

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

In the Matter of the Independent Review Process:

Manwin Licensing International S.A.R.L.,

Claimant,

v.

Internet Corporation For Assigned Names and
Numbers (“ICANN”),

Respondent.

CASE MANAGER: Carolina Cardenas

ICDR Case No. 50 117 T 00812 11

ICANN’S RESPONSE TO YOUPORN’S BRIEF RE STANDING TO MAINTAIN IRP

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The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Response to Manwin Licensing International S.A.R.L.’s (“YouPorn”)¹ Brief re Standing to Maintain IRP.

I. INTRODUCTION

This is only the second request for independent review that has been initiated since ICANN established the process in 2002. As this Panel is aware, the first independent review process (“IRP”) request was initiated by ICM Registry LLC (“ICM”) in June 2008. ICM’s IRP request challenged ICANN’s rejection of ICM’s application to run the .XXX top-level domain (“TLD”). ICM had standing to initiate that IRP proceeding because it sought review of the decision by the ICANN Board to deny ICM’s application to establish and operate the .XXX TLD. After volumes of briefing and a week-long evidentiary hearing, the IRP Panel recommended (in a 2 – 1 declaration) that ICANN approve the .XXX TLD.

With its IRP request, YouPorn seeks to undo the prior IRP Panel’s decision regarding the approval of the .XXX TLD. In addition, YouPorn seeks to alter the manner in which ICM operates the .XXX TLD. To do this, YouPorn adopts an interpretation of the IRP standing requirement that would eviscerate the notion of finality in IRP decisions, and would extend IRP standing to any party aggrieved by the operation of a TLD regardless of whether it was “materially affected by” an action or decision by the ICANN Board, as required under the IRP provisions. YouPorn does not have standing to bring these challenges, for several reasons.

First, YouPorn does not have standing to revisit, re-litigate or challenge ICANN’s approval of the .XXX TLD and ICM’s operation of that registry based on the previous IRP proceeding. YouPorn now seems to concede this point by focusing in its brief regarding standing almost exclusively on its challenge to the ICM registry agreement. However, to the extent that YouPorn persists in challenging ICANN’s approval of ICM’s application for .XXX, its position cannot be reconciled with the need for finality of IRP decisions. ICANN approved the .XXX TLD pursuant to

¹ In its Request for Independent Review Proceeding and Brief re Standing, Manwin Licensing International S.A.R.L. refers to itself as “YouPorn.” For the sake of consistency, ICANN will do the same.

an open and transparent process, *and in response to a prior IRP ruling*. Permitting YouPorn to reopen the previous IRP proceeding would render the IRP meaningless and could subject ICANN to a revolving door of inconsistent IRP rulings.

Second, YouPorn champions an unsustainably broad interpretation of the IRP standing requirement. YouPorn's interpretation is contrary to ICANN's mandate, its organizational purpose, and the drafting history of the Bylaws' IRP provisions. Moreover, that interpretation is contrary to the law and common sense. ICANN's interpretation, which tracks the drafting history of its own Bylaws and is consistent with its mandate and organizational purpose, requires a claimant to have been directly and materially affected by a specific board decision or action within ICANN's mandate. It is this interpretation, rather than YouPorn's, that is entitled to deference.

Third, YouPorn does not identify *any* specific ICANN decision or action within its mandate that materially affects YouPorn within the meaning of the Bylaws. YouPorn's challenge to ICM's operation of the .XXX TLD targets ICM conduct, not any ICANN action related to YouPorn. YouPorn has no standing to challenge ICANN's omission of commercial terms from its registry agreement with ICM. The breadth of a commercial contract is a substantive decision beyond the scope of an IRP and cannot be challenged by a party that has no personal and direct connection to the decision. If YouPorn has standing to maintain an IRP *against ICANN* in order to challenge *ICM's* operation of the .XXX TLD, any member of the Internet community, or any user of the Internet for that matter, would arguably have IRP standing to challenge the conduct of a third party, regardless of how attenuated that conduct is from a decision or action of ICANN's Board.

Finally, this IRP should be summarily dismissed because the relief YouPorn seeks cannot be awarded by this Panel. YouPorn does have remedies available to it in other fora, and in fact the IRP is duplicative of the antitrust action YouPorn filed against ICANN and ICM in federal court. YouPorn seeks essentially identical relief in these parallel proceedings but, due to the limitation on declarations an IRP Panel can make, the non-binding nature of the IRP, and the absence of ICM in these proceedings, YouPorn's only prospect of obtaining any binding relief is in federal court.

ICANN should not be required to incur the costs that YouPorn seeks to impose on it through a duplicative IRP.

II. YOUPORN APPEARS TO CONCEDE IT DOES NOT HAVE STANDING TO REVISIT, RE-LITIGATE OR CHALLENGE ICANN’S APPROVAL OF THE .XXX TLD BASED ON THE PREVIOUS IRP.

Contrary to the allegations in its papers initiating these proceedings, YouPorn now appears to abandon its challenge to ICANN’s approval of the .XXX TLD, and instead focuses on post-approval conduct, namely, the terms of the ICM registry agreement.² This is for good reason—YouPorn cannot revisit, re-litigate or challenge the ICANN Board’s approval of the .XXX TLD as it is the product of a previous IRP proceeding decided by a different IRP Panel, which must be respected. Construing the IRP so broadly as to permit serial and inconsistent rulings would render it meaningless—an individual disappointed by the declaration of one panel could simply initiate a new IRP in the hope of achieving a different result. ICANN’s ultimate approval of the .XXX TLD following the issuance of the first IRP ruling was an open and transparent procedure in compliance with ICANN’s Bylaws, and that decision was in full accord with the previous IRP ruling. Any further challenge to that decision is beyond the scope of the IRP established in ICANN’s Bylaws.

A. The IRP Cannot Be Construed to Permit Inconsistent Rulings.

Whether labeled as *res judicata*, collateral estoppel, finality of judgments or just common sense, neither YouPorn nor anyone else has standing to re-litigate issues previously decided by a different IRP Panel. Allowing such claims would render the IRP meaningless and could put ICANN in a position where it must address repeated and inconsistent rulings. That result would be contrary to the process established in ICANN’s Bylaws and the alternative dispute resolution methods from which it is derived.

Although an IRP Panel’s declaration is “advisory in effect,”³ it—as well as the ICANN Board’s action in accordance with that declaration—must nonetheless be entitled to finality within

² See YouPorn Br., p. 4:7-8 (“You Porn asserts that ICANN’s conduct in *approving the anticompetitive ICM registry contract* without competing bids over extensive objections violated and was inconsistent with” ICANN’s bylaws.) (emphasis added).

