

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

In the Matter of the Independent Review Process:

Manwin Licensing International S.A.R.L.,

Claimant,

v.

Internet Corporation For Assigned Names and  
Numbers ("ICANN"),

Respondent.

CASE MANAGER: Carolina Cardenas

ICDR Case No. 50 117 T 00812 11

**ICANN'S RESPONSE TO MANWIN LICENSING INTERNATIONAL S.A.R.L.'S  
REQUEST FOR INDEPENDENT REVIEW PROCEEDING**

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Pursuant to Article IV, Section 3 of the Bylaws for the Internet Corporation for Assigned Names and Numbers (“ICANN”) and the International Centre for Dispute Resolution (“ICDR”) Rules as supplemented by ICANN’s Bylaws, ICANN hereby submits this Response to Manwin Licensing International S.A.R.L.’s (“YouPorn”<sup>1</sup>) Request for Independent Review Proceeding.

## **I. INTRODUCTION**

1. ICANN is a not-for-profit public benefit corporation that administers certain features of the Internet’s domain name system pursuant to a series of agreements with the United States Government. Since its formation in 1998, ICANN has been responsible for, among other things, promoting competition with respect to the Internet’s domain name system. For example, ICANN has accredited over a thousand companies (called “registrars”) that are authorized to sell domain name registrations to consumers.

2. ICANN also has facilitated (at a much slower pace) the creation of new Top Level Domains (“TLDs”) to supplement the TLDs that were originally available on the Internet, such as “.COM,” “.NET” and “.ORG.” The entities that operate TLDs for the benefit of the Internet community are known as “registries” or “registry operators.” The dispute that gives rise to these proceedings concerns the addition of the “.XXX” TLD to the Internet and ICANN’s approval of ICM Registry, LLC (“ICM”) to act as the registry operator for the new .XXX TLD.

3. The Independent Review Process (“IRP” or “Process”) that YouPorn has invoked here is a unique proceeding that is specifically provided for in ICANN’s Bylaws, although YouPorn has invoked it in an inappropriate manner, as explained herein. The IRP is intended to serve as a means by which entities that participate in ICANN’s processes can have an independent review of decisions made by ICANN’s Board of Directors. Specifically, the Process, when invoked, calls for one or three neutral panelists (the “Panel”) to consider and then declare whether the Panel thinks an action or decision of ICANN’s Board of Directors was consistent with ICANN’s Bylaws or Articles of Incorporation. The ICANN Board then considers that declaration. The declaration is not binding on the ICANN Board but, of course, ICANN takes the Process seriously and considers the declaration at the next opportunity.

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<sup>1</sup> In its Request for Independent Review Proceeding, Manwin Licensing International S.A.R.L. refers to itself as “YouPorn.” For the sake of consistency, ICANN will do the same.

4. This is only the second IRP initiated pursuant to ICANN's Bylaws. Importantly, as YouPorn acknowledges, the first IRP involved ICM's claim that ICANN had improperly rejected ICM's application for the .XXX TLD. ICM prevailed in that IRP, and ICANN subsequently awarded ICM the .XXX TLD. In an odd and facially redundant twist, YouPorn now seeks to have a second IRP initiated for the purpose of second-guessing the declaration of the first IRP Panel and ICANN's decision to follow that Panel's declaration.

5. As explained herein, ICANN requests that this IRP Panel immediately dismiss YouPorn's Request for Independent Review Proceeding ("Request") with no further proceedings, for two reasons. First, YouPorn lacks standing to request an IRP proceeding pursuant to ICANN's Bylaws. Second, even if YouPorn had standing to initiate this IRP, YouPorn is doing little more than challenging an exhaustive prior IRP Panel declaration; permitting a second IRP on the very same subject matter is inappropriate and would constitute an enormous waste of resources.

**A. YouPorn Lacks Standing To Request An Independent Review Proceeding.**

6. Since its inception, ICANN's processes and policy development have depended on the engagement of stakeholders around the world. Stakeholders participate in many ways, including participation in the policy development processes, in public comment processes, on advisory committees and supporting organizations. ICANN's model is based on the principle of reaching consensus solutions to difficult problems, although consensus within ICANN does not mean unanimous community support on every issue. The Internet community brings a wide range of viewpoints to the discussions, often with diverging interests. Reaching a thoughtful, negotiated solution that is acceptable to most, and ensures that all viewpoints are considered, is what ICANN strives to do. The IRP is one of ICANN's accountability mechanisms created to ensure that ICANN remains accountable to the Internet community and all stakeholders that participate in ICANN's bottom-up, multi-stakeholder model. The IRP was created to allow community participants taking part in ICANN's processes the ability to seek external, third-party review of an ICANN Board decision.

7. As a reflection of ICANN's reliance on community participation in ICANN's multi-stakeholder model, ICANN's Bylaws expressly limit who may submit a request for an IRP

proceeding. Only persons “materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.”<sup>2</sup>

8. The IRP is not available to every party that is somehow affected by a decision of the ICANN Board (much less a decision of another entity that has a contractual relationship with ICANN). The alleged harm must be “material” and derived directly from ICANN Board conduct. ICANN maintains contracts with numerous registries as well as over 1,000 ICANN-accredited registrars that offer consumers the opportunity to register domain names—names such as ICANN.ORG. The IRP is not a vehicle available to any one of the millions of individuals that may be affected in some quantum by ICANN’s contracts with these entities. Instead, an IRP claimant must demonstrate some logical nexus or connection between the claimant’s alleged harm and a decision or action of the ICANN Board. In other words, the ICANN Board’s decision or action must specifically concern the “materially affected” IRP claimant.

9. Indeed, when the ICANN community contemplated the creation of an IRP shortly after ICANN’s incorporation, the concern was raised that an individual or entity should not be permitted to file a claim “without having been affected sufficiently directly.”<sup>3</sup> The Advisory Committee on Independent Review noted that while “nearly every Internet user can be said to be affected in some quantum by nearly any decision of the ICANN Board,” such attenuated injury should not be deemed sufficient to invoke the IRP.<sup>4</sup> One commenter suggested that the “Committee should lay down more precise standards” in that regard.<sup>5</sup> When ICANN adopted revised Bylaws in December 2002 (following an extensive evolution and reform process), the “more precise standard” came in the form of a materiality threshold, akin to U.S. federal standing

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<sup>2</sup> See Bylaws for Internet Corporation for Assigned Names and Numbers, Article IV, § 3.2, emphasis added, *available at* <http://www.icann.org/en/general/bylaws.htm> (last modified December 8, 2011) [Hereinafter ICANN Bylaws] (last visited April 20, 2012). Although the majority of materials cited in this Response are publicly available on the Internet at [www.icann.org](http://www.icann.org) and other Internet websites, for ease of reference, ICANN has provided the Panel with copies of all materials cited herein. ICANN Bylaws are attached hereto as ICANN Exhibit 1.

<sup>3</sup> ICANN Open Meeting – Afternoon Session, May 25 & 26, 1999, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/open2.html#irac> [hereinafter “May 25-26, 2009 ICANN Open Meeting”] (last visited April 20, 2012), attached hereto as ICANN Exhibit 2.

<sup>4</sup> Draft Principles for Independent Review, Interim Report of the Advisory Committee on Independent Review With Addendum, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html> [hereinafter “Draft Principles for Independent Review”] (last visited April 20, 2012), attached hereto as ICANN Exhibit 3.

<sup>5</sup> May 25-26, 2009 ICANN Open Meeting, *supra* note 3.

principles, which requires that persons submitting a request for IRP proceeding be “materially affected” by an ICANN Board decision or action.<sup>6</sup> The materiality threshold remains in place today.

10. YouPorn fails to satisfy the materiality threshold. Prior to the submission of its Request, YouPorn did not participate in any ICANN process relating to the issues presented in YouPorn’s Request. YouPorn never applied for an adult-oriented (or any other) TLD, despite having the opportunity to do so on two different occasions. Nor did YouPorn submit any objection, complaint, comment or other communication to the ICANN Board at any time throughout two separate and exhaustive processes (first in 2000 and then in 2004) during which ICANN considered applications for new TLDs, including adult entertainment-themed TLDs and ICM’s application for .XXX. In fact, prior to initiating the IRP, YouPorn never presented any application or other request to the ICANN Board for consideration. Having failed to participate in ICANN’s processes, and complaining only of ICM’s conduct in operating .XXX, YouPorn cannot properly invoke the IRP.

11. Furthermore, YouPorn does not (and cannot) allege that it has been “materially affected by a decision or action by the Board.”<sup>7</sup> Instead, YouPorn’s entire claimed “injury” stems from the actions taken primarily by ICM (not ICANN) subsequent to ICANN’s decision to approve ICM as the registry operator for the .XXX TLD. Specifically, YouPorn complains that it has been materially affected by ICM’s (not ICANN’s) conduct in: (a) requiring those registering for a website in the .XXX TLD to waive certain legal and other claims it has against ICM; (b) requiring those operating websites in the .XXX TLD to operate as a member of the ICM-defined community or declare it is not a member of that community; and (c) charging substantial sums to acquire and/or block websites in the .XXX TLD.<sup>8</sup> ICANN does not sell Internet domain names, it is not a registrar for Internet domain names, and it certainly does not operate the .XXX TLD. YouPorn’s claimed injury is thus derived entirely from actions purportedly taken by ICM, not the ICANN Board.

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<sup>6</sup> ICANN Bylaws, Effective as of December 15, 2002, *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 4.

<sup>7</sup> ICANN Bylaws, *supra* note 2, Article IV, § 3.2.

<sup>8</sup> YouPorn’s Request, ¶ 53.

12. In short, YouPorn alleges that it has suffered precisely the type of attenuated harm that falls outside the purview of the IRP. That YouPorn claims some type of injury associated with the operation of a TLD on the Internet does not mean that YouPorn has standing to pursue an IRP. IRP proceedings must be limited in some rational way to review of ICANN Board conduct that specifically concerns the affected party. YouPorn here fails to make that connection.

13. In reality, YouPorn's Request is nothing more than an attempt by YouPorn to shut down the .XXX TLD established and operated by ICM so that YouPorn can protect its substantial share of the online adult entertainment market. YouPorn has sought the very same relief in a lawsuit filed against ICM and ICANN in federal district court in Los Angeles. Indeed, what YouPorn is really complaining of is the potential competition that its websites may face from the operation of .XXX. Facilitation of competition in the domain name system is entirely consistent with ICANN's mandate in administering features of the Internet's domain name system.

14. Further, YouPorn has the burden of proving that a decision or action by the ICANN Board violated ICANN's Bylaws or Articles of Incorporation. Here, ICANN's acceptance of applications for new TLDs in 2000 and again in 2004, and ultimate approval of ICM's .XXX application, falls squarely within ICANN's mission to create competition within the domain name system. Article 4 of ICANN's Articles of Incorporation states that "[t]he Corporation shall operate . . . through open and transparent processes that enable competition and open entry in Internet-related markets." And Article I, Section 2.6 of ICANN's Bylaws identifies one of ICANN's core values as "[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest." YouPorn's concerns regarding how increased competition might affect its bottom line cannot support a finding that ICANN violated its Bylaws or Articles of Incorporation in approving means by which that additional competition may occur.

15. To allow YouPorn to proceed with its Request would make a mockery of the IRP and undermine ICANN's multi-stakeholder model. YouPorn's fundamental premise that ICANN's implementation of a prior IRP Panel's declaration gives rise to a new IRP claim—



particularly where YouPorn is not materially affected and where YouPorn cannot show that the Board violated its Bylaws or Articles of Incorporation—runs directly counter to ICANN’s accountability and transparency commitments.

16. Because YouPorn cannot satisfy the materiality threshold required by ICANN’s Bylaws, the Panel should dismiss YouPorn’s Request without further proceedings (aside from, perhaps, a telephonic hearing to permit argument from counsel on this standing issue). Even if the Panel wishes to proceed beyond this standing issue, the conduct alleged in YouPorn’s Request does not support a finding that the ICANN Board acted in violation of the Bylaws or Articles of Incorporation.

**B. YouPorn Does Not Establish That ICANN Violated Its Bylaws Or Articles of Incorporation.**

17. Since ICANN was formed in 1998, ICANN has been slowly adding TLDs to the Internet in order to confirm that the expansion of TLDs would not endanger the security or stability of the Internet. For example, in the year 2000, ICANN approved “.BIZ,” “.INFO,” “.MUSEUM,” and a few other TLDs to be added to the Internet.

18. ICM’s .XXX proposal, submitted in 2004 in conjunction with ICANN’s second round of adding TLDs to the Internet, was one of the most controversial proposals ICANN has considered. In 2007, ICANN’s Board of Directors—which debated ICM’s proposal extensively and was not of one mind during most of the debate—decided to turn down ICM’s proposal.

19. In what became the first IRP proceeding ever initiated pursuant to ICANN’s Bylaws, ICM challenged ICANN’s decision to deny ICM’s .XXX application. ICM claimed that ICANN had effectively approved its application for .XXX in June 2005, while ICANN asserted that it had reserved judgment on, and then in 2007 elected to reject, ICM’s application. In February 2009, an IRP Panel declared 2-1 that ICANN had, in fact, awarded ICM the .XXX sponsored TLD in June 2005 and should not have “changed its mind” thereafter.

20. In March 2011, after considering extensively the Panel’s Declaration and concerns voiced by various governments and numerous stakeholders in the Internet community, ICANN’s Board voted, consistent with the findings of the majority of the first IRP Panel, to approve the .XXX TLD. ICANN thereafter executed a registry agreement with ICM for

operation of the .XXX TLD. YouPorn did not contribute or participate in any of the many public comment periods leading up to the March 2011 vote.

21. By its Request, YouPorn seeks little more than to re-litigate many of the issues that the first IRP Panel addressed, as well as the resulting decision of the ICANN Board to approve the .XXX TLD and execute the .XXX registry agreement with ICM. YouPorn's Request does not explain why establishing a second IRP Panel on the same topic makes any sense, nor does YouPorn explain how the decision of the ICANN Board to accept and implement portions of the first Panel's declaration possibly could constitute a violation of ICANN's Bylaws or Articles of Incorporation. To the contrary, the ICANN Board carefully and fully followed ICANN's processes in considering, and ultimately resolving to adopt, the majority's declaration in the first IRP proceeding.<sup>9</sup> Those decisions should not be re-litigated here, and doing so would establish a precedent that controversies such as these never end because they could be subject to the second-guessing (and beyond) of subsequent IRP Panels.

22. Moreover, the ICANN Board's consideration and open and public debate in advance of its decision to implement the first IRP Panel's Declaration goes to the very heart of ICANN's commitment, memorialized in its Bylaws, to remain accountable to its multi-stakeholder model and numerous stakeholders. YouPorn's challenge of that decision itself violates the spirit of ICANN's Bylaws.

