

CANN't Keep .XXX Voluntary
or
ICANN's Dilemma

Reed Lee
Chicago, Illinois, USA

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A for-profit limited liability company calling itself the ICM Registry (“ICM”) has proposed that the Internet Corporation for Assigned Names and Numbers (“ICANN”) adopt a “voluntary” .xxx top level domain name; and, for a time at least, ICANN showed a considerable inclination to accept that suggestion as part of its roll-out of so-called “sponsored” top level domain names. But ICANN’s dilemma (and ICM’s paradox) is this: ICANN can only really decide whether a .xxx top level domain name will exist or not. *Others* will decide whether, if it exists, it will be voluntary or mandatory. And it is now quite clear that a great many of those ‘others’ have very different priorities and policy preferences than ICANN does. Under these circumstances, I humbly submit, ICANN must rationally settle for second-best (no .xxx) in order to be sure of avoiding the worst (mandatory .xxx). ICM’s proposal has, in effect, put ICANN in something very much like the classic “prisoner’s dilemma.” Let me explain.

The Disclaimers

Before getting to the details, though, let me make a couple of things clear.

First, although I am a Free Speech Coalition (“FSC”) Board Member, and although FSC has long and firmly opposed the approval and introduction of a .xxx top level domain name, I express my own views here. They may or may not be shared by others. I am proud of the Free Speech Coalition’s early and forthright opposition to .xxx and of its rejection of short-sighted proposals which might have offered some clear benefits to the organization itself, but only at the expense of unacceptable long-term risks to sexually oriented expression on the Internet. And I am proud, too, of FSC’s steadfast opposition to .xxx in the face of political forces and financial interests which were, at times, less than completely clear to us. The analysis which I present below may explain *one* of FSC’s many reasons for opposing .xxx, but, again, I speak only for myself.

Second, as an early participant in the sponsored .xxx debate, I have long articulated several reasons why .xxx is a bad idea, even if it could remain formally voluntary. I do not reiterate those ideas at any length here. I still hold to those views, though, and think that several subsequent events have vindicated some of them. In particular, I still believe that the Internet is and should remain a dynamic, robust, and wide-open expressive tool for everything that all people – surely including adults – have to say in this world. Happily (especially since I happen to be a U.S. constitutional lawyer), the United States Supreme Court seems to agree. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868-70 (1997)(striking down Communications Decency Act, “CDA”). Through the “vast democratic forums of the Internet,” *Id.* at 868, says the Court, “any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox,” *Id.* at 870. And, of course, “[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.” *Roth v. United States*, 354 U.S. 476, 487 (1957). So there is every reason to expect that many adults will want to engage in sex talk over such an accessible and far-reaching medium as the Internet. If special lanes are to be carved out of the “information superhighway,” they should be bicycle lanes for the children, not special channels for ‘disfavored’ or ‘suspect’

speech by adults. In this respect, I note that, again, the U.S. Supreme Court agrees. After the FSC debate over the .xxx proposal, a majority opinion of that Court also recognized that a .kids top level (or even secondary) domain name offers a potential solution to the problem protecting children from speech about sex while on the Internet. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 663 (2004)(preventing the government, pending trial, from enforcing the Child Online Protection Act, “COPA”). And that same opinion also articulated my earlier preference for narrow, pin-pointed, and selective destination filtering over the much blunter instrument of universal and necessarily blanket source filtering. *Id.* at 667. But one of the few unique features of .xxx over other ways of regulating children’s access to portions of the Internet is its ability to facilitate source filtering or – even worse – switching system filtering of sexually oriented expression. But source and switching system filtering diminish, not enhance, end-users’ control over what they see over the Internet. On the other hand, FSC is actively studying ways (some of which are fairly obvious) to facilitate specific destination filtering so that children and unwilling adults can avoid exposure to sexually oriented expression on the Internet. If such mechanisms can avoid enabling switching system filtering, control over the Internet will remain where it truly belongs, with each individual end user.