³ *ICM Registry, LLC v. Internet Corporation for Assigned Names and Numbers (“ICANN”)*, ICDR Case No. 50 117 T 00224 08, Declaration (Feb. 19, 2010) [Hereinafter *ICM v. ICANN Declaration*], attached hereto as ICANN Exhibit A.

the scope of the IRP. ICANN's Bylaws permit persons "materially affected by a decision or action by the Board" to request an independent review of that action or decision.⁴ There is nothing in the Bylaws to suggest that a person may maintain a new IRP proceeding to challenge an action or decision that directly results from a declaration by a prior IRP Panel. On the contrary, the notion of repeated IRP proceedings challenging an action consistent with a prior IRP panel's declaration conflicts with the Bylaws' express intent to "keep the costs and burdens of independent review as low as possible."⁵

Applicable arbitration law is instructive in this regard. Under the Bylaws, "[t]he IRP shall be operated by an international arbitration provider ... using arbitrators under contract with or nominated by that provider."⁶ Further, the IRP is governed by the Supplementary Procedures for ICANN's Independent Review Process ("Supplementary Procedures") in combination with the International Center for Dispute Resolution's International Arbitration Rules ("ICDR Rules"). Pursuant to the ICDR Rules, an IRP Panel's declaration is "final."⁷

Indeed, as the California Court of Appeal has noted, the "'very essence' of arbitration is finality."⁸ Permitting a person to challenge an action or decision that already has been adjudicated by an arbitration panel "would undermine the legitimacy of the arbitration award itself, and of the arbitration process."⁹ Thus, "[d]ecisions of an arbitration panel normally provide the type of finality sought by courts to be protected by collateral estoppel."¹⁰

Courts have applied California's strict claim preclusion rules to prevent parties from re-litigating claims that were previously addressed in arbitration, even if the party filing suit was not a party to the prior arbitration proceeding.¹¹ Here, however, this Panel need not apply strict *res*

⁴ Bylaws for Internet Corporation for Assigned Names and Numbers, Article IV, § 3.2, available at <http://www.icann.org/en/general/bylaws.htm> (As amended March 16, 2012) [Hereinafter ICANN Bylaws], attached hereto as ICANN Exhibit B.

⁵ ICANN Bylaws Article IV, § 3.10.

⁶ ICANN Bylaws Article IV, § 3.4.

⁷ ICDR Rules Article 27(1).

⁸ *Saika v. Gold*, 49 Cal. App. 4th 1074, 1076 (1996) (citations omitted).

⁹ *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 439 F.3d 653, 666 (10th Cir. 2006).

¹⁰ *Hammad v. Lewis*, 638 F. Supp. 2d 70, 74 (D.D.C. 2009).

¹¹ *See Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th 550, 557-58 (1999).

judicata or collateral estoppel rules. Rather, this Panel need only reach the non-controversial conclusion that the Bylaws, Supplementary Rules, and ICDR Rules do not permit a party to invoke an IRP to re-litigate issues resolved and determined in a prior IRP proceeding.

B. ICANN’s Approval of the .XXX TLD Was Done in an Open and Transparent Manner in Compliance with ICANN’s Bylaws and in Response to a Prior IRP Ruling.

To the extent that YouPorn still purports to challenge ICANN’s approval of the .XXX TLD, it lacks standing to do so because the approval was done in a transparent manner in response to a prior IRP Panel’s ruling.

ICANN’s approval of the .XXX TLD was the result of a process initiated nearly ten years ago and completed after an IRP Panel issued its ruling in *ICM v. ICANN*. As the IRP Panel found, the ICANN Board passed resolutions in 2003 for the introduction of sponsored TLDs.¹² There were four categories of selection criteria: (1) Sponsorship Information; (2) Business Plan Information; (3) Technical Standards; and (4) Community Value.¹³ The Board resolved that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated.”¹⁴ ICM’s application for the .XXX TLD was one of just ten TLD applications arising from ICANN’s 2003 request for proposal (“RFP”), and the only one applying for the .XXX TLD.¹⁵ Under the terms of the RFP, anyone could apply for an TLD; there was no competitive bidding for specific TLDs.¹⁶

Although ICM’s initial application was not approved, the ICANN Board gave ICM (and several other applicants for different TLDs) a further opportunity to address deficiencies in its application.¹⁷ On June 1, 2005, the ICANN Board adopted a resolution “authoriz[ing] the President

¹² *ICM v. ICANN* Declaration ¶ 13. A sponsored TLD (“sTLD”) is a specialized TLD that has a sponsor representing a specific community that is served by the sTLD. This differs from an unsponsored generic TLD (“gTLD”). Except for where the distinction is relevant, this brief uses the unqualified acronym “TLD” to refer to both sTLDs and gTLDs.

¹³ Draft RFP for New sTLDs (Part A. Explanatory Notes – Selection Criteria), *available at* <http://archive.icann.org/en/tlds/new-stld-rfp/new-stld-application-parta-15dec03.htm>, attached hereto as ICANN Exhibit C.

¹⁴ *ICM v. ICANN* Declaration ¶ 13.

¹⁵ *Id.* ¶ 14. No other entity applied for any TLD similar in any way to .XXX.

¹⁶ Draft RFP for New sTLDs (Part A. Explanatory Notes), as ICANN Exhibit C.

¹⁷ *ICM v. ICANN* Declaration ¶¶ 15-16.

and General Counsel to enter into negotiations relating to proposed commercial and technical terms of the .XXX sponsored top-level domain (sTLD) with [ICM],” and, upon the successful completion of negotiations, to “present such proposed terms to [the Board], for approval and authorization to enter into an agreement relating to the delegation of the TLD.”¹⁸ On March 30, 2007, however, after extensive negotiations with ICM and comments from ICANN’s Governmental Advisory Committee (“GAC”) and the public on matters of public policy, ICANN concluded that ICM had failed to meet the sponsorship criterion. Therefore, it rejected the proposed registry agreement with ICM and denied ICM’s application for the .XXX TLD.¹⁹

The primary question presented to the prior IRP Panel was whether the ICANN Board’s rejection of the proposed registry agreement and denial of the request for the .XXX TLD was consistent with ICANN’s Articles of Incorporation and Bylaws.²⁰ The IRP Panel concluded that the Board, on June 1, 2005, had determined that ICM’s application did in fact meet the sponsorship criterion and that the Board’s 2007 decision was a reconsideration of the sponsorship finding and therefore inconsistent with ICANN’s Articles of Incorporation and Bylaws.²¹ Thus, according to the IRP Panel, ICANN was bound to approve the .XXX TLD and authorize ICM to operate that registry upon finalizing the terms of a registry agreement.

In light of the prior IRP Panel’s findings, any challenge to: (i) the decision to approve the .XXX TLD; (ii) the administration of the process by which ICM was selected as the registry operator; or (iii) the approval of a registry agreement with ICM is beyond the scope of this, or any other, IRP Panel’s authority. The prior IRP Panel found not only that ICANN’s approval of the .XXX TLD and ICM as its operator in 2005 was consistent with ICANN’s Articles of Incorporation and Bylaws, but that any reconsideration of that decision would violate those rules.

