

ADULT WEBSITES AND THE TOP-LEVEL DOMAIN DEBATE: ICANN’S ADOPTION OF .XXX DRAWS ADULT-INDUSTRY IRE[♦]

ROBERT D. RICHARDS[^] & CLAY CALVERT[®]

INTRODUCTION.....	528
I. THE LONG, STRANGE TRIP OF .XXX: A BRIEF HISTORY OF A CONTROVERSIAL, TOP-LEVEL DOMAIN NAME.....	531
A. Early Rumblings of .XXX and Its Initial Rejection by ICANN.....	532
B. If at First You Don’t Succeed, Try Again . . . and Again	533
C. Giving the Green Light to the Red Light District: Approval of the .XXX TLD and the Immediate Fall Out.....	537
II. AN INSIDE VIEW OF THE .XXX DEBATE: LEADING FIGURES CANDIDLY SPEAK OUT.....	540
A. Key Protagonists in a Protracted Debate	540
B. Joan Irvine.....	543
C. Stuart Lawley.....	546
D. Diane Duke	550
E. Larry Flynt.....	556
III. CONCLUSION	562

[♦] Permission is hereby granted for noncommercial reproduction of this Note in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

[^] John & Ann Curley Professor of First Amendment Studies and Founding Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University, University Park, Pa. B.A., 1983, M.A. 1984, Communications, The Pennsylvania State University; J.D., 1987, The American University. Member, State Bar of Pennsylvania.

[®] Professor & Brechner Eminent Scholar in Mass Communication and Founding Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fl. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The authors thank student Mirelis Torres of the University of Florida’s Levin College of Law and the College of Journalism and Communications for her excellent research that contributed to this article and for reviewing and editing a draft of this article.

INTRODUCTION

After more than a full decade of handwringing, pushback and debate,¹ the California-based Internet Corporation for Assigned Names and Numbers (“ICANN”)² in March 2011 finally approved a .XXX³ top-level domain (“TLD”) that “will only be available to the adult entertainment industry.”⁴ In brief, instead of ending in the traditional “.COM” suffix typically used by business entities on the Internet, an adult entertainment company now will be able to register its website(s) under a “.XXX” ending. The impact of this switch could be immense; by May 2011, adult content accounted for approximately twelve percent of all material on the Internet and there were, according to Steve DelBianco, executive director of NetChoice (a coalition of e-commerce and online leaders), about “400 million adult pages already on the Internet.”⁵

ICM Registry, the driving force behind the new .XXX TLD, claims it is “a financially stable and completely independent entity with no affiliation, current or historic, with the adult entertainment industry.”⁶ It furthermore trumpets the alleged

¹ See *infra* Part I (providing a history on the debate over the .XXX TLD). See also Sarah Jacobsson Purewal, *ICANN Approves .XXX Domain for Adult Entertainment Industry*, PCWORLD, (Mar. 22, 2011, 6:20 AM), http://www.pcworld.com/article/222793/icann_approves_xxx_domain_for_adult_entertainment_industry.html (noting that “ICANN has been debating on the .xxx domain suffix since 2004, and the issue has been pretty hot. It’s not only anti-porn and religious groups who are against the domain suffix; some movers and shakers in the porn industry are also against it.”).

² ICANN was formed in 1998 and “is a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy on the Internet’s unique identifiers.” *About, ICANN*, <http://www.icann.org/en/about> (last visited Oct. 11, 2011). It “is formally a private nonprofit California corporation created, in response to a summoning by U.S. government officials, to take regulatory actions that [the U.S. Department of Commerce] was unable or unwilling to take directly.” A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20 (2000).

³ The “.XXX” suffix often is referred to, in spoken and colloquial language, as “Dot Triple-X.” Joanna Walters, *230,000 Porn Websites Rush to Join .XXX*, OBSERVER (London), Mar. 20, 2011, at 13 (using the term “Dot Triple-X”). For purposes of this article, the authors have left the lower-case designation of “.xxx” intact only when directly quoting it from newspaper articles and emails, rather than altering the quotation. When not quoting from other sources, the authors use the terms “.XXX TLD” and “.XXX” interchangeably to refer to the concept of a .XXX top-level domain.

⁴ Press Release, ICM Registry, *.XXX Adult Entertainment Domain Name Gets the Go Ahead* (July 17, 2011), *available at* <http://www.icmregistry.com/news/welcomeapproval.php>.

⁵ *ICANN Generic Top-Level Domains (gTLD) Oversight Hearing Before the H. Subcomm. on Intellectual Prop., Competition and the Internet*, 112th Cong. 73 (2011) (statement of Steve DelBianco, Executive Director, NetChoice), *available at* http://judiciary.house.gov/hearings/printers/112th/112-37_66155.pdf.

⁶ *Adult Entertainment Domain Name Gets the Go Ahead*, PRWEB (Mar. 18, 2011), <http://www.prweb.com/releases/2011/3/prweb8220448.htm>.

benefits of the .XXX TLD on its website:

Despite a very large online market for adult entertainment, large sections of society do not wish to come into contact with its products and as such .XXX provides both willing consumers of adult entertainment and those who wish to avoid it with an easily identifiable mark the—the end of the web address.⁷

If only it were that simple, and if only all of the leading members of the adult entertainment industry in the United States, including some of its top attorneys, agreed with the supposed advantages of a .XXX TLD. The reality, instead, is that there is strong and strident dissent from some key players and segments of the American adult entertainment industry.

For instance, Michael Klein, president of Larry Flynt's Hustler adult-entertainment empire, told a leading adult-industry trade publication he was "surprised it happened at all with all the objections going on It's unfortunate they decided to approve it."⁸ Paul Cambria, a leading adult industry attorney,⁹ claimed the .XXX TLD raises First Amendment¹⁰ free speech concerns, stating:

As long as speech is legal we don't grade it as according to contentXXX would compartmentalize adult legal speech and that would serve as a crack in the wall for free speech.

.XXX would afford a step toward content-based categorization of otherwise lawful speech. It would also provide a very convenient tool for those who have the power to either censor or prevent lawful speech to be disseminated.¹¹

Diane Duke, head of the adult-entertainment industry trade organization known as the Free Speech Coalition—it is, perhaps, best recognized in legal circles for successfully challenging, before

⁷ .XXX, *Let's Be Adult About it*, BLACKNIGHT SOLUTIONS, <http://www.blacknight.com/register-xxx-domains.html> (last visited Oct. 12, 2011).

⁸ Lyla Katz, *Adult Industry Members Respond to .XXX Approval*, XBIZ NEWSWIRE (Mar. 18, 2011, 5:45 PM), <http://newswire.xbiz.com/view.php?id=131906> (internal quotation marks omitted).

⁹ See generally Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147 (2004) (providing the contents of an in-depth, in-person interview with Cambria conducted by the authors).

¹⁰ The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated eighty-six years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹¹ Katz, *supra* note 8 (internal quotation marks omitted).

the U.S. Supreme Court, a federal statute banning virtual child-pornography¹²—blasted the decision.¹³ As she told the *Washington Post*, “This is putting a red target on us People who are pedophiles and child pornographers are not part of the adult-entertainment system. We have a code of ethics. We do a great job of creating an adults-only space.”¹⁴

It is not just members of the adult entertainment industry, however, who object to the .XXX TLD. Ironically, so too do some family-friendly conservative groups like the Family Research Council, which contends that implementation of .XXX by ICANN legitimizes online pornography.¹⁵ As Steven Hirsch, head of the southern California-based adult-movie company Vivid Entertainment Group, once put it, “this is probably the only time that my industry and folks on the far right agree on something.”¹⁶

Furthermore, the U.S. Department of Commerce criticized ICANN’s approval of the .XXX TLD, with Assistant Secretary of Commerce Lawrence Strickling stating that the “decision goes against the global public interest, and it will open the door to more Internet blocking by governments and undermine the stability and security of the Internet.”¹⁷ Strickling’s comments highlighted the long-standing tension between ICANN’s efforts at independence and its close relationship with the United States government.¹⁸

This timely article examines the debate and controversy surrounding the new .XXX TLD. Part I provides an overview of the protracted history and long-running deliberations surrounding the .XXX TLD, tracing its more-than-decade-long trajectory from initial news media accounts and related coverage through its eventual approval by ICANN in 2011.¹⁹ Part II then features exclusive, first-person commentary provided by both key supporters and high-profile detractors of the .XXX TLD, including proponents Stuart Lawley and Joan Irvine, on the one hand, and opponents Larry Flynt and Diane Duke, on the other.²⁰

¹² See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding unconstitutional, on grounds of facial overbreadth, two provisions of the federal Child Pornography Protection Act of 1996).

¹³ See Ian Shapira, *Coming Soon to a Computer near You*, WASH. POST, Mar. 19, 2011, at A13 (including Duke’s comments).

¹⁴ *Id.* (internal quotation marks omitted).

¹⁵ Christopher Rhoads, *Red-Light District: Plan for Adult Area Sparks a Fight on Control of Web*, WALL ST. J., May 10, 2006, at A1.

¹⁶ *Id.*

¹⁷ Shapira, *supra* note 13.

¹⁸ See generally A. Michael Froomkin, *Almost Free: An Analysis of ICANN’s ‘Affirmation of Commitments,’* 9 J. TELECOMM. & HIGH TECH. L. 187 (2011) (providing an excellent overview and analysis of the relationship between ICANN and the U.S. government).

¹⁹ *Infra* notes 24–87 and accompanying text.

²⁰ *Infra* notes 88–189 and accompanying text.

The comments from this quartet of leading players were gathered by the authors of this article from both e-mail correspondence and, in the case of Mr. Flynt, in-person commentary at Hustler's headquarters in Beverly Hills, California.²¹ Finally, Part III provides a brief conclusion and addresses issues surrounding the actual implementation and operation of a .XXX TLD now that ICANN has, as it were, green-lighted a red-light district²² on the Internet.²³

I. THE LONG, STRANGE TRIP OF .XXX: A BRIEF HISTORY OF A CONTROVERSIAL, TOP-LEVEL DOMAIN NAME

Like any good soap-opera plot, the history of the .XXX TLD pivots on a slow moving and long running saga, punctuated here and there by unexpected twists and turns, and featuring an astonishing alliance between unexpected bedfellows.²⁴ And similar to a soap-opera lothario,²⁵ the individuals behind the .XXX TLD attempted to woo and seduce officials at the non-profit ICANN on multiple occasions, but found themselves spurned on each occasion until a successful San Francisco courting in 2011. The victory for ICM Registry ultimately proved expensive, with *PC Magazine* reporting that by May 2010, "a grand total of \$7 million in legal fees has been spent on the fight, \$5 million from ICM and \$2 million from ICANN."²⁶ This part of the article traces that

²¹ Interview with Larry C. Flynt, Publisher, Hustler magazine, in Beverly Hills, Cal. (July 7, 2011).

²² See *Red-light district definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/red-light+district> (last visited Oct. 11, 2011) (defining the term as "an area or district in a city in which many houses of prostitution are located")

²³ *Infra* notes 190–200 and accompanying text.

²⁴ Paul K. McMasters, *Inside the 1st Amendment: Shall We Construct a Red-Light District on the Internet*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Sept. 4, 2005, at 1D (observing that "pornography fighters and some pornography producers" joined forces to oppose the .XXX TLD).

