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11 MANWIN LICENSING INTERNATIONAL
S.A.R.L.,

12 Claimant,

13 v.

14 INTERNET CORPORATION FOR
15 ASSIGNED NAMES AND NUMBERS,

16 Respondent.

ICDR CASE NO. 50 117 T 00812 11

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

File Date: November 17, 2011
Trial Date: None

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1 **I. INTRODUCTION**

2 ICANN has enormous monopoly power over the entire internet, the critical worldwide
3 engine for commerce and the dissemination of information of every kind. Recognizing the serious
4 concerns posed by such sweeping monopoly in a purely private entity, ICANN has repeatedly and
5 loudly touted its “accountability” and “transparency” to the global Internet community. ICANN
6 designed and publicized the Independent Review Panel (“IRP”) procedure as one of its crucial
7 accountability processes, and the only one independent of ICANN itself.

8 Flatly contrary to its claimed broad accountability, ICANN now seeks to insulate from IRP
9 review its indefensible decisions (among others) empowering ICM Registry, LLC (“ICM”) to
10 create and operate a protection racket. ICANN authorized ICM to charge adult and non-adult
11 businesses alike extortionate prices to prevent the taint and profit loss from misuse of those
12 businesses’ own names in the .XXX TLD. Considerable evidence establishes that ICM’s .XXX
13 business plans focused – with ICANN’s consent – on exploiting such a racket. ICANN’s flawed
14 decisions permitting such plans were inconsistent with a host of ICANN’s obligations and “core
15 values” enshrined in its Bylaws – including those promoting competition and giving serious
16 consideration to the views of governments, all of which decried .XXX.

17 ICANN seeks to insulate these decisions from review by conjuring new IRP barriers and
18 through an artificially restrictive reading of the IRP standing provision. In particular, for example,
19 ICANN argues that neither Manwin Licensing International S.A.R.L. (“YouPorn”) nor anyone
20 else can bring an IRP unless it first sought a .XXX registry contract or participated in other non-
21 IRP comment procedures. But nothing in the IRP standing rule – which ICANN itself drafted –
22 contains any such prerequisites. Moreover, such prerequisites would make absolutely no sense.
23 Why would a party opposed to establishing .XXX in the first instance be required to bid for its
24 operation as a condition to challenging the .XXX decisions?

25 ICANN also argues that YouPorn was not “materially affected” by ICANN’s .XXX
26 decisions. In fact, .XXX has illegally diverted and threatens to divert YouPorn’s business through
27 misuse of YouPorn’s valuable adult-content domain names and minor variants of those names.
28 YouPorn was thus “materially affected” under any plain language interpretation of the term or

1 under any of the allegedly analogous legal principles ICANN identifies. As only one example,
2 ICANN argues that “materially affected” is the same as the Article III “case or controversy”
3 threshold. But, as explained below, the United States District Court has already ruled that
4 YouPorn’s claims exceed that Article III standard.

5 ICANN’s arguments would leave all the persons and businesses critically affected by its
6 .XXX decisions without meaningful IRP review. ICANN may now prefer not to be bothered. But
7 such an attitude not only conflicts with the plain IRP language which ICANN itself drafted, but
8 would set a dangerous precedent of insularity for a powerful monopoly crucially affecting millions
9 of businesses and individuals worldwide.

10 **II. YOUPORN PLAINLY MEETS THE IRP STANDING REQUIREMENTS.**

11 To insure that it “remain[s] accountable to the Internet community,” one of ICANN’s core
12 values, ICANN created minimal standing requirements for IRPs. Bylaws, Art. I, § 2(10).
13 ICANN’s standing Bylaw states: “Any person materially affected by a decision or action by the
14 [ICANN] Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws
15 may submit a request for independent review of that decision or action.” Bylaws, Art. IV, § 3.
16 You Porn plainly meets each of these standing elements: (1) it challenges identified ICANN
17 Board actions or decisions; (2) asserted to be inconsistent with ICANN’s Bylaws; and (3) was
18 materially affected by such actions and decisions.

19 **A. YouPorn Challenges ICANN Board Actions And Decisions.**

20 ICANN admits that it has sole responsibility for (and a monopoly over) the Internet
21 “domain name system” or “DNS,” without which the Internet cannot operate. The DNS insures
22 that each web site has a unique domain name and that Internet users will reach the intended
23 destination when entering that site’s name into their web browsers. ICANN also has sole
24 responsibility for and a monopoly over approving new Top Level Domain names (“TLDs”), such
25 as .com., .org, or .net, and the “registries” to operate each TLD.

26 Years ago, defendant ICM Registry, LLC (“ICM”) began seeking ICANN’s approval of
27 the new .XXX TLD, intended for adult content websites. After ICANN rejected ICM’s initial
28 efforts, ICM pressured ICANN for approval. Eventually, ICM offered ICANN millions of dollars

1 in fees for agreeing to approve the .XXX TLD and to award ICM the registry contract on
2 favorable terms. ICANN did agree. The favorable terms included that .ICM would face no
3 competing bids for the initial or renewal .XXX registry contracts; that ICANN would agree to
4 initial anticompetitive .XXX sales prices and terms and delegate to ICM unchecked powers to set
5 future monopoly such prices and terms; that ICANN would not approve competing TLDs intended
6 for adult content; and that ICANN would presumptively renew ICM's registry contract.

7 ICANN's refusal to permit competition for the ICM registry contract was egregious in
8 light of pre-existing case law. In *Coalition for ICANN Transparency v. VeriSign, Inc.*, 611 F.3d
9 495, 499-500 (9th Cir. 2010) ("*VeriSign*"), the Ninth Circuit addressed the 2006 .com registry
10 agreement between ICANN and VeriSign, the .com registry. The agreement was made without
11 competing bids from other registry operators. The Ninth Circuit found this constituted an antitrust
12 violation in the unique market for TLD registry agreements. The Ninth Circuit noted: "It is not
13 disputed that there can only be one operator for each domain registry at any one time. Therefore,
14 the only viable competition can take place in connection with obtaining a new contract" *Id.*
15 at 499. The Ninth Circuit also noted that ICANN is a "private standards-setting body" with "no
16 public accountability" making competition for registry contracts particularly necessary. *Id.* at 506-
17 07.