YouPorn’s related contention²² that ICANN failed to permit competition for the .XXX TLD is a red herring. Under the 2004 selection criteria, there was never going to be competitive bidding

¹⁸ *Id.* ¶ 19.

¹⁹ *Id.* ¶ 47.

²⁰ *Id.* ¶ 142.

²¹ *Id.* ¶¶ 147-149, 152.

²² YouPorn’s Br. re Standing at 3:7-17.

for .XXX or any other TLD in that round. To the contrary, ICANN requested proposals for new TLDs, and ICM was the only applicant for .XXX. The process was open and transparent. Thus, the Ninth Circuit's decision in *Coalition for ICANN Transparency v. VeriSign, Inc.*, 611 F.3d 495 (9th Cir. 2010), six years later regarding the renewal of the registry agreements for the two largest existing gTLDs—.COM and .NET—is irrelevant to the 2004 process for selecting new TLDs. And ICANN was not even a party to that action at the time of the Ninth Circuit's decision.²³

III. ICANN ESTABLISHED THE IRP, AND ITS INTERPRETATION OF THAT PROCESS IS ENTITLED TO DEFERENCE.

ICANN was formed in 1998. Early on, it conceived of a discretionary independent review process in its original Bylaws by which certain parties could seek review of Board decisions that were argued to be contrary to ICANN's Bylaws or Articles of Incorporation. The procedure is unique to ICANN.

Over the course of several years, ICANN established the specific contours of the IRP. Thus, ICANN is in a unique position to address why the IRP was created, the expectations of how that process facilitates ICANN's mandate, and who was intended to be able to invoke the IRP. As a result, ICANN's interpretation of the Bylaws giving rise to that process deserves deference. YouPorn's protestations notwithstanding, California law does not require a broad interpretation of ICANN's Bylaws that would hamper ICANN's ability to fulfill its organizational purposes. Nor does common sense support an interpretation of IRP standing that would expose ICANN to thousands of IRPs for any action or inaction, regardless of whether the claimants were personally involved in the action or decision-making.

A. ICANN's Mandate, Its Organizational Purposes, and the Drafting History of the IRP Support ICANN's Interpretation of IRP Standing.

"A by-law of a private corporation is a rule or law adopted by it for its internal government"²⁴ As the architect of its bylaws, a corporation has a fundamental role in their interpretation. A bylaw must be interpreted with an eye toward the corporation's intent and organizational purposes,

²³ ICANN had been a defendant earlier in the litigation, but the district court had twice dismissed ICANN from the case, causing the plaintiff to drop ICANN as a defendant.

²⁴ *Olinco v. Merle Norman Cosmetics, Inc.*, 200 Cal. App. 2d 260, 267 (1962) (quoting *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 195 (1905)).

while also taking into account the rights of the parties who urge a contrary interpretation.²⁵

California law requires “defer[ence] to the board’s determinations if any interpretation of the bylaws is necessary.”²⁶ ICANN’s mandate and the drafting history of the Bylaws provisions at issue here make clear that the IRP was not intended to provide a forum for the types of complaints YouPorn has set forth in its briefing. The IRP Panel should defer to ICANN’s interpretation.

ICANN’s purposes are technical, not commercial or political. ICANN’s mission, which it carries out as a non-profit public benefit corporation, is to coordinate the global Internet’s system of unique identifiers and to ensure the stability and security of the domain name system on behalf of the global Internet community.²⁷ This involves coordinating the allocation and assignment of unique identifiers for the Internet (*i.e.*, IP addresses and protocol port and parameter numbers), coordinating the operation of the domain name system (“DNS”) root server system, and coordinating policy development “reasonably and appropriately related to these technical functions.”²⁸ Put simply, ICANN’s mandate is unconcerned with the commercial or political aspects of the Internet.

In its original Bylaws, ICANN conceived that its Board “may, *in its sole discretion*, provide for an independent review by a neutral third party.”²⁹ Thus, from the outset, the idea of independent review was that it would be in the Board’s discretion. The Board later decided to provide for independent review of a narrow class of behavior, and amended the Bylaws with the direction to

²⁵ See *Bennett v. Hibernia Bank*, 47 Cal. 2d 540, 552 (1957) (“The reasonableness of the by-law must be considered in the light of all the circumstances, including such matters as the purposes for which the corporation was organized and the extent of the rights of the particular member involved.”).

²⁶ *Hard v. Cal. State Employees Ass’n*, 96 Cal. App. 4th 708, 714 (2002); see also *Hard v. Cal. State Employees Ass’n*, 112 Cal. App. 4th 1343, 1347 (2003) (“A court may review a private organization’s interpretation of straightforward bylaw language only where it is unreasonable, does not involve an arcane rule within the peculiar knowledge of the organization, and does not depend on the organization’s rituals and customs.”).

²⁷ Bylaws, Article I, § 1 (Mission).

²⁸ Bylaws, Article I, § 1 (Mission).

²⁹ Original Bylaws, effective 6 November 1998, Article III, Section 4 (emphasis added), available at <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm#III>, attached hereto as ICANN Exhibit D.

“adopt policies and procedures for independent third-party review of Board actions alleged by an affected party to have violated the Corporation’s articles of incorporation or bylaws.”³⁰

In formulating the independent review framework, ICANN’s Advisory Committee on Independent Review (the “Advisory Committee”) advised narrowing the class of parties with standing to maintain an IRP proceeding. Specifically, the Advisory Committee explained that the “affected party” standard stated in the Bylaws amendment “sweeps too broadly, ... as nearly every Internet user can be said to be affected in some quantum by nearly any decision of the ICANN Board.”³¹ To prevent a broad interpretation of IRP standing, the Advisory Committee specifically recommended a “materiality” threshold, limiting independent review to individuals and entities that have “more *directly been affected* by the action (or failure to act) at issue.”³²

Thereafter, the IRP framework went through additional levels of review and was wholly reformulated before being incorporated into the Bylaws. The effect of these additional levels of review was to further narrow the scope of independent review, while making it useful for those who participate in the ICANN community who believed that the Board was in fact acting outside of its Bylaws or Articles of Incorporation.

In 2002, for example, Stuart Lynn, then the President of ICANN, offered a reform proposal questioning the very purpose of independent review. In his opinion, there was “no justification, ... and no necessity, for any process that would allow some other body, such as the nascent Independent Review Panel, made up of non-Trustees to override a Board of Trustees decision.”³³

During the extensive revisions of the Bylaws that followed President Lynn’s proposal, the Committee on ICANN Evolution and Reform (the “Reform Committee”) took over from the Advisory Committee in formulating the IRP. The Reform Committee explained that “any review

³⁰ Amended Bylaws, effective 21 November 1998, Article III, Section 4(b) (emphasis added), *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-23nov98.htm>, attached hereto as ICANN Exhibit E.