And finally, by way of general objection, neither ICM nor its creature the International Foundation for Online Responsibility (“IFFOR”) is in any particularly good position to be trusted with responsibilities over a voluntary self-regulation system. No one associated with ICM, to my knowledge, has anything like the extensive background experience with sexually oriented expression that virtually all of FSC’s long-time members can readily demonstrate. The very fact that ICM, or those now associated with it, once proposed and offered to operate a .kids top level domain name belies any contrary suggestion. (I recall, too, how out of place one of ICM’s representatives seemed to me at an FSC membership meeting which included attendees who’d faced jail time for the expression which they had published or disseminated and others who’d stepped up to defend sexually oriented expression before the courts and legislatures). After several years of trying, neither ICM nor IFFOR could ever claim anything more than sparse and isolated support within the adult entertainment industry. Even that had dried up or become tepid well before the most recent events awakened even the most naive to the dangers posed by .xxx. Even apart from IFFOR’s utter lack of experience with the “community” it hopes to *self-regulate*, organizations like FSC, EFF, and the ACLU have already demonstrated both their willingness and their ability to defend freedom of expression – including sexual expression – on the Internet and to defend it vigorously. There thus seems little need for ICM (acting independently) or for a wholly new, distant, and untested hybrid organization like IFFOR. This is especially so because ICM – heavily represented on IFFOR’s board of directors – would profit handsomely from a mandatory .xxx.

In any event, these sorts of reasons convinced me, and perhaps some others, that no .xxx is better even than a voluntary .xxx. But, again, I won’t repeat *these* arguments below. At this point, I want to address those who believe that, all things considered, a voluntary .xxx would be better than no .xxx, but that a *mandatory* .xxx would be worse than either one. I want to show that, at least under current and foreseeable political circumstances, rational people with such a preference ranking will settle for their second choice (no

.xxx) because if they do not, others with very different preferences will promptly move to make .xxx mandatory. In other words, adopting the best choice would permit others to bring about the worst of all possibilities. But first, a bit of (very light) technical background for anyone who's been asleep at the computer screen for the past couple of decades.

The Background

As virtually everyone knows, a domain name system (“DNS”) has been established for the Internet under which legible and/or memorable (mnemonic) alpha-numeric character strings (*e.g.* freespeechcoalition.com or strictscrutiny.net) are mapped to particular Internet addresses established under the basic Internet protocol (*e.g.* 192.0.34.163, to use ICANN’s example). It didn’t have to be this way, of course. When telephones first came around, for instance, everyone got used to having a number represent a person, or a family, or a business, or a government agency. And we all got used to using phone books or on-line listing services to match people we felt like talking to with numbers where they could be reached. Even before that, we were used to numerical street addresses (*e.g.* 671 West 43rd Street). Likewise, we could have had Internet numbers, and Internet “white pages” directories. Indeed, my residential telephone number or street address could have *served* as my Internet number, perhaps in some internationally standardized form. But the Internet developed differently. Computers being what they are, it wasn’t too difficult to set up a network of dedicated “DNS servers” to translate human-readable mnemonic ‘addresses’ into the numerical Internet protocol (“IP”) addresses that the Internet computers had already gotten used to. In effect, the Internet “white pages” were quickly computerized, and they thereafter enabled almost everyone to ignore actual IP addresses.

And networks being what they are, it made a good deal of sense to organize the DNS servers into a hierarchical structure to promote redundancy and overall efficiency. That dove-tailed nicely with a hierarchical “domain name space” under which we specify a particular computer or site on the Internet by listing a top level domain name (“TLD”) preceded by a second level domain name, and perhaps preceded by others. *E.g.* www.freespeechcoalition.com. As the domain name system developed, there were relatively few top level domain names such as .com, .gov, .edu and the like. But, again, the domain name system didn’t have to be this way. There could, for instance, have been as many TLDs as there are yellow pages or encyclopedia entries, and the domain name system might then have taken on a self-directory character. But that didn’t happen either, and, for various reasons, it is unlikely to happen soon. So, for the foreseeable future, we’re left with or stuck with (depending on your point of view), a relative paucity of TLDs. ICANN has, however, shown an interest in rolling out additional top level domain names – on a measured basis – as a sort of “proof of concept” for a domain name system built upon a vastly expanded TLD base. But for the reasons I discuss here, .xxx is such an unusual and controversial TLD that it is unlikely to prove anything about other possible TLDs. Indeed, a .xxx TLD would invite and is already attracting increased government regulation of the Internet, and it would ultimately make it more much difficult for ICANN to maintain its own independence from government regulators.

The Possibilities

The debate over .xxx has isolated three alternate (*i.e.* mutually exclusive) possibilities.

The first is what we have now: no .xxx (In the shorthand which follows, I shall designate this possibility “N”).