23. In all events, the ICANN Board's consideration of the Panel's advisory Declaration and subsequent debate regarding the .XXX TLD was done publicly and extensively. Throughout the process, continuing through the Board's approval of ICM and execution of the .XXX registry agreement, the Board was dedicated to fulfilling its commitment to accountability and transparency in a manner that adhered rigorously to ICANN's Bylaws and Articles of Incorporation. Accordingly, in the unlikely event that this Panel elects to proceed to a hearing on the merits, the Panel should easily determine that ICANN has not breached its Bylaws or Articles of Incorporation by deciding—in conformance with a lengthy declaration of the prior IRP Panel—to allow ICM to act as the operator of the .XXX TLD.

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<sup>9</sup> The Panelists in the first IRP included: (1) the Honorable Stephen M. Schwebel; (2) the Honorable Dickran M. Tevrizian (Ret.); and (3) Jan Paulsson, Esq.

24. YouPorn further asserts that ICANN has breached its Bylaws and Articles of Incorporation by failing to conduct economic studies regarding the potential impact the introduction of .XXX might have, not permitting competitive bidding on the .XXX registry agreement, and not adopting specific “consensus policies.” But YouPorn has manufactured such obligations in an effort to protect its commercial interests in the market for online adult entertainment. ICANN’s Bylaws or Articles of Incorporation do not require ICANN to undertake such actions, and simply saying that the Bylaws or Articles of Incorporation require such actions—without a single supporting citation—does not make it so.

25. The only other conduct challenged by YouPorn in its Request relates to conduct by ICM allegedly occurring after the .XXX registry agreement was executed. But the IRP does not exist to address the propriety of conduct undertaken by third parties after a Board decision. The IRP is intended to hold ICANN accountable for operating in a manner consistent with its Bylaws and Articles of Incorporation. Any problems YouPorn might have with ICM’s conduct are not a proper basis for an IRP proceeding.

26. Finally, YouPorn has requested that the Panel award certain affirmative relief, beyond the relief allowed in the IRP, which is limited to a declaration of whether the ICANN Board acted in conformance with its Bylaws or Articles of Incorporation. For instance, YouPorn asks that the Panel require ICANN to “adopt ‘Consensus Policies’ binding on ICM that protect competition, trademarks and other name and intellectual property rights in connection with the operation of the .XXX TLD and other TLDs.”<sup>10</sup> But the Panel’s authority is limited to declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the declaration of the IRP Panel. There is nothing in the Bylaws or Articles of Incorporation that grants the Panel authority to award affirmative relief and to require ICANN to undertake specific conduct. As such, YouPorn’s request that the Panel award any affirmative relief should be stricken.

27. In short, there is no basis for YouPorn’s Request, and the Request should be summarily denied.

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<sup>10</sup> YouPorn’s Request, ¶ 61(j).

## **II. SUMMARY OF ICANN'S POSITION**

28. First, under ICANN's Bylaws, only persons "materially affected by a decision or action by the Board" may submit a request for independent review of that decision or action. Here, YouPorn fails to satisfy the materiality threshold required by ICANN's Bylaws as a prerequisite to invoking the IRP. YouPorn thus lacks standing to initiate this IRP under ICANN's Bylaws.

29. Second, ICM already challenged ICANN's decision to reject the .XXX application in the first-ever IRP proceeding constituted under ICANN's Bylaws. That Panel already fully considered the facts related to the .XXX TLD and declared that the ICANN Board's rejection of ICM's .XXX application in March 2007 was inconsistent with ICANN's Bylaws and Articles of Incorporation. YouPorn is now claiming that ICANN's approval of ICM's .XXX application in accordance with that Panel's Declaration is also a violation of ICANN's Bylaws and Articles of Incorporation (*i.e.*, that the Panel's Declaration was wrong). It would be wholly inappropriate and inconsistent with the IRP itself to proceed with a second IRP to second-guess the Declaration of a prior Panel on essentially the same issues.

30. Given YouPorn's failure to satisfy the materiality threshold in ICANN's Bylaws, and the farce that a second IRP proceeding on the same precise topic as the first one would make of the Process itself, the Panel should dismiss YouPorn's Request without further proceedings. However, if the Panel wishes to proceed, ICANN will demonstrate that its approval of ICM's application for the .XXX TLD following the first Panel's advisory Declaration was entirely consistent with ICANN's Articles of Incorporation and Bylaws.

31. In this Response to YouPorn's Request, ICANN will:

- (a) Describe the history and function of ICANN (Section III);
- (b) Explain ICANN's decision-making processes, including the process for Independent Review Proceedings (Section IV);
- (c) Address the relevant facts that give rise to this dispute (Section V);
- (d) Explain how YouPorn lacks standing to initiate the instant IRP (Section VI);

- (e) Respond to YouPorn’s claims that ICANN’s Board violated ICANN’s Bylaws and Articles of Incorporation (Section VII);
- (f) Respond to YouPorn’s request for relief (Section VIII); and
- (g) Propose next steps for these proceedings (Section IX).

32. The procedures that govern this IRP proceeding provide that, in order to keep the costs and burdens of the process to a minimum, this Panel should conduct, to the extent possible, its proceedings via the Internet and hold meetings via telephone where necessary.<sup>11</sup>

Accordingly, the detailed record that the parties already have provided to the Panel, via YouPorn’s Request and this Response, should facilitate the orderly resolution and disposition of these proceedings, as ICANN discusses in Section IX.

### **III. ICANN’S HISTORY AND FUNCTION**

33. ICANN is a not-for-profit public benefit corporation that was organized under California law in 1998.<sup>12</sup> ICANN’s mission is to coordinate the global Internet’s system of unique identifiers and ensure the stability, integrity and utility of the domain name system on behalf of the global Internet community.<sup>13</sup> Pursuant to a series of agreements with the United States Department of Commerce, ICANN is responsible for administering certain aspects of the Internet’s domain name system.<sup>14</sup>

34. The Internet is succinctly described as “an international network of interconnected computers.”<sup>15</sup> Each computer connected to the Internet has a unique identity, established by its unique Internet Protocol address (“IP address”). An IP address consists of a series of numbers. Because those numbers are hard to remember, the founders of the Internet created the domain name system (“DNS”) to allow those numbers to be converted into names such as “ICANN.ORG” or “USCOURTS.GOV.” In these examples, “.ORG” and “.GOV” are known as

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<sup>11</sup> See ICANN Bylaws, *supra* note 2, Article IV, § 3.10; Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process, § 4, *available at* <http://www.adr.org/sp.asp?id=32197> (last visited April 20, 2012) [Hereinafter ICDR Supplementary Procedures], attached hereto as ICANN Exhibit 5.

<sup>12</sup> Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, *available at* <http://www.icann.org/en/general/articles.htm> (last modified Nov. 21, 1998) (last visited April 20, 2012), attached hereto as ICANN Exhibit 6.

<sup>13</sup> ICANN Bylaws, *supra* note 2, Article 1, § 1 (Mission).

<sup>14</sup> *Id.*

<sup>15</sup> *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

the “Top Level Domain” or “TLD.” The letters immediately to the left of the last “period” or “dot” are known as the Second Level Domain (ICANN or USCOURTS); the letters to the left of the Second Level Domain are known as the Third Level Domain (for example, the “CACD” in the website to the United States District Court for the Central District of California’s main Internet page located at CACD.USCOURTS.GOV).

35. As part of ICANN’s mission, ICANN contracts with qualified entities to run generic Top Level Domain name “registries” (such as “.COM” and “.ORG”). Each registry functions similar in some ways to a phone book, making sure that each name registered (akin to a phone number) in that TLD is unique.

36. ICANN accredits companies known as registrars that offer consumers the opportunity to register domain names—names such as ICANN.ORG. Each accredited registrar has an agreement with ICANN that permits the registrar to sell domain name registrations in generic TLDs or “gTLDs.”<sup>16</sup> Each accredited registrar must also have an agreement with the registry operator for each TLD registry in which the registrar wants to sell registrations. Registrars, in turn, must also contract with consumers and businesses (“registrants”) that wish to register domain names.

37. Generic TLDs have been identified as either “unsponsored” or “sponsored.” The most well-known “unsponsored” gTLDs are “.COM” and “.NET”; there are no restrictions as to who can register domain names in “unsponsored” gTLDs. By contrast, a “sponsored” gTLD is operated by an organization that has a sponsor—typically an entity representing a narrower group or industry. One example is “.MUSEUM”, which is operated for the benefit of museums throughout the world and is not available to persons who are not in the museum industry. .XXX is a “sponsored” TLD.<sup>17</sup>

#### **IV. ICANN’S DECISION-MAKING AND INDEPENDENT REVIEW PROCESS**

38. ICANN is a complex organization that facilitates input from a wide variety of

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<sup>16</sup> There are several types of TLDs. Currently, most TLDs with three or more characters are called “generic” TLDs or “gTLDs.” Other types of TLDs include two-letter country-code TLDs, such as .FR and .CZ and IDN ccTLDs, which are country-code TLDs in scripts other than Latin, such as in Chinese scripts to represent China, or Cyrillic to represent the Russian Federation.

<sup>17</sup> The purpose and function of unsponsored TLDs and sponsored TLDs are subject to change as ICANN continues to add new TLDs to the DNS, as ICANN is presently doing through its New gTLD Program.

Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants. In broader terms, ICANN includes the Board, the Staff, the Ombudsman,<sup>18</sup> an independent Nominating Committee,<sup>19</sup> three Supporting Organizations,<sup>20</sup> four Advisory Committees,<sup>21</sup> a Technical Liaison Group,<sup>22</sup> and a very large, globally distributed group of community members who participate in ICANN’s processes. The Supporting Organizations provide policy recommendations and advice on specific topics, and Advisory Committees provide advice to the ICANN Board.

39. ICANN’s Board of Directors consists of sixteen voting directors,<sup>23</sup> the majority of whom reside outside of the United States. In addition, five non-voting liaisons to the Board are appointed by Advisory Committees or other groups to take part in Board discussions and deliberations.<sup>24</sup>

40. Nearly all of those who support ICANN through its various community organizations and committees volunteer their services. A graphic depiction of how the ICANN community inter-relates is found on ICANN’s website and is reproduced here:<sup>25</sup>

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<sup>18</sup> ICANN Bylaws, *supra* note 2, Article V.

<sup>19</sup> *Id.* at Article VII.

<sup>20</sup> *Id.* at Articles VIII-X.

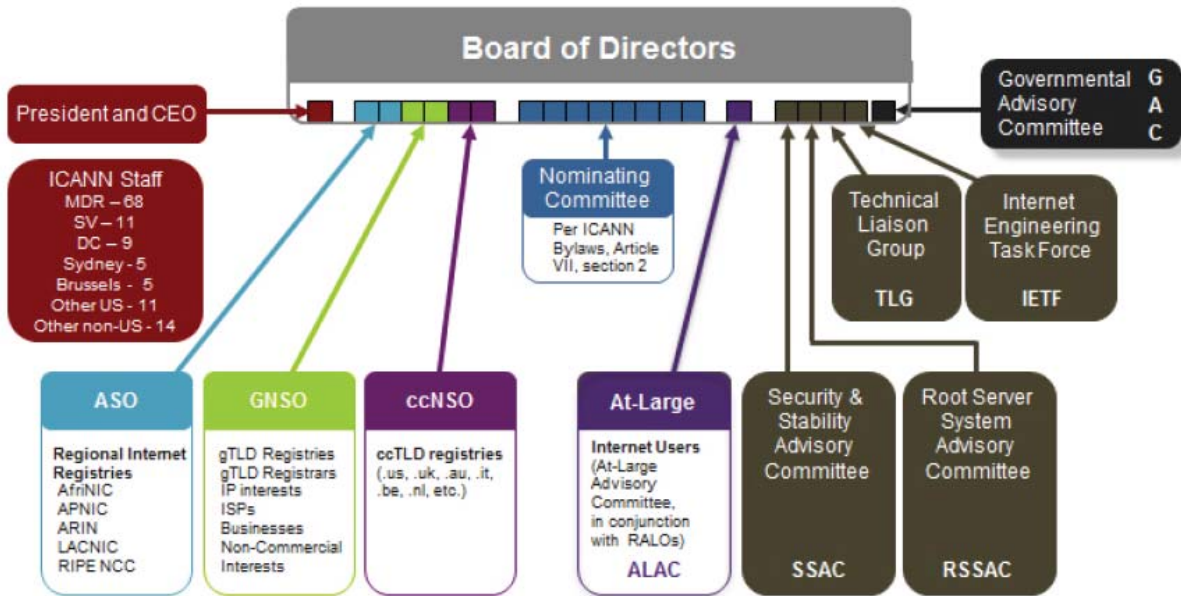
<sup>21</sup> *Id.* at Article XI.

<sup>22</sup> *Id.* at Article XI-A, § 2.

<sup>23</sup> *Id.* at Article VI, § 1 (Board of Directors). Eight voting directors are selected by ICANN’s Nominating Committee, another six voting directors are selected by ICANN’s three Supporting Organizations (each selecting two), and one voting director is selected by the At-Large Community. The ICANN President also serves as a voting director. *Id.* at Article VI, § 2.

<sup>24</sup> *Id.* at Article VI, § 9 (Non-Voting Liaisons).

<sup>25</sup> ICANN Multi-Stakeholder Model, *available at* <http://www.icann.org/en/groups>. Note that staff numbers and geographic distribution is subject to change as necessary.



41. In carrying out its mission, ICANN is held accountable to the Internet community for operating in a manner that is consistent with its Bylaws. The Bylaws provide for three unique processes to serve as a form of “Accountability and Review” of ICANN’s actions.<sup>26</sup> Specifically, the Bylaws provide for: (1) “Reconsideration” of the Board’s actions—a review process administered by a committee of the Board; (2) “Independent Review of Board Actions” (at issue here)—defined as a separate process for independent third-party review of Board actions alleged by a “materially affected” party to be inconsistent with the Articles of Incorporation or Bylaws; and (3) the “Office of the Ombudsman” to evaluate and where possible resolve complaints about alleged unfair treatment by ICANN’s Board or Staff, or by one of ICANN’s constituent bodies.<sup>27</sup>

42. The IRP is not a traditional dispute resolution process, *i.e.*, mediation or arbitration, but rather is intended to provide the ICANN community with a formal process for reviewing specific decisions of the ICANN Board. The International Centre for Dispute Resolution has been appointed as ICANN’s Independent Review Provider.<sup>28</sup> The ICDR Rules, as supplemented by ICANN’s Bylaws and Supplementary Procedures that the ICDR adopted

<sup>26</sup> ICANN Bylaws, *supra* note 2, Article IV, § 1 (Accountability and Review).

<sup>27</sup> *Id.* at Article IV, §§ 2-4.