²⁵ A lothario is "a man whose chief interest is seducing women." *Lothario Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/lothario> (last visited Oct. 11, 2011). As Professor Susan Cannon Harris writes:

Nicholas Rowe wrote *The Fair Penitent* in England in 1703, adapting the plot from Massinger and Fields's *The Fatal Dowry*. In Rowe's play, the beautiful Calista, promised by her father to his protégé, Altamont, has already been seduced by a rake named Lothario. After the wedding, Altamont's friend and brother-in-law Horatio discovers an incriminating letter from Calista to Lothario. Horatio confronts Lothario, who gloats, and then Calista, who denies everything. Altamont refuses to believe Horatio's charges, but later stumbles across Lothario and Calista meeting in a garden; once he has overheard enough, Altamont kills Lothario. Calista repairs to Lothario's tomb to contemplate her misdeeds; learning that her father has been mortally wounded by Lothario's friends, she stabs herself, having just time to implore and receive forgiveness from her father and Altamont before she expires.

Susan Cannon Harris, *Outside the Box: The Female Spectator, The Fair Penitent, and the Kelly Riots of 1747*, 57 THEATRE J. 33, 48 (2005) (citations omitted).

²⁶ Brian Heater, *Comments Sought on .XXX Domain Debate*, PC MAGAZINE (May 7, 2010, 2:34 PM), <http://www.pcmag.com/article2/0,2817,2363531,00.asp>.

costly history chronologically through news media coverage of the .XXX TLD debate, providing necessary background for a better understanding of the arguments set forth in Part II by a quartet of key protagonists.

A. *Early Rumblings of .XXX and Its Initial Rejection by ICANN*

More than a decade ago, back in November 2000, the *Wall Street Journal* reported that ICANN was considering adding more than a dozen possible new suffixes for Internet addresses.²⁷ The newspaper noted, however, that ICANN officials at the time “rejected ‘xxx’ addresses for adult Web sites. Although supporters contend that designation would make it easier to block access to those sites for children, [ICANN] said there was no mechanism to force adult sites to migrate from popular ‘com’ Web addresses to ‘xxx.’”²⁸ Rejection came despite what the *Los Angeles Times* in July 2000 had called “strong interest in a suffix like .xxx or .sex for adult material.”²⁹ As described later in this section, it would not be the only time that ICANN turned down the .XXX TLD.

The .XXX TLD was not alone, however, in being rebuffed by ICANN in 2000. The *New York Times* reported that other potential suffixes rejected by ICANN’s board included .web, .kids, .union, .health, .travel and .geo.³⁰ On the other hand, ICANN “selected .info and .biz for general use and .pro for professionals. Also added were .name for personal Web sites, .museum for museums, .aero for airline groups and .coop for business cooperatives.”³¹

All totaled, ICANN received about forty-five applications in 2000 for more than one hundred new top-level suffixes, with each application, including that for .XXX, costing \$50,000.³² Despite such a steep fee, ICANN simply “dismissed [the .XXX TLD] outright,”³³ and the entire selection process for new top-level domain names in 2000 was widely criticized.³⁴

The original application for both the .XXX TLD and .KIDS TLD alternative was submitted in October 2000 by ICM Registry,

²⁷ Ted Bridis, *E-Business: Internet Technical Manager Narrows Field of Address Suffixes*, WALL ST. J., Nov. 13, 2000, at B12.

²⁸ *Id.*

²⁹ Karen Kaplan, *The Cutting Edge: Focus on Technology; ‘Dot-Coms’ May Be Sharing Web with ‘Dot-Kids’ or ‘Dot-XXX’*, L.A. TIMES, July 10, 2000, at 1.

³⁰ Chris Gaither, *7 New Domains Are Chosen to Join the Popular .com*, N.Y. TIMES, Nov. 17, 2000, at C4.

³¹ *Id.*

³² Dina ElBoghdady, *Dot-What?; Decision Near After Rancorous Debate on New Internet Suffixes*, WASH. POST, Nov. 15, 2000, at E1.

³³ *Id.*

³⁴ See William Glanz, *Internet’s Domains Chooser Criticized*, WASH. TIMES, Feb. 9, 2001, at B11 (noting that “critics have howled that ICANN’s work to pick the new suffixes was veiled in secrecy, that the nonrefundable application fee of \$50,000 was too high and that applicants faced subjective criteria.”).

Inc. of Toronto, Canada.³⁵ Making the argument in behalf of both proposals that year was Michael Palage, chief policy officer of ICM Registry, who proclaimed:

The new domains are a viable alternative to mandatory filtering of any kind These TLDs would allow parents, schools and libraries to automatically identify and filter access to the Internet's .xxx red-light district, a logical step that is now supported both by organizations seeking to protect children and adult content providers. At the same time, the .kids domain would be the green-light area with safe sites for children under the age of 12 that focus on education, entertainment, community organizations and services.³⁶

In sharp contrast, the year 2000 also marked the first time when censorship and First Amendment concerns were raised about implementation of a .XXX TLD. For instance, attorney Vishva V. Ramlall of the Information and Technology Trade Policy Division of the Department of Foreign Affairs and International Trade observed that “[f]ree speech advocates contend segregated TLDs would enable undemocratic regimes to censor TLDs. A dot-xxx or dot-sex gTLD, by segregating pornography, may prevent children from accessing it. However, ‘slippery slope’ constitutional arguments related to censorship and freedom of expression are also at stake.”³⁷

B. *If at First You Don't Succeed, Try Again . . . and Again*

Although the .XXX TLD failed to gain ICANN's approval in late 2000, the suffix was soon being offered by a Pasadena, California, company called New.net in March 2001 for an annual fee of \$25.³⁸ New.net was described at the time by one leading magazine as “the first challenger to ICANN with a chance of reaching critical mass. It is backed by Idealab!, a well-financed, though not always successful, dotcom incubator”³⁹

ICM Registry's efforts at taking a second shot with the .XXX TLD at ICANN began in 2003 when, as the *Wall Street Journal* reported, a British entrepreneur living in Jupiter, Florida, named

³⁵ *TLD Application for .KIDS and .XXX*, ICANN (Oct. 11, 2000), <http://www.icann.org/en/tlds/kids3>. See also *ICM Registry Proposal for .XXX and .KIDS Domains Provides New Option in Internet Filtering Controversy*, BUS. WIRE, Oct. 18, 2000, at 1, available at ProQuest Document ID 62712713.

³⁶ *ICM Registry Proposal for .XXX and .KIDS*, *supra* note 35 (internal quotation marks omitted).

³⁷ Vishva Ramlall, *Opening Statement: Cybersquatting Is Burgeoning*, LAWS. WKLY., Sept. 29, 2000.

³⁸ *Business: Domain Strain*, ECONOMIST, Mar. 10, 2001, at 64.

³⁹ *Id.*

Stuart Lawley entered the scene.⁴⁰ Lawley claimed to have no connection to the adult entertainment industry, and he told the *Wall Street Journal* that he first became “interested in domain names in 2003 at his son’s school in Florida, when he met a parent involved in [ICANN] affairs.”⁴¹

In 2004, Stuart Lawley first gained national news coverage for being associated with the .XXX TLD. That’s when the *New York Post* described him as “an English businessman who used \$1 million he earned from selling another dot-com to lobby for the adoption of triple-x.”⁴² The *Post* article intimated a distinct profit motive for Lawley, noting that he “will make back his investment seven times over.”⁴³ More favorably framed, a *Voice of America* report that same year quoted Lawley for the proposition that the .XXX TLD “will both protect families and children, while at the same time allow the online, adult-entertainment website operators to responsibly self-organize and self-regulate[.]”⁴⁴

In 2004, ICM submitted to ICANN a new proposal for a sponsored .XXX TLD (“sTLD”).⁴⁵ As ICANN describes that 2004 application on its website:

an sTLD must have a sponsoring organization to oversee the policy development for the sTLD, ICM stated that the International Foundation for Online Responsibility, or the IFFOR, would serve in that role. The Sponsored Community was defined as “the responsible online adult-entertainment community.” The “online adult-entertainment community” is further defined as those individuals, businesses, and entities that provide sexually-oriented information, services, or products intended for consenting adults or for the community itself.⁴⁶

In June 2005, ICANN gave tentative approval to ICM’s application for the sponsored .XXX TLD.⁴⁷ Formal approval, however, was soon delayed after the U.S. Department of Commerce reportedly “received nearly 6,000 letters and e-mails

⁴⁰ Rhoads, *supra* note 15.

⁴¹ *Id.*

⁴² Stephen Lynch, *Site Seeks to Dominate Porn Viewing*, N.Y. POST, Mar. 24, 2004, at 33.

⁴³ *Id.*

⁴⁴ Ted Landphair, *New Effort Aims to Give Pornography Sites Separate Domain*, VOICE OF AMERICA, Mar. 25, 2005, available at www.usict.org/docs/voiceofamerica.pdf.

⁴⁵ See *Chronological History of ICM’s Involvement with ICANN as of 31 March 2011*, ICANN, 1 (Mar. 31, 2011), <http://www.icann.org/en/tlds/agreements/xxx/history-icm-involvement-31mar11-en.pdf>.

⁴⁶ *Id.*

⁴⁷ See *Talk of the Nation: Declan McCullagh Discusses .XXX Added as an Internet Domain Suffix* (National Public Radio broadcast June 2, 2005), available at Proquest Document ID 848293271 (describing the ICANN decision and the controversy surrounding the .XXX TLD).

expressing concerns about the impact of pornography on families and children and objecting to setting aside a domain suffix for it”⁴⁸ As the *Los Angeles Times* punningly put it, “the Bush administration is flashing a yellow light at plans to offer a red-light district on the Internet.”⁴⁹ Lawley, however, was not amused, and he expressed frustration at the delay, stating the following:

[T]his matter has been before ICANN for five years, and very actively and publicly debated for the past 18 months We are, to say the very least, disappointed that concerns that should have been raised and addressed weeks and months ago are being raised in the final days.⁵⁰

Lawley’s ICM Registry, in fact, filed federal Freedom of Information Act⁵¹ requests on October 18, 2005, to the Commerce Department and State Department seeking all records from March 1, 2005, through the date of the request relating to the .XXX TLD debate.⁵²

Opposition to the .XXX TLD continued to mount later in 2005, with Patrick Trueman, senior legal counsel for the conservative-oriented Family Research Council, opining in a *USA Today* column that “creating a designated domain for pornography would simply have the effect of legitimizing much material that is likely illegal.”⁵³ Expressing a decidedly non-adult industry viewpoint against the .XXX TLD, Trueman argued the following:

ICANN does not pretend that the .xxx domain would clean up the .com domain, and the agency has no enforcement powers to make this happen. Pornographers would simply expand to .xxx, thus perhaps doubling the number of porn sites and doubling their menace to society. Thus the argument that .xxx would benefit children is without any basis in fact.⁵⁴

By December 2005, with opposition growing,⁵⁵ the one-time

⁴⁸ *Government Urges Delay in ‘XXX’ Domain*, USA TODAY, Aug. 16, 2005, http://www.usatoday.com/tech/news/techpolicy/2005-08-16-xxx-domain_x.htm.

⁴⁹ Chris Gaither, *Opposition Puts Domain for Net Porn on Hold*, L.A. TIMES, Aug. 17, 2005, at C1.

⁵⁰ *Government Urges Delay in ‘XXX’ Domain*, *supra* note 48 (internal quotation marks omitted).

⁵¹ 5 U.S.C. § 552 (2006).

