

ICM Registry White Paper

The .xxx Domain and Principles of Free Expression

ICM Registry's Statement of Principles

- Individuals have an inherent right to decide what expressive materials they prefer to receive or to avoid.
- ICM Registry is both philosophically committed and contractually bound to the voluntary, non-regulatory principles on which the Internet Domain Name System (“DNS”) is based.
- The .xxx domain was designed to enable adult content providers to use the domain voluntarily and on a non-exclusive basis, to follow ethical business practices, and to give end users greater ability to find or to avoid online content.
- This privately-administered, voluntary system is incompatible with government-imposed content regulation, and ICM Registry is committed to opposing attempts to use the DNS as a way to exert government control over online expression.

Introduction

ICM Registry LLC (“ICM”) conceived the .xxx domain under the principles of Article 19 of the Universal Declaration of Human Rights, Article 10 of the European Convention on Human Rights, and the First Amendment to the United States Constitution, which recognize that individuals have an inherent right to decide what expressive materials they prefer to receive. A central purpose of the .xxx domain is to enable providers of sexually-oriented content to use the domain on a non-exclusive and voluntary basis and to give end users greater ability to find the content they want and to avoid what they don't want. In securing ICANN's approval to operate the .xxx domain, ICM is both philosophically committed and contractually bound to the voluntary, non-regulatory principles on which the global DNS is based. Accordingly, ICM will vigorously oppose proposals to convert this voluntary system into a vehicle for content regulation, including governmental efforts to cajole or *require* providers of sexually-oriented

content to register domain names in .xxx or Internet Service Providers to block adult content without the end user's prior request.

Critics of ICM have argued that approval of the .xxx domain gives official sanction to adult material and will result in the proliferation of pornography on the Internet, or that, alternatively, sponsorship requirements of the .xxx domain will impose regulatory burdens and governments will use the domain as a vehicle for new laws, such as forcing adult material into .xxx or imposing blocking regimes. These paradoxical concerns are wrong. Sexually-oriented material exists online, is protected by law, and the existence of a .xxx domain will not cause it to increase. By the same token, a voluntary domain is not "regulation," and efforts by members of the adult online community to establish responsible policies as baseline business practices will not empower governments to adopt new laws they would not already be inclined to enact.

I. Free Expression on the Internet and in the .xxx Domain

The Internet is the natural home of free expression and is a unique and wholly new medium of worldwide human communication. It is located in no particular geographical location and has no centralized control point, but is available to anyone, anywhere in the world with online access. The information available on the Internet is as "diverse as human thought" with the capability of providing instant access on topics ranging from "the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls." From the beginning, the Internet has made available a cornucopia of sexually-oriented information and entertainment, just as other new communications technologies before it have done; this happens because sex is "a great and mysterious motive force in human life" that "has indisputably been a subject of absorbing interest to mankind through the ages."

During the 1990s the Internet and World Wide Web evolved from a series of research projects to become dominant global media, and managing organizations likewise had to evolve to keep pace. The DNS and Internet management began with contracts administered by the U.S. Department of Commerce, but by the end of the decade, it was evident that a new structure was needed. At that crucial point in history, the Commerce Department might have continued to exert authority, or an international organization such as the United Nations might have asserted control. Instead, the U.S. government proposed privatizing the management of Internet names and addresses to allow for the development of competition and to facilitate global participation in Internet management.

As a result, the Internet Corporation for Assigned Names and Numbers (“ICANN”) was established as a private non-profit corporation. ICANN is responsible for managing the Internet Protocol address spaces and assignment of address blocks to regional Internet registries, for maintaining registries of Internet protocol identifiers, and for the management of the top-level DNS root zone. Much of its work has concerned the introduction of new top-level domains (“TLDs”). ICANN’s primary principles of operation have been described as helping preserve the operational stability of the Internet, to promote competition, to achieve broad representation of the global Internet community, and to develop policies appropriate to its mission through consensus-based processes.

