

**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 YOUNG & RUBICAM’S SUPPLEMENTAL IRP BRIEF ON REMEDIES  
AND OTHER PROCEEDINGS**

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The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Response to Manwin Licensing International S.A.R.L.’s (“YouPorn”)<sup>1</sup> Supplemental IRP Brief on Remedies and Other Proceedings.

## **I. INTRODUCTION**

In its supplemental brief, YouPorn contends that it initiated this Independent Review Process (“IRP”) to challenge two decisions by the ICANN Board: (1) approval of the .XXX TLD; and (2) approval of the ICM registry agreement.<sup>2</sup> The IRP Panel’s December 3, 2012 Case Management Order recognized four distinct issues bearing on the viability of YouPorn’s challenges, each of which reflects the fundamental concern animating ICANN’s request for dismissal – YouPorn is far too removed from the events that gave rise to the approval of the .XXX TLD and the ICM registry agreement to challenge those decisions in a new IRP.

To appreciate ICANN’s position and its responses to the Panel’s questions, it is important to acknowledge the broader context in which YouPorn’s Request for IRP arises. In 2003, ICANN began the process of soliciting applications to introduce new sponsored TLDs (“sTLDs”). In 2004, ICM submitted the sole application for an adult-oriented sTLD – .XXX. On June 1, 2005, the ICANN Board resolved to begin negotiating a registry agreement with ICM for operation of the .XXX sTLD. Subsequently, ICANN posted a draft registry agreement on its website for public comment. In 2006, after considering comments from the public and ICANN’s Governmental Advisory Committee (“GAC”), as ICANN is required to do under its Bylaws, the ICANN Board rejected the proposed ICM registry agreement. In 2007, after ICM submitted a further revised proposed registry agreement and that version was posted for public comment, ICANN rejected the revised draft agreement and denied ICM’s application to operate a .XXX sTLD. ICANN’s denial

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<sup>1</sup> Throughout this proceeding, Manwin Licensing International S.A.R.L. has referred to itself as “YouPorn.” For the sake of consistency, ICANN will do the same.

<sup>2</sup> YouPorn’s Supplemental IRP Brief on Remedies & Other Proceedings at 3:5-9 [Hereinafter “YouPorn’s Supp. IRP Br.”]. In its Request for IRP, YouPorn raised four challenges—ICANN’s: (1) approval of the .XXX TLD; (2) administration of the process by which ICANN selected the registry operator for the .XXX TLD; (3) approval of ICM to serve as the registry operator for .XXX; and (4) agreement with ICM governing ICM’s operation of the .XXX TLD. Request of Manwin Licensing International S.A.R.L., for Independent Review Proceeding ¶ 2 [Hereinafter “YouPorn’s Request for IRP”]. YouPorn now concedes that the first three of its challenges are indistinguishable from one another.

prompted ICM's initiation of the first IRP proceeding in 2008. After extensive briefing and a week-long hearing, the prior IRP Panel declared on February 19, 2010, that ICANN should not have "reconsider[ed]" its decision to proceed to contract negotiations with ICM because ICM's application for the .XXX sTLD met all the necessary criteria, and that doing so was inconsistent with ICANN's Bylaws.<sup>3</sup> On June 25, 2010, after soliciting and considering further public comment regarding .XXX – and in line with the IRP Panel declaration – ICANN decided to award ICM a registry agreement. Accordingly, ICANN re-entered negotiations with ICM and, in August 2010, ICANN posted a draft registry agreement with ICM for public comment. In March 2011, ICANN and ICM entered the registry agreement for operation of the .XXX sTLD.

Throughout this entire open and transparent process – a process spanning seven years – YouPorn was silent, save a single letter on September 22, 2010, in which it stated that it "oppose[d] the creation of a .XXX domain."<sup>4</sup> This letter was sent six years after ICANN first sought public comment regarding the proposed creation of .XXX, two years after ICM initiated the prior IRP to challenge ICANN's rejection of the .XXX sTLD, and several months after ICANN ultimately determined to act consistently with the prior IRP Panel's conclusion that reversing course and not proceeding to contract negotiations with ICM was inconsistent with its Bylaws. Moreover, YouPorn *never* commented on or complained about the proposed terms of the draft ICM registry agreement, which ICANN posted for public comment. In fact, YouPorn did not raise its concerns until it filed this IRP action, six months after ICANN bound itself to the registry agreement.

Put simply, YouPorn, along with all other interested parties, had numerous opportunities through various ICANN processes to properly raise concerns or challenges regarding the .XXX sTLD and the ICM registry agreement. But YouPorn did not oppose the .XXX sTLD until long after ICM initiated its IRP and ICANN determined to act consistently with that IRP Panel's findings. Moreover, YouPorn did not oppose or object to the terms of the ICM registry agreement

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<sup>3</sup> *ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers ("ICANN")*, ICDR Case No. 50 117 T 00224 08, Declaration ¶ 149 (Feb. 19, 2010) [Hereinafter *ICM v. ICANN Declaration*], attached to ICANN's Response to YouPorn's Brief re Standing to Maintain IRP as ICANN Exhibit A.

<sup>4</sup> YouPorn's Brief re Standing to Maintain IRP at 20:4-5 (quoting YouPorn Ex. 1) [Hereinafter "YouPorn's Br. re Standing"].

until long after ICANN was bound by them. YouPorn cannot remedy its previous failures to act by invoking an IRP seeking to overturn decisions made long ago. YouPorn's IRP action is the wrong procedure, at the wrong time, for addressing the injuries YouPorn now claims it has suffered, as set forth below.

First, YouPorn's challenge to the approval of the .XXX sTLD must be dismissed in light of the prior IRP Panel's final decision in the ICM IRP. YouPorn is, as a practical matter, seeking to have this Panel reevaluate the decision made by the prior IRP Panel, which declared that ICANN's prior denial of ICM's .XXX sTLD application was inconsistent with ICANN's Bylaws. ICANN must not be exposed to conflicting declarations from different IRP panels regarding the same underlying ICANN decision.

Second, YouPorn's concession that all it can hope to obtain from this IRP proceeding is supposed "educational and public benefits"<sup>5</sup> demonstrates that it lacks standing even under Article III principles—YouPorn cannot establish a concrete and particularized injury that is redressable by the IRP. Although YouPorn lacks standing to raise either of its challenges, the challenge to the ICM registry agreement is particularly susceptible to dismissal on standing grounds because YouPorn challenges the terms of the registry agreement and ICM's conduct thereunder, not the process by which ICANN entered that binding contract.

YouPorn's requested relief further demonstrates why the Panel is not suited to adjudicate these claims. YouPorn seeks remedies that are outside the scope of the Panel's authority or would be unavailable here because ICANN would be unable to act upon the Panel's recommendations even if YouPorn prevailed.

At base, YouPorn seeks an advisory ruling that it hopes to use in the pending antitrust action. That is not the purpose of the IRP, and the Panel should not permit YouPorn to exploit the IRP in this manner. The Panel should summarily dismiss YouPorn's Request for IRP on any or all of these grounds. In the alternative, the Panel should, at a minimum, stay the IRP pending a final judgment in YouPorn's federal lawsuit against ICANN and ICM.

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<sup>5</sup> YouPorn's Supp. IRP Br. at 5:15-16.

