

## REFERENCE MATERIALS – BOARD PAPER NO. 2017.10.29.1a

**TITLE:** **Consideration of Reconsideration Request 17-4**

### **Document/Background Links**

The following attachments are relevant to the Board's consideration of Reconsideration Request 17-4.

Attachment A is [Reconsideration Request 17-4](#), submitted on 25 July 2017.

Attachment B are [Exhibits 1 to 55](#) in support of Reconsideration Request 17-4, submitted on 26 July 2017.

Attachment C is the [Ombudsman Action on Request 17-4](#), dated 24 August 2017.

Attachment D is the [BAMC Recommendation on Request 17-4](#), issued 11 October 2017.

Attachment E is the [request](#) submitted by DotMusic Limited and dotgay LLC pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), dated 10 June 2017.

Attachment F is the [response](#) to dotgay LLC's DIDP request, dated 10 July 2017.

Attachment G is the Requestors' [Rebuttal](#) to the BAMC Recommendation on Request 17-4 and [Exhibits 56-57](#) in support thereof, submitted on 26 October 2017.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 27 October 2017

Email: amy.stathos@icann.org

## **DotMusic Limited and dotgay LLC Reconsideration Request (“RR”)**

### **1. Requestor Information**

Requestors:

**Name:** DotMusic Limited (“DotMusic”)

**Address:** Contact Information Redacted

**Email:** Constantinos Roussos, Contact Information Redacted

**Name:** dotgay LLC (“dotgay”)

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requestors are represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

DotMusic Limited and dotgay LLC (the “Requestors”) seek reconsideration of ICANN’s response to their joint DIDP Request, which denied the disclosure of certain information requested

pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On June 10, 2017, the Requestors sought disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”) review of the Community Priority Evaluation (“CPE”) process through an independent review process by FTI Consulting, Inc. (“FTI”) (the “DIDP Request”).<sup>1</sup> Specifically, the Requestors submitted four requests as follows:

Request No. 1: “Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;”

Request No. 2: “Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its ‘first track’ review;”

Request No. 3: “Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and”

Request No. 4: “Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.”<sup>2</sup>

Subsequently, on July 10, 2017, ICANN responded to the DIDP Request by asserting that the “information responsive to Items 1 and 3 were previously provided” to the Requestors, and the information requested in Items 2 and 4 (1) “is not an appropriate DIDP request” because it does not concern documentary information and (2) “is subject to the [ ] DIDP Conditions of Non-Disclosure.”<sup>3</sup>

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<sup>1</sup> Exhibit 1, Request No. 20170610-1, dotgay LLC and DotMusic Limited DIDP Request (June 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>2</sup> Exhibit 2, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>3</sup> *Id.*

**4. Date of action/inaction:**

ICANN acted on July 10, 2017 by issuing its response to the DIDP Request (the “DIDP Response”).

**5. On what date did you become aware of action or that action would not be taken?**

The Requestors became aware of the action on July 10, 2017, when they received the DIDP Response.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requestors are materially affected by ICANN’s refusal to disclose certain information concerning FTI’s independent review of the CPE process, as requested in the DIDP Request.

By way of background, the Requestors filed separate community-based generic Top-Level Domain (“gTLD”) applications: DotMusic applied for the “.MUSIC” string and dotgay applied for the “.GAY” string. However, the Economist Intelligence Unit (the “EIU”) recommended that ICANN reject the Requestors’ community applications.<sup>4</sup> Since the Requestors received the EIU’s decision, they made various submissions, including independent expert reports in support of their separate community applications,<sup>5</sup> that show the EIU’s decision is fundamentally erroneous. These submissions explain how the EIU Panel disparately treated DotMusic’s application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community

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<sup>4</sup> Exhibit 3, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>; Exhibit 4, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>5</sup> Request 16-5: DotMusic Limited, <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en> (listing documents submitted in support of DotMusic’s Reconsideration Request 16-5); Request 16-3: dotgay LLC, <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en> (listing documents submitted in support of dotgay’s Reconsideration Request 16-3).

applications, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria. dotgay’s submissions show that the EIU, in evaluating dotgay’s community application, misapplied the CPE criteria, failed to follow its own guidelines, discriminatorily treated the application, and made several factual errors that demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities.

In January 2017, ICANN retained an independent reviewer, FTI, to review the CPE process and “the consistency in which the CPE criteria were applied.” FTI is collecting information and materials from ICANN and the CPE provider as part of its review process and will then submit its findings to ICANN based on this underlying information. FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requestors’ Reconsideration Requests—DotMusic submitted Reconsideration Request 16-5 (“Request 16-5”) and dotgay submitted Reconsideration Request 16-3 (“Request 16-3”). Both reconsideration requests are currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requestors, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.”<sup>6</sup>

Thus, on May 5, 2017, DotMusic filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “DotMusic DIDP Request”).<sup>7</sup> Subsequently, dotgay filed a DIDP Request also seeking documents concerning the BGC’s review of the CPE process on May 18, 2017 (the “dotgay DIDIP Request”).<sup>8</sup> In submitting these two

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<sup>6</sup> Exhibit 5, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>7</sup> Exhibit 6, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>8</sup> Exhibit 7, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

requests, the Requestors expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes.”<sup>9</sup> ICANN failed to do so when it denied certain requests made in both DotMusic’s DIDP Request on June 4, 2017 and dotgay’s DIDP Request on June 18, 2017.<sup>10</sup>

The Requestors had also filed the DIDP Request in pursuit of supplemental information regarding FTI’s independent review process. Once again, ICANN failed to adhere to its Bylaws by acting “through open and transparent processes” when it issued the DIDP Response on July 10, 2017 and did not produce the requested information.<sup>11</sup>

Specifically, ICANN must “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>12</sup> According to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”<sup>13</sup> The Bylaws require that ICANN “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”<sup>14</sup> “employ[ ] open and transparent policy development mechanisms;”<sup>15</sup> “apply[ ] documented policies neutrally and objectively, with integrity and

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<sup>9</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>10</sup> Exhibit 8, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>; Exhibit 9, Request No. 20170518-1, ICANN’s Response to dotgay’s DIDP Request (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>11</sup> Exhibit 10, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>12</sup> Amended and Restated Articles of Incorporation, § 2(III).

<sup>13</sup> ICANN Bylaws, Art. 4, § 4.2(o).

<sup>14</sup> *Id.*, Art. 1, § 1.2(a).

<sup>15</sup> *Id.*, Art. 3, § 3.1.

fairness;”<sup>16</sup> and “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.”<sup>17</sup>

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>18</sup> ICANN’s failure to provide complete responses to the DIDP Request raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Request 16-5, and the .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>19</sup>

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising that ICANN maintains that it can hire FTI to undertake such a review without providing all the materials that will be used to inform FTI’s findings and conclusions to affected parties and without confirming that FTI would even consider documents submitted by the affected parties.

It is of critical importance that ICANN confirm the scope of the material provided to FTI in the course of its review and the details of the review proves in order to ensure full transparency, openness, and fairness. This includes the names of the ICANN employees, officials, executives, board members, agents, etc. that were interviewed by FTI during its independent review process. By providing this information to applicants, ICANN will prevent serious questions from arising concerning the independence and credibility of FTI’s investigation. For similar reasons of

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<sup>16</sup> *Id.*, Art. 1, § 1.2(v).

<sup>17</sup> *Id.*, Art. 1, § 1.2(vi).

<sup>18</sup> *See id.*, Arts. 1, 3-4.

<sup>19</sup> Exhibit 11, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

transparency and independence, ICANN must disclose not only the details of FTI's selection process but also the underlying documents.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN's action through the DIDP Response materially affects the two global communities supporting the DotMusic and dotgay applications: the global music community and the global gay community. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC and the .GAY gTLDs, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN's identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed ICANN damages its credibility, accountability, and trustworthiness. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that the EIU followed in evaluating community applications, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.<sup>20</sup> This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to

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<sup>20</sup> See Exhibit 12, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; see also Exhibit 13, dotgay's Presentation to the Board Governance Committee (May 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

safeguard the interests of their separate community members, which have supported DotMusic's .MUSIC application<sup>21</sup> and dotgay's .GAY application, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in disclosing the identities of individuals interviewed by FTI during its independent review process and in confirming that FTI will disclose its final report to the public is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>22</sup> This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>23</sup> ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the requested items will undermine both the integrity and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5 and Request 16-3. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

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<sup>21</sup> See Exhibit 14, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf> (identifying co-requestors for reconsideration of DotMusic's CPE Evaluation).

<sup>22</sup> See Exhibit 15, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>23</sup> ICANN's Documentary Information Disclosure Policy (last visited Jun. 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 The Community Applications Serving as the Bases for the DIDP Request**

The Requestors elected to obtain their respective gTLDs by undergoing the CPE process as community applicants. However, both Requestors discovered that the CPE process, as implemented by the EIU, discriminatorily treated community applicants and are now contesting the EIU's final determinations on their applications.

#### **8.1.1 DotMusic's community application for .MUSIC**

The .MUSIC CPE process for DotMusic's application was initiated in mid-2015. Nearly a year later, DotMusic discovered that it did not prevail as a community applicant.<sup>24</sup> In response to this denial, DotMusic, supported by multiple community organizations, filed Request 16-5 on Feb. 24, 2016.<sup>25</sup> Now, over a year later, and after numerous submissions to ICANN<sup>26</sup> and a presentation before the BGC,<sup>27</sup> DotMusic still has not received a determination from the BGC regarding Request 16-5.

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<sup>24</sup> Exhibit 16, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>25</sup> Exhibit 17, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>26</sup> *See, e.g.*, Exhibit 18, Letter from DotMusic Limited to the BGC (Mar. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>; Exhibit 19, Letter from DotMusic Limited to the BGC (Mar. 28, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>; Exhibit 20, Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (Jun. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>; Exhibit 21, Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>; Exhibit 22, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; Exhibit 23, DotMusic's Additional Responses to a Question by the Board Governance Committee during the 17 September 2016 Presentation (Sep. 19, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf>; Exhibit 24, Supplement to DotMusic's Additional Responses to a Question by the BGX during the 17 Sep. 2016 Presentation (Dec. 6, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic Limited to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

<sup>27</sup> *See* Exhibit 26, DotMusic's Presentation to the Board Governance Committee (12 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

### 8.1.2 dotgay's community application for .GAY

Similar to DotMusic, dotgay's CPE evaluation of the .GAY gTLD was initiated in early 2014. dotgay discovered that it did not prevail as a community applicant later that year.<sup>28</sup> In response, dotgay filed a reconsideration request with the BGC, which was granted because the BGC determined that the EIU did not follow procedure during the CPE process. As a result, the BGC sent dotgay's community application to the EIU for re-evaluation. However, the second CPE produced the same results based on the same arguments—the EIU rejected dotgay's application.<sup>29</sup>

When dotgay submitted another reconsideration request to the BGC in regards to this rejection, though, the BGC excused the discriminatory conduct and the EIU's policy and process violations. It refused to reconsider the CPE a second time. Therefore, dotgay filed a third reconsideration request, Request 16-3, on February 17, 2016 in response to the BGC's non-response on many of the issues highlighted in the second reconsideration request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>30</sup> For nearly a year afterwards, despite numerous letters to ICANN,<sup>31</sup> dotgay had still not received a final determination by the ICANN Board.

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<sup>28</sup> Exhibit 27, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>29</sup> See Exhibit 28, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>30</sup> See Exhibit 29, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>31</sup> See Exhibit 30, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 31, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 32, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 34, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board

### **8.1.3 The BGC's Decision to Place the Requestors' Reconsideration Requests on Hold**

Then, on April 26, 2017, ICANN finally updated both Requestors on the status of Request 16-5 and Request 16-3 through a general update to several gTLD applicants with pending reconsideration requests. The Requestors received a letter from ICANN BGC Chair Chris Disspain indicating that their reconsideration requests were “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>32</sup>

This update on the status of their reconsideration requests failed to provide the Requestors with any significant information on the BGC's review of the CPE process, despite the fact that their requests had been pending for over a year.

### **8.2 The Requestors' Prior DIDP Requests**

As a result of this dearth of information, the Requestors submitted separate DIDP requests to ICANN.<sup>33</sup> ICANN's DIDP “is intended to ensure that information contained in documents

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(March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>32</sup> Exhibit 35, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>33</sup> Exhibit 36, DotMusic Limited's First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>34</sup> It serves as a principle element of ICANN’s approach to transparency and information disclosure.”<sup>35</sup> In accordance with this principle and policy, ICANN has provided past requestors with documents and information derived from documents when responding to DIDP Requests.<sup>36</sup> While the “DIDP procedures do not require ICANN to create or compile summaries of any documented information[,] . . . as part of its commitment to transparency and accountability, ICANN has undertaken [ ] effort[s] to do so” in the past.<sup>37</sup>

### 8.2.1 DotMusic’s DIDP Request

Acting in accordance with ICANN’s DIDP process, DotMusic submitted the DotMusic DIDP Request on May 5, 2017. DotMusic sought information to further its investigation of the “numerous CPE process violations and the contravention of established procedures,” as described in Request 16-5,<sup>38</sup> *and* information regarding the CPE process as it concerned its Request 16-5 because “the BGC Letter does not transparently provide any meaningful information besides that

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<sup>34</sup> Exhibit 37, ICANN Documentary Information Disclosure Policy (lasted visited Jul. 17, 2017), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>35</sup> *Id.*

<sup>36</sup> See Exhibit 38, ICANN Response to Request No. 20080924-1 (Oct. 24, 2008), <https://www.icann.org/en/about/transparency/20080924-1/younger-response-24oct08-en.pdf> (providing information to applicant not contained in a specifically-identified document); Exhibit 39, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf> (same); Exhibit 40, ICANN Response to Request No. 20161024-8 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-8-cis-response-23nov16-en.pdf> (same); Exhibit 41, ICANN Response to Request No. 20160211-1 (Mar. 12, 2016), <https://www.icann.org/en/system/files/files/didp-20160211-1-rrsg-response-12mar16-en.pdf> (same).

<sup>37</sup> Exhibit 42, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf>. In responding to any request submitted pursuant to the DIDP, ICANN staff first identifies all documents responsive to the DIDP request and then reviews those documents to determine whether they call under any of the DIDP’s Nondisclosure conditions. And, if they do, ICANN staff determined whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure. Exhibit 43, Process for Responding to DIDP Requests (Oct. 29, 2013), <http://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>38</sup> Exhibit 44, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

there is a review underway and that the RR is on hold.”<sup>39</sup>

DotMusic made ten separate requests to ICANN in the DotMusic DIDP Request. These requests were as follows:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;”
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions, or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review.<sup>40</sup>

DotMusic concluded in its request that “[t]here are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

and credibility of such an independent review.”<sup>41</sup>

### 8.2.2 dotgay’s DIDP Request

dotgay also filed a DIDP request, which is related to the .GAY CPE.<sup>42</sup> It sought to “ensure that information contained in documents concerning ICANN’s operational activities, with within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>43</sup> Further, like other gTLD applicants, dotgay sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>44</sup> because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>45</sup>

As a result of this dearth of information from ICANN, the Requestor made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

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<sup>41</sup> *Id.*

<sup>42</sup> Exhibit 45, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>46</sup>

Like DotMusic, dotgay concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”<sup>47</sup>

### **8.3 ICANN’s Response to the Prior DIDP Requests**

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

Prior to responding to the DotMusic DIDP Request and the dotgay DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to both requests.<sup>48</sup> ICANN explained that:

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.<sup>49</sup>

No other information was provided to the Requestors regarding the CPE review at issue in its Request until ICANN issued its formal responses to their prior DIDP Requests.

### **8.3.1 ICANN's Response to the DotMusic DIDP Request**

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<sup>48</sup> Exhibit 46, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>49</sup> *Id.*

ICANN first responded to the DotMusic DIDP Request on June 4, 2017.<sup>50</sup> ICANN's response provided the same information that had already been given to DotMusic on June 2, 2017 regarding the ICANN's decision to review the CPE process and to hire FTI to conduct an independent review of the CPE process.<sup>51</sup> ICANN further denied Requests Nos. 1-6, 8 and 10. ICANN's responses to these requests were as follows:

Items 1-4: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDIP previous submitted by DotMusic Limited. . . .

Item 8: . . . This item overlaps with Items 4 and 5. . . .

Item 10: . . . These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure.<sup>52</sup>

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<sup>50</sup> Exhibit 47, ICANN's Response to DotMusic Limited's First DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

ICANN, in providing such responses to the DotMusic DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. DotMusic thus submitted Reconsideration Request 17-2 (“Request 17-2”) in response.<sup>53</sup>

### **8.3.2 ICANN’s Response to the dotgay DIDP Request**

ICANN finally responded to the dotgay DIDP Request on June 18, 2017. It provided the same basic information that had already been given on June 2, 2017 to dotgay, and on June 4, 2017 to DotMusic.<sup>54</sup> ICANN denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN’s responses to these requests were as follows:

Items 1, 2, 3, 8, and 13 . . .

As stated in ICANN’s Response to DIDP Request 20170505-1 that you submitted on behalf of DotMusic Limited, these documents are not appropriate for disclosure based on the [ ] applicable DIDP Defined Conditions of Non-Disclosure. . . .

Item 9 . . .

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.<sup>55</sup>

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<sup>53</sup> Exhibit 48, Reconsideration Request 17-2 (Jun. 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>54</sup> Exhibit 49, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>55</sup> *Id.*

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy. dotgay thus submitted Reconsideration Request 17-3 (“Request 17-3”) in response.<sup>56</sup>

#### 8.4 The DIDP Request

In response to ICANN’s insufficient documentary disclosures on June 2 and 4, 2017, the Requestors sent ICANN a joint letter on June 10, 2017. The letter stated, *inter alia*, that:

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

**First**, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

**Second**, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very

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<sup>56</sup> Exhibit 50, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

limited approach of how staff was involved.”<sup>57</sup>

Furthermore, the Requestors made an additional DIDP Request in the joint letter for additional information. The Requestors asked ICANN to provide the following information:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.<sup>58</sup>

## **8.5 ICANN’s Response to the DIDP Request**

On July 10, 2017, ICANN’s responded to the DIDP Request by denying all four information requests.<sup>59</sup> According to ICANN, its DIDP is only intended to provide “documentary information already in existence within ICANN that is not publically available.”<sup>60</sup> And, as such, it refused the four requests for the following reasons:

### Items 1 and 3

. . . The information responsive to Items 1 and 3 were previously provided in Response to DIDIP Request 20170505-1 and Response to DIDIP Request 20170518-1.

### Items 2 and 4

. . . As noted above, the DIDP is limited to requests for documentary

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<sup>57</sup> Exhibit 51, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> Exhibit 52, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>60</sup> *Id.*

information already in existence within ICANN that is not publically available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update. This request for information is not an appropriate DIDIP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure. . . .

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.<sup>61</sup>

Regarding ICANN’s denial of Items 1 and 3, this information was not previously provided to Requestors. ICANN has not confirmed “that FTI will review all of the documents submitted by DotMusic . . . in the court of their reconsideration requests.”<sup>62</sup> The documents referenced in ICANN’s response—ICANN’s prior responses to the DotMusic DIDP Request and the dotgay DIDP Request—simply claim that ICANN provided FTI with materials relevant to the Reconsideration Requests at issue, and does not in any way confirm that FTI will review the documents.<sup>63</sup> Further, ICANN clearly did not disclose “the details of FTI’s selection process . . . and the terms under which FTI currently operates for ICANN”<sup>64</sup> to the Requestors in its prior responses to the Requestors’ information

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Exhibit 53, ICANN’s Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>64</sup> Exhibit 54, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

requests.<sup>65</sup> The Requestors and other gTLD applicants have not yet received any details regarding ICANN's contract with FTI, even though the contract itself is a document in ICANN's possession.

Further, regarding ICANN's denial of Items 2 and 4, both items request information that is more than likely contained in ICANN documents and that is in the public's interest to disclose. The Requestors seek simply the identity of individuals interviewed by FTI and not the substance of those interviews and seeks confirmation that FTI's final report will be available to the gTLD applicants. Disclosure of such information to the gTLD applicants is necessary to ensure that the independent review remains a fair, transparent, and independent process, as discussed in **Sections 6 and 7** above.