18 In awarding the ICM registry contract, ICANN not only eschewed the plain lesson of
19 *Verisign*, but (equally disturbing) awarded the ICM contract without imposing any price
20 constraints, any restrictions on anticompetitive conduct, or any restrictions on conduct threatening
21 intellectual property rights. *YouPorn Request for IRP ("Request")* ¶¶ 36-45, 56-59. Recognizing
22 that TLD operators have the power to impose monopoly pricing, ICANN has in other TLD
23 registry contracts frequently imposed price caps or similar restrictions against anticompetitive
24 conduct. Moreover, ICANN failed to conduct proper economic studies analyzing the competitive
25 impact of a new .XXX TLD or of the .XXX registry contract before approving them. *Request*
26 ¶¶ 3(f), 26, 42-43. ICANN also failed to give proper credence to the strong objections to the
27 .XXX TLD from the adult entertainment industry (the very community ICM falsely contended
28 was "sponsoring" its application), from the Governmental Advisory Committee, from the DOC

1 and other U.S. and non-U.S. governmental agencies, and from other members of the Internet
2 community. Request ¶¶ 17, 20, 28, 39-41, 56-60.

3 YouPorn challenges these ICANN decisions and actions in approving .XXX and the ICM
4 registry contract.

5 **B. YouPorn Asserts That These Actions And Decisions Are Inconsistent With**
6 **The ICANN Bylaws.**

7 You Porn asserts that ICANN’s conduct in approving the anticompetitive ICM registry
8 contract without competing bids over extensive objections violated and was inconsistent with,
9 among other things, ICANN’s Bylaw commitments to “support broad, informed participation,”
10 “promote well-informed decisions based on expert advice,” “ensure that those entities most
11 affected can assist in the policy development process,” “duly tak[e] into account governments’ or
12 public authorities’ recommendations,” “[i]ntroduc[e] and promot[e] competition in the registration
13 of domain names where practicable and beneficial in the public interest,” “depend on market
14 mechanisms [e.g., competitive bidding] to promote and sustain a competitive environment,”
15 protect intellectual property rights, and treat everyone “fairly” without “singling anyone [such as
16 ICM] out.” Request ¶¶ 8, 10, 45, 56, 57, 58, 59. *See also* Bylaws, Art. I, § 2, Art. II, § 6 and
17 Art. IV, § 1.

18 **C. YouPorn Has Been Materially Affected By ICANN’s Actions And Decisions.**

19 Not surprisingly, ICANN’s misguided approval of the anticompetitive .XXX TLD and
20 registry agreement has had horribly anticompetitive but completely foreseeable results. ICM, as
21 empowered by ICANN and with its approval, has sold .XXX registry services at above-market
22 monopoly prices and subject to onerous sales restrictions (such as requirements that purchasers
23 release claims and agree to the unreasonable controls set by a sponsoring organization) that would
24 never exist in a competitive market, and that, as a result, ICM has gorged on monopoly profits.
25 ICM’s President Stuart Lawley has been quoted as saying that ICM expects annual profits of \$200
26 million from .XXX. Joseph Galante, *The Man Who Would Be the Dot-XXX King*, BLOOMBERG
27 BUSINESSWEEK MAGAZINE, July 1, 2010, *available at*

28 http://www.businessweek.com/magazine/content/10_28/b4186038373596.htm. Lawley also says

1 that he “has sold nine premium .XXX domain names for \$100,000 or more, which is unparalleled
2 in any other domain launch.” Press Release, ICM Registry, LLC, *ICM Registry Announces*
3 *Record-Setting Prices for New .XXX Domains*, Oct. 6, 2011, available at
4 [http://www.icmregistry.com/press/icm-registry-announces-record-setting-prices-for-new-xxx-](http://www.icmregistry.com/press/icm-registry-announces-record-setting-prices-for-new-xxx-domains/)
5 [domains/](http://www.icmregistry.com/press/icm-registry-announces-record-setting-prices-for-new-xxx-domains/). As Lawley reportedly confirmed, “this was always going to be a very lucrative
6 arrangement.” *Domain ‘.xxx’ Approved for Web Porn Sites*, USA TODAY, Mar. 18, 2011,
7 available at http://usatoday30.usatoday.com/tech/news/2011-03-18-porn-domain_N.htm. ICANN
8 shares in these profits through ICM’s agreement to pay enhanced registry fees. Request ¶ 45.

9 Much of this lucre comes from “defensive” registrations. Owners of trademarks (or of
10 domain names in different TLDs) must pay ICM fees to block others from using those (or
11 confusingly similar) marks or names to designate .XXX websites. The need for such defensive
12 registrations is particularly acute in .XXX. Owners of names associated with adult content face a
13 risk of customer confusion and diversion to sites with similar names in a TLD specifically
14 designated for (and with identity letters universally connoting) adult content. Owners of names
15 not associated with adult content have a particular wish to avoid that association in .XXX. For
16 example, celebrities or owners of children’s character names have a particular need to avoid
17 association with .XXX.

18 The need for .XXX defensive registrations thus affects all businesses, and has been broadly
19 decried as a “hold up.” See, e.g., Rhett Pardon, *Hustler Prepared to Fight .XXX Infringement*,
20 xBIZ, July 12, 2011 (Hustler President Michael Klein has stated: “[I]t appears that the .XXX TLD
21 will do nothing but drive up costs to the adult community and will force us to fight infringement
22 on yet another front. ... [N]or will ... we be shaken down by ICM[.]”), available at
23 <http://www.xbiz.com/news/136179>; Terry Baynes, *Businesses in U.S. Complain of .xxx*
24 *Shakedown*, REUTERS, Aug. 15, 2011 (“Porn and mainstream businesses alike complain they are
25 being forced to buy [.XXX] domain names they don’t want, don’t need and won’t use – and
26 compare the process to a hold-up. ... ‘Many feel they’re being blackmailed to protect their
27 brands,’ said Kristina Rosette, a trademark lawyer at the law firm Covington & Burlington.”),
28 available at <http://www.reuters.com/article/2011/08/15/us-internet-xxx->

1 idUSTRE77E5W920110815. The significant costs and disadvantages of such defensive
2 registrations, and their detrimental effect on competition, are a deadweight drag on the economy
3 far outweighing any alleged benefit of the .XXX TLD.

4 As a result of ICANN's conduct and with ICANN's approval, ICM also charges above-
5 market monopoly prices for "affirmative" .XXX registrations. Businesses "affirmatively" register
6 names purportedly for use in operating an active .XXX website displaying new content, rather
7 than for purposes of "defensively" preventing someone else from exploiting in .XXX an existing
8 trademark or non-.XXX domain name.

9 YouPorn has been particularly and materially affected by the anticompetitive results of
10 ICANN's failure to abide by its Bylaw commitments. YouPorn owns and licenses the trademarks
11 and domain names used for many of the most popular adult-oriented websites, including
12 YouPorn.com, the single most popular free adult video website on the Internet, as well as
13 xTube.com, Pornhub.com, and Brazzers.com, to cite but a few examples. YouPorn also manages
14 online content under the "Playboy" trademark and runs Playboy TV worldwide, both under license
15 from Playboy Enterprises, Inc. As one of the leading providers of adult Internet content, YouPorn is
16 particularly vulnerable to misuse in .XXX by others of its valuable domain names and trademarks.
17 Request ¶¶ 1, 53, 59.