## **II. THE PANEL SHOULD NOT RECONSIDER THE PRIOR IRP PANEL'S FINAL RULING REGARDING ICANN'S APPROVAL OF THE .XXX TLD.**

The prior IRP Panel “concluded that by adopting its resolutions of June 1, 2005, the [ICANN] Board found that ICM’s application met [the] financial, technical and sponsorship criteria” established by the 2004 sTLD application process and that “the sTLD process was ‘successfully completed,’” which precluded the Board from reconsidering its determination that “ICM’s application met sponsorship criteria” and therefore the Board’s approval of the .XXX sTLD.<sup>6</sup> All that remained was the completion of a registry agreement. In the prior IRP Panel’s view, ICANN’s *reconsideration of its approval* of the .XXX sTLD violated its Bylaws. With this IRP, YouPorn asks the Panel to reach the opposite conclusion—that ICANN’s *approval* of the .XXX sTLD violated its Bylaws. The IRP does not permit such a result. YouPorn’s challenge to the approval of the .XXX sTLD (¶ 2(a)-(c) of its Request for IRP) should be dismissed.

### **A. The Prior IRP Panel’s Decision Is Entitled to Finality.**

Few formal rules govern ICANN’s Independent Review Process. Although general legal principles—such as *res judicata*, issue preclusion, and Article III standing—inform the Panel’s rulings in this IRP, those principles are not directly applicable. Rather, the Panel is guided primarily by the practical and equitable concerns forming these general principles and built into the IRP. Finality of an IRP Panel’s decision is chief among those concerns. The Bylaws establishing the IRP do not permit endless review of an ICANN Board decision or action. Instead, the Bylaws provide a forum for an independent panel to review “contested actions” of the Board and to declare whether the actions were consistent with the ICANN Articles of Incorporation and Bylaws.<sup>7</sup> Allowing the same actions to be contested in different IRPs would paralyze ICANN, preventing it from taking decisive action in accordance with an IRP Panel’s declaration.

Moreover, to the extent that formal rules govern the IRP, those rules reinforce the need for finality. The Supplementary Procedures for the IRP incorporate the International Center for Dispute Resolution’s International Arbitration Rules (“ICDR Rules”) insofar as they do not conflict with the Supplementary Procedures or ICANN’s Bylaws. Article 27(1) of the ICDR Rules provides

<sup>6</sup> *ICM v. ICANN* Declaration ¶ 149.

<sup>7</sup> See Bylaws, Article IV, § 3.3.

that a tribunal’s decision “shall be final and binding on the parties.” Although the prior IRP Panel made clear that an IRP Panel’s ruling is not **binding** in the sense of compelling ICANN’s actions, no one—not ICANN, ICM, or YouPorn—has disputed that an IRP Panel’s ruling must be final.

The distinction between “final” and “binding” is well-established.<sup>8</sup> In this context, “final” refers to whether a Board action can be subject to further IRP review, whereas “binding” refers to the effect of an IRP declaration on ICANN’s freedom to act. The importance of the distinction is that, while ICANN can decline to take action consistent with an IRP Panel’s declaration, neither ICANN nor anyone else can petition the prior IRP Panel for reconsideration of its decision or seek review of that decision by another IRP Panel or any other adjudicative body. The same principle holds true for YouPorn in connection with the previous IRP. Given the purpose of an IRP proceeding to bring finality to ICANN’s decision-making, a third party is not permitted to second-guess a prior IRP Panel’s decision simply by initiating a new IRP.

YouPorn ignores Article 27(1) of the ICDR Rules and the practical and equitable bases for requiring finality of IRP decisions. Instead, it exclusively argues that *res judicata* does not support dismissal.<sup>9</sup> As explained in ICANN’s Response to YouPorn’s Brief re Standing to Maintain IRP, however, arbitration law and claim preclusion rules are merely “instructive.”<sup>10</sup> Although those rules

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<sup>8</sup> See, e.g., *Patterson v. Allstate Ins. Co.*, 884 So. 2d 178, 180 (Fla. Ct. App. 2004) (addressing effect of “a nonbinding arbitration decision [that] has become final”); *Appeal of State Employees Ass’n of New Hampshire, Inc.*, 661 A.2d 226, 227 (N.H. 1995) (“Although the CBA characterizes the selectmen’s decision as ‘final,’ it does not state that it is ‘binding’ and, as such, that it precludes all review by the PELRB.”). Although the prior IRP Panel suggested that the Supplementary Procedure’s omission of Article 27 of the ICDR Rules was significant to its analysis of whether an IRP was binding, it did not address whether an IRP Panel decision was final. However, the Supplementary Procedures make clear that the ICDR Rules apply unless a rule is inconsistent with the Supplementary Procedures, in which case the latter governs. Supplementary Rules ¶ 2. In other words, ICDR Rules are not individually adopted. The non-binding nature of an IRP Panel’s decision is made clear by the limited authority granted to the Panel in Article IV, section 3.8 of ICANN’s Bylaws, not by the omission of a direct reference to Article 27 in the Supplementary Procedures is irrelevant.

<sup>9</sup> Among other things, YouPorn disputes the applicability of claim preclusion principles to a non-party to a prior arbitration. (YouPorn’s Supp. IRP Br. at 7-8 & n.13.) Although YouPorn correctly notes that *Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th 550 (1999), concerned a non-party’s assertion of claim preclusion against a party, there are “numerous instances where non-parties have been held bound by a previous arbitration award or judgment.” *Drago Daic, Trustee v. Nauru Phosphate Royalties (Texas), Inc.*, 27 S.W.3d 695, 701 (Tex. App. 2000) (collecting cases). YouPorn’s real argument is that the results of a prior arbitration should not be applied “against a non-party like YouPorn and on issues not previously decided.” (YouPorn’s Supp. IRP Br. at 8 n.13.) ICANN addresses these arguments below in the unique context of the IRP, which materially differs from a standard arbitration.

<sup>10</sup> See ICANN’s Response to YouPorn’s Brief re Standing to Maintain IRP at 4.



sometimes provide helpful analogies, the contours of the *res judicata* doctrine in state and federal courts do not govern the issue of IRP finality. Here, there was a well-publicized IRP addressing ICANN’s decision to stop the .XXX TLD from moving forward. That IRP came to a close with a declaration from the IRP Panel, and ICANN abided by that declaration. YouPorn cannot now seek to reopen these same issues by bringing its own IRP challenge.

**B. YouPorn’s Attempt to Carve Out Narrow Issues from Those Addressed in the Prior IRP Does Not Undermine the Finality of the Prior IRP Panel’s Ultimate Decision.**

YouPorn disregards the prior IRP Panel’s ultimate decision—that ICANN violated its Articles of Incorporation and Bylaws by reconsidering its approval of ICM’s application to operate the .XXX sTLD. The reason for YouPorn’s omission is clear. YouPorn is asking this Panel to reach exactly the opposite conclusion—that ICANN violated its Bylaws by approving ICM’s application to operate the .XXX sTLD. Such a decision obviously would directly conflict with the prior IRP Panel’s final decision.

To avoid this conclusion, YouPorn argues that it has raised new theories for why approval of the .XXX sTLD violated ICANN’s Bylaws, and it attempts to narrowly frame the Board decision at issue in the prior IRP. But, as the prior IRP Panel explained, “[t]he principal – and difficult – issue that the Panel must resolve is whether the rejection by the ICANN Board of the proposed agreement with ICM Registry and its denial of the application’s request for delegation of the .XXX sTLD was or was not consistent with ICANN’s Articles of Incorporation and Bylaws.”<sup>11</sup> The approval (and rejection) of the .XXX sTLD was *the* issue. If this Panel adopted a different resolution of that issue, ICANN would be subject to conflicting decisions.

