



# Triple X, Internet Content Regulation and the ICANN Regime

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*The backers of the controversial .xxx domain have negotiated a new contract with ICANN. Final approval of the contract is still vehemently opposed by an amusing alliance of anti-pornography conservatives and pornographers with investments in existing adult domain names. Nevertheless, chances are now good that it will finally succeed in gaining the approval of the ICANN Board.<sup>1</sup>*

*What are the implications of this probable resolution of the .xxx drama for the Internet and Internet governance? They are major. But no one seems to be talking about them.*

Let's begin with the most direct implication. The .xxx contract sets an important precedent by giving ICANN policy making and enforcement responsibility over web site content. The .xxx bid managed to survive ICANN's long and embarrassingly arbitrary process by surrendering to the desire of governments to impose regulations, taxes and conditions on ICM Registry's desire to establish a space for adult content on the web. Take a look at some of the things ICM Registry had to agree to do to be able to register a three-letter string in the top level of DNS:

1. Prohibit child pornography. No one disputes this, but child pornography is already totally illegal globally, with all major jurisdictions prosecuting it vigorously and national laws reinforced by bans in global instruments such as the Convention on the Rights of the Child. So why are we using an ICANN registry contract as a redundant global legislator?
2. The registry is required to engage independent third parties, such as the Internet Watch Foundation, to proactively monitor registrant compliance with registry policies. ICANN retains the right to disapprove ICM's choice of monitoring service providers; thus we can add to its "technical coordination" duties the selection of suitable content watchdogs.
3. The registry must develop industry best practices designed to protect

<sup>1</sup> We say this for two reasons. First, ICM Registry has succeeded in altering the contract in ways that directly meets the objections expressed by some governments (particularly the US) and the board members who voted against it. It would be unconscionable, even for ICANN, to reject a contract that does exactly what the registry was asked to do. Second, ICANN CEO Paul Twomey was involved in the later stages of the new contract negotiations. Since the contract appears to meet the approval of this most-politically sensitive member of the ICANN staff, it should have his vote, and he should be able to bring other votes with him.

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children online and empower parents and other users to avoid content they do not wish to see.

4. The registry must create and support an "International Forum for Online Responsibility," which is supposed to be a "globally representative" place where "all stakeholders are able to discuss and actively respond to concerns about online adult entertainment," and which allows "the sponsoring community and other stakeholders to participate in the development, implementation, and enforcement of best practices.
5. The registry must reserve geographic and names that have religious or cultural "sensitivity"; thus ICANN will be in the business of determining cultural and religious boundaries on a global basis
6. The registry must pay \$10 per name per year to support child safety organizations and to sponsor development of technology to enhance the ability of Internet users to control their online experience.

As an ICM Registry document says, the contractual changes "substantially enhance ICANN's leverage over the Registry Operator throughout the life of the agreement." With this contract ICANN takes (another) step away from its technical coordination mandate and adds an element of content regulation to its policy portfolio, alongside trademark/copyright protection.

### ***Facing Facts about Global Governance of Internet Content***

Let's set aside for now the issue of whether this is "good" or "bad." It's more important to start wrapping our minds around the nature of this increasingly entrenched global governance regime. We can't possibly understand what is happening here if we try to conceive it in terms of a simple dichotomy, so common to the WSIS debates, between "more government" and "less government" or even "US unilateral" vs. "multilateral." No, one must characterize the .xxx resolution both as a victory for governments in their quest to assert "public policy" control over ICANN, and as a defeat for the traditional intergovernmental process and traditional forms of governmental control. Governments got to "regulate" the proposed adult domain in line with their "public policy" concerns, but they did it in a way that accepts ICANN's narrow, private regime of regulation by contract and its strange microcosm of a multilateral forum, the Governmental Advisory Committee (GAC). By accepting and participating in this resolution, governments further entrench the ICANN regime, for better or worse.

And things could be worse. Some might argue that regulation of content is not something that should be delegated to a private sector entity to begin with. Content regulation, they might contend, is a public policy issue that should be decided in a "democratic" manner, not on the basis of ICANN's "bottom up" processes. But there are two problems with this line of thinking.

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**First, it is not self-evident that Internet content regulation should be "democratic" at all.** "Democratic" basically means the will of the majority. A global majority, or a collection of national governments, are not known for their devotion to abstract principles of tolerance and free expression. They are much more likely to be politically mobilized by a desire to suppress or regulate some kind of expression that angers or provokes them at any given moment. Most free expression supporters don't recognize the right of a majority to suppress expression they don't like simply because they are in a majority. Indeed, most Western countries are constitutional democracies where a wide range of liberal freedoms are put outside the reach of democratic majorities for precisely this reason. Unless global policy making around Internet content is informed by fundamental liberal values and retains strong constitutional protections for individual human rights to free expression, the prospect of "public policy" making by national governments (or some other democratic or majority-driven process) is highly unattractive. (This is one reason why IGP has sought a framework convention which would codify principled protections into Internet governance.)