18
19 Indeed, third parties already have acquired .XXX domain names confusingly similar or
20 identical to domain names owned by YouPorn.¹ This in turn will inevitably lead to customer
21 confusion, free riding, and diminution in the value of YouPorn's rights. YouPorn can prevent such
22 conduct only by paying ICM significantly above-market prices for defensive registrations and
23 abiding by the other anticompetitive terms, such as releasing its claims, required for such
24
25
26

27 ¹ For example, cyber squatters have registered domains confusingly similar to YouPorn's famous
28 celebs.com and brazzers.com websites, including celebs.xxx, brazzer.xxx and brazers.xxx.

1 registrations. This all resulted from ICANN’s improvident conduct in approving .XXX and the ICM
2 registry contract.

3 **III. YOUPORN MEETS THE “MATERIALLY AFFECTED BY” STANDING**
4 **REQUIREMENT, WHICH MUST BE CONSTRUED BROADLY.**

5 **A. The Plain Meaning Of “Materially Affected By” Supports YouPorn’s**
6 **Standing.**

7 ICANN’s standing Bylaw is a matter of corporate governance to be interpreted under the
8 California law, where ICANN is incorporated. *See State Farm Mut. Auto. Ins. Co. v. Superior*
9 *Court*, 114 Cal. App. 4th 434, 443 (2003) (“The traditional conflicts rule developed by courts has
10 been that internal corporate relationships are governed by the laws of the [state] of
11 incorporation.”), *quoting McDermott, Inc. v. Lewis*, 531 A.2d 206, 215-16 (Del. 1987); Rest. 2d,
12 Conflict of Laws § 302, comment (a) (1971) (internal affairs include matters relating to the
13 “adoption of bylaws”).

14 Bylaws are construed under normal rules of contract and statutory construction. *Singh v.*
15 *Singh*, 114 Cal. App. 4th 1264, 1294 (2004) (“It is generally accepted that corporate bylaws are to
16 be construed according to the general rules governing the construction of statutes and contracts.”)
17 (internal citations omitted). The “language of a contract is to govern its interpretation[.]” Cal.
18 Civil Code § 1638. “When a contract is reduced to writing, the intention of the parties is to be
19 ascertained from the writing alone, if possible[.]” Cal. Civil Code § 1639. *See also, e.g.,*
20 *McKnight v. Torres*, 563 F.3d 890, 893 (9th Cir. 2009) (“The unambiguous words of the
21 agreement are the end of the story.”). Moreover, generally, “[t]he words of a contract are to be
22 understood in their ordinary and popular sense....” Cal. Civil Code § 1644.

23 “Materiality” is commonly defined as “[h]aving some logical connection with the
24 consequential facts, material evidence.” BLACK’S LAW DICTIONARY 991 (7th ed. 1999) (definition
25 of “material”). “Materially affected by” simply means significantly influenced by. *See THE AM.*
26 *HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1109 (3d ed. 1992) (defining “materially” to
27 mean “To a significant degree; substantially.”); *id.* at 29 (defining “affected” to mean “Acted

1 upon, influenced, or changed.”); RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1185 (2d
2 ed. 2001) (defining “materially” to mean “To an important degree; considerably.”); *id.* at 33
3 (defining “affected” to mean “Acted upon; influenced. [or] Influenced in a harmful way ...”).
4 “By” itself means “through the medium of.” RANDOM HOUSE WEBSTER’S UNABRIDGED
5 DICTIONARY at 287. In other words, the use of “by” requires only what is commonly known as
6 “but for” causation or causation in fact.²

7 “But for” causation requires only a minimal relationship between the cause and effect. *See*
8 *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 968-69 (1997) (California’s “substantial factor
9 [causation] standard generally produces the same results as does the ‘but for’ rule of causation”);
10 *People v. Caldwell*, 36 Cal. 3d 210, 220-221 (1984) (Substantial factor test is unsatisfied only if
11 the cause “was so infinitesimal or so theoretical that it cannot properly be regarded as a substantial
12 factor in bringing about the particular result. This is merely a special application of the general
13 maxim – ‘*de minimis non curat lex*’ . . .”) (internal citation omitted).

14 YouPorn clearly meets this test. As set forth above, YouPorn has suffered actual and
15 threatened significant injuries to its valuable domain name rights resulting from ICANN’s actions
16 inconsistent with its Bylaws. Nothing more is required for IRP standing.

17 A universal principle of proper contract interpretation is that a court cannot rewrite a
18 contract under the guise of interpreting it. *See, e.g., Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th
19 1070, 1078 (2003) (“we do not rewrite any provision of any contract . . . for any purpose”);
20 *Aerojet-Gen. Corp. v. Transport Indemnity Co.*, 17 Cal. 4th 38, 75 (1997) (“We may not rewrite
21 what [the parties] themselves wrote.”); *Stockton Dry Goods Co. v. Girsh*, 36 Cal. 2d 677, 679
22 (1951) (“The function of the court is to ascertain what in terms or in substance is contained in the
23 instrument and not to insert what has been omitted, or to omit what has been inserted.”); *Addiego*

24
25 ² “‘But for’ causation is a short way of saying ‘the defendant’s conduct is a cause of the event if
26 the event would not have occurred but for that conduct.’ It is sometimes stated as ‘*sine qua non*
27 causation[.]’” *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1183 (9th Cir. 2000). *See also* 6
28 WITKIN, SUM. OF CAL. LAW, TORTS § 1185 (10th ed. 2010) (“The first element of legal cause is
cause *in fact*: it is necessary to show that defendant’s [acts] contributed in some way to the
plaintiff’s injury, so that ‘but for’ the defendant’s [acts] the injury would not have been
sustained.”) (emphasis in original).

1 v. *Hill*, 238 Cal. App. 2d 842, 846 (1965) (“courts cannot make better agreements for parties than
2 they themselves have been satisfied to enter into”).

3 That is precisely what ICANN seeks to do here. It seeks to rewrite “materially affected
4 by” to add at least two limitations that nowhere appear in the text. First, it wants the Board action
5 not only to “materially affect” the claimant, but also to “*specifically concern* the ‘materially
6 affected’ claimant.” Second, it wants the harm to be caused “by” the Board’s conduct, but also to
7 be “*derived directly* from ICANN Board conduct.” ICANN May 4, 2012 Response to Manwin
8 Request for IRP (“Response”) ¶ 104. But since neither limitation appears in the text, the Bylaw
9 cannot be rewritten to include them. In any event, the addition of these terms would not change
10 the result. YouPorn has been particularly affected by results which derive directly from the acts of
11 ICANN’s Board.