⁵² See *ICM Registry, L.L.C. v. U.S. Dept. of Commerce*, 2007 U.S. Dist. LEXIS 22853, *4-5 (D.D.C. Mar. 29, 2007) (describing the precise terms of the FOIA request).

⁵³ Patrick Trueman, *.XXX Would Legitimize Porn*, USA TODAY, Sept. 15, 2005, at A12.

⁵⁴ *Id.*

⁵⁵ See, e.g., Charles Arthur, *The Geek: Why Creating a Red-Light District on the Net Won’t Work*, INDEPENDENT (London), June 8, 2005, at 38, available at

delay was transformed into a formal decision by ICANN chairman Vint Cerf to drop the .XXX TLD altogether from ICANN's agenda for an upcoming meeting, thus dealing what the *London Times* called "a blow" to Lawley.⁵⁶ Elly Plooij-van Gorsel, senior counsel for Belgium-based Blueprint Partners, contended that the .XXX TLD "plan became a casualty of US politics."⁵⁷

But that did not end the saga. In May 2006, ICANN formally rejected the .XXX TLD once again, this time by a nine to five vote.⁵⁸ National Public Radio ("NPR") reported at the time that "[t]here will be no formal red light district on the Internet. [ICANN] has rejected giving porn web sites a .xxx suffix. An unlikely coalition of some adult web sites and religious groups rejected the idea."⁵⁹ As the NPR broadcast noted, "many of the adult web sites were opposed to this idea. They claimed that it came down to a free speech issue, that they shouldn't be shunted off to an area that could end up being cut off from their prospective customers."⁶⁰ Christian and conservative groups also opposed the idea, the NPR report added, because of the following:

They weren't happy about the legitimacy that they said this formal designation would give to pornography. And because there would be no requirement for the adult web sites to migrate over to this new area on the Web, this new domain, if you will, the anti-pornography groups said that this would just have ended up adding to more of what's already out there, and it would have just handed these sites an easy promotional boost.⁶¹

ICM Registry appealed the decision,⁶² but in March 2007 ICANN once again rejected, by a nine-to-five vote, ICM Registry's application for a .XXX TLD.⁶³ Shortly before the vote, the Canadian government came out against the .XXX TLD, warning that the new top-level domain could put ICANN "in the tricky

<http://www.independent.co.uk/news/science/charles-arthur-the-geek-493435.html> (calling the plan for a .XXX TLD "fatally flawed" and arguing, instead, in favor of a .KIDS TLD).

⁵⁶ Kieren McCarthy, *ICANN Drops Plans for X-Rated Domain*, *TIMES* (London), Dec. 2, 2005, at 65.

⁵⁷ Elly Plooij-van Gorsel, *Will Nations Resist Superpower Pressure and Pass the .XXX Test?*, *FINANCIAL TIMES* (London), Mar. 25, 2006, at 10.

⁵⁸ Victoria Shannon, *Sex, Politics and the Internet*, *INT'L HERALD TRIB.* (Paris), May 22, 2006, at 10.

⁵⁹ *Day to Day: No Web 'Red Light' District* (National Public Radio broadcast May 11, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5398650>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Shannon, *supra* note 58, at 10.

⁶³ Thomas Crampton, *Agency Rejects .XXX Suffixes for Sex-Related Sites on Internet*, *N.Y. TIMES*, Mar. 31, 2007, at C2.

business of content regulation, having to decide which sites are pornographic and which are not.”⁶⁴ According to the *New York Times*, the ICANN board members who voted against it “expressed concern that it would compel [ICANN] to become involved in regulating content, among other issues.”⁶⁵ Stuart Lawley fired back that the vote against the .XXX TLD was “not supportable for any of the reasons articulated by the board.”⁶⁶

ICM Registry, in fact, was so upset by the alleged political machinations and intermeddling that it filed a federal lawsuit arguing that “the United States Government, through the Departments of State and Commerce and Commerce’s National Telecommunications and Information Administration, intervened behind the scenes to urge ICANN to reject the application, responding to pressure from well-connected and socially conservative groups such as James Dobson’s Focus on the Family.”⁶⁷ ICM Registry made federal Freedom of Information Act⁶⁸ requests to the Departments of State and Commerce “in an effort to ascertain their involvement with the rejection of its .xxx application. The departments released many documents, but withheld or redacted others as within the deliberative process privilege.”⁶⁹ The government’s motion for summary judgment against ICM Registry was granted in March 2008.⁷⁰

C. *Giving the Green Light to the Red Light District: Approval of the .XXX TLD and the Immediate Fall Out*

The Free Speech Coalition (“FSC”), the adult entertainment industry’s leading trade organization, staged a protest in March 2011 in San Francisco, outside of ICANN’s five-day meeting⁷¹ at the Westin Hotel against possible adoption of the .XXX TLD.⁷² “We can unequivocally say that the industry does not support it,” proclaimed Diane Duke, executive director of the FSC, at a press conference.⁷³ According to *PC Magazine*, Duke also stated that the FSC “would not be opposed to the use of .XXX if it were one of

⁶⁴ *Web Overseer Votes down Dot-XXX for Adult Sites*, WALL ST. J., Mar. 31, 2007, available at ProQuest Document ID 1247527191.

⁶⁵ Crampton, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ ICM Registry, L.L.C. v. U.S. Dept. of Commerce, 538 F. Supp. 2d 130, 132 (D.D.C. 2008).

⁶⁸ 5 U.S.C. § 552 (2006).

⁶⁹ *ICM Registry*, 53 F. Supp. 2d at 132.

⁷⁰ *See id.* at 138 (concluding that “[f]or the reasons set forth in the accompanying memorandum, defendants’ motion for summary judgment is GRANTED”).

⁷¹ *See generally* Lynn Stanton & Brian Hammond, *ICANN Board Approves ‘.XXX’ Registry Agreement*, TELECOMM. REP., Apr. 1, 2011, at 17 (providing an overview of ICANN’s public meeting in San Francisco, which featured a speech by former President Bill Clinton).

⁷² Mark Hachman, *Update: Adult Industry Protests .XXX Domain*, PC MAGAZINE (Mar. 17, 2011, 4:52 PM), <http://www.pcmag.com/article2/0,2817,2382185,00.asp>.

⁷³ *Id.* (internal quotation marks omitted).

the generic top-level-domains . . . that are being proposed, rather than a domain that singled out and isolated the adult industry, and were run by . . . a for-profit corporation.”⁷⁴

The FSC was, once again, joined by a rather odd bedfellow in its efforts to halt adoption of the .XXX TLD. As the *National Review* reported in 2010:

A strange alliance has formed between some porn and Christian-conservative groups. The former don't like the new domain name because they fear it will encourage censorship down the road; the latter oppose it because it is voluntary, which means that porn sites can still exist in the .com universe, and because it will further legitimize porn.⁷⁵

Despite such opposition, a formal “.XXX Registry Agreement” was reached between ICANN and ICM Registry in March 2011 in San Francisco.⁷⁶ An ICANN spokesperson stated that “[t]his decision represents a difficult, careful balance, weighing the extensive community advice both for and against.”⁷⁷

Although ICANN approved the .XXX TLD in March 2011, the vote was not unanimous—nine members of the ICANN board voted to approve it, three members voted against it and four, apparently due to conflicts of interest, abstained.⁷⁸ Despite the split vote, the *New York Times* called the decision “a big win for ICM Registry, a Florida-based company that first applied for the dot-xxx domain in 2004. ICM will oversee the domain and profit from it.”⁷⁹ It was this latter point—that the .XXX TLD was little more than a revenue-generating engine for ICM Registry—that bothered some. As the *Associated Press* reported, “ICM Registry and its CEO, Stuart Lawley, who has led the fight for ICANN's approval of ‘.xxx,’ stand to profit handsomely from the rollout of ‘.xxx’ websites - because he will be in charge of collecting fees for the use of the new domains.”⁸⁰ ICANN reported there already were more

⁷⁴ *Id.*

⁷⁵ Jonah Goldberg & Nick Schulz, *Gated or X-Rated?*, NAT'L REV., July 19, 2010, available at <http://www.nationalreview.com/articles/243449/gated-or-x-rated-jonah-goldberg>.

⁷⁶ See *.XXX Registry Agreement*, ICANN (Mar. 31, 2011), available at <http://www.icann.org/en/tlds/agreements/xxx/xxx-agreement-31mar11-en.htm>.

⁷⁷ Joseph Menn, *Approval Given for XXX Domain Names*, FIN. TIMES (London), Mar. 19, 2011, at 12.

⁷⁸ Cheryl Wetzstein, *Despite Objections, .XXX OK'd for Internet Domain Names*, WASH. TIMES, Mar. 21, 2011, at A6.

⁷⁹ Miguel Helft, *Pornography Sites Will Be Allowed to Use .XXX Addresses*, N.Y. TIMES, Mar. 19, 2011, at B5.

⁸⁰ *Domain '.XXX' Approved for Web Porn Sites*, USA TODAY, Mar. 18, 2011, http://www.usatoday.com/tech/news/2011-03-18-porn-domain_N.htm [hereinafter *Domain '.xxx' Approved*].

than 100,000 reservations for a .XXX TLD.⁸¹

The U.S. government came out against ICANN's decision. Lawrence Strickling, assistant Department of Commerce secretary, stated "[w]e are disappointed that ICANN ignored the clear advice of governments worldwide, including the U.S. . . . This decision goes against the global public interest, and it will open the door to more Internet blocking by governments and undermine the stability and security of the Internet."⁸²

The fears of censorship quickly became reality after ICANN approved the .XXX TLD in March 2011, with India's government proclaiming later that same month that "India, along with many other countries from the Middle East and Indonesia, opposed the grant of the domain in the first place, and we would proceed to block the whole domain, as it goes against the IT Act and Indian laws."⁸³ Similarly, Saudi Arabia vowed to shut off access in that country to all .XXX sites.⁸⁴

In May 2011, just two months after .XXX TLD gained ICANN's approval, the U.S. House Judiciary Subcommittee on Intellectual Property, Competition and the Internet⁸⁵ held a hearing called "ICANN Generic Top-Level Domains (gTLD) Hearing."⁸⁶ That's when Joshua Bourne, president of the Coalition Against Domain Name Abuse, blasted adoption of the .XXX TLD, telling the subcommittee's members the following:

[I]ronically, the recent roll out of .XXX has created a tremendous economic opportunity for those interested in selling domain names and, indirectly, ICANN for the fees it will receive. Not even the adult industry wanted .XXX. They had already established a brand under a separate extension, most likely .COM, but now were forced to consider defensive registration under .XXX. This challenge of defensive registrations also challenged all brand owners. Imagine Disney

⁸¹ *The Week So Far*, NEW STATESMAN, Mar. 31, 2011, at 10.

⁸² Shapira, *supra* note 13 (internal quotation marks omitted).

⁸³ Francis Tan, *India to Block .XXX Top-Level Domain*, NEXT WEB ASIA (Mar. 24, 2011), <http://thenextweb.com/asia/2011/03/24/india-to-block-xxx-top-level-domain> (internal quotation marks omitted).

⁸⁴ Shapira, *supra* note 13.

⁸⁵ See Committee on Judiciary Subcommittee Jurisdiction, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, <http://judiciary.house.gov/about/subcommittee.html> (last visited Oct. 11, 2011) (identifying the members of the Subcommittee on Intellectual Property, Competition, and the Internet, and providing this subcommittee "shall have jurisdiction over the following subject matters: copyright, patent, trademark law, information technology, antitrust matters, other appropriate matters as referred by the Chairman, and relevant oversight").