Try as it might to splinter the fundamental decision of approving the .XXX sTLD into a variety of new issues that were implicated by that decision, YouPorn cannot escape that ICANN already took the prior IRP Panel’s declaration seriously and has acted in accordance with that declaration. One can always identify after the fact some “new issue” that could have been

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<sup>11</sup> *ICM v. ICANN* Declaration ¶ 142.

addressed in greater detail, but that does not mean that a new proceeding is appropriate once the prior proceeding has concluded.

**C. The Nature of the IRP Addresses the Principles of Adequate Representation on Which YouPorn Relies.**

The IRP is a unique procedural vehicle. Although governed in part by arbitration rules, it does not provide a forum for parties to state unlimited claims against one another. Rather, there is a single, limited purpose—to determine whether a decision or action of the ICANN Board violated ICANN’s Articles of Incorporation and Bylaws. ICANN and the IRP Panel evaluate the decision or action at issue in the context of all of ICANN’s Articles of Incorporation and Bylaws. Because an IRP Panel reviews the overall consistency of an ICANN decision with ICANN’s governing principles, there is no need for distinct constituencies to represent different aspects of the Articles of Incorporation and Bylaws. In the ICM IRP, ICANN vigorously defended the allegations that its rejection of the .XXX sTLD violated its Bylaws.

In arguing that the prior IRP Panel’s decision lacks preclusive effect because YouPorn was not a party to that IRP and had no privity with ICANN,<sup>12</sup> YouPorn essentially contends that ICANN’s Bylaws cannot be adequately protected by ICANN in the context of an IRP. But the purpose of the IRP is to provide a forum for parties directly affected by an action or decision of the ICANN Board to challenge that action or decision, and to bring finality to the Board’s decision. If a non-party to a prior IRP were permitted to initiate a new IRP to attack a result favorable to its adversary, the IRP would become a forum for parties to wage proxy wars against one another (as YouPorn is attempting to do against ICM here), without regard to the effect on ICANN or the rest of the Internet community. That result is inconsistent with the IRP’s core purposes.

**III. YOUPORN LACKS STANDING TO BRING EITHER OF ITS CHALLENGES.**

YouPorn’s lack of standing remains an absolute barrier to the maintenance of any part of its Request for IRP. Its new spin on the relief it seeks—educational and public benefits for the Internet community at large—demonstrates that YouPorn would not have standing even under Article III principles. But those principles, while instructive, are not the touchstone of IRP standing. Rather,

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<sup>12</sup> See YouPorn’s Supp. IRP Br. at 7:9-8:3 & nn.12-13.

as the Bylaws' drafting history makes clear, YouPorn must establish a direct connection to specific Board decision making. This it cannot do.

**A. YouPorn's Emphasis on the Purported Educational and Public Benefits of the IRP Procedure Reinforces Its Lack of Standing.**

Although ICANN did not emphasize Article III standing principles in its Response to YouPorn's Brief re Standing, YouPorn's supplemental brief argues that IRP standing is essentially equivalent to Article III standing and that YouPorn already established standing under that framework.<sup>13</sup> Notably, YouPorn does not address the actual contours of Article III or how YouPorn meets those requirements in light of its new argument that the relief it seeks from this IRP are the "educational and public benefits" that would accrue to ICANN and the general public. YouPorn's articulation of the generic relief that it hopes will result from this IRP actually proves that YouPorn does not have a concrete and particularized injury redressable by the IRP. It has the same interests of any Internet user, interests that are well-served by ICANN's longstanding practice of soliciting public comment in connection with its decision making, including the decisions at issue here.

To establish Article III standing, a plaintiff must demonstrate, in part, that it has suffered a "concrete and particularized injury in fact" and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."<sup>14</sup> In its supplemental brief, YouPorn for the first time characterizes the relief requested in the IRP as the "educational and public benefits" that might flow from "independent non-binding reviews of the propriety of ICANN decision-making."<sup>15</sup> YouPorn argues that the IRP is "an extremely important means of educating and informing ICANN ... of sophisticated arbitrator opinions about its processes."<sup>16</sup> YouPorn also asserts that the IRP has "the beneficial effect of publicizing and providing an opportunity for public review of and pressure concerning ICANN's operations."<sup>17</sup> But the relief YouPorn now requests,

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<sup>13</sup> *See id.* at 14:5-8.

<sup>14</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>15</sup> YouPorn's Supp. IRP Br. at 3:19-4:9.

<sup>16</sup> *Id.* at 3:23-4:1; *see also id.* at 5 n.6 ("This Panel's decisions could also be very informative to ICANN . . .").

<sup>17</sup> *Id.* at 4:1-2; *see also id.* at 2:17-18 ("this IRP is largely an opportunity to provide public input and educational review of the decision to implement the .XXX TLD and registry contract").

the educational and public benefits derived from the IRP process, is not “likely” to—and in fact will not—redress the injury YouPorn purportedly has suffered.

YouPorn’s entire claimed “injury” stems from the actions taken by ICM (not ICANN) subsequent to ICM becoming the registry operator for the .XXX sTLD.<sup>18</sup> Providing a vehicle for public review and consideration of the ICANN Board’s decision to approve the .XXX sTLD and registry contract simply will not redress YouPorn’s real complaint regarding ICM’s pricing structure for domain names in the .XXX sTLD.<sup>19</sup>

In any event, ICANN’s approval of .XXX was pursuant to an open and transparent process, and in response to a prior IRP ruling. Moreover, every proposed draft of the registry agreement with ICM was posted on ICANN’s website for public comment. Thousands of public comments were submitted and reviewed by ICANN prior to its approval of the registry agreement.<sup>20</sup> The public and ICANN have already had the opportunity to review and comment on the Board’s decision to approve the .XXX sTLD and registry agreement in connection these processes. YouPorn’s requested relief would not redress any particularized injury suffered by YouPorn and is entirely redundant.<sup>21</sup> To the extent Article III principles are instructive, they instruct that YouPorn lacks standing to maintain this IRP.

**B. YouPorn Disregards Governing Principles of Bylaw Interpretation and the Drafting History of the IRP Bylaws.**

YouPorn does not dispute that California law requires “defer[ence] to the board’s determinations if any interpretation of the bylaws is necessary.”<sup>22</sup> YouPorn instead argues that no

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<sup>18</sup> YouPorn’s Request for IRP at ¶ 53(a)-(f) (describing how requirements imposed by ICM on registrants allegedly affect YouPorn). Although YouPorn’s characterization of ICM’s actions are well off the mark, ICANN need not address them in this threshold proceeding.

<sup>19</sup> YouPorn theorizes what ICANN “could” do in the event the Panel finds in favor of YouPorn. *See* YouPorn’s Supp. IRP Br. at 4:10-5:7. But YouPorn’s speculation and desire that ICANN take certain actions—actions that YouPorn concedes cannot be mandated by this Panel—cannot satisfy YouPorn’s burden to establish that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 561.

<sup>20</sup> *See* ICANN’s Response to YouPorn’s Request for IRP, ¶¶ 77-82.