12 **B. ICANN’s Mandate Requires A Broad Interpretation Of Standing.**

13 “A contract may be explained by reference to the circumstances under which it was made,
14 and the matter to which it relates.” Cal. Civil Code § 1647. Here, ICANN’s power over the
15 Internet, ICANN’s nature, ICANN’s mission and core values, and the purpose of the IRP
16 procedure require broad IRP standing so that process can achieve its remedial purpose.

17 No one can doubt that the Internet is one of the world’s most important technological
18 resources with astronomical social, economic, and political impacts that pervade every corner of
19 the world. Nor can anyone dispute ICANN’s unbridled power over this unique resource. ICANN
20 exercises plenary control over the Internet domain name system (“DNS”), which is the gateway to
21 the nearly infinite universe of names and numbers that allows the Internet to function. Yet,
22 ICANN is a private organization. It is not owned or regulated by any government or, through
23 treaties, any collection of governments. It is not owned by anyone. It has no shareholders or
24 members who can vote to change its Articles, to make its Board of Directors accountable to its
25 Articles, Bylaws, or core values, or to fulfill its mandate to “operate for the benefit of the Internet
26 community as a whole.” Nov. 21, 1998 ICANN Articles of Incorporation (Response, Ex. 6)
27 (“Articles”), § 4.

1 ICANN’s mission is “to coordinate, at the overall level, the global Internet’s systems of
2 unique identifiers, and in particular, to insure the stable and secure operation of the Internet’s
3 unique identifier systems.” Bylaws, Art. I, § 1. In performing its mission, ICANN’s Board is
4 required to remain true to enumerated core values, including: preserving and enhancing the global
5 interoperability of the Internet; respecting the flow of information made possible by the Internet;
6 seeking and supporting broad, informed participation at all levels of policy development and
7 decision-making; promoting and sustaining a competitive environment; promoting competition in
8 the registration of domain names; employing open and transparent policy development
9 mechanisms; applying documented policies neutrally and objectively, with integrity and fairness;
10 and remaining accountable to the Internet community. Bylaws, Art. I, § 2.

11 It falls on the Board to adhere to these core values. Under its Bylaws, “ICANN should be
12 accountable to the community for operating in a manner that is consistent with these Bylaws, and
13 with due regard for the core values set forth in Article I of these Bylaws.” Bylaws, Art. IV, §1.
14 But what happens if the Board is not true to its mission? The Bylaws establish three “review”
15 mechanisms: (1) reconsideration of Board decisions by the Board’s Governance Committee;
16 (2) independent third-party review of Board decisions; and (3) periodic reviews of Supporting
17 Organizations and Advisory Committees under procedures wholly controlled by the Board and
18 with changes implemented only by supermajority votes of the Board.

19 The IRP process is “intended to reinforce the various accountability mechanisms otherwise
20 set forth in these Bylaws, including the transparency provisions of Article III, and the Board and
21 other selection mechanisms set forth throughout these Bylaws.” Bylaws, Art. IV, § 1.
22 Significantly, the IRP is the only accountability mechanism that is independent of the Board
23 whose very actions are being challenged.³ Even then, the IRP process is not binding on ICANN
24 or the Board. Rather, it results only in published declarations and recommendations, which can be
25 accepted or rejected by the Board. Bylaws, Art. IV, § 3(8).

26

27 ³ The periodic reviews of Supporting Organizations and Advisory Committees is by, rather than
28 independent of, the ICANN Board, and is limited to a review of those organizations and
committees. It does not cover actions or decisions by ICANN or its Board. Bylaws, Art. IV, § 4.

1 Thus, the IRP is the most critical – and only independent – process for ensuring that the
2 Board uses its plenary power over this invaluable global technological resource to remain true to
3 ICANN’s mission and its core values “for the benefit of the Internet community as a whole.”
4 Articles ¶ 4. In this context, ICANN’s arguments for severely restricting access to independent
5 third-party review of the Board’s actions are not only legally wrong; they are dangerous. IRP
6 standing must be broadly construed to achieve the remedial purposes for which it was created. *See*
7 *United States v. N.Y. Tel. Co.*, 682 F.2d 313, 316-17 (2d Cir. 1982) (in case involving Internal
8 Revenue Code, “statute’s remedial purpose” dictated interpreting standing provision broadly);
9 *Davis v. City of Aurora*, No. 08-cv-002107-PAB-MJW, 2011 U.S. Dist. LEXIS 76010, at ** 11-
10 13 (D. Colo. July 14, 2011) (collecting Civil Rights Act cases holding the same); *accord Chicago*
11 *Truck Drivers v. El Paso CGP Co.*, 525 F.3d 591, 605 (7th Cir. 2008) (amendments to ERISA
12 statute “should be broadly construed to effectuate its remedial purposes”); *Kang v. U. Lim Am.,*
13 *Inc.*, 296 F.3d 810, 816 (9th Cir. 2002) (“we broadly interpret ambiguous language in civil rights
14 statutes to effectuate the remedial purpose of the legislation”).

15 **C. The Drafting History Supports Broad Standing.**

16 The drafting history of the standing Bylaw supports a broad interpretation of the IRP
17 standing provision.

18 First, ICANN references the 1998 Bylaws, but they support liberal standing. Response
19 ¶ 105. In 1998, Bylaw, Article III, § 4 provided:

20 The Board shall adopt policies and procedures through which a
21 party *affected* by an action of the Corporation can seek
22 reconsideration of that action. These policies and procedures may
23 include threshold standards or other requirements to protect against
24 *frivolous or non-substantive* use of the reconsideration process.
 The Board may, in its sole discretion, provide for an independent
 review process by a neutral third party. Response, Ex. 46 (emphasis
 added).⁴

25 ⁴ On November 21, 1998, ICANN adopted a change to its Bylaws that dropped the last sentence
26 quoted above, and added a new section: “The . . . Board shall, following solicitation of input from
27 the Advisory Committee on Independent Review and other interested parties and consideration of
28 all such suggestions, 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.” Nov. 21, 1998 ICANN Bylaws, Art. III § 4 (Response, Ex. 46). These Bylaw provisions
remained unchanged until the December 2002 revision discussed below.