⁸⁶ ICANN *Generic Top-Level Domains (gTLD) Hearing Before the H. Subcomm. on Intellectual Prop., Competition and the Internet*, 112th Cong. (2011), available at http://judiciary.house.gov/hearings/printers/112th/112-37_66155.PDF.

executives considering the prospect of Disney.XXX.⁸⁷

With this brief history of the .XXX TLD in mind, the Article turns in the next part to exclusive, current commentary gathered by the authors from stakeholders in and opponents of the controversial top-level domain name.

II. AN INSIDE VIEW OF THE .XXX DEBATE: LEADING FIGURES CANDIDLY SPEAK OUT

This part of the Article has five sections, the first of which provides biographical information about each of the four individuals queried by the authors regarding the .XXX TLD debate. The remaining four sections set forth, in question-and-answer fashion, the opinions and remarks of those individuals.

A. *Key Protagonists in a Protracted Debate*

On April 19, 2011, *Adult Video News*, a respected trade publication for the adult entertainment industry, reported that Joan Irvine, “the longtime executive director of the Association of Sites Advocating Child Protection (“ASACP”),” was leaving that post to become executive director of the International Foundation for Online Responsibility (“IFFOR”).⁸⁸

For nine years, Irvine headed ASACP, an organization that “battles child pornography through its CP Reporting Hotline and helps parents prevent children from viewing age-restricted material online with the Restricted To Adults - RTA Website Label.”⁸⁹ As the authors of this Article noted in a 2008 article, “[w]hat sets ASACP apart from the other organizations with similar missions is its sponsorship. The funding for the organization comes primarily from companies in the adult entertainment industry, including powerful players like Hustler, Playboy, and Wicked Pictures.”⁹⁰

During her tenure at ASACP, Irvine characterized the adult

⁸⁷ *Id.* at 78 (statement of Joshua S. Bourne, President, Coalition Against Domain Name Abuse).

⁸⁸ *Joan Irvine Resigns ASACP to Become Exec. Director of IFFOR*, AVN MEDIA NETWORK (Apr. 19, 2011, 3:43 PM), <http://business.avn.com/articles/technology/Joan-Irvine-Resigns-From-ASACP-Takes-Position-with-IFFOR-433110.html>.

⁸⁹ Association of Sites Advocating Child Protection Mission Statement, <http://www.asacp.org/> (last visited Oct. 16, 2011) (noting that “[f]ounded in 1996, ASACP is a non-profit organization dedicated to online child protection”).

⁹⁰ Robert D. Richards & Clay Calvert, *Untangling Child Pornography from the Adult Entertainment Industry: An Inside Look at the Industry's Efforts to Protect Minors*, 44 CAL. W. L. REV. 511, 518–19, 521 (2008) (citations omitted) (noting that “ASACP is a key player in the fight against child pornography and a leader in preventing minors from viewing inappropriate content. In September 2007, the organization reached the 250,000 mark in terms of processing reports of child pornography.”).

entertainment business as “very supportive”⁹¹ of ASACP’s efforts, but added that it took a while for the relationship to flourish, as the industry “needed to see that ASACP was doing what it said it was going to do and that it was going to survive.”⁹² In her new post, Irvine likely will need to expend some of the goodwill and capital she accrued at ASACP with leading adult industry figures in order to persuade the more skeptical members of that business that IFFOR will keep their best interests in mind. Unquestionably, as this Article described in Part I, she has her work cut out for her.⁹³

IFFOR will manage the new .XXX TLD.⁹⁴ Its organizational structure calls for a policy council to report to its board of directors,⁹⁵ with one of the council’s main objectives being to “foster communication between the Sponsored Community and other Internet stakeholders.”⁹⁶ Indeed, the council will have five members from the sponsored community, joined by a child-safety expert, a free-expression expert, a privacy and security expert and an ICM representative.⁹⁷ The council’s other mandates are to protect free expression and develop responsible business practices on a wide array of related issues.⁹⁸

Given the vociferous opposition from a segment of the adult entertainment industry described in Part I, Irvine undoubtedly faces contentious times ahead. She makes it clear, however, in her responses to the questions posed by the authors that she possesses the right credentials for the position and stands ready to do what it takes.⁹⁹

Irvine will not be battling alone. Her new colleague, Stuart Lawley, chairman and chief executive officer of ICM Registry, who also serves as chairman of IFFOR, brings to the issue considerable Internet experience, along with a controversial relationship with

⁹¹ *Id.* at 532.

⁹² *Id.*

⁹³ *See supra* notes 8–16 and accompanying text.

⁹⁴ INTERNATIONAL FOUNDATION FOR ONLINE RESPONSIBILITY (“IFFOR”), <http://www.iffor.org> (last visited Oct. 11, 2011) (noting that the domain “will be managed in accordance with the provisions of this charter . . . and the bylaws of the International Foundation for Online Responsibility”).

⁹⁵ Organizational Chart, IFFOR, <http://www.iffor.org/bio/chart.html> (last visited Oct. 11, 2011).

⁹⁶ ICM Registry Policy, attachment A, IFFOR, 1 (July 26, 2010), <http://www.iffor.org/docs/appendix-a-iffor-pdp-26jul10-en.pdf> (IFFOR Policy Council and Policy Development Process).

⁹⁷ *Id.*

⁹⁸ *Id.* (including “practices designed to combat child pornography, facilitate user choice and parental control regarding access to online adult entertainment, and protect the privacy, security, and consumer rights of consenting adult consumers of online entertainment goods and services”).

⁹⁹ Email from Joan Irvine, Exec. Dir., International Foundation for Online Responsibility, to Robert D. Richards, John & Ann Curley Professor of First Amendment Studies, Pennsylvania State University (May 11, 2011, 14:14 EDT) (on file with authors).

key players in the mainstream adult entertainment industry. Nevertheless, Lawley dismisses the reach and impact of his critics, asserting “[t]he opposition has been very small and very vocal It has been completely overblown.”¹⁰⁰ In fact, he calls the new domain “a win for everyone including those who want to view adult material, those who produce it and those who want to stay away from it.”¹⁰¹

Lawley is no stranger to entrepreneurial undertakings; his biography on the IFFOR website claims he “has developed and successfully managed a number of UK and US businesses in office technology and the Internet.”¹⁰² An engineer by education, Lawley also “is principal owner, Chairman & CEO of a National Electronic Health Records business, an Electronic Home Automation business and is also a lead investor and Director of a well known Multimedia Online Game Playing business.”¹⁰³ In response to the authors’ questions, Lawley addresses his detractors’ concerns and dismisses what he sees as mischaracterizations of the .XXX TLD.¹⁰⁴

Irvine and Lawley are squaring off against formidable opponents within the adult entertainment industry, including the FSC, the self-described “trade association for the adult entertainment industry.”¹⁰⁵ The FSC’s executive director, Diane Duke, has been highly critical of the .XXX TLD, telling CNN in April 2011 that “[t]he Internet community and the sponsorship community want no part of this” and that the .XXX TLD “was nothing but a money grab in the name of ‘child protection.’”¹⁰⁶

¹⁰⁰ Helft, *supra* note 79.

¹⁰¹ Todd Etshman, *Domain Name for Adult Sites Makes IDing, Blocking Easier*, DAILY RECORD (Rochester, N.Y.), Apr. 19, 2011 (observing that the ICM Registry maintains that “the introduction of .xxx creates a credible self-regulated forum for all stakeholders to discuss and actively respond to concerns about online adult entertainment.”).

¹⁰² Biography of Stuart Lawley, IFFOR, <http://iffor.org/bio/lawley.html> (last visited Oct. 16, 2011).

¹⁰³ *Id.*

¹⁰⁴ Email from Stuart Lawley, Chairman and Chief Exec. Officer, ICM Registry and Chairman, International Foundation for Online Responsibility, to Robert D. Richards, John & Ann Curley Professor of First Amendment Studies, Pennsylvania State University (May 11, 2011, 14:14 EDT) (on file with authors).

¹⁰⁵ *Welcome Letter*, FREE SPEECH COAL., <http://www.freespeechcoalition.com/about-us.html> (last visited Oct. 11, 2011) (noting that the FSC’s “members consist of a broad range of adult businesses from producers and webmasters to manufacturers, retailers and many, many more.”). For an in-depth discussion of the work of the Free Speech Coalition, see Clay Calvert & Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 CARDOZO ARTS & ENT. L.J. 247 (2004) (discussing, inter alia, the landmark U.S. Supreme Court decision that bears the organization’s name, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)).

¹⁰⁶ *FSC’s Duke Debates Attorney Robert Corn-Revere on CNN*, AVN MEDIA NETWORK (Apr. 20, 2011, 3:05 PM), <http://business.avn.com/articles/technology/FSC-s-Duke-Debates-Attorney-Robert-Corn-Revere-on-CNN-433307.html> (observing that “[t]he domain is the first to categorize websites by content, setting a negative precedent for fragmentation of the Internet.”).

Duke disparaged ICANN for disregarding an “overwhelming outpouring of opposition from the adult entertainment industry—the supposed sponsorship community.”¹⁰⁷ She also believes that ICANN has “dismissed the ‘interests of free speech on the Internet.’”¹⁰⁸ In her responses to the authors’ questions, Duke provides the details of why the adult industry members she represents so vehemently oppose the .XXX TLD.¹⁰⁹

One of those adult industry titans who starkly objects to the domain is Hustler chairman and founder Larry Flynt. Flynt is not one to shy away from controversy, particularly if it involves the business that has earned him a handsome living or the First Amendment that protects his ability to practice his craft, which he so staunchly defends.¹¹⁰ With the .XXX TLD, he has encountered both. Before the domain was approved, Flynt weighed in with ICANN, submitting correspondence in opposition that called the creation of the .XXX designation “a bad idea.”¹¹¹ Flynt contended that “[i]t will lead to unwarranted and unwanted regulation of the adult industry and increased censorship.”¹¹² From a business perspective, Flynt noted that “[t]he adult industry has been hit hard by copyright infringement and the recession and especially now, we don’t need to spend money we don’t have on a product we don’t want.”¹¹³

During the in-person interview with the authors of this article, Flynt derided the .XXX TLD as needless expenditure of fiscal resources for the adult industry, as well as a threat to the First Amendment.

With this background in mind, the Article now turns to the remarks of Joan Irvine, Stuart Lawley, Diane Duke and Larry Flynt, respectively.

B. *Joan Irvine*

QUESTION: Without question, the .XXX TLD is one of the most controversial issues that the adult industry has grappled with in recent years. What made you want to step into the fray in such a highly visible position?

¹⁰⁷ *Domain ‘.XXX’ Approved*, *supra* note 80.

¹⁰⁸ *Id.*

¹⁰⁹ Email from Diane Duke, Exec. Dir., Free Speech Coalition, to Robert D. Richards, John & Ann Curley Professor of First Amendment Studies, Pennsylvania State University (June 9, 2011, 17:26 EDT) (on file with authors).

¹¹⁰ See generally Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 *COMMLAW CONSPECTUS* 159 (2001) (providing an in-depth feature on Flynt and including his remarks to a series of questions posed by the authors).

¹¹¹ Letter from Larry Flynt, founder and Chairman of Hustler and Larry Flynt Publications, to ICANN (Apr. 2006) (copy on file with the authors).