**9. What are you asking ICANN to do now?**

The Requestors ask ICANN to disclose the documents requested in the DIDP Request.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requestors are community applicants for gTLD strings and the organizations that issued the DIDP Request to ICANN. They are materially affected by ICANN's decision to deny the DIDP Request, especially since its gTLD application is at issue in the underlying request. Further, the communities supporting their applications—the music community and the gay community—are materially affected by ICANN's failure to disclose the requested

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<sup>65</sup> See Exhibit 55, ICANN's Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes, this Reconsideration Request is being brought on behalf of DotMusic and dotgay.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

Yes, there is a causal connection between the circumstances and the harm for both DotMusic and dotgay, as explained above in **Sections 6 through 8**.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*

# Exhibit 1

ARIF HYDER ALI

Contact Information Redacted

10 June 2017

**VIA E-MAIL**

Chris Disspain  
Chair, ICANN Board Governance  
Committee  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.  
Jones Day  
555 South Flower Street  
Los Angeles, CA 90071 2300

**Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update**

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.<sup>1</sup> As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”<sup>2</sup> we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

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<sup>1</sup> See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

<sup>2</sup> Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.<sup>3</sup> In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.<sup>4</sup> At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Wayne. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic’s formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain’s 28 April 2017 letter and Mr. LeVee’s 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information<sup>5</sup> and *two weeks* before the investigator’s final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.”<sup>6</sup>

This is troubling for several reasons. ***First***, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

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<sup>3</sup> See *e.g.*, Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

<sup>4</sup> ICANN Madrid GDD Summit, May 9, 2017.

<sup>5</sup> See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

<sup>6</sup> 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."<sup>7</sup>

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

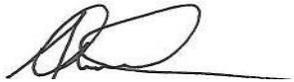
1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

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<sup>7</sup> ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. [http://schr.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf), pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (ombudsman@icann.org)

# Annex A

## DotMusic Limited

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### Key Documents

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	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

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### Other Relevant Documents

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	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	<b>Description</b>
<b>5.</b>	Reconsideration Request 14-8 (4 March 2014)
<b>6.</b>	Revised Reconsideration Request 14-8 (5 March 2014)
<b>7.</b>	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
<b>8.</b>	Reconsideration Request 14-28 (7 June 2014)
<b>9.</b>	Letter from Constantine Roussos to ICANN (13 June 2014)
<b>10.</b>	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
<b>11.</b>	Letter from Constantine Roussos to ICANN (1 July 2014)
<b>12.</b>	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
<b>13.</b>	Letter from Rich Bengloff to ICANN (7 March 2015)
<b>14.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
<b>15.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
<b>16.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
<b>17.</b>	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
<b>18.</b>	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	<b>Description</b>
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	<b>Description</b>
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	<b>Description</b>
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	<b>Description</b>
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	<b>Description</b>
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	<b>Description</b>
<b>87.</b>	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
<b>88.</b>	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
<b>89.</b>	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
<b>90.</b>	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

# **Annex B** **dotgay LLC**

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## **Key Documents**

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<b>Tab</b>	<b>Description</b>
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

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## **Other Relevant Documents**

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<b>Tab</b>	<b>Description</b>
1.	Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

# Exhibit 2

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

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Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

### **Response**

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

#### Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

#### Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 3



**New gTLD Program**  
**Community Priority Evaluation Report**  
Report Date: 10 February 2016

Application ID:	1-1115-14110
Applied-for String:	MUSIC
Applicant Name:	DotMusic Limited

**Overall Community Priority Evaluation Summary**

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

**Panel Summary**

Overall Scoring	10 Point(s)	
<u>Criteria</u>	<u>Earned</u>	<u>Achievable</u>
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	3	4
#3: Registration Policies	4	4
#4: Community Endorsement	3	4
<u>Total</u>	<u>10</u>	<u>16</u>
<b>Minimum Required Total Score to Pass <u>14</u></b>		

Criterion #1: Community Establishment	0/4 Point(s)
1-A Delineation	0/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application is “delineated using established NAICS codes that align with the (i) characteristics of the globally recognized, organized Community, and (ii) .MUSIC global rotating multi-stakeholder Advisory Board model of fair representation, irrespective of locale, size or commercial/non-commercial status” (Application, 20A). The applicant lists over 40 categories of community member and identifies each with a North American Industry Classification System (NAICS) code that is further narrowed by the applicant’s requirement that “only those that are defined by and identify with the sub-set of the NAICS code that relates to “music” would qualify as a member of the Community.” According to the application, these categories, with the NAICS code cited by the applicant, are:

- Musical groups and artists (711130)
- Independent music artists, performers, arrangers & composers (711500)
- Music publishers (512230)
- Music recording industries (512290)
- Music recording & rehearsal studios (512240)
- Music distributors, promoters & record labels (512220)
- Music production companies & record producers (512210)
- Live musical producers (711130)
- Musical instrument manufacturers (339992)
- Musical instruments & supplies stores (451140)
- Music stores (451220)
- Music accountants (541211)
- Music lawyers (541110)
- Musical groups & artists (711130)
- Music education & schools (611610)
- Music agents & managers (711400)
- Music promoters & performing arts establishments (711300)
- Music promoters of performing arts with facilities (711310)
- Music promoters of performing arts without facilities (711320)
- Music performing arts companies (711100)
- Other music performing arts companies (711190)
- Music record reproducing companies (334612)
- Music, audio and video equipment manufacturers (334310)
- Music radio networks (515111)
- Music radio stations (515112)
- Music archives & libraries (519120)
- Music business & management consultants (541611)
- Music collection agencies & performance rights organizations (561440)
- Music therapists (621340)
- Music business associations (813910)
- Music coalitions, associations, organizations, information centers & export offices (813920)
- Music unions (813930)
- Music public relations agencies (541820)
- Music journalists & bloggers (711510)
- Internet Music radio station (519130)
- Music broadcasters (515120)
- Music video producers (512110)
- Music marketing services (541613)
- Music & audio engineers (541330)
- Music ticketing (561599)
- Music recreation establishments (722410)
- Music fans/clubs (813410) [Application, 20A]

The Panel notes that for some member categories noted above, the official NAICS code definition refers to a broader industry group or an industry group that is not identical to the one cited by the applicant. For example, “Music accountants” (541211) is defined in the NAICS as “Offices of Certified Public

Accountants”, and “Music lawyers” (541110) are defined as “Offices of Lawyers”.

In addition to the above-named member categories, the applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (Application, 20D). The application materials make clear that these entities, which may not be included in the list of member categories above, are strictly related to the functioning of those other categories within the defined community’s music-related activities.

The applicant thereby bounds community membership by way of well-defined categories. Therefore the Panel has determined that the applicant provides a clear and straightforward membership definition. The various categories relating to the creation, production, and distribution of music as well as the several other related entities that contribute to these music-related operations are clearly delineated as per AGB guidelines for the first criterion of Delineation.

However, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).

While the Panel acknowledges that many of these individuals would share a “commonality of interest” in music, according to the AGB this is not sufficient to demonstrate the requisite awareness and recognition of a community among its members. While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such cohesion is considerable enough that the community defined as a whole cannot be said to have the cohesion required by the AGB.

The Panel therefore determined that there is insufficient awareness and recognition of a community among the proposed community members, and that they do not therefore cohere as a community as required by the AGB. The defined community as a whole, in all its member categories, does not meet the AGB’s requirement for community awareness and recognition. Therefore, the Panel determined that the community as defined in the application satisfies one of the two conditions to fulfill the requirements for delineation, and therefore does not receive credit for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application is disperse geographically and across a wide array of music-related activities, including all the categories listed in the previous section, such as creation, production, and distribution, among others. The applicant has made reference to, and has documented support from, several organizations that are a dedicated subset of the defined community. However, based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.

According to the AGB, “organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” An “organized” community, according to the AGB, is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes individuals and organizations in all of the more than 40 member categories included by the application. Based on information provided in the application materials and the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories explicitly defined.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to obtain a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Panel determined that this application refers to a “community” construed to obtain a sought-after generic word as a gTLD string.

The applicant has a very large degree of support from musical organizations. Many of these organizations were active prior to 2007. However, the fact that each organization was active prior to 2007 does not mean that these organizations were active as a community prior to 2007, as required by the AGB guidelines. That is, since those organizations and their members do not themselves form a cohesive community as defined in the AGB, they cannot be considered to be a community that was active as such prior to 2007.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

*0/2 Point(s)*

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents... (Application, 20A)

However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.<sup>1</sup> Therefore, it fails the second criterion for Size.

The Panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

According to the application, “The Community has bought, sold, and bartered music for as long

<sup>1</sup>As stated previously, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest... There should be: (a) an awareness and recognition of a community among its members...” Failing such qualities, the AGB’s requirements for community establishment are not met.

(“LONGEVITY”) as it has been made”. The Panel acknowledges that as an activity, music has a long history and that many parts of the defined community show longevity. However, because the community is construed, the longevity of the defined community as a whole cannot be demonstrated. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of “cohesion,” the community defined by the application does not meet the AGB’s standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB’s requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

<b>Criterion #2: Nexus between Proposed String and Community</b>	<b>3/4 Point(s)</b>
2-A Nexus	<b>2/3 Point(s)</b>
<p>The Panel determined that the application partially met the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string identifies but does not match the name of the community as defined in the application, and it is not a well-known short-form or abbreviation of the community. The application received a score of 2 out of 3 points under criterion 2-A: Nexus.</p>	
<p>To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify’ means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.</p>	
<p>Because the community defined in the application is a collection of many categories of individuals and organizations, and because there is no single entity that serves all of these categories in all their geographic breadth, there is no “established name” for the applied-for string to match, as required by the AGB for a full score on Nexus. The community, as defined in the application, includes some entities that are only tangentially related to music, such as accountants and lawyers, and which may not be automatically associated with the gTLD string. However, the applicant has limited the subset of such professionals included in the defined community<sup>2</sup>. Moreover, the applicant has also included “musical groups and artists” and “independent music artists, performers, arrangers &amp; composers” in its defined community. The string MUSIC identifies these member categories, which include individuals and entities involved in the creation of music. Thus the applied-for string does identify the individuals and organizations included in the applicant’s defined community member categories due to their association with music, which the applicant defines as “the art of combining sounds rhythmically, melodically or harmonically” (Application, 20A).</p>	
<p>The Panel determined that the applied-for string identifies (but does not match) the name of the community as defined in the application without over-reaching substantially. It therefore partially meets the requirements for Nexus.</p>	
2-B Uniqueness	<b>1/1 Point(s)</b>

<sup>2</sup> The applicant lists over 40 categories of community member and identifies each with a North American Industry Classification System (NAICS) code that is further narrowed by the applicant’s requirement that “only those that are defined by and identify with the sub-set of the NAICS code that relates to “music” would qualify as a member of the Community.”

The Community Priority Evaluation panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application. The application received a maximum score of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application. The string as defined in the application demonstrates uniqueness, as the string does not have any other significant meaning beyond identifying the individuals, organizations, and activities associated with the music-related member categories defined by the applicant. The Community Priority Evaluation panel determined that the applied-for string satisfies the condition to fulfill the requirements for uniqueness.

<b>Criterion #3: Registration Policies</b>	<b>4/4 Point(s)</b>
<b>3-A Eligibility</b>	<b>1/1 Point(s)</b>
<p>The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.</p> <p>To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the applicant, this requirement is met by verifying registrants' participation in one of the defined community member categories:</p> <p style="padding-left: 40px;">Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination, conflict of interest or “likelihood of material detriment to the rights and legitimate interests” of the Community:</p> <p style="padding-left: 40px;">(i) Qualification criteria as delineated by recognized NAICS codes corresponding to Community member classification music entity types. (Application, 20A)</p> <p>The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p>	
<b>3-B Name Selection</b>	<b>1/1 Point(s)</b>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated, community-based purpose of the applied-for gTLD. The applicant has included in its application several name selection rules that are consistent with its community-based purpose, which is “creating a trusted, safe online haven for music consumption” while ensuring that musicians' rights are protected:</p> <p style="padding-left: 40px;">Names Selection Policy – to ensure only music-related names are registered as domains under .MUSIC, with the following restrictions:</p> <ol style="list-style-type: none"> <li>1) A name of (entire or portion of) the musician, band, company, organization, e.g. the registrants “doing business as” name</li> <li>2) An acronym representing the registrant</li> <li>3) A name that recognizes or generally describes the registrant, or</li> <li>4) A name related to the mission or activities of the registrant</li> </ol> <p>The Community Priority Evaluation panel determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
<b>3-C Content and Use</b>	<b>1/1 Point(s)</b>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Content and</p>	

Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated, community-based purpose of the applied-for gTLD. The application includes several content and use requirements, all of which are consistent with its community-based purpose of “creating a trusted, safe online haven for music consumption” while ensuring that musicians’ rights are protected:

The following use requirements apply:

- Use only for music-related activities
- Comply with applicable laws and regulations and not participate in, facilitate, or further illegal activities
- Do not post or submit content that is illegal, threatening, abusive, harassing, defamatory, libelous, deceptive, fraudulent, invasive of another’s privacy, or tortious
- Respect the intellectual property rights of others by posting or submitting only content that is owned, licensed, or otherwise have the right to post or submit
- Immediately notify us if there is a security breach, other member incompliance or illegal activity on .MUSIC sites
- Do not register a domain containing an established music brand’s name in bad faith that might be deemed confusing to Internet users and the Music Community
- Do not use any automated process to access or use the .MUSIC sites or any process, whether automated or manual, to capture data or content from any service for any reason
- Do not use any service or any process to damage, disable, impair, or otherwise attack .MUSIC sites or the networks connected to .MUSIC sites (Application, 20E)

The Community Priority Evaluation panel determined that the application satisfied the condition to fulfill the requirements for Content and Use.

**3-D Enforcement**

**1/1 Point(s)**

The Panel determined that the application meets the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures and coherent and appropriate appeals mechanisms. The application received a score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures for enforcing its policies, including random compliance checks and special monitoring. The application also references a dispute resolution process, and provides a clear description of an appeals process in the Public Interest Commitments (PIC). The PIC was utilized to verify that the applicant has appropriate appeals mechanisms. The Panel determined that the application satisfies both of the two requirements for Enforcement and therefore scores 1 point.

**Criterion #4: Community Endorsement**

**3/4 Point(s)**

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>.

The table below summarizes the review and verification of support and opposition documents for the DotMusic Limited application for the string “MUSIC”. Note that some entities provided multiple letters of support through one or more of the mechanisms noted above. In these cases, each letter is counted separately in the table below. For example, if a letter of support from an entity was received via attachments, and a

separate letter received via correspondence, each letter is counted as reviewed, valid for verification (where appropriate), verification attempted (where appropriate) and successfully verified (where appropriate).

**Summary of Review & Verification of Support/Opposition Materials as of 13 October 2015<sup>3</sup>**

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	157	0	0	0
Attachments to 20(f)	150	68	68	40
Correspondence <sup>4</sup>	331	160	160	40
<b>Grand Total</b>	<b>638</b>	<b>228</b>	<b>228</b>	<b>80</b>

**4-A Support**

***1/2 Point(s)***

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). The panel has not found evidence of a single such organization recognized by all of the defined community’s members as representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

**4-B Opposition**

***2/2 Point(s)***

<sup>3</sup> The table reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information. ICANN notified the applicant on 4 December 2015 that although the applicant submitted a high volume of correspondence, “Much of this correspondence was submitted well after the deadline...any correspondence dated later than 13 October 2015 or submitted from today on will not go through the Panel’s verification process and may not be considered by the Panel.”

<sup>4</sup> The Panel reviewed 53 pieces of correspondence that contained 331 individual letters.

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant verified opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application did not receive any letters of relevant and verified opposition. The Community Priority Evaluation Panel determined that the applicant satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

# Exhibit 4



**New gTLD Program**  
**Community Priority Evaluation Report**  
Report Date: 6 October 2014

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay llc

**Overall Community Priority Evaluation Summary**

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

**Panel Summary**

Overall Scoring	10 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16

**Minimum Required Total Score to Pass 14**

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application (“GAY<sup>1</sup>”) is drawn from:

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA<sup>2</sup>. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The application further elaborates the requirements of the above individuals to demonstrate membership in the community:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

This community definition shows a clear and straightforward membership and is therefore well defined. Membership is “determined through formal membership with any of dotgay LLC’s [the applicant’s] Authentication Partners (AP) from the community”, a transparent and verifiable membership structure that adequately meets the evaluation criteria of the AGB.

In addition, the community as defined in the application has awareness and recognition among its members. The application states:

As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as “hubs” and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community. In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:

1. Have an active and reputable presence in the Gay Community
2. Have a mission statement that incorporates a focus specific to the Gay Community
3. Have an established policy that affirms community status for member enrolment
4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

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<sup>1</sup> In this report the community as defined by the application is referred to as the “GAY community” instead of the “gay community” or the “LGBTQIA community”. The “GAY community” is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD. “Gay community” or “LGBTQIA community” are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant’s defined community. This use is consistent with the references to these groups in the application.

<sup>2</sup> The Applicant notes with regard to its use of the term LGBTQIA that “LGBTQIA – Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community.” This report uses the term similarly.

Based on the Panel's research and materials provided in the application, there is sufficient evidence that the members as defined in the application would cohere as required for a clearly delineated community. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic scope and the community as defined is a global one. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization representative of the community defined by the applicant, as referred to above, has records of activity beginning before 2007. LGBTQIA individuals have been active outside of organizations as well, but the community as defined is comprised of members of [AP] organizations.

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. While the application does cite global estimates of the self-identified gay/LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, and ally) population (1.2% of world population), it does not rely on such figures to determine the size of its community. This is because the applicant requires that any such LGBTQIA individual also be a member of an AP organization in order to qualify for membership of the proposed community. According to the application:

Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members.

The size of the delineated community is therefore still considerable, despite the applicant's requirement that the proposed community members must be members of an AP.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community"<sup>3</sup>, and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .GAY community<sup>4</sup> are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of LGBTQIA individuals has accelerated since then, especially in recent decades and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater rates of visibility of LGBTQIA individuals, recognition of LGBTQIA rights and community organization, both in the US and other western nations as well as elsewhere.<sup>5</sup> While socio-political obstacles to community

<sup>3</sup> "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community.

<sup>4</sup> The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD.

<sup>5</sup> Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

organization remain in some parts of the world,<sup>6</sup> the overall historical trend of LGBTQIA rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a “presence in the Gay Community”, and also “incorporate a focus specific to the Gay Community.” By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

**Criterion #2: Nexus between Proposed String and Community**

**0/4 Point(s)**

**2-A Nexus**

**0/3 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community. To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.”

The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus. As cited above:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).

The application, therefore, acknowledges that “the world at large” understands the Gay community to be an entity substantially different than the community the application defines. That is, the general population understands the “Gay community” to be both those individuals who have “come out” as well as those who are privately aware of their non-heterosexual sexual orientation. Similarly, the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part. That is, the community as defined by the applicant refers only to the sub-set of individuals who have registered with specific organizations, the Authenticating Partners.

As the application itself also indicates, the group of self-identified gay individuals globally is estimated to be 1.2% of the world population (more than 70 million), while the application states that the size of the community it has defined, based on membership with APs, is 7 million. This difference is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

<sup>6</sup> <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

Moreover, while the applied-for string refers to many individuals not included in the application’s definition of membership (i.e., it “substantially over-reaches” based on AGB criteria), the string also fails to identify certain members that the applicant has included in its definition of the .GAY community. Included in the application’s community definition are transgender and intersex individuals as well as “allies” (understood as heterosexual individuals supportive of the missions of the organizations that comprise the defined community)<sup>7</sup>. However, “gay” does not identify these individuals. Transgender people may identify as straight or gay, since gender identity and sexual orientation are not necessarily linked.<sup>8</sup> Likewise, intersex individuals are defined by having been born with atypical sexual reproductive anatomy<sup>9</sup>; such individuals are not necessarily “gay”<sup>10</sup>. Finally, allies, given the assumption that they are heterosexual supporters of LGBTQIA issues, are not identified by “gay” at all. Such individuals may be an active part of the .GAY community, even if they are heterosexual, but “gay” nevertheless does not describe these individuals as required for Nexus by the AGB. As such, there are significant subsets of the defined community that are not identified by the string “.GAY”.

The Community Priority Evaluation panel has determined that the applied-for string does not match nor does it identify without substantially over-reaching the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

**2-B Uniqueness** **0/1 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application,*” according to the AGB (emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above.). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

**Criterion #3: Registration Policies** **4/4 Point(s)**

**3-A Eligibility** **1/1 Point(s)**

The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that:

.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.

The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Eligibility.

<sup>7</sup> This prevailing understanding of “ally” is supported by GLAAD and others: <http://www.glaad.org/resources/ally>

<sup>8</sup> <http://www.glaad.org/reference/transgender>

<sup>9</sup> [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex)

<sup>10</sup> “Gay” is defined by the Oxford dictionaries as “A homosexual, especially a man.” The applicant defines the community as “individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society.”