1 Thus, by late 1998, any party “affected” could seek reconsideration (and independent
2 review, subject to adoption of policies), without a materiality limitation. Later, in 2000, as
3 authorized by the 1998 Bylaws, ICANN adopted review policies to include the “materially
4 affected” standard to avoid “frivolous or non-substantive” use of the reconsideration and IRP
5 processes. Mar. 10, 2000 ICANN Independent Review Policy § 6.2 (YouPorn’s Ex. 7). Later, in
6 2002, the Bylaws were amended to incorporate the same “materially affected” standard. Dec. 15,
7 2002 ICANN Bylaws Art. IV § 3 (Response, Ex. 4). This history confirms that “materially
8 affected by” is an extremely low threshold designed to weed out “frivolous or non-substantive”
9 challenges. YouPorn plainly clears that hurdle.

10 Second, contrary to ICANN’s position (Response ¶ 106), the 1999 comment by the
11 Advisory Committee on Independent Review does not suggest an intent to create a restrictive
12 standing requirement, but rather the opposite. In 1999, when the 1998 Bylaws were in place, that
13 committee took public comments on several “principles,” including Principle 6: “Any individual
14 or entity may file a claim if that individual or entity has been *materially affected by* the contested
15 action or failure to act by the ICANN Board.” Response, Ex. 3, at 3 (emphasis added). In
16 response, Pavan Duggal,⁵ expressed concern at a public meeting that the “materially affected by”
17 language “might allow an individual to file a claim without having been affected sufficiently
18 directly” and asked that ICANN “lay down more precise standards.” *Id.* ¶ 9, Ex. 2 at 1. ICANN
19 declined to further restrict the “materially affected by” standard. By so declining, the committee
20 signaled its deliberate intent to keep standing broad, but only to weed out “frivolous or non-
21 substantive” challenges.

22 Third, contrary to ICANN’s assertion, the Advisory Committee’s Comment on Principle 6
23 reinforces this analysis, since it merely comments on the distinction between “affected in any
24 quantum at all” (the 1998 standard) and “materially affected by” (a proposed “threshold standard”
25 contemplated by the 1998 Bylaw). The Committee stated, in its draft recommendation, that the
26 “materially affected by” standard incorporated the “conventional legal threshold of materiality” to

27 _____
28 ⁵ Mr. Duggal was a member of the ICANN Membership Advisory Committee. See Biographies,
<http://archive.icann.org/en/committees/membership/biographies.htm>.

1 avoid claims by “nearly every Internet user [who] can be said to be affected in some quantum by
2 nearly any decision of the ICANN Board . . . keeping independent review available to those
3 individuals or entities that have more directly been affected by the action (or failure to act) at
4 issue.” Response ¶ 106, *quoting* Response Ex. 3.⁶ The Committee did not state, as ICANN
5 contends, that an action has to “specifically concern” the person challenging it, or that the person’s
6 injury had to “derive directly from ICANN’s action.” Instead, the Committee was merely noting
7 that essentially *every member* of the Internet community is “affected in some quantum” by *every*
8 ICANN decision, and that something “more direct” *than that* should be required. The “something
9 more” was materiality and that simply avoided frivolous or non-substantive claims.

10 YouPorn is a very significant player in the online adult entertainment community. It has
11 had its valuable adult-content trademarks and domain names misappropriated and threatened in a
12 TLD expressly intended for adult content. It has been deprived of reasonable means to prevent
13 such misappropriation. It has suffered serious resulting harm and threats to its business and name
14 rights. The Board’s actions have thus affected YouPorn much more significantly and directly than
15 they have affected general members of the Internet community. If despite the very particular
16 impacts on YouPorn, it lacks standing to challenged ICANN’s .XXX decisions, then no one
17 (perhaps other than ICM itself) would have such standing. So broadly immunizing ICANN from
18 accountability would set dangerous precedent.

19 **IV. IRP STANDING IS BROADER THAN ARTICLE III STANDING, WHICH**
20 **YOUPORN MEETS.**

21 ICANN contends that the By-Law meaning of “materially affected by” “can be informed
22 by the analogous ‘case and controversy’ jurisdictional limit” of Article III of the United States
23 Constitution. Response ¶ 108. However, ICANN presents no evidence at all that ICANN
24 intended to incorporate the Article III’s standard. In fact, the standards serve quite different
25 functions, belying any such intent. Article III standing is intended to insure that litigants invoke

26 _____
27 ⁶ The Committee expressly noted that it “is an advisory committee recommendation in draft form.
28 It is NOT authoritative and is NOT to be relied on by any party.” Response, Ex. 3 at 1 (emphasis
in original).

1 federal courts only for binding opinions, not advisory or hypothetical ones. *Steel Co. v. Citizens*
2 *for a Better Env't*, 523 U.S. 83, 101 (1998) (“Hypothetical jurisdiction produces nothing more
3 than a hypothetical judgment – which comes to the same thing as an advisory opinion,
4 disapproved by this Court from the beginning.”). By contrast, IRP proceedings are *designed* for
5 nonbinding advisory declarations. The standing threshold for a nonbinding, advisory IRP opinion
6 should necessarily be lower than for obtaining binding orders enforceable by plenary federal
7 governmental powers.

8 Although the Article III analogy is inapt, and although Article III standing is more
9 restrictive than IRP standing, YouPorn easily meets Article III standing anyway. The standards
10 for Article III standing are set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61
11 (1992):

12 [T]he irreducible constitutional minimum of standing contains three
13 elements. First, the plaintiff must have suffered an “injury in fact” –
14 an invasion of a legally protected interest which is (a) concrete and
15 particularized and (b) “actual or imminent, not ‘conjectural’ or
16 ‘hypothetical[.]’” Second, there must be a causal connection
17 between the injury and the conduct complained of – the injury has to
be “fairly . . . trace[able] to the challenged action of the defendant,
and not . . . the result [of] the independent action of some third party
not before the court.” Third, it must be “likely,” as opposed to
merely “speculative,” that the injury will be “redressed by a
favorable decision.”

18 *Id.* at 560-61 (internal citations omitted).

19 **A. Injury in Fact**

20 “Injury in fact” reflects the statutory requirement that a person be
21 “adversely affected” or “aggrieved,” and it serves to distinguish a
22 person with a direct stake in the outcome of a litigation – even
23 though small – from a person with a mere interest in the problem.
24 We have allowed important interests to be vindicated by plaintiffs
25 with no more at stake in the outcome of an action than a fraction of a
vote; a \$ 5 fine and costs; and a \$ 1.50 poll tax As Professor
[Kenneth Culp] Davis has put it: “The basic idea that comes out in
numerous cases is that an identifiable trifle is enough for standing to
fight out a question of principle; the trifle is the basis for standing
and the principle supplies the motivation.”

