it does not appear to be posted on the Internet. It was distributed at the Intellectual Property Constituency meeting, December 7, 2010, at Cartagena and is referenced in the video recording of that meeting at time = 39:43, Virtual Meeting Room (archive)/Full,  
<http://cartagena39.icann.org/node/15325>  
It was not displayed as a slide during the presentation, though the language of some of the slides draws upon it.
- <sup>11</sup> Ibid
- <sup>12</sup> Jonathan Robinson, Programme Director, Valideus (the company overseeing the program for ICM),  
Video recording of Intellectual Property Constituency meeting, December 7, 2010 at time = 1:00:39-1:01:22,  
*see also* Displayed Slide at time = 0:43:17-0:44:24,  
<http://cartagena39.icann.org/node/15325>
- <sup>13</sup> Sunrise for .xxx: Initial Rights Protection Mechanisms Under the New .xxx TLD,  
Attached hereto, *see* n. 10.
- <sup>14</sup> Declaration of Independent Review Panel, *ICM v. ICANN*, ¶ 85 at page 45, (recognizing that ICM specified a self-selecting sponsored community, but was that no different in this respect than .TEL or .MOBI),  
<http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>
- <sup>15</sup> IFFOR Bylaws, Appendix B § A,  
<http://www.iffor.org/docs/appendix-b-baseline-policies-26jul10-en.pdf>