<b>3-B Name Selection</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .Gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
<b>3-C Content and Use</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”</p> <p>The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Content and Use.</p>	
<b>3-D Enforcement</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access. The Community Priority Evaluation panel has determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.</p>	

<b>Criterion #4: Community Endorsement</b>	<b><i>2/4 Point(s)</i></b>
<b>4-A Support</b>	<b><i>1/2 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.</p>	

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). (While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent it. There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

*1/2 Point(s)*

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

# Exhibit 5



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Disspain". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain  
Chair, ICANN Board Governance Committee

# Exhibit 6

ARIF HYDER ALI

Contact Information Redacted

5 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .MUSIC Application ID 1-1115-14110<sup>1</sup>**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report<sup>2</sup> found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").<sup>3</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless

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<sup>1</sup> DotMusic's .MUSIC community Application (ID 1-1115-14110), <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1392>; Also See [https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392](https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download%20application/1392?t:ac=1392)

<sup>2</sup> .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>3</sup> See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

there is a compelling reason for confidentiality.<sup>4</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.<sup>5</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>6</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

#### **A. Context and Background**

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

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<sup>4</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

<sup>5</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>6</sup> *Id.*

generally and specifically with respect to the CPE reports issued by the CPE provider”<sup>7</sup> and that the BGC may have requested from the CPE provider “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup>

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>10</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded

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<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

#### **B. Documentation Requested**

The documentation requested by DotMusic in this DIDP includes all of the “material currently being collected as part of the President and CEO’s review” that has been shared with ICANN and is “currently underway.”<sup>11</sup>

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit’s handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;

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<sup>11</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer ([krista.papac@icann.org](mailto:krista.papac@icann.org))  
Herb Waye, ICANN Ombudsman ([herb.waye@icann.org](mailto:herb.waye@icann.org))

# Exhibit 7

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .GAY Application ID 1-1713-23699**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report<sup>1</sup> found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.<sup>2</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.<sup>3</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

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<sup>1</sup> .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>

<sup>2</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>

<sup>3</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

*Documentary Information Disclosure Policy (DIDP) Requests.*<sup>4</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP’s Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>5</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

### **A. Context and Background**

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the “BGC”).<sup>6</sup> Dotgay has sent several letters to ICANN noting that ICANN’s protracted delays in reaching a decision and ICANN’s continued lack of responsiveness to dotgay’s inquiries about the status of dotgay’s request represent a violation of ICANN’s commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting “an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider”<sup>7</sup> and that the BGC may have requested from the CPE provider “the materials and research

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<sup>4</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>5</sup> *Id.*

<sup>6</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; See also *dotgay’s* powerpoint presentation:

<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup> Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation.<sup>10</sup>

Dotgay has received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>11</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but

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<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>

<sup>11</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3. . . ." <sup>12</sup> According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

## **B. Documentation Requested**

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway."<sup>13</sup> Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

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<sup>12</sup> Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

<sup>13</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

1. All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>14</sup>
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm (“the evaluator”) undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

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<sup>14</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>15</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,



Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

# Exhibit 8

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

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Thank you for your request for documentary information dated 5 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

### **Response**

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and

Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (*See* Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.

#### Items 5-6

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board (Item 6). As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited. Rather than repeating those here, see Response to DIDP Request No. 20160429-1, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic->

[response-supporting-docs-15may16-en.pdf](#). The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

#### Item 7

Item 7 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application

#### Items 8

Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

#### Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

#### Item 10

Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

## **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 9

To: Arif Ali on behalf of dotgay LLC

Date: 18 June 2017

Re: Request No. 20170518-1

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Thank you for your request for documentary information dated 18 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the Review):

1. All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm ("the evaluator") undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

## Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (See Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. (See Letter from Chris Disspain to Concerned Parties, 26 April 2017,

<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; see also, Minutes of BGC 18 October 2016 Meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.>)

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, ICANN undertook the process to find the most qualified evaluator for the review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1, 2, 3, 8, and 13

Items 1, 2, 3, 8, 9, and 13 seek the disclosure of overlapping categories of documents relating to the Review. Specifically, these items request the following:

- Documents relating to "ICANN's request to the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports" (Item 1);
- "[D]ocuments from the EIU provider to ICANN including but not limited to: (a) ICANN's request for 'the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,' and

(b) all communications between the EIU and ICANN regarding the request” (Item 2);

- “[D]ocuments relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation” (Item 3);
- Materials provided to the evaluator by the EIU (Item 8); and
- Materials provided to ICANN by the evaluator concerning the Review (Item 13).

As stated in ICANN’s [Response to DIDP Request 20170505-1](#) that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

#### Items 4, 5, 6, 7

Items 4 through 7 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 4), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 5), the date of appointment (Item 6), and the terms of instructions provided to the evaluator (Item 7). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive

conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

#### Item 9

Item 9 seeks the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board." As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>
- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previously submitted by dotguy. Rather than repeating those here, see Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>. The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing.

#### Item 10

Item 10 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application.

#### Items 11

Item 11 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 7 and 9. The information responsive to the overlapping items has been provided in response to Items 7 and 9 above.

#### Item 12

Item 12 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

#### **About DIDP**

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 10

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

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Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

### **Response**

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

#### Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

#### Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 11

# DotMusic Reconsideration Request (“RR”)

## 1. Requester Information

**Name:** DotMusic Limited (“DotMusic”)<sup>1</sup>

**Address:** Contact Information Redacted

**Email:** Constantine Roussos, Contact Information Redacted

**Counsel:** Jason Schaeffer, Contact Information Redacted

**Name:** International Federation of Musicians<sup>2</sup> (“FIM”)

**Email:** Benoît Machuel, Contact Information Redacted

**Name:** International Federation of Arts Councils and Culture Agencies<sup>3</sup> (“IFACCA”)

**Email:** Sarah Gardner, Contact Information Redacted

**Name:** Worldwide Independent Network<sup>4</sup> (“WIN”)

**Email:** Alison Wenham, Contact Information Redacted

**Name:** Merlin Network<sup>5</sup> (“Merlin”)

**Email:** Charles Caldas, Contact Information Redacted

**Name:** Independent Music Companies Association<sup>6</sup> (“IMPALA”)

**Email:** Helen Smith, Contact Information Redacted

**Name:** American Association of Independent Music<sup>7</sup> (“A2IM”)

**Email:** Dr. Richard James Burgess, Contact Information Redacted

**Name:** Association of Independent Music<sup>8</sup> (“AIM”)

**Email:** Charlie Phillips, Contact Information Redacted

**Name:** Content Creators Coalition<sup>9</sup> (“C3”)

**Email:** Jeffrey Boxer, Contact Information Redacted

**Name:** Nashville Songwriters Association International<sup>10</sup> (“NSAI”)

**Email:** Barton Herbison, Contact Information Redacted

**Name:** ReverbNation<sup>11</sup>

**Email:** Jean Michel, Contact Information Redacted

## 2. Request for Reconsideration of: X Board action/inaction

<sup>1</sup> <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

<sup>2</sup> <http://fim-musicians.org/about-fim/history>

<sup>3</sup> [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members) and [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members)

<sup>4</sup> <http://winformusic.org/win-members>

<sup>5</sup> <http://merlinnetwork.org/what-we-do>

<sup>6</sup> <http://impalamusic.org/node/16>

<sup>7</sup> <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

<sup>8</sup> <http://musicindie.com/about/aimmembers>

<sup>9</sup> <http://c3action.org>

<sup>10</sup> <https://nashvillesongwriters.com/about-nsai>

<sup>11</sup> <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

**3. Description of specific action you are seeking to have reconsidered.**

The above-referenced requesters request to have the .MUSIC Community Priority Evaluation (“CPE”) Report for Application ID. 1-1115-14110 (“Report”)<sup>12</sup> corrected and properly graded to accurately reflect the true nature of DotMusic’s *community establishment, community definition, support* and *nexus* based on established Applicant Guidebook (“AGB”) policies and processes.<sup>13</sup>

The Report provided a total score of ten (10) points, resulting in a failing grade for the Application’s request for Community Status. The result unfairly denied Music Community recognition and necessary intellectual property protection. A review of the Report evidences multiple prejudicial errors that ICANN, both directly and as extension of the Economist Intelligence Unit (“EIU”) Panel, either incorrectly applied ICANN-approved processes and policies, or completely failed to apply ICANN established processes and policies. Such material errors resulted in the incorrect evaluation of the Application, an improper scoring of points when compared to over forty-three (43) independent expert testimony letters (*See* Expert Chart, Exhibit A40)<sup>14</sup> and inconsistent, disparate treatment when compared to prevailing CPE Applicants (*See* CPE Comparison Chart, Exhibit A41).<sup>15</sup> Each error, when corrected and overturned, would result to a total Application score of sixteen (16) points. Despite a materially improper evaluation by the EIU, and the disclaimer contained in the Report that “[...] *these Community Priority Evaluation results do not necessarily determine the final result of the application,*” ICANN accepted the Report’s inaccurate results and changed the “*Contention Resolution Result*” to “*Into Contention.*”<sup>16</sup> Accordingly, DotMusic and other affected global organizations identified above (collectively referenced as the “Requesters”) seek to overturn the “*Contention Resolution Result*” to “*Prevailed Contention.*”

**4. Date of action/inaction:** February 10th, 2016 PST

**5. On what date did you became aware of action or that action would not be taken?**

February 10th, 2016 PST

**6. Describe how you believe you are materially affected by the action or inaction:**

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<sup>12</sup> DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, Ex.A1

<sup>13</sup> *See* AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, §4.2.3

<sup>14</sup> *See* Independent Expert Testimony Letters Scoring Chart, Ex.A40

<sup>15</sup> *See* linear CPE Comparison Chart, Ex.A41

<sup>16</sup> DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; *See* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>, Ex. A2

DotMusic is adversely affected by ICANN's actions and inactions. If DotMusic is not awarded .MUSIC, DotMusic, will suffer material brand dilution<sup>17</sup> and be subject to expensive auctions which (as agreed upon by the EU<sup>18</sup>) were designed to favor deep pocketed Applicants - such as Amazon and Google (who also have a prior history with the piracy of music: Google as a provider of ad networks to pirate sites and Amazon as a leading advertiser on pirate sites).<sup>19</sup> As set forth in the Application, DotMusic has an all-inclusive tent that is united by its core principles consistent with its articulated community-based purpose:

- Creating a trusted, safe online haven for music consumption and licensing
- Establishing a safe home on the Internet for Music Community (“Community”) members regardless of locale or size
- Protecting intellectual property & fighting piracy
- Supporting Musicians’ welfare, rights & fair compensation
- Promoting music and the arts, cultural diversity & music education
- Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both reaching commercial and non-commercial stakeholders.<sup>20</sup>

Per DotMusic’s Application and Public Interest Commitments (“PIC”),<sup>21</sup> .MUSIC will be launched as a safe haven for legal music consumption that ensures that .MUSIC domains are trusted and authenticated to benefit the interests of the Internet community and the global music community. DotMusic, its current and future music members and supporters will be adversely affected if the Report stands and DotMusic is awarded to any of the competing non-community applicants<sup>22</sup> (which will also be a disservice to the Internet user community in general) because competing applicants either: (i) lack the music community multi-stakeholder governance model to represent the community’s interests; and/or (ii) lack the extensive music-tailored safeguard policies that DotMusic has.<sup>23</sup>

Allowing the Report to stand would turn .MUSIC into an unsafe, unreliable and untrusted string governed by non-community interests that will create material harm to the legitimate interests

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<sup>17</sup> DotMusic holds the European community trademarks for “*DotMusic*” and “*MUSIC*.” Ex.A35, A37 and A38

<sup>18</sup> <http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/msg00016.html>

<sup>19</sup> <http://billboard.com/biz/articles/news/digital-and-mobile/6106454/online-pirates-thrive-on-legitimate-ad-dollars>, <http://venturebeat.com/2014/02/18/the-average-piracy-site-makes-4-4m-each-year-on-ads-from-amazon-lego-etc>

<sup>20</sup> Application, 18A. Also *see* 20C

<sup>21</sup> PIC, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, Ex.A3

<sup>22</sup> All of the competing non-community applicants in DotMusic’s contention set are existing gTLD portfolio registries (Google, Amazon, Donuts/Rightside, Radix, Minds & Machines and Famous Four Media).

<sup>23</sup> *See* Application 20E; Also *See* PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27; Also *see* .MUSIC Applicant Comparison Chart, <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>, Appendix C, pp.43-45, Ex.A32

of the Music Community by increasing intellectual property infringement and other types of malicious abuse. Music is a sensitive string driven by content and copyright protection that must be operated responsibly within its regulated sector as outlined in the Application. The Music Community is one of the Internet's most vulnerable communities given the adverse effects of mass piracy, intellectual property infringement and malicious abuse on the web and the inefficiencies of the outdated 1998 DMCA Law to provide adequate music copyright protection online.<sup>24</sup> By not awarding .MUSIC to DotMusic, the Music Community will lose the only opportunity to offer assurance to Internet users that all .MUSIC sites are indeed trusted, safe and licensed, which will also help search engines provide a better user experience by replacing unsafe, insecure pirate sites (that dominate music-themed web search results today) with relevant and higher quality .MUSIC sites.<sup>25</sup>

By virtue of ICANN's actions and inactions, the public interest is harmed and the multi-stakeholder music community will not be able to ensure trust and reliability in the DNS for Internet users because the music community will not be able to govern the last remaining music-themed gTLD,<sup>26</sup> in violation of ICANN's "*key responsibilities is introducing and promoting competition*"<sup>27</sup> in the registration of domain names, while ensuring the security and stability of the domain name system (DNS)."<sup>28</sup> Further, ICANN disregards its own 2007 Recommendations and Principles that stated "*where an applicant lays any claim that the TLD is intended to support a particular community...that claim will be taken on trust*."<sup>29</sup>

Without a reserved, safe and reliable zone on the Internet dedicated to the Music Community, the community and the public will be harmed because the music community will be unable to promote a trusted and secure sector through enhanced safeguards. The Music Community (the

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<sup>24</sup> <https://www.google.com/transparencyreport/removals/copyright/?hl=en> e.g. One single DotMusic supporter, BPI, filed over 2 million URL takedown requests to Google for the week of February 15, 2016, *see*

<https://google.com/transparencyreport/removals/copyright/reporters/1847/BPI-British-Recorded-Music-Industry-Ltd>

<sup>25</sup> *See* <http://theverge.com/2015/11/23/9781752/google-takedown-requests-2015> and

<http://billboard.com/biz/articles/news/1083146/business-matters-legal-mp3-sites-are-still-buried-by-google-search-results>

<sup>26</sup> No community applicant has been awarded a music-themed string in the New gTLD Program.

<sup>27</sup> ICANN has awarded Amazon the .SONG and .TUNES music-themed strings. Amazon is also a competing applicant for .MUSIC. Allowing Amazon to possibly be awarded the three most relevant music-themed strings violates ICANN's Bylaws with respect to "promoting competition."

<sup>28</sup> <https://newgtlds.icann.org/en/about/program>

<sup>29</sup> <http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6, Ex.A4; Also *see* <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>. Ex.A5

defined “*logical alliance*” with members representing over 95% of music consumed globally) has been negatively affected by the Report.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

See Answer to Question 6 above.

**8. Detail of Board Action/Inaction – Required Information**

In this section, DotMusic presents the evidence required for ICANN to approve the request in this RR: **(8.1)** The relationship and contractual obligations between ICANN and the Economist with respect to the CPE process; **(8.2)** the AGB process and relevance of ICANN-approved GAC Category 1 and 2 Advice; **(8.3)** Comparisons to other CPE-prevailing community applications, demonstrating quality control deficiencies, unpredictability, inconsistencies, process failures, fairness issues and disparate treatment; and **(8.4)** Facts and procedural violations demonstrating that ICANN did not follow established processes in the evaluation of the Application in its grading as set forth in the .MUSIC Report, including material errors and omissions in determining the critical areas of *community establishment, nexus and support*. As a result of the material process, procedural errors and omissions set forth below, the Application was prevented from scoring the full 16 points and improperly did not receive a passing CPE grade.

**(8.1) The relationship and contractual obligations between ICANN and the EIU.**

Ultimately, ICANN makes the final decision on CPE results. The ICANN Board is responsible for the acts of its Staff and the EIU with respect to the CPE process because it is within ICANN’s sole discretion whether an applicant passes or fails. Pursuant to its contract with ICANN, the EIU provides “*recommended scores to ICANN for final review and approval*” and ICANN is “*free in its complete discretion to decide whether to follow [the EIU]’s determination and to issue a decision on that basis or not.*”<sup>30</sup> ICANN and the EIU specifically acknowledge that: “*each decision and all associated materials must be issued by ICANN in its own name only;*” that CPE results are “*ICANN’s final decision;*” and that “*ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue.*”<sup>31</sup> In a declaration, the EIU confirmed that:

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<sup>30</sup> <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b) (ii) (12 Mar. 2012) [Ex. C-40]), Ex.A7

<sup>31</sup> *Id.*, § 10(b) (iii)-(iv), (vii)

[t]he EIU is a privately held company working as a vendor to ICANN. We are not a gTLD decision-maker but simply a consultant to ICANN.<sup>32</sup>

Moreover, ICANN is the gatekeeper of all information exchanged between applicants and the EIU, including alerting the EIU of relevant GAC Advice pertaining to the existence of a “*cohesive*” regulated sector for the string evaluated to ensure scoring predictability and scoring consistency. ICANN and the EIU “*agreed that [the] EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.*”<sup>33</sup> Furthermore, the Report includes a disclaimer representing that ICANN is ultimately responsible for determining whether or not to implement the EIU evaluators’ conclusions.<sup>34</sup> While the Board may not be responsible for its Staff’s day-to-day operations, the Board is responsible for final CPE determinations, process, evaluations, and acceptance or rejection of the .MUSIC Report.

#### **(8.2) The AGB process and the relevance of ICANN-approved GAC Category 1 and 2 Advice.**

Per the AGB, Board decisions on certain strings are not merely a “box-ticking” administrative exercise by staff or consultants. The Board has accepted GAC Advice on many occasions to determine the fate of certain strings (e.g. .AMAZON and .AFRICA); and even superseding the determinations of Panels if deemed necessary by ICANN to serve the public interest (e.g. the Community Objections for .ISLAM and .HALAL). In relation to .MUSIC, the ICANN Board accepted GAC Advice with respect to Category 1 and Category 2 Safeguards,<sup>35</sup> but the Board took no action pertaining to GAC’s Advice to give “*preferential treatment for all applications which have demonstrable community support*” such as DotMusic’s. At the Singapore ICANN meeting in

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<sup>32</sup> EIU Declaration <https://icann.org/en/system/files/files/eiu-declaration-13apr15-en.pdf>, Pg.2, Ex.A8

<sup>33</sup> New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b)(ii) (12 Mar. 2012) [<https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-40].), § 10(b)(iii)-(iv), (vii), Ex.A7

<sup>34</sup> See Report, p.9. Each CPE report states that “these Community Priority Evaluation results do not necessarily determine the final result of the application. *In limited cases the results might be subject to change.*” New gTLD Program, Report; see also New gTLD Program Consulting Agreement, p. 2 (26 July 2011) (“ICANN retains the right to inspect, to stop work, to prescribe alterations, and generally supervise the Contractor’s work to insure its conformity with the . . . Statement of Work”) [<https://www.icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-41], Ex.A9

<sup>35</sup> DotMusic’s Application was a community application with music-tailored enhanced safeguards that extended beyond the minimum GAC Advice requirements. To serve the public interest, the Internet community and the entire global music community, DotMusic also filed a PIC to reflect its accountability and to clarify its Application’s specifications, which also pertained to its *community definition, community establishment, nexus, registration policies* and *support*. See PIC

March 2014, GAC reiterated that advice to ICANN “to protect the public interest and improve outcomes for communities”<sup>36</sup> and to take “better account of community views and improving outcomes for communities”<sup>37</sup> (i.e. giving community applicants the benefit of the doubt). Throughout the process, ICANN has allowed non-community applicants to materially alter their applications to follow GAC Advice to either remain in contention or be awarded sensitive strings (such as .GMBH<sup>38</sup>). Because such change requests for non-community applicants were allowed and accepted (in response to GAC Advice), it is equally and reasonably fair to allow DotMusic to be awarded .MUSIC based on trust, GAC’s Advice favoring community applicants with demonstrable support and ICANN’s own acceptance that the music string has cohesion under an ICANN-approved regulated sector. It is also reasonable to award DotMusic this sensitive string, because the Application responsibly and conscientiously already had the requisite music-tailored enhanced safeguards that served a higher purpose when it filed its Application in 2012 (notably, DotMusic’s safeguards exceed GAC Category 1 Safeguard Advice). Further, it should have been clear to ICANN and the EIU that the Application exceeds the CPE criteria and serves the public interest, Internet community and music community, as outlined in the Application and confirmed in more detail throughout its PIC. For these reasons alone the .MUSIC Report should be overturned and a passing grade awarded to Applicant.

**(8.3) Comparisons to other CPE-prevailing community applications, demonstrate inconsistencies, unpredictability, process failures, fairness issues and disparate treatment.**

ICANN did not follow established procedures in the *community establishment, nexus* and *support* evaluation process, which resulted in a failing CPE grade. For example, the criterion concerning “*organization*” (that relates to having support from a “*recognized*” organization), the Report specifically failed to consider many globally-recognized organizations that are *mainly* dedicated to the music community addressed (“*logical alliance of communities that relate to music*”).