<sup>28</sup> *Id.* at Article IV, § 3.4.



specially for IRPs, apply here.<sup>29</sup> Unlike a traditional arbitration or mediation through the ICDR, the IRP does not specifically contemplate the need for a live hearing. To the contrary, the Bylaws expressly provide that an IRP proceeding should be conducted via “email and otherwise via the Internet to the maximum extent feasible.”<sup>30</sup> The Panel may also hold meetings via telephone where necessary.<sup>31</sup>

43. Pursuant to ICANN’s Bylaws, the Panel is supposed to issue a written declaration designating, among other things, the prevailing party.<sup>32</sup> The Panel is not authorized to award affirmative relief requiring ICANN to undertake specific actions.<sup>33</sup>

44. The IRP was not created to require ICANN to abdicate its decision-making authority to a third party (which it cannot legally do). Accordingly, the Panel’s declaration is not binding. However, the Board is mandated to consider the Panel’s declaration at the Board’s next meeting, where feasible.<sup>34</sup> Further, as a key component of ICANN’s accountability commitment to its community, ICANN takes the process quite seriously.

## V. SUMMARY OF RELEVANT FACTS

### A. **ICANN’s Role In The Introduction Of New TLDs And The 2000-2001 New TLD Selection Process.**

45. ICANN’s role in the delegation of new TLDs can be traced to the U.S. Government’s June 5, 1998 White Paper entitled “Statement of Policy, Management of Internet Names and Addresses.”<sup>35</sup> In that White Paper, the U.S. Government, which at that time controlled the Internet’s domain name system, declared its willingness to recognize a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the DNS. The White Paper envisioned a transition process during which the not-for-profit

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<sup>29</sup> In the event of any inconsistency between the Supplementary Procedures and the ICDR’s Rules, the Supplementary Procedures shall govern. *Id.* at Article IV, § 3.5; *see also* ICDR Supplementary Procedures, *supra* note 11, § 2.

<sup>30</sup> ICANN Bylaws, *supra* note 2, Article IV, § 3.10

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at Article IV, § 3.12; ICDR Supplementary Procedures, *supra* note 11, § 7.

<sup>33</sup> *Cf.* ICANN Bylaws, *supra* note 2, Article II, § 3.3 & 3.8.

<sup>34</sup> *Id.* at Article IV, § 3.15.

<sup>35</sup> Management of Internet Names and Addresses (June 5, 1998), *available at* <http://www.icann.org/en/general/white-paper-05jun98.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 7.

corporation would enter various agreements to facilitate the transition to the private sector of the U.S. Government's role in the Internet names and numbers address system in a manner that ensured the stability of the Internet.<sup>36</sup>

46. The White Paper provided that the new corporation—ultimately determined to be ICANN—should have the authority to manage and perform a specific set of functions related to coordination of the domain name system. This included the authority necessary to “oversee policy for determining the circumstances under which new TLDs are added to the root system.”<sup>37</sup> The introduction of new TLDs has been a central focus of ICANN's operation and policy development work since ICANN's founding.<sup>38</sup>

47. Shortly after its formation, ICANN began to explore the possibility of adding new TLDs to the DNS. After much deliberation and public comment, on July 16, 2000, the ICANN Board adopted a policy for the introduction of new TLDs in “a measured and responsible manner.”<sup>39</sup> This initial round was a preliminary effort to constitute a “proof of concept” to improve ICANN's understanding and experience in practical and policy issues involved in adding new TLDs.<sup>40</sup>

48. ICANN received 47 applications for over 200 new gTLDs (both unsponsored and sponsored). YouPorn did not apply for any new gTLD in that round.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Notably, the Internet community has declared ICANN's efforts in this regard to be successful. For example, in 2004, the Organisation for Economic Co-Operation and Development (OECD) issued a report entitled “Generic Top Level Domain Names: Market Development and Allocation Issues.” The OECD report reviewed the historical results of ICANN's introduction of new TLDs and concluded: “ICANN's reform of the market structure for the registration of generic Top Level Domain Names has been very successful. The division between registry and registrar functions has created a competitive market that has lowered prices and encouraged innovation.” Working Paper on Telecommunication and Information Services Policies, Generic Top Level Domain Names: Market Development and Allocation Issues, July 13, 2004, *available at* <http://www.oecd.org/dataoecd/56/34/32996948.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 8.

<sup>39</sup> ICANN TLD Application Process: Information for Applicants, *available at* <http://www.icann.org/en/tlds/tld-application-process.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 9; *see also* Resolutions of the ICANN Board, July 16, 2000, *available at* <http://www.icann.org/en/tlds/new-tld-resolutions-16jul00.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 10.

<sup>40</sup> ICANN Criteria for Assessing TLD Proposals, August 15, 2000, *available at* <http://www.icann.org/en/tlds/tld-criteria-15aug00.htm>, attached hereto as ICANN Exhibit 11 (“The current program of establishing new TLDs is intended to allow the Internet community to evaluate possible additions and enhancements to the DNS and possible methods of implementing them. Stated differently, the current program is intended to serve as a ‘proof of concept’ for ways in which the DNS might evolve in the longer term.”).

49. Among the 47 proposals received by ICANN was an application from ICM for the creation of an unsponsored .XXX TLD.<sup>41</sup> .XXX was not selected during the “proof of concept” round for three reasons: (1) “it did not appear to meet unmet needs;” (2) “the controversy surrounding” .XXX was great; and (3) the application included a “poor definition of the hoped-for benefits of [] .XXX.”<sup>42</sup> In short, “[t]he evaluation team concluded that at this early ‘proof of concept’ stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs.”<sup>43</sup>

50. In November 2000, the ICANN Board authorized seven proposals to become new gTLDs to be added to the DNS upon U.S. Department of Commerce approval.<sup>44</sup> The new gTLDs consisted of four unsponsored TLDs (.BIZ, .INFO, .NAME, and .PRO) and three sponsored TLDs (.MUSEUM, .AERO, and .COOP). The seven were selected following extensive input from ICANN Staff, outside advisors, and the Internet community as a whole.

51. ICANN considered the launch of the seven new TLDs to be successful because, among other things, the launch did not impair the security or stability of the Internet, and the introduction of new TLDs was in furtherance of ICANN’s mission to facilitate competition in domain name registrations. As a result, following the completion of the “proof of concept” round and the addition of the new TLDs to the DNS, ICANN considered adopting procedures for the introduction of more TLDs, as described in the next section.

## **B. ICANN’s sTLD Selection Process.**

52. On October 18, 2002, then-ICANN President Stuart Lynn drafted “A Plan for

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<sup>41</sup> ICANN received applications for .XXX from two other applicants in addition to ICM, but not YouPorn. See List of TLD Applications Lodged, *available at* <http://archive.icann.org/en/tlds/tld-applications-lodged-02oct00.htm>.

<sup>42</sup> ICANN Report on TLD Applications: Application of the August 15 Criteria of Each Category or Group, November 9, 2000, *available at* <http://www.icann.org/en/tlds/report/report-iiib1c-09nov00.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 12.

<sup>43</sup> *Id.*

<sup>44</sup> Second Annual Meeting and Organizational Meeting of the ICANN Board, November 16, 2000, *available at* <http://www.icann.org/en/minutes/prelim-report-16nov00.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 13.

Action Regarding New gTLDs.”<sup>45</sup> Lynn recommended that the ICANN Board consider immediately initiating a new round of proposals for “sponsored” TLDs or “sTLDs.”

53. Throughout 2003, ICANN solicited public comments about developing proposed criteria and procedures for evaluating sTLD proposals.<sup>46,47</sup> Upon much deliberation and consultation with its supporting organizations and advisory committees,<sup>48</sup> on December 15, 2003, ICANN launched the next round of the TLD selection process by posting an open request for proposals for any interested party to apply for the delegation of a new sTLD.<sup>49</sup> Unlike the “proof of concept” round, this new round was expressly limited to “sponsored” TLDs; as a result, the question of sponsorship was critical to the application, which contained numerous questions that an applicant was required to address. If a proposed TLD was not truly “sponsored,” it would be rejected in this round but could be approved in later rounds where

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<sup>45</sup> A Plan for Action Regarding New gTLDs, Stuart Lynn, ICANN President, October 18, 2002 (Appendix A. Background), *available at* <http://www.icann.org/en/committees/ntepptf/new-gtld-action-plan-18oct02.htm> (last visited April 20, 2012) posted for public comment on November 8, 2002, attached hereto as ICANN Exhibit 14.

<sup>46</sup> *See* Establishment of New sTLDs: Request for Proposals (Draft for Public Comment), June 24, 2003, *available at* <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-rfp-24jun03.htm> (last visited April 20, 2012) [Hereinafter Draft RFP for New sTLDs], attached hereto as ICANN Exhibit 15.

<sup>47</sup> On December 15, 2002, the ICANN Board directed Lynn to develop a draft RFP for the purpose of soliciting proposals for a limited number of additional new sTLDs. *See* ICANN Minutes, Fourth Annual Meeting of the Board, December 15, 2002, *available at* <http://www.icann.org/en/minutes/minutes-annual-meeting-15dec02.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 16. On March 25, 2003, ICANN Staff posted for public comment the proposed criteria and the proposed process for evaluating sTLD proposals. *See* ICANN Rio de Janeiro Meeting Topic: Criteria to be Used in the Selection of New Sponsored TLDs, March 25, 2003, *available at* <http://www.icann.org/meetings/riodejaneiro/stld-rfp-topic.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 17. Three months later, on June 24, 2003, ICANN posted for public comment a draft RFP and invited further comment through August 25, 2003. *See* Draft RFP for New sTLDs.

<sup>48</sup> The draft RFP received significant input via ICANN’s online public forum. ICANN’s At Large Advisory Committee or “ALAC,” a community of individual Internet users who consider and provide advice within ICANN, including in the policy development work, also drafted and posted its “Response to the Proposed sTLD RFP and Suggested Principles for New TLD Processes,” dated October 9, 2003, *available at* <http://alac.icann.org/correspondence/response-stld-process-09oct03.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 18. ICANN’s Generic Names Supporting Organization or “GNSO,” the successor to the gTLD responsibilities of the Domain Name Supporting Organization, shortly after provided its comment and called upon the ICANN Board to move forward with the process for an interim round of sTLDs. GNSO Council Carthage Meeting Minutes, October 29, 2003, *available at* <http://gns0.icann.org/meetings/minutes-gns0-29oct03.shtml> (last visited April 20, 2012), attached hereto as ICANN Exhibit 19. The ICANN Board reviewed the public comments received on the draft RFP and noted in particular, “an appreciation of the importance to the community of this topic, and the intent to seek further input and open communication with the community on this topic” before arriving at any decision. ICANN Minutes, Special Board Meeting, October 13, 2003, *available at* <http://www.icann.org/en/minutes/minutes-13oct03.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 20.

<sup>49</sup> *See* New sTLD Application, December 15, 2003, *available at* <http://www.icann.org/en/tlds/new-stld-rfp/new-stld-application-part-a-15dec03.htm> (last visited April 20, 2012) [Hereinafter New sTLD Application], attached hereto as ICANN Exhibit 21. Although Lynn’s Action Plan suggested limiting the number of sTLDs in this round of proposals to three, community comment encouraged ICANN not to limit that number. *See* Draft RFP for New sTLDs, *supra* note 46.

sponsorship was not an element of the application.

54. The sTLD application provided the selection criteria that would be used to evaluate all proposals. The criteria were designed as “objective criteria” to enable the independent evaluators to determine which applications “best” met ICANN’s requirements.<sup>50</sup> The selection criteria consisted of four categories: (1) Sponsorship Information; (2) Business Plan Information; (3) Technical Standards; and (4) Community Value.<sup>51</sup>

**C. ICM’s Application For The .XXX sTLD And ICANN’s Review Of That Application.**

55. ICANN sets forth in this section a considerable amount of the history of ICM’s 2004 application for the .XXX TLD so that the Panel can appreciate the extensive factual background of the .XXX TLD, ICANN’s consideration of ICM’s application, and the amount of information that was presented to the first IRP Panel.

56. ICANN received a total of ten sTLD applications, including ICM’s March 16, 2004 application for a .XXX sTLD.<sup>52</sup> The International Foundation for Online Responsibility (“IFFOR”) was proposed as .XXX’s sponsoring organization.<sup>53</sup> YouPorn did not apply for any new sTLD, .XXX or otherwise.

57. In April 2004, ICANN convened an independent panel of experts (the “Evaluation Panel”) to review and recommend those sTLD applications that satisfied the selection criteria. The Evaluation Panel included a program manager and the following three independent teams of panelists, comprising: (1) technical panel; (2) business and financial panel; and (3) sponsorship panel. The Evaluation Panel submitted to ICANN its evaluations for all ten sTLD applications by the end of August 2004. The Evaluation Panel found that only two of the applicants satisfied the selection criteria. With respect to ICM’s .XXX application, the Evaluation Panel concluded that .XXX met both the technical and business selection criteria, but determined that ICM did not meet the sponsorship criteria and had “deficiencies [that] cannot be remedied within the

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<sup>50</sup> *Id.* (Part A. Explanatory Notes – Selection Criteria).

<sup>51</sup> *Id.*

<sup>52</sup> New sTLD RFP Application, .XXX, Part B. Application Form, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/xxx.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 22.

<sup>53</sup> *Id.*

applicant's proposed framework." The Evaluation Panel recommended that ICANN not consider the .XXX application further.<sup>54</sup>

58. Because the Evaluation Panel had recommended approval of only two sTLD applicants, in August 2004, the ICANN Board decided to give all of the other sTLD applicants another opportunity to provide clarifying information and to answer further questions "relating to any potential deficiencies in the application that were highlighted in the independent evaluation."<sup>55</sup> All applicants were encouraged to review the contents of the reports and to respond in writing to ICANN.<sup>56</sup>

59. ICM responded to the request for more information and provided ICANN with a formal response to the Evaluation Panel's report, arguing that the Evaluation Panel's concerns were unfounded.<sup>57</sup>

60. On June 1, 2005, the ICANN Board held a special meeting via teleconference. The Board engaged in extensive discussion regarding ICM's .XXX sTLD application and ultimately resolved to allow ICM to proceed to contract negotiations.<sup>58</sup> The resolutions provided:

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<sup>54</sup> ICANN, New sTLD Applications, Appendix D, Evaluation Reports, August 27, 2004, at 82, *available at* <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf>, attached hereto as ICANN Exhibit 23.

With respect to .XXX, the Evaluation Panel found that ICM's application met both the technical and business selection criteria but concluded that the .XXX application did not meet four of the nine subparts of the sponsorship selection criteria. Specifically, the Evaluation Panel: (1) "[did] not believe that the .XXX application represented a clearly defined community"; (2) found that the lack of cohesion in the community, and the planned involvement of child advocates and free expression interest groups, would preclude the effective formulation of policy for the community; (3) was not convinced that there was sufficient evidence of community support outside of North America or from child safety, law enforcement, or freedom of expression organizations; and (4) "did not agree that the application added new value to the Internet name space." *Id.*

<sup>55</sup> Confidential Exhibit – Correspondence from Kurt Pritz, ICANN, to Stuart Lawley, ICM, erroneously dated July 31, 2004, enclosing Independent Evaluation Report for .XXX, Prepared for ICANN, Compiled on August 27, 2004, attached hereto as ICANN Confidential Exhibit A.