¹¹² *Id.*

¹¹³ *Id.*

IRVINE: It was a difficult decision to leave ASACP after so many years but yet a very easy decision to join IFFOR. ICANN approved ICM Registry's .XXX application, so .XXX was here—whether some people like it or not. I am pragmatic. I thought it was important that someone who understands the adult entertainment industry helps lead the policy development at IFFOR. I had nine successful years of experience doing this at ASACP and helping the industry to protect their business by protecting children.

ASACP developed technology to monitor member sites, a website meta-tag (“RTA”)¹¹⁴ that over 4.5 million sites have implemented, and Best Practices.¹¹⁵ So many adult companies already know the business benefits of such initiatives.

I thought that leading IFFOR was an interesting opportunity to use my experience on a broader and more international platform and to address other areas of Internet safety that was not within the narrower ASACP child protection mission.

In addition, when I worked at ASACP it was frustrating that most mainstream companies avoided public association with the adult industry even though these companies obtained substantial revenue from the industry.¹¹⁶ Even just a few weeks into my new position, I am amazed at the large mainstream companies that want to meet with me and potentially partner on some of the IFFOR initiatives. This will result in a business win-win for all.

QUESTION: Some proponents of the .XXX TLD contend that it will be akin to a “Better Business Bureau”¹¹⁷ for the adult industry—a “Good Housekeeping Seal of Approval,”¹¹⁸ so to speak. Do you see it that way?

¹¹⁴ RESTRICTED TO ADULTS, <http://www.rtalabel.org> (last visited Oct. 11, 2011) (noting that the “label was created by the Association of Sites Advocating Child Protection . . . to better enable parental filtering, and to demonstrate the online adult industry’s commitment to helping parents prevent children from viewing age-inappropriate content.”).

¹¹⁵ See Industry Best Practices, ASS’N OF SITES ADVOCATING CHILD PROTECTION, http://www.asacp.org/index.php?content=best_practices (last visited Oct. 11, 2011) (describing how “ASACP, in conjunction with Industry leaders, has developed these recommended Best Practices”).

¹¹⁶ Cf. Richards & Calvert, *supra* note 90, at 530 (discussing how ASACP must work “to gain the respect of some of the law enforcement agencies” given its connection to the adult entertainment industry).

¹¹⁷ See *Vision, Mission and Values*, BETTER BUS. BUREAU, <http://www.bbb.org/us/BBB-Mission/> (last visited Oct. 11, 2011) (noting its mission as “[a]n ethical marketplace where buyers and sellers can trust each other”).

¹¹⁸ See About the Good Housekeeping Seal, GOOD HOUSEKEEPING, <http://www.goodhousekeeping.com/product-testing/history/about-good-housekeeping-seal> (last visited Oct. 11, 2011) (observing that “*Good Housekeeping* maintains good taste and exercises strict editorial judgment as to products it will accept for advertising in the printed magazine and in reviewing all of the advertising copy it publishes.”).

IRVINE: Yes. There are many inaccurate and downright false perceptions about many of the providers of online adult entertainment. DotXXX is a proactive move by certain members of the adult entertainment industry to address many of those misconceptions and to try to garner more willing consumers of adult entertainment online.

QUESTION: What policy areas do you envision as top priorities for IFFOR in the coming months?

IRVINE: The baseline policies are already set¹¹⁹ and these will be the policies that the TLD will launch with. IFFOR's mission in the near term is more outreach and education to all stakeholders concerning the true nature of dotXXX. In due course, the Policy Council will address any policies they wish to under the laid down Policy Development Process.¹²⁰ Plus, one is talking about the Internet and technology, which is always changing. It is the responsibility of IFFOR to develop policies around such changes so it is a win-win for all.

QUESTION: IFFOR is being set up as a completely separate entity from ICM Registry. Yet, it will be funded by a portion (\$10) of each domain registration fee. How do you intend to ensure that ICM Registry stays out of the .XXX policymaking agenda?

IRVINE: ICM has only one seat out of nine on the Policy Council and it is omitted from some of the voting thresholds within IFFOR. ICM purely has its contract between itself and IFFOR to adhere to.¹²¹

QUESTION: Some of the adult industry leaders and their attorneys have voiced concern that the .XXX TLD is a precursor to censorship.¹²² Indeed, some countries have already indicated they will ban the domain.¹²³ Is there anything IFFOR can do in its policymaking to allay those fears?

IRVINE: DotXXX is a voluntary domain and will remain that way. ICM registry supplied ICANN with a legal analysis of this question

¹¹⁹ See ICM Registry Policy, app. B, IFFOR (July 26, 2010), <http://www.iffor.org/docs/appendix-b-baseline-policies-26jul10-en.pdf> (IFFOR Baseline Policies).

¹²⁰ See ICM Registry Policy, attachment A, *supra* note 96.

¹²¹ See Sponsoring Organization Agreement, ICANN (July 26, 2010), <http://www.icann.org/en/tlds/agreements/xxx/iffor-sponsoring-organization-agreement-26jul10-en.pdf>.

¹²² See *supra* notes 8, 11, and accompanying text.

¹²³ See *supra* notes 83–84.

as part of our application.¹²⁴ If anything, a .xxx domain will provide additional support for the argument that voluntary measures are a less restrictive alternative that renders government action unconstitutional.¹²⁵

It is true that other nations are not governed by the First Amendment.¹²⁶ But other countries without robust protections for free expression already block a wide variety of content, and the creation of this domain will not affect that fact. Indeed, the argument that self-labeling will “cause” other governments to block adult sites is equally applicable to any volunteer system, including the “Restricted to Adults” (RTA) label the Free Speech Coalition has endorsed.¹²⁷ On balance, we believe that governments around the world are less likely to block sites en masse if individuals are empowered to make their own content choices.

C. *Stuart Lawley*

QUESTION: From the outset, the adult entertainment industry has strongly opposed the establishment of the .XXX TLD. Did the extent of the industry’s opposition surprise you?

LAWLEY: This simply isn’t the case. Many of the industry have supported this from the get go. A small, but vocal minority always opposed and tried to overstate the opposition. Despite many calls to action from a single organization,¹²⁸ at most a few hundred webmasters, mainly from the United States, spoke up and opposed. On the other side, we have tens of thousands of webmasters from over eighty countries, signed up and ready to register hundreds of thousands of names.

QUESTION: You have long touted the marketing benefits of the .XXX TLD, and the main content producers in the adult industry

¹²⁴ See Memorandum from Robert Corn-Revere, Davis, Wright, Tremaine, L.L.P., on Legal Protections for the Voluntary Nature of an Adult Internet Domain (Mar. 11, 2004) (on file with authors).

¹²⁵ See ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 905 (2d ed. 2002) (discussing how content-based laws and regulations fail the strict scrutiny test if they do not use “the least restrictive alternative for achieving the government’s interest”).

¹²⁶ See *supra* note 10 (setting forth the relevant terms of the First Amendment).

¹²⁷ See, e.g., Press Release, Ass’n of Sites Advocating Child Protection, ASACP Reaches out to Congress, State and Federal Attorneys General (Mar. 29, 2011), available at <http://www.rtlabel.org/index.php?content=news&item=920,asacp-reaches-out-to-congress-state-and-federal-attorneys-general> (noting that “[o]n the Andre Controversa radio show, FSC Executive Director Diane Duke praised the adult industry’s filtering system, which prevents children from accessing its content. Duke reinforced the timely message by blogging at XBIZ, ‘The adult entertainment industry has always supported efforts to improve child Internet safety, especially greater parental involvement in filtering and supervising their children’s use of the Internet.’”).

¹²⁸ Presumably, Lawley is referring to the Free Speech Coalition, which has been outspoken in its opposition to the .XXX TLD, as discussed *infra* Part II.D and accompanying text.

are fairly savvy business people. Why do you think they do not see any value to marketing their product in another venue?

LAWLEY: Many of them do and that's why they are queued up, ready to register.

QUESTION: Hustler President Michael Klein¹²⁹ has called the .XXX TLD a “ghetto for adult domains.”¹³⁰ Is there any merit in his characterization?

LAWLEY: We and our many supporters view it more like a “resort.”

QUESTION: Adult industry attorney Paul Cambria¹³¹ has suggested that “.XXX would compartmentalize adult legal speech and that would serve as a crack in the wall for free speech.”¹³² How do you respond to that argument? Do you see any potential First Amendment issues arising out of the establishment of the .XXX TLD?

LAWLEY: The same argument was made when the industry (and others) opposed the CDA.¹³³ They argued, in part, that the existence of filters eliminated the need for legal restrictions for “indecent” material online. That argument carried the day in *Reno v. ACLU*,¹³⁴ and was even more influential in the decision striking down the Child Online Protection Act after a ten-year battle.¹³⁵ Still, there are those who oppose even the *voluntary* use of filters, and they call it “censorware.”¹³⁶ If those arguments had persuaded the industry ten years ago that no filters should be used, it is far from certain that the courts would have been willing to strike down the law. We believe that governments are less likely

¹²⁹ See *Michael H. Klein: Executive Profile and Biography*, BUS. WK., available at <http://investing.businessweek.com/research/stocks/private/person.asp?personId=22760486&privcapId=4577799&previousCapId=22728216&previousTitle=LFP%20Broadcasting%20LLC> (last visited Oct. 11, 2011) (noting that “Mr. Klein has been President of LFP Broadcasting LLC and LFP Internet Group LLC since June 2005.”).

¹³⁰ Katz, *supra* note 8.

¹³¹ For a profile of attorney Paul Cambria's impact on the adult entertainment industry, see Calvert & Richards, *supra* note 9, at 147.

¹³² Katz, *supra* note 8.

¹³³ Communications Decency Act of 1996, 47 U.S.C. § 223(a), (d) (2006).

¹³⁴ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (declaring provisions of the Communications Decency Act unconstitutional on vagueness and overbreadth grounds).

¹³⁵ See *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666–67 (2004) (suggesting that “[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them.”).

¹³⁶ See, e.g., *Internet Blocking & Censorware*, ELEC. FRONTIER FOUND., <http://w2.eff.org/Censorship/Censorware/index.html> (last visited Oct. 11, 2011) (providing “some basic ideas about how to get involved in preventing the spread of Internet blocking, especially in schools and libraries”).

to be given the power of censorship when individuals are given more and better ways to determine what content they want in their homes.

QUESTION: What safeguards will IFFOR consider to protect against the “piracy”¹³⁷ of domain names of established adult entertainment websites or companies?

LAWLEY: DotXXX has the most developed intellectual property rights protection of any new TLD ever launched, ranging from a full Trademark Sunrise¹³⁸ to a unique “grandfathering” process (for non TM names that are held in other TLDs) through to a 48-hour Rapid Takedown process¹³⁹ and a full Charter Eligibility Dispute Resolution Process¹⁴⁰ to the usual UDRP.¹⁴¹

QUESTION: Will IFFOR address the concern raised by smaller adult content producers that registering their own trade names, along with all similar names, will be cost prohibitive?

LAWLEY: Pricing is an ICM issue, not IFFOR. DotXXX names will be a source of new, quality traffic, over and above the traffic that the webmasters already enjoy in their .coms, etc[.,] via type in traffic, our traffic-generating portals and via search engine positioning of the very relevant .xxx names. We confidently believe that the annual revenues generated from those sources will provide a healthy return on investment.