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<sup>36</sup> <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2> Section 3, 1a, p.4, ExA10

<sup>37</sup> <http://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf>, Register #18, Ex.A11

<sup>38</sup> Donuts was allowed to make material changes to their application to proceed with the delegation of .GMBH based on GAC advice and Donuts’ Public Interest Commitments (PIC), *See* <https://www.icann.org/en/system/files/correspondence/willett-to-metzger-28jan16-en.pdf>. ICANN rejected a similar change request by the .CPA community applicants. ICANN “deferred consideration of AICPA’s December 2014 Change Request, including changes made to reflect the principles of the Beijing Communiqué,” *See* <https://www.icann.org/en/system/files/files/reconsideration-request-15-17-aicpa-redacted-19sep15-en.pdf>, p.4

The FIM, an “*international federation of national communities of similar nature*”<sup>39</sup> representing the “*voice of musicians worldwide*” (musicians represent the overwhelming majority of the Music Community). This is contrary to the unsubstantiated, indefensible and undocumented opinion of ICANN that the FIM is not a “*recognized community institution(s)/member organization(s)*.”<sup>40</sup>

The IFPI, another globally recognized supporting organization, also exceeds the same criteria under *community establishment and support*. The IFPI is only associated with music and it is the globally-recognized organization that administers the International Standard Recording Code (ISRC), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community. The code was developed with the ISO technical committee 46, subcommittee 9 (TC 46/SC 9), which codified the standard as ISO 3901 in 1986.<sup>41</sup> The IFPI’s ISRC is “intentionally standardised under ISO,” globally structured<sup>42</sup> and “well established, widely accepted internationally”<sup>43</sup> Furthermore, it relates to the addressed music community defined by DotMusic, an “*organized and delineated logical alliance of communities that relate to music*.” The IFPI does not restrict ISRC codes to solely its members. In fact, ISRC eligibility is available and dedicated to the entire global music community, irrespective of whether they are members of organizations or not, are professionals or amateurs, are independent or non-independent, commercial or non-commercial:

Owners of recordings may for example be independent artists, record labels or recorded music groups. ISRC is available to all owners of recordings regardless of their membership<sup>44</sup> (or not) with any industry association.<sup>45</sup>

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<sup>39</sup> CPE Guidelines: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of...a logical alliance of communities,” <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.4, Ex.A12-1; Also see AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, 4-12, Ex.A13 and “Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,” Notes, 20A, A-14, Ex.A13

<sup>40</sup> The FIM is a globally-recognized music community organization with documented official relations with the United Nations Economic and Social Council (“ECOSOC”) (Ros C); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM is also consulted by the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”).

<sup>41</sup> [http://www.iso.org/iso/home/store/catalogue\\_tc/catalogue\\_detail.htm?csnumber=23401](http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401)

<sup>42</sup> <http://isrc.ifpi.org/en/isrc-standard/structure>

<sup>43</sup> <http://isrc.ifpi.org/en/why-use/benefits>

<sup>44</sup> DotMusic’s community application defines the community as “a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music: the art of combining sounds rhythmically, melodically or harmonically.” The IFPI’s ISRC codes do not restrict eligibility to members of select music organizations but are available to the entire music community as defined.

In fact, without the IFPI's ISRC codes there would not be legal music consumption because there would be no way to appropriately and efficiently attribute music to music community members.<sup>46</sup>

In the case of .HOTEL's CPE Report, the prevailing applicant received a full grade for "Organization" **because** the Panel found "*recognized community institution(s)/member organization(s)*,"<sup>47</sup> the International Hotel & Restaurant Association (IH&RA) and HOTREC:

the community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)...<sup>48</sup>

...The applicant possesses documented support from the recognized community institution(s)/member organization(s).<sup>49</sup>

In awarding .HOTEL the full two (2) points for *support*, the Panel concluded that the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines):

[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.<sup>50</sup>

The .HOTEL community applicant passed with full scores for *community establishment* and *support* where several entities were found to be *mainly dedicated to the community* and *recognized*, despite those organizations also representing other interests or sectors such as "restaurants" (or some being geographically focused like the AH&LA and the CHA). Conversely, the .MUSIC Report failed to provide full scoring to DotMusic stating that "[t]here is no single such organization recognized by all of the defined community's members as representative of the defined community in its entirety."<sup>51</sup> This finding is improper because there is no policy or rule that requires an organization to represent a community *in its entirety* in order to score the full two points under *support*. While there is an option requiring the "*authority to represent the community*," the Guidelines provided other alternative options available to score the full two points under "*support*." The CPE Guidelines define

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<sup>45</sup> <http://isrc.ifpi.org/en/using-isrc>

<sup>46</sup> Without the IFPI's ISRC codes, YouTube Music (which is consumed by over 1 billion YouTube users) would be unable to effectively credit the corresponding music copyright owner related to each music video, see <https://support.google.com/youtube/answer/6007080> and; For the same reason, nearly all digital music retailers rely on and require ISRC codes, including Apple iTunes<sup>46</sup> (the world's largest music retailer with over 43 million music tracks<sup>46</sup>, see <http://apple.com/itunes/working-itunes/sell-content/music-faq.html> and <http://apple.com/itunes/music> and <http://www.digitalmusicnews.com/2014/04/24/itunes800m>

<sup>47</sup> .HOTEL CPE, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6, Ex.A14

<sup>48</sup> Ibid, *community establishment*, p.2

<sup>49</sup> Ibid, *support*, p.6

<sup>50</sup> Ibid

<sup>51</sup> Report, p.3 and p.8

“recognized” as “*institution(s)/organization(s) that are clearly recognized by the community members as representative of that community*” i.e. not in their “*entirety*” but merely “*representative*.” According to the Oxford dictionary, the primary definition of “*recognize*” is to “*identify*.”<sup>52</sup> According to the Oxford dictionary, the definition of the adjective “*representative*” is “*typical of a class, group, or body of opinion*” or “*containing typical examples of many or all types*” or “*to act and speak on behalf of a wider group*.”<sup>53</sup>

Even if an “*entirety*” criterion (not specifically mentioned in the AGB or CPE Guidelines) is assessed, both the International Federation of Arts Councils and Culture Agencies (“IFACCA”) (the only international federation representing government culture agencies and arts councils globally covering all of the Application’s music categories and subsets in their entirety<sup>54</sup>) and ReverbNation (the world’s largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations in over 100 countries and across all of the Application’s music categories and subsets in their entirety<sup>55</sup>) qualify because they represent all the music categories and music subsets delineated in their entirety without discrimination globally. Based on the foregoing, it is clear that both co-requesters IFACCA and ReverbNation are “*typical of a group*” that is representative of the “*music*” community defined in its entirety. Therefore, it is clear that the Application had demonstrable support from multiple globally-recognized organizations mainly dedicated to the Music Community. ICANN’s and the EIU’s failure to properly evaluate the application and find support for the community is apparent when the .MUSIC Report is compared to other prevailing CPE Determinations. Thus, the rationale ICANN used to find that the International Hotel & Restaurant Association (IH&RA) is representative of “*hotel*” community should apply to IFACCA and ReverbNation in the case of Music Community. That is, if the IH&RA is found to be “*recognized*” and “*representative*” entity of the “*hotel*” community, then the IFACCA and ReverbNation are “*representative*” [of the music community] too because they share similar characteristics as the IH&RA and other entities found to have satisfy CPE in other determinations. Per the Guidelines:

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<sup>52</sup> [http://www.oxforddictionaries.com/us/definition/american\\_english/recognize](http://www.oxforddictionaries.com/us/definition/american_english/recognize)

<sup>53</sup> [http://www.oxforddictionaries.com/us/definition/american\\_english/representative](http://www.oxforddictionaries.com/us/definition/american_english/representative)

<sup>54</sup> [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members) and [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members)

<sup>55</sup> <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

*Consistency of approach in scoring Applications will be of particular importance...<sup>56</sup> and “[t]he panel must be able to exercise **consistent** and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible...<sup>57</sup>*

According to the CPE Guidelines, the contextual interpretation of community particularities requires in-depth knowledge and expertise of the community.<sup>58</sup> All the Music Community categories and Music Community subsets that DotMusic delineated as members are essential for the global music sector to operate. Further, the “*logical alliance of communities that related to music*” (or “*alliance of groups*”) functions with cohesion as a whole in a regulated sector to protect music under agreed-upon structures governed by copyright law and international treaties. Without this cohesion, there would be no regulated music sector, and more importantly, music would not exist as we know it.

There are other clear examples of error relating to: consistency, fairness, predictability, equal treatment and procedural violations pertaining to DotMusic’s CPE process in comparison to community applicants that have prevailed CPE for whom ICANN applied the right threshold to pass. For example, ICANN’s scoring of the prevailing .RADIO applicant, in which ICANN assessed the “*majority*” support criterion (thereby granting .RADIO full points), while in contrast for DotMusic’s Application ICANN did not assess the “*majority*” criterion as outlined earlier in this RR:

However, the [.RADIO] applicant possesses documented support from institutions/organizations representing a majority of the community addressed.<sup>59</sup>

The EIU also determined that all .RADIO, .HOTEL, .OSAKA, .ECO, .GAY and .SPA community applicants had “*cohesion*” for *community establishment*:

(i) The EIU established that the .RADIO had *cohesion* solely on the basis of being “*participants in this...[radio] industry*.”<sup>60</sup>

(ii) The EIU awarded .HOTEL full points for *community establishment* for a “*cohesive*” community definition that is comprised of “*categories [that] are a logical alliance of members*.”<sup>61</sup>

Even though DotMusic similarly presents music community based on “*logical alliance*” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper;

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<sup>56</sup> CPE Guidelines, p.22

<sup>57</sup> Ibid

<sup>58</sup> The CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined...community plays an important role,” CPE Guidelines, p.22

<sup>59</sup> .RADIO CPE, <https://icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7, Ex.A15-1

<sup>60</sup> Ibid, p.2

<sup>61</sup> .HOTEL CPE, p.2, Ex.A14

(iii) The EIU awarded full points to .OSAKA determining there was “*cohesion*” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;<sup>62</sup> Similarly, DotMusic’s “*logical alliance*” is “*related to music*” (i.e. has a tie) but its Application was penalized;

(iv) The EIU awarded .ECO full points, stating that “*cohesion and awareness is founded in their demonstrable involvement in environmental activities*” which “*may vary among member categories*.”<sup>63</sup> Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities;

(v) The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under *community establishment* establishing that there is stronger *cohesion* than DotMusic based on “*an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies*”<sup>64</sup> (emphasis added). In contradiction, the EIU determined DotMusic’s “*logical alliance*” operating under a regulated sector that is united by copyright lacked any “*cohesion*” of belonging to a community; and

(vi) The EIU awarded .SPA the full points under *community establishment* and *nexus*, while DotMusic scored zero points and three respectively. A perfunctory comparison between DotMusic’s application and the prevailing .SPA application reveals substantial bias and contradictions. Similarly, based on ICANN’s rationale for the .SPA CPE, it is evident that the .MUSIC application should have consistently and fairly received maximum points as well. According to the .SPA application:

The spa community primarily includes:

- Spa operators, professionals and practitioners
- Spa associations and their members around the world
- Spa products and services manufacturers and distributors

...The secondary community generally also includes holistic and personal wellness centers and organizations. While these secondary community organizations do not relate directly to the operation of spas, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.<sup>65</sup>

Yet, the .MUSIC Report penalized the Application under *community establishment* to the fullest extent possible (grading zero points) for lacking “*cohesion*” while the .SPA community applicant

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<sup>62</sup> .OSAKA CPE, p.2, Ex.A18

<sup>63</sup> .ECO CPE, p.2, Ex.A17

<sup>64</sup> .GAY CPE, p.2, Ex.A15-2

<sup>65</sup> .SPA Community Application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/123?t:ac=123>, 20A, Ex.A16-2

was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for *community establishment*. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their *inclusion* in industry organizations and *participation* in their events:

Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.<sup>66</sup>

In contrast, ICANN rejected DotMusic’s membership music categories and music subsets as not having the requisite awareness even though, similar to the spa community, all Music Community members also “*participate*” in music-related events and are included in music groups or music subsets as evidenced by DotMusic’s *majority* music (*logical alliance*) community support of organizations with members representing the overwhelming *majority* of music consumed globally.

Moreover, despite a general definition of the *spa community* that included entities with a non-essential, tangential relationship with the spa community and a *secondary community* that did *not relate directly* to the string, the .SPA applicant was also awarded a full score under *nexus*. In contrast DotMusic’s community *name*, the “*Music Community*,” which matches string, lost 1 point for *nexus*.

As illustrated, when compared to other CPE determinations (*See Exhibit A41*), had policies been followed and a consistent evaluation been applied, then the Application should have received maximum points that would have resulted in a passing CPE grade, a conclusion that is also supported by forty-three (43) separate independent experts (*See Exhibit A40*).

**(8.4) Facts and procedural violations show that ICANN did not follow its own processes in the determination of the .MUSIC Report, including critical areas relating to *community establishment, nexus and support*. ICANN is the party responsible for ensuring quality control and a predictable, consistent and fair CPE process.**

According to ICANN, “all applicants for a new gTLD registry should be evaluated against transparent and predictable criteria.”<sup>67</sup> There were multiple prejudicial errors and improper procedural issues with ICANN not following the AGB guidelines and requirements, including:

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<sup>66</sup> .SPA CPE Report, Community Establishment, p.2, Ex.A16-1

<sup>67</sup> According to the Oxford dictionary, the word “fully” is defined as “completely or entirely; to the furthest extent” or “without lacking or omitting anything,” [http://www.oxforddictionaries.com/us/definition/american\\_english/fully](http://www.oxforddictionaries.com/us/definition/american_english/fully)

(i) **Policy misapplication of ICANN-accepted GAC Advice adopted by ICANN before the CPE process began is a procedural error.** Contrary to the .MUSIC CPE Report, the ICANN Board accepted GAC Category 1 Advice that music is a cohesive “regulated sector.” This means that the ICANN Board also agrees that the music community has cohesion. By accepting GAC Advice and rendering a decision that music is: (i) a “*string likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm;*” and (ii) that it is a “*string that is linked to [a] regulated sector*” that “*should operate in a way that is consistent with applicable laws,*”<sup>68</sup> there is reasonable expectation that ICANN would apply this policy acceptance in all evaluations that are processed to ensure transparency, predictability and consistency. This misapplication of a policy adopted by ICANN before the CPE process began is a procedural error. As such, the New gTLD Program procedural process for DotMusic’s evaluation was unpredictable, lacking both transparency and consistency.

(ii) **Not properly identifying the community definition required in 20A that was labeled as a defined term in the Application in reference to the AGB (“Community”):**

The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature (“**Community**”)", that relate to music: the art of combining sounds rhythmically, melodically or harmonically (Application, 20A)

According to the AGB, the Question section for 20A explicitly states:

20A. Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to **this** question.<sup>69</sup>

ICANN not only disregarded DotMusic’s definition from 20A, the Report does not mention or properly reference DotMusic’s definition. Instead ICANN construed its own general definition from 20D contravening the AGB’s instructions that “*community priority evaluation*” for DotMusic “*will be scored based on the community identified in response to **this** question*” (i.e. the definition identified in the Application answer to 20A not 20D). According to the .MUSIC Report:

[T]he applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (**Application, 20D**).

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<sup>68</sup> <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, An.5, p.8, Ex.A34

<sup>69</sup> AGB, Attachment to Module 2, Evaluation Questions and Criteria, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>, Question, 20A, A-14

In other words, ICANN scored DotMusic’s application relying on critically incorrect variables and parameters. In assessing DotMusic’s definition of the Music Community, ICANN misapplied material policy and permitted material procedural defects and inconsistencies in CPE evaluations to occur, resulting in an improper conclusion that DotMusic did not prevail CPE.

(iii) **Not properly identifying the name of the community to address nexus** that was labeled as a defined term in the Application in reference to the AGB (“**Name**”). While the *name* of the community “*Music Community*” was acknowledged by the EIU, it was not applied under its scoring for *nexus*:

The name of the community served is the “Music Community” (“**Community**”) <sup>70</sup>

*The “MUSIC” string matches the name (“Name”) of the Community and is the established name by which the Community is commonly known by others.*<sup>71</sup> (See Application 20)

According to the Report:

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The **Music Community**’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents (Application, 20A)<sup>72</sup>

As evidenced, under *nexus*, ICANN misapplied the wrong “*name*” definition by not applying the Application’s *established name* (the “*Music Community*”) inaccurately determining that the “*there is no “established name” for the applied-for string to match...for a full score on Nexus.*”<sup>73</sup> It is beyond shadow of a doubt that the established name that the Application defines and identifies, the “*Music Community*,” exactly matches the string .MUSIC.

(iv) **Not applying the alternate criterion to earn maximum points for support** that corresponds “*documented support...from institutions/organizations representing a majority of the overall community addressed.*”<sup>74</sup> CPE Guidelines provide that if an applicant lacks “documented authority to represent the community”<sup>75</sup> then the Panel should consider alternative options as follows: First, the Panel should decide whether the applicant has “documented support from the

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<sup>70</sup> Application, 20A

<sup>71</sup> Ibid

<sup>72</sup> Report, p.4

<sup>73</sup> Report, *Nexus*, p.5

<sup>74</sup> AGB, *Support*, “Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2,” 4-18

<sup>75</sup> CPE Guidelines, pp.16-18

recognized community institution(s)/member organization(s) to represent the community?”<sup>76</sup> If the applicant meets this criterion then the full two (2) points are awarded. If not, the Panel should then consider whether:

[t]here are multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?<sup>77</sup>

The Application meets this “*majority*” criterion, but this option was not applied to the .MUSIC CPE process. The Application is a global music community initiative supported by organizations with members representing over ninety-five percent (95%) of music consumed globally (an overwhelming majority),<sup>78</sup> yet the “majority” criterion was not assessed by ICANN in the grading of *Support*. If one excluded all the music related to DotMusic’s supporting organizations and their members, then music as we know it today would not exist. In fact the majority of music would not be available for consumption or enjoyment (**emphasis added**). The absurdity of the findings of the .MUSIC Report is further shown by another key supporter of DotMusic, NAMM, the trade association that represents nearly all the major music instrument and products’ manufacturers.<sup>79</sup> Without NAMM’s members’ instruments and music products, music cannot be created. Therefore, it is clear that the Application has the support of the “*majority*” of the community addressed.

In summary of (i), (ii), (iii) and (iv), the evidence supports that there is prejudicial pattern of behavior by ICANN not to follow established process and instructions. No other applicant in the New gTLD Program has provided more evidence, correspondence and research to assist ICANN with the CPE process than DotMusic has to ensure a consistent, predictable and fair evaluation in comparison to other community applicants that have prevailed. Judging from the Report’s inconsistent and contradictory rationale and ICANN’s failure to follow due process, it appears that the objective was to find ways to reject DotMusic’s Application by relying on inaccurate facts and not giving DotMusic the same benefit of the doubt given to the CPE applicants that prevailed. At ICANN’s request, DotMusic also provided detailed answers to Clarifying Questions<sup>80</sup> (“CQ Answers”), including significant credible and reputable evidence substantiating DotMusic’s

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<sup>76</sup> CPE Guidelines, pp.17-18

<sup>77</sup> Ibid

<sup>78</sup> <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at Ex.A19-1, A19-2, A19-3, and A19-4; and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>79</sup> <https://www.namm.org/about>

<sup>80</sup> See Clarifying Questions (“CQ”), Ex.A20 and Answers to Clarifying Questions (“CQ Answers”), Ex.A21

Application's position with respect to the *community definition, community establishment* (including "cohesion"), *nexus* and *support*. A cursory review of the CQ Answers would find support to overturn all the points deducted from the Application.

If the EIU carefully reviewed the CQ Answers then it would be clear what the *community definition (community establishment)* and the *name* of the community (*nexus*) were because it was explicitly identified multiple times.<sup>81</sup> As explicitly outlined in the CPE Guidelines, DotMusic's "logical alliance" community definition explicitly meets criteria: "With respect to "Delineation" and "Extension," it should be noted that a community can consist of...a logical alliance of communities." This is also substantiated by the AGB, which explicitly states that in the case of a community of an "alliance of groups" (such as DotMusic's Application), "details about the constituent parts are required."<sup>82</sup> DotMusic's community definition is a "strictly delineated and organized logical alliance of communities that relate to music" (Application, 20A) which unequivocally meets this criterion. Contradicting established procedure, the EIU improperly found that the "logical alliance" definition has no cohesion. Moreover, while DotMusic followed the AGB and CPE Guidelines and provided details on each of the delineated music categories and music subsets (i.e. the *constituent parts*) demonstrating how they form the "logical alliance" community definition, the Application was penalized to the maximum extent under the Report's *community establishment* for doing so. Further, dictionary definitions for "logical"<sup>83</sup> and "alliance"<sup>84</sup> establish that these definitions require cohesion and the *requisite awareness*.

