



September 8, 2010

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

Dear ICANN Board Members,

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. We urge the Board to make sure that it has the full and accurate information necessary to make a sound decision on ICM's application. That decision, one way or the other, will have direct and obvious effects on the domain name space; but it will also inevitably have more far reaching effects on the regulation of Internet content and on ICANN's potential role as a direct or indirect content regulator.

FSC is an interested party because it directly represents thousands of Internet publishers and users who have quite properly come to rely on the freedom of speech which has thus far characterized the Internet. In this respect, FSC speaks for an important set of Internet stakeholders. More broadly, FSC also speaks from its long and deep experience as an advocate for freedom of speech, particularly the sort of sexually oriented expression which is relevant here. The debates surrounding sexually oriented speech are often ferocious and they seldom avoid serious threats of government regulation. For this reason, we urge the Board, as the .XXX debate comes to a close, to focus on the broader social concerns raised by ICM's application, which implicates much more than domain name policy.

ICM itself has raised these broader policy issues, so it is no surprise that many of the comments surrounding its application have focused on concerns about freedom or regulation of sexually oriented expression. ICM speaks, for instance, of a "responsible" global online adult entertainment community. But it does so only in the most general terms: promising each side in the underlying debate that its concerns will be fully satisfied once IFFOR finally gets around to adopting its policies. We have been around these underlying debates for long enough to know that the proper approach to general promises of such a vague panacea is a deep and abiding skepticism. The Board should not be prepared to approve ICM's application unless it is convinced that ICM can actually accomplish what it promises – not merely technically, but also in the realm of policies where pleasing everyone *always* turns out to be impossible. For if ICM and IFORR, once enabled, turn out not to be able to please everyone, it is important to know now whose interest will suffer – whose *freedom* will be lost – and how long ICANN, if it appears to get into the business of treating sexually oriented speech specially, could remain above the fierce political fray which inevitably surrounds that expression.

More concretely, the adult entertainment community already has an entity through which Internet publishers and others can self identify as a responsible global online adult entertainment community. As the trade association for the adult entertainment community, FSC has developed a Code of Ethics that was created with input from our broad membership and our democratically elected board of directors. Stuart Lawley of ICM has, in fact, stated that he would like to use FSC's Code of Ethics as a basis for IFFOR policy making; but it is far from clear what more or what else he contemplates by way of regulating adult entertainment. Precisely for this reason, the *existing* responsible global online adult entertainment community –

PO BOX 10480 Canoga Park, CA 91309

Phone: (818) 348-9373 | Fax: (818) 348-8893 | www.freespeechcoalition.com

already operating under FSC's Code of Ethics – unanimously opposes ICM's proposal. Few of us who have been fortunate enough to lead free lives will consent in advance to unknown regulations to be imposed by unknown people not directly responsible to us by way of election or otherwise.

These issues lie at the heart of the debate over ICM's .XXX proposal. ICM's new definition of the sponsorship community underscores the problem:

The TLD Community will consist of the responsible global online adult-entertainment community ("Community"), generally defined as: individuals, business, entities, and organizations that: (i) have voluntarily determined that a system of self-identification would be beneficial, (ii) have voluntarily agreed to comply with all IFFOR Policies and Best Practices Guidelines, as published from time to time on the IFFOR web site.

The first part of this definition describes businesses and organizations that "have voluntarily determined that a system of self-identification would be beneficial." FSC has received numerous letters from companies representing thousands of .XXX pre-registrations. These companies voice outright opposition to a .XXX sTLD and state that they have pre-registered defensively to protect their brand names and their Internet traffic. But by ICM's own definition these companies do not even *qualify* for a .XXX sTLD because they have not truly voluntarily agreed to anything and because they believe that ICM's proposed .XXX sTLD would be detrimental.

FSC believes that ICM has included these pre-registering companies in its demonstration of support for its application. But Mr. Lawley told the adult community at the XBIZ conference in February of 2007 that pre-registrations would *not* be used as a show of support for .XXX. See

(<http://xbizconference.com/videos/XXX/clip11/clip11.html>)

Those who pre-registered for second-level domains names under .XXX did so in reliance upon Mr. Lawley's representation that such pre-registration would *not* amount to a showing of support for ICM or for a .XXX sTLD. If these preregistration *have* been so used, then Mr. Lawley has been less than honest with someone. Similarly, if ICM is now using its pre-registration information to try to show some support at this late date, it is diverting the process to purposes which ICM made some effort to disclaim initially. It is thus critical to the Board's transparency goals to make sure that pre-registrations are *not* considered as a component of sponsorship community support for ICM. To address this issue, FSC requests that the ICANN Board:

- Determine how many pre-registrations claimed by ICM are in fact defensive registrations
- Determine how many pre-registrations are registrars or companies hoping to re-sell

More broadly, FSC remains deeply concerned that the facts surrounding the level of support, or lack thereof, for ICM's proposal within the sponsorship community have been and are being confused or misrepresented. Our fears in this regard are heightened by the lack of transparency surrounding ICM's submissions. Why, for instance, should the names of IFFOR Board members and proposed members of the Policy Council be shielded from the world? Presumably, they will become known at some point. Why should that be only *after* ICM and IFFOR are enabled as content regulators? What free person would consent in advance to policies to be announced later by a group already concealed in a closed room?