QUESTION: Many industries balk at “codified self-regulation,” fearing that government will use it against them at some future point. Will there be legal representation on—or as counsel to—the IFFOR board to guard against that occurring to the extent

¹³⁷ For a discussion about the ongoing issue of piracy in the adult entertainment industry, see Free Speech Coalition Anti-Piracy Action Program, *Piracy*, FREE SPEECH COAL., <http://www.freespeechcoalition.com/piracy.html> (last visited Oct. 11, 2011) (explaining that the program offers “content producers/providers an affordable, organized approach to dealing with content theft and copyright infringement”).

¹³⁸ See *.XXX Launch Overview*, ICM REGISTRY, <http://www.icmregistry.com/launch.php> (last visited Oct. 11, 2011) (describing the Sunrise period as “the trademark owner’s time to apply and then Opt-in or Opt-out of .XXX”).

¹³⁹ ICM Registry Policy, IFFOR, 4 (July 20, 2010), <http://www.iffor.org/docs/preventing-abusive-registrations-20jul10-en.pdf> (describing Rapid Takedown).

¹⁴⁰ Charter Eligibility Dispute Resolution Policy, ICANN, <http://www.icann.org/en/udrp/cedrp-policy.html> (last modified Aug. 13, 2011).

¹⁴¹ Uniform Domain Name Dispute Resolution Policy, ICANN (Oct. 24, 1999), <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm> (declaring that the policy “has been adopted by [ICANN], is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you.”).

possible?

LAWLEY: Many industries have faced this same question in the past. After the movie studios adopted the MPAA¹⁴² rating system in the late 1960s,¹⁴³ films were able to tell stories and portray life with a new degree of freedom that previously was unknown in the industry. This resulted from a combination of positive legal developments, coupled with a rating system that allowed families and individual moviegoers to have some indication of what they might expect before they entered the theater.¹⁴⁴ Initially, there were some local efforts to codify the voluntary system, but each one was invalidated by the courts.¹⁴⁵ ICM Registry has publicly committed to actively oppose any governmental effort to incorporate this voluntary labeling system, and both ICM and IFFOR will have the best legal representation open to them.

QUESTION: It sometimes seems like getting the major players in the adult entertainment industry to play nice and work together is like herding cats. Is it even possible on this issue to get all of the major players in the industry on board here and to work constructively with you? How important is it, for instance, to have the Free Speech Coalition¹⁴⁶ work constructively with IFFOR?

LAWLEY: FSC is a worthwhile organization that has done good work in the past in support of free expression. However, it is important to remember that the industry is global with, in our estimation, over 100,000 active participants. To date, we have over 22,000 of them indicating willingness to participate and we haven't even started our pre-launch efforts. Compare this to the very few adult "trade associations" scattered across the globe that are purely domestic in nature and tend to have very small membership numbers. There has never been a multi-stakeholder, international

¹⁴² See generally About Motion Picture Association of America ("MPAA"), MPAA, <http://www.mpa.org/about> (last visited Oct. 11, 2011) (noting that the organization "serves as the voice and advocate of the American motion picture, home video and television industries in the United States and around the world").

¹⁴³ See History of MPAA, MPAA, <http://www.mpa.org/about/history> (last visited Oct. 11, 2011) (describing how MPAA President Jack Valenti, in 1968, "founded the voluntary film rating system giving creative and artistic freedoms to filmmakers while fulfilling its core purpose of informing parents about the content of films so they can determine what movies are appropriate for their kids").

¹⁴⁴ See, e.g., *What Each Rating Means*, MOTION PICTURE ASS'N OF AM., <http://www.mpa.org/ratings/what-each-rating-means> (last visited Oct. 11, 2011) (providing details of the G, PG, PG-13, R and NC-17 ratings).

¹⁴⁵ See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (holding that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.").

¹⁴⁶ See *supra* notes 12–14 and accompanying text.

organization of this kind before. That being said, we believe that as .xxx goes online and as the misconceptions about it are debunked, we will have an opportunity to win over those in the industry who have been skeptical.

D. *Diane Duke*

QUESTION: Speaking on behalf of the Free Speech Coalition, you have been very vocal in your opposition to the .XXX TLD. What are your main objections to a special Internet designation for adult content?

DUKE: Adult companies are being railroaded in to this process. They have to pay to protect the brands they already own. They do not want .XXX domains and are left with the choice to pay \$300 to block their copyrighted name (many adult companies don't have all of their domain names copyrighted and the mis-spellings and related names cannot be blocked) OR purchase a product that may put them at risk. Our main arguments include the following:

- .XXX costs at least 10 times what .coms cost (recent numbers thrown out are \$70–\$75/per domain name wholesale).
- Just 5 days after .XXX passed, India¹⁴⁷ and Kenya¹⁴⁸ have blocked .XXX with the promise of more countries like Australia,¹⁴⁹ Germany to follow—instantly de-valuing the costly .XXX domain names.
- sTLDs have a proven history of failure—even ones that are not blocked by entire countries and have their industry's support (.travel anyone?).¹⁵⁰
- High traffic websites will be leery of linking to a .XXX site, fearful of themselves being blocked or having dead links in blocking countries.
- All registrants of .XXX must agree to third-party automated monitoring of their sites for compliance of IFFOR policies. And you will have to purchase your domain name before you even know what those policies are.

¹⁴⁷ Tan, *supra* note 83.

¹⁴⁸ *Kenya Won't Allow Porn Domain*, JOURNALISTS OF S. AFR. (May 13, 2011, 3:19 AM), <http://www.journalism.co.za/kenya-wont-allow-porn-domain.html> (quoting Kenyan Information and Communication Permanent Secretary Bitange Ndemo saying, "We are not going to allow .xxx in this country; it's actually a certificate for people to watch pornography . . .").

¹⁴⁹ *See Conroy Opposes Proposed New XXX Domain*, ECOMMERCE REP. (Oct. 28, 2010), <http://www.ecommercereport.com.au/?p=1215> (noting that the Australian Minister for Broadband, Communications and the Digital Economy opposes the new domain "because of the lack of identified public benefit").

¹⁵⁰ For more about the .travel TLD, see *About .travel TLD*, .TRAVEL, <http://www.travel.travel/index.php/about-travel> (last visited Oct. 11, 2011) (describing how ".travel is an Internet domain specifically for the travel and tourism industry.").

- Aliases (.XXX and .com going to the same site) require that related .coms adhere to IFFOR policies.
- IFFOR Policies will be determined by a council hand-picked by a Board chaired by ICM's Stuart Lawley—not the industry .XXX is supposed to represent. Moreover, ICM Registry has ultimate veto power over policy development.
- Businesses that register with .XXX make their alias[].coms an easier target for censorship and blocking—and don't want to put their .coms at risk.
- Do the math. It doesn't add up. Even if ICM's claims of new consumers who "trust" .XXX ring true, for a company like Kink.com, which has approximately 10,000 domain names, it would have to bring in a three-quarters of a million dollars in new revenues annually—just to break even.

QUESTION: When you voice your opposition, are you speaking on behalf of the entire adult industry or the FSC's members?

DUKE: I have yet to find an adult business that thinks this is a good idea.

QUESTION: Is there a division within the FSC membership on the .XXX TLD or is this one of those issues on which all of the FSC members stand united? If there are divisions, can you briefly explain over what particular aspects of .XXX TLD they arise?

DUKE: We have had complete support from our membership.

QUESTION: Were you surprised when ICANN gave its approval to the .XXX TLD at the March 2011 meeting in San Francisco?¹⁵¹ Why or why not?

DUKE: More disappointed than surprised. If you look over the contract, you will see that ICANN will make \$2 annually for every .XXX domain name registered. That is twice as much as they make with any other domain name (they get twenty-five cents for .coms). Moreover, ICM indemnified ICANN from any lawsuit concerning .XXX. No risk and a financial windfall coupled with considerabl[e] legal threats from ICM if they didn't pass it. ICANN ignored what was best for the Internet to support what was best for ICANN.

QUESTION: What was your initial reaction—what went through your

¹⁵¹ Stanton & Hammond, *supra* note 71.

mind—when first learned about ICANN’s approval of the .xxx TLD?

DUKE: The ICANN Board sold out.

QUESTION: According to a survey conducted by XBIZ through its social networking site (granted, not a statistically sound approach), more than 36 percent of respondents say they will purchase the .XXX TLD, while 13 percent remain undecided.¹⁵² It would appear that a considerable percentage of those involved see some value in the .XXX domain. Do you think that is an accurate reflection of the adult industry’s position as a whole?

DUKE: I believe that a majority of the folks who plan to buy .XXX domains will do so defensively to protect their brands. The remaining are most likely cybersquatters trying to make money redirecting traffic from the legitimate businesses

QUESTION: Some proponents have suggested that the .XXX TLD will serve as a “Good Housekeeping Seal of Approval,”¹⁵³ of sorts, for the adult industry. Why don’t you see it that way?

DUKE: I find it ironic that the entity attempting to build a “web of trust” has done so through a web of deception. We, time and time again, caught ICM in lies to the industry and to ICANN. FSC has a Code of Ethics to which our members already comply.¹⁵⁴ ICM developed its reason for being by perpetuating myths and stereotypes about the adult entertainment community inferring it to be irresponsible. The adult entertainment community is a hundred times more trustworthy and responsible than ICM, or IFFOR for that matter, could ever hope to be.

QUESTION: Adult industry attorney Paul Cambria has argued that the .XXX TLD would “compartmentalize adult legal speech and that would serve as a crack in the wall for free speech.”¹⁵⁵ In what ways do you see the First Amendment rights of adult content producers eroding through the .XXX TLD?

DUKE: It puts a target on the back of the adult entertainment

¹⁵² *XBIZ Research* (retrieved July 17, 2011) (on file with the author).

¹⁵³ See *supra* note 118.

¹⁵⁴ Code of Ethics, FREE SPEECH COAL., <http://www.freespeechcoalition.com/code-of-ethics.html> (last visited Oct. 11, 2011) (noting that the Code was “created to clarify for members, for prospective members and for the consumers we serve the common and fundamental practices to which our Coalition aspires”).

¹⁵⁵ Katz, *supra* note 8.

community making them easy prey for anti-industry predators and those who wish to impose oppressive censorship.

QUESTION: Opponents of the .XXX TLD often characterize it as a “ghetto” for adult content.¹⁵⁶ If adult businesses are able to retain their dot-com presence as well as establish a .XXX domain, doesn’t that open up more market potential rather than less?

DUKE: In 2007 when Jeffrey Douglas and I lobbied against .XXX, we carried a bill with us that was authored by Senator Max Baucus to mandate .XXX.¹⁵⁷ It is highly likely that there will be countries and communities that will try to mandate .XXX for adult businesses, thus creating a ghetto for adult entertainment and endangering free speech and free expression.

QUESTION: You have suggested that the .XXX domain will make it easier for children to find adult content on the Web,¹⁵⁸ while the domain’s supporters maintain the opposite position.¹⁵⁹ Why do you feel that minors [are] more likely be exposed to adult content through the .XXX TLD?

DUKE: The main reason that Kenya gave for blocking .XXX was that it would make it easier for their children to access .XXX. Children could type in anything with .XXX behind it and get adult materials. Ironically, though, several child advocate groups believe that a .XXX TLD could do more harm than good. One such group is SafeKids.com, one of the oldest and most respected Internet safety websites.¹⁶⁰ Its creator, Larry Magid,¹⁶¹ wrote:

As an Internet safety advocate, my concern about .xxx is that it could give parents a false sense of security. True, it would be very easy to configure browsers or filters to automatically block sites designated as .xxx, but since this is a voluntary program, there would be nothing to stop adult site operators from also using .com. It would be like setting up a red-light district in a community while also allowing adult entertainment establishments to operate in residential shopping centers.¹⁶²

¹⁵⁶ *Id.*

¹⁵⁷ Cyber Safety for Kids Act of 2006, S. 2426, 109th Cong. (2006).

