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ICANN Board of Directors
4676 Admiralty Way, Suite 330
Marian Del Rey, CA 90292

Re: Opposition to .xxx sTLD application of ICM Registry

Dear Sirs,

This letter of opposition is intended to provide ICANN with a sufficient basis to deny the .xxx sTLD application of ICM Registry ("ICM").

Over the past fifteen years, this office has represented more than one hundred (100) members of the adult entertainment and adult novelty communities. My clients include some of the largest and best respected members of these communities, including but not limited to Evil Angel®, Kick Ass Pictures®, JM Video® and The Stockroom®, as well as many smaller and lesser known businesses.

I also represent many of the most famous individual performers in the industry such as Nina Hartley®, Vince Vouyer® and Aurora Snow® and, again, many lesser well known individuals.

This office presently represents a significant number of internet companies, toy manufacturers, photographers, brick and mortar stores, fetish and other "specialty" producers, modeling agencies, models, directors, producers, and affiliate program managers, all of whom are effected by ICM's .xxx sTLD application.

To the best of my knowledge, and without exception, none of my clients, past or present, support ICM's application. Additionally, as a respected attorney practicing in the First Amendment arena, I have discussed ICM's .xxx proposal with hundreds if not thousands of other members of the relevant community over the past several years. I have yet to encounter a single bona fide informed supporter of the .xxx sTLD other than individuals employed by or affiliated with Mr. Lawley and/or ICM.

As an prior member of the adult entertainment industry (I was a director, camera operator, and editor prior to becoming a lawyer), and as an attorney with years of experience defending the First Amendment and Intellectual Property rights of my clients, I am uniquely aware of the dangers posed by Mr. Lawley's and ICM's application. Accordingly, this letter also is intended to register my own personal opposition to the .xxx sTLD application.

Let's be clear, ICM's attempt to create a .xxx sTLD is motivated by nothing more than the perceived financial value to its principals. Accordingly, ICM's application should be reviewed, and its "evidentiary support" closely scrutinized, as ICM and Mr. Lawley stand to make potentially hundreds of millions of dollars should ICANN grant its application.

It is also crucial to weigh the financial benefits to ICM against what a .xxx sTLD would and could do to the relevant community, and to the internet as a whole.

There is no question that creating .xxx would force thousands of members of the relevant community to expend revenue to protect their existing trademarks - both registered and common law - and the significant time and expense they have expended in branding their products. Every member of the community, from content providers to performers will be faced with a Hobson's choice: pay money to ICM to register corresponding .xxx domains, or risk another company exploiting their trademarks and good will.

To that extent, ICANN should consider that granting ICM's application - thereby forcing trademark holders to pay ICM to defensively protect their marks - may well constitute unlawful contributory trademark infringement. (See generally 15 U.S.C.A. § 1114; Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182 (1982) "if a [party] ... intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the [party]... is contributorially responsible for any harm done as a result....")

Accordingly, should ICANN decide to move forward in concert with ICM to create the .xxx sTLD, especially in light of its being placed on notice by so many members of the relevant community that they have been forced to (or in many cases already have) defensively register .xxx derivatives of their pre-existing trademarked brands, ICANN and ICM may well face class action litigation to enjoin the granting of any such domains, as well as significant financial liability as to any and all damages caused thereby.

Further, as the .xxx designator is uniquely descriptive of the type of goods and/or services offered, it is highly likely that governments around the world, including the United States, will attempt to require providers to migrate to the .xxx sTLD¹, thereby causing ICANN's granting of the monopoly over said domain to be violative of the Sherman Antitrust Act. (See generally 15 U.S.C.A., § 2; U. S. v. Chas. Pfizer & Co., 245 F. Supp. 737 (E.D. N.Y. 1965); U. S. v. Standard Oil Co. of California, 362 F. Supp. 1331 (N.D. Cal. 1972), judgment aff'd, 412 U.S. 924, 93 S. Ct. 2750, 37 L. Ed. 2d 152 (1973). This may well subject ICANN and ICM to protracted and costly antitrust litigation in addition to the aforementioned trademark litigation.