The DNS that ICANN inherited initially consisted of seven TLDs: .com, .edu, .gov, .int, .mil, .net, and .org. For the unrestricted registries (.com, .net and .org), users were permitted to register on a first-come, first-served basis. Unlike these generic TLDs, sponsored TLDs are restricted for use by particular communities, such as .gov for United States governmental institutions, .edu for post-secondary educational institutions, and .mil for the U.S. military.

Sponsored TLDs are specialized domains that have sponsors representing a defined community to be served by the domain. The communities may be based on ethnic, geographical, professional, technical, or theme concepts proposed by private organizations that establish the eligibility requirements for the domain. In 2000, ICANN added a number of sponsored TLDs, including .aero, for members of the air transport industry, .coop, for cooperative associations, and .museum, for (obviously) museums. Since then, ICANN has added .asia, for companies, organizations, and individuals in the Asia-Pacific region, .cat, for the Catalan linguistic and cultural community, .jobs, for human resource managers, .mobi, for providers and consumers of mobile products and services, .tel, for businesses and individuals to publish contact data, and .travel, for travel agents, airlines, hotel operators, and tourism bureaus.

The .xxx domain is an industry-specific TLD, sponsored by the International Foundation for Online Responsibility (“IFFOR”). It was adopted in recognition of the fact that sexually-oriented information and entertainment represents a significant percentage of online communication and that it is here to stay. As with other sponsored domains, the Registry limits registrations to those applicants verified as members of the designated industry. In this case, the Sponsored Community is defined as individuals, business, entities, and organizations have voluntarily agreed to comply with policies and best practices guidelines promulgated by IFFOR and (a) provide online adult entertainment intended for consenting adults; (b) represent providers; or (c) provide products or services to providers and representatives of the community.

A central purpose of the domain is to provide a private sector, voluntary domain for members of the adult content community who agree to adhere to business practices designed to ensure a safe and secure viewing experience for consumers of adult content while simultaneously providing safeguards for those who would prefer to avoid such material. The baseline policies

adopted by IFFOR include ethical business practices that responsible members of the adult community already follow: strict policies against child abuse images and marketing to children, prohibitions on malware, spyware or SPAM advertising, protections for consumer privacy, and protections for intellectual property. Existence of the .xxx domain further helps to ensure that websites with adult material are accurately identified so that individuals (not governments) can more effectively find or avoid this type of content.

II. Participation in a Sponsored Domain is Not Regulation

The .xxx domain, like other sponsored domains, was designed to take advantage of attributes of online communication and of the DNS that have made the Internet the most effective medium for free expression in history. The domain is a private-sector initiative and participation in it is voluntary. Criteria for determining who qualifies for the sponsored community and what policies and best practices constitute “online responsibility” are established by IFFOR, and not by any government. The purpose of setting forth best practices is to promote consumer confidence in the websites and services provided by members of the community and to provide consumer protection without government regulation.

Members of the sponsored community agree to follow ethical business practices that have long been embraced by leading providers of adult entertainment services. These include prohibiting images depicting child abuse and reporting such images to the proper authorities when they are discovered. They also include taking steps to ensure that sexually-oriented entertainment is made available only to consenting adults and that sites are accurately labeled to help assist parents control access in their households. Good business practices also include strong protections for consumer privacy, and ensuring that computer users do not have to worry about malware, spyware, or SPAM. Such ethical practices protect not just the providers and

consumers of adult entertainment, but also all members of the online community, including those who prefer to avoid such content.

IFFOR will establish policies for the .xxx community through a representative process. By its charter, the IFFOR Policy Council consists of nine members, five of which are representatives of the adult online community, one is an expert of freedom of expression, one is an expert on privacy, one is an expert on child protection, and the final member is designated by ICM itself. IFFOR's mission is to provide guidance for responsible business practices for the businesses that voluntarily elect to be held to such standards, not to become a governing body for the Internet.