¹⁵⁸ See *supra* note 106.

¹⁵⁹ See Landphair, *supra* note 44.

¹⁶⁰ See About & Contact Info., SAFEKIDS, <http://www.safekids.com/about> (last visited Oct. 11, 2011) (describing the organization as “one of the oldest and most enduring sites for Internet safety”).

¹⁶¹ See About Larry Magid, LARRY’S WORLD, <http://www.larrysworld.com/about> (last visited Oct. 11, 2011) (identifying Larry Magid as “co-director of ConnectSafely.org and founder of SafeKids.com”).

¹⁶² *Net Oversight Board to Consider .XXX Domains*, SAFEKIDS (Mar. 10, 2010),

He concluded, “I’m still not convinced that .xxx is in the best interest of child protection”¹⁶³

QUESTION: The policy governing the .XXX TLD will be set and monitored by the International Foundation for Online Responsibility (IFFOR), rather than the ICM Registry, which has a financial stake in the domain.

DUKE: Let’s explore how independent IFFOR is from ICM. According to its bylaws, IFFOR’s Board of Directors will “have one or more members, the number thereof to be determined from time to time by resolution of the Board of Directors.”¹⁶⁴ The Bylaws go on to state, “The Board of Directors shall initially consist of the person named as director in the certificate of incorporation or elected by the incorporator of the corporation.”¹⁶⁵ That person is Stuart Lawley. The bylaws also ensure that ICM will have a standing position on the board that cannot be removed by a vote of the other Board members.¹⁶⁶ Moreover, the bylaws also state that the ICM representative is ex officio Chairman of the IFFOR Board.¹⁶⁷

To recap, according to IFFOR’s Bylaws:

- Initially, IFFOR will have one Board member, ICM’s Chairman and CEO, Stuart Lawley.
- The remaining Board members will be selected by the initial Board of Directors, Stuart Lawley.
- The ICM position on the board is the only position guaranteed on the board without term limits that cannot be removed under any circumstances by the Board.
- IFFOR’s Board Chair and ICM’s Board Chair are one in the same, Stuart Lawley, who will preside over all IFFOR Board meetings.

This doesn’t sound independent to me.

QUESTION: Are you at all confident that IFFOR will operate in the best interest of the sponsored community—i.e., the adult entertainment industry?

<http://www.safekids.com/2010/03/10/net-oversight-board-to-consider-xxx-domains>.

¹⁶³ *Id.*

¹⁶⁴ First Restated Bylaws of the International Foundation for Online Responsibility, IFFOR, 1 (July 26, 2010), <http://www.iffor.org/docs/iffor-bylaws-26jul10-en.pdf>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 3.

DUKE: No, here's why, according to the IFFOR bylaws, the Policy Council's role is to:

(i) Foster communication between the responsible global online community (the "Sponsored Community") and other Internet stakeholders;¹⁶⁸

(ii) Protect Free Expression rights as defined in the United Nations Declaration of Human Rights;¹⁶⁹ and

(iii) Promote the development and adoption of responsible business practices designed to combat child pornography, facilitate user control and parental control regarding access to online entertainment, and protect the privacy, security, and consumer rights of consenting consumers of adult online adult goods and services (Policy Goals).¹⁷⁰

In addition, the "Council" will be responsible for developing a program, including selection criteria and procedures, by which a portion of IFFOR's revenues will be distributed in furtherance of the policy goals (the "Grants Program"), and for selecting recipients of such funds.¹⁷¹

To recap, according to IFFOR's Bylaws:

- IFFOR's policy goals address only the issues of child pornography, user and parental control of access and consumer protection
- The "Grants Program" funds only the furtherance of the "Policy Goals"
- Therefore the "Grants Funding" goes to fund only issues related to child pornography, user and parental control of access and consumer protection
- The "Grants Program" is funded by from a portion of the \$10 per domain name tagged to fund IFFOR less IFFOR's overhead.

In his July 8, 2010, post on XBIZ, Stuart Lawley wrote[, "[W]e envisage a range of initiatives being considered, including but not limited to: health and safety of Adult Industry workers, legal challenges facing the industry such as 2257, piracy, counterfeiting, onerous legislation etc, labeling initiatives, combating child abuse, parental awareness etc.["]¹⁷²

In other words, the health and safety of adult industry

¹⁶⁸ *Id.* at 5.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Diane Duke, *Inside the FCS, Part One: .XXX and Child Protection . . . Bullshit*, XBIZ (Mar. 1, 2011), <http://www.xbiz.com/blogs/131159> (reacting to Lawley blog posting).

workers, legal challenges facing the industry such as 2257,¹⁷³ piracy,¹⁷⁴ counterfeiting, onerous legislation, etc., labeling initiatives or any other support promised to the industry using funds from IFFOR, clearly would not be in support of IFFOR's stated "Policy Goals," and therefore would be in direct conflict with IFFOR's Bylaws.

QUESTION: You have been highly critical of the ICANN board, suggesting that it "disregarded overwhelming outpouring of opposition from the adult entertainment industry."¹⁷⁵ What is the Free Speech Coalition's strategy going forward? What options, if any, are there to fight against this new domain?

DUKE: Collectively, adult businesses understand that .ICM's .XXX is bad for the adult entertainment industry. FSC has launched a "Just Say No"¹⁷⁶ to .XXX campaign encouraging adult businesses to stay .com. Moreover, we are working on legal options for companies to protect their brand without paying what amounts to blackmail to keep ICM from selling their copyrighted names.

E. Larry Flynt

QUESTION: What problems do you perceive with ICANN's adoption of a .XXX top-level domain for the adult entertainment industry?

FLYNT: There are several issues. First, because this may go to federal court, we see it as a First Amendment issue. In addition to that, there are a number of other issues.

For one thing, it is going to be much more expensive. The cost factor is extremely important. It is going to cost ten times as much for .XXX as it would for the regular .com domain name. That's certainly not appealing.

¹⁷³ 18 U.S.C. § 2257 (2006). See also Clay Calvert & Robert D. Richards, *Inside the FBI Inspections of Adult Movie Company Age-Verification Records: A Dialogue with Special Agent Chuck Joyner*, 15 UCLA ENT. L. REV. 55 (2008) (providing a discussion of the federal government's enforcement of these adult industry age-verification and record-keeping requirements).

¹⁷⁴ See *Piracy*, *supra* note 137.

¹⁷⁵ Jacqui Cheng, *ICANN Approves .XXX Red-Light District for the Internet*, WIRED (Mar. 21, 2011), <http://www.wired.co.uk/news/archive/2011-03/21/icann-approves-xxx> (suggesting that the .XXX domain "has gone through so many ups and downs over the last 11 years that it's almost a shock that it has finally gone through").

¹⁷⁶ See *FSC Launches Anti-.XXX Campaign: Just Say NO!*, AVN MEDIA NETWORK (Mar. 25, 2011, 1:17 PM), <http://business.avn.com/articles/technology/FSC-Launches-Anti-XXX-Campaign-Just-Say-NO-430172.html> (quoting Diane Duke as stating that "[c]ollectively, adult businesses understand that ICM's .XXX is bad for the adult entertainment industry").

The most important issue, however, is that it diminishes the brand. To be forced to use a .XXX with Hustler will diminish our brand because we sell a lot more items through our stores¹⁷⁷ and various avenues—clubs,¹⁷⁸ etc.—that would not be covered by the categories covered by .XXX. So, I see this as both a trademark and a First Amendment issue.

QUESTION: Do you also see this as a money grab for the people who are setting up the .XXX domain?

FLYNT: Of course, that's what the whole thing is about. There's another motivation that should not go unnoticed. It makes it a lot easier for religious groups—people who have been censoring for years anyway—to come in later as a coalition and make demands on .XXX. That's a type of censorship, not a prior restraint by the government,¹⁷⁹ but it is still an ugly form of censorship.

QUESTION: Some countries have already threatened to censor any .XXX domain – Saudi Arabia and India, for instance.¹⁸⁰ They have said they are not going to allow the domain in their countries. Since the adult entertainment business is international, is that a concern for you?

FLYNT: Of course, it's a concern because, as a content provider for cable and satellite, we go into sixty-six different countries. It will be a big issue for us. It just doesn't work for me or anyone else in this industry. I really don't understand why we are getting this crammed down our throats.

QUESTION: This is one of those rare occasions where ICANN has approved a sponsored top-level domain without much industry support. Were you surprised when that happened?

FLYNT: Yes, I was surprised, but there was another underlying factor and I'm not quite sure what it is. You never know when conservative fundamentalists are going to raise their ugly heads and necks. It wouldn't surprise me if they were stirring the pot here.

¹⁷⁷ See HUSTLER HOLLYWOOD, <http://www.hustlerhollywood.com> (last visited Oct. 11, 2011) (selling a variety of products, from t-shirts and lingerie to adult videos and sex toys).

¹⁷⁸ See, e.g., HUSTLER CLUB LAS VEGAS, <http://www.vegashustlerclub.com> (last visited Oct. 11, 2011).

¹⁷⁹ See generally DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 32 (17th ed. 2011) (explaining that prior restraint laws historically “required printers to obtain prior approval from the government or the church before printing their handbills, pamphlets or newspapers”).

¹⁸⁰ See *supra* notes 83–84.

QUESTION: Does it concern you that, if adult businesses are housed on .XXX, it would be just that much easier for the government to locate and pinpoint certain businesses to target for prosecution?

FLYNT: It's possible. But the government is so inept and underhanded that I would really hate to give them credit for thinking that far ahead. Let's face it. Whatever it is they are dealing with, eventually they are going to muck it up.

QUESTION: Do you perceive that the adult businesses in Southern California are united in their opposition to .XXX?

FLYNT: I am not that familiar with what position the other mainstream businesses have taken with respect to .XXX.

QUESTION: Earlier you mentioned that you think this issue will eventually end up in the federal courts. Are you confident that the industry will prevail?

FLYNT: I think the courts are faced with what is obviously a First Amendment issue here. Despite all of the dissatisfaction I have had with the present Supreme Court, one thing you have to say is that they are definitely pro-First Amendment.¹⁸¹ We'll have to see how the courts deal with this issue.

QUESTION: Are you worried that Hustler competitors or other individuals will seize the opportunity to grab the Hustler name and use it to create market confusion on the .XXX domain?

FLYNT: We don't know what the outcome will be. We're very diligent about policing copyright and trademark infringement. We have to wait and see what kind of effect this will have.

QUESTION: As you mentioned, the costs for adult businesses to enter the .XXX domain will be significant. This also comes at a time when the adult industry, like other businesses, is experiencing an economic downturn. Are you concerned about the timing of this launch of .XXX, particularly for the smaller companies that may be cash strapped at this point in time?

¹⁸¹ See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (striking down California's law restricting minors' access to violent video games on First Amendment grounds); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (holding that the First Amendment protects demonstrators at military funerals from tort liability related to their protesting activities).

FLYNT: I don't know if the smaller companies will be affected that much by it. It's not a big cost factor to them. It's a big cost factor to us because we have a huge presence on the Internet, video, stores and other venues.