<sup>21</sup> YouPorn’s articulation of its requested relief also underscores its failure to allege that it has been injured in any unique way. Even if ICANN and the general public would be further informed and educated by this IRP, YouPorn does not explain how that relief would address any injury it has suffered that is distinct from any other user of the Internet.

<sup>22</sup> *Hard v. Cal. State Employees Ass’n*, 96 Cal. App. 4th 708, 714 (2002).

interpretation of the IRP Bylaws provisions is necessary here because those provisions are straightforward.<sup>23</sup> If that were so, YouPorn would not have spent six pages of its Brief re Standing asking the Panel to “broadly” construe the “materially affected” language that is the touchstone of IRP standing.<sup>24</sup> The parties’ briefing demonstrates that language is not straightforward, reinforcing the need for deference to ICANN’s interpretation.<sup>25</sup>

YouPorn also contends that the prior IRP Panel “specifically rejected ICANN’s deference argument,”<sup>26</sup> but fails to note that the prior IRP Panel did not address bylaw interpretation; rather, it addressed the application of the business judgment rule to ICANN’s decision making.<sup>27</sup> The business judgment rule is not at issue here, and YouPorn provides no explanation for why the Panel should ignore California principles of bylaw interpretation when interpreting ICANN’s Bylaws, particularly given its initial stance that the Bylaws section addressing IRP standing must be interpreted broadly.

The need for due deference to ICANN’s interpretation is reinforced by the drafting history of the Bylaws, which YouPorn dismisses. The Bylaws’ drafting history is vital because a corporation’s bylaws “must be considered in the light of all the circumstances, including such matters as the purposes for which the organization was organized and the extent of the rights of the particular member involved.”<sup>28</sup> The drafting history of the ICANN Bylaw concerning IRP standing demonstrates that ICANN’s purpose in establishing the IRP was narrow, and was not intended to provide rights for “generic” members of the Internet community that lack any direct connection to a Board decision. As the Advisory Committee on Independent Review explained, an “affected party” standard was too lax because it “sweeps too broadly, ... as nearly every Internet user can be said to

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<sup>23</sup> See YouPorn’s Supp. IRP Br. at 15:5-10.

<sup>24</sup> See YouPorn’s Br. re Standing at 7-13.

<sup>25</sup> See *Hard v. Cal. State Employees Ass’n*, 112 Cal. App. 4th 1343, 1347 (2003) (explaining that California courts may not even review a private organization’s interpretation of bylaw language unless that language is “straightforward” and the interpretation is “unreasonable, does not involve ... the peculiar knowledge of the organization, and does not involve the organization’s rituals and customs”).

<sup>26</sup> YouPorn’s Supp. IRP Br. at 14:9-11.

<sup>27</sup> *ICM v. ICANN* Declaration ¶ 136.

<sup>28</sup> *Bennett v. Hibernia Bank*, 47 Cal. 2d 540, 552 (1956).

be affected in some quantum by nearly any decision of the ICANN Board.”<sup>29</sup> YouPorn’s challenge to ICANN’s approval of a new TLD and an agreement governing the operation of that TLD illustrates the Board’s concern with broad standing. ICANN’s interpretation of the Bylaws provision regarding standing is consistent with both the drafters’ intent and the language of that provision, and gives the Bylaws “a more reasonable operation and effect” than YouPorn’s interpretation of boundless IRP standing.<sup>30</sup>

YouPorn addresses just one of the dozen citations to the drafting history supporting ICANN’s interpretation of the standing Bylaw. YouPorn argues that a “mere ICANN Committee[’s]” explanation that IRPs do not “involve a review of the merits of the particular decision” is irrelevant.<sup>31</sup> But that “mere” committee, the Committee on ICANN Evolution and Reform, was addressing the existing IRP policy that “call[ed] for the scope of review to be limited strictly to ‘compar[ing] contested actions of the ICANN Board to the Bylaws and Articles of Incorporation and to declare whether the ICANN Board has acted consistent with the provisions of those documents.’”<sup>32</sup> That is substantively identical to the current scope of the IRP codified in ICANN’s Bylaws.<sup>33</sup> Consistent with the Reform Committee’s recommendation, the Board never “broaden[ed] independent review ... to involve a review of the merits of a particular decision.”<sup>34</sup>

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<sup>29</sup> Draft Principles of the Advisory Committee on Independent Review, Ex. D to 27 May 1999 Meeting Minutes, *available at* <http://www.icann.org/en/groups/board/documents/minutes-exhibit-d-27may99-en.htm>, attached to ICANN’s Response to YouPorn’s Brief re Standing to Maintain IRP as ICANN Exhibit F.

<sup>30</sup> *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 631 (1911).

<sup>31</sup> YouPorn’s Supp. IRP Br. at 15 n.16, citing Committee on ICANN Evolution and Reform, Working Paper on the ICANN Structure and the Nominating Committee Concept, 9 May 2002, *available at* <http://archive.icann.org/en/committees/evol-reform/working-paper-structure-09may02.htm>, attached to ICANN’s Response to YouPorn’s Brief re Standing to Maintain IRP as ICANN Exhibit H.

<sup>32</sup> Committee on ICANN Evolution and Reform, Working Paper on the ICANN Structure and the Nominating Committee Concept, 9 May 2002, *available at* <http://archive.icann.org/en/committees/evol-reform/working-paper-structure-09may02.htm>, attached to ICANN’s Response to YouPorn’s Brief re Standing to Maintain IRP as ICANN Exhibit H.

<sup>33</sup> See Bylaws, Article IV, § 3.3 (the IRP panel “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 the provisions of those Articles of Incorporation and Bylaws”).

<sup>34</sup> Committee on ICANN Evolution and Reform, Working Paper on the ICANN Structure and the Nominating Committee Concept, 9 May 2002, *available at* <http://archive.icann.org/en/committees/evol-reform/working-paper-structure-09may02.htm>, attached to ICANN’s Response to YouPorn’s Brief re Standing to Maintain IRP as ICANN Exhibit H.

The scope of the IRP was then, as it is now, limited to a review of the consistency of the Board's procedural decision-making with the Articles of Incorporation and Bylaws.

**C. YouPorn's Lack of a Direct Connection with ICANN's Decision-Making Requires Dismissal of All of Its Claims on Standing Grounds.**

The IRP is available only to persons "materially affected by a decision or action by the Board."<sup>35</sup> To satisfy the materiality threshold, a claimant must establish a direct connection between it and the Board decision or action it challenges. Here, there is no direct connection between YouPorn and *any* of the ICANN Board decisions it purports to challenge. As a result, YouPorn lacks standing to maintain this IRP.

First, although YouPorn insists that it "has not abandoned its attack" on ICANN's decision to approve the .XXX sTLD, YouPorn still fails to establish any personal connection to that specific Board decision, let alone the "direct connection" required for IRP standing. Nor could it. 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 object, complain or otherwise avail itself of the public comment period throughout two exhaustive processes during which ICANN considered applications for new TLDs, including ICM's application for .XXX. Despite its failure to engage in ICANN's processes leading to the approval of .XXX, YouPorn now seeks to control the operation of .XXX in an attempt to stave off potential competition from .XXX to YouPorn's online adult entertainment websites in other TLDs (such as .COM). YouPorn's concern that .XXX may affect its dominant position as a leading purveyor of pornography on the Internet does not support standing to invoke the IRP.