**Second, most discussions of inserting "public policy" concerns into Internet content regulation do not take account of the heterogeneous values and institutional deficit at the global level.** If regulation of content should not be delegated to a private sector entity, then by process of elimination the suggestion is that it should be left to governments. But which governments? Which nation's culture, which nation's "majority" will decide this? National governments are all limited and territorial in their scope. None of them can claim a democratic mantle at the global level. That's one of the main reasons we got a global private sector solution, an ICANN, to govern DNS to begin with. The ideal solution is to keep ICANN's decisions purely coordinative and to let the policy chips fall where they may, to be taken up in other, more legitimate forums. But alternative policy forums keep failing to command the global consensus required. So delegation of these issues to a private sector entity continues.

The ICANN process fosters dealing with policy problems in an ad hoc manner by taking advantage of the narrow kinds of leverage inherent in ICANN's gate-keeping role and contractual governance model. (It is similar to the fact that the U.S. got Net Neutrality regulation not through passing real legislation, which was too difficult, but by imposing conditions on a merger agreement.) Thus, although many governments and theorists complain about it, the contractual approach can be seductive and self-perpetuating. It allows governments to escape many of the burdens and accountability checks of real global

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law and policy making. In the .xxx case, governments didn't have to negotiate a generally applicable treaty about the thorny issue of what is pornography and what to do about it, build support for it, get it ratified, and face any electoral accountability. They just raised some objections and let Paul Twomey's staff and ICM Registry work out the details. It is a mutual accommodation that is convenient for the established institutional players. Whether it serves the global Internet-using public very well remains to be seen.

The saving grace of the private contractual governance model is precisely its narrow and private scope: no one has to use this new xxx domain. One can put pornographic material under .com, .net, country codes, or elsewhere. It is possible that the contract regulates the domain to death; it is also possible that the added value of a .xxx listing will justify the huge regulatory burden imposed on it. Either way, subjection to its regime is more or less a matter of choice.

### ***Concerns for the Future***

Still, there are things what should make us uncomfortable about the way the .xxx controversy was resolved. Three points in particular come to mind.

**First, it might set a precedent for mission creep.** The resolution of the .xxx controversy is less objectionable if the scope of this new and heightened regulatory authority is limited to the .xxx domain. As noted before, no one has to use .xxx and there are plenty of alternatives. But if "content regulation by contract" becomes a precedent that starts to get extended to other domains, then it is very dangerous to freedom of expression on the Internet. In particular, we must insist in the future that renewal of existing gTLD contracts not step into this territory.

**Second, it is a highly arbitrary and unpredictable regime.** The system is analogous in many ways to broadcast licensing or the early days of cable franchising in the U.S., where the license is considered a privilege that is conferred on whoever is deemed "most worthy" by a (highly politicized) public authority. In order to position themselves as "worthy," supplicants for the license are required to offer various goodies, concessions, payoffs and high-sounding promises to their political masters. This problem is exacerbated by the serious lack of procedural formality in ICANN, and especially in the GAC. Without any rules or laws to determine what is within or outside the scope of governmental interest, domain applications that attract the interest or opposition of virtually any organized group are ripe targets. We can expect additional ad hoc policy deals to be negotiated and additional pounds of flesh to be extracted in the future as

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new TLDs are proposed. And it is worth noting that ICM Registry has survived this process only because it is backed by a determined and wealthy businessman who was willing to pay over \$2 million in legal fees and was capable of making a credible threat to drag ICANN through the courts if need be.

**Third, we must never forget, or allow the world to forget, that the .xxx application proved conclusively that the U.S. government can and will use (or abuse) its special powers as ICANN's sole political oversight authority when domestic political pressures make it politically profitable to do so.**

The Internet Governance Project has long maintained that ICM's .xxx application deserved to be successful. We took this position because we don't believe ICANN should discriminate among TLD applications on the basis of the content or meaning of the string, and because we believe that ICANN (and its oversight authority, the US Government) should not arbitrarily change the rules in the middle of the game. If there are problems here, they are not problems with the .xxx gTLD application. They are problems inherent in ICANN's institutional structure.

The Internet Governance Project (IGP) is an interdisciplinary consortium of academics with scholarly and practical expertise in international governance, Internet policy, and information and communication technology.

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