The degree of multitude of direct and indirect evidence make it beyond reasonable doubt that overlooking the Application's *community definition* and *name* of the community identified was

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<sup>81</sup> See CQ Answers: The *community definition* of "logical alliance" is referred to and explicitly defined in seven (7) separate pages of the CQ Answers provided to the EIU at p.6, p.8, p.9, p.12, p.14, p.16 and p.17. Also see CQ Answers, *Community Establishment & Definition Rationale and Methodology*, Annex A (pp-22-43) defining the community as "a delineated and organized logical alliance of communities of similar nature related to music" at p.22, p.25, p.38. Also see Annexes' table of contents (p.20), which include *Annex D Venn Diagram for Community Definition and Nexus* that explicitly defines and identifies the *community definition* relating to *community establishment* (See Application, 20A) and the *name* of the community "music community" relating to *nexus*.

<sup>82</sup> AGB, Attachment to Module 2, Evaluation Questions and Criteria: "Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required," Notes, 20A, A-14

<sup>83</sup> Oxford Dictionaries "**logical**" definition: (i) *1. Of or according to the rules of logic or formal argument;* (ii) *1.1 Characterized by or capable of clear, sound reasoning;* (iii) *1.2 (Of an action, development, decision, etc.) natural or sensible given the circumstances, see [http://oxforddictionaries.com/us/definition/american\\_english/logical](http://oxforddictionaries.com/us/definition/american_english/logical)*

<sup>84</sup> Oxford Dictionaries "**alliance**" definition: (i) *1. A union or association formed for mutual benefit, especially between organizations;* (ii) *1.1 A relationship based on an affinity in interests, nature, or qualities;* (iii) *1.2 A state of being joined or associated, see [http://oxforddictionaries.com/us/definition/american\\_english/alliance](http://oxforddictionaries.com/us/definition/american_english/alliance)*

grossly negligent resulting in a failing grade for the Application. The omission of the Application's *community definition* and *name* from the .MUSIC Report was a gross error because it would have been impossible to ignore them given that they were explicitly mentioned and identified a significantly number of times as evidenced in:

1. The Application, Q20A;
2. The Public Interest Commitments;
3. Nearly *two-thousand correspondence letters* to ICANN and the EIU;<sup>85</sup>
4. Public comments from supporters in ICANN's microsite relating to the Application;
5. Answers to Clarifying Questions that the EIU requested (emphasis added);
6. Testimonies from over 40 independent experts submitted to ICANN and the EIU;
7. An independent Nielsen poll identifying the *community definition*;

As set forth above, ICANN and the EIU contravened the established vital CPE Guidelines and EIU Panel Process procedures.

**(v) ICANN and the EIU contravened established CPE Guidelines and EIU Panel Process procedures.**

As the Board should be aware, CPE requires:

Consistency of approach in scoring Applications will be of particular importance...<sup>86 87</sup>

The EIU will fully cooperate with ICANN's quality control process...<sup>88</sup>

The Panel Firm exercises consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and documents the way in which it has done so in each case.<sup>89</sup>

Furthermore, ICANN affirmed in correspondence with DotMusic that "*in accordance with the CPE Panel's process document to help assure independence of the process, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team.*"<sup>90</sup> Contrary to this correspondence and the procedures outlined in the ICANN's EIU Panel Process document, ICANN also appears to play a critical role in instructing and subjectively guiding the EIU to reach certain determinations by providing the EIU

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<sup>85</sup> See Ex.A.19-4

<sup>86</sup> CPE Guidelines, p.22

<sup>87</sup> In an email exchange between ICANN and the EIU, there is evidence of a "quality control process" for "consistency of approach in scoring across applications" (in this case the CPE process for .LLP, .LLC and GMBH), comparing them for consistency purposes with the .MLS CPE Report: "*Can we have an example (such as was provided in MLS) as to what other meanings might exist?*" See C44, ICANN\_DR-00458, p.3, Ex.A27

<sup>88</sup> Ibid, pp.22-23

<sup>89</sup> EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3, Ex.A12-2

<sup>90</sup> See Ex.A23

with rationale, subjective redline edits, comments, presentations and other forms of communication before the final CPE determinations are released publicly.

Public documents disclosed to Dot Registry (the community applicant for .INC, .LLC, and .LLP) and its legal counsel Arif Ali, in an Independent Review Proceeding (“IRP”) against ICANN, present clear evidence that ICANN edited and materially redlined the CPE draft Determinations for .INC, .GMBH, .LLC and .LLC on the EIU’s behalf before their final release, providing substantive and subjective rationale, making substantive redlines as well as suggested edits, which is a serious violation of established procedure and puts ICANN Staff at the heart of CPE decision-making in violation of CPE established procedure.<sup>91</sup> For example, in an email from EIU to ICANN on June 2, 2014 the EIU makes ICANN suggested changes and even asks permission from ICANN to make the same changes to a different application:

From: EIU to ICANN  
Email Subject: Re: Updated draft results (4)

...I've made the suggested changes... Quick question: is there a reason why you didn't send back .INC? Should we make the same changes for that evaluation?<sup>92</sup>

On June 3<sup>rd</sup>, 2014, the most revealing email shows that ICANN is involved in the decision-making process for determining CPE results, including providing subjective feedback, discussing rationale and providing presentations to the EIU:

From: ICANN to EIU  
Email Subject: Re: Updated draft results (4)

...On my initial review they looked really good. We will discuss the rationale in the presentation tomorrow. I would ask we make one change to all of the reports prior to final version...<sup>93</sup>

Aside from the procedural, policy and quality control process violations by both ICANN and the EIU, it appears from the hands-on instructions, discussions, guidance and more importantly subjective decision-making rationale provided by ICANN to the EIU, that the EIU clearly lacked the necessary training and expertise to make consistent judgment even though the EIU Panel Process document required that:<sup>94</sup>

All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process

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<sup>91</sup> See <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, C042 – C044; Also see Ex.A25, Ex.A26 and Ex.A27

<sup>92</sup> See Ex.27, C044, ICANN\_DR\_00457, p. 2

<sup>93</sup> Ibid, C044, p. ICANN\_DR\_00456, p.1

<sup>94</sup> EIU Panel Process, p.2

included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.

EIU evaluators are highly qualified... and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.

ICANN and the EIU relied on false and inaccurate material information and refused to take the clearly identified and relevant information into consideration in their rationale and decision-making process, which contradicted established ICANN policies. ICANN's and the EIU's disregard of the *community definition, name* of the community and failure to apply the majority *support* criterion is quite worrisome given the time allotted to determine the Report (July 27, 2015 to February 10, 2016). In an IRP final declaration concerning the .ECO and .HOTEL community applications,<sup>95</sup> the IRP Panelists agreed and also echoed DotMusic's serious concerns and glaring problems with the CPE Process in general:

[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.<sup>96</sup> ...[T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.<sup>97</sup> ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure...ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.<sup>98</sup> The combination of these statements gives cause for concern to the Panel.<sup>99</sup> The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.<sup>100</sup> In conclusion,...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.<sup>101</sup>

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<sup>95</sup> Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.HOTEL/.ECO IRP”) <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>

<sup>96</sup> .HOTEL/.ECO IRP, ¶ 146, p.37, Ex.A28

<sup>97</sup> Ibid, ¶ 147, pp.37-38

<sup>98</sup> Ibid, ¶ 148, p.38

<sup>99</sup> Ibid, ¶ 149, p.38

<sup>100</sup> Ibid, ¶ 150, p.38

<sup>101</sup> Ibid, ¶ 158, p.39

(vi) **Google conflict of interest.** Finally, it bears noting that the multiple process violations evidenced in this RR are further exacerbated by the conflict of interest with Google, another .MUSIC applicant.<sup>102</sup> According to ICANN’s Panel Process document,<sup>103</sup> “*the following principles characterize the EIU evaluation process for gTLD applications: All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.”* However, Eric Schmidt, the chairman of Google, was a spokesperson,<sup>104</sup> a trustee<sup>105</sup> and on the board of Economist from November, 2013<sup>106</sup> to December, 2015.<sup>107</sup> DotMusic’s CPE process for .MUSIC conducted by the Economist began in July, 2015.<sup>108</sup> That means for about 5 months during DotMusic’s CPE evaluation the EIU had conflict of interest in its role of managing the CPE Process on behalf of ICANN. This potential conflict of interest supported by what appears to be a strong correlation in success and failure rates in CPE based on whether a community applicant was in Google’s contention set or not. As of February 10<sup>th</sup>, 2016, there were 22 community applicants that have gone through CPE.<sup>109</sup> Out of the 22 community applicants, 10 were in a contention set with Google. **None of the applicants in contention with Google prevailed CPE. The success rate to prevail CPE without Google in the contention set was approximately 42%** (i.e. 5 out of 12 applications). The EIU passed nearly half the community applications if they were not in a contention set with Google, while failing all applicants competing with Google (including DotMusic). This statistically significant difference is a substantial discrepancy following a strong correlative pattern. ICANN CEO Fadi Chehade and the Board acknowledged the significance and sensitivity of this conflict of interest at the Singapore ICANN Meeting *Public Forum* in February 2015,<sup>110</sup> yet nothing was done to ensure the Economist had no conflict of interest when CPE began in July 2015.

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<sup>102</sup> This is not the first time DotMusic reports a conflict of issue relating to .MUSIC. Doug Isenberg represented .MUSIC competitor Amazon in Community Objections (“CO”) filed by DotMusic, while also serving as a New gTLD Program Legal Rights Objection (“LRO”) panelist.

<sup>103</sup> EIU Panel Process, p.2

<sup>104</sup> <https://www.youtube.com/watch?v=kHSwRHeeCqg>, see Ex.A29, p.1; Also see Ex.A29, p.2

<sup>105</sup> See [http://www.economistgroup.com/pdfs/Annual\\_Report\\_2015\\_FINAL.pdf](http://www.economistgroup.com/pdfs/Annual_Report_2015_FINAL.pdf), p.18, Ex.A30-2

<sup>106</sup> Ibid, p.29; Also see The Economist Board retrieved on September 30, 2015:

[https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results\\_and\\_governance/board.html](https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results_and_governance/board.html)

<sup>107</sup> See <http://www.theguardian.com/media/2015/dec/10/economist-appoints-tessa-jowell-to-board-as-googles-eric-schmidt-departs>, Ex.A31

<sup>108</sup> See <https://newgtlds.icann.org/en/applicants/cpe#invitations>

<sup>109</sup> See, <https://newgtlds.icann.org/en/applicants/cpe#invitations>

<sup>110</sup> See <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, February 12<sup>th</sup>, 2015, p.61, Ex.A30-1

## 9. What are you asking ICANN to do now?

Requesters ask that the result of the .MUSIC Report be overturned by ICANN, by awarding DotMusic an additional six (6) points (or a passing grade). These are the total points that were deducted by ICANN as a result of ICANN not consistently following the CPE process and not applying the proper scoring guidelines to DotMusic’s Application in accordance with the policies and procedures defined in the AGB. In fact, ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to substantial flaws in its rationale methodology and scoring process. Additionally a linear comparative analysis between DotMusic’s application and the prevailing CPE applications for .SPA, .RADIO, .ECO, .OSAKA, and .HOTEL leads to the conclusion ICANN contravened the CPE Process and did not employ “consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, document[ing] the way in which it has done so in each of the above mentioned community application cases.”<sup>111</sup>

DotMusic’s community Application clearly meets the **trust** claim (*See* ICANN’s 2007 Recommendations and Principles to launch the New gTLD Program, IGH CV-10) given its demonstrable global music community majority support, multi-stakeholder governance structure and music-tailored policies that serve a higher purpose, as outlined in its Application that .MUSIC:

1. Is exclusive only to legitimate members of the entire global music community;
2. Is governed and controlled by the global music community. Each music constituent community type has a governance seat on the multi-stakeholder .MUSIC Board (PAB);<sup>112</sup>
3. Is supported by organizations with members representing over 95% of music consumed globally (i.e. a majority);
4. Has enhanced safeguards to protect intellectual property, prevent cybersquatting and eliminate copyright infringement;
5. Has incorporated all IFPI intellectual property protection provisions that include policies to stop domain hopping, takedown policies in the case of piracy, authorization provisions, permanent blocks, privacy/proxy provision, true name/address mandates and trusted sender complaint policies amongst others;
6. Requires registrant validation via a mandatory two-step phone/email authentication process;
7. Protects names of famous music artists and brands by giving registration priority to those entities during a priority-based launch phase. .MUSIC also gives registration priority to community members belonging to legitimate Music Community Member Organizations to spur adoption, trust and safety;
8. Has domain naming conditions that eliminate cybersquatting and famous music brand trademark infringement. Registrants are only allowed to register their own name, acronym or “Doing Business As;”
9. Only allows legal music content and legal music usage; and
10. Will take down any domain infringing on any of its enhanced safeguards.

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<sup>111</sup> EIU Panel Process, p.3

<sup>112</sup> See Expanding multi-stakeholder Board at <http://music.us/board>

Aligned with its community-based mission, policies and PIC,<sup>113</sup> DotMusic's Application is the only applicant with music-tailored enhanced copyright protection safeguards that include:

- **Stopping Domain Hopping**: All domains that trusted senders...have sent over 10K notices against will be on the block domain list, which will continually be updated, unless there is evidence that the domain has been authorized by most of the applicable rights holders to use the content in question...
- **Take Down Policies**: DotMusic will require all registrants on music to have and implement policies that include the following: (i) upon receipt of a facially valid copyright take down notice, the registrant must search for all copies or links to access the noticed content on the site, and remove all such copies or links from its site; and (ii) it must implement a strong repeat infringer policy.... DotMusic will suspend the domain if the registrant fails to have or enforce such policies.
- **Stay Down and Repeat Offender**: DotMusic will suspend the domain if the registrant fails to have or enforce DotMusic takedown policies.Repeat offenders will be disallowed from registering.
- **Authorization**: Confirmation that "content that they otherwise have the right to post" means that the poster has express authorization to post the content.
- **Permanent Block**: Blocked domains will not be made available for registration by any third party unless there is a two third (2/3) vote by the Advisory Committee...
- **Privacy / Proxy**: Requirement that privacy/proxy services will be compliant with DotMusic's Name Selection policy (mandating that the domain is the name of the registrant, their acronym, "doing business as," description of their mission or activities) and discloses the beneficial registrant as per DotMusic's Registration Policies. If such disclosure is not made then the registrant will not be allowed to proceed with registration.
- **True name and address**: If a .MUSIC domain makes available any music owned or posted by a third party...(directly or indirectly), the domain must prominently post on the site the true name of the website operator, a contact person...phone number, physical address, and email address at which the contact person may be contacted.
- **Trusted Sender Complaint**: If .MUSIC receives a complaint from a trusted sender...then DotMusic will investigate the complaint and suspend the domain, giving the registrant reasonable time to fix compliance matter. The domain will be terminated if registrant does not fix the compliance matter or fails to respond to the complaint.<sup>114</sup>

The Board should note the level of support for DotMusic's Application and the Application's maximum score under its *Registration Policies* that are aligned with its community-based purpose (*Eligibility, Name Selection, Content and Use and Enforcement*<sup>115</sup>) as evidence that it is "in the best interest of the Internet community" for DotMusic to be awarded .MUSIC. ICANN Board/NGPC member George Sadowsky<sup>116</sup> hit the nail on the head on the *only* goal that matters: "*ensuring user trust in using the DNS*" and "*to strengthen user trust*:"

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process...it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the...community and/or Internet users in general."...We are

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<sup>113</sup> Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

<sup>114</sup> Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

<sup>115</sup> Report, *Registration Policies*, pp.6-7

<sup>116</sup> <https://www.icann.org/profiles/george-sadowsky>, <https://www.icann.org/resources/pages/board-of-directors> and <https://www.icann.org/resources/pages/new-gtld-program-committee-2014-03-21-en>

unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.<sup>117</sup>

In a statement the week after the release of the .MUSIC Report, ICANN CEO Fadi Chehade agreed that with respect to intellectual property infringement (which is at the heart of the Application’s enhanced safeguards), “*ICANN, where necessary and appropriate, shape the discussion and commit to be part of a solution. [ICANN] cannot simply put [its] head in the sand and say these issues are not of [ICANN’s] concern:*”

As issues such as intellectual property infringement...are addressed in other fora, ICANN ...where necessary and appropriate, shape the discussion and debate and commit to be part of a solution in keeping with our values and mission. We cannot simply put our head in the sand and say that these issues are outside of the logical infrastructure layer in which we operate and thus not of our concern. Some solutions within the economic and societal layers of digital governance require distributed, innovative and collaborative issue-specific networks, of which the technical community depending on the issue sometimes must be a key part. We must remain part of the global conversations on digital governance, aware and ready to act when necessary.<sup>118</sup>

Aligned with ICANN’s CEO’s own statements to protect the public interest and the music community’s intellectual property rights, **we request ICANN to overturn the .MUSIC CPE Report and approve DotMusic’s community application** because (i) of the preponderance of evidence and support that DotMusic’s application exceeds the criteria established for community priority evaluation in comparison to other prevailing CPE applicants;<sup>119</sup> (ii) ICANN inaction led to multiple CPE process violations, prejudicial errors and an unfair and inconsistent quality control process when evaluating DotMusic’s application (in itself and in comparison to others); and (iii) more importantly “it would be in the best interest of the Internet community” for ICANN to do so given the community application’s demonstrable support that represents over 95% of music consumed globally and DotMusic’s Public Interest Commitments and music-tailored *Registration Policies* (taken from a “holistic perspective” as required by ICANN Guidelines<sup>120</sup>) that scored

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<sup>117</sup> Booking.com B.V. v. ICANN, ICDR Case No. 50-2014-000247 (March 3, 2015) Final Declaration at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>, ¶ 119, Ex.A6

<sup>118</sup> Fadi Chehade (ICANN CEO), <https://icann.org/en/system/files/correspondence/chehade-to-icann-board-19feb16-en.pdf>, p.6, February 19, 2016, Ex.A33

<sup>119</sup> ICANN ignored DotMusic’s answers to Clarifying Questions, over 40 testimonies filed by independent experts (See Appendix A, p.36, Ex.A32), an independent Nielsen poll conducted with over 2,000 participants (See Appendix B, p.38, Ex.A32), and nearly 2,000 letters of support (See Ex.A19-1, A19-2, A19-3, A19-4 and A-19-5 and <https://gtldcomment.icann.org/applicationcomment/viewcomments>), which provide clear evidence that substantiates scoring maximum points under *Community Establishment, Nexus and Support*.

<sup>120</sup> The scoring of the *Registration Policies* section related to *Name Selection, Content and Use and Enforcement* is the only criterion to be graded from a “holistic perspective.” See CPE Guidelines, pp.12-14

maximum points. DotMusic also requests: (i) to meet with individual Board members; (ii) a meeting with the ICANN Board; and (iii) a hearing to clarify the positions expressed in this RR.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

DotMusic is a community applicant for .MUSIC. The justifications under which DotMusic has standing and the right to assert this RR are:

- i) Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.<sup>121</sup>
- ii) Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;<sup>122</sup>
- iii) Conflict of Interest Issues;
- iv) Failure to Consider Evidence filed; and
- v) Violation of ICANN Articles of Incorporation/Bylaws:
  1. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.<sup>123</sup>
  2. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>124</sup>
  3. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>125</sup>
  4. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>126</sup>
  5. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>127</sup>
  6. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.<sup>128</sup>
  7. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy [e.g. copyright law and setting certain royalty rates for music's regulated sector] and duly taking into account governments' or public authorities' recommendations.<sup>129</sup>

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<sup>121</sup> Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

<sup>122</sup> JAS established that “*the existence of a visible and well-publicized proactive quality program properly incented all evaluation panel vendors to be appropriately cognizant of evaluation consistency, accuracy, and process fidelity, and perform accordingly.*” The .MUSIC CPE lacked a “*proactive quality control process*” deficient of the Initial Evaluation “*unified approach,*” which “*substantially mitigated the risk of isolation and inconsistent or divergent evaluations,*” ICANN Initial Evaluation Quality Control Program Report, <https://newgtlds.icann.org/en/program-status/application-results/ie-quality-program-26aug14-en.pdf>, p.16. Also see Ex.A38 and Ex.A39

<sup>123</sup> ICANN Bylaws, Art. I, § 2.6

<sup>124</sup> ICANN Bylaws, Art. I, § 2.1

<sup>125</sup> ICANN Bylaws, Art. I, § 2.7

<sup>126</sup> ICANN Bylaws, Art. I, § 2.8

<sup>127</sup> ICANN Bylaws, Art. I, § 2.9

<sup>128</sup> ICANN Bylaws, Art. I, § 2.10

<sup>129</sup> ICANN Bylaws, Art. I, § 2.11

8. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>130</sup>
9. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>131</sup>

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.**

**Do you have any documents you want to provide to ICANN? Yes, see Exhibits**

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*

Respectfully Submitted,

Constantinos Roussos  
DotMusic Founder

Tina Dam  
DotMusic Chief Operating Officer

Cc: Jason Schaeffer  
DotMusic Legal Counsel

February 24, 2016

DotMusic Website: <http://music.us>

DotMusic Board: <http://music.us/board>

DotMusic Supporting Organizations: <http://music.us/supporters>

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<sup>130</sup> ICANN Bylaws, Art. II, § 3

<sup>131</sup> ICANN Bylaws, Art. III, § 1

# Exhibit 12

yourname.music



www.music.us

**DotMusic Presentation to  
ICANN Board Governance Committee**

**September 17, 2016**

**Presentation by Arif H. Ali, Dechert LLP,  
Washington, D.C.**

## **BGC's Duty to Ensure that the EIU and ICANN Staff Complied with ICANN's Articles & Bylaws**

- In performing its duties of reconsideration, the BGC must:
  - ensure that the EIU and ICANN staff complied with the principles of **fairness, transparency, and non-discrimination**, as set out in the ICANN Articles and Bylaws.