Second, YouPorn fails to establish a direct connection between it and ICANN's decision to approve the ICM registry agreement. YouPorn quibbles with ICANN's characterization that YouPorn's real challenge is to what was left out of the registry agreement, rather than what is in the agreement. But YouPorn does not dispute that it is challenging actions taken by ICM (not ICANN) *after* ICANN made the decision to approve ICM's registry agreement. The fact that ICANN did not "insist" on certain language in the .XXX registry agreement does not mean that ICANN made the

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<sup>35</sup> Bylaws, Article IV, § 3.2.

decisions on how to implement the .XXX sTLD; the decisions that YouPorn does not like are ones made by ICM in operating the .XXX registry. YouPorn's displeasure with ICM's adoption of pricing and other terms for the registration of domain names in .XXX is not sufficient to provide YouPorn standing to maintain an IRP challenging "non-decisions" of the ICANN Board.

Finally, YouPorn's new argument that it is challenging "other decisions or actions, such as ICANN's decision ... to approve IIFOR [*sic*] despite its restrictive policies," is equally unavailing.<sup>36</sup> Neither YouPorn's Request for IRP nor its subsequent briefing include facts supporting this argument. YouPorn is now making up new claims in an attempt to avoid the tenuous nature of its challenges.

**D. YouPorn Further Lacks Standing to Challenge the Registry Agreement Because It Challenges the Merits of the Agreement, Not ICANN's Procedure in Entering the Agreement.**

YouPorn argues in this IRP that ICANN's approval of the ICM registry agreement was inconsistent with the Articles of Incorporation and Bylaws. But YouPorn does not challenge the process by which ICANN approved that agreement. In fact, ICANN took painstaking efforts to ensure a robust discussion on the merits of the agreement, including posting the proposed registry agreement for public comment, summarizing and analyzing the public comments, and consulting with the GAC before entering the agreement.<sup>37</sup> Rather than challenging the (undeniably appropriate) process by which ICANN proceeded with the .XXX registry agreement, YouPorn challenges the substance of the registry agreement—citing various provisions that it would like to have seen included in that agreement to constrain ICM's conduct. But those complaints are beyond the scope of an IRP.<sup>38</sup>

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<sup>36</sup> YouPorn's Supp. Br. re Standing at 16:4-7.

<sup>37</sup> See ICANN's Response to YouPorn's Request for IRP ¶¶ 81-92.

<sup>38</sup> See Committee on ICANN Evolution and Reform, Working Paper on the ICANN Structure and the Nominating Committee Concept, 9 May 2002, available at <http://archive.icann.org/en/committees/evol-reform/working-paper-structure-09may02.htm>, attached to ICANN's Response to YouPorn's Brief re Standing to Maintain IRP as ICANN Exhibit H (Reform Committee declining to "broaden independent review ... to involve a review of the merits of a particular decision"). The ICM IRP also is instructive on this point. In the prior IRP Panel's final analysis, ICANN's "reconsideration" of its determination that ICM's application met the criteria for approval of the .XXX sTLD "was not consistent with the application of neutral, objective and fair documented policy." *ICM v. ICANN* Declaration ¶ 152. The focus of the IRP was the process by which ICANN rejected the .XXX sTLD, not the merits of that decision.



YouPorn appears to recognize that a connection to ICANN’s procedures is essential to IRP standing, arguing that ICANN failed to address YouPorn’s “participat[ion] in ICANN’s processes.”<sup>39</sup> However, YouPorn’s only “participation” in any ICANN process was its September 22, 2010 letter to ICANN “vehemently oppos[ing] the creation of a .XXX domain.”<sup>40</sup> That letter did *not* challenge the proposed ICM registry agreement; instead, it contested the approval of the .XXX sTLD, a decision that already had been reviewed and considered through an IRP. At no time did YouPorn *ever* object to a term in any proposed registry agreement, much less terms “omitted” from such an agreement (such as a price cap). Moreover, the ICANN Board took no action nor made any decision regarding YouPorn’s belated letter.

**IV. THE RELIEF YOUTORN SEEKS IS INCONSISTENT WITH THE IRP PROCEDURE AND IMPOSSIBLE TO OBTAIN.**

Yet another basis for the dismissal of YouPorn’s Request for IRP is that it does not seek appropriate relief. Most of the relief requested in the initial Request for IRP (and all of the new relief requested in its supplemental brief) is simply beyond the narrow scope of the IRP Panel’s remedial authority. And the only declaratory relief YouPorn requests that is within the letter of the IRP—a declaration that ICANN acted inconsistently with its Articles of Incorporation and Bylaws—is unavailable in the present circumstances because ICANN would be unable to act upon the IRP Panel’s declarations without impairing contractual rights of third parties. Finally, the existence of alternate fora to address YouPorn’s complaints reinforces the need for dismissal of this IRP.

**A. The Majority of YouPorn’s Requests for Relief Facially Exceed the Panel’s Authority and Should Be Stricken.**

Although YouPorn now contends that this IRP is about “public input,” “educational review,” and “a thorough airing of [ICANN’s] decision-making about the .XXX TLD,”<sup>41</sup> its actual

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<sup>39</sup> YouPorn’s Supp. IRP Br. at 14 n.15.

<sup>40</sup> ICANN’s Response to YouPorn’s Brief re Standing to Maintain IRP at 19 (quoting YouPorn’s Br. re Standing at 20:4-5).

<sup>41</sup> YouPorn’s Supp. IRP Br. at 2:17-26. YouPorn’s contention that a decision in this IRP will serve an educational purpose in connection with the new gTLD program is particularly unpersuasive in light of the ongoing public dialogue that is currently taking place with respect to that program.

Request for IRP seeks relief that is well beyond the Panel’s authority. YouPorn’s latest brief requests still further relief that is unavailable in an IRP. The Panel should strike these requests, which will illuminate that the only relief available to YouPorn is inconsistent with its stated goals. The requests further confirm that YouPorn lacks standing, as discussed below.

ICANN’s Bylaws permit the IRP Panel to grant two forms of relief: (1) declare whether the Board’s action was inconsistent with the Articles of Incorporation or Bylaws, and (2) recommend that the Board stay an action or decision, or take interim action, until the Board acts upon the IRP Panel’s opinion.<sup>42</sup> Despite this clear statement of the limited relief available, YouPorn’s Request for IRP asks the Panel to direct ICANN to “reconsider its decision regarding approval of the .XXX TLD,” “complete proper economic studies,” “void” the approval of the .XXX TLD and the ICM registry agreement, “reconsider who should be allowed to act as the registry operator for the .XXX TLD,” “seek to rescind” the ICM registry agreement, “negotiate conditions and terms that provide adequate protections for free and fair competition,” “adopt ‘Consensus Policies’ binding on ICM,” and “compensate YouPorn for the costs incurred by YouPorn in bringing” this IRP.<sup>43</sup> None of this relief is attainable in the IRP, and the final request is expressly prohibited in the Bylaws.<sup>44</sup>

The extent of YouPorn’s overreach is emblematic of its true goals. YouPorn is not interested in a “thorough airing” of ICANN’s procedural decision making. It wants ICANN to make the .XXX sTLD disappear by rescinding the ICM registry agreement. As explained above, this would directly contradict the prior IRP Panel’s declaration.

In its supplemental brief, YouPorn attempts to ignore the improper requests for relief listed in its Request for IRP, opting instead for the illusion that it seeks nothing more than a declaration that ICANN acted inconsistently with its Bylaws. But YouPorn frequently falls back into its habit of arguing that the Panel can do far more, such as “instruct[ing] ICANN to move to adopt policies that” YouPorn favors<sup>45</sup> and “tell[ing] ICANN that it should have given more consideration to public

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<sup>42</sup> Bylaws, Article IV, § 3.8.b & c.