³¹ Draft Principles of the Advisory Committee on Independent Review, Ex. D to 27 May 1999 Meeting Minutes, *available at* <http://www.icann.org/en/groups/board/documents/minutes-exhibit-d-27may99-en.htm>, attached hereto as ICANN Exhibit F.

³² *Id.* (emphasis added).

³³ President’s Report: ICANN – The Case for Reform, 24 February 2002, *available at* <http://archive.icann.org/en/general/lynn-reform-proposal-24feb02.htm>, attached hereto as ICANN Exhibit G.

by an independent review panel should be subject to very careful constraints.”³⁴ The committee made clear that it would not broaden independent review “to involve a review of the merits of the particular decision,” agreeing with President Lynn that an IRP Panel should not have “the ability to override decisions by the Board . . . simply because an independent review panel disagrees with the Board on the merits.”³⁵ Further, the Reform Committee explained that “any independent review panel must have a clear mandate to dispose of summarily frivolous issues so as not to allow the mere existence of the process to be misused to impede the exercise of community will.”³⁶ In the resulting “Blueprint for Reform,” the Reform Committee proposed that the Board “create a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has *acted* in conflict with ICANN’s Bylaws.”³⁷

After establishing the overall principles governing the proposed accountability mechanisms, the Reform Committee sought assistance with its implementation of those specific provisions. The resulting Preliminary Framework advised that each mechanism (Ombudsman, Reconsideration, and Independent Review) “provide accountability under different circumstances and should be individually tailored to those circumstances.”³⁸

As the Reform Committee began to flesh out these mechanisms, it again reiterated the “narrow role for independent review.”³⁹ The Reform Committee emphasized that it was not “consistent with ICANN’s limited mission and financial structure to assume and facilitate a judicial review-like process under which all or most ICANN decisions could be subjected to costly, time-

³⁴ Committee on ICANN Evolution and Reform, Working Paper on the ICANN Structure and the Nominating Committee Concept, 9 May 2002, *available at* <http://archive.icann.org/en/committees/evol-reform/working-paper-structure-09may02.htm>, attached hereto as ICANN Exhibit H.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Committee on ICANN Evolution and Reform, ICANN: A Blueprint for Reform, § 5, (emphasis added), *available at* <http://archive.icann.org/en/committees/evol-reform/blueprint-20jun02.htm>, attached hereto as ICANN Exhibit I.

³⁸ Accountability Framework Assistance Project, Preliminary Framework 29 July 2002, *available at* <http://archive.icann.org/en/committees/evol-reform/afap-report-29jul02.htm>, attached hereto as ICANN Exhibit J.

³⁹ Committee on ICANN Evolution and Reform, First Interim Implementation Report, § 2.5, 1 August 2002, *available at* <http://archive.icann.org/en/committees/evol-reform/first-implentation-report-01aug02.htm>, attached hereto as ICANN Exhibit K.

consuming delays.”⁴⁰ The Reform Committee expressed deep skepticism of any approach that would allow a “broader scope of review or appeal mechanisms.”⁴¹

Ultimately, the Reform Committee proposed an independent review process that was separate from the reconsideration process. The proposed reconsideration procedure was broader, permitting a party to challenge “staff actions or inactions that contradict established ICANN policy(ies)” and “actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information.”⁴² The IRP, by contrast, was limited to a “person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”⁴³ The Board adopted these proposed Bylaws without revision.⁴⁴

In light of this background, YouPorn’s contention that ICANN’s mandate requires a broad interpretation of IRP standing is entirely without merit. In fact, a broad interpretation of IRP standing is *inconsistent with* ICANN’s mandate, its organizational purpose, and the drafting of the Bylaws. ICANN adopted the independent review process in its discretion, and only after repeatedly narrowing its scope, the powers of an IRP Panel, and the class of individuals and entities that could initiate or maintain an IRP proceeding. By contrast, YouPorn is asking this IRP Panel essentially to create a much broader type of IRP, one with wholly new rights for any person or entity that is dissatisfied with a third-party registry’s operation of a top-level domain. That is well beyond the scope of IRP standing as envisioned by ICANN. To paraphrase the California Court of Appeal, ICANN’s Bylaws nowhere provide for the right of a third party to obtain independent review of a registry agreement between ICANN and a registry operator, and California law does not compel the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Committee on ICANN Evaluation and Reform, Proposed New Bylaws Recommended by the Committee on ICANN Evolution and Reform, 2 October 2002, Article IV, § 2, *available at* <http://archive.icann.org/en/committees/evol-reform/proposed-bylaws-02oct02.htm>, attached hereto as ICANN Exhibit L.

⁴³ *Id.*

⁴⁴ ICANN Bylaws, Article IV, §§ 2 & 3.

“interjection” of a right that is “inconsistent with the scheme, the purpose, the function of” ICANN.⁴⁵

B. The Law Does Not Require a Broad Interpretation of ICANN’s Bylaws.

YouPorn ignores the specific rules governing the interpretation of bylaws, relying instead on the “general” proposition that bylaws are construed according to the rules governing the interpretation of contracts and statutes.⁴⁶ While the general rules governing contracts and statutes may be instructive in interpreting bylaws, they are not the end of the story. And even those general rules do not require a broad interpretation of bylaws, as YouPorn contends. In fact, many principles of construction, both those unique to the interpretation of bylaws and general principles governing contract and statutory interpretation, point toward a narrow construction of the Bylaws at issue here.

First, the interpretation of a bylaw provision must address the provision’s purpose and the interpretation’s effect on corporate operations.⁴⁷ Courts analyze not only the “usual understanding of the term” but whether the interpretation gives the bylaw “a reasonable operation and effect.”⁴⁸ Where a proposed interpretation would “hamper the board” in its ability to operate, courts will read a bylaw’s terms in a “more restricted sense,” so as to effectuate the corporation’s purpose.⁴⁹ The ICANN committee that assisted in drafting the IRP provisions of the Bylaws expressed this concern on numerous occasions, emphasizing that the IRP must not “be misused to impede the exercise of community will”⁵⁰ or to subject “all or most ICANN decisions ... to costly, time-consuming delays.”⁵¹

⁴⁵ *Spencer v. Hibernia Bank*, 186 Cal. App. 2d 702, 736 (1960).

⁴⁶ YouPorn Br. re Standing, p. 7 (citing *Singh v. Singh*, 114 Cal. App. 4th 1264, 1294 (2004)). *Singh* says little more than that corporate bylaws may be construed according to the general rules governing the construction of statutes and contracts. It does not provide for a “broad” construction of any document, be it statute, contract, or bylaw.

⁴⁷ *See Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 631 (Cal. 1911).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Committee on ICANN Evolution and Reform, Working Paper on the ICANN Structure and the Nominating Committee Concept, 9 May 2002, ICANN Exhibit H.