<sup>56</sup> *Id.*

<sup>57</sup> Confidential Exhibit – Formal Response to ICANN's Independent Evaluation Report on .XXX sTLD, from Stuart Lawley, ICM, to Kurt Pritz, ICANN, October 9, 2004, attached hereto as ICANN Confidential Exhibit B. ICM and IFFOR later provided the ICANN Board with a memorandum similar to its formal response to ICANN staff, outlining the reasons why they believed the ICANN Board should allow the .XXX sTLD to proceed despite the recommendation of the Evaluation Panel. See Confidential Exhibit – Memorandum to the ICANN Board of Directors, November 2, 2004, Revised December 7, 2004, attached hereto as ICANN Confidential Exhibit C.

<sup>58</sup> ICANN Minutes, Special Meeting of the Board, June 1, 2005, *available at* <http://www.icann.org/en/minutes/minutes-01jun05.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 24.

Resolved [05.32] the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.

Resolved [05.33] if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.<sup>59</sup>

61. In accordance with the June 2005 resolutions, ICANN entered into contract negotiations with ICM for a proposed registry agreement. By August 9, 2005, ICM's first draft .XXX sTLD agreement was posted on ICANN's website for public comment and submitted to the Board. ICANN's next Board meeting was scheduled for August 16, 2005, at which time ICANN had planned on discussing ICM's first draft of the .XXX registry agreement.<sup>60</sup>

62. However, following the publication of ICM's first draft, the Chairman of ICANN's Governmental Advisory Committee and several member countries expressed concerns with the proposed .XXX sTLD, and requested that the Board provide additional time for governments to express their concerns before the Board reached a final decision on the proposed registry agreement.<sup>61</sup>

63. ICANN's Bylaws make clear that the ICANN Board is required to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies.<sup>62</sup> ICANN accordingly believed that it was required by its Bylaws to consider the GAC's concerns, and the Board postponed discussion of ICM's first draft registry agreement to

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<sup>59</sup> *Id.*

<sup>60</sup> See ICM Draft, August 1, 2005, Sponsored TLD Registry Agreement, available at <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-09aug05.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 25.

<sup>61</sup> See Letter from Mohamed Sharil Tarmizi, GAC Chairman, to ICANN Board Regarding .XXX TLD, August 12, 2005, available at <http://www.icann.org/en/correspondence/tarmizi-to-board-12aug05.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 26; Letter from Michael D. Gallagher, U.S. DOC, to Vinton Cerf, received August 15, 2005, available at <http://www.icann.org/en/correspondence/gallagher-to-cerf-15aug05.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 27.

<sup>62</sup> ICANN's Bylaws, *supra* note 2, Article XI, § 2.1(i). In those situations where the Board seeks to take actions that are inconsistent with the GAC's advice, the Board is required to inform the GAC and state the reasons why the Board has decided not to follow the GAC's advice. *Id.* The GAC and the ICANN Board must then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. *Id.* If no such solution can be found, the ICANN Board must state in its final decision the reasons why the GAC advice was not followed. *Id.*

allow for input from the GAC.

64. Over the next several months, members of the ICANN Board corresponded with various GAC member countries and members of the Internet community, who expressed the view that they and other member countries should address the public policy issues raised by the .XXX sTLD application. The GAC's concerns culminated in the GAC's issuance of a document (the "Wellington Communiqué") on March 8, 2006.<sup>63</sup>

65. In the Wellington Communiqué, the GAC stated that the public interest benefits promised by ICM had not yet been included as ICM's obligations in the draft .XXX sTLD registry agreement,<sup>64</sup> and asked that ICANN confirm that any final registry agreement contain enforceable provisions covering all of ICM's commitments. The GAC also stated that "without prejudice to the above, several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD."<sup>65</sup>

66. In response to the Wellington Communiqué, a unanimous ICANN Board approved a directive to ICANN's President and General Counsel to continue further negotiations with ICM and to return to the Board with any recommendations regarding amendments to the proposed .XXX sTLD registry agreement, particularly "to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor's policies."<sup>66</sup>

67. On May 10, 2006, after a detailed discussion, the ICANN Board voted 9-5 against ICM's current draft of the proposed .XXX sTLD registry agreement.<sup>67</sup> The Board minutes reflect the difficult challenges this sTLD presented, with Board members expressing varying

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<sup>63</sup> During this time, ICM and ICANN Staff also continued to negotiate the terms of the registry agreement. In March 2006, ICM and ICANN Staff finalized a second draft of the registry agreement.

<sup>64</sup> GAC Communiqué – Wellington, New Zealand, March 28, 2006, *available at* <http://www.icann.org/en/committees/gac/communique-28mar06.pdf> (last visited April 20, 2012) [hereinafter Wellington Communiqué, attached hereto as ICANN Exhibit 28.

<sup>65</sup> *Id.*

<sup>66</sup> Regular Meeting of the Board, Minutes, March 31, 2006, *available at* <http://www.icann.org/minutes/minutes-31mar06.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 29.

<sup>67</sup> Special Meeting of the Board, Minutes, May 10, 2006, *available at* <http://www.icann.org/en/minutes/minutes-10may06.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 30.



views of ICM's draft agreement.<sup>68</sup> For the most part, the majority thought that the contract negotiations with ICM did not produce the required or expected results, with a minority arguing that ICM had satisfied the "sponsorship" and other concerns (and thus should be allowed to proceed).<sup>69</sup>

68. ICANN and ICM thereafter worked to negotiate additional revisions to the draft .XXX sTLD registry agreement that addressed the Board's and the GAC's expressed concerns. On January 5, 2007, the revised agreement was posted for public comment, which was open until February 5, 2007.<sup>70</sup>

69. Nevertheless, several members of the ICANN Board had become increasingly concerned that ICM's proposal was not going to satisfy the RFP sponsorship criteria. On March 30, 2007, the Board adopted (by a 9-5 vote) a resolution rejecting ICM's revised agreement and denying ICM's application for the .XXX sTLD.<sup>71</sup>

#### **D. ICM's Request for Independent Review Proceeding.**

70. On June 6, 2008, ICM filed the first ever Request for Independent Review Proceeding pursuant to ICANN's Bylaws. The Request alleged that:

- (a) ICANN failed to follow its established process in its rejection of ICM's Application for the .XXX TLD, in violation of the Articles of Incorporation and Bylaws. Specifically, ICM alleged that it satisfied the first phase of the evaluation process and proceeded to the second phase of contract negotiations. However, much later, ICANN improperly re-opened the first phase decision by determining that ICM did not satisfy the "Sponsored Community" criteria and used this as a basis for rejecting the ICM Application.
- (b) ICANN improperly established new criteria in its assessment of ICM's Application, in violation of the Articles of Incorporation

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<sup>68</sup> After the Board vote, Chairman Vinton Cerf recognized the "diversity of views" and commented that the Board was "clearly quite polarized on this question". Voting Transcript of Board Meeting, May 10, 2006, *available at* <http://www.icann.org/minutes/voting-transcript-10may06.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 31.

<sup>69</sup> *Id.*

<sup>70</sup> January 5, 2007 Draft Sponsored TLD Registry Agreement, *available at* <http://www.icann.org/en/tlds/agreements/xxx/proposed-xxx-agmt-05jan07.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 32.

<sup>71</sup> ICANN, Meeting of the Board, Transcript, March 30, 2007, *available at* <http://www.icann.org/en/meetings/lisbon/transcript-board-30mar07.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 33.

and Bylaws. Specifically, ICM alleged that ICANN applied a “new definition of sponsorship criteria” suddenly prohibiting a self-selecting community that did not have the universal support of all members of the community.

- (c) ICANN failed to engage in good faith negotiations with ICM for a registry agreement, in violation of the Articles of Incorporation and Bylaws. Specifically, ICM alleged that ICANN repeatedly delayed the negotiations on the proposed .XXX Application.
- (d) ICANN exceeded its mission during the evaluation and the rejection of ICM’s Application, in violation of the Articles of Incorporation and Bylaws. Specifically, ICM alleged that ICANN improperly considered “public policy” issues and such consideration goes beyond the technical function of ICANN.

71. On September 8, 2008, ICANN filed its Response to ICM’s Request. ICANN’s Response included the following points:

- (a) ICANN’s evaluation of ICM’s proposal, as well as ICANN’s negotiations with ICM, were at all times open, transparent, and in good faith.
- (b) ICM knew that its proposal would be controversial, and that the Board would need substantial time to evaluate the proposed TLD. ICM even requested periodically that the Board defer votes on the proposal so that ICM could provide additional information to the Board and respond to concerns that had been expressed. The Board welcomed and evaluated ICM’s additional submissions.
- (c) ICANN retained at all times the discretion to reject ICM’s proposal. At no time did ICANN commit—contractually or otherwise—to approve ICM’s proposal, a fact that ICM knew quite clearly throughout the process.
- (d) ICANN’s Bylaws require the Board to consider the opinion of the GAC on public policy concerns.
- (e) ICANN’s Bylaws support that a deferential standard of review be applied to the IRP, particularly with respect to the nature of ICM’s claims. As long as the Board’s discussions are open and transparent, its decisions are made in good faith, and the relevant parties have been given an opportunity to be heard, there is a strong presumption that the Board’s decisions are appropriate.

72. On January 22, 2009, ICM filed its Memorial on the Merits, along with witness statements from Becky Burr (ICM’s counsel in negotiations), Elizabeth Williams (head of the Independent Sponsorship Evaluation Panel), and two expert witnesses, Professors Jack Goldsmith (regarding application of International Law to the proceeding) and Milton Mueller

(opining on the history and practices of ICANN). The Memorial contained the following clarifying contentions, among others:

- (a) ICM was requesting a binding determination through the IRP.
- (b) ICANN failed to act openly and transparently by failing to provide procedural fairness by not adhering to the selection criteria set for in the Request for Proposal.
- (c) ICANN failed to adhere to the provisions of the Bylaws requiring non-discriminatory treatment.
- (d) ICANN acted in excess of its purpose and mission in that it improperly considered “public policy” issues and such consideration goes beyond the technical function of ICANN.
- (e) ICANN violated its Bylaws governing the Governmental Advisory Committee.
- (f) ICANN failed to act in conformity with other relevant principles of international law, including the principles of good faith, abuse of rights and legitimate expectations.
- (g) ICANN’s actions were inconsistent with its Bylaws and Articles of Incorporation under relevant principles of California law.

73. In its May 8, 2009 filing, ICANN responded to ICM’s claims, challenging the factual premises of each claim as well as ICM’s characterization of the IRP. ICANN included witness statements from Dr. Vinton Cerf, Alejandro Pisanty and Dr. Paul Twomey as the former Chair, Vice-Chair, and President and CEO of ICANN, respectively. ICANN also provided an expert declaration from Professor David Caron to opine on the application of international law to the proceedings.

74. The three-member Panel held a five-day hearing from September 21-25, 2009, during which both sides submitted written and live testimony.

75. The Panel issued its Declaration on February 19, 2010. In the Panel’s 2-1 advisory Declaration, the Panel declared in relevant part, as follows:

- (a) The holdings of the Panel are advisory in nature; they do not constitute a binding arbitral award.
- (b) The Board of ICANN in adopting its resolutions of June 1, 2005, determined that the application of ICM for the .XXX sTLD met the required sponsorship criteria.

- (c) The Board’s reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.

76. One panelist issued a Minority/Dissenting opinion, concluding that ICM never satisfied the sponsorship requirements and the criteria for an sTLD, and that the Board denied ICM’s applications on the merits and in an open and transparent forum. The dissenting opinion did not challenge the Panel’s declaration relating to the non-binding nature of the Declaration.

**E. ICANN’s Consideration Of The Panel’s Advisory Declaration And Subsequent Board Action.**

77. In accordance with the Bylaws, the Board considered the Panel’s Declaration at the Board’s next meeting after the issuance of the Declaration, which was on March 12, 2010 in Nairobi, Kenya. The Board noted “in the absence of the process for approving an sTLD six years following the receipt of the original application, the Board wishes to create a transparent set of process options which can be published for public comment.”<sup>72</sup>

78. On March 26, 2010, a draft report and explanatory diagrams describing ICANN’s options following the IRP Panel’s Declaration on ICM’s .XXX application were posted for a 45-day public comment period. ICANN received over 13,000 comments into the forum—the highest number of comments ever received on a single topic. Most of the comments did not substantively address the proposed process options, instead providing personal opinions on adult-related content on the Internet. Of those that substantively addressed the process options, there was no middle ground; commenters were either for or against ICANN proceeding with the .XXX sTLD application.

79. After careful consideration of all substantive comments, on June 25, 2010, at the next Board Meeting in Brussels, Belgium, the Board resolved to accept and “act in accordance with the following findings of the Independent Review Process Majority: (i) ‘the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria;’ and (ii) ‘the Board’s reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.’” In furtherance of this resolution, the Board directed “staff to conduct expedited due

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<sup>72</sup> See ICANN Adopted Board Resolutions, Nairobi, Kenya, March 12, 2010, *available at* <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 34.

diligence to ensure that: (1) the ICM Application is still current; and (2) there have been no changes in ICM's qualifications."<sup>73</sup>

80. Thereafter, ICANN conducted expedited due diligence, including requesting and receiving documents from ICM, as well as participating in a face-to-face meeting and a video conference. The expedited due diligence showed that the ICM Application was still current and that there had been no negative changes in ICM's qualifications. Additionally, ICM provided information during the due diligence phase attempting to answer questions raised regarding the International Foundation for Online Responsibility (IFFOR), the proposed Sponsor Organization, how it would work and who would likely be participating in it.

81. In August 2010, the ICANN Board authorized the posting for public comment ICM's supporting due diligence materials and proposed registry agreement for the .XXX sTLD. The Board also directed Staff, upon completion of the public comment period, to provide the Board with a summary and analysis of comments received during the public comment forum, and to provide a recommendation of whether the proposed registry agreement is consistent with GAC advice on the proposed .XXX sTLD.<sup>74</sup>

82. The proposed registry agreement and the due diligence materials not marked by ICM as confidential were posted online. As directed, ICANN Staff provided the Board with a summary and analysis of the public comment, which consisted of over 700 submissions.<sup>75</sup>

83. The Board also considered whether the proposed registry agreement is consistent with GAC advice on the proposed .XXX sTLD. There are four communications from the GAC comprising the advice received by the ICANN Board as it relates to the proposed registry agreement for the .XXX sTLD: the Wellington Communiqué;<sup>76</sup> a February 2, 2007 Letter from

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<sup>73</sup> ICANN Minutes, Meeting of the Board, June 25, 2010, *available at* <http://www.icann.org/en/minutes/minutes-25jun10-en.htm> (last visited April 20, 2012) [hereinafter "June 25, 2010 ICANN Meeting Minutes"], attached hereto as ICANN Exhibit 35.