<sup>43</sup> YouPorn’s Request for IRP at 3:1-26 (¶ 3.e-1).

<sup>44</sup> See Bylaws, Article IV, § 3.12 (with the exception of the costs paid to the IRP Provider, “[e]ach party to the IRP proceedings shall bear its own expenses”).

<sup>45</sup> YouPorn’s Supp. IRP Br. at 5:4-7.

and governmental objections to the .XXX TLD.”<sup>46</sup> The Panel has no more authority to grant these requests than the eight improper requests for relief listed in YouPorn’s Request for IRP. The Panel should strike YouPorn’s improper requests for relief.

**B. The Remaining Requests for Relief Do Not Encompass the Contractual Remedies that YouPorn Proposes.**

YouPorn’s remaining requests for relief seek declarations that ICANN’s actions or decisions were inconsistent with its Articles of Incorporation and Bylaws.<sup>47</sup> Although this form of relief typically is within the scope of an IRP Panel’s authority, it would serve no purpose here.

Even if the Panel contradicted the prior IRP Panel’s decision and declared that ICANN’s approval of the .XXX sTLD was inconsistent with its Articles of Incorporation and Bylaws, ICANN would be unable “act[] upon the opinion of the IRP” Panel.<sup>48</sup> Doing so would require ICANN to shut down the .XXX sTLD, causing the breach of thousands of contracts involving third-party registrants operating in that domain. The operation of the .XXX sTLD is too far along to allow ICANN to unilaterally halt its operation. The Panel’s decision would not only be non-binding, it would be impossible to implement.

Similarly, if the Panel declared that ICANN’s agreement with ICM violated its Articles of Incorporation and Bylaws, ICANN could not act upon that opinion without breaching its contract with ICM and exposing itself to liability for the breach. The Panel cannot be put in a position that requires it to recommend a breach of contract as a remedy for third-party complaints about the substance of ICANN’s contracts. YouPorn appears to recognize this, arguing that ICANN would not necessarily have to breach its contract; rather, it could rescind the ICM registry agreement based on various alleged breaches by ICM.<sup>49</sup> Under this theory, for the Panel to conclude that ICANN

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<sup>46</sup> *Id.* at 13:4-6.

<sup>47</sup> YouPorn’s Request for IRP at 2:16-26 (¶ 3.a-d). Although the IRP Request identifies four actions that purportedly violated ICANN’s Articles of Incorporation and Bylaws, YouPorn’s supplemental brief makes clear that YouPorn really only challenges two actions—(1) approval of the .XXX TLD, and (2) approval of the ICM registry contract. *See* YouPorn’s Supp. IRP Br. at 3:5-9.

<sup>48</sup> Bylaws, Article IV, § 3.8.b-c.

<sup>49</sup> YouPorn’s Supp. IRP Br. at 4:13-5:3. Notably, ICANN receives bi-annual Certification Reports from ICM regarding all aspects of the .XXX registry agreement. An IRP is not a proper forum for ICANN-ICM contract compliance issues.

could act upon the declaration that YouPorn seeks, it would not only have to interpret the registry agreement between ICANN and ICM, but review the conduct of a third party (ICM) to determine if that conduct provided a basis for rescission. That is not the province of an IRP Panel. More importantly, YouPorn's requested relief confirms (again) that its real complaint is with ICM's conduct after the registry agreement was signed, and not with any action of the ICANN Board.

**C. YouPorn's Rejection of the UDRP to Address Its Concerns Rings Hollow.**

YouPorn argues that the Uniform Domain Name Dispute Resolution Policy ("UDRP"), a binding and globally accepted alternative dispute resolution mechanism for claims that a domain name has been improperly registered, does not address all of YouPorn's concerns regarding creation of the .XXX sTLD.<sup>50</sup> But this argument ignores YouPorn's alleged injury and the fact that the UDRP addresses—in a binding manner—that claimed injury.<sup>51</sup> Specifically, to support its standing argument, YouPorn has repeatedly claimed that it is adversely affected by ICM's "defensive registration racket" (although YouPorn has not alleged that it has actually paid any fees to defensively register a domain name in .XXX).<sup>52</sup> If this is truly the injury suffered by YouPorn, the UDRP is the precise procedure it should invoke if a third party ever registers one of YouPorn's trademarks or domain names in .XXX. Accordingly, there is no reason for the Panel to offer an advisory and non-binding opinion to address YouPorn's alleged injury where there already exists a less-burdensome, less-expensive and less-protracted procedure that provides the relief YouPorn requests.

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<sup>50</sup> YouPorn's Supp. IRP Br. at 6 n.7.

<sup>51</sup> ICANN's Response to YouPorn's Brief re Standing to Maintain IRP at 22-23. It is also important to note that the .XXX sTLD has built-in mechanisms that provide exceptional protections to trademark holders and seek to minimize defensive registrations. For instance, during what was called the "Sunrise B" period, ICM provided trademark holders with an opportunity to opt-out of the .XXX TLD in order to ensure that their marks and names are not registered as domain names by others in .XXX. See .XXX Sunrise B, available at <http://www.icmregistry.com/launch/sunrise-b/>, attached hereto as ICANN Exhibit S. ICM also offers the Rapid Evaluation Service ("RES") as a low-cost, efficient arbitration forum, administered by the National Arbitration Forum, to protect trademarks in .XXX. See Domain Disputes, available at <http://icmregistry.com/domain-disputes/>, attached hereto as ICANN Exhibit T.

<sup>52</sup> YouPorn's Supp. IRP Br. at 3; YouPorn's Br. re Standing at 4-6.

V. **THE PANEL SHOULD NOT ENTER AN ADVISORY OPINION WHILE YOUNORN PURSUES THE REAL RELIEF IT DESIRES IN THE FEDERAL ANTITRUST PROCEEDINGS.**

A. **An Advisory Opinion Is Unnecessary and Inappropriate In Light of the Pending Federal Court Proceedings.**

ICANN does not contend that YouPorn’s antitrust lawsuit bars this proceeding, as YouPorn suggests.<sup>53</sup> Rather, ICANN argues that it is inefficient and ineffective for this matter to proceed given the fact that YouPorn’s lawsuit and this IRP request overlapping relief and challenge the same conduct for the same reasons. Seeking an advisory opinion in this action is a complete waste of time, energy and money when YouPorn is concurrently seeking a binding ruling in a court of law.

Although YouPorn attempts to distinguish its two actions, the primary distinguishing factor is the fora in which they are pending. In both actions, YouPorn seeks the same relief. In its antitrust lawsuit, YouPorn is asking the district court to “enjoin[] the .XXX TLD,” declare that “the .XXX registry contract be openly rebid or rewritten to introduce competition for .XXX registry services,” and “impos[e] reasonable price constraints and service requirements on permanent blocking services and other defensive registrations in the .XXX TLD.”<sup>54</sup> Identical relief is sought here.<sup>55</sup> In both actions, YouPorn challenges the same conduct. In its antitrust lawsuit, YouPorn alleges that ICANN violated the antitrust laws by agreeing to create the .XXX sTLD, agreeing to a contract with ICM without competition from other registry operators, and by permitting ICM to charge “above-market and extortionate prices for .XXX defensive registrations.”<sup>56</sup> YouPorn challenges the exact same conduct in this IRP.<sup>57</sup> And in both actions YouPorn challenges ICANN’s conduct for the same reason: for allegedly “authorizing the anticompetitive .XXX defensive registration racket.”<sup>58</sup> Moreover, in a previous brief, YouPorn argued that, because YouPorn had

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<sup>53</sup> YouPorn’s Supp. IRP Br. at 11.)