26 *United States v. Students Challenging Regulatory Agency Procedures* (“SCRAP”), 412 U.S. 669,
27 689, n. 14 (1973) (internal citations omitted). Contrary to ICANN’s argument (Response ¶ 109),
28 that one person’s injury was of a type also suffered by many others does not make the injury

1 insufficient for standing. Several Supreme Court cases have so held.⁷ Moreover, even threatened
2 and not yet realized injury is sufficient to satisfy the injury in fact requirement. *Linda R. S. v.*
3 *Richard D.*, 410 U.S. 614, 617 (1972) (“some *threatened* or actual injury” sufficient for injury in
4 fact) (emphasis added).

5 **B. Causal Connection**

6 For Article III standing, the connection required between the alleged act and injury is
7 minimal. Contrary to ICANN’s assertions, a claimant’s injuries need not “derive directly,”
8 without intervening factors, from the alleged improper actions. Instead, “the injury may be
9 indirect, as long as the complaint indicates that the injury is fairly traceable to the defendant’s acts
10 or omissions.” 15-101 MOORE’S FED. PRACTICE – CIVIL § 101.41[2] (2012). Nor does Article III
11 standing require that a claimant prove the proximate causation needed to establish liability. *Maya*
12 *v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). For standing, a claimant need merely
13 “establish a ‘line of causation’ between defendants’ action and their alleged harm that is more than
14 ‘attenuated.’ A causal chain does not fail simply because it has several ‘links,’ provided those
15 links are ‘not hypothetical or tenuous’ and remain ‘plausibl[e].” *Id.* (internal citations omitted).

16 Here, all of YouPorn’s asserted actual and threatened injuries are “fairly traceable” to the
17 Board’s actions and decisions; they are not “hypothetical or tenuous.”

18
19
20 ⁷ See, e.g., *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998) (“[W]here a harm is concrete,
21 though widely shared, the Court has found ‘injury in fact.’ . . . This conclusion seems particularly
22 obvious where (to use a hypothetical example) large numbers of individuals suffer the same
23 common-law injury (say, a widespread mass tort), or where large numbers of voters suffer
24 interference with voting rights conferred by law.”); *Pub. Citizen v. United States Dep’t of Justice*,
25 491 U.S. 440, 449-50 (1989) (“The fact that other citizens or groups of citizens might make the
26 same complaint after unsuccessfully demanding disclosure under FACA does not lessen
27 appellants’ asserted injury, any more than the fact that numerous citizens might request the same
28 information under the Freedom of Information Act entails that those who have been denied access
do not possess a sufficient basis to sue.”); *Sierra Club v. Morton*, 405 U.S. 727, 738-41 (1972)
(courts have discarded the notion “that an injury that is widely shared is *ipso facto* not an injury
sufficient to provide the basis for judicial review”), *superseded in part by statute as stated in FAIC*
Secur., Inc. v. United States, 768 F.2d 352, 357 (D.C. Cir. 1985); *Newdow v. Lefevre*, 598 F.3d
638, 641-42 (9th Cir. 2010) (atheist had standing to challenge statute requiring motto “In God We
Trust” be placed on coins even though “his encounters with the motto are common to all
Americans”), *cert. denied*, 131 S. Ct. 1612 (2011).

1 **C. Likelihood of Redress**

2 The third element of Article III standing – that the injury could likely be redressed by a
3 favorable decision – must be considered in context. An IRP results only in a nonbinding, advisory
4 declaration and recommendation. Declaration of IRP, *ICM Registry, LLC v. ICANN* ¶¶ 131-34
5 (Feb. 19, 2010) (Response, Ex. 48). ICANN has discretion whether to follow the decision.
6 Therefore, no claimant can prove that ICANN will in fact adopt a favorable declaration to redress
7 the claimant’s injuries. The ICANN Bylaws cannot be read to impose a requirement for such
8 impossible proof. Construing this standing element in the context of a non-binding process,
9 YouPorn has met it. The Panel can provide the relief requested by YouPorn – a declaration that
10 ICANN’s decisions and actions are inconsistent with ICANN’s Bylaws and recommendations for
11 ICANN action. Request ¶ 61. That is the only relief this Panel can grant under the IRP Rules.
12 Bylaws, Art. IV, § 3(3).

13 **D. The Court in a Companion Federal Action Has Already Decided that YouPorn**
14 **Has Standing**

15 To confirm that YouPorn meets the Article III standing requirements, the Panel need go no
16 further than the recent order in YouPorn’s federal antitrust lawsuit against ICANN and ICM.
17 There, ICANN argued that YouPorn lacked “antitrust standing.” Such standing requires, among
18 other things, unlawful conduct causing an injury to plaintiff. *See Am. Ad Mgmt., Inc. v. Gen. Tel.*
19 *Co.*, 190 F.3d 1051,1055 (9th Cir. 1999). But antitrust standing is *more* restrictive than Article III
20 standing: “Antitrust standing requires more than the ‘injury in fact’ and the ‘case or controversy’
21 required by Article III of the Constitution.” *Fla. Seed Co., Inc. v. Monsanto Co.*, 105 F.3d 1372,
22 1374 (11th Cir.) (internal citation omitted), *cert. denied*, 522 U.S. 913 (1997). *See also, e.g., Ross*
23 *v. Bank of Am., N.A.*, 524 F.3d 217, 224-25 (2d Cir. 2008) (“Antitrust standing demands a much
24 more detailed and focused inquiry into a plaintiff’s antitrust claims than constitutional standing.”);
25 *Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1232 (9th Cir. 1998)
26 (antitrust standing “more demanding standard” than Article III standing) (internal citation
27 omitted).

1 Dismissing defendants' contrary arguments, the federal court found that YouPorn satisfied
2 antitrust standing. *Manwin Licensing Int'l S.a.r.l. v. ICM Registry, LLC*, No. CV 11-9514 PSG
3 (JCGx), 2012 U.S. Dist. LEXIS 125126, at **28-29 (C.D. Cal. Aug. 14, 2012) (attached hereto as
4 YouPorn's Ex. 10). Having thus satisfied antitrust standing, YouPorn indisputably satisfies the
5 more lenient Article III standard.

6 **V. ECJ OPINIONS ARE WHOLLY INAPPOSITE.**

7 ICANN's analogy to the standing rules of the European Union Court of Justice ("ECJ")
8 fails. Response ¶¶ 118-20. First, the two organizations are entirely different. ICANN is a private,
9 unregulated corporation. It is not a public international organization established by a treaty among
10 twenty seven sovereign states, like the European Union. ICANN's bottom-up, consensus-based
11 governance model is consistent with liberal standing. Such liberal standing is not necessarily
12 consistent with the EU's top-down governance model.