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## **BGC Must Address the EIU's Discrimination Against DotMusic**

- The EIU Panel singled out DotMusic for disparate treatment.
  - Introduced a new “**cohesion plus**” test for establishing “awareness and recognition” among members.
    - DotMusic required to show not only that there is “commonality of interest” and “cohesion” among its members, but **also** show that “cohesion is considerable enough.” This is a cohesion plus test.
  - Yet, the EIU and ICANN staff **never** applied the “cohesion plus” test in approving .HOTEL, .OSAKA, and .RADIO.

4

- In .HOTEL, .OSAKA, and .RADIO, the EIU Panel applied a **different** standard to determine “awareness and recognition.”
  - .HOTEL: The application demonstrated “awareness and recognition” because “the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”
  - .OSAKA: The application demonstrated “awareness and recognition” because “of the clear association with the Osaka geographical area, as according to the applicant, the Osaka Community is largely defined by its prefectural borders.”
  - .RADIO: The application demonstrated “awareness and recognition” “because the community as defined consists of entities and individuals that are in the radio industry and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community,” and “membership in the (industry) community is sufficiently structured.”
- It appears that the EIU Panels applied the “commonality of interest” test, not the “cohesion” test in .HOTEL, .OSAKA, and .RADIO.

5

- In contrast, the EIU Panel, in DotMusic, **conceded** that there is a “commonality of interest” among members.
- The EIU Panel, however, proceeded to apply a “cohesion plus” test in determining “awareness and recognition” among DotMusic members:
  - Under Article II, Section 3 of the Bylaws, “ICANN shall not apply its standards, policies, procedures, or practices inequitably or **single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.” (Bylaws, Art. II, §3)
  - “While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such **cohesion is considerable enough** that the community defined as a whole cannot be said to have the cohesion required by the AGB.”
- The EIU Panel and ICANN staff in DotMusic violated ICANN’s Policy of Non-Discrimination:
  - Moreover, under the CPE Guidelines, the “evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. **Consistency of approach** in scoring Applications will be of particular importance.” (CPE Guidelines, p. 22)

6

## **EIU Also Failed To Act Fairly and Openly**

- The EIU Panel failed to explain how DotMusic's evidence was insufficient to show cohesion.
  - The panel concluded that DotMusic's application fails to demonstrate "delineation" because "the number of individuals included in the defined community. . . do not show such cohesion is considerable enough."
- The EIU panel concluded that DotMusic failed to fulfil the requirements for "organization" requirement based on the EIU's research.
  - For example, based on its "research," the EIU concluded that "there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories."
  - Yet, the EIU failed to disclose its research in violation of its obligation to provide "conclusions that are compelling and defensible" and "to document the way in which it has done so in each case."

7

## **Presentation by Dr. Jørgen Blomqvist**

**Honorary Professor in International Copyright,  
University of Copenhagen, Denmark**

8

**Statement of Dr. Richard Burgess  
Ph.D. in Ethnomusicology**

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**Concluding Remarks  
&  
Questions**

10

# Exhibit 13

# Dotgay's Presentation to the Board Governance Committee

15 May 2016

Dechert  
LLP

# **The EIU Contradicted ICANN's Policies in Evaluating Dotgay's Application**

# EIU is Bound by the AGB

- **Bylaws, Art. I, § 2(8)**

- “Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”

- **CPE Guidelines, p. 1**

- “The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.”

- **AGB, Module 1**

- “This Applicant Guidebook is the implementation of the Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

# EIU Egregiously Misapplied the AGB (I)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to truly consider whether the applied for string “matches the name of the community” as the “name by which the community is commonly known by **others.**”
- The EIU **misapplied Module 4.2.3 of the AGB** by failing to consider whether the applied-for string “closely describes **the community**” and not “the community members.”
- The EIU **misapplied Module 4.2.3 of the AGB** by adding a non-established nexus requirement, i.e., by requiring that the name of the community apply to each community member.

# EIU Egregiously Misapplied the AGB (II)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to distinguish the “community” from the “community members”, making clear that the string need not be applied to each community member, but simply “match the community name’ for a score of 3, or alternatively, closely “describe the community” for a score of 2.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community endorsement criterion to require that the endorsing organization have community recognition beyond membership.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community opposition criterion to include a local community center as an organization of non-negligible size when this community center is merely one out of hundreds of community centers that are members of a global organization that endorsed the Dotgay application.
- The EIU **misapplied Module 4.2.3 of the AGB** in relation to the letter of opposition filed by the Q Center, even though the Center had been influenced by a competing applicant for .GAY, and the EIU should have discounted it as “filed for the purpose of obstruction” within the meaning of the AGB.

# EIU is Prohibited from Discriminating

- **Bylaws, Art. II, § 3**

- “ICANN shall not apply its standards, policies, procedures, or practices **inequitably or single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.”

- **CPE Guidelines, p. 22**

- “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and **non-discrimination**. Consistency of approach in scoring Applications will be of particular importance.”
- *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

# EIU Discriminated against Dotgay (I)

- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the EIU had found sufficient in other instances that a member self-identify as having a tie to the community. [E.g., .OSAKA]
- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the inclusion of other members “not automatically associated with the gTLD” did not prevent the EIU from establishing nexus in other instances. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by rejecting the ILGA as a representative organization when the EIU had found in other instances that a community may have more than one such organization. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by accepting that a local community center is an organization of non-negligible size when the EIU had found in the instance of the International Radio Emergency Support Coalition that it was not. [E.g., .RADIO]

# EIU Discriminated against Dotgay (II)

- The EIU **discriminated against Dotgay** by deeming it had insufficiently representative support despite support from equivalent organizations being sufficient for other community strings:
  - The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is a global organization dedicated to promoting gay rights composed of over 1,100 member organizations covering countless individuals in 125 countries. It is recognized by the United Nations. [.GAY]
  - The International Hotel & Restaurant Association (IH&RA) is an umbrella trade organization that is composed of national hotel and trade organizations for the hotel and restaurant industries in over 100 countries. It is recognized by the United Nations. [.HOTEL]
  - The World Broadcasting Unions (WBU) is an umbrella organization that is composed of eight regional broadcasting organizations and is dedicated to coordinating international broadcasting. [.RADIO]

# EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (I)

- The EIU would have granted Dotgay Community Priority Status had it applied the same standard to .GAY that it applied to other Community Applications with equivalent facts:
  - .OSAKA received the maximum score for nexus despite the fact that the community was identified not only as those who are within the OSAKA geographical area, but those “who self-identify as having a tie to OSAKA, or the culture of OSAKA.” In the case of .GAY, the EIU applied a new and heightened standard for nexus in requiring the name of the community apply to each specific individual or sub-group to that may self-identify and use the applied-for string. It is irrelevant to the analysis that OSAKA is a geographic region.
  - .HOTEL was found to “closely describe the community, without overreaching substantially” despite the fact that the hotel community included entities that “may not be automatically associated with the gTLD,” such as marketing associations. If the same standard had been applied to .GAY, the outcome would have been different. The BGC cannot accept the EIU's conclusion that “more than a small part” of the community would not be automatically associated with .GAY without further due diligence. It is clear that the EIU did not ask the right questions and made no efforts to quantify the part of the community that supposedly is not described as gay.

# EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (II)

- .RADIO was found to “closely describe[s] the community, without overreaching substantially beyond the community” despite the EIU acknowledging that “the community, as defined in the application, also includes some entities that are only tangentially related to radio, such as companies providing specific services or products to radio broadcasting organizations.” The EIU further accepted that these companies “would not likely be associated with the word RADIO. However, these entities are considered to comprise only a small part of the community and . . . public will generally associate the string with the community as defined by the applicant.” If the EIU had asked whether the public generally associated the string with the community as defined by the applicant, .GAY would have been as successful as .RADIO.

# EIU is Bound to Act Fairly and Openly

- **Bylaws Art. I, § 2(8)**
  - “Making decisions by **applying documented policies [i.e. the AGB] neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. III, § 1**
  - “ICANN and its constituent bodies shall operate to the **maximum extent feasible** in an **open and transparent manner** and **consistent with procedures designed to ensure fairness.**”
- **CPE Guidelines, p. 22**
  - “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.”
  - *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

# EIU Acted Unfairly and Opaquely (I)

- The EIU **ignored the ICC Expert Determination** that found the name of the string .GAY matches Dotgay's definition of the gay community.
- The EIU **did not disclose any due diligence**, including any research, it may have conducted when evaluating the Application **nor did ICANN provide documents from the EIU in response to Dotgay's DIDP Requests.**
- The EIU presented no support for and made no quantification effort to justify its finding that the alleged overreach extends to “more than a small part” of the identified community.

# EIU Acted Unfairly And Opaquely (II)

- The EIU **asked only one clarifying question** unrelated to Nexus or Community Support/Opposition Criteria and **thus denied Dotgay the opportunity** to address EIU misunderstandings and mistakes.
- The EIU involved the same personnel in the Second CPE as in the First CPE, raising serious doubts as to who evaluated the application and giving rise to a potential **conflict of interest**.
- ICANN's refusal to disclose the names of the evaluators based on a confidentiality provision is not consistent with **ICANN's and the EIU's transparency obligations**.

# The Duties of the Board Governance Committee

# The Bylaws Demand the BGC to Ensure Correct Application of the AGB and Correct Finding of Material Facts

- **Bylaws, Art. IV, §2(1)**

“Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have been adversely affected by: (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.”

# The Bylaws Demand the AGB to Independently Assess the CPE Report and Make a Recommendation to the Board

- **Bylaws, Art. IV. §2(3)**

“The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to: (a) evaluate requests for review or reconsideration; (b) summarily dismiss insufficient requests; (c) evaluate requests for urgent consideration; (d) conduct whatever factual investigation is deemed appropriate; (e) request additional written submissions from the affected party, or from other parties; (f) make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and (g) make a recommendation to the Board of Directors on the merits of the request, as necessary.”

# The Bylaws Demand that the BGC Conduct its Review with Care and Independent Judgment

- Duty to evaluate the due diligence performed by the EIU and independently conduct due diligence as appropriate.
- **Bylaws Art. I, § 2(8)**

“Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. IV, § 3(4)(b)**

“did the Board exercise **due diligence and care** in having a reasonable amount of facts in front of them?”
- **Bylaws, Art. IV, § 3(4)(c)**

“did the Board members exercise **independent judgment** in taking the decision... ?”

# IRP Panel Confirmed the BGC's Duty to Review Underlying Facts and Ensure Correct Application of ICANN policies

- *Despegar* IRP Panel, ¶ 69

“The Panel agrees that **if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied.** It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. **The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.**”

# The BGC Must Ensure the Correct Application of the AGB and Correct Finding of Material Facts (I)

- Duty to **correct the EIU's misapplication** of the AGB in requiring the name of the community to apply to each community member in order for nexus to be established.
- Duty to ensure that the EIU determined nexus in **the precise manner** set out in the AGB and by **applying the standard set out in the AGB**.
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from an organization with “reciprocal recognition on the part of the community members of the organization’s authority to represent them” beyond membership in the organization.
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from a “single [] organization recognized by all of the defined community’s members as the representative of the defined community in its entirety.”

# The BGC Must Ensure Correct Application of the AGB and Correct Finding of Material Facts (II)

- Duty to **independently assess** the Determination of the ICC Expert, which found that the string .GAY matches Dotgay's definition of the gay community.
- Duty to **independently assess** whether a local gay community is an organization of "non-negligible size," particularly when the organization is a member of a global organization that supported the application, and to assess whether its opposition raises serious conflict of interest issues.

# The BGC Has the Duty to Ensure Non-Discrimination

- The BGC must ensure **non-discriminatory treatment** by applying the same standard for community support applied by other CPE Panels (e.g., .OSAKA, .HOTEL, .RADIO) for Dotgay.
- **Bylaws, Art. II, § 3**

“ICANN shall not apply its standards, policies, procedures, or practices **inequitably or single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.”
- ***Despegar* IRP Panel, ¶¶ 146-147**

“**ICANN itself has no quality review or control process** ....The Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations .... **[T]here needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.**”

# The BGC Must Ensure Procedural Fairness

- Duty to **ensure fairness in the CPE process** in light of the findings of the ICC Independent Expert that the string .GAY matches Dotgay’s definition of the gay community.
- ***ILGA v. Afilias* Expert Determination, ¶ 13:**

“ILGA's standing has not been doubted by Afilias and is not to be doubted. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), i.e. with a group that is publicly recognized as a community at a local **and/or** global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). **The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior** and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence.”

# ICANN Has a Duty to Foster Diversity and Safety of the Internet Community

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate **for the benefit of the Internet community as a whole . . . .**”

- **Bylaws Art. III, § 1**

“Seeking and supporting broad, informed participation reflecting the ***functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.***”

# The Denial of a .GAY Community gTLD will Undermine Diversity and Public Interest

- ICANN has a **positive obligation to foster diversity** on the Internet. The Community gTLD program is an attempt to fulfil that obligation.
- This includes ensuring vulnerable and deserving communities are empowered and protected in the public interest.
- Dotgay is the **only applicant** for the **.GAY gTLD** with **Public Interest Commitments**, including:
  - Pledging to provide a minimum of **67% profits** from domain name registrations to a separate foundation to support gay community initiatives.
  - Appropriate **Authentication Policies** to ensure community-appropriate material.
  - Reserving key domain names as a community resource and support websites: **Rights.gay; HIV.gay; Safe.gay; Suicide.gay; Health.gay; Ally.gay; Transgender.gay, Lesbian.gay; Queer.gay; Pride.Gay.**

# The Bylaws and Articles Demand That the BGC Ensure Transparency

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate for the benefit of the Internet community . . . **through open and transparent processes . . . .**”

- **Bylaws Art. III, § 1**

“ICANN and its constituent bodies shall operate to the **maximum extent feasible** in an **open and transparent manner** and **consistent with procedures designed to ensure fairness.**”

# IRP Panel and ICANN Board Confirmed Transparency Duty

- *Despegar* IRP Panel, ¶ 145

**“The Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and objects to be achieved by ICANN, transparency and administrative due process should be applicable.”**

- **Board Resolution dated 19 March 2016**

**“Board accepts the findings of the Panel’s Final Declaration . . . The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes . . . .”**

# The BGC Must Ensure Transparency

- EIU and ICANN staff **have not disclosed** the underlying materials from the EIU analysis.
- The EIU withheld documents from both the BGC and Dotgay, preventing Dotgay from knowing how its Application was treated and the BGC from independently reviewing whether the principles of fairness and non-discrimination were satisfied.

# Exhibit 14

# DotMusic Reconsideration Request (“RR”)

## 1. Requester Information

**Name:** DotMusic Limited (“DotMusic”)<sup>1</sup>

**Address:** Contact Information Redacted

**Email:** Constantine Roussos, Contact Information Redacted

**Counsel:** Jason Schaeffer, Contact Information Redacted

**Name:** International Federation of Musicians<sup>2</sup> (“FIM”)

**Email:** Benoît Machuel, Contact Information Redacted

**Name:** International Federation of Arts Councils and Culture Agencies<sup>3</sup> (“IFACCA”)

**Email:** Sarah Gardner, Contact Information Redacted

**Name:** Worldwide Independent Network<sup>4</sup> (“WIN”)

**Email:** Alison Wenham, Contact Information Redacted

**Name:** Merlin Network<sup>5</sup> (“Merlin”)

**Email:** Charles Caldas, Contact Information Redacted

**Name:** Independent Music Companies Association<sup>6</sup> (“IMPALA”)

**Email:** Helen Smith, Contact Information Redacted

**Name:** American Association of Independent Music<sup>7</sup> (“A2IM”)

**Email:** Dr. Richard James Burgess, Contact Information Redacted

**Name:** Association of Independent Music<sup>8</sup> (“AIM”)

**Email:** Charlie Phillips, Contact Information Redacted

**Name:** Content Creators Coalition<sup>9</sup> (“C3”)

**Email:** Jeffrey Boxer, Contact Information Redacted

**Name:** Nashville Songwriters Association International<sup>10</sup> (“NSAI”)

**Email:** Barton Herbison, Contact Information Redacted

**Name:** ReverbNation<sup>11</sup>

**Email:** Jean Michel, Contact Information Redacted

## 2. Request for Reconsideration of: X Board action/inaction

<sup>1</sup> <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

<sup>2</sup> <http://fim-musicians.org/about-fim/history>

<sup>3</sup> [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members) and [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members)

<sup>4</sup> <http://winformusic.org/win-members>

<sup>5</sup> <http://merlinnetwork.org/what-we-do>

<sup>6</sup> <http://impalamusic.org/node/16>

<sup>7</sup> <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

<sup>8</sup> <http://musicindie.com/about/aimmembers>

<sup>9</sup> <http://c3action.org>

<sup>10</sup> <https://nashvillesongwriters.com/about-nsai>

<sup>11</sup> <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

**3. Description of specific action you are seeking to have reconsidered.**

The above-referenced requesters request to have the .MUSIC Community Priority Evaluation (“CPE”) Report for Application ID. 1-1115-14110 (“Report”)<sup>12</sup> corrected and properly graded to accurately reflect the true nature of DotMusic’s *community establishment, community definition, support* and *nexus* based on established Applicant Guidebook (“AGB”) policies and processes.<sup>13</sup>

The Report provided a total score of ten (10) points, resulting in a failing grade for the Application’s request for Community Status. The result unfairly denied Music Community recognition and necessary intellectual property protection. A review of the Report evidences multiple prejudicial errors that ICANN, both directly and as extension of the Economist Intelligence Unit (“EIU”) Panel, either incorrectly applied ICANN-approved processes and policies, or completely failed to apply ICANN established processes and policies. Such material errors resulted in the incorrect evaluation of the Application, an improper scoring of points when compared to over forty-three (43) independent expert testimony letters (*See* Expert Chart, Exhibit A40)<sup>14</sup> and inconsistent, disparate treatment when compared to prevailing CPE Applicants (*See* CPE Comparison Chart, Exhibit A41).<sup>15</sup> Each error, when corrected and overturned, would result to a total Application score of sixteen (16) points. Despite a materially improper evaluation by the EIU, and the disclaimer contained in the Report that “[...] *these Community Priority Evaluation results do not necessarily determine the final result of the application,*” ICANN accepted the Report’s inaccurate results and changed the “*Contention Resolution Result*” to “*Into Contention.*”<sup>16</sup> Accordingly, DotMusic and other affected global organizations identified above (collectively referenced as the “Requesters”) seek to overturn the “*Contention Resolution Result*” to “*Prevailed Contention.*”

**4. Date of action/inaction:** February 10th, 2016 PST

**5. On what date did you became aware of action or that action would not be taken?**

February 10th, 2016 PST

**6. Describe how you believe you are materially affected by the action or inaction:**

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<sup>12</sup> DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, Ex.A1

<sup>13</sup> *See* AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, §4.2.3

<sup>14</sup> *See* Independent Expert Testimony Letters Scoring Chart, Ex.A40

<sup>15</sup> *See* linear CPE Comparison Chart, Ex.A41

<sup>16</sup> DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; *See* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>, Ex. A2

DotMusic is adversely affected by ICANN's actions and inactions. If DotMusic is not awarded .MUSIC, DotMusic, will suffer material brand dilution<sup>17</sup> and be subject to expensive auctions which (as agreed upon by the EU<sup>18</sup>) were designed to favor deep pocketed Applicants - such as Amazon and Google (who also have a prior history with the piracy of music: Google as a provider of ad networks to pirate sites and Amazon as a leading advertiser on pirate sites).<sup>19</sup> As set forth in the Application, DotMusic has an all-inclusive tent that is united by its core principles consistent with its articulated community-based purpose:

- Creating a trusted, safe online haven for music consumption and licensing
- Establishing a safe home on the Internet for Music Community (“Community”) members regardless of locale or size
- Protecting intellectual property & fighting piracy
- Supporting Musicians’ welfare, rights & fair compensation
- Promoting music and the arts, cultural diversity & music education
- Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both reaching commercial and non-commercial stakeholders.<sup>20</sup>

Per DotMusic’s Application and Public Interest Commitments (“PIC”),<sup>21</sup> .MUSIC will be launched as a safe haven for legal music consumption that ensures that .MUSIC domains are trusted and authenticated to benefit the interests of the Internet community and the global music community. DotMusic, its current and future music members and supporters will be adversely affected if the Report stands and DotMusic is awarded to any of the competing non-community applicants<sup>22</sup> (which will also be a disservice to the Internet user community in general) because competing applicants either: (i) lack the music community multi-stakeholder governance model to represent the community’s interests; and/or (ii) lack the extensive music-tailored safeguard policies that DotMusic has.<sup>23</sup>

Allowing the Report to stand would turn .MUSIC into an unsafe, unreliable and untrusted string governed by non-community interests that will create material harm to the legitimate interests

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<sup>17</sup> DotMusic holds the European community trademarks for “*DotMusic*” and “*MUSIC*.” Ex.A35, A37 and A38

<sup>18</sup> <http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/msg00016.html>

<sup>19</sup> <http://billboard.com/biz/articles/news/digital-and-mobile/6106454/online-pirates-thrive-on-legitimate-ad-dollars>, <http://venturebeat.com/2014/02/18/the-average-piracy-site-makes-4-4m-each-year-on-ads-from-amazon-lego-etc>

<sup>20</sup> Application, 18A. Also see 20C

<sup>21</sup> PIC, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, Ex.A3

<sup>22</sup> All of the competing non-community applicants in DotMusic’s contention set are existing gTLD portfolio registries (Google, Amazon, Donuts/Rightside, Radix, Minds & Machines and Famous Four Media).