The second is what ICM says it has proposed and what ICANN believes it is considering: voluntary .xxx (“V”).

The final possibility is that which hovered over the FSC’s .xxx debates, which has now presented itself in the United States Senate, and which, in any event, could hardly have failed to occur to the most casual observer: mandatory .xxx (“M”).

Now, any rational person can probably rank these possibilities in terms of his or her preference. “Best, middle, worst” would represent a simple rank-ordering of preferences – an “ordinal” preference ranking for those who recall the ‘social-science-speak.’ An “interval” or “ratio” preference ranking would attempt to reflect *how much* a person prefers one particular possibility over the next: *e.g.* “best two-to-one over middle, middle five-to-one over worst, or, we might say, best = 10, middle = 5, worst = 1.” But a minor technical problem arises when moving from an ordinal to an interval or ratio ranking as I have done here. We are used to ordinal rankings moving from lower to higher integers as the preference decreases. But interval or ratio rankings are often (but not always) scored in the opposite direction. So the person with the highest score on some written exam generally ranks first, while the person ranking second has a lower absolute score. Best tends to be a high interval or ratio value but a low ordinal one. In what follows, I will try to avoid this problem by using interval or ratio rankings where the lower number is better. Think of a golf or a bowling score or, as we’ll see below, a jail sentence. So in the ratio case I just gave, we’d assign best = 1, middle = 2, worst = 10, or some uniform multiples thereof. For the time being, I’ll keep things simple and stick with ordinal preferences. I don’t think this simplification makes any difference at all on these issues with the possible exception of the last matter I discuss, where I will briefly revisit interval preference rankings.

Among the three alternatives, there are six possible ordinal priority orderings:

N>V>M N>M>V V>N>M V>M>N M>N>V M>V>N

You can think of the > as the mathematical “greater than” symbol, but this runs into the ascending/descending order problem I addressed above. For full analytical rigor, it is probably best to think of the symbol as simply “is better than” or “is preferred over” so long as we stay with ordinal rankings. For the somewhat “backwards” interval or ratio preference rankings I will use, you can maintain a rigorous “greater than” interpretation by thinking of the values as *negative* integers. Not too hard to do, I suppose, when thinking about jail terms. Again, though, nothing much turns on what approach you adopt, so

long as you stay consistent and keep in mind that this preference relation is transitive (*i.e.* if $a > b$ and $b > c$, then $a > c$).

Back to our ranking alternatives. These are all of the mathematically possible permutations; perhaps not all of these preference rankings are rational. It is not clear to me, for instance, why anyone – at least anyone who is most specifically concerned about sexually oriented expression (one way or the other) – would adopt $V > M > N$ or $M > V > N$. So, I’ll set them aside in most of what follows. (I will, however, return to and address these possible rankings below, because less specific sets of interests, such as those relating to the domain name space in general, might well support them). Also, as I said before, I’ll leave my own personal ordinal preference, $N > V > M$ aside in this discussion as well. That leaves three remaining possibilities; but two of them, I think (for reasons which I’ll specify shortly), turn out to be functionally equivalent for the purposes of a critical step in this analysis. So it comes down to two different preference “camps”:

$V > N > M$ versus $N > M > V$ and $M > N > V$

I assume here that ICANN would adopt the first of these preference rankings. Certainly this is what the ICM proposal contemplates. It is, at least for me, a much more difficult call as to ICM’s preference ranking. ICM’s refusal to embrace Greg Piccionelli’s “poison pill” proposal, advanced at the most recent InterNext debate, leaves me wondering. If ICM believed $V > N > M$ rather than $V > M > N$, why would it not publicly adopt, or at least explore, the poison pill idea? Furthermore, it has always been easy to see that ICM, as a for-profit, investment-backed concern, has substantial institutional pressure to prefer either V or M over N , which would net it no profit. And between V and M , which would make for *greater* ICM profit? Against these pressures, ICM offered only that it was committed to freedom of expression. Yet I never heard of anyone from ICM in any previous free expression controversies. So far as I could tell (and I asked at length) no one from the adult entertainment community, which *long* preceded the Internet, knew anyone from ICM before the .xxx proposal arose. So ICM certainly did not offer the sort of demonstrated history of commitment for freedom of expression which many of us in FSC and elsewhere can show without much effort. For these reasons, I respectfully remain skeptical of ICM’s honest preference ranking. And, given the above distribution of preferences, the difference between $V > N > M$ and $V > M > N$ is, to me, a difference between good guy and bad: white hat, if you will, and black. But, for the purposes of this analysis, it is ICANN’s honest preference ranking, not ICM’s, which really matters. Again, I assume in good faith that that is $V > N > M$.