⁵¹ Committee on ICANN Evolution and Reform, First Interim Implementation Report, 1 August 2002, ICANN Exhibit K.

Second, even if general principles of contract and statutory interpretation applied here, they instruct courts to narrowly construe terms where appropriate. By statute, California provides that “[h]owever broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.”⁵² There is no counter-party to the ICANN Bylaws, ICANN developed the Bylaws and the drafting history shows that ICANN did not intend to create broad IRP standing that would permit a party indirectly affected by an ICANN action or decision to impose on ICANN the expense and burden of an IRP. Thus, IRP standing must be narrowly interpreted to reach only those circumstances contemplated by ICANN in drafting the Bylaws.

Similarly, the common law canon of interpretation *expressio unius est exclusio alterius* provides that to express one thing implies the exclusion of the other.⁵³ The canon takes a narrow view of the scope of the language used, rather than a broad one. Here, for example, the IRP is limited to a “decision or action by the Board.”⁵⁴ Under the *expressio unius* canon, the limitation of IRP review to Board actions or decisions prevents an interpretation that permits an IRP claimant to challenge (a) the Board’s failure to act, and (b) an action or decision of a party other than the Board (here, ICM). Similarly, ICANN’s Bylaws limit IRP standing to those “materially affected” by a decision or action of the ICANN Board.⁵⁵ Thus, the *expressio unius* canon precludes a Bylaw interpretation that would provide standing to a party only indirectly affected by an action or decision of the ICANN Board.

The only authorities YouPorn cites in support of its conclusion that IRP standing must be broadly construed address remedial statutes, such as the Civil Rights Act.⁵⁶ ICANN’s Bylaws obviously are not akin to a remedial statute, and the IRP is not a forum for all complaints about the

⁵² Cal. Civ. Code § 1648.

⁵³ See *American Cntr. for Educ., Inc. v. Cavnar*, 26 Cal. App. 3d 26, 33 (1972) (applying *expressio unius* canon to hold that bylaws provision allowing delegation of appointment power implied non-delegation of removal power).

⁵⁴ ICANN Bylaws, Article 4, § 3.

⁵⁵ ICANN Bylaws, Article 4, § 3.

⁵⁶ YouPorn Br. re Standing, p. 11 (citing *United States v. N.Y. Tel. Co.*, 682 F.2d 313, 316-17 (2d Cir. 1982); *Davis v. City of Aurora*, No. 08-civ-002107-PAB-MJW, 2011 U.S. Dist. LEXIS 76010, at *11-13 (D. Colo. July 14, 2011); *Chicago Truck Drivers v. El Paso CGP Co.*, 525 F.3d 591, 605 (7th Cir. 2008)

operation of the Internet. Rather, the IRP is limited to complaints about alleged process failures in the Board’s decision-making that directly affect parties specifically concerned with that decision-making. Further, the IRP does not provide any binding remedy for a claimant. Accordingly, YouPorn’s analogy to civil rights and other remedial statutes is inapt.

C. YouPorn’s Interpretation of the IRP Standing Requirements Lacks Merit.

Shorn of its mistaken analysis of ICANN’s mandate, its incomplete review of the Bylaws’ drafting history, and its erroneous appeal for a broad interpretation of ICANN’s Bylaws, YouPorn’s argument boils down to a dictionary definition of the phrase “materially affected by.” YouPorn ignores the context in which that phrase was adopted, and the relationship between the phrase and the balance of the language in the provisions establishing the IRP standing requirement.⁵⁷

As discussed above, the Advisory Committee first proposed the “materially affected” standard in response to concerns that the standard contemplated by the Bylaws was too broad. In proposing a materiality threshold, the Advisory Committee explained that materiality required the claimant to have “more directly been affected by” Board action or inaction.⁵⁸ The Advisory Committee worried that any Internet user would be able to maintain an IRP based on any Board action or inaction if the standard was lower.⁵⁹ Although the Reform Committee maintained the requirement for a direct connection with the claimant, it continued to restrict the scope of standing, requiring that the claimant be “materially affected by a decision or action by the Board.”⁶⁰ Thus, the standing requirement ultimately adopted required a *direct connection* between the claimant and a specific Board decision or action.

YouPorn ignores this historical and grammatical context and asks the Panel to apply a standard it cobbles together from the definitions of the words “materially,” “affected,” and “by” in

⁵⁷ Cal. Civ. Code § 1647 (“A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.”); Cal. Civ. Code § 1641 (“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”).

⁵⁸ Draft Principles of the Advisory Committee on Independent Review, Ex. D to 27 May 1999 Meeting Minutes, ICANN Exhibit F.

⁵⁹ *Id.*

⁶⁰ Committee on ICANN Evaluation and Reform, Proposed New Bylaws Recommended by the Committee on ICANN Evolution and Reform, 2 October 2002, ICANN Exhibit L; *see also* Bylaws Article IV, § 3.

two general interest dictionaries.⁶¹ It then asks the Panel to indulge a *non sequitur* by arguing that “materially affected by,” which ICANN adopted to strengthen the IRP standing requirement, equates to “but for” causation, which is, of course, the *weakest* sense of causation.⁶² By virtue of ICANN’s coordination of the DNS, however, the Board’s decisions and actions could be seen as a “but for” cause of nearly all things related to the Internet’s DNS. For example, ICANN’s coordination of the DNS facilitates all Internet users’ ability to view content on the Internet, but simply because an Internet user has some type of problem—that ICANN might or might not be able even to address—does not equate to standing to pursue an IRP. Yet, under YouPorn’s interpretation of “materially affected by,” virtually all Internet users are “materially affected” by ICANN’s decisions or actions on a daily basis and could maintain an IRP.⁶³ This interpretation directly contradicts ICANN’s insistence that the IRP must not subject “all or most ICANN decisions ... to costly, time-consuming delays.”⁶⁴

YouPorn’s interpretation of the IRP standing requirement has no limiting principles. According to YouPorn, as long as an individual or entity can identify an ICANN decision or action in the causal chain that led to its grievance, it has standing to maintain an IRP. This interpretation is wholly without merit and could result in ICANN being overrun with IRPs and impaired from carrying out its mandate.

⁶¹ YouPorn Brief re Standing 7:25-8:5 (citing the American Heritage Dictionary and the Random House Unabridged Dictionary).

⁶² YouPorn Brief re Standing 7:5-8:13 (defining “by” and concluding, “[i]n other words, the use of ‘by’ requires only what is commonly known as ‘but for’ causation or causation in fact”).