QUESTION: So you believe that it is going to hit the big players harder because they have so many more websites and related ventures that now have to be established on .XXX?

FLYNT: Yes, that's why I say it might not hurt the smaller companies as much.

QUESTION: Are you concerned that .XXX is a "ghetto" of sorts for the adult entertainment industry?¹⁸² By attaching that suffix, there will now be a "red-light district" on the Internet and people will view all of the content on that domain as somehow the same, whereas the .com suffix is a neutral business term.

FLYNT: Of course, that's a concern. Let me give you a comparison. Twenty-five years ago, adult bookstores had all of their doors and windows blacked out. They had "XXX" all the way around the buildings. Guys went in wearing raincoats over their heads. That's the way they bought their adult material because "XXX" has a negative stigma about it.

When we opened our Hustler stores, we changed that model. We wanted to make the stores friendly. We wanted to get women shoppers as well as men shoppers. It worked because we were creating the right kind of atmosphere for them. Hustler Hollywood has a much better image than some adult bookstore over on Ventura Boulevard.

It's the same way when we talk about assembling content for the Internet. So, if we are all lumped together on .XXX, that's unfair.

QUESTION: Do you think there may come a time, once the .XXX is established and operational, that some of the more conservative members of Congress might try to require all adult content to be placed in .XXX and removed from the other domains, such as .com?

FLYNT: They would have already done it if they had thought of it.

¹⁸² See Katz, *supra* note 8.

QUESTION: Lawsuits obviously cost money. Do you think this is an issue that is worth fighting in court and one that the industry will fund?

FLYNT: We have to fund it because no one else will do it. With the adult industry, we are on our own. As in anything we face, the mainstream press is not going to come in and fight this battle for us. We have to do it ourselves or it won't get done.

QUESTION: The mainstream media may have reported on the issue, but have not taken a position on it. Does that surprise you in any way?

FLYNT: Let me tell how to best sum up the mainstream press, and it comes from personal experience. When I lost the *Hustler Magazine v. Falwell*¹⁸³ case before the jury [in] Lynchburg, Virginia, we sought out anybody who would be willing to file an amicus brief on appeal. We reached out to several media outlets, such as the *New York Times*, the *Washington Post*, NBC, book publishers associations, and no one wanted to help. Nothing. They didn't even write about it. We lost in the Fourth Circuit.¹⁸⁴

We petitioned the Supreme Court. Once the Supreme Court granted certiorari,¹⁸⁵ everybody was on the bandwagon. Floyd Abrams,¹⁸⁶ representing the *New York Times*, was one of the first ones to call. They knew if this case goes the wrong way, they would all be in trouble. If damages could be awarded just because someone's feelings were hurt, the media would be in trouble. It was a big, big risk for them, so they all wanted to come in. But when did they want to come in? They came in when they were personally threatened by what the outcome could be. They didn't come in because it was the right thing to do. They didn't want to come in and stand on principle. That's the whole story of the mainstream press.

QUESTION: Because this issue doesn't affect them directly, they're

¹⁸³ *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986) (affirming the Western District of Virginia's damages award for Falwell on intentional infliction of emotional distress, and for Flynt by dismissing invasion of privacy claim and denying Falwell's libel claim), *rev'd sub nom* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (reversing lower court on damages award, and requiring Falwell to prove malice or recklessness on Hustler's part in publishing the statements at issue).

¹⁸⁴ *Falwell*, 797 F.2d at 1278.

¹⁸⁵ *Hustler Magazine v. Falwell*, 480 U.S. 945 (1987).

¹⁸⁶ See Floyd Abrams Bio, CAHILL GORDON & REINDEL L.L.P., <http://www.cahill.com/attorneys/data/201> (last visited Oct. 11, 2011) (noting that Abrams "has a national trial and appellate practice and extensive experience in high-visibility matters, often involving First Amendment, intellectual property, insurance, public policy and regulatory issues").

not going to be concerned about it. Is that what you're saying? In other words, even if the issue has First Amendment considerations, because the mainstream media are not going to have a place on .XXX, they are not going to get involved.

FLYNT: They see the bigger picture, but they don't care. I once had an entertainment lawyer in New York tell me that "Saturday Night Live" changed dramatically – all of the parodies they did – after our win in the *Falwell* case. The NBC lawyers were there with a copy of the opinion in their hands on the set, saying, "You can do this because of the lawsuit that Larry Flynt won."

QUESTION: Theoretically, the goal of setting up a .XXX domain is to make it easier to prevent kids from seeing adult material. Do you think the adult industry already does enough to shield minors from this material?

FLYNT: I have an answer that nobody likes. We can't limit adult viewing and reading habits to only what is fit for children¹⁸⁷ or we'll have nothing left except *Alice in Wonderland*¹⁸⁸ and *Little Red Riding Hood*.¹⁸⁹

Parents have an obligation to protect their kids, to select what programs they watch on television and what computers they have access to. The religious right always throws "the kids" into the debate. That's the last bit of the argument – "It's OK for adults, but look what you're doing to the children." It's about parental responsibility, but you can understand why the censors throw that out there. They don't want to hear about any blocking devices or how parents have the ability to keep children from being exposed to this material. They only want to talk censorship.

There are about a dozen different blocking and filtering devices out there that will block out anything that parents don't want their children to see. In addition, we don't allow children into our stores like Hustler Hollywood, and children are not allowed to buy *Hustler* magazine. They're not allowed to buy adult videos. Ultimately, it's up to the parents to protect their kids, as it should be.

¹⁸⁷ Strikingly, Flynt's statement here mirrors that of the U.S. Supreme Court in a case dating back more than a half-century to 1957. *Butler v. Michigan*, 352 U.S. 380, 381–83 (1957) (analyzing the validity of a Michigan statute criminalizing the sale of content "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth," observing that the law in question "reduce[s] the adult population of Michigan to reading only what is fit for children," and concluding that the statute was unconstitutional) (emphasis added).

¹⁸⁸ LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* (1865).

¹⁸⁹ Charles Perrault, *Little Red Riding-Hood*, reprinted in *THE BLUE FAIRY BOOK* 51 (Andrew Lang ed., 5th ed. 1891).

III. CONCLUSION

In June 2011, just three months after its approval of the .XXX TLD, the board of directors of ICANN took another giant move. They approved a plan to dramatically increase the number of generic top-level domain names from just twenty-two to potentially thousands.¹⁹⁰ As one newspaper article observed, ICANN now is “opening up the system so companies and organizations can apply to create their own versions of ‘.com,’ ‘.org’ or ‘.gov.’ Under the new rules, instead of a ‘coke.com,’ Coca-Cola might control the domain ‘.coke’ and assign Web addresses such as ‘drink.coke’ or ‘bottle.coke.’”¹⁹¹

The same article quoted Scott Bain, an attorney at the Software & Information Industry Association, as stating that “intellectual property owners will have to spend a lot of money and time to enforce their rights.”¹⁹² Another article noted the money-making motive in such a move by ICANN, quoting one Internet domain entrepreneur for the proposition that “[i]t’s a big game for ICANN and the registrars to make more money.”¹⁹³

These twin concerns over intellectual property rights and profit gouging are two of the same ones that animate much of the trepidation within the adult industry about the new .XXX TLD, as the comments of Diane Duke and Larry Flynt make clear. It should, of course, come as no surprise either that some of the leading players in the adult entertainment industry in Southern California would not take kindly to an initiative like the .XXX TLD or that there may be some disagreement within the industry as to .XXX TLD.¹⁹⁴ Kat Sunlove, former head of the Free Speech Coalition, once described those in the adult industry as having “a certain independent streak. It is like herding cats to get these people to get up off their money, especially if they don’t perceive a value-added to them.”¹⁹⁵

Getting the adult industry to perceive the value-added

¹⁹⁰ Press Release, ICANN, ICANN Approves Historic Change to Internet’s Domain Name System (June 20, 2011), *available at* <http://www.icann.org/en/announcements/announcement-20jun11-en.htm>. See Sam Holmes, *Web Addresses Enter New Era*, WALL ST. J., June 21, 2011, at B1 (reporting on the top-level domain expansion).

¹⁹¹ David Sarno, *Domain Names Now Can Have Any Ending; Expansion Beyond “.com” May Yield Confusing Sea of Suffixes*, BALTIMORE SUN, June 21, 2011, at C2.

¹⁹² *Id.*

¹⁹³ *New Web Suffixes May Go Unused*, PITT. TRIB. REV. (June 23, 2011), http://www.pittsburghlive.com/x/pittsburghtrib/business/s_743419.html.

¹⁹⁴ It should be noted that Duke maintains there is no disagreement within the membership of the Free Speech Coalition about the .XXX TLD, as she stated that “[w]e have had complete support from our membership.” See *supra* Part II.C (setting forth Duke’s comments).

¹⁹⁵ Calvert & Richards, *supra* note 105, at 275 (2004) (quoting Sunlove from an interview conducted by the authors of this article in December 2003).

component of a .XXX TLD for which they will need to pay money, as the comments of both Diane Duke and Larry Flynt in this article indicate, is something that has yet to occur. In fact, they tend to see only the drawbacks, not the benefits.

Having to shell out money in order to purchase a new top-level suffix to protect one's brand against possible piracy—a major concern in the industry today¹⁹⁶—or to maintain one's trademark or brand surely is a tough sell for an adult industry that, as the *Los Angeles Times* reported in early 2011, “has been buffeted by the economic downturn, the falloff in DVD sales and a cornucopia of free content on the Internet.”¹⁹⁷ These simply are not good times for an adult industry that, as Alec Helmy, president and publisher of adult trade publication XBiz, put it, “is struggling in a big way.”¹⁹⁸

The financial problem wrought by the .XXX TLD is clear to Duke. As wrote to the authors of this article, members of the adult industry now will

have to pay to protect the brands they already own. They do not want .XXX domains and are left with the choice to pay \$300 to block their copyrighted name (many adult companies don't have all of their domain names copyrighted and the misspellings and related names cannot be blocked) OR purchase a product that may put them at risk.¹⁹⁹

The problem here, of course, goes beyond the adult industry and the .XXX TLD to sweep up any expansion of suffixes on the Internet. As the *New York Times* reported in June 2011 in a story about ICANN's now-enacted plans to greatly expand the range of TLDs, “Owners of corporate brands and other trademarks—who remember the cybersquatting that marred the early days of the Internet, when profiteers claimed brand names and then resold them to their owners—say the expansion would open the door to a new round of intellectual property abuses.”²⁰⁰

The bottom line is that the era of the .XXX TLD has arrived. The open questions are now how Lawley and Irvine will administer it, and how the adult industry in the United States will respond to it, in the coming months and years.

¹⁹⁶ See Jon Swartz, *Free Porn on 'Tube Sites' a Turnoff to Industry Profits*, USA TODAY, Mar. 2, 2010, at B3, available at http://www.usatoday.com/MONEY/usaedition/2010-03-02-porn02_ST_U.htm (describing piracy of adult content).

¹⁹⁷ Richard Verrier, *Company Town; On Location; Porn Studio is a Top-10 Film Site*, L.A. TIMES, Feb. 9, 2011, at B3.

¹⁹⁸ *Id.*

¹⁹⁹ See *supra* Part II.C (setting forth Duke's comments).

²⁰⁰ Eric Pfanner, *A Universe of New Web Suffixes Could Be Coming*, N.Y. TIMES, June 20, 2011, at B9.