What about those ‘others’ to whom I alluded above? Are there really people out there who believe $N > M > V$? I think it is pretty clear that Michael Gallagher, the U.S. Assistant Secretary of Commerce for Communications and Information, is one such person. And for the time being, the Bush administration appears to be with him on that. Even someone who expressly supports the present .xxx proposal specifically in order to ‘keep .xxx out of the hands of the adult entertainment industry’ might also be operating from this preference ranking, if (s)he believes that .xxx is inevitable in the long run. And what about $M > N > V$? I think it is equally clear that many opponents of sexually oriented expression

would actually rejoice in a mandatory .xxx as a means of regulating or even substantially suppressing sexually oriented expression. Anyone who's been in the free speech fray for very long has heard their arguments: smut – as they call it – should be 'driven underground,' 'kept in the closet,' or otherwise marginalized; making it hard to reach will deter and limit its dissemination; failing to censure it in some way amounts to an endorsement. Does anyone doubt that these opponents have noticed, for instance, the effect that an X or an NC-17 rating has on a motion picture's ability obtain newspaper listings or book into mainstream theaters? A .xxx TLD would, they may hope, provide an identical 'kiss of death' for sexually oriented expression on the Internet by facilitating purely private censorship. Once sexually oriented expression can be readily identified, for instance, those who run servers near the source of that expression can be pressured to block it or those who operate the switching computers, including those forming the backbone of the domain name server structure, could be pressured to filter without regard to the preferences of individual end users. Opponents of sexually oriented expression could also call upon ISPs to simply block DNS calls involving any .xxx domain (i.e. calls to the .xxx domain would return no valid IP address). Or search engines could be pressured not to return any .xxx entries at all no matter how sexually explicit the search request.

After this monograph was substantially completed, two United States Senators formally weighed in with the M>N>V preference. S. 2426, introduced by Senators Baucus and Pryor on March 16, 2006, would make .xxx mandatory for any material on the Internet which is defined as "harmful to minors." The main thoroughfare of the "information superhighway" would be reduced to a bicycle lane, while expression which is perfectly appropriate for adults would be left to hazard source or switching system filtering beyond the control of the adult senders and the willing adult receivers. This is plainly *not* what the Internet promised at its best.

In the end, though, for those who would react to ICANN's approval of .xxx, the difference between N>M>V and M>N>V is meaningless because, if it ever gets to that point, ICANN will have taken the N out of the running. This is where the transitivity of the preference relation becomes important. And this is why I grouped the preference rankings into the camps I designated above. Because if ICANN takes N out of the picture, only M>V and V>M remain for consideration. And these 'others' I'm concerned about agree on M>V. That's enough. Note particularly, the effect that adoption of the .xxx proposal would have on those who believe N>M>V. They are perfectly happy – indeed, *happiest* – with no .xxx at all. But once N is ruled out by ICANN, they along with the rest of these "others" will have no choice but to push for M. And every recent political development indicates that those in and closest to government power *strongly* prefer M to V. At every turn, for instance, those who would burden, marginalize, or suppress adult expression on the Internet have had the ear of the United States Congress. Government power still seems ready to back those who would reduce all but the margins of the Internet to the level of U.S. broadcast television (and note the current controversies even over that). *This* is the reality which ICANN must recognize. Because, while it is up to ICANN to create .xxx or not, it is up to the various *governments* to make it mandatory or to leave it voluntary. *No one* can credibly suggest that ICANN can keep .xxx voluntary. Hence the main title of this article.

The Math

Since this is a discussion of policies for a computer network, some math is surely appropriate, no? Happily, this part is optional. If I've already convinced you of ICANN's dilemma, then you got my basic point. There is no need to read this section, unless you want to know why I have articulated this as "ICANN's dilemma." If, on the other hand, you still need some convincing about how an "opponent's" future possible moves can affect your own present move, then you can either learn to play chess or you can read on. Today's lesson comes from a branch of applied mathematics known as "game theory." Game theory offers abstract explanations for a wide range of human behavior. It has ensconced itself firmly into much contemporary philosophy, sociology, political science, and strategic theory, to say nothing of economics. Fortunately, we're not getting very far into it, since our topic is the very first game theory example most people ever encounter.