⁶³ Another scheme that uses a “materially affected by” standard, Florida’s Code of Ethics for Public Officers and Employees, is notable because it imposes limitations on standing. That legislation authorizes a court to void a contract pursuant to an action brought by “[a]ny citizen materially affected by the contract...” Fla. Stat. Ann. § 112.3175(1)(b)(3). “Materially affected” is defined to mean “will be affected in a substantially different manner or degree than the manner or degree in which the public in general will be affected, or, if the matter affects only a special class of persons, then affected in a substantially different manner or degree in which such class will be.” Fla. Stat. Ann. § 112.312(16). The IRP standard is more restrictive than this, as the Advisory Committee’s comments make clear that it also incorporates a “direct” privity requirement, but even the Florida scheme acknowledges limiting principles.

⁶⁴ Committee on ICANN Evolution and Reform, First Interim Implementation Report, 1 August 2002, ICANN Exhibit K.

D. Common Sense Does Not Support the Broad Standing YouPorn Advocates.

Ultimately, bylaws must be given a “reasonable construction.”⁶⁵ YouPorn’s construction of ICANN’s IRP Bylaws provisions is anything but reasonable. Under YouPorn’s construction, any person or entity operating in *any TLD* has standing to maintain an IRP if it is unhappy with the operation of any *other TLD*, without regard to whether that person or entity had any direct interaction with ICANN or whether ICANN took any specific action with respect to the terms of operation with which the person or entity disagrees. It does not make sense that ICANN would expose itself to thousands of IRP proceedings for literally any action or inaction it may undertake.

IV. YOUPorn DOES NOT HAVE STANDING TO CHALLENGE ICM’S CONDUCT IN AN IRP PROCEEDING, YET THAT IS PRECISELY WHAT YOUPorn IS COMPLAINING ABOUT.

YouPorn’s primary complaint relates to defensive registrations (registering its second level .COM domain names in .XXX so that others cannot register those names) and a lack of price caps in the .XXX registry agreement. These issues relate directly to how ICM is operating the .XXX TLD, and operational decisions that ICM has made, are well beyond IRP review.

A. IRP Standing Requires a Specific Board Decision or Action That Materially Affects the Claimant.

As the ICANN Bylaws’ drafting history shows, the IRP was not intended to provide parties with a forum to complain about the actions of others. Rather, IRP standing is limited to individuals and entities that have been “materially affected” by a “decision or action by the Board.”⁶⁶ As the Advisory Committee made clear, “material” in this context requires a direct connection between the party affected and the Board action or decision.⁶⁷ Further, the IRP request must challenge a specific Board action or decision, as is clear from the Board’s rejection of the Advisory Committee’s proposal to permit challenges to inaction.⁶⁸ And the IRP may not “involve a review of the merits of

⁶⁵ *Olinco v. Merle Norman Cosmetics, Inc.*, 200 Cal. App. 2d 260, 272 (1962); *see also Sanchez v. Grain Growers Ass’n of Cal.*, 126 Cal. App. 3d 665, 672 (1981) (giving bylaws a reasonable construction to sustain their validity).

⁶⁶ Bylaws, Article IV, § 3.

⁶⁷ Draft Principles of the Advisory Committee on Independent Review, Ex. D to 27 May 1999 Meeting Minutes, ICANN Exhibit F (“materially affected” limits IRP standing to individuals and entities that have “directly been affected” by a Board action).

⁶⁸ *Compare* Draft Principles of the Advisory Committee on Independent Review, Ex. D to 27 May 1999 Meeting Minutes, ICANN Exhibit F (proposing that “independent review should be

the particular decision.”⁶⁹ Thus, the alleged injury must be caused by a specific Board decision or action taken pursuant to processes that are allegedly inconsistent with ICANN’s Articles of Incorporation or Bylaws, and that directly affects the claimant.

Contrary to YouPorn’s argument,⁷⁰ ICANN does not contend that an IRP may only be brought by someone that seeks to operate a TLD or participated in other ICANN activities. Instead, ICANN’s position is that there has to be an actual Board decision or action that directly and materially affects the claimant in a manner distinct from the general public, and the claim must not merely second-guess the merits of the Board’s decision-making. YouPorn’s IRP request identifies no decision or action by the ICANN Board that meets this requirement.

B. YouPorn Does Not Challenge a Specific Board Decision or Action Within the Scope of the IRP.

YouPorn’s real complaint is about “domain name rights.”⁷¹ YouPorn is challenging ICM’s pricing structure for domain names in the .XXX TLD. In a futile attempt to tie ICM’s operation of the .XXX TLD to ICANN, YouPorn purports to challenge ICANN’s failure to include price caps and other restrictive terms in the registry agreement with ICM. Thus, YouPorn is actually challenging what was *left out* of the contract, rather than what is in the contract. Further, YouPorn does not allege that the process ICANN used to “leave out” these restrictive terms was inconsistent with ICANN’s Articles of Incorporation or its Bylaws. Rather, YouPorn—in its capacity as a potential second-level domain name registrant in .XXX—is challenging ICM’s decisions on how to operate the registry, which obviously is not permitted within the IRP.

ICANN’s mission is to coordinate the DNS in a manner that ensures the stable and secure operation of the Internet’s unique identifier systems. In performing its mission, ICANN is directed to limit its activities to “those matters within ICANN’s mission requiring or significantly benefiting

(continued...)

available in cases of failure to act as well as actions by the board”), *with* ICANN Bylaws, Article IV, § 3 (limiting independent review to a “decision or action by the Board”).

⁶⁹ Committee on ICANN Evolution and Reform, Working Paper on the ICANN Structure and the Nominating Committee Concept, 9 May 2002, ICANN Exhibit H.

⁷⁰ YouPorn Br. re Standing at 1:19-21.

⁷¹ YouPorn Br. re Standing at 8:14-16.

from global coordination.”⁷² Another of ICANN’s core values is to “depend[] on market mechanisms to promote and sustain a competitive environment” rather than to attempt to regulate that market.⁷³

Whether ICANN could have imposed price caps on ICM is beside the point. The fact is that ICM, not ICANN, set the price for .XXX names – ICANN’s Board played no role whatsoever in that decision. The facts that the Board did not instruct ICANN’s President and CEO or ICANN’s General Counsel to negotiate a price cap for .XXX names does not give all entities that were interested in registering names in the .XXX registry standing to initiate an IRP proceeding. Price caps have been included in some of the legacy TLDs, but only when insisted on by the government or where the registry made such a request.⁷⁴ Neither circumstance was present here. Moreover, with the form registry agreement for the new gTLDs that ICANN is in the process of reviewing, ICANN has made clear that it will not be including price caps in any new gTLDs,⁷⁵ which is consistent with ICANN’s core value to depend on market mechanisms “where feasible and appropriate.”⁷⁶ Thus, the “omission” from the registry agreement that YouPorn challenges is not within the scope of ICANN’s mandate and goes to the substance of the agreement, not to whether the Board’s decision-making process was consistent with ICANN’s Articles of Incorporation and Bylaws.

By contrast, the prior IRP proceeding involving .XXX addressed a very specific Board action – there, the Board’s denial of ICM’s application for the .XXX TLD. That decision was exactly the sort of decision that the IRP provisions were designed to address, the approval or rejection of a new TLD obviously is squarely within the mandate of the ICANN Board.