<sup>74</sup> ICANN Minutes, Meeting of the Board, August 5, 2010, *available at* <http://www.icann.org/en/minutes/minutes-05aug10-en.htm> (last visited April 20, 2012) [hereinafter "August 5, 2010 ICANN Meeting Minutes"], attached hereto as ICANN Exhibit 36.

<sup>75</sup> See XXX-Revised-ICM-Agreement, Chronological Index, *available at* <http://forum.icann.org/lists/xxx-revised-icm-agreement/> (last visited April 20, 2012), attached hereto as ICANN Exhibit 37.

<sup>76</sup> Wellington Communiqué, *supra* note 64.

the Chair and Chair-Elect of the GAC to the Chair of the ICANN Board;<sup>77</sup> the Lisbon Communiqué;<sup>78</sup> and an August 4, 2010 letter from the Chair of the GAC to the ICANN Board.<sup>79</sup> While the proposed registry agreement included measures consistent with the policy issues identified in these communications, it was recommended that signing the proposed registry agreement would be inconsistent with the GAC’s broader statements and advice regarding the .XXX sTLD. It was therefore recommended that the Board continue to follow the Bylaws-defined processes and engage in limited consultation with the GAC.

84. The Board therefore resolved at its October 28, 2010 meeting that “the Board Chair shall engage the GAC Chair on developing a process for consultation with the GAC on its communications and advice.”<sup>80</sup>

85. To facilitate the engagement between the Board Chair and the GAC Chair, the General Counsel and Secretary sent a chart of those GAC statements relating to the .XXX sTLD for which ICANN noted that consultation between the GAC and the Board may be warranted.<sup>81</sup>

86. During the December 2010 meeting in Cartagena, Colombia, the Board Chair and the GAC Chair met twice, and there was an additional meeting between members of the Board and the GAC to discuss potential process steps, the creation of a consultation process consistent with the ICANN Bylaws, and other matters relating to issues of potential conflict between GAC advice and the Board’s intended decisions.

87. At its December 10, 2010 meeting, the Board resolved that it intended to enter into a registry agreement with ICM Registry for the .XXX sTLD, subject to GAC consultation

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<sup>77</sup> Letter from the Chair and Chair-Elect of the GAC to the Chair of the ICANN Board, February 2, 2007, available at <http://www.icann.org/correspondence/tarmizi-to-cerf-02feb07.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 38.

<sup>78</sup> GAC Communiqué – Lisbon, Portugal, March 28, 2007, available at [https://gacweb.icann.org/download/attachments/1540116/GAC\\_28\\_Lisbon\\_Communique.pdf?version=1&modificationDate=1312543747000](https://gacweb.icann.org/download/attachments/1540116/GAC_28_Lisbon_Communique.pdf?version=1&modificationDate=1312543747000) (last visited April 20, 2012), attached hereto as ICANN Exhibit 39.

<sup>79</sup> Letter from the Chair of the GAC to the ICANN Board, August 4, 2010, available at <http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 40.

<sup>80</sup> ICANN Minutes, Meeting of the Board, October 28, 2010, available at <http://www.icann.org/en/minutes/minutes-28oct10-en.htm> (last visited April 20, 2012) [hereinafter “October 28, 2010 ICANN Meeting Minutes”], attached hereto as ICANN Exhibit 41.

<sup>81</sup> ICM – Chart of GAC Advice, available at <http://www.icann.org/en/tlds/agreements/xxx/icm-gac-advice-chart-28oct10-en.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 42.

and advice, and would consult with the GAC as required by ICANN's Bylaws.<sup>82</sup> The Board also directed ICANN Staff to prepare a draft process for consulting with the GAC.

88. On January 25, 2011, the Board directed ICANN Staff to provide the GAC with the document setting forth the full Board position on items of GAC advice. The Board further established that the Board-GAC consultation on ICM's registry agreement as triggered in Cartagena and as provided for in ICANN Bylaws, would take place no later than March 17, 2011.

89. On March 16, 2011, the GAC submitted a letter to the Board clarifying GAC advice on the application for the .XXX sTLD.

90. On March 17, 2011, noting that there were areas where the Board's entering into a registry agreement with ICM may not be consistent with GAC advice, the Board and the GAC held a formal consultation in San Francisco, California. This good-faith consultation fulfilled the Bylaws requirement.<sup>83</sup>

91. On March 18, 2011, the ICANN Board authorized ICANN to enter into a registry agreement with ICM for the operation of the .XXX sTLD. The Board noted that, in making its decision, it had carefully considered comments from the community and the GAC, in furtherance of its mission.<sup>84</sup> In conformity with the Bylaws-required process, the Board further identified that this decision was not consistent with GAC advice, and provided a detailed rationale, including the reasons that the Board differed from the GAC's advice.<sup>85</sup>

92. On March 31, 2011, ICANN and ICM entered into a Sponsored TLD Registry Agreement for the operation of the .XXX sTLD.

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<sup>82</sup> ICANN Bylaws, *supra* note 2, Article XI, § 2.1(j) ("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>83</sup> *Id.*

<sup>84</sup> ICANN Resolution, March 18, 2011, *available at* <http://www.icann.org/en/minutes/resolutions-18mar11-en.htm#5> (last visited April 20, 2012) [hereinafter March 18, 2011 ICANN Resolution], attached hereto as ICANN Exhibit 43.

<sup>85</sup> *Id.*

**F. Relations Between YouPorn And ICM After .XXX Is Approved.**

93. From its inception, ICANN has strived to implement a bottom-up, consensus driven model that relies on community participation in ICANN's processes. But YouPorn never participated in any of the opportunities for public comment after the first IRP Panel issued its Declaration. YouPorn never interposed any objection to ICANN in connection with ICM's .XXX application or following ICANN's approval of the .XXX TLD and execution of ICM's registry agreement. In fact, YouPorn never reached out to ICANN in any capacity regarding the .XXX TLD application and subsequent registry agreement in advance of serving ICANN with this Request.

94. Notwithstanding its apparent disinterest in ICANN's community-driven processes, YouPorn was evidently following the progress on ICM's .XXX application and the status of ICM's .XXX registry agreement with ICANN. Shortly after the Board's June 2010 decision to proceed to an expedited due diligence review of ICM, in July 2010, YouPorn's Managing Partner, Fabian Thylmann ("Thylmann"), contacted ICM's founder and President Stuart Lawley ("Lawley") to express an interest in investing in ICM. ICM indicated that it was not seeking new investors at that time. This interaction was perhaps the catalyst for YouPorn's subsequent efforts to prevent .XXX from coming into existence, efforts that culminated with YouPorn filing the instant Request and with YouPorn filing a lawsuit in the United States District Court for the Central District of California against both ICANN and ICM for various (unsupported) antitrust violations.

95. YouPorn's pre-litigation acts against ICM included:

- (a) An October 2010 threat to ICM by Thylmann to file suit against ICM if the .XXX domain sTLD was approved by ICANN, after complaining that YouPorn saw the introduction of the .XXX TLD as a threat to its dominance over the adult Internet industry, including its operation "tube" sites consisting of content posted by users from various sources. *See* Declaration of Stuart Lawley ("Lawley Decl.") at ¶ 18; Declaration of Greg Dumas ("Dumas Decl.") at ¶ 4.
- (b) A December 2010 rejection of ICM's invitation to participate in ICM's Founders Program<sup>86</sup> with the comment that .XXX was

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<sup>86</sup> Under the Founders Program, early registrants could secure and develop key .XXX domain names prior to the general registration of .XXX domains by members of the adult entertainment industry who desired to participate in the Sponsored Community.



“useless . . . if it comes to market.” *See* Dumas Decl. at ¶ 5 & Ex. 1.

- (c) A June 2011 letter to ICM threatening to file wholly unsupported Lanham Act claims against the registry if ICM did not unilaterally take action to prevent third parties from registering any domain that infringed on YouPorn’s purported trademarks, ““or any similar misleading names.”” *See* Lawley Decl. at ¶ 19 & Ex. 2.<sup>87</sup>
- (d) September and October 2011 threats to bring legal action against ICM if certain of YouPorn’s demands regarding ICM’s operation of .XXX domains were not met, including: (i) allocating a minimum of 2,000-3,000 .XXX domain names to YouPorn free of charge; (ii) committing to prevent IFFOR from making any policies that ban or restrict the operation of “tube” sites consisting of content posted by users from various sources on .XXX domains; (iii) granting across-the-board discounts on all .XXX domain registrations; and (iv) operating certain ‘premium’ or high value domain names, such as “tube.xxx,” through a revenue sharing arrangement between YouPorn and ICM. *See* Lawley Decl. at ¶¶ 20-25; Dumas Decl. at ¶¶ 6-10.
- (e) Claims that YouPorn would create its own adult industry trade organization presumably in reaction to the successful formation of IFFOR. *See* Lawley Decl. at ¶ 26; Dumas Decl. at ¶ 10.

96. In September and October 2011, ICM engaged in negotiations with YouPorn over YouPorn’s demands regarding desired .XXX names, and expected discussions to continue. *See* Lawley Decl. at ¶ 27; Dumas Decl. at ¶ 11. Instead, YouPorn unilaterally broke off negotiations with ICM and filed the instant Request and lawsuit against ICANN and ICM on November 16, 2011. *See* Lawley Decl. at ¶ 28; Dumas Decl. at ¶ 12.

97. Since filing its lawsuit against ICM and ICANN and initiating this IRP against ICANN, YouPorn’s desire to silence ICM and quash the .XXX sTLD has become even more transparent. YouPorn recently announced a ban on all activity between its brands and Internet sites registered in the .XXX TLD, including advertising for .XXX websites on its tube sites. In addition, YouPorn said it will not permit its content to be used or advertised on .XXX websites. In a press release, Thylmann asserted that, ““The [instant] lawsuit was just the beginning”” and that “[t]hrough this ban, we hope to make a strong statement against the .XXX domain.”” Lawley Decl. at ¶ 29 & Ex. 2.

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<sup>87</sup> ICM responded with a letter outlining the total absence of any legal basis for such a lawsuit. Lawley Decl. at ¶ 19 & Exhibit 3.

98. These statements on their face—particularly when coupled with YouPorn’s course of conduct over the past 18 months—make clear that YouPorn’s primary concern is that it is unhappy that the .XXX TLD is expected to create competition that could threaten YouPorn’s dominance in the market for adult-entertainment websites. But the IRP does not exist to help competitors stave off new competition as approved by the ICANN Board. The fact that the introduction of .XXX potentially impacts YouPorn’s dominance in the online adult-entertainment market does not support a finding that YouPorn has been “materially affected” by an ICANN Board decision sufficient to confer standing to bring an IRP or that ICANN has violated its Bylaws or Articles of Incorporation in approving the .XXX TLD and ICM as .XXX’s registry operator.

## **VI. YOUNORN LACKS STANDING TO REQUEST AN INDEPENDENT REVIEW PROCEEDING**

99. IRPs were designed to provide a forum to address whether the ICANN Board acted inconsistently with its Articles of Incorporation and Bylaws. The unique process was established to ensure that parties “materially affected” by a decision or action of the ICANN Board had the ability to seek review of that decision or action by an entity outside of ICANN.

100. ICANN’s Bylaws specifically limit the availability of the IRP to the following:

A person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision of action.<sup>88</sup>

101. The materiality threshold is a reflection of the unique and innovative model governing ICANN’s community-driven policy development and decision-making processes. In ICANN’s multi-stakeholder model, the policies that create a stable, competitive domain name system are developed in a manageable, bottom-up, consensus-based process that has global, multi-stakeholder representation. ICANN brings together the spectrum of Internet stakeholders and users, including businesses, governments, non-commercial interests, technical interests, and individual users, and provides mechanisms for their bottom-up coordination of policy development related to ICANN’s specific role in the management of the DNS and unique Internet identifiers. These stakeholders initiate and guide the policy development process;

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<sup>88</sup> ICANN Bylaws, *supra* note 2, Article IV, § 3.2.

ICANN sustains their efforts by providing staff support, resources, and coordination of activities to maintain the participation of informed individuals and groups. In other words, ICANN's bottom-up coordination of global stakeholder interests is the way in which ICANN fulfills its mission.

102. The need to respect the outcomes generated via the multi-stakeholder model was recently emphasized by Lawrence Strickling, Assistant Secretary of Commerce for Communications and Information of the National Telecommunications and Information Agency, U.S. Department of Commerce:

The multistakeholder process does not guarantee that everyone will be satisfied with the outcome. But it is critical to preserving the model of Internet governance that has been so successful to date that all parties respect and work through the process and accept the outcome once a decision is reached.<sup>89</sup>

103. This extensive, inclusive and bottom-up process has been encapsulated in ICANN's Bylaws. The Bylaws also impose obligations of accountability between ICANN and the community it serves, including the availability of the IRP mechanism and the imposition of the materiality threshold on any party requesting an IRP proceeding.

104. The IRP is not available to every affected party. The alleged harm must be "material" and derived directly from ICANN Board conduct. ICANN maintains contracts with several registries as well as over 1,000 ICANN-accredited registrars that offer consumers the opportunity to register domain names—names such as ICANN.ORG. The IRP is not a vehicle available to any one of the millions of individuals or entities that may be affected in some quantum by ICANN's contracts with these entities. Instead, an IRP claimant must demonstrate some logical nexus or connection between it and a decision or action of the ICANN Board. In other words, the ICANN Board's decision or action must specifically concern the "materially affected" IRP claimant. As described herein, the fact that YouPorn claims some type of injury associated with the operation of .XXX on the Internet is not sufficient to grant YouPorn standing to request an IRP proceeding.

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<sup>89</sup> Remarks of Assistant Secretary Strickling at the Practising Law Institute's 29th Annual Telecommunications Policy & Regulation Conference, December 8, 2011, *available at* <http://www.ntia.doc.gov/speechtestimony/2011/remarks-assistant-secretary-strickling-practising-law-institutes-29th-annual-te> (last visited April 20, 2012), attached hereto as ICANN Exhibit 44.

105. That the IRP is limited to those “materially affected” by an ICANN Board action or decision—*i.e.*, claimants who can demonstrate a rational nexus between an ICANN Board action or decision and the material harm suffered by the claimant—has been evident since ICANN’s incorporation. The very first iteration of ICANN’s Bylaws provided that any policies and procedures governing reconsideration of a Board action “may include threshold standards or other requirements to protect against frivolous or non-substantive use of the reconsideration process.”<sup>90</sup>

106. The Advisory Committee on Independent Review, a committee constituted to advise on the creation of ICANN’s Independent Review Process, also emphasized the “materiality” threshold throughout its work. For instance, in comments issued in 1999, the Committee stated:

“Question 6: Who may file a claim for independent review?

Principle 6: Any individual or entity may file a claim if that individual or entity has been materially affected by the contested action or failure to act by the ICANN Board.