This raises a problem with the second element of ICM's refined definition of the community which supposedly seeks a sponsored .XXX TLD. This element requires adult businesses to agree to comply with "IFFOR Policies and Best Practices Guidelines" that have yet to be created by boards and councils which have yet to be revealed. Given its *lack* of support among the broad existing global online adult entertainment community, ICM is quite understandably maneuvering to define a narrower community from which it might claim support. Indeed, by defining the community as those who support IFFOR's policy, ICM has articulated a community which *by definition* supports IFFOR and ICM. The difficulty, though, is that while ICM may have re-defined itself a supporting community in the abstract, it has now identified an *empty* supporting community. The Internet publishers and users whom FSC is proud to call its constituents are responsible businesses that do not place blind faith in any entity. Those who eventually win and maintain adult industry support earn it through their efforts and their actions. Vague, general promises stating that everyone will be happy in the end, have not and will not generate support for ICM from the adult entertainment community. This is especially true because the global online adult entertainment community is aware that ICM is making similarly vague and general promises to those who want to burden and in many cases outright ban sexually oriented expression. We know that ICM cannot keep all of these promises to genuinely opposing parties. The Board should not ensconce ICANN in their conflicts; and it should not believe ICM's assurances that it will be able to manage the raging 'pornography wars' in a way that avoids ICANN involvement.

More concretely, our close familiarity with those in the existing responsible global online adult entertainment community discloses no support whatsoever for ICM's proposal. This further underscores our concern that those whom ICM has identified as supporting its proposed .XXX sTLD have, in fact, long since opposed the application or have never really been members of the sponsorship community at all. Rather it seems ICM support comes from others, such as registrars, who see an obvious short-term profit to be made for themselves but who need have little concern for the long-range dangers posed by ICM's application to freedom of expression for sexually oriented speech. To address this issue, FSC requests that the ICANN Board:

- Verify that companies listed in support are viable adult businesses
- Verify that companies listed in support in fact do support ICM's current application for a .XXX sTLD

In the interest not only of transparency in the abstract, but also of bringing to light the full information necessary for a sound final decision on ICM's application, FSC has filed a Documentary Information Disclosure Policy (DIDP) request for the following information:

1. The list of the IFFOR Board members;
2. The list of proposed members of the Policy Council;
3. IFFOR's Business Plan/Financials;
4. Business Plan/Financials Years 1-5 utilizing 125,000 Initial Registrations;
5. The list of .XXX sTLD pre-registrants who have been identified to ICANN;
6. ICM's Proof of Sponsorship Community Support as submitted to ICANN;

FSC believes that the information previously provided for public comment is woefully lacking. The adult entertainment community – the community which would be most impacted by a .XXX sTLD – requires more information about the application in order to provide the appropriate level of feedback to the ICANN Board for it to make an informed decision. Feedback from the

community most impacted by .XXX is critical. In order for the adult entertainment industry to be able to properly respond to ICM's application, FSC respectfully asks the ICANN Board:

- To extend the public comment period to 30 days after FSC's DIDP request has been resolved.

FSC deeply understands and appreciates the challenges brought to ICANN by ICM's .XXX sTLD application. Indeed, it is for just this reason that FSC has stressed the broader implications of this proposal beyond issues focusing on domain name policy. As significant and active stakeholders in the Internet community, FSC's members want the Board to understand that the proposed application has great potential to negatively impact the adult entertainment industry. FSC, its members and the adult entertainment community have never asked for any special treatment for sexually oriented speech on the Internet. Ironically, it has been an outsider – ICM – who has purported to do so on our behalf. In any event, it is critical that we, the interested party most impacted by your decision, have the opportunity to provide feedback as part of a comprehensive and *fully* transparent process. In keeping with that goal – and to restate our requests – we ask that the ICANN Board:

- Verify that companies which ICM has listed in support are viable adult businesses
- Verify that companies listed in support in fact do support ICM's current application for a .XXX sTLD
- Determine how many pre-registrations claimed by ICM are in fact defensive registrations
- Determine how many pre-registrations are registrars or companies hoping to re-sell domain names
- Extend the public comment period to 30 days after FSC's DIDP request has been resolved.

On behalf of its members and of the broad and diverse global online adult entertainment community, FSC thanks you for your time and consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'Diane Duke', with a long horizontal flourish extending to the right.

Diane Duke
Executive Director