III. ICM Registry Opposes Any Attempt to Impose Government Restrictions on its Non-Exclusive, Voluntary Domain

A common objection ICM has heard is that the IFFOR policies may not constitute regulation, but governments around the world will seize upon creation of the .xxx domain as an excuse to adopt new laws forcing adult websites into the domain and requiring prior blocking of adult websites. ICM is well aware of the challenges to the adult online community posed by censorship and is fully committed to preserving a robust system of free expression. Indeed, ICM believes that the cause of free expression is advanced most effectively through the adoption of ethical business practices and by enhancing individual user control over online content. The history of legal protection for online speech confirms that the more control individuals have over the material they want to view or to avoid, the less government is able or inclined to intrude on the marketplace of ideas.

The possibility that national governments may try to regulate online speech did not begin with .xxx or with the creation of ICANN, and their existence does not make such regulation any more likely. Indeed, both were created as *alternatives* to government management and control of

the Internet. To the extent governments may seize upon voluntary industry practices as a springboard for direct regulation of online expression, they might just as easily point to other industry efforts to promote responsible business practices. For example, the Association of Sites Advocating Child Protection (“ASACP”) is an organization serving the adult community that is dedicated to eliminating online child abuse images. It provides hotlines for reporting such material to law enforcement officials, and also sponsors a Restricted to Adult (“RTA”) label to designate sexually-oriented websites. However, such laudable efforts to promote responsible behavior have not led to greater regulation, and, in fact, help forestall it.

Taking the United States as one example, the history of efforts to regulate online speech confirms that self-regulatory initiatives do more to preclude government control than to enable it. The U.S. Supreme Court invalidated the Communications Decency Act (“CDA”), which sought to restrict online speech, in part because developments in filtering technology undermined the case for regulation. A successor law, the Child Online Protection Act (“COPA”), likewise was struck down because private filtering software and other non-regulatory mechanisms provided a less restrictive alternative to government control. Other cases invalidated efforts to make filtering of online expression mandatory. In a similar vein, courts have rejected efforts by governments to adopt and enforce private rating systems, such as MPAA movie ratings. These decisions are based on two important principles: First, it is difficult to justify laws that restrict free speech when people have private, voluntary means at their disposal to help control their own media consumption. Second, it is incompatible with legal protections for free expression to commandeer such private measures in the service of governmental censorship schemes.

Such holdings are not confined to U.S. law or policy, where the First Amendment to the U.S. Constitution provides strong protections for free speech. The Organization for Security and

Co-operation in Europe has found that state-level blocking policies could result in prior restraint that undoubtedly could have a serious impact on freedom of expression. Accordingly, it has reported that domain-based blocking of websites and platforms carrying legal content would be regarded as a serious infringement of freedom of speech as it is understood under Article 10 of the European Convention on Human Rights. Even a blocking system based on purportedly “voluntary agreements” with the government would lack basic due process and would risk interfering with fundamental rights.

Based on such concerns, the European Commission dropped a proposal this year that would have required Internet Service Providers to block websites that contained alleged images of child abuse. Although this does not affect the .xxx domain directly, since a condition of membership prohibits child abuse images, the reason for the EU policy change is directly relevant. The mandatory blocking proposal would have constituted prior restraint, and it was dropped from the final proposal because it was inconsistent with European Convention on Human Rights.

Any attempt to usurp the DNS as a tool of governmental content control would not just clash with international protections for free expression, it also would contradict the reasons ICANN was created and would disrupt the contractual terms governing the .xxx domain. Any effort to deputize the Internet industry to serve such policy goals would be strongly resisted by ICM because it would contradict the philosophy and values upon which the domain was based, as well as disrupt business operations and therefore be utterly unworkable. Accordingly, ICM would vigorously oppose governmental interventions.

But even without such philosophical concerns, ICM would fight government attempts to “piggyback” regulation on the .xxx domain for a very practical reason: No business can operate

successfully with government regulators from numerous countries seeking to impose new requirements that conflict with the contract under which it will operate. ICM simply cannot accept mandates that would affect who *must* use the domain or that would limit adults from gaining access to it. Such requirements would be burdensome and unworkable, and would be entirely incompatible with ICM's business model as well as the reasons for which the .xxx domain was created. ICM opposes regulations that limit its autonomy as a business.