Understandably, the ICANN board members are unaware of the numerous perils a .xxx sTLD would cause to distributors of adult goods and services, as well as its possible effect on other controversial content providers. Clearly, confining suppliers of sexually explicit entertainment and/or goods to the use of .xxx domains would make it much easier for those looking to censor such expression. However, the problem of defining what constitutes material that must be distributed through a .xxx domain raises serious concerns. Nothing prevents governmental entities all over the world from making their own determinations, regardless of the policies of ICM's secretive and heretofore undisclosed IFFOR board. Other forms of sexually related speech

¹ Note that when Mr. Lawley initially proposed a .xxx sTLD and presented the plan to a meeting of community members, he was asked whether ICM would include a "poison pill" in its application that would eliminate the .xxx sTLD in the event of any governmental requirement that adult oriented content be exclusively distributed thereby. ICM has refused to include such a poison pill in its plans and, apparently, actually stands to generate significant additional revenue should one or more governmental agencies actually require its use.

may well be relegated to the .xxx ghetto, such as speech offering and/or advocating sexual education, birth control, prevention of sexually transmitted diseases, and abortion services. Repressive governments worldwide - such as North Korea, China, and Iran - as well as repressive states here - such as Utah, Alabama and Georgia - can simply block all such materials at the source. It is not ICANN's place, even acting through a proxy like ICM, to make internet censorship easier for those who would enforce their own moral codes.

These fears are not unfounded. Senators Baucus and Pryor, two conservative anti-adult entertainment legislators, proposed Senate Bill 2426 (109th Cong, SB 2426) which would have required ICANN to create a .xxx TLD and would have mandated providers of sexually explicit materials (that were deemed "harmful to minors" based on a modified Miller/Ginsburg² standard) to employ only .xxx TLDs or face criminal sanctions.

It further appears that ICM has attempted to mislead the ICANN board as to the level of industry support. Again, in the many years that this issue has been unresolved, I have yet to meet a bona fide informed member of the relevant community who actually supports the ICM registration - other than those with ties to ICM. Based on my many years in the industry, both before I became an attorney and thereafter, I do not believe that any statistically relevant segment of the community actually supports the ICM application.³

It also appears that, despite its promise not to do so, ICM has attempted to use defensive registrations as a show of support for its application. Further, both the letter in opposition from the Free Speech Coalition, the actual trade association for the adult entertainment industry⁴, and other letters filed in opposition (see ICMREGISTRY COMMITTING FRAUD from Douglass Ward filed 9/10/10 -<http://forum.icann.org/lists/xxx-revised-icm-agreement/msg00092.html>) lead me to believe that ICM has significantly and intentionally overstated the level of support from the relevant community.

Accordingly, in the event that ICANN is not yet convinced that the application should be rejected, ICANN should require ICM to publically disclose its evidence of support as well as its pre-registration data to allow the necessary evaluation of the veracity of its representations, and then allow for further public comment once a reasonable time is allowed to evaluate said data.

² See the three part obscenity test in Miller v. California, 413 U.S. 15 (1973); modified to fit a harmful to minors standard (sometimes referred to as obscenity lite) by Ginsberg v. New York, 390 U.S. 629 (1968)

³ I note that all the proponents listed in the letters of support are totally unknown to me and my attempts to identify them and their actual position(s) in the relevant community have been unsuccessful. Further, to the extent that any of the letters of support may be from actual and/or potential registrars or registries, ICANN should not consider them members of the relevant community as they do not provide adult oriented goods and/or services and would, presumably, offer registrar and/or registry services for other TLDs as well.

⁴ For the record, I am a past member of the board of directors of the Free Speech Coalition.

It is understandable that ICANN is concerned with the threat of potential litigation should it refuse ICM's application. ICM has shown itself to be a very aggressive proponent of its own financial interests and ICANN's fears may well be valid. However, ICANN should also be aware that it faces potential and equally protracted litigation should it grant ICM's application, under Intellectual Property and Antitrust law. Numerous members of the relevant community have significant interest that they may well decide to protect through litigation, either directly or collectively through groups and/or their trade association, rather than allow ICANN to permit ICM to extract extortionate defensive registration fees well into the future. Accordingly, ICANN should make its decision on what is best for the relevant community and the internet as a whole, irrespective of its fear of litigation which may be brought by ICM should its application be denied.

The relevant community has demonstrated, beyond reasonable dispute, that it does not support the .xxx sTLD. If ICM has any real support, it should be no small matter to disclose it to the light of rational inspection.

I urge ICANN to reject ICM's .xxx sTLD application and to permanently end this attempt by ICM to employ a monopoly to parasitically extort hundreds of millions of dollars from the adult entertainment industry.

Nothing in this letter is intended as, nor shall be construed as, an admission against the interests of my clients, nor a waiver of their claims, rights, remedies or defenses, all of which are hereby expressly reserved.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Allan B. Gelbard', with a long horizontal flourish extending to the right.

Allan B. Gelbard
Attorney at Law