- <sup>16</sup> ICANN By-Laws, Art. II, § 3,  
(prohibiting disparate treatment not justified by substantial and reasonable cause)  
<http://www.icann.org/en/general/bylaws.htm#II>
- <sup>17</sup> Declaration of Independent Review Panel, *ICM v. ICANN*, ¶¶ 57-61 at pages 33-35,  
<http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>
- <sup>18</sup> Sue Denim, ICM Reveals Dot-xxx Sunrise Details,  
<http://www.ynot.com/content.php?116368-ICM-Reveals-Dot-xxx-Sunrise-Details>  
*see also*,  
<http://www.icmregistry.com/about/sunrise.php>
- <sup>19</sup> Meeting of ICANN Board, Lisbon, March 28, 2007,  
[http://www.icann.org/en/minutes/resolutions-30mar07.htm#\\_Toc36876524](http://www.icann.org/en/minutes/resolutions-30mar07.htm#_Toc36876524)
- <sup>20</sup> GAC Communiqué—Lisbon, Government Advisory Committee, March 28, 2007, at page 5,  
[http://gac.icann.org/system/files/GAC\\_28\\_Lisbon\\_Communique.pdf](http://gac.icann.org/system/files/GAC_28_Lisbon_Communique.pdf)
- <sup>21</sup> See, e.g., Government of Canada comments on the proposed ICM Registry Agreement (Attachment), February 2, 2007,  
<http://forum.icann.org/lists/xxx-icm-agreement/msg00558.html>
- <sup>22</sup> Meeting of ICANN Board, Lisbon, March 28, 2007,  
[http://www.icann.org/en/minutes/resolutions-30mar07.htm#\\_Toc36876524](http://www.icann.org/en/minutes/resolutions-30mar07.htm#_Toc36876524)
- <sup>23</sup> ICM, New sTLD RFP Application: .xxx, March 19, 2004, (“safeguard children online and combat child pornography”)  
<http://www.icann.org/en/tlds/stld-apps-19mar04/xxx.htm>;  
ICM, Letter to ICANN, August 15, 2005 at page 2,  
<http://icann.org/en/correspondence/lawley-to-twomey-15aug05.pdf>
- <sup>24</sup> Government Advisory Committee meeting agenda, November 25, 2005, at page 3,  
[http://gac.icann.org/system/files/20051128\\_GAC24\\_Vancouver\\_Agenda.pdf](http://gac.icann.org/system/files/20051128_GAC24_Vancouver_Agenda.pdf)
- <sup>25</sup> Final Communiqué, Government Advisory Committee, March 28, 2006, at page 3,  
[http://gac.icann.org/system/files/GAC\\_25\\_Wellington\\_Communique.pdf](http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf)
- <sup>26</sup> ICM, Letter to ICANN Board, April 18, 2006 at pages 3-4,  
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- <sup>27</sup> BBC, Canada Concern at Iran Death Penalty for Web Designer, December 6, 2010,  
<http://www.bbc.co.uk/news/world-us-canada-11932679>;  
National Post, Little Hope for Release of Cdn. Resident Facing Iranian Death Sentence:  
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- <sup>28</sup> Final Communiqué, Government Advisory Committee, March 28, 2006, at page 3,  
[http://gac.icann.org/system/files/GAC\\_25\\_Wellington\\_Communique.pdf](http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf)
- <sup>29</sup> Meeting of ICANN Board, Lisbon, March 28, 2007,  
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- <sup>30</sup> Meeting of ICANN Board, Lisbon, March 28, 2007,  
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GAC Communiqué—Lisbon, Government Advisory Committee, March 28,2007, at p. 4,  
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Final Communiqué, Government Advisory Committee, March 28,2006, at p. 3  
(referring to “the deficiencies noted in the Evaluation Report”),  
[http://gac.icann.org/system/files/GAC\\_25\\_Wellington\\_Communique.pdf](http://gac.icann.org/system/files/GAC_25_Wellington_Communique.pdf)
- <sup>31</sup> Declaration of Independent Review Panel, *ICM v. ICANN*,  
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- <sup>32</sup> Meeting of ICANN Board, Lisbon, March 28, 2007,  
[http://www.icann.org/en/minutes/resolutions-30mar07.htm#\\_Toc36876524](http://www.icann.org/en/minutes/resolutions-30mar07.htm#_Toc36876524)
- <sup>33</sup> Declaration of Independent Review Panel, *ICM v. ICANN*, ¶¶ 147-49, 152 Fourth and Fifth, at pages 65-68, 70,  
<http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>
- <sup>34</sup> Declaration of Independent Review Panel, *ICM v. ICANN*, ¶¶ 39, 52, 82, 125 at pages 23, 30,, 45, 48-59  
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- <sup>35</sup> ICM, letter to ICANN Board, March 8, 2007,  
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- <sup>36</sup> XBIZ 2007 Hollywood Forum, .XXX Seminar, Part11,  
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- <sup>37</sup> ICM, Launch Overview (Sunrise), rightmost column, “Sunrise B,”  
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- <sup>38</sup> ICANN, DIDP Requests and Responses, Request 20100908-1,  
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- <sup>39</sup> Declaration of Independent Review Panel, *ICM v. ICANN* (dissent), at pages 72-79,  
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- <sup>40</sup> Declaration of Independent Review Panel, *ICM v. ICANN*, ¶¶ 133-34, 152 First, at pages 61, 69,  
<http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>
- <sup>41</sup> ICANN Bylaws, Art. XI, § 2(1)(j),  
<http://www.icann.org/en/general/bylaws.htm#XI>
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Final Communiqué, Government Advisory Committee, March 28,2006, at p. 3  
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- <sup>43</sup> Meeting of ICANN Board, Lisbon, March 28, 2007,  
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<sup>44</sup> Rod Beckstrom and Peter Dengate Thrush, Post Cartagena Interview, at time = 7:57,  
<http://cartagena39.icann.org/>  
Entire .XXX discussion from time = 7:00 to 11:08

<sup>45</sup> Id. at time = 8:03

<sup>46</sup> Declaration of Independent Review Panel, *ICM v. ICANN*, ¶ 151, at page 69,  
<http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>

<sup>47</sup> Compare Ibid with Id. ¶¶ 147, 149, 152 Fourth and Fifth, at pages 65, 67-68, 70

<sup>48</sup> Declaration of Independent Review Panel, *ICM v. ICANN*, ¶ 151, at page 69,  
(reciting ICM's argument and reaching only a conditional conclusion: "To the extent that this is so....")  
<http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf>

<sup>49</sup> See page 5 of this letter at text following note 22

<sup>50</sup> Cf. Declaration of Independent Review Panel, *ICM v. ICANN*, ¶¶ 71-78,89-92, at pages 40-44, 46-47,  
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<sup>51</sup> Government of Canada comments on the proposed ICM Registry Agreement (Attachment), February 2, 2007,  
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<sup>52</sup> GAC Communiqué—Lisbon, Government Advisory Committee, March 28,2007, at p. 4,  
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**“SUNRISE” FOR .XXX**

**Initial rights protection mechanisms under the new .xxx TLD**

## Overview

ICM, the registry operator for the new .xxx top level domain name (TLD), has developed a comprehensive and innovative rights protection mechanism (RPM) for the launch period of the domain. It will afford great protection of intellectual property to businesses operating outside of the adult industry, whilst ensuring that the .xxx name space affords appropriate opportunity and priority to the adult industry, its Sponsored Community.