Comment on Principle 6: The Committee believes that the term ‘affected party’ sweeps too broadly, however, as nearly every Internet user can be said to be affected in some quantum by nearly any decision of the ICANN Board. Accordingly, the Committee recommends that the conventional legal threshold of materiality be incorporated, keeping independent review available to those individuals or entities that have more directly been affected by the action (or failure to act) at issue.”<sup>91</sup>

107. When ICANN adopted revised Bylaws in December 2002 following an evolution and reform process, the concept of a “conventional legal threshold of materiality” was adopted, limiting the availability of the IRP to persons “materially affected” by an ICANN Board decision or action.<sup>92</sup> The materiality threshold remains in place today.

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<sup>90</sup> ICANN Bylaws as effective Nov. 6, 1998, at Article III, § 4, *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm#III> (last visited April 20, 2012), attached hereto as ICANN Exhibit 45; *see also* ICANN Amended Bylaws as effective Nov. 21, 1998, at Article III, § 4(a) (“The Board shall adopt policies and procedures governing such review or reconsideration, which may include threshold standards or other requirements to protect against frivolous or non-substantive use of the reconsideration process.”) (emphasis added), *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-23nov98.htm> (last visited April 20, 2012), attached hereto as ICANN Exhibit 46.

<sup>91</sup> Draft Principles for Independent Review, *supra* note 4.

<sup>92</sup> ICANN Bylaws, Effective as of December 15, 2002, *supra* note 6.

108. The constructs of the “conventional legal threshold of materiality” requirement can be informed by the analogous constitutional “case and controversy” jurisdictional limit placed upon the federal courts in the United States, whereby a plaintiff must satisfy three elements to have standing. First, the plaintiff must have suffered a “concrete and particularized” injury in fact.<sup>93</sup> Second, the injury must be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”<sup>94</sup> Third, a court decision in the litigant’s favor must be likely to redress the plaintiff’s claimed injuries.<sup>95</sup> YouPorn fails to satisfy any of the three prongs of this conventional legal test for standing. It likewise fails to meet the “materiality” threshold established as a prerequisite for any claimant to submit a Request for IRP proceeding pursuant to ICANN’s Bylaws.

109. First, YouPorn does not—and could not plausibly—assert that it has been “materially affected” by or has personally suffered a particularized injury in fact on account of any action (or inaction) taken by the ICANN Board.<sup>96</sup> Injury in fact is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”<sup>97</sup> In attempting to establish injury in fact, “it is not sufficient that [a plaintiff] has merely a general interest common to all members of the public.”<sup>98</sup> Here, YouPorn cannot establish injury in fact because all it asserts is a generalized grievance shared in substantially equal measure by many others. For example, YouPorn claims that “[u]nder ICM’s requirements for the .XXX TLD, in order to have an .XXX website, YouPorn must agree to unacceptable restrictions on free expression,” “must waive certain legal and other claims it has against ICM,” and “must either operate .XXX websites as a member of the ICM-defined community or it must declare that it is not a member of the community . . . .” (YouPorn’s

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<sup>93</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); U.S. Const. art. III, § 2.

<sup>94</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

<sup>95</sup> *Lujan*, 504 U.S. at 561.

<sup>96</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 738-40 (1972) (finding environmental group lacked standing to challenge government-issued permits for park development because members were not personally harmed by the permit issuance).

<sup>97</sup> *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted).

<sup>98</sup> *Schlesinger, Secretary of Defense v. Reservists Cmt. To Stop The War*, 418 U.S. 208, 219-20 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)); see also *Warth v. Seldin*, 422 U.S. 490, 499 (“[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”).

Request, ¶ 53(a)-(c)); *see also id.* at ¶ 53(d)-(f)).<sup>99</sup> But these alleged grievances purportedly affect any individual or entity seeking to operate a .XXX website, not just YouPorn. YouPorn therefore cannot establish that it has personally suffered a particularized—as compared to generalized—injury in fact.

110. Nor can YouPorn allege “a personal stake” in the ICANN Board’s decision to award the .XXX registry agreement to ICM, as is required to warrant invocation of federal jurisdiction.<sup>100</sup> YouPorn never even communicated with ICANN in advance of initiating this IRP. YouPorn did not apply for an adult-oriented (or any other) TLD, despite having the opportunity to do so on two different occasions prior to ICM being awarded the .XXX sTLD registry agreement. Nor did YouPorn voice any objection, complaint, comment or other communication to the ICANN Board at any time throughout two separate and exhaustive processes (first in 2000 and then in 2004) during which ICANN considered applications for TLDs, including adult entertainment-themed TLDs and ICM’s application for .XXX.

111. A vital element of ICANN’s process is the opportunity for public comment on substantive issues before it is considered by the Board for approval. Following its community-driven, consensus based process, each proposed draft ICM .XXX registry agreement was posted on ICANN’s website for public comment. YouPorn did not comment or raise any objection to the .XXX TLD or the ICM registry agreement at any time throughout this process.<sup>101</sup> YouPorn likewise failed to comment when the ICANN Board was considering whether to move forward with the .XXX TLD application and registry agreement with ICM following the first IRP Panel’s advisory Declaration.<sup>102</sup>

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<sup>99</sup> As addressed below, YouPorn’s alleged harm is derived from acts undertaken by ICM, not ICANN, and therefore is not appropriately the subject of an IRP proceeding.

<sup>100</sup> *Warth*, 422 U.S. at 498-99 (citation omitted).

<sup>101</sup> *See, e.g.*, ICANN Public Comment Forum, .XXX-TLD-Agreement, *available at* <http://forum.icann.org/lists/xxx-tld-agreement/mail2.html#00558> (2006), <http://forum.icann.org/lists/xxx-icm-agreement/threads.html> (2007), and <http://forum.icann.org/lists/xxx-revised-icm-agreement/> (2010) (last visited April 20, 2012).

<sup>102</sup> Following a public comment period between March 26 and May 10, 2010, ICANN posted for public comment a summary and analysis of the comments received regarding ICANN’s draft report of possible process options for further consideration of the ICM application for the .XXX sTLD. YouPorn is not mentioned as authoring any individual submission. ICANN Summary and Analysis of Comments for Report of Possible Process Options for Further Consideration of the ICM Application for the .XXX sTLD, *available at* <http://forum.icann.org/lists/icm-options-report/pdfmBHZbZDj5s.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 47.

112. YouPorn has, to ICANN’s knowledge, never before participated in ICANN’s community-driven process prior to initiating this IRP. YouPorn thus cannot identify a “personal stake” in the ICANN Board’s decision to award the .XXX registry agreement to ICM. YouPorn instead offers up a litany of ill-defined harms allegedly caused by the actions of ICM, and linked to the ICANN Board only by virtue of ICM and ICANN’s contractual relationship. But the fact that an entity is disappointed with the conduct of an Internet registry does not mean that the entity can run to ICANN and initiate an IRP; IRPs must be limited in some rational way to review of ICANN Board conduct that specifically concerns the affected party.

113. Second, there is no causal connection between the injury and the conduct complained of by YouPorn.<sup>103</sup> This requirement parallels the comments made at the ICANN Board’s open meeting in 1999, where a question was asked whether “perhaps principle 6 [addressing who may file a claim for independent review] is too broad?”<sup>104</sup> The specific concern was raised that as currently written, it “might allow an individual to file a claim without having been affected sufficiently directly.”<sup>105</sup>

114. Here, YouPorn’s allegations of harm are precisely the type of attenuated harm precluded from the purview of the IRP. YouPorn’s entire claimed “injury” stems from the actions taken by ICM (not ICANN) subsequent to ICM becoming the registry operator for the .XXX TLD. (YouPorn’s Request, ¶ 53(a)-(f) (describing how requirements imposed by ICM—not ICANN—on registrants allegedly affect YouPorn).)

115. Specifically, YouPorn complains that:

- ICM is “[e]xtort[ing] or attempt[ing] to extort substantial sums from members of the adult entertainment industry and others, including YouPorn, to protect their exiting (sic) websites, trademarks and other intellectual property, whether they intend to operate websites within the .XXX TLD or block such sites” (YouPorn’s Request, ¶ 59(a));

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<sup>103</sup> *Simon*, 426 U.S. at 44-46 (finding plaintiff lacked standing to sue government for failure to provide tax benefits to hospital, because tax policy was not the direct cause of the claimed injuries).

<sup>104</sup> May 25-26, 2009 ICANN Open Meeting, *supra* note 3.

<sup>105</sup> *Id.*

- ICM is “[r]equir[ing] persons registering websites for the .XXX TLD to pay money to IFFOR, an organization controlled by ICM and its principals, even if the registrants do not agree with IFFOR’s viewpoints” (YouPorn’s Request, ¶ 59(b));
- ICM is “[u]nlawfully t[ying] products and services together in violation of law, such as by requiring that any registrant either purchase or block all websites in which it had any affirmative or defensive interest, rather than choosing to purchase and operate some and block others” (YouPorn’s Request, ¶ 59(c));
- ICM is “[r]equir[ing] registrants to give up legal rights and claims they may have against ICM as a condition of registering or blocking a website” (YouPorn’s Request, ¶ 59(d)).

116. YouPorn’s alleged injury is thus not fairly traceable to any action by ICANN.<sup>106</sup> Instead, it is allegedly the result of the independent action of some third party not before the Panel, namely, ICM.<sup>107</sup> Further, YouPorn’s alleged harm is the result of ICM’s conduct undertaken after ICM obtained ICANN’s approval for the .XXX TLD. YouPorn’s alleged harm is far removed from any ICANN Board decision or action; such a tenuous connection cannot support standing sufficient for YouPorn to maintain this IRP.<sup>108</sup>

117. Third, even assuming the Panel declares YouPorn the prevailing party,<sup>109</sup> and further assuming the ICANN Board adopts the Panel’s advisory declaration in its entirety, a Panel declaration favorable to YouPorn would not redress the injuries YouPorn claims to have suffered.<sup>110</sup> The majority of the complained-of actions are under the exclusive control of—or constitute actions taken exclusively by—ICM, not the ICANN Board. On its face, YouPorn’s

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<sup>106</sup> *Simon*, 426 U.S. at 41-42.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> It is significant that the .XXX TLD is now operative; certain domain names do resolve within the .XXX TLD. And ICM is the registry operator for the .XXX TLD. Should the Panel declare YouPorn the prevailing party and essentially reverse the actions ICANN took in furtherance of the first IRP Panel’s Declaration, the Panel would be asking ICANN to breach its contractual obligations to ICM, as well as ICANN’s Bylaws.

<sup>110</sup> *Lujan*, 504 U.S. 568-71 (finding that plaintiff lacked standing to sue government officials because the third party conduct causing plaintiff’s alleged injuries would likely not “be altered or affected” by a ruling in plaintiff’s favor).



Request does nothing more than explain YouPorn’s distaste for how ICM is running the .XXX registry.

118. The contours of the “conventional legal threshold of materiality” requirement contemplated by the Advisory Committee on Independent Review may also be informed by international law, such as the standing threshold applied to plaintiffs by the highest court of the European Union (“EU”), the Court of Justice (“ECJ”). The ECJ reviews challenges to actions taken by such institutions as the EU Council, EU Commission or European Central Bank.<sup>111</sup> The standing threshold individual ECJ applicants must satisfy is dictated by the Treaty on the Functioning of the EU, which provides that: “Any natural or legal person may . . . institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”<sup>112</sup> The ECJ has strictly construed both the “direct concern” and “individual concern” prongs of this legal threshold for standing, despite recent challenges. YouPorn cannot satisfy either of the threshold standing requirements under the law of the European Union, which also militates in favor of a finding that YouPorn has not met the “materiality threshold” set forth in ICANN’s Bylaws.

119. First, to have standing in the ECJ, an applicant must demonstrate a “direct concern” in the challenged action or decision. Just as a direct concern cannot be demonstrated where the effect of an individual third-party response to an EU Commission decision could cause potential harms,<sup>113</sup> similarly, here, YouPorn cannot demonstrate a direct concern where its alleged injuries are derived from ICM’s conduct undertaken in its capacity as the .XXX registry operator. In short, YouPorn’s alleged injuries relate to how ICM operates the .XXX sTLD and are not directly concerned with any action undertaken by the ICANN Board.

120. Second, ECJ applicants must show an “individual concern” with the challenged

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<sup>111</sup> Treaty on the Functioning of the European Union, art. 263, Dec. 13, 2007, *available at* <http://www.consilium.europa.eu/treaty-of-lisbon?lang=en>.

<sup>112</sup> *Id.* (emphasis added).

<sup>113</sup> In Case 222/83, *Municipality of Differdange v. Comm'n*, 1984 E.C.R. 2889, an applicant sought judicial review of an EU Commission decision that authorized aid to steel producers, conditioned on decreased production. The applicant alleged that the anticipated reduction in production would cause a decrease in local tax revenues. The court found that the applicant failed to establish a “direct concern” with the Commission’s decision, because any losses would be caused not by the Commission’s action but instead by the decision of individual steel producers to, in fact, decrease production.

decision. In *Plaumann*, the ECJ defined an “individual concern” to be one where a decision affects the applicant “by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons.”<sup>114</sup> Thus, where an applicant is unable to distinguish a decision’s impact upon it as compared with others, an applicant will be found to lack the requisite individual concern with the challenged decision. Here, YouPorn challenges the ICANN Board’s approval of ICM as the .XXX registry operator, but does not show that ICANN’s decision to grant such approval concerns YouPorn individually or differently from any other entity. In short, YouPorn fails to satisfy either of the two prongs of this conventional legal test for standing under the law of the European Union.<sup>115</sup> It likewise fails to meet the “materiality” threshold established as a prerequisite for any claimant to submit a Request for IRP proceeding pursuant to ICANN’s Bylaws.

121. At bottom, YouPorn claims to be upset with the manner in which ICM is operating the new .XXX registry. As YouPorn already operates some of the most successful pornographic websites on the Internet, websites that will likely continue to operate irrespective of anything ICM or ICANN might do, what YouPorn is really complaining of is the potential competition that its websites may face from the operation of .XXX. Indeed, the thrust of YouPorn’s Request is that YouPorn is concerned that .XXX will create competition for YouPorn, and apparently YouPorn wishes that it—and not ICM—had been awarded the .XXX TLD (although it has never applied for any TLD).