The so-called "prisoner's dilemma" was developed in 1950 by Merrill Flood and Melvin Dresher, two weapons policy planners at the RAND Corporation, and it was popularized by the Princeton mathematician Albert Tucker. *See generally* <http://plato.stanford.edu/entries/prisoner-dilemma> (Stanford Encyclopedia of Philosophy); Axelrod, Robert, *The Evolution of Cooperation* at 7-19, 125 (Basic Books, 1984). It has been used to analyze all manner of human interactions, great and small. It has been offered as an explanation of why the nuclear weapons policy of 'mutual assured destruction' between the U.S. and U.S.S.R. worked (to the extent that it did). When I studied social, political, and legal philosophy in the 1970's, it was offered as an abstract explanation for motivations underlying the social contract or, in a more elaborate form, in John Rawls' original position. At the other end of the spectrum, it can explain what one teenager will say to mutual friends after breaking off a romantic engagement with another. And, at least sometimes, it really does explain individual plea bargaining decisions in the criminal courts.

In its original formulation, it goes something like this:

Two persons agree to commit a serious crime, and they further agree that, if apprehended by law enforcement, they will remain silent and refuse to implicate each other. In committing the serious crime, they also commit a minor one, a misdemeanor. Each is, in fact, subsequently apprehended and detained and questioned separately from the other. Each prisoner initially refuses to talk. The prosecutor then separately approaches each prisoner with the following offer, and makes it clear that the other prisoner is receiving the same offer: "We've got you both dead-to-rights on this misdemeanor charge, so if neither of you talk, we'll convict you both and get you sentenced to 6 months in the county jail. But we're pretty sure you were both in on a serious felony too. Now, if you give me evidence to convict your accomplice of the felony, I'll drop all charges – felony and misdemeanor – against you. You'll go free, and your accomplice will be convicted and probably sentenced to ten years (120 months) in prison. But remember, I'm giving the same deal to your accomplice. So, if your

accomplice talks to me and you don't, you'll be the one going to prison for 120 months. If you both talk, I'll have the felony conviction on both of you, but we'll ask the judge to go light on the sentence. You'll probably both get about two years (24 months). Each of you must make your decision by noon tomorrow. After that, no more deals. I will not allow you to talk to one another, and I will not tell you of the other's choice before the deadline for you own."

Now, each prisoner has an independent choice to make. In traditional prisoner's dilemma discussions, this choice is termed "cooperate" (with the other prisoner as per the original agreement to keep silent) or "defect" (to the prosecutor's side and talk). So whether it's termed cooperate/defect, mum/sing or something yet more colorful, we still have two independent agents, each making a partially informed choice. If the prisoners think about the situation, each could draw the following identical "pay-off table" to describe the possible outcomes (as you'd expect with jail sentences, less is better):

	B's Choice	
	Cooperate (Stay Mum)	Defect (Sing Like a Bird)
A's Choice		
Cooperate (Stay Mum)	A=6, B=6	A=120, B=0
Defect (Sing Like a Bird)	A=0, B=120	A=24, B=24

Now, there are all sorts of ways to assess this situation, but most people who look at it conclude that if each prisoner acts in a rational, self-interested way and does not fear any retribution from defecting to the prosecutor, then both prisoners will defect to the prosecutor and talk. They will thus both serve twenty-four months instead of the six months they faced if they had both cooperated with one another as per their original agreement. The so-called Nash equilibrium (*i.e.* where no one player can improve his or her outcome by a change in only his or her strategy) leaves both prisoners worse off than they might have been if they could have been *certain* about what the other would do. (By the way, Albert Tucker, who originated these numbers, grew up in Canada, so he may have been used to uncharacteristically reasonable prosecutors. Nothing turns on these precise numbers, however. The dilemma remains even as the sentence for the joint felony conviction is increased toward 120 months.)