The key innovation from ICM will be the opportunity extended to rights owners from outside the adult industry to reserve and therefore block names at the .xxx registry so that they cannot be used as conventional web addresses.

ICM will work in close partnership with specialist consultancy, Valideus on the execution of the .xxx rights protection programme. Through company directors Nick Wood and Lorna Gradden, as well as programme director Jonathan Robinson, Valideus has extensive experience in the area of intellectual property protection in domain names.

Once ICM has signed its contract with ICANN to operate the .xxx TLD, Valideus will lead the programme of work to communicate the details of the rights protection policies, manage the application process and validate applications under the initial (Sunrise) periods. Following the Sunrise periods, outcomes will be reviewed and communicated to ICM in order for the relevant statuses to be set in the .xxx registry prior to the full, live launch.

## Sunrise routes into the .xxx registry

There will be three tracks within the Sunrise period for .xxx, two of which will be routes to conventional domain name registration by the adult industry community. The third will be a route for businesses and organisations beyond the adult industry to secure a blocked name. The three routes will be referred to as Sunrise A (Adult Industry Trademark), Sunrise B (Blocked Trademark) and Sunrise C (Current Owner or Grandfathered Domain).

### **Sunrise A – Adult Industry (for rights owners from within the adult industry)**

This route will be available to existing rights owners operating within the adult entertainment industry sector. Names secured through this route will result in the registration of conventional, resolving domain names at the registry. Since .xxx is a Sponsored Community domain for members of the adult entertainment industry, a string applied for under Sunrise A will, all else being equal, receive priority over the identical string applied for under Sunrise B.

### **Sunrise B – Blocked Name (for rights owners from outside of the adult industry)**

Sunrise B is for rights owners from outside the adult entertainment industry sector. Names secured through Sunrise B will not result in the registration of a conventional, resolving domain name at the .xxx registry. Instead, these names will be reserved and blocked from live use. The applied for string will resolve to a standard white page indicating only that the string is reserved from use through ICM's rights protection programme. The corresponding WHOIS information will contain standard registry contact details.

### **Sunrise C – Current Owner (for pre-existing domain name owners from another TLD)**

Sunrise C will be open to domain name registrants within the adult entertainment industry sector who can show that they have a corresponding registration at another TLD registry. Names secured through this route will result in the registration of a conventional, resolving domain name at the .xxx registry.

## Mechanism

All Sunrise applications must be submitted via ICANN accredited registrars and all ICANN accredited registrars will be eligible to participate. Valideus will be circulating details of how registrars can sign up in due course.

## Timing and communication

Once the contract is signed between ICANN and ICM, there will be a short interval (likely 90 days) before the .xxx Sunrise launches. Information about the .xxx Sunrise will be disseminated as widely as possible through a variety of domain industry, intellectual property and broader business channels.

## Fees

For Sunrise A, a onetime fee will apply which will cover the submission, processing and validation of the relevant right. In addition, the standard registry fee will apply for the period or periods of registration applied for.

For Sunrise B, a onetime fee will apply which will cover the submission, processing and validation of the relevant right. It will result in an indefinite reservation or blocking of the term in the registry and ICM does not envisage charging any additional fees for blocking this string over the term of their contract to run the .xxx registry.

For Sunrise C, a onetime fee will apply which will cover the submission and processing of the relevant right. In the case of Sunrise C, the fee will be substantially lower than that of Sunrise A or B, reflecting the automated processes involved. In addition, the standard registry fee will apply for the period or periods of registration applied for.

## Feedback

This is an innovative rights protection mechanism intended to afford the greatest possible protection of intellectual property, whilst simultaneously recognising the community nature and purpose of the TLD. As the detail of the .xxx Sunrise programme is still in development, early feedback from members of the intellectual property community, from registrars or the adult entertainment industry via in-person meetings, web meetings or e-mail, is welcome.

## Contacts

**ICM Registry** - [www.icmregistry.com](http://www.icmregistry.com)

**Valideus** - [www.valideus.com](http://www.valideus.com)

**Programme Director** - [jonathan.robinson@valideus.com](mailto:jonathan.robinson@valideus.com)