⁷² ICANN Bylaws, Article I, § 2.2.

⁷³ ICANN Bylaws, Article I, § 2.5.

⁷⁴ 18 March 2011 Draft Rationale for Approving Registry Agreement with ICM for .XXX sTLD at 17, *available at* <http://www.icann.org/en/groups/board/documents/draft-icm-rationale-18mar11-en.pdf>, attached hereto as ICANN Exhibit M.

⁷⁵ *See* New gTLD Agreement, *available at* <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-04jun12-en.pdf>, attached hereto as ICANN Exhibit N.

⁷⁶ Bylaws, Article I1, § 2.5.

If claims like YouPorn's were permitted to proceed, ICANN could be subjected to perpetual IRP proceedings relating to decisions that are outside the scope of its mandate and that have nothing to do with ICANN's fidelity to its Articles of Incorporation and Bylaws. This is a particularly salient consideration given that ICANN is in the process of evaluating nearly two thousand new TLD applications. The effect of YouPorn's interpretation would be that everyone who desires to submit a defensive registration—potentially millions of persons and entities all over the world—could invoke an IRP to hamstring ICANN in fulfilling its mission. Indeed, YouPorn concedes that, based on its interpretation of the Bylaws, the scope of potential IRP claimants is incredibly broad, including celebrities and the owners of children's character names.⁷⁷ The IRP cannot be construed to establish such broad standing.

C. YouPorn Has Not Been Materially Affected by a Specific Board Action or Decision.

Even if ICANN's role in approving the ICM registry agreement without requiring the restrictions that YouPorn seeks to impose could be the subject of an IRP proceeding, You Porn is not a party that could initiate such a proceeding because YouPorn was not "materially affected" by that approval. For purposes of IRP standing, materiality requires a direct connection between the claimant and the decision or action.⁷⁸ Here, YouPorn has no personal connection to the Board decision that it is challenging; it is just one of potentially millions of individuals and entities that it alleges would suffer the same injury as a result of that decision.

YouPorn attempts to establish a direct connection to the Board's "decisions" regarding .XXX by citing a letter that it wrote to ICANN on September 22, 2010 to "vehemently oppose[] the creation of a .XXX domain."⁷⁹ YouPorn does not identify which of the Board's "decisions" its

⁷⁷ YouPorn Br. re Standing at 5.

⁷⁸ Draft Principles of the Advisory Committee on Independent Review, Ex. D to 27 May 1999 Meeting Minutes, ICANN Exhibit F ("materially affected" limits IRP standing to individuals and entities that have "directly been affected" by a Board action).

⁷⁹ YouPorn Br. re Standing at 20:4-5 (quoting YouPorn Ex. 1). The same is true of comments by the Free Speech Coalition, which YouPorn contends "vociferously opposed adoption of the .XXX TLD and ICM's appointment to operate it." YouPorn Br. re Standing at 20:6-7. Both of those issues were adjudicated by the prior IRP brought by ICM.

letter challenged, but the letter's content shows that YouPorn was contesting the actual approval of the .XXX TLD and of ICM as its operator, which was already resolved in the prior IRP declaration.

In any event, even if its letter had contested the approval of the ICM registry agreement's terms, YouPorn does not have a sufficiently direct relationship with that decision to give it standing to maintain an IRP. YouPorn does not allege that it has any relationship with ICANN that is not mediated by a registry operator. Rather, YouPorn contends that its domain names in the .COM TLD are threatened by the creation of the .XXX TLD. The registration of a domain name in one TLD does not entitle all registrants to challenge every Board decision regarding a different TLD. YouPorn is not directly affected by anything ICANN did. Rather, it is directly affected by *ICM's* adoption of pricing and other terms for registration of domain names in .XXX with which YouPorn disagrees. This link is too attenuated to provide IRP standing against ICANN.

Finally, YouPorn does not allege that it was injured in a unique way. It complains that it has trademarks and .COM domain names that it wishes to defensively register as domain names in .XXX. But that is potentially true of all trademark holders regardless of their presence on the Internet, and all domain name registrants in other TLDs. YouPorn is not affected in a substantially different manner or degree than any other trademark or domain name owner. YouPorn argues that its alleged injury is unique because it is a "significant player in the online adult entertainment community."⁸⁰ But YouPorn's argument does not hinge on its significance in the adult entertainment industry. By YouPorn's own admission, anyone who does not wish to have its name registered in .XXX—including celebrities and owners of children's character names—has the same interest as YouPorn. The nature of the injury YouPorn alleges it will sustain is identical to that of every other trademark holder and domain name holder in another TLD that wishes to defensively register a domain name in .XXX, and the degree of the alleged injury is not substantially different than that of any other person or entity in any industry that wishes to defensively register multiple domain names in .XXX. That is not enough to show that YouPorn has been "materially affected by a decision or action by the Board."

⁸⁰ YouPorn Br. re Standing at 13.

D. If YouPorn’s Interpretation Is Correct, Third Parties Would Have Standing to Initiate IRP Proceedings That Have Nothing to Do With ICANN.

Under YouPorn’s erroneous interpretation of ICANN’s Bylaws, it has standing to initiate an IRP proceeding to challenge the pricing terms ICM has adopted for the .XXX TLD because the ICM registry agreement does not cap or otherwise restrict those pricing terms. YouPorn concedes that, based on this broad interpretation, celebrities and the owners of children’s character names would have standing to maintain an IRP proceeding on the same basis. In fact, under YouPorn’s interpretation, the IRP would be far more chaotic. YouPorn’s interpretation would extend IRP standing even more broadly, to countless third parties that challenge actions having only the most tenuous connection to ICANN.

Although YouPorn ostensibly is challenging ICANN’s failure to include pricing restrictions in the .XXX registry agreement with ICM, third parties could just as easily challenge any other terms included or omitted from a registry agreement. As with YouPorn’s IRP request, those complaints are more appropriately directed to the registry operator, but under YouPorn’s interpretation of the Bylaws, the potential registrant also would have standing to maintain an IRP proceeding against ICANN. Likewise, a registrant seeking longer or different terms in its contract with a registrar could initiate an IRP proceeding against ICANN for failing to insist on restrictions on the registry operator in the overarching registry agreement, or the registrar in the Registrar Accreditation Agreement.

These are not fanciful concerns. As set forth above, ICANN is in the process of coordinating a broad expansion of the TLD system. Under YouPorn’s interpretation of the Bylaws, ICANN could find itself defending IRPs for each registry agreement it enters for a new TLD even if it never contemplated an aspect of the new registry operator’s operation that draws the challenge.

V. THE RELIEF SOUGHT BY YOUNORN CANNOT BE AWARDED IN THIS IRP PROCEEDING AND IS DUPLICATIVE OF YOUNORN’S FEDERAL LAWSUIT.