13 Second, the processes are different. The IRP is non-binding; decisions of the ECJ are
14 binding. Restrictive standing makes more sense for binding decisions. Otherwise, persons with
15 marginal interests could compel binding consequences on the respondent. The same concern does
16 not apply to non-binding advisory opinions.

17 Third, and most importantly, the standing words used in the Treaty on the Functioning of
18 the EU are entirely different from the words used for IRP standing. The Treaty provides: "Any
19 natural or legal person may . . . institute proceedings against an act *addressed to that person* or
20 which is of *direct and individual concern* to them, and against a regulatory act which is of *direct*
21 *concern to them* and does not entail implementing measures" (emphasis added). Response ¶ 118.
22 *See also* YouPorn's Ex. 8, Art. 263, *available at* [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF)
23 [lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF). This
24 restrictive language nowhere appears in ICANN's standing Bylaw – not even close.

25 Not surprisingly then, the ECJ cases ICANN cites are entirely inapposite. ICANN cites
26 ECJ cases holding that the ECJ sometimes reads "direct concern" to mean direct and immediate
27 causation without any intervening factor, and "individual concern" to mean effects on the
28 challenger "by reason of certain attributes which are peculiar to them or by reason of

1 circumstances in which they are differentiated from all persons.” See authorities discussed at
2 Response ¶¶ 119-20 and nn. 113-15. But such cases simply highlight the differences from the IRP
3 standing provision, which contains no remotely similar language.⁸ Moreover, as explained in
4 Section III(A) above, California, not EU law governs interpretation of the ICANN Bylaws.

5 **VI. NO “PARTICIPATION REQUIREMENT” EXISTS FOR IRP STANDING.**

6 ICANN apparently argues that, to have IRP standing, YouPorn must have “participated in
7 ICANN’s processes” that led to the challenged decisions and itself have bid for the .XXX registry
8 contract. See Response ¶¶ 3, 6, 10, 110-112. This argument fails for a number of reasons.

9 First, nothing in the standing Bylaw states or even suggests that the IRP claimant must
10 participate in the ICANN processes leading to the challenged board decisions. Again, ICANN is
11 simply asking the Panel to rewrite its standing Bylaw, something this Panel cannot do.

12 Second, the reconsideration process, which is separate and distinct from the IRP process,
13 demonstrates that no participation requirement exists for the latter. Under the reconsideration
14 Bylaw, discretionary dismissal is possible if the claimant fails to participate. Bylaws, Art. IV,
15 § 2(16) (“To protect against abuse of the reconsideration process, a request for reconsideration
16 may be dismissed by the board governance committee where . . . the affected party had noticed
17 an opportunity to, but did not, participate in the public comment period relating to the contested
18 action, if applicable.”). Thus, ICANN knew how to impose a participation requirement when it
19 wanted to do so. It chose to include such a requirement for the reconsideration process, but not for
20

21 ⁸ The restrictive ECJ standing has also been criticized by scholars as unnecessarily limiting access
22 to justice. See Jose Manuel Cortes Martin, *At the European Constitutional Crossroads: Easing*
23 *the Conditions for Standing of Individuals Seeking Judicial Review of Community Acts*, 12 MICH.
24 ST. J. INT’L L. 121, 121 (2003) (“The interpretation of the conditions required for an individual to
25 bring an action for annulment of an act of general application under Article 230(4) of the Treaty
26 Establishing the European Community ... has traditionally been one of the most controversial and
27 least transparent in the case law of the European Court of Justice (ECJ). It is even considered by
28 some to be an almost insurmountable obstacle for access to Community courts.”); *id.* at 127-128
29 (“The limited standing of individuals for directly testing the legality of Community measures of
30 general application, to which this strict interpretation of individual concern gives rise, is an issue
31 that has repeatedly preoccupied a large share of the legal community to the point that some have
32 given credit to the undoubtedly extreme idea that the European Union thereby suffers an
33 irreversible and profound loss of democracy.”). Such a limited standing rule – one extremely
34 difficult for anyone to meet – is wholly inconsistent with the notion of bottom-up, community-
35 driven, consensus-based, transparent, and accountable governance that are core values of ICANN.

1 the separate IRP process. *Cf. Sousa v. Alvarez-Machain*, 542 U.S. 692, 711 n. 9 (2004) (“When
2 the legislature uses certain language in one part of the statute and different language in another,
3 the court assumes different meanings were intended.”), quoting 2 N. Singer, STATUTES AND
4 STATUTORY CONSTRUCTION, § 46:06, p. 194 (6th Revised Edition 2000). See also *Burns v.*
5 *McGraw*, 75 Cal. App. 2d 481, 487 (1946) (listing certain legal proceedings as constituting a
6 breach but not others indicates that others did not constitute a breach); *Aozora Bank, Ltd. v. 1333*
7 *North Cal. Blvd.*, 119 Cal. App. 4th 1291, 1296 (2004) (where bank carved out waste action from
8 non-recourse note provisions but failed to carve out attorneys fees’ claims, bank could not recover
9 attorneys’ fees).

10 Third, ICANN’s 2002 change to its Bylaws on IRP standing confirms no participation
11 requirement exists. Prior to 2002, ICANN’s IRP Policy required that, before commencing an IRP,
12 a party first seek reconsideration, which reconsideration could include discretionary dismissal for
13 failure to participate. Mar. 10, 2000 ICANN Independent Review Policy § 6.3, superseded
14 Dec. 15, 2002 (YouPorn’s Ex. 7); Mar. 4, 1999 ICANN Reconsideration Policy, superseded
15 Dec. 15, 2002 (YouPorn’s Ex. 9). Thus, when ICANN eliminated the reconsideration condition to
16 an IRP request in 2002, it fully separated the two procedures and eliminated any discretionary
17 dismissal for failure to participate.

18 Fourth, YouPorn should not have to bid for operating a .XXX TLD it opposes in order to
19 challenge the .XXX decisions. No language in the standing requirement supports such an absurd
20 result.

21 Fifth, any “participation” requirement would be flatly inconsistent with ICANN’s core
22 values of open, transparent, accountable, and bottom-up governance. See *Am. Motorcyclists Ass’n*
23 *of Am. v. Watt*, 543 F. Supp. 789, 795 (C.D. Cal. 1982) (“If failure to participate in the rule
24 making process estopped a litigant from bringing suit in Court challenging the rule adopted, then
25 the vast majority of potential litigants could not sue. All persons would have to be on guard to
26 ensure that some agency did not promulgate some rule that might someday deny them a benefit to
27 which they otherwise would have been entitled . . . Such a result is neither desirable nor is it the

1 law.”), quoting *Dobbs v. Train*, 409 F. Supp. 432, 434-35 (N.D. Ga. 1975), *aff’d*, *Dobbs v.*
2 *Costle*, 559 F.2d 946 (5th Cir. 1977).

