



December 1, 2010

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

Dear ICANN Board Members, Mr. Beckstrom and Mr. Jeffrey,
I write this letter on behalf of the Free Speech Coalition (FSC), the trade association for the adult entertainment industry. FSC remains deeply concerned about the application by ICM Registry (ICM) for a .XXX sTLD.

ICANN's mission is narrowly focused and technical in nature. Should ICANN approve the ICM Registry application for .XXX, ICANN would have dramatically exceeded its responsibility and jurisdiction by assigning regulatory authority and content control to any entity, especially one as controversial as IFFOR, the proposed overseer of ICM's sTLD. Any shift of ICANN's focus away from its technical responsibilities to content-based regulation not only compromises ICANN as an organization, but also threatens the security and stability of the Internet as a whole. Domains using .XXX may end up being blocked by censorious regimes, a scenario that could eventually lead to alternate domain name systems being set up, thus fragmenting the Internet. Internet governance, oversight and enforcement properly lie in the hands of national governments and multinational organizations. If ICANN ventures into highly controversial and politicized content-based subject matter, it not only will find itself woefully lacking in the resources it will need to address these issues, but also it will lose the independence and credibility that comes with being a strictly technical, non-political organization.

In her letter of November 22, 2010, Interim GAC Chair Heather Dryden restates the concerns addressed in the GAC's August 4, 2010 correspondence, "The GAC believes it is imperative that the impact on the continued security, stability and universal resolvability of the domain name system of the potential blocking at the national level of new gTLD strings that are considered to be either objectionable or that raise national sensitivities be assessed prior to introducing new gTLDs."

ICANN's Chairman of the Board, Peter Dengate-Thrush responded to the concern raised in Ms Dryden's letter, "I do not consider this to be a stability issue per se but rather a policy issue where ICANN is implementing the consensus position developed by the GNSO." Frankly, I am a little surprised with how quickly ICANN's Chairman dismissed the GAC's stated and restated concerns about DNS stability. This dismissal comes on the heels of an announcement that an alternative group is forming to develop a peer-to-peer-based alternative to today's ICANN-controlled DNS system.¹

Even if the Sunde proposal does not seem to represent an immediate or even realistic alternative to the ICANN-controlled DNS system, it is reasonable to assume that this proposal represents potential future battlegrounds. Controlling a competing DNS system offers compelling economic benefits. Why accelerate that process by creating such divisiveness?

¹ http://www.pcworld.com/businesscenter/article/211969/p2pbased_alternative_to_dns_hopes_to_challenge_icann.html.

As this relates to ICM's application, there exists little doubt that a TLD dedicated solely to adult entertainment will be blocked by some countries while others will attempt to mandate its use for all adult companies. Why would ICANN want to start this destructive process in motion by delivering to countries that would feel compelled to block controversial content, a TLD ripe for censorship? While ICM's proposed TLD may not cause the fragmentation of the internet, .XXX could contribute significantly to the aforementioned instability. It would be a sizeable error on ICANN's part to underestimate the considerable amount of online real estate held by the adult entertainment industry as well as the adult industry's stark opposition to ICM's .XXX, making an alternative DNS system based on eliminating censorship an attractive alternative.

If ICANN signs a contract with ICM for .XXX, it will set bad precedence on numerous fronts. For example, ICM has established that \$10 of the \$60 registration fee will go to some entity to protect children. Imposing a "tax" on the adult industry sets a bad precedence for future TLD's. As the Internet Commerce Association (ICA) aptly stated in their comments to ICANN of January 5, 2007:

Registrant fees should be properly restricted solely to supporting the registry operator's costs of maintaining a secure and accurate database. If .XXX registrants intending to engage in legal activities can be required to fund hotlines, technology developments, and educational efforts directed against illegal activities they neither promote nor engage in, what logical argument can there be against requiring the same of all other registrants who provide adult content at other TLDs? Similarly, if the good cause of child online safety can be used to extract mandatory financial support, what other promoters of good causes will petition ICANN to mandate similar involuntary contributions to their efforts in future TLD agreements? Will the websites of corporations that manufacture tobacco products as well as websites that feature ads for those products be required to support anti-smoking and cancer research organizations? How about automakers and auto ads and global warming? Fast food restaurant chains and good nutrition and anti-obesity campaigns? Video games and youth violence? The meat and fur industries and animal rights? The list of potential supplicants is as long as the organizations which pursue "good causes". Once ICANN establishes the precedent that registrant fees can include mandatory contributions to organizations who have claimed, however tenuously, that the registrant bears some responsibility for the ill it seeks to cure it will have opened the floodgates to being looked to as a funding source for them.

Indeed the very act of requiring businesses to support financially an advocacy group is an improper violation of free speech and free association rights. What if IFFOR designates monetary support for a group which some holders of .XXX domains oppose? This mandatory support provision is emblematic of the fundamental insensitivity to free expression issues which the ICM Registry proposal represents.