<sup>23</sup> See Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27; Also see .MUSIC Applicant Comparison Chart, <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>, Appendix C, pp.43-45, Ex.A32

of the Music Community by increasing intellectual property infringement and other types of malicious abuse. Music is a sensitive string driven by content and copyright protection that must be operated responsibly within its regulated sector as outlined in the Application. The Music Community is one of the Internet's most vulnerable communities given the adverse effects of mass piracy, intellectual property infringement and malicious abuse on the web and the inefficiencies of the outdated 1998 DMCA Law to provide adequate music copyright protection online.<sup>24</sup> By not awarding .MUSIC to DotMusic, the Music Community will lose the only opportunity to offer assurance to Internet users that all .MUSIC sites are indeed trusted, safe and licensed, which will also help search engines provide a better user experience by replacing unsafe, insecure pirate sites (that dominate music-themed web search results today) with relevant and higher quality .MUSIC sites.<sup>25</sup>

By virtue of ICANN's actions and inactions, the public interest is harmed and the multi-stakeholder music community will not be able to ensure trust and reliability in the DNS for Internet users because the music community will not be able to govern the last remaining music-themed gTLD,<sup>26</sup> in violation of ICANN's "*key responsibilities is introducing and promoting competition*"<sup>27</sup> in the registration of domain names, while ensuring the security and stability of the domain name system (DNS)."<sup>28</sup> Further, ICANN disregards its own 2007 Recommendations and Principles that stated "*where an applicant lays any claim that the TLD is intended to support a particular community...that claim will be taken on trust*."<sup>29</sup>

Without a reserved, safe and reliable zone on the Internet dedicated to the Music Community, the community and the public will be harmed because the music community will be unable to promote a trusted and secure sector through enhanced safeguards. The Music Community (the

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<sup>24</sup> <https://www.google.com/transparencyreport/removals/copyright/?hl=en> e.g. One single DotMusic supporter, BPI, filed over 2 million URL takedown requests to Google for the week of February 15, 2016, *see*

<https://google.com/transparencyreport/removals/copyright/reporters/1847/BPI-British-Recorded-Music-Industry-Ltd>  
<sup>25</sup> *See* <http://theverge.com/2015/11/23/9781752/google-takedown-requests-2015> and <http://billboard.com/biz/articles/news/1083146/business-matters-legal-mp3-sites-are-still-buried-by-google-search-results>

<sup>26</sup> No community applicant has been awarded a music-themed string in the New gTLD Program.

<sup>27</sup> ICANN has awarded Amazon the .SONG and .TUNES music-themed strings. Amazon is also a competing applicant for .MUSIC. Allowing Amazon to possibly be awarded the three most relevant music-themed strings violates ICANN's Bylaws with respect to "promoting competition."

<sup>28</sup> <https://newgtlds.icann.org/en/about/program>

<sup>29</sup> <http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6, Ex.A4; Also *see* <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>. Ex.A5

defined “*logical alliance*” with members representing over 95% of music consumed globally) has been negatively affected by the Report.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

See Answer to Question 6 above.

**8. Detail of Board Action/Inaction – Required Information**

In this section, DotMusic presents the evidence required for ICANN to approve the request in this RR: **(8.1)** The relationship and contractual obligations between ICANN and the Economist with respect to the CPE process; **(8.2)** the AGB process and relevance of ICANN-approved GAC Category 1 and 2 Advice; **(8.3)** Comparisons to other CPE-prevailing community applications, demonstrating quality control deficiencies, unpredictability, inconsistencies, process failures, fairness issues and disparate treatment; and **(8.4)** Facts and procedural violations demonstrating that ICANN did not follow established processes in the evaluation of the Application in its grading as set forth in the .MUSIC Report, including material errors and omissions in determining the critical areas of *community establishment, nexus and support*. As a result of the material process, procedural errors and omissions set forth below, the Application was prevented from scoring the full 16 points and improperly did not receive a passing CPE grade.

**(8.1) The relationship and contractual obligations between ICANN and the EIU.**

Ultimately, ICANN makes the final decision on CPE results. The ICANN Board is responsible for the acts of its Staff and the EIU with respect to the CPE process because it is within ICANN’s sole discretion whether an applicant passes or fails. Pursuant to its contract with ICANN, the EIU provides “*recommended scores to ICANN for final review and approval*” and ICANN is “*free in its complete discretion to decide whether to follow [the EIU]’s determination and to issue a decision on that basis or not.*”<sup>30</sup> ICANN and the EIU specifically acknowledge that: “*each decision and all associated materials must be issued by ICANN in its own name only;*” that CPE results are “*ICANN’s final decision;*” and that “*ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue.*”<sup>31</sup> In a declaration, the EIU confirmed that:

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<sup>30</sup> <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b) (ii) (12 Mar. 2012) [Ex. C-40]), Ex.A7

<sup>31</sup> *Id.*, § 10(b) (iii)-(iv), (vii)

[t]he EIU is a privately held company working as a vendor to ICANN. We are not a gTLD decision-maker but simply a consultant to ICANN.<sup>32</sup>

Moreover, ICANN is the gatekeeper of all information exchanged between applicants and the EIU, including alerting the EIU of relevant GAC Advice pertaining to the existence of a “*cohesive*” regulated sector for the string evaluated to ensure scoring predictability and scoring consistency. ICANN and the EIU “*agreed that [the] EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.*”<sup>33</sup> Furthermore, the Report includes a disclaimer representing that ICANN is ultimately responsible for determining whether or not to implement the EIU evaluators’ conclusions.<sup>34</sup> While the Board may not be responsible for its Staff’s day-to-day operations, the Board is responsible for final CPE determinations, process, evaluations, and acceptance or rejection of the .MUSIC Report.

#### **(8.2) The AGB process and the relevance of ICANN-approved GAC Category 1 and 2 Advice.**

Per the AGB, Board decisions on certain strings are not merely a “box-ticking” administrative exercise by staff or consultants. The Board has accepted GAC Advice on many occasions to determine the fate of certain strings (e.g. .AMAZON and .AFRICA); and even superseding the determinations of Panels if deemed necessary by ICANN to serve the public interest (e.g. the Community Objections for .ISLAM and .HALAL). In relation to .MUSIC, the ICANN Board accepted GAC Advice with respect to Category 1 and Category 2 Safeguards,<sup>35</sup> but the Board took no action pertaining to GAC’s Advice to give “*preferential treatment for all applications which have demonstrable community support*” such as DotMusic’s. At the Singapore ICANN meeting in

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<sup>32</sup> EIU Declaration <https://icann.org/en/system/files/files/eiu-declaration-13apr15-en.pdf>, Pg.2, Ex.A8

<sup>33</sup> New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b)(ii) (12 Mar. 2012) [<https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-40].), § 10(b)(iii)-(iv), (vii), Ex.A7

<sup>34</sup> See Report, p.9. Each CPE report states that “these Community Priority Evaluation results do not necessarily determine the final result of the application. *In limited cases the results might be subject to change.*” New gTLD Program, Report; see also New gTLD Program Consulting Agreement, p. 2 (26 July 2011) (“ICANN retains the right to inspect, to stop work, to prescribe alterations, and generally supervise the Contractor’s work to insure its conformity with the . . . Statement of Work”) [<https://www.icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-41], Ex.A9

<sup>35</sup> DotMusic’s Application was a community application with music-tailored enhanced safeguards that extended beyond the minimum GAC Advice requirements. To serve the public interest, the Internet community and the entire global music community, DotMusic also filed a PIC to reflect its accountability and to clarify its Application’s specifications, which also pertained to its *community definition, community establishment, nexus, registration policies* and *support*. See PIC

March 2014, GAC reiterated that advice to ICANN “to protect the public interest and improve outcomes for communities”<sup>36</sup> and to take “better account of community views and improving outcomes for communities”<sup>37</sup> (i.e. giving community applicants the benefit of the doubt). Throughout the process, ICANN has allowed non-community applicants to materially alter their applications to follow GAC Advice to either remain in contention or be awarded sensitive strings (such as .GMBH<sup>38</sup>). Because such change requests for non-community applicants were allowed and accepted (in response to GAC Advice), it is equally and reasonably fair to allow DotMusic to be awarded .MUSIC based on trust, GAC’s Advice favoring community applicants with demonstrable support and ICANN’s own acceptance that the music string has cohesion under an ICANN-approved regulated sector. It is also reasonable to award DotMusic this sensitive string, because the Application responsibly and conscientiously already had the requisite music-tailored enhanced safeguards that served a higher purpose when it filed its Application in 2012 (notably, DotMusic’s safeguards exceed GAC Category 1 Safeguard Advice). Further, it should have been clear to ICANN and the EIU that the Application exceeds the CPE criteria and serves the public interest, Internet community and music community, as outlined in the Application and confirmed in more detail throughout its PIC. For these reasons alone the .MUSIC Report should be overturned and a passing grade awarded to Applicant.

**(8.3) Comparisons to other CPE-prevailing community applications, demonstrate inconsistencies, unpredictability, process failures, fairness issues and disparate treatment.**

ICANN did not follow established procedures in the *community establishment, nexus* and *support* evaluation process, which resulted in a failing CPE grade. For example, the criterion concerning “*organization*” (that relates to having support from a “*recognized*” organization), the Report specifically failed to consider many globally-recognized organizations that are *mainly* dedicated to the music community addressed (“*logical alliance of communities that relate to music*”).

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<sup>36</sup> <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2> Section 3, 1a, p.4, ExA10

<sup>37</sup> <http://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf>, Register #18, Ex.A11

<sup>38</sup> Donuts was allowed to make material changes to their application to proceed with the delegation of .GMBH based on GAC advice and Donuts’ Public Interest Commitments (PIC), *See* <https://www.icann.org/en/system/files/correspondence/willett-to-metzger-28jan16-en.pdf>. ICANN rejected a similar change request by the .CPA community applicants. ICANN “deferred consideration of AICPA’s December 2014 Change Request, including changes made to reflect the principles of the Beijing Communiqué,” *See* <https://www.icann.org/en/system/files/files/reconsideration-request-15-17-aicpa-redacted-19sep15-en.pdf>, p.4

The FIM, an “*international federation of national communities of similar nature*”<sup>39</sup> representing the “*voice of musicians worldwide*” (musicians represent the overwhelming majority of the Music Community). This is contrary to the unsubstantiated, indefensible and undocumented opinion of ICANN that the FIM is not a “*recognized community institution(s)/member organization(s)*.”<sup>40</sup>

The IFPI, another globally recognized supporting organization, also exceeds the same criteria under *community establishment* and *support*. The IFPI is only associated with music and it is the globally-recognized organization that administers the International Standard Recording Code (ISRC), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community. The code was developed with the ISO technical committee 46, subcommittee 9 (TC 46/SC 9), which codified the standard as ISO 3901 in 1986.<sup>41</sup> The IFPI’s ISRC is “intentionally standardised under ISO,” globally structured<sup>42</sup> and “well established, widely accepted internationally”<sup>43</sup> Furthermore, it relates to the addressed music community defined by DotMusic, an “*organized and delineated logical alliance of communities that relate to music*.” The IFPI does not restrict ISRC codes to solely its members. In fact, ISRC eligibility is available and dedicated to the entire global music community, irrespective of whether they are members of organizations or not, are professionals or amateurs, are independent or non-independent, commercial or non-commercial:

Owners of recordings may for example be independent artists, record labels or recorded music groups. ISRC is available to all owners of recordings regardless of their membership<sup>44</sup> (or not) with any industry association.<sup>45</sup>

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<sup>39</sup> CPE Guidelines: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of...a logical alliance of communities,” <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.4, Ex.A12-1; Also see AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, 4-12, Ex.A13 and “Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,” Notes, 20A, A-14, Ex.A13

<sup>40</sup> The FIM is a globally-recognized music community organization with documented official relations with the United Nations Economic and Social Council (“ECOSOC”) (Ros C); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM is also consulted by the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”).

<sup>41</sup> [http://www.iso.org/iso/home/store/catalogue\\_tc/catalogue\\_detail.htm?csnumber=23401](http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401)

<sup>42</sup> <http://isrc.ifpi.org/en/isrc-standard/structure>

<sup>43</sup> <http://isrc.ifpi.org/en/why-use/benefits>

<sup>44</sup> DotMusic’s community application defines the community as “a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music: the art of combining sounds rhythmically, melodically or harmonically.” The IFPI’s ISRC codes do not restrict eligibility to members of select music organizations but are available to the entire music community as defined.

In fact, without the IFPI's ISRC codes there would not be legal music consumption because there would be no way to appropriately and efficiently attribute music to music community members.<sup>46</sup>

In the case of .HOTEL's CPE Report, the prevailing applicant received a full grade for "Organization" **because** the Panel found "*recognized community institution(s)/member organization(s)*,"<sup>47</sup> the International Hotel & Restaurant Association (IH&RA) and HOTREC:

the community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)...<sup>48</sup>

...The applicant possesses documented support from the recognized community institution(s)/member organization(s).<sup>49</sup>

In awarding .HOTEL the full two (2) points for *support*, the Panel concluded that the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines):

[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.<sup>50</sup>

The .HOTEL community applicant passed with full scores for *community establishment* and *support* where several entities were found to be *mainly dedicated to the community* and *recognized*, despite those organizations also representing other interests or sectors such as "restaurants" (or some being geographically focused like the AH&LA and the CHA). Conversely, the .MUSIC Report failed to provide full scoring to DotMusic stating that "[t]here is no single such organization recognized by all of the defined community's members as representative of the defined community in its entirety."<sup>51</sup> This finding is improper because there is no policy or rule that requires an organization to represent a community *in its entirety* in order to score the full two points under *support*. While there is an option requiring the "*authority to represent the community*," the Guidelines provided other alternative options available to score the full two points under "*support*." The CPE Guidelines define

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<sup>45</sup> <http://isrc.ifpi.org/en/using-isrc>

<sup>46</sup> Without the IFPI's ISRC codes, YouTube Music (which is consumed by over 1 billion YouTube users) would be unable to effectively credit the corresponding music copyright owner related to each music video, *see* <https://support.google.com/youtube/answer/6007080> and; For the same reason, nearly all digital music retailers rely on and require ISRC codes, including Apple iTunes<sup>46</sup> (the world's largest music retailer with over 43 million music tracks<sup>46</sup>, *see* <http://apple.com/itunes/working-itunes/sell-content/music-faq.html> and <http://apple.com/itunes/music> and <http://www.digitalmusicnews.com/2014/04/24/itunes800m>

<sup>47</sup> .HOTEL CPE, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6, Ex.A14

<sup>48</sup> Ibid, *community establishment*, p.2

<sup>49</sup> Ibid, *support*, p.6

<sup>50</sup> Ibid

<sup>51</sup> Report, p.3 and p.8

“recognized” as “*institution(s)/organization(s) that are clearly recognized by the community members as representative of that community*” i.e. not in their “*entirety*” but merely “*representative*.” According to the Oxford dictionary, the primary definition of “*recognize*” is to “identify.”<sup>52</sup> According to the Oxford dictionary, the definition of the adjective “*representative*” is “typical of a class, group, or body of opinion” or “containing typical examples of many or all types” or “to act and speak on behalf of a wider group.”<sup>53</sup>

Even if an “*entirety*” criterion (not specifically mentioned in the AGB or CPE Guidelines) is assessed, both the International Federation of Arts Councils and Culture Agencies (“IFACCA”) (the only international federation representing government culture agencies and arts councils globally covering all of the Application’s music categories and subsets in their entirety<sup>54</sup>) and ReverbNation (the world’s largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations in over 100 countries and across all of the Application’s music categories and subsets in their entirety<sup>55</sup>) qualify because they represent all the music categories and music subsets delineated in their entirety without discrimination globally. Based on the foregoing, it is clear that both co-requesters IFACCA and ReverbNation are “typical of a group” that is representative of the “music” community defined in its entirety. Therefore, it is clear that the Application had demonstrable support from multiple globally-recognized organizations mainly dedicated to the Music Community. ICANN’s and the EIU’s failure to properly evaluate the application and find support for the community is apparent when the .MUSIC Report is compared to other prevailing CPE Determinations. Thus, the rationale ICANN used to find that the International Hotel & Restaurant Association (IH&RA) is representative of “hotel” community should apply to IFACCA and ReverbNation in the case of Music Community. That is, if the IH&RA is found to be “recognized” and “representative” entity of the “hotel” community, then the IFACCA and ReverbNation are “representative” [of the music community] too because they share similar characteristics as the IH&RA and other entities found to have satisfy CPE in other determinations. Per the Guidelines:

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<sup>52</sup> [http://www.oxforddictionaries.com/us/definition/american\\_english/recognize](http://www.oxforddictionaries.com/us/definition/american_english/recognize)

<sup>53</sup> [http://www.oxforddictionaries.com/us/definition/american\\_english/representative](http://www.oxforddictionaries.com/us/definition/american_english/representative)

<sup>54</sup> [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members) and [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members)

<sup>55</sup> <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

*Consistency of approach in scoring Applications will be of particular importance...<sup>56</sup> and “[t]he panel must be able to exercise **consistent** and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible...<sup>57</sup>*

According to the CPE Guidelines, the contextual interpretation of community particularities requires in-depth knowledge and expertise of the community.<sup>58</sup> All the Music Community categories and Music Community subsets that DotMusic delineated as members are essential for the global music sector to operate. Further, the “*logical alliance of communities that related to music*” (or “*alliance of groups*”) functions with cohesion as a whole in a regulated sector to protect music under agreed-upon structures governed by copyright law and international treaties. Without this cohesion, there would be no regulated music sector, and more importantly, music would not exist as we know it.