<sup>54</sup> Complaint at 42:27-48:6, *Manwin Licensing Int’l S.A.R..L. v. ICM Registry*, ICANN Exhibit O.

<sup>55</sup> See YouPorn’s Request for IRP at 27-28.

<sup>56</sup> See YouPorn’s Supp. IRP Br. at 11;; see also Complaint at ¶ 3, *Manwin Licensing Int’l S.A.R..L. v. ICM Registry*, ICANN Exhibit O.

<sup>57</sup> YouPorn’s Br. re Standing at 2-4.

<sup>58</sup> YouPorn’s Supp. IRP Br. at 3; see also Complaint at ¶ 3, *Manwin Licensing Int’l S.A.R..L. v. ICM Registry*, ICANN Exhibit O.

standing to bring its “companion federal action,” YouPorn has standing to maintain this IRP action.<sup>59</sup>

There is no escaping the fact that YouPorn’s IRP action—like its federal lawsuit—alleges anticompetitive and monopolistic conduct, and seeks to halt the .XXX sTLD or, at least, rewrite the contract. Although YouPorn argues that the standards of proof in the antitrust action and this IRP proceeding are different, YouPorn does not dispute that success in its antitrust suit would provide it all of the real relief that it seeks in this action. If that relief were granted, there would be no reason to continue with this IRP—there would be no value to reviewing decision making that has been nullified by a court order. Finally, YouPorn’s contention that it seeks “educational review” of ICANN’s decision-making is an insufficient reason to force the incurrence of significant expenses to conduct this duplicative proceeding, particularly in light of the fact that IRP proceedings are intended to be efficient.<sup>60</sup>

**B. If the Panel Declines to Dismiss the IRP, It Should Stay the IRP Pending the Conclusion of YouPorn’s Parallel Antitrust Proceeding.**

Although YouPorn’s Request IRP should be summarily dismissed for all the reasons stated, the Panel should, at a minimum, stay this proceeding pending a final determination of YouPorn’s pending federal lawsuit. The overlap between the lawsuit and the IRP, and the potential for YouPorn to obtain in federal court all the particularized relief that it seeks in these proceedings renders the court a far better forum for YouPorn to press its claims than this IRP.

Analogous California law regarding stays of litigation is instructive. In that context, courts “consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions.”<sup>61</sup> Where “the rights

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<sup>59</sup> YouPorn’s Br. re Standing at 16-17.

<sup>60</sup> The Reform Committee emphasized that it was not “consistent with ICANN’s limited mission and financial structure to assume and facilitate a judicial review-like process under which all or most ICANN decisions could be subjected to costly, time-consuming delays.” Committee on ICANN Evolution and Reform, First Interim Implementation Report, § 2.5, 1 August 2002, available at <http://archive.icann.org/en/committees/evol-reform/first-implentation-report-01aug02.htm>, attached to ICANN’s Response to YouPorn’s Brief re Standing to Maintain IRP as ICANN Exhibit K; *see also* Bylaws, Article IV, § 3.10.

<sup>61</sup> *Caiafa Prof'l Law Corp. v. State Farm Fire & Cas. Co.*, 15 Cal. App. 4th 800, 804 (1993) (quoting *Farmland Irrigation. Co. v. Dopplmaier*, 48 Cal. 2d 208, 215 (1957)).

of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced,” courts may stay a proceeding in deference to the alternate forum.<sup>62</sup>

All of these concerns are present here. The purely advisory nature of the relief available in the IRP raises an inference that YouPorn’s Request for IRP is designed solely to harass ICANN. The overlapping nature of YouPorn’s pleadings in the two proceedings—both of which focus on complaints about the purportedly anti-competitive nature of ICM’s and ICANN’s conduct—put this Panel on the path to unseemly conflicts with the federal district court. The federal court proceeding is further along, as YouPorn’s complaint partially survived a motion to dismiss. And, due to the court’s subpoena power, the availability of witnesses is greatly increased in federal court.

Deferring to the federal court is particularly appropriate in the context of YouPorn’s challenge to the ICM registry agreement, which is the primary target of both its Request for IRP and its federal antitrust complaint. YouPorn’s complaint in both actions is that ICANN’s registry agreement with ICM is anti-competitive and should be rescinded. Regardless of any distinctions between the federal antitrust laws and the ICANN Bylaws that YouPorn seeks to vindicate, the allegedly anti-competitive nature of ICM’s conduct is squarely presented in both proceedings. The federal court is far better suited to addressing those concerns—indeed, although ICM’s conduct is squarely at issue in this IRP, ICM is not a party to the IRP, whereas ICM is a party in the federal court action.<sup>63</sup> If the Panel does not summarily dismiss YouPorn’s request, the Panel should stay this proceeding until the court has had an opportunity to do so.

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<sup>62</sup> *Id.*

<sup>63</sup> For example, YouPorn asserts that the ICM registry agreement “improperly contains an authorization for ICM to set its own anticompetitive monopoly prices.” YouPorn’s Supp. IRP Br. 15:19-21. That is a legal issue, which has yet to be adjudicated by the court. YouPorn’s reliance on these types of “facts” to justify its IRP Request demonstrates why the IRP is not the appropriate forum for YouPorn’s complaints or, at a minimum, why these proceedings are premature.

**VI. CONCLUSION**

For the reasons stated, ICANN respectfully requests that the Panel summarily dismiss YouPorn's request or, in the alternative, stay this proceeding pending a final judgment in the concurrently pending federal antitrust suit.

Respectfully submitted,

Dated: January 25, 2013

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LAI-3184372v1



# Exhibit S



Member Login

ABOUT PRESS REGISTRARS FAQ CONTACT WHOIS

# .XXX Sunrise B

SUNRISE  
SEPTEMBER 7TH

## SUNRISE A

Secure your trademarks and matching domains now!

Learn More

## SUNRISE B

How you can protect your non-adult brands.

Learn More

LANDRUSH  
CLOSED

## LANDRUSH

Find out how you can secure a premium .XXX domain!

Learn More

GENERAL AVAILABILITY  
DECEMBER 6TH

## GENERAL AVAILABILITY

Be the first to get that highly-priced .XXX domain!

Learn More

QUIET PERIOD

QUIET PERIOD



# SUNRISE B

For those who are non-members of the adult sponsored community with registered trademarks who wish to block names from use in .XXX

September 7 - October 28, 2011

## SUNRISE B

Sunrise B is the time when trademark owners can apply to opt-out of .XXX. This period will run for 52 days starting September 7, 2011. Trademark and domain holders wishing to block their trademarks from .XXX during Sunrise B may submit an application through one of our accredited registrars located [here](#).

Sunrise B is aimed at applicants from outside of the adult Sponsored Community. These applicants are owners of a qualifying trademark registration, who seek to reserve names in order to ensure that those names are not registered as domain names by others in .XXX. At the close of the Sunrise Period, if no conflicting application by a Sunrise A applicant has been made, these names will be reserved from registration (blocked).