As YouPorn acknowledges,⁸¹ the IRP Panel cannot issue a binding ruling, only an advisory declaration.⁸² And given the nature of YouPorn’s specific complaint regarding the terms of the

⁸¹ YouPorn Br. re Standing at 14:4-5.

⁸² ICANN Bylaws Article IV, § 3.8 (limiting the IRP Panel’s authority to declaring whether Board action was inconsistent with the bylaws); *ICM v. ICANN* Declaration ¶¶ 131-34.

registry agreement with ICM, which is not a party to this IRP proceeding, there is no relief that YouPorn can obtain even if it could show that it has been materially affected by a specific Board decision. The thrust of YouPorn's complaint relates to conduct of ICM, not ICANN.

Indeed, at the same time that it is attempting to maintain this IRP proceeding to obtain an advisory declaration, YouPorn is requesting binding relief from the United States District Court for the Central District of California in a pending antitrust action against ICANN *and ICM*.⁸³ If YouPorn obtains the relief it seeks in its antitrust action, this IRP proceeding will be superfluous. ICANN should not be saddled with the expense of defending YouPorn's allegations in parallel proceedings, particularly given the futility of the relief sought.

A. The IRP Panel Cannot Grant the Relief Sought.

As a practical matter, there is nothing YouPorn can achieve via independent review of an ICANN decision because ICANN does not set or control the prices that ICM charges for domain names. ICM (not ICANN) set the prices and restrictions that have upset YouPorn. The IRP Panel cannot declare that ICM, a third party, must alter its pricing structure for registrations in .XXX. Further, any declaration by an IRP is non-binding. Thus, as a simple consequence of the relief sought and the nature of the IRP, YouPorn cannot obtain any relief in this proceeding.

B. YouPorn Has Alternative Fora to Seek Binding Relief.

To the extent YouPorn has legitimate concerns, there are other procedures that it can invoke to seek relief. For example, if YouPorn has trademark interests in a particular domain name, it can use the Uniform Domain Name Dispute Resolution Policy ("UDRP") to resolve those issues.⁸⁴ The UDRP is an alternative dispute resolution process that allows persons with trademark interests to assert those interests against others who have registered domain names that the trademark holder claims infringed its interests. ICANN does not administer the UDRP, but it does require all accredited registrars to abide by the decisions of the UDRP panels, and to include the UDRP in their contracts with consumers.

⁸³ *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, No. CV 11-9514-PSG (C.D. Cal.), attached hereto as ICANN Exhibit O.

⁸⁴ See Uniform Domain Name Dispute Resolution Policy, October 24, 1999, available at <http://www.icann.org/en/help/dndr/udrp/policy>, attached hereto as ICANN Exhibit P.

Any entity that believes that another entity has improperly registered a domain name infringing its trademark rights can invoke the UDRP process, the remedy of which is requiring the applicable registrar to transfer the domain name. Thus, for example, Yahoo has frequently used the UDRP to prevent others from using names that are confusingly similar to its “Yahoo” trademark. By way of example, Yahoo used the UDRP to cause the transfer of 37 domain names that had been registered that appeared to violate Yahoo’s trademark.⁸⁵ There are thousands of persons and entities that have resolved concerns regarding intellectual property interests via the UDRP,⁸⁶ and YouPorn does not explain why the UDRP does not provide complete relief in this respect.

As another example, YouPorn believes it has valid antitrust claims against ICANN and ICM. Although ICANN disagrees as a matter of fact and law, YouPorn has brought those claims in federal court, and the district court has allowed portions of that action to proceed. In the antitrust action, YouPorn is asking the district court to “enjoin[] the .XXX TLD,” declare that “the .XXX registry contract can be openly rebid or rewritten to introduce competition for .XXX registry services,” and “impos[e] reasonable price constraints and service requirements on permanent blocking services and other defensive registrations in the .XXX TLD.”⁸⁷ Identical relief is sought here.⁸⁸ And, although YouPorn recognizes that the IRP Panel’s declaration would not be binding, it disregards that the specific declarations it seeks are beyond the IRP Panel’s jurisdiction. The IRP Panel can only declare whether the ICANN Board’s actions were consistent or inconsistent with the Articles of Incorporation and Bylaws. It cannot make the specific declarations YouPorn seeks.

YouPorn’s filing of the federal action is yet another way in which this IRP proceeding differs from the ICM IRP proceeding. ICM did not seek to maintain parallel IRP and federal court proceedings. It refrained from filing suit while it sought a resolution of its complaints using

⁸⁵ See WIPO Arbitration and Mediation, Administrative Panel Decision, *available at* <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0273.html>, attached hereto as ICANN Exhibit Q.

⁸⁶ See List of Proceedings Under Uniform Domain Names Dispute Resolution Policy, *available at* <http://archive.icann.org/en/udrp/proceedings-list-name.htm>, attached hereto as ICANN Exhibit R.

⁸⁷ Complaint at 42:27-48:6, *Manwin Licensing Int’l S.A.R.L. v. ICM Registry*, ICANN Exhibit O.

⁸⁸ See Request of Manwin Licensing International S.A.R.L., for Independent Review Proceeding at 27-28.

ICANN's internal mechanism. Efficiency demands that YouPorn pursue only one action. YouPorn should not be able to subject ICANN to the costs of both time and money that would result from duplicative proceedings. IRP standing cannot be interpreted so broadly as to permit this wasteful and inequitable result.

C. A Declaration Recommending That ICANN Breach Its Contract Is Not a Viable Remedy.

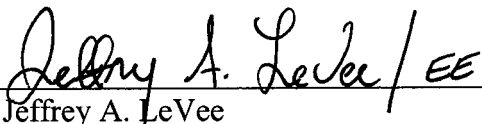
Finally, the nature of the relief sought by YouPorn is impractical. ICANN cannot unilaterally do anything about the registry agreement to include price caps or other terms that YouPorn apparently seeks without potentially breaching a contract. The IRP cannot issue a declaration advising ICANN to breach a contract. If it did, it is highly improbable that ICANN would be able to follow that declaration. And a declaration advising ICANN to renegotiate with ICM would not have any effect on ICM, severely constraining ICANN's bargaining position.

VI. CONCLUSION.

For the reasons stated, ICANN respectfully requests that the Panel conclude that YouPorn lacks standing to maintain this IRP and summarily dismiss YouPorn's request.

Respectfully submitted,

Dated: November 16, 2012

By:  / EE

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Cook County, Illinois. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 S. Flower Street, 50th Fl, Los Angeles CA 90071. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On November 16, 2012, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

**ICANN'S RESPONSE TO YOUPORN'S BRIEF RE
STANDING TO MAINTAIN IRP**

in a sealed envelope, postage fully paid, addressed as follows:

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

Executed on November 16, 2012, at Los Angeles, CA.



Debbie Futrowsky

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