3 Sixth and finally, YouPorn in any event did participate in ICANN’s processes to challenge
4 its .XXX decisions. On September 22, 2010, YouPorn wrote to ICANN “vehemently oppos[ing]
5 the creation of a .XXX domain.” YouPorn’s Ex. 1. Moreover, YouPorn has long been a member
6 of Free Speech Coalition (“FSC”), an adult entertainment industry group, which itself vociferously
7 opposed adoption of the .XXX TLD and ICM’s appointment to operate it. FSC filed more than a
8 dozen comments with ICANN and even testified in person, in front of the ICANN Board, at a
9 public hearing in Lisbon, Portugal on March 29, 2007. See YouPorn’s Exs. 2-6. FSC’s actions
10 satisfied any “participation” requirement, even if there were one. Cf. *Am. Baptist Churches in the*
11 *U.S.A. v. Meese*, 712 F. Supp. 756, 764-66 (N.D. Cal. 1989) (associations have standing to bring
12 claims on behalf of their members who possess standing, unless there is a need for individualized
13 proof).

14 **VII. ICANN’S OTHER ARGUMENTS ARE BASELESS**

15 ICANN asserts other arguments which, while nominally directed at standing, really go to
16 the merits, are in any event baseless, and need be addressed only briefly at this stage.

17 First, ICANN resorts to hurling accusations that YouPorn’s IRP Request is merely an
18 attempt to thwart competition in the online adult entertainment market. See, e.g., Response, ¶¶ 13,
19 121. The accusations are baseless. YouPorn seeks to reduce or eliminate the costs to defensively
20 or affirmatively register in .XXX. That will enhance not reduce competition. Moreover, even
21 elimination of the .XXX TLD altogether would not limit competition. As ICANN vociferously
22 argued in federal court, other TLDs readily sponsor adult-content websites, and barriers to entry
23 are low. YouPorn will thus continue to face (and embraces) vibrant competition whether or not
24 .XXX exists. YouPorn’s goal is to eliminate *unfair* competition from the .XXX protection racket,
25 not to suppress *fair* competition. But all this is in any event wholly irrelevant. YouPorn’s alleged
26 (but mischaracterized) intent has nothing to do with standing. Alleged bad intent does not defeat
27 standing, and ICANN cites no authority that it does.

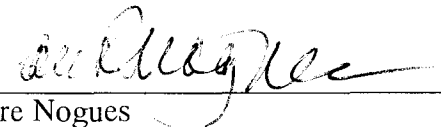
1 Second, ICANN argues that YouPorn lacks standing because its harm stems entirely from
2 acts by ICM not ICANN. *See, e.g.*, Response, ¶¶ 11, 116. The argument is silly. ICANN created
3 the .XXX TLD, approved the ICM registry contract, empowered and authorized ICM to set the
4 anticompetitive pricing and other .XXX operating terms about which YouPorn complains, and
5 gets a cut of every monopoly-priced registration fee received by ICM. ICANN's acts are thus a
6 direct cause of YouPorn's harm.⁹

7 **VIII. CONCLUSION**

8 For the reasons discussed above, YouPorn asks the Panel to declare that YouPorn has
9 standing to proceed to the merits.

10 DATED: October 15, 2012

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13
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15 Jean Pierre Nogues
16 Attorneys for Claimant
17 Manwin Licensing International S.a.r.l.

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22 ⁹ ICANN also argues that YouPorn seeks improperly to collaterally attack and re-litigate the result
23 of an earlier IRP proceeding between ICANN and ICM. The argument too has nothing to do with
24 standing, but is also flat wrong. As ICANN admits, in that earlier IRP, ICM and ICANN were the
25 only parties. ICM was self-interested in obtaining a .XXX registry contract for its own
26 enrichment, and argued only that ICANN had already contractually agreed to approve .XXX and
27 could not change its mind. The IRP Panel ultimately agreed. *ICM Registry, LLC v. ICANN* ¶ 152
(Feb. 19, 2010) (Response, Ex. 48). No one in the last IRP represented or advocated for those
28 concerned that allowing .XXX would adversely affect businesses and competition. Moreover,
nothing in the previous IRP addressed the uncompetitive terms of the actual .XXX registry
contract, which were not adopted until *after* that IRP. In short, this is not re-litigation of the prior
decision addressing purely contractual arguments made by a self-interested party, but raises
entirely new arguments, based in significant part on later facts, and on behalf of previously
unrepresented parties.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, CA 90064-1683.

On October 15, 2012, I served a copy of the foregoing document(s) described as **YOUPORN'S BRIEF RE STANDING TO MAINTAIN IRP** on the interested parties in this action at their last known address as set forth below by taking the action described below:

Jeffrey A. LeVee, Esq.
Jones Day
555 South Flower Street
50th Floor
Los Angeles, CA 90071

BY PERSONAL DELIVERY: I placed the above-mentioned document(s) in sealed envelope(s), and caused personal delivery by **FIRST LEGAL SUPPORT SERVICES** of the document(s) listed above to the person(s) at the address(es) set forth above.

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

Executed on October 15, 2012, at Los Angeles, California.

Bertha A. García

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California.

I am over the age of 18, and not a party to the within action; my business address is FIRST LEGAL SUPPORT SERVICES, 1511 West Beverly Blvd., Los Angeles, CA 90026.

On October 15, 2012, I served the foregoing document(s) described as **YOUPORN'S BRIEF RE STANDING TO MAINTAIN IRP**, which was enclosed in sealed envelopes addressed as follows, and taking the action described below:

Jeffrey A. LeVee, Esq.
Jones Day
555 South Flower Street
50th Floor
Los Angeles, CA 90071

- BY PERSONAL SERVICE:** I hand delivered such envelope(s):
 - to the addressee(s);
 - to the receptionist/clerk/secretary in the office(s) of the addressee(s).
 - by leaving the envelope in a conspicuous place at the office of the addressee(s) between the hours of 9:00 a.m. and 5:00 p.m.

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

Executed on October 15, 2012, at Los Angeles, California.

Printed Name	Signature

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, CA 90064-1683.

On October 15, 2012, I served a copy of the foregoing document(s) described as **YOUPORN'S BRIEF RE STANDING TO MAINTAIN IRP** on the interested parties in this action at their last known address as set forth below by taking the action described below:

[SEE ATTACHED SERVICE LIST]

BY PLACING FOR COLLECTION AND MAILING: I placed the above-mentioned document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s) for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at 11377 West Olympic Boulevard, Los Angeles, California 90064-1683 in the ordinary course of business.

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

Executed on October 15, 2012, at Los Angeles, California.

Bertha A. García

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