### Qualification, Eligibility and Verification For Sunrise

These will be detailed in the Comprehensive [Launch Policies](#).

### Non-Competing Applications

#### Single Sunrise B Only

A successful application to block a domain name by a single, qualified applicant under Sunrise B, and not subject to a competing application from an adult Sponsored Community applicant under Sunrise A, will be designated "reserved-trademark" or similar. This domain name will be removed from the pool of domain names available for registration in future phases of the registry operation and the WHOIS information will simply list standard registry information. The corresponding domain name will resolve to a standard informational page indicating the status of the domain name as not available for registration or similar. Allowing the domain name to resolve is designed to prevent "synthetic DNS" or non-DNS resolution systems from hi-jacking queries to these domain names.

### Competing Applications and IP Claims

#### Multiple Sunrise B Applications

In the event that there is more than one qualified applicant under Sunrise B, the domain name will be reserved in exactly the same way as if there were only a single applicant and there will be no refund or apportionment of fees among such applicants.

#### Competing Sunrise A and Sunrise B Applications

If both a Sunrise A and a Sunrise B applicant want the same domain name, priority will be given to the Sunrise A applicant to register the domain name. At the close

of the Sunrise period, if more than one Sunrise application is made for a domain name, all Sunrise applicants for that domain name will be notified of the claims made by the other Sunrise applicants for that name. In the event any Sunrise A applicant proceeds with a registration, the applicant will be deemed on notice of the intellectual property claims submitted by the other Sunrise applicant(s) and may not claim lack of notice with regard to such applicant(s) in any subsequent dispute proceeding. All Sunrise application fees are non-refundable.

We suggest you view "Wake Up to Sunrise" for a better understanding of the Launch process.



**About**

- [About .XXX](#)
- [About ICM Registry](#)
- [Sponsored Community](#)
- [FAQ](#)

**Registrars**

- [Get Your .XXX](#)
- [Become A Registrar](#)
- [Registrar Login](#)

**Programs**

- [Premium Domains](#)
- [Adult Performer Program](#)
- [.SEX, .PORN New gTLDs](#)
- [Search.xxx Ad Program Offer](#)

**Press**

- [In The News](#)
- [Press Releases](#)
- [Multimedia Center](#)

**Other**

- [Report Abuse](#)
- [Opt-in for Updates](#)
- [.XXX WHOIS Lookup](#)
- [Member Login](#)



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# Exhibit T



## Domain Disputes

ICM Registry has created specialized dispute resolution policies to help proceed against unauthorized registrants.

 <p><b>ICM NEW gTLD BROCHURE</b></p> <p>Download</p>	 <p><b>DISPUTE RESOLUTION POLICIES AND BRAND PROTECTION OPTIONS</b></p> <p>Download</p>	 <p><b>WHITE PAPER ON REGISTRIES AND TRADEMARKS</b></p> <p>Download</p>	 <p><b>IP-PROTECTION</b></p> <p>Download</p>
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### RES

Protects Registered Trademarks  
 Protects Personal Names  
 Protects Professional "Stage" Names  
 Must be able to prove name was registered and is being used in bad faith (or if not yet used – must prove that it is not conceivable that it could be used in good faith)

#### Time Frame

Initial Results: 2 Business Days

#### Result

Successful complaints result in the .XXX domain name being removed from use by anyone; the name becomes "registry reserved" in perpetuity.

#### Cost

\$1,300 (NAF is the only provider of this service)

### CEDRP

Protects against registration or use that is not in compliance with the .XXX Sponsored Community criteria  
 Protects against registration or use of a .XXX name that was obtained in Sunrise A by someone without eligibility to do so

#### Time Frame

On average: 30 Calendar Days

#### Result

Successful complaints result in the .XXX domain name being cancelled from the "at fault" registrant. The .XXX domain name then becomes generally available.

#### Cost

\$1,300 (NAF is the only provider of this service)

### ICANN UDRP

Protects trademark owners (registered and non-registered trademarks)  
 Must be able to prove that the domain name was registered and used in bad faith

#### Time Frame

On average: 40 Calendar Days

#### Result

Successful complaints result in the .XXX domain name being transferred from the "at fault" registrant to the party who initiated the UDRP.

#### Cost

\$1,300 - \$2,600 ++ (NAF and WIPO are the most used providers of this service)

## Dispute Resolution

## RES

This policy protects trademarks from online infringement. If someone registered a .XXX domain name that is identical or confusingly similar to a registered trademark or an actual name or stage name - without the rights to do so – you can proceed against them under the Rapid Evaluation Service (RES: <http://icmregistry.com/policies/res-policy>).

The National Arbitration Forum (NAF) is the dispute resolution provider; the fees for this are \$1,300. A successful complainant does not get the name transferred to them, but instead the name itself gets removed from the pool of available names and cannot be registered by anyone; in some cases, you can get this issue resolved within 2 business days.

## CEDRP

This policy challenges the eligibility of a .XXX domain name owner. If someone registered a .XXX domain name without eligibility to do so - you can proceed against them under the Charter Eligibility Dispute Resolution Policy (CEDRP: <http://icmregistry.com/policies/cedrp-policy>).

The National Arbitration Forum (NAF) is the dispute resolution provider; the fees for this are \$1,300. A successful complainant does not get the name transferred to them, but instead the name itself gets deleted from the unauthorized party and becomes a part of the general pool of available names and can be registered.

## ICANN UDRP

This policy was designed to combat trademark infringement and cybersquatting. If someone has registered a trademark as a .XXX domain name in bad faith – you can proceed against them under the Uniform Dispute Resolution Policy (UDRP: <http://www.icann.org/en/dndr/udrp/policy.htm>).

<p><b>About</b></p> <ul style="list-style-type: none"> <li>About .XXX</li> <li>About ICM Registry</li> <li>Sponsored Community</li> <li>FAQ</li> </ul>	<p><b>Registrars</b></p> <ul style="list-style-type: none"> <li>Get Your .XXX</li> <li>Become A Registrar</li> <li>Registrar Login</li> </ul>	<p><b>Programs</b></p> <ul style="list-style-type: none"> <li>Premium Domains</li> <li>Adult Performer Program</li> <li>.SEX, .PORN New gTLDs</li> <li>Search.xxx Ad Program Offer</li> </ul>	<p><b>Press</b></p> <ul style="list-style-type: none"> <li>In The News</li> <li>Press Releases</li> <li>Multimedia Center</li> </ul>	<p><b>Other</b></p> <ul style="list-style-type: none"> <li>Report Abuse</li> <li>Opt-in for Updates</li> <li>.XXX WHOIS Lookup</li> <li>Member Login</li> </ul>
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**PROOF OF SERVICE BY E-MAIL**

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 S. Flower Street, 50<sup>th</sup> Fl, Los Angeles CA 90071. On January 25, 2013, I served a copy of the following document on the interested parties in this action at their last known e-mail address as set forth below by taking the action described below:

**ICANN'S RESPONSE TO YOUPOORN'S SUPPLEMENTAL  
IRP BRIEF ON REMEDIES AND OTHER PROCEEDINGS**

The Honorable Dickran M. Tevrizian  
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I served the above-mentioned document electronically on the parties listed at the e-mail addresses above and, to the best of my knowledge, the transmission was completed and without error in that I did not receive an electronic notification to the contrary.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 25, 2013, at Los Angeles, CA.



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Kate Wallace