

THE .XXX FACTOR

RITA RODIN JOHNSTON*

I joined the Internet Corporation for Assigned Names and Numbers (“ICANN”) Board in 2006 excited to preside over the policy work of international citizens concerned with the workings of the Internet’s infrastructure. Within minutes of my tenure, I was listening to presentations about porn. Well, not precisely about porn, but whether the Board had previously approved an application giving the green light to an Internet red-light district.

After living through the issue for five years and hearing the myriad arguments for and against, including those fleshed out in the following articles, I believe that the issue has little to do with whether creating a separate top-level domain (“TLD”) for adult websites is a good or a bad idea. Or, whether as Msrs. Weinstein and McCleary posit, the collection of a high volume of adult websites will encourage criminal behavior. Rather, it has to do with whether an established process was followed.

What Msrs. Richards and Calvert omit from their chronology is that the vote in 2007 against .XXX was followed by an appeal by ICM Registry, the applicant of .XXX, to an Independent Review Panel (“IRP”). The IRP, after hearing both sides of the argument, found that the ICANN Board concluded that .XXX met the sponsorship criteria in 2005, and thus it could not revisit and reverse that conclusion in 2007.

This finding was compelling and I believed instructive, thus I reversed my position and voted in favor of .XXX in 2011. It was a difficult decision—the Board was widely criticized, including by governments and trade associations around the world, some of whom subsequently announced that they would block access to the .XXX TLD in their countries.

The role of a Director is not to be popular or lauded. Nor is it to inject personal beliefs or biases into debates. It is to respect established processes and apply them equally to all. If the Board were to vote against .XXX notwithstanding the findings of the IRP, it would turn its back on a process the ICANN community established to be a check and balance on its decisions. This would be a violation of its fiduciary duties, and no governmental pressure

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or popular belief could assuage that breach.

My full statement, read into the record in March, 2011 during our vote, follows.

RITA RODIN JOHNSTON: Thank you, Peter. There's an expression in the U.S. "caught between a rock and hard place." And for those that are not familiar with it, it connotes being caught between two very difficult choices. And I have never felt this so poignantly as with this .XXX decision.

I was a member of the board in 2007 when I, and we, voted against XXX. We were instructed notwithstanding activities of a prior board in 2005 to review the application to see whether, among other things, it met the sponsorship criteria. At that time, I did not feel that it did so I voted against.

Subsequently, an independent review panel reported that my vote was improperly considered. As a board member, I did not have the ability to assess the sponsorship criteria because the prior board had made that decision, maybe in a confusing way but it made that decision in 2005.

It is now 2011, six years later, and we still have not made our final decision. The reason I think the situation is between a rock and a hard place is because this is the clear lose-lose for our board. If we vote in favor, we are seen to ignore comments of community participants including the [Governmental Advisory Committee]. If we vote against, we do not honor the findings of an independent process that we have set up to review our decisions.

In my view, we all learned that the criteria set up as part of the prior [sponsored top-level domain] round could have been improved in many important areas. In reviewing some of the elements of the IRP process as with many of ICANN processes, there also is room for improvement. And as we've seen this week, the consultation process with the GAC is still in its quite nascent stages and needs urgent attention.

But the bottom line for me is on balance; I feel a responsibility to respect our processes. However flawed they may be—and I hope they are included in the [Accountability and Transparency Review Team] process for improvements—they exist. You all read them, you use them, and you rely on them.

In that instance, I do not feel that I can now again, for a second time, vote against this TLD. To me, that would mean that I place my status as a board member above everything and everyone else here, and I don't think that is even marginally appropriate or true.

This is not a debate about pornography or free speech or

respect for religious, cultural, or governmental differences. The time for that is long past. This is a debate about respect for process.

So I hope, to channel President Clinton as many have done this week, regardless of our individual, personal views on this issue, we can all join together and stumble forward with this TLD.

I want to express apologies to the GAC members who do not support this TLD. Blocking occurs today, and this vote may exacerbate that, which would be very unfortunate.

I want to apologize to community members who took the time to come to the [microphone] yesterday and many times over these long years to oppose this TLD. The good news for you is .XXX will not quash free speech, nor will it affect any other TLD so your sites in .com and others can continue to flourish, or do whatever the appropriate word would be there that they do. . .

And, finally, to the .XXX registry, good luck . . . I hope that you uphold your contractual commitments and will be prudent, cautious, and responsible in this bold new space. Thanks very much.

As we go to press, owners of the website YouPorn.com filed an IRP proceeding alleging, *inter alia* (i) approving .XXX was in violation of ICANN's bylaws and (ii) if .XXX is approved, it must be put out for bid, not given to ICM Registry.¹ The .XXX Factor, Act II. . .

¹ Complaint at 19–20, *Manwin Licensing Intern. V. ICM Registry, L.L.C.*, No. CV11-9514-PSG (JCGx) (C.D. Cal. Nov. 16, 2011).