I've always assessed the paradox underlying the prisoner's dilemma in terms of the columns and rows of the pay-off table. Prisoner A would clearly prefer to limit the actual outcomes to those in the left column instead of the right, while Prisoner B prefers those in the top row to those in the bottom. But the crafty prosecutor has frustrated them both; for under the prosecutor's offer, Prisoner A's choice controls only the rows (while A would prefer a column) and Prisoner B's only the columns (while B would prefer a row). Not only can the prisoners not (jointly) agree on a preferred outcome, they can't even (selfishly) narrow the possible outcomes as they'd like. The harsh reality is that no

matter what row Prisoner A chooses, Prisoner B's choice can do substantial harm, and B, in fact, has an interest in doing so. And *vice versa* for Prisoner B's choice of column. So each must choose in order to *minimize the harm* which the *other's choice* can do. The dilemma/paradox/tragedy here is that by doing so, both prisoners, in this case, are deprived of their first choice of outcome. Each has to settle for second best in order to avoid the worst. Because choosing the best can lead to catastrophe.

The Harsh Reality

I do not mean to suggest here that ICANN's present .xxx choice situation is *exactly* like the classic prisoner's dilemma. I do submit that the similarities are particularly relevant and that the differences, to the extent that they matter, actually make ICANN's position somewhat *worse*. As in the classic prisoner's dilemma, there are actually two important decisions here, not one; and each is to be made by a decision-maker who is independent of – and who cannot count on – the other. Each prisoner can decide only what (s)he will do; the other important decision is left in the hands of the accomplice. In the classic case, these two decisions are symmetrical and made simultaneously, but nothing turns on that detail. Here, ICANN can decide whether .xxx will exist or not, but *only* that. If it adopts the .xxx TLD, further outcomes are entirely out of its hands. And, in this case, ICANN must make its decision first and *without any guarantee* concerning the second decision: whether or not an existing .xxx will be made mandatory by governments responding to those who oppose adult expression on the Internet. So here, only ICANN has the disadvantage of not knowing how the other will respond. Now, even if that were a genuinely open question, ICANN would have to proceed with considerable caution since adopting .xxx would leave the decision between ICANN's best and worst outcomes to others. But there really is very little doubt, in this case, but that those who will influence the second decision overwhelmingly prefer a mandatory .xxx to a voluntary one, whatever their preferences about no .xxx at all. To revert to the parlance I suggested earlier, if the white hats say "yes" to .xxx, the black hats will, from their perspective, have no choice but to make it mandatory. An ordinal "payoff table" for this situation looks something like this (whether you think of the bottom row as a single cell or as two identical cells makes no real difference):

ICANN's Choice	"Others" Choice	
	Voluntary .xxx	Mandatory .xxx
Adopt .xxx	I=best, O=worst	I=worst, O=best
Reject .xxx	I=middle, O=middle	I=middle, O=middle

Even if we assume that the “others” would adopt $N>M>V$ rather than $M>N>V$, ICANN’s prospects do not improve:

ICANN’s Choice	“Others” Choice	
	Voluntary .xxx	Mandatory .xxx
Adopt .xxx	I=best, O=worst	I=worst, O=middle
Reject .xxx	I=middle, O=best	I=middle, O=best

Even under these circumstances, if ICANN adopts .xxx, the “others” can and would improve the situation, from their point of view, by making the mandatory move. So if ICANN – and perhaps even ICM – a really would prefer a voluntary .xxx TLD, they can’t have it. The black hats just won’t let them. As with the classic prisoner’s dilemma, ICANN’s problem is that it must choose a row, not a column. (Rotating the table by 90 degrees would exchange columns for rows for ICANN’s choice, but it would similarly shift the payoffs, so ICANN’s dilemma is not an artifact of the way I’ve set out the tables). And in this case, under either of these payoff tables, the row containing ICANN’s best choice, also contains its worst. Only by choosing its second choice, can ICANN avoid the worst. Under these circumstances, anyone in ICANN’s first-move position adopting $V>N>M$ – indeed anyone preferring no .xxx to a mandatory one – will say “no” to the .xxx TLD.

ICM would present ICANN’s choice as $V>N$ or $N>V$, and, indeed, for a short-sighted decision-maker, that might be the way it looks. But this suggestion overlooks what would happen if ICANN went along with ICM’s proposal. The inevitable second move would, for the reasons indicated above, be made on the basis of $V>M$ or $M>V$. Under these circumstances, I think the foregoing analysis establishes that the overall preference which *ultimately* counts – for *all* rational decision-makers in this process – is $N>M$ or $M>N$. That is, the crucial comparison is between what we have now (N) and what we’d wind up with at the *end* of the entire .xxx process (M). The intermediate preference alliances – odd as some of them may be ($N>V$: $N>V>M$, $N>M>V$, $M>N>V$ versus $V>N$: $V>N>M$, $V>M>N$, $M>V>N$ for the first decision and $V>M$: $N>V>M$, $V>N>M$, $V>M>N$ versus $M>V$: $N>M>V$, $M>N>V$, $M>V>N$ for the second) – are irrelevant in the end. A careful, rational decision-maker in ICANN’s position should recognize this at the outset. So the possible preference rankings ultimately break down as follows:

Reject .xxx	Adopt .xxx
$N>V>M$	$M>N>V$
$N>M>V$	$M>V>N$
$V>N>M$	$V>M>N$

So only those who prefer a mandatory .xxx to none at all should support its approval. With one exception, those who would adopt .xxx also prefer $M>V$; and, as I said above, I

assume that ICANN genuinely prefers V>M. But what about that exception. What about V>M>N? As I have shown, the difference between that and V>N>M makes all the difference in the world to the .xxx question. But both prefer V>N, and so either one might appeal to someone who is primarily concerned to expand the available set of TLDs. For this reason, my final thoughts address why one who is primarily concerned over Internet policy, the future of the domain name space, or ICANN's own institutional interests will conclude that .xxx is just not worth the trouble. That is, they will reject V>M>N in favor of V>N>M. Consider, for instance, what would happen if .xxx were approved and then made mandatory.

Now, some might suggest that, in the foregoing analysis, I've ignored a possible third move in this series. Sure, they'd concede, there are forces in and close to government which strongly prefer a mandatory .xxx to a voluntary one; and, yes, they can be expected to prevail upon legislatures to make .xxx, if approved, mandatory. But then, they'd say, the adult webmaster community has only to repair to the courts to block that mandatory move, forcing everyone to live with a voluntary .xxx TLD, and leaving ICM to live (and profit) happily ever after. But which constitutional lawyers have stepped forward to explain that this outcome would be anything close to a sure thing even in the United States, let alone in the People's Republic of China or Saudi Arabia? The Communications Decency Act might not have passed muster as a "cyberzoning" measure, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997), but a mandatory .xxx just might, *Id.* at 886 (O'Connor, J., joined by Rehnquist, C.J., concurring in judgment and dissenting in part). Ask the brick and mortar adult entertainment enterprises how they have fared under so-called adult use zoning. It has *not* been a pretty picture. And, I note in passing, even if we could ultimately prevail in such an endeavor, don't those of us concerned with defending sexually oriented expression really have our hands full just now with challenges to Section 2257 (which FSC is spearheading), obscenity laws (where FSC has filed a friend of the court brief), and other matters which state legislatures and Congress are throwing and threatening to throw at us left and right? Isn't it fair for those of us in the thick of these battles to say that we don't need another major constitutional fight – over .xxx – right now? Moreover, I have heard close Internet watchers, who are already litigating over legal restrictions on the Internet, refer to .xxx as "CDA III," meaning that after COPA (*i.e.* "CDA II") finally falls, they're certain that Congress' next move would be to make .xxx, if it exists, mandatory. They don't need that battle right now either.

And look at matters from ICANN's institutional perspective as well. To be sure, those who are concerned about ICANN's independence from government cannot be happy about the U.S. Commerce Department's and the Government Advisory Committee's recent "interference" over .xxx. With this concern, I genuinely sympathize. As a free speech lawyer, my inclination is to support a truly independent ICANN. Like everyone else who supports broad freedom of expression, I am impressed – indeed astounded – by the sort of Internet which an essentially voluntary design process has thus far wrought. But if ICANN adopts the .xxx TLD simply to spite the resisting governments or to demonstrate its independence from those governments, what will the governments do? They'll make it mandatory. And how will *that* enhance ICANN's independence from

government? Indeed, the adult webmaster community – most likely with FSC taking the lead – would then be forced to sue. ICANN would most likely be a defendant along with the governments, hardly making an independent ICANN stand easy or even likely. A .xxx TLD – or any TLD which invites content censorship by government – is hardly the place for ICANN to take a stand for its independence. Similarly, those who are primarily concerned – either in response to pressure from critics or from genuine policy perspectives – to increase the number of sponsored or generic TLDs (and who, in the abstract, could thus conceivably adopt either V>M>N or V>N>M preference rankings) can hardly conclude that a TLD as controversial as .xxx – unwanted by the community supposed to have sponsored it and the virtually certain target of government legislation – would either prove any concept or promote the orderly expansion of the domain name space. Consider, by contrast, the recently approved .cat TLD (for the Catalan language). Effectively approved in advance by France and Spain, it is a much better proof of concept (because it lacks the political baggage) than, say, a .kurd would be, either now or in the foreseeable future. The political overtones simply render the latter TLD too unique to prove any general concept. The same is true for .xxx.