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<sup>114</sup> Case 25/62, *Plaumann v. Comm’n*, 1963 E.C.R. 95. In *Plaumann*, a German clementine importer challenged an EU Commission decision not to authorize a reduction in German import duties for clementines. The court held that the applicant had not been singled out by the decision, nor had the applicant distinguished the decision’s impact upon it as compared with other importers, and thus, the applicant lacked the requisite individual concern in the Commission’s decision. *Id.*

<sup>115</sup> The ECJ’s legal threshold for standing has been challenged in two recent cases, and the ECJ has resisted each attempt to liberalize the governing treaty’s standing requirements. First, in the *UPA* case, an EU Advocate General suggested a “new interpretation of individual concern,” and recommended a “substantial adverse effects” test which would be easier for plaintiffs to satisfy and would allow for a more relaxed standing threshold than the *Plaumann* test permits. See Case 50/00P, *Union de Pequeños Agricultores v. Council (UPA)*, 2002 E.C.R. I-6677. The ECJ rejected the recommendation for a more liberal standing threshold. *Id.* Second, just prior to the release of the ECJ’s final *UPA* decision, one of the lower EU courts (the Court of First Instance) reinterpreted the treaty language and proposed a test where an applicant would be considered “individually concerned” with a challenged action if the action “affects his legal position in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.” See Case T-177/01, *Jégo-Quéré v. Comm’n*, 2002 E.C.R. II-2365. On appeal, the ECJ rejected this novel interpretation, and reaffirmed the more restrictive *Plaumann* test for individual concern. See Case C-263/02P, *Comm’n v. Jégo-Quéré*, 2004 E.C.R. I-3425. Given these failed attempts to loosen the ECJ’s standing threshold, it is clear that the European Union’s judicial branch, just like the U.S. federal system, adheres to a strict conventional legal threshold for standing.

122. YouPorn has the burden of proving that a decision or action by the ICANN Board violated ICANN's Bylaws or Articles of Incorporation. Here, ICANN's acceptance of applications for new TLDs in 2000 and again in 2004, and ultimate approval of ICM's .XXX application, falls squarely within one of ICANN's core values to create competition within the DNS. Article 4 of ICANN's Articles of Incorporation states that "[t]he Corporation shall operate . . . through open and transparent processes that enable competition and open entry in Internet-related markets."). And Article 1, Section 2.6 of ICANN's Bylaws identifies one of ICANN's core values as "[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest." YouPorn's concerns regarding how increased competition might affect its bottom line cannot support a finding that ICANN has violated its Bylaws or Articles of Incorporation in taking an action that may increase competition.

123. In short, YouPorn does not allege that it has been "affected sufficiently directly" by any conduct undertaken by ICANN.<sup>116</sup> To allow YouPorn to proceed with its Request would fundamentally challenge the legitimacy of the ICANN multi-stakeholder model and the Bylaws. YouPorn is asking this Panel to declare that ICANN should not be accountable to its community, to its Bylaws or to the review procedures set forth herein; YouPorn's alleged attenuated injury does not satisfy the materiality threshold required by ICANN's Bylaws. YouPorn's Request should be dismissed on this basis alone.

## **VII. RESPONSE TO YOUTORN'S UNSUPPORTED CLAIMS THAT ICANN VIOLATED ITS BYLAWS AND ARTICLES OF INCORPORATION**

124. YouPorn's inability to show that it has been "materially affected" by a decision or action of the ICANN Board (as opposed to ICM's alleged conduct) is fatal to YouPorn's Request. Because YouPorn cannot satisfy the materiality threshold required by ICANN's Bylaws, the Panel should dismiss YouPorn's Request without the need for any further proceedings.

125. However, in the event the Panel wishes to proceed, the conduct alleged in YouPorn's Request does not support a finding that ICANN has violated its Bylaws or Articles of Incorporation.

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<sup>116</sup> May 25-26, 2009 ICANN Open Meeting, *supra* note 3.

126. Within the context of the above-described facts, and without meaningfully addressing the actual language of ICANN’s Bylaws or Articles of Incorporation, YouPorn asserts—in conclusory fashion—that ICANN has violated five separate provisions of its governing documents.<sup>117</sup> The conduct underlying these alleged violations boils down to either: (1) ICANN’s approval of the .XXX registry agreement and ICM as the registry operator for .XXX; or (2) ICM’s (not ICANN’s) subsequent conduct under the registry agreement. Neither supports a finding that ICANN has violated its Bylaws or Articles of Incorporation.

127. First, ICANN’s approval of ICM’s application for the .XXX TLD and ICM as the registry operator of .XXX has already been adjudicated by an IRP Panel. ICANN’s Bylaws require ICANN to review and consider an IRP Panel’s declaration.<sup>118</sup> ICANN’s careful consideration of, and ultimate decision to implement, the first IRP Panel’s declaration cannot support a finding that ICANN has breached its Bylaws or Articles of Incorporation.

128. In the first ever IRP proceeding constituted under ICANN’s Bylaws, ICM challenged the ICANN Board’s March 2007 decision to reject ICM’s application for the .XXX TLD. Following a five-day hearing from September 21-25, 2009, during which both parties submitted written and live testimony, the three-member Panel issued its Declaration on February 19, 2010. In the Panel’s 2-1 advisory Declaration, the Panel declared that the ICANN Board, in adopting its resolutions of June 1, 2005, found that ICM’s .XXX application met the required sponsorship criteria and that the Board’s reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.<sup>119</sup>

129. That Panel already fully considered and declared that the ICANN Board’s rejection of ICM’s .XXX application in March 2007 was inconsistent with ICANN’s Bylaws and Articles of Incorporation. For YouPorn to now claim that ICANN’s approval of ICM’s .XXX application following the Board’s consideration of the Panel’s Declaration is a violation of ICANN’s Bylaws and Articles of Incorporation is absurd.

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<sup>117</sup> YouPorn’s Request, ¶¶ 56-60.

<sup>118</sup> ICANN Bylaws, *supra* note 2, Article 4, § 3.15.

<sup>119</sup> Advisory Declaration of IRP Panel, ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, at ¶ 152, *available at* <http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf> (last visited April 20, 2012) [hereinafter “Advisory Declaration of IRP Panel”], attached hereto as ICANN Exhibit 48.

130. Moreover, allowing YouPorn to re-litigate ICANN’s approval of .XXX would establish a precedent that controversies such as these never end; they could be subject to the second-guessing of subsequent IRP Panels. Indeed, should YouPorn prevail in this proceeding, and should the ICANN Board somehow decide to block the .XXX TLD—a TLD that already has been implemented on the Internet—under YouPorn’s interpretation of the rules, nothing would prevent ICM from filing yet another request for IRP proceeding. The process would become an endless loop that would make a farce out of what is otherwise a truly unique method for obtaining review of decisions by a board of directors.

131. While YouPorn may not agree with the first Panel’s Declaration, the IRP contemplated by ICANN’s Bylaws is not intended to be a vehicle to re-litigate declarations issued by prior Panels. Instead, ICANN’s accountability and review procedures were adopted “to reinforce the various accountability mechanisms otherwise set forth in [the] Bylaws” and in an attempt to hold ICANN “accountable to the community for operating in a manner that is consistent with [the] Bylaws.”<sup>120</sup> The first IRP proceeding commenced by ICM did just that—ICANN was held accountable to the community for operating in a manner consistent with its Bylaws and Articles of Incorporation. That decision should not be re-litigated here.

132. Second, ICANN acted in compliance with its Bylaws and Articles of Incorporation in considering and resolving to accept relevant portions of the first Panel’s Declaration, and YouPorn fails to demonstrate otherwise. Indeed, ICANN did not blindly adopt the first Panel’s Declaration without careful consideration. Instead, ICANN undertook a comprehensive review of the Panel’s Declaration and, in an open and transparent manner consistent with its Bylaws, invited extensive public comment and consideration before considering its options. YouPorn fails to address any of the following process undertaken by ICANN before approving the .XXX TLD in March 2011.<sup>121</sup> This process demonstrates ICANN’s commitment to holding itself accountable to the community, and directly contradicts YouPorn’s contention that ICANN failed to conduct its activities “in an open and transparent

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<sup>120</sup> ICANN’s Bylaws, *supra* note 2, Article IV, § 1 (Purpose).

<sup>121</sup> YouPorn summarizes an entire year of ICANN’s work between March 2010 and March 2011 (including ICANN’s lengthy, comprehensive consideration process; the multiple opportunities for public comment; the completion of Bylaws-mandated good-faith consultation with the GAC; and the detailed rationale provided for the Board’s decision) in three paragraphs over 16 lines. *See* YouPorn’s Request, ¶¶ 36-38.

manner that promotes well-informed decisions based on expert advice.”<sup>122</sup>

133. In accordance with the Bylaws, the Board considered the Panel’s Declaration at the Board’s next meeting after the issuance of the Declaration, throughout the week of March 7-12, 2010 in Nairobi, Kenya, and reviewed various paths toward conclusion.<sup>123</sup>

134. In keeping with its commitment to act in an open and transparent manner, on March 26, 2010, a draft report and explanatory diagrams describing ICANN’s options following the IRP Declaration on ICM’s .XXX Application were posted for a 45-day public comment period. ICANN received over 13,000 comments into the forum.<sup>124</sup>

135. On June 25, 2010, at the next Board Meeting in Brussels, Belgium, the Board noted that it had reviewed the public comments received, and further discussed and debated the process options for further consideration of the Panel Declaration. Following the Board’s careful consideration and vigorous debate, the Board resolved to accept and “act in accordance with the following findings of the Independent Review Process Majority: (i) ‘the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria;’ and (ii) ‘the Board’s reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.’” In furtherance of this resolution, the Board directed “staff to conduct expedited due diligence to ensure that: (1) the ICM Application is still current; and (2) there have been no changes in ICM’s qualifications.”<sup>125</sup>

136. ICANN thereafter conducted expedited due diligence, including requesting and receiving documents from ICM, as well as participating in a face-to-face meeting and a video conference. The expedited due diligence showed that the ICM Application was still current and that there had been no negative changes in ICM’s qualifications. Additionally, ICM provided

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<sup>122</sup> YouPorn’s Request, ¶ 58.

<sup>123</sup> See ICANN Adopted Board Resolutions, June 12, 2010, Nairobi, Kenya, #15 (Consideration of the Independent Review Panel Declaration, *ICM Registry v. ICANN*), *supra* note 72. The Board noted that “in the absence of the process for approving an sTLD six years following the receipt of the original application, the Board wishes to create a transparent set of process options which can be published for public comment.” *Id.*

<sup>124</sup> Most of the comments submitted did not substantively address the process options that were posted for comment; instead most commenters provided their personal opinions on the addition of adult content on the Internet.

<sup>125</sup> June 25, 2010 ICANN Meeting Minutes, *supra* note 73.

information during the due diligence phase attempting to answer questions raised regarding the International Foundation for Online Responsibility (IFFOR), the proposed Sponsor Organization, how it would work and who would likely be participating in it.

137. In August 2010, in an attempt to remain fully transparent, ICM's supporting due diligence materials and proposed registry agreement for the .XXX sTLD were posted for public comment.<sup>126</sup> The Board also directed ICANN Staff, upon completion of the public comment period, to provide the Board with a summary and analysis of comments received during the public comment forum, and to provide a recommendation of whether the proposed registry agreement is consistent with GAC advice on the proposed .XXX sTLD.<sup>127</sup>

138. The Board also considered whether the proposed registry agreement was consistent with GAC advice on the proposed .XXX sTLD. While the proposed registry agreement included measures consistent with the policy issues identified by the GAC, it was recommended that signing the proposed registry agreement would be inconsistent with the GAC's broader statements and advice regarding the .XXX sTLD. It was therefore recommended that the Board continue to follow the Bylaws-defined processes and engage in limited consultation with the GAC.

139. During the December 2010 ICANN meeting in Cartagena, Colombia, the Board did engage with the GAC. The Board Chair and the GAC Chair met twice, and there was an additional meeting between members of the Board and the GAC to discuss potential process steps, the creation of a consultation process consistent with the ICANN Bylaws, and other matters relating to issues of potential conflict between GAC advice and the Board's intended decisions.

140. At its December 10, 2010 meeting, the Board resolved that it intended to enter into a registry agreement with ICM for the .XXX sTLD, subject to GAC consultation and advice, and would consult with the GAC as required by ICANN's Bylaws.<sup>128</sup> The Board also directed

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<sup>126</sup> The proposed registry agreement and the due diligence materials not marked by ICM as confidential were posted on ICANN's website.

<sup>127</sup> August 5, 2010 ICANN Meeting Minutes, *supra* note 74.

<sup>128</sup> ICANN Bylaws, *supra* note 2, Article XI, § 2.1(j) ("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

ICANN Staff to prepare a draft process for consulting with the GAC.

141. On January 25, 2011, the Board directed ICANN Staff to provide the GAC with the document setting forth the full Board position on items of GAC advice. On March 16, 2011, the GAC submitted a letter to the Board clarifying GAC advice on the application for the .XXX sTLD.

142. On March 17, 2011, noting that there were areas where the Board's entering into a registry agreement with ICM may not be consistent with GAC advice, the Board and the GAC held a formal consultation in San Francisco, California. This consultation fulfilled the Bylaws requirement.<sup>129</sup>

143. On March 18, 2011, the ICANN Board authorized ICANN to enter into a registry agreement with ICM for the operation of the .XXX sTLD. The Board identified that this decision was not consistent with GAC advice, and provided a detailed rationale, including the reasons that the Board differed from that advice.<sup>130</sup>

144. On March 31, 2011, ICANN and ICM entered into a Sponsored TLD Registry Agreement for the operation of the .XXX sTLD.

145. YouPorn ignores the foregoing process that ICANN undertook to ensure compliance with its Bylaws and Articles of Incorporation following the Panel's Declaration on ICM's .XXX TLD Application. This process demonstrates that ICANN's subsequent review of the Panel's advisory Declaration was fully consistent with its Bylaws and Articles of Incorporation. Specifically:

- (a) ICANN's conduct was consistent with its proven commitment to accountability and transparency. Indeed, ICANN considers these principles to be fundamental safeguards in ensuring that its international, bottom-up and multi-stakeholder operating model remains effective.

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(continued...)

and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”).

<sup>129</sup> *Id.* at Article XI, § 2.1(j).

<sup>130</sup> *Id.* at Article XI, § 2.1(k).



- (b) ICANN’s conduct was consistent with its mission to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.
- (c) Consistent with Paragraph 3 of its Articles of Incorporation, ICANN, operating in furtherance of its charitable, educational, and scientific purposes, and in recognition of the fact that the Internet is an international network of networks, has properly pursued the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by: (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).
- (d) Pursuant to its Articles of Incorporation, Paragraph 4, ICANN operated at all times for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with the Articles of Incorporation and Bylaws, through open and transparent processes that enabled competition and opened entry in Internet-related markets. ICANN also cooperated as appropriate with relevant international organizations.

146. The foregoing process also proves the falsity of YouPorn’s assertion that ICANN violated its Bylaws and Articles of Incorporation by failing to “take public policy into account in making its decisions,” including by allegedly “disregard[ing] the advice of the GAC and its members” on the .XXX TLD.<sup>131</sup> The ICANN Board engaged in a good-faith consultation prior to the Board’s approval of the .XXX TLD, including a formal consultation on March 17, 2011 to discuss the areas where the Board’s entering into a registry agreement with ICM may not be consistent with GAC advice. Numerous documents were exchanged throughout the process, whereby ICANN detailed the Board’s position on items of GAC advice. And while the Board was unable to reach resolution with the GAC, upon approving the ICM .XXX registry agreement, the Board identified that its decision was not consistent with GAC advice, and

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<sup>131</sup> YouPorn’s Request, ¶ 56(c).

provided a detailed rationale, including the reasons that the Board differed from that advice.<sup>132</sup> In so doing, the Board fulfilled its requirements under the Bylaws, which provide that the GAC and the ICANN will “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed . . . .”<sup>133</sup> YouPorn cannot prove otherwise.