With ICANN's drive for new gTLDs underway, has it been fully considered what will happen when a new adult gTLD is proposed? Does ICANN really believe that the litigious ICM will sit idly by while a .SEX or .PORN gTLD is introduced? Is ICANN so naive to believe that the purveyor of the "sponsored" TLD, who spent in excess of \$10 million to bully its way through ICANN's processes, will stop its threats of litigation with a mere approval of the sTLD? What about those in the adult community who wish to apply for a gTLD? With ICANN's policy development in regards to "Morality and Public Order" will gTLDs be held to a higher standard than the sTLD? Does ICANN believe that it is not liable for this inequity? Any company prepared to invest the substantial moneys necessary to manage a gTLD will surely take ICANN to court to demand equitable standards for their TLD application. Imagine the devastation to the

organization, after literally years of effort from ICANN and its volunteers developing new gTLD standards, to have ICANN's introduction of gTLDs come to a screeching halt because of a legal challenge as a result of .XXX.

The GAC expressed well-founded concerns about ICM's vague promises, as demonstrated in its Wellington Communiqué, which questions ICM's ability to deliver on its promises relating to the following public policy issues:

1. Take appropriate measures to restrict access to illegal and offensive content;

How will ICM be able to determine what is legal and offensive when those definitions change from nation to nation? It is inappropriate for ICM to act in this role. Those activities are better left to individual governments.

2. Support the development of tools and programs to protect vulnerable members of the community;

ICM has established that \$10 of the \$60 registration fee will go to some unknown and undefined entity to "protect children." Imposing a "tax" on the adult industry sets a bad precedence for future TLD's. Registrant fees should be properly restricted solely to supporting the registry operator's costs of maintaining a secure and accurate database.

3. Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and...

The .XXX sTLD is and will always be deliberately and inextricably intertwined with sexually oriented expression on the Internet. As such, it will be an inevitable and on-going focus of those who would criminalize such expression on the Internet and elsewhere. The day when no substantial or powerful voice will be raised in opposition to such content on the Internet (even apart from the question of children and unwilling adults) is simply not in sight. We know this from our long and deep involvement in the public debate. Some countries would make .XXX mandatory for adult businesses, effectively putting a target on the backs of many legal businesses making them vulnerable to overzealous governments and authorities. Influential members of the United States Congress have already committed themselves to that position. Moreover, if the Board moves forward with .XXX, FSC, in its role as trade association for the adult industry, will monitor policies created and implemented by IFFOR and continue to challenge decisions that are not in the best interest of our members.

4. Act to ensure the protection of intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers drawing on best practices in the development of registration and eligibility rules.

This point is ironic, in that the number one complaint from industry professionals about .XXX is how much it would cost them to protect their brand and traffic should the .XXX sTLD be approved. Our industry has been hit hard by the recession and many of these businesses do not have the capital to invest in, for some, thousands of .XXX versions of their domains. For most adult businesses, the passage of .XXX would pose a serious threat to their brand and trademark.

During its meeting in Brussels ICANN Board Members were visibly shaken by the resolution to move forward with considering the application. Harald Alvestrand voiced his concern:

To say that I am uncomfortable with this situation is an understatement. I believe that our process has been followed; our reconsideration process has been followed. We have received competent legal advice on what is the reasonable path forward for what the organization should do, and that effectively this forces me to say that it is in the best interest of the organization and the interest of the furtherance of the organization's goals to act as if something is true that I believe is not, in fact, so. This is a very uncomfortable situation, but I can see no better way to move forward.

As ICANN board members spoke of their decision, they mentioned that their decision was good for the organization. True, ICM Registry promises millions of dollars of income for ICANN, assuming that income is not consumed by the inevitable litigation which ICANN will find itself a party to if the proposal is adopted. By focusing narrowly on the economic benefits for ICANN, the organization itself, the Board has lost sight of its overall mission "to ensure the stable and secure operation of the Internet's unique identifier systems."

Rod Beckstrom, ICANN's own CEO, stated in his last comment on the subject in the Brussels Board meeting, "In my view as CEO, the board must be able to use business judgment in order to protect the global public interest in the coordination of the root of the Internet and the domain name system."

In other words, how tragic is it that ICANN's Board is so bogged down by its commitment to process, that it loses its ability to apply truth, common sense and the best interests of the internet community.

Do not get mired in a process which forces you to side with two of three jurists and one opportunistically aggressive and litigious company. FSC urges the ICANN Board to use common sense; use business judgment; listen to your CEO; listen to the "sponsorship" community; listen to the 150 countries represented by the GAC; pay attention to the threat of instability that will come from a fragmented internet and reject ICM's application once and for all.

Sincerely,

A handwritten signature in black ink, appearing to read "Diane Duke", written over a horizontal line.

Diane Duke
Executive Director