These, I think, are reasons for adopting V>N>M over V>M>N, and thus for rejecting .xxx. But, in the end, perhaps, interval preferences do come into play here. Perhaps those who really want additional TLDs but who care only weakly between voluntary and mandatory would be willing to risk the outcome of constitutional litigation over a mandatory .xxx TLD. Perhaps ICM, which would profit handsomely under *either* .xxx regime, is willing to risk that too. The risk of loss on the voluntary/mandatory issue is minimal (at most) to it. So here, I respectfully submit, it is time for two things to happen. First, ICANN must take *full* stock of the current situation. It must assess ICM's .xxx proposal not only in light of its general visions about the landscape of the ultimate domain name space, but it must also consider the realities of the controversy over sexually oriented expression on the Internet, a fray in which it would thoroughly ensconce itself by adopting .xxx. If and when ICANN considers that, I think it will conclude, at least in part for the reasons given here, that it doesn't want .xxx – as opposed to many less controversial TLDs – *enough* to risk the costs of a struggle over a mandatory .xxx TLD. Second, the adult webmasters – the Internet denizens who theoretically sponsored the present .xxx proposal but who, except for a few isolated cases, do not support it at all – must stand up and be heard by ICANN. They have too much to lose and, quite frankly, much too little to gain, to risk giving ICM leave to establish and operate a .xxx TLD. As a sponsored TLD, .xxx would be an irony at best. Under the present political climate, any .xxx TLD would be a disaster for freedom of speech on the Internet.

Looking Forward

None of this is to abandon realistic hope of protecting children – and unwilling adults, for that matter – from sexually oriented expression on the Internet. As I mentioned earlier, FSC is actively exploring ways to promote destination filtering, *i.e.* enabling end users to effectively choose what they do and do not want to see, hear, and read on the Internet. There are many reasons for this, of course, but an economic one would suffice by itself. Virtually all of FSC’s Internet members seek to *sell* the sexually oriented expression they offer over the Internet. They don’t need the credit card charge-backs and other problems which inevitably follow when children try to access that expression. And the “adult internet” has long since outgrown business models where payment is exchanged on the basis of a simple world wide web “click-through” regardless of whether such a click results in a sale. FSC’s members have every incentive to restrict their visitors to those who can and really might purchase their wares. For this and the other obvious reasons, FSC is eager to consider, develop, and discuss filtering systems which genuinely empower the end user.

Simple metatagging, for instance, promises to facilitate fine-tuned destination filtering and is likely to be less subject to source or switching system filtering than a special TLD. Another approach is to think about promoting “filtering in” as opposed to “filtering out.” The distinction is worth considering because if something – be it a metatag or a domain name – identifies specific expression as *appropriate* rather than inappropriate for children, no one would have any incentive to block it either at the source or in the switching system. The “filtering in” approach even dovetails nicely with the capabilities provided by a sponsored TLD. Under a .kids (or .juv or something suitably international) regime, for instance, the sponsoring child welfare organization would always be there to cut off a perverse interloper who has nothing better to do than to try to expose children to expression inappropriate for them. And a sponsoring organization could even adopt second level domain names more specifically adapted to its purpose. So we could see, for instance, `online_medical_dictionary.16.kids`, `dinosaur_museum.08.kids.`, and the like. And if someone were *genuinely* interested in protecting children on the Internet, we could even see `pet_care.no_ads.kids!` Furthermore, if millions of parents worldwide decided to set their browsers to receive *only* .kids (or .juv) unless they had entered their secret password, the vast majority of general websites would have an incentive to have a presence under that domain name. So even at a truly modest price, second level domain names could support a vigorous sponsoring organization.

The possibilities are intriguing when we no longer tie our thinking to deliberately burdening or cordoning off speech between consenting adults. But *until* we do that, we will be stuck with schemes like .xxx which, in the end, pose too many threats to consenting adults who simply want to use the Internet to exchange expression which is perfectly appropriate for consenting adults.