147. YouPorn also tries to obscure the issues by throwing in allegations about economic studies that ICANN purportedly should have undertaken to assess the impact of the introduction of new TLDs, including the .XXX TLD.<sup>134</sup> But such claims have little relevance to YouPorn’s real concern—how increased competition in the market for online adult-entertainment will affect YouPorn’s own commercial interests. In any event, ICM’s .XXX TLD application was submitted during—and considered in conjunction with—ICANN’s 2004 sTLD selection process, a process that did not require ICANN to commission or undertake economic studies as a prerequisite to approving TLDs. YouPorn has produced no evidence—indeed there is no evidence—supporting YouPorn’s contention that ICANN should have conducted economic studies regarding the impact of the introduction of .XXX or any other sTLD application submitted in the 2004 selection process.

148. YouPorn is seemingly blurring the lines between that distinct 2004 selection process and the New gTLD Program that ICANN is currently engaged in, whereby ICANN is accepting applications for numerous new gTLDs. But even with respect to the New gTLD Program, YouPorn’s representations are false. Within the New gTLD Program, ICANN completed five separate economic studies to address the costs and benefits of new gTLDs.<sup>135</sup>

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<sup>132</sup> March 18, 2011 ICANN Resolution, *supra* note 84.

<sup>133</sup> ICANN Bylaws, *supra* note 2, Article XI, §§ 2.1(j)-(k).

<sup>134</sup> YouPorn’s Request, ¶¶ 56(d), 57(a), (b).

<sup>135</sup> The five economic studies include: (1) Revisiting Vertical Separation of Registries and Registrars, CRA International, October 23, 2008, *available at* <http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 49; (2) Preliminary Analysis of Dr. Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, *available at* <http://www.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 50; (3) Report of Dr. Dennis Carlton Regarding ICANN’s Proposed Mechanism for Introducing New gTLDs, June 5, 2009, *available at* <http://www.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf> (last visited April 20, 2012) [hereinafter “Carlton II”], attached hereto as ICANN Exhibit 51; (4) An Economic Framework for the Analysis of the Expansion of General Top-Level Domain Names, Michael Katz, Gregory Rosston, and Theresa Sullivan, June 2010, *available at*

Those reports were comprehensive, and one principal conclusion, as stated by Dr. Dennis Carlton, a noted economics professor and former Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice, is that any resultant delay of the launch of the New gTLD Program “is likely inconsistent with consumer interests” and could “substantially reduce [consumer] welfare.”<sup>136</sup> The completion of those reports gave rise to the March 2011 Board decision that no further economic studies were necessary prior to the launch of the New gTLD Program.<sup>137</sup> After consultation, the GAC agreed and ICANN committed to performing additional studies only after the introduction of new gTLDs.<sup>138</sup> YouPorn’s contention that ICANN “failed to conduct proper economic studies of the impact of the introduction of new TLDs”<sup>139</sup> is without merit, as well as wholly irrelevant to these proceedings.

149. YouPorn further manufactures a “competitive bidding” requirement in the selection of registry operators, although no such requirement exists under ICANN’s Bylaws, Articles of Incorporation or otherwise.<sup>140</sup> Moreover, applying a competitive bidding process at the end of the sTLD application period would, in and of itself, violate the terms of the Request for Proposal for the sTLD round through which .XXX was approved. The sTLD application round was open to any applicant; YouPorn could have applied for .XXX or any other adult-entertainment themed TLD, but YouPorn did not submit any application. All sTLD applicants had to demonstrate to the independent evaluation panels that they satisfied the specified selection criteria, which was broken down into the following categories: (1) sponsorship information; (2)

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<http://www.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf>, attached hereto as ICANN Exhibit 52; and (5) Economic Considerations in the Expansion of Generic Top-Level Domain Names, Michael Katz, Gregory Rosston, and Theresa Sullivan, December 2010, *available at* <http://www.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 53.

<sup>136</sup> Carlton II, *supra* note 135, at ¶¶ 23, 29, *passim*.

<sup>137</sup> ICANN Rationale for Board Decision on Economic Studies Associated with the New gTLD Program, March 21, 2011, *available at* <http://www.icann.org/en/minutes/rationale-economic-studies-21mar11-en.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 54 (“ICANN’s Board has concluded that there is no economic basis that would justify stopping the New gTLD Program from proceeding and no further economic analysis will prove to be any more informative in that regard than those that have already been conducted.”).

<sup>138</sup> New gTLD Explanatory Memorandum, Discussion Draft: Market & Economic Impacts, April 15, 2011, *available at* <http://www.icann.org/en/topics/new-gtlds/market-economic-impacts-15apr11-en.pdf> (last visited April 20, 2012), attached hereto as ICANN Exhibit 55.

<sup>139</sup> YouPorn’s Request, ¶¶ 56(d), 57(b).

<sup>140</sup> *Id.* at ¶¶ 56(b), 57(f).

business plan information; (3) technical standards; and (4) community value. Allowing the proposal of a TLD string separate from the vetting of the applicant that will run that string has never been part of any ICANN process for the introduction of TLDs to date. Not only is there no Bylaws or Articles of Incorporation requirement for competitive bidding to execute a registry agreement, YouPorn’s request for competitive bidding at the entry of the .XXX Registry Agreement is in fact against established process.

150. YouPorn also alleges that ICANN violated its Bylaws and Articles of Incorporation by “entering into an agreement with ICM for operation of the .XXX registry that did not include adequate safeguards and protection of competition and intellectual property and other rights.”<sup>141</sup> To start, it is simply not true that the .XXX registry agreement lacks adequate safeguards and protection of intellectual property. The .XXX registry agreement in fact includes numerous trademark protections (some similar to those incorporated into the New gTLD Program) such as sunrise protections, blocking, and a rapid takedown process—protections that go beyond those required in today’s other existing registry agreements. But YouPorn’s claims fail in any event, as YouPorn does not cite any provision in ICANN’s Bylaws that would require ICANN to include specific provisions in its registry agreements. No such provision exists, which defeats YouPorn’s claims.

151. YouPorn’s allegation that ICANN and its Generic Names Supporting Organization (“GNSO”) are required to “develop and adopt Consensus Policies relating to registry operators adequately protecting competition, trademarks and other name and intellectual property rights” is also false and is likewise asserted without any citation to ICANN’s Bylaws or Articles of Incorporation.<sup>142</sup> The GNSO is not required to develop consensus policies on any specific topics. The consensus policy process provides a mechanism for the creation of new policies that are required to be followed by existing gTLD registries and/or registrars. To the extent YouPorn believes that additional policy is required for the protection of trademark and other intellectual property rights, YouPorn is welcome to participate in the policy development process, which is open to all.

152. At bottom, YouPorn is manufacturing obligations that it wishes existed in an

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<sup>141</sup> *Id.* at ¶ 59.

<sup>142</sup> *Id.* at ¶ 18.

effort to protect its commercial interests in the market for online adult entertainment. But ICANN's Bylaws or Articles of Incorporation do not require such things as economic studies assessing the potential impact of sTLD applications submitted in 2004, competitive bidding, or specific consensus policies. Simply saying that the Bylaws or Articles of Incorporation require such actions does not make it so, and YouPorn has offered no evidence to support its allegations. In fact, the careful process ICANN undertook in ultimately approving the .XXX TLD, including ICANN's consideration of the first IRP Panel's Declaration on this issue and subsequent consultation with the GAC on public policy issues relating to .XXX, demonstrates that ICANN acted at all times in an open and transparent manner consistent with its Bylaws and Articles of Incorporation.

153. The only other conduct challenged by YouPorn in its Request relates to conduct allegedly occurring after the .XXX registry agreement was executed. In that regard, as noted, YouPorn appears to be challenging things that ICM has done pursuant to the .XXX registry agreement. But the IRP does not exist to address the propriety of conduct undertaken by third parties. And, as explained above, any injury that YouPorn claims to have suffered from ICM's alleged conduct is too attenuated to afford YouPorn standing to initiate this IRP against ICANN.

154. Moreover, YouPorn in no way explains how ICM's conduct shows that ICANN violated ICANN's Bylaws or Articles of Incorporation. The only manner in which YouPorn attempts to connect ICANN to this alleged conduct is through the conclusory allegation that ICANN has "failed to take action respecting ICM's breaches of the .XXX Registry Agreement and the appendices and amendments thereto, allowing ICM to persist in anticompetitive conduct and in derogation of trademarks, name rights and other intellectual property rights." (YouPorn's Request, ¶ 56(e).) But an alleged subsequent breach of the registry agreement by ICM does not constitute ICANN Board action necessary to maintain an IRP.

155. YouPorn has sued ICM (and ICANN) in the United States District Court for the Central District of California in the matter of *YouPorn Licensing International S.A.R.L. v. ICM Registry, LLC, d/b/a .XXX and Internet Corporation for Assigned Names and Numbers*, Case No. CV11-9514-PSG (JCGx), alleging that the same conduct alleged in YouPorn's Request violates state and federal antitrust laws. If YouPorn has viable claims against ICM, they can be resolved

in a federal district court, not in a proceeding to which ICM cannot even be a party.

### **VIII. RESPONSE TO YOUTORN'S REQUESTED RELIEF**

156. YouPorn requests that, in addition to various declarations that ICANN's conduct was inconsistent with ICANN's Bylaws and Articles of Incorporation, the Panel grant the following affirmative relief:

- “A declaration that ICANN must reconsider its decision regarding approval of the .XXX TLD for use in the DNS in a manner consistent with its Articles of Incorporation and Bylaws.” (YouPorn's Request, ¶ 61(e));
- “A declaration that ICANN's decision approving ICM as registry operator for the .XXX TLD and the agreement between ICANN and ICM setting out the terms and conditions on which ICM would act as the registry operator for the .XXX TLD are void.” (*Id.* at ¶ 61(f));
- “A declaration that should ICANN, after reconsideration consistent with its Articles of Incorporation and Bylaws, determine to allow the .XXX TLD to be used in the DNS, it must reconsider who should be allowed to act as the registry operator for the .XXX TLD in a process administered in a manner consistent with ICANN's Articles of Incorporation and Bylaws.” (*Id.* at ¶ 61(g))<sup>143</sup>;
- “A declaration that ICANN has failed to take action to rescind or enforce the .XXX Registry Agreement, and the appendices and amendments thereto, in the fact of multiple serious breaches of same by ICM, and must, to comply with its articles of incorporation and bylaws, seek such relief immediately.” (*Id.* at ¶ 61(h));
- “Declare that ICANN must upon the expiration of the initial term of the ICM registry agreement either allow open and for (sic) competition for the .XXX registry and/or upon any renewal of the ICM registry agreement, negotiate

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<sup>143</sup> In addition to requesting that the Panel go beyond its authority by awarding affirmative relief, YouPorn is requesting that ICANN abandon its documented processes governing the designation of a registry operator. The designation of a registry operator is based, in part, on who applies. YouPorn is asking for a variance from this established process.

conditions and terms that provide adequate protections for free and fair competition, trademarks, other name and intellectual property rights in connection with the operation of the .XXX TLD.” (*Id.* at ¶ 61(i))<sup>144</sup>; and

- “Require that ICANN adopt ‘Consensus Policies’ binding on ICM that protect competition, trademarks and other name and intellectual property rights in connection with the operation of the .XXX TLD and other TLDs.” (*Id.* at ¶ 61(j).)<sup>145</sup>

157. But any request that the Panel grant affirmative relief goes beyond this Panel’s authority. ICANN’s Bylaws provide, in pertinent part:

3. Requests for such independent review shall be referred to an Independent Review Panel (“IRP”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.<sup>146</sup>

8. The IRP shall have the authority to:

a. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.<sup>147</sup>

158. Thus, the Panel is limited to declaring whether an action or inaction of the Board

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<sup>144</sup> YouPorn’s request for relief in this regard would require ICANN to re-write its registry agreement with ICM to include new substantive terms, many of which do not exist in any other registry agreement ICANN maintains. This would require ICANN to treat ICM differently than any other registry, which could in itself constitute a violation of ICANN’s Bylaws.

<sup>145</sup> ICANN cannot simply “adopt” consensus policies. Consensus policies are derived through the ICANN policy development process and are presented to the Board for approval only when a recommendation is finalized pursuant to specific voting thresholds within the GNSO Council. While YouPorn is welcome to initiate and participate in this process, ICANN is not authorized to just “adopt” consensus policies.

<sup>146</sup> ICANN Bylaws, *supra* note 2, Article II, § 3.3.

<sup>147</sup> *Id.* at Article II, § 3.8.

was inconsistent with the Articles of Incorporation or Bylaws and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP. There is nothing in the Bylaws or Articles of Incorporation that grants the Panel authority to award affirmative relief and to require ICANN to undertake specific conduct.

159. Indeed, in the first IRP ever constituted under ICANN’s Bylaws, the IRP found as follows:

“The authority of the IRP is ‘to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws’—to ‘declare’, not to ‘decide’ or to ‘determine’. Section 3(8) of the Bylaws continues that the IRP shall have the authority to ‘recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP’. The IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.”<sup>148</sup>

160. ICM’s requested relief is therefore inconsistent with the relief available under the Independent Review Process established under ICANN’s Bylaws and should be stricken.

#### **IX. PROPOSED NEXT STEPS FOR THIS PROCEEDING**

161. ICANN is confident that YouPorn does not have standing to invoke the Independent Review Process contemplated by ICANN’s Bylaws. It is critical that this threshold issue be decided at the outset of this proceeding; absent standing, this IRP proceeding should be terminated. ICANN therefore proposes that the Panel schedule a telephonic hearing to allow argument by counsel on the limited issue of whether YouPorn’s stated “standing as an affected party” as set forth in Section IV of YouPorn’s Request<sup>149</sup> is sufficient to establish that YouPorn has been “materially affected” by an action or decision of the ICANN Board.

162. In the event further consideration of YouPorn’s claims is warranted following resolution of ICANN’s standing objections, ICANN proposes that the Panel consult, by email, conference call, or in person (as the Panel believes is appropriate) in order to determine whether

<sup>148</sup> Advisory Declaration of IRP Panel, *supra* note 119.

<sup>149</sup> See Section IV of YouPorn’s Request (“ICANN’s Consent to the Independent Review Procedure and YouPorn’s Standing as an Affected Party”).





The Panel should also declare that, as the party not prevailing, YouPorn is not entitled to any of the relief it seeks.

Respectfully submitted,

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