There are other clear examples of error relating to: consistency, fairness, predictability, equal treatment and procedural violations pertaining to DotMusic’s CPE process in comparison to community applicants that have prevailed CPE for whom ICANN applied the right threshold to pass. For example, ICANN’s scoring of the prevailing .RADIO applicant, in which ICANN assessed the “*majority*” support criterion (thereby granting .RADIO full points), while in contrast for DotMusic’s Application ICANN did not assess the “*majority*” criterion as outlined earlier in this RR:

However, the [.RADIO] applicant possesses documented support from institutions/organizations representing a majority of the community addressed.<sup>59</sup>

The EIU also determined that all .RADIO, .HOTEL, .OSAKA, .ECO, .GAY and .SPA community applicants had “*cohesion*” for *community establishment*:

(i) The EIU established that the .RADIO had *cohesion* solely on the basis of being “*participants in this...[radio] industry*.”<sup>60</sup>

(ii) The EIU awarded .HOTEL full points for *community establishment* for a “*cohesive*” community definition that is comprised of “*categories [that] are a logical alliance of members*.”<sup>61</sup>

Even though DotMusic similarly presents music community based on “*logical alliance*” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper;

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<sup>56</sup> CPE Guidelines, p.22

<sup>57</sup> Ibid

<sup>58</sup> The CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined...community plays an important role,” CPE Guidelines, p.22

<sup>59</sup> .RADIO CPE, <https://icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7, Ex.A15-1

<sup>60</sup> Ibid, p.2

<sup>61</sup> .HOTEL CPE, p.2, Ex.A14

(iii) The EIU awarded full points to .OSAKA determining there was “*cohesion*” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;<sup>62</sup> Similarly, DotMusic’s “*logical alliance*” is “*related to music*” (i.e. has a tie) but its Application was penalized;

(iv) The EIU awarded .ECO full points, stating that “*cohesion and awareness is founded in their demonstrable involvement in environmental activities*” which “*may vary among member categories*.”<sup>63</sup> Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities;

(v) The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under *community establishment* establishing that there is stronger *cohesion* than DotMusic based on “*an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies*”<sup>64</sup> (emphasis added). In contradiction, the EIU determined DotMusic’s “*logical alliance*” operating under a regulated sector that is united by copyright lacked any “*cohesion*” of belonging to a community; and

(vi) The EIU awarded .SPA the full points under *community establishment* and *nexus*, while DotMusic scored zero points and three respectively. A perfunctory comparison between DotMusic’s application and the prevailing .SPA application reveals substantial bias and contradictions. Similarly, based on ICANN’s rationale for the .SPA CPE, it is evident that the .MUSIC application should have consistently and fairly received maximum points as well. According to the .SPA application:

The spa community primarily includes:

- Spa operators, professionals and practitioners
- Spa associations and their members around the world
- Spa products and services manufacturers and distributors

...The secondary community generally also includes holistic and personal wellness centers and organizations. While these secondary community organizations do not relate directly to the operation of spas, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.<sup>65</sup>

Yet, the .MUSIC Report penalized the Application under *community establishment* to the fullest extent possible (grading zero points) for lacking “*cohesion*” while the .SPA community applicant

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<sup>62</sup> .OSAKA CPE, p.2, Ex.A18

<sup>63</sup> .ECO CPE, p.2, Ex.A17

<sup>64</sup> .GAY CPE, p.2, Ex.A15-2

<sup>65</sup> .SPA Community Application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/123?t:ac=123>, 20A, Ex.A16-2

was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for *community establishment*. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their *inclusion* in industry organizations and *participation* in their events:

Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.<sup>66</sup>

In contrast, ICANN rejected DotMusic’s membership music categories and music subsets as not having the requisite awareness even though, similar to the spa community, all Music Community members also “*participate*” in music-related events and are included in music groups or music subsets as evidenced by DotMusic’s *majority* music (*logical alliance*) community support of organizations with members representing the overwhelming *majority* of music consumed globally.

Moreover, despite a general definition of the *spa community* that included entities with a non-essential, tangential relationship with the spa community and a *secondary community* that did *not relate directly* to the string, the .SPA applicant was also awarded a full score under *nexus*. In contrast DotMusic’s community *name*, the “*Music Community*,” which matches string, lost 1 point for *nexus*.

As illustrated, when compared to other CPE determinations (*See Exhibit A41*), had policies been followed and a consistent evaluation been applied, then the Application should have received maximum points that would have resulted in a passing CPE grade, a conclusion that is also supported by forty-three (43) separate independent experts (*See Exhibit A40*).

**(8.4) Facts and procedural violations show that ICANN did not follow its own processes in the determination of the .MUSIC Report, including critical areas relating to *community establishment, nexus and support*. ICANN is the party responsible for ensuring quality control and a predictable, consistent and fair CPE process.**

According to ICANN, “all applicants for a new gTLD registry should be evaluated against transparent and predictable criteria.”<sup>67</sup> There were multiple prejudicial errors and improper procedural issues with ICANN not following the AGB guidelines and requirements, including:

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<sup>66</sup> .SPA CPE Report, Community Establishment, p.2, Ex.A16-1

<sup>67</sup> According to the Oxford dictionary, the word “fully” is defined as “completely or entirely; to the furthest extent” or “without lacking or omitting anything,” [http://www.oxforddictionaries.com/us/definition/american\\_english/fully](http://www.oxforddictionaries.com/us/definition/american_english/fully)

(i) **Policy misapplication of ICANN-accepted GAC Advice adopted by ICANN before the CPE process began is a procedural error.** Contrary to the .MUSIC CPE Report, the ICANN Board accepted GAC Category 1 Advice that music is a cohesive “regulated sector.” This means that the ICANN Board also agrees that the music community has cohesion. By accepting GAC Advice and rendering a decision that music is: (i) a “*string likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm;*” and (ii) that it is a “*string that is linked to [a] regulated sector*” that “*should operate in a way that is consistent with applicable laws,*”<sup>68</sup> there is reasonable expectation that ICANN would apply this policy acceptance in all evaluations that are processed to ensure transparency, predictability and consistency. This misapplication of a policy adopted by ICANN before the CPE process began is a procedural error. As such, the New gTLD Program procedural process for DotMusic’s evaluation was unpredictable, lacking both transparency and consistency.

(ii) **Not properly identifying the community definition required in 20A that was labeled as a defined term in the Application in reference to the AGB (“Community”):**

The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature (“**Community**”)", that relate to music: the art of combining sounds rhythmically, melodically or harmonically (Application, 20A)

According to the AGB, the Question section for 20A explicitly states:

20A. Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to **this** question.<sup>69</sup>

ICANN not only disregarded DotMusic’s definition from 20A, the Report does not mention or properly reference DotMusic’s definition. Instead ICANN construed its own general definition from 20D contravening the AGB’s instructions that “*community priority evaluation*” for DotMusic “*will be scored based on the community identified in response to **this** question*” (i.e. the definition identified in the Application answer to 20A not 20D). According to the .MUSIC Report:

[T]he applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (**Application, 20D**).

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<sup>68</sup> <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, An.5, p.8, Ex.A34

<sup>69</sup> AGB, Attachment to Module 2, Evaluation Questions and Criteria, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>, Question, 20A, A-14

In other words, ICANN scored DotMusic’s application relying on critically incorrect variables and parameters. In assessing DotMusic’s definition of the Music Community, ICANN misapplied material policy and permitted material procedural defects and inconsistencies in CPE evaluations to occur, resulting in an improper conclusion that DotMusic did not prevail CPE.

(iii) **Not properly identifying the name of the community to address nexus** that was labeled as a defined term in the Application in reference to the AGB (“**Name**”). While the *name* of the community “*Music Community*” was acknowledged by the EIU, it was not applied under its scoring for *nexus*:

The name of the community served is the “Music Community” (“**Community**”) <sup>70</sup>

*The “MUSIC” string matches the name (“Name”) of the Community and is the established name by which the Community is commonly known by others.*<sup>71</sup> (See Application 20)

According to the Report:

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The **Music Community**’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents (Application, 20A)<sup>72</sup>

As evidenced, under *nexus*, ICANN misapplied the wrong “*name*” definition by not applying the Application’s *established name* (the “*Music Community*”) inaccurately determining that the “*there is no “established name” for the applied-for string to match...for a full score on Nexus.*”<sup>73</sup> It is beyond shadow of a doubt that the established name that the Application defines and identifies, the “*Music Community*,” exactly matches the string .MUSIC.

(iv) **Not applying the alternate criterion to earn maximum points for support** that corresponds “*documented support...from institutions/organizations representing a majority of the overall community addressed.*”<sup>74</sup> CPE Guidelines provide that if an applicant lacks “documented authority to represent the community”<sup>75</sup> then the Panel should consider alternative options as follows: First, the Panel should decide whether the applicant has “documented support from the

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<sup>70</sup> Application, 20A

<sup>71</sup> Ibid

<sup>72</sup> Report, p.4

<sup>73</sup> Report, *Nexus*, p.5

<sup>74</sup> AGB, *Support*, “Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2,” 4-18

<sup>75</sup> CPE Guidelines, pp.16-18

recognized community institution(s)/member organization(s) to represent the community?”<sup>76</sup> If the applicant meets this criterion then the full two (2) points are awarded. If not, the Panel should then consider whether:

[t]here are multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?<sup>77</sup>

The Application meets this “*majority*” criterion, but this option was not applied to the .MUSIC CPE process. The Application is a global music community initiative supported by organizations with members representing over ninety-five percent (95%) of music consumed globally (an overwhelming majority),<sup>78</sup> yet the “majority” criterion was not assessed by ICANN in the grading of *Support*. If one excluded all the music related to DotMusic’s supporting organizations and their members, then music as we know it today would not exist. In fact the majority of music would not be available for consumption or enjoyment (**emphasis added**). The absurdity of the findings of the .MUSIC Report is further shown by another key supporter of DotMusic, NAMM, the trade association that represents nearly all the major music instrument and products’ manufacturers.<sup>79</sup> Without NAMM’s members’ instruments and music products, music cannot be created. Therefore, it is clear that the Application has the support of the “*majority*” of the community addressed.

In summary of (i), (ii), (iii) and (iv), the evidence supports that there is prejudicial pattern of behavior by ICANN not to follow established process and instructions. No other applicant in the New gTLD Program has provided more evidence, correspondence and research to assist ICANN with the CPE process than DotMusic has to ensure a consistent, predictable and fair evaluation in comparison to other community applicants that have prevailed. Judging from the Report’s inconsistent and contradictory rationale and ICANN’s failure to follow due process, it appears that the objective was to find ways to reject DotMusic’s Application by relying on inaccurate facts and not giving DotMusic the same benefit of the doubt given to the CPE applicants that prevailed. At ICANN’s request, DotMusic also provided detailed answers to Clarifying Questions<sup>80</sup> (“CQ Answers”), including significant credible and reputable evidence substantiating DotMusic’s

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<sup>76</sup> CPE Guidelines, pp.17-18

<sup>77</sup> Ibid

<sup>78</sup> <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at Ex.A19-1, A19-2, A19-3, and A19-4; and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>79</sup> <https://www.namm.org/about>

<sup>80</sup> See Clarifying Questions (“CQ”), Ex.A20 and Answers to Clarifying Questions (“CQ Answers”), Ex.A21

Application's position with respect to the *community definition*, *community establishment* (including "cohesion"), *nexus* and *support*. A cursory review of the CQ Answers would find support to overturn all the points deducted from the Application.

If the EIU carefully reviewed the CQ Answers then it would be clear what the *community definition* (*community establishment*) and the *name* of the community (*nexus*) were because it was explicitly identified multiple times.<sup>81</sup> As explicitly outlined in the CPE Guidelines, DotMusic's "logical alliance" community definition explicitly meets criteria: "With respect to "Delineation" and "Extension," it should be noted that a community can consist of...a logical alliance of communities." This is also substantiated by the AGB, which explicitly states that in the case of a community of an "alliance of groups" (such as DotMusic's Application), "details about the constituent parts are required."<sup>82</sup> DotMusic's community definition is a "strictly delineated and organized logical alliance of communities that relate to music" (Application, 20A) which unequivocally meets this criterion. Contradicting established procedure, the EIU improperly found that the "logical alliance" definition has no cohesion. Moreover, while DotMusic followed the AGB and CPE Guidelines and provided details on each of the delineated music categories and music subsets (i.e. the *constituent parts*) demonstrating how they form the "logical alliance" community definition, the Application was penalized to the maximum extent under the Report's *community establishment* for doing so. Further, dictionary definitions for "logical"<sup>83</sup> and "alliance"<sup>84</sup> establish that these definitions require cohesion and the *requisite awareness*.

The degree of multitude of direct and indirect evidence make it beyond reasonable doubt that overlooking the Application's *community definition* and *name* of the community identified was

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<sup>81</sup> See CQ Answers: The *community definition* of "logical alliance" is referred to and explicitly defined in seven (7) separate pages of the CQ Answers provided to the EIU at p.6, p.8, p.9, p.12, p.14, p.16 and p.17. Also see CQ Answers, *Community Establishment & Definition Rationale and Methodology*, Annex A (pp-22-43) defining the community as "a delineated and organized logical alliance of communities of similar nature related to music" at p.22, p.25, p.38. Also see Annexes' table of contents (p.20), which include *Annex D Venn Diagram for Community Definition and Nexus* that explicitly defines and identifies the *community definition* relating to *community establishment* (See Application, 20A) and the *name* of the community "music community" relating to *nexus*.

<sup>82</sup> AGB, Attachment to Module 2, Evaluation Questions and Criteria: "Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required," Notes, 20A, A-14

<sup>83</sup> Oxford Dictionaries "**logical**" definition: (i) *1. Of or according to the rules of logic or formal argument*; (ii) *1.1 Characterized by or capable of clear, sound reasoning*; (iii) *1.2 (Of an action, development, decision, etc.) natural or sensible given the circumstances*, see [http://oxforddictionaries.com/us/definition/american\\_english/logical](http://oxforddictionaries.com/us/definition/american_english/logical)

<sup>84</sup> Oxford Dictionaries "**alliance**" definition: (i) *1. A union or association formed for mutual benefit, especially between organizations*; (ii) *1.1 A relationship based on an affinity in interests, nature, or qualities*; (iii) *1.2 A state of being joined or associated*, see [http://oxforddictionaries.com/us/definition/american\\_english/alliance](http://oxforddictionaries.com/us/definition/american_english/alliance)

grossly negligent resulting in a failing grade for the Application. The omission of the Application's *community definition* and *name* from the .MUSIC Report was a gross error because it would have been impossible to ignore them given that they were explicitly mentioned and identified a significantly number of times as evidenced in:

1. The Application, Q20A;
2. The Public Interest Commitments;
3. Nearly *two-thousand correspondence letters* to ICANN and the EIU;<sup>85</sup>
4. Public comments from supporters in ICANN's microsite relating to the Application;
5. Answers to Clarifying Questions that the EIU requested (emphasis added);
6. Testimonies from over 40 independent experts submitted to ICANN and the EIU;
7. An independent Nielsen poll identifying the *community definition*;

As set forth above, ICANN and the EIU contravened the established vital CPE Guidelines and EIU Panel Process procedures.

**(v) ICANN and the EIU contravened established CPE Guidelines and EIU Panel Process procedures.**

As the Board should be aware, CPE requires:

Consistency of approach in scoring Applications will be of particular importance...<sup>86 87</sup>

The EIU will fully cooperate with ICANN's quality control process...<sup>88</sup>

The Panel Firm exercises consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and documents the way in which it has done so in each case.<sup>89</sup>

Furthermore, ICANN affirmed in correspondence with DotMusic that "*in accordance with the CPE Panel's process document to help assure independence of the process, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team.*"<sup>90</sup> Contrary to this correspondence and the procedures outlined in the ICANN's EIU Panel Process document, ICANN also appears to play a critical role in instructing and subjectively guiding the EIU to reach certain determinations by providing the EIU

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<sup>85</sup> See Ex.A.19-4

<sup>86</sup> CPE Guidelines, p.22

<sup>87</sup> In an email exchange between ICANN and the EIU, there is evidence of a "quality control process" for "consistency of approach in scoring across applications" (in this case the CPE process for .LLP, .LLC and GMBH), comparing them for consistency purposes with the .MLS CPE Report: "*Can we have an example (such as was provided in MLS) as to what other meanings might exist?*" See C44, ICANN\_DR-00458, p.3, Ex.A27

<sup>88</sup> Ibid, pp.22-23

<sup>89</sup> EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3, Ex.A12-2

<sup>90</sup> See Ex.A23

with rationale, subjective redline edits, comments, presentations and other forms of communication before the final CPE determinations are released publicly.

Public documents disclosed to Dot Registry (the community applicant for .INC, .LLC, and .LLP) and its legal counsel Arif Ali, in an Independent Review Proceeding (“IRP”) against ICANN, present clear evidence that ICANN edited and materially redlined the CPE draft Determinations for .INC, .GMBH, .LLC and .LLC on the EIU’s behalf before their final release, providing substantive and subjective rationale, making substantive redlines as well as suggested edits, which is a serious violation of established procedure and puts ICANN Staff at the heart of CPE decision-making in violation of CPE established procedure.<sup>91</sup> For example, in an email from EIU to ICANN on June 2, 2014 the EIU makes ICANN suggested changes and even asks permission from ICANN to make the same changes to a different application:

From: EIU to ICANN  
Email Subject: Re: Updated draft results (4)

...I've made the suggested changes... Quick question: is there a reason why you didn't send back .INC? Should we make the same changes for that evaluation?<sup>92</sup>

On June 3<sup>rd</sup>, 2014, the most revealing email shows that ICANN is involved in the decision-making process for determining CPE results, including providing subjective feedback, discussing rationale and providing presentations to the EIU:

From: ICANN to EIU  
Email Subject: Re: Updated draft results (4)

...On my initial review they looked really good. We will discuss the rationale in the presentation tomorrow. I would ask we make one change to all of the reports prior to final version...<sup>93</sup>

Aside from the procedural, policy and quality control process violations by both ICANN and the EIU, it appears from the hands-on instructions, discussions, guidance and more importantly subjective decision-making rationale provided by ICANN to the EIU, that the EIU clearly lacked the necessary training and expertise to make consistent judgment even though the EIU Panel Process document required that:<sup>94</sup>

All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process

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<sup>91</sup> See <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, C042 – C044; Also see Ex.A25, Ex.A26 and Ex.A27

<sup>92</sup> See Ex.27, C044, ICANN\_DR\_00457, p. 2

<sup>93</sup> Ibid, C044, p. ICANN\_DR\_00456, p.1

<sup>94</sup> EIU Panel Process, p.2

included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.

EIU evaluators are highly qualified... and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.

ICANN and the EIU relied on false and inaccurate material information and refused to take the clearly identified and relevant information into consideration in their rationale and decision-making process, which contradicted established ICANN policies. ICANN's and the EIU's disregard of the *community definition, name* of the community and failure to apply the majority *support* criterion is quite worrisome given the time allotted to determine the Report (July 27, 2015 to February 10, 2016). In an IRP final declaration concerning the .ECO and .HOTEL community applications,<sup>95</sup> the IRP Panelists agreed and also echoed DotMusic's serious concerns and glaring problems with the CPE Process in general:

[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.<sup>96</sup> ...[T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.<sup>97</sup> ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure...ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.<sup>98</sup> The combination of these statements gives cause for concern to the Panel.<sup>99</sup> The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.<sup>100</sup> In conclusion,...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.<sup>101</sup>

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<sup>95</sup> Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.HOTEL/.ECO IRP”) <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>

<sup>96</sup> .HOTEL/.ECO IRP, ¶ 146, p.37, Ex.A28

<sup>97</sup> Ibid, ¶ 147, pp.37-38

<sup>98</sup> Ibid, ¶ 148, p.38

<sup>99</sup> Ibid, ¶ 149, p.38

<sup>100</sup> Ibid, ¶ 150, p.38

<sup>101</sup> Ibid, ¶ 158, p.39

(vi) **Google conflict of interest.** Finally, it bears noting that the multiple process violations evidenced in this RR are further exacerbated by the conflict of interest with Google, another .MUSIC applicant.<sup>102</sup> According to ICANN’s Panel Process document,<sup>103</sup> “*the following principles characterize the EIU evaluation process for gTLD applications: All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.”* However, Eric Schmidt, the chairman of Google, was a spokesperson,<sup>104</sup> a trustee<sup>105</sup> and on the board of Economist from November, 2013<sup>106</sup> to December, 2015.<sup>107</sup> DotMusic’s CPE process for .MUSIC conducted by the Economist began in July, 2015.<sup>108</sup> That means for about 5 months during DotMusic’s CPE evaluation the EIU had conflict of interest in its role of managing the CPE Process on behalf of ICANN. This potential conflict of interest supported by what appears to be a strong correlation in success and failure rates in CPE based on whether a community applicant was in Google’s contention set or not. As of February 10<sup>th</sup>, 2016, there were 22 community applicants that have gone through CPE.<sup>109</sup> Out of the 22 community applicants, 10 were in a contention set with Google. **None of the applicants in contention with Google prevailed CPE. The success rate to prevail CPE without Google in the contention set was approximately 42%** (i.e. 5 out of 12 applications). The EIU passed nearly half the community applications if they were not in a contention set with Google, while failing all applicants competing with Google (including DotMusic). This statistically significant difference is a substantial discrepancy following a strong correlative pattern. ICANN CEO Fadi Chehade and the Board acknowledged the significance and sensitivity of this conflict of interest at the Singapore ICANN Meeting *Public Forum* in February 2015,<sup>110</sup> yet nothing was done to ensure the Economist had no conflict of interest when CPE began in July 2015.

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<sup>102</sup> This is not the first time DotMusic reports a conflict of issue relating to .MUSIC. Doug Isenberg represented .MUSIC competitor Amazon in Community Objections (“CO”) filed by DotMusic, while also serving as a New gTLD Program Legal Rights Objection (“LRO”) panelist.

<sup>103</sup> EIU Panel Process, p.2

<sup>104</sup> <https://www.youtube.com/watch?v=kHSwRHeeCqg>, see Ex.A29, p.1; Also see Ex.A29, p.2

<sup>105</sup> See [http://www.economistgroup.com/pdfs/Annual\\_Report\\_2015\\_FINAL.pdf](http://www.economistgroup.com/pdfs/Annual_Report_2015_FINAL.pdf), p.18, Ex.A30-2

<sup>106</sup> Ibid, p.29; Also see The Economist Board retrieved on September 30, 2015:

[https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results\\_and\\_governance/board.html](https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results_and_governance/board.html)

<sup>107</sup> See <http://www.theguardian.com/media/2015/dec/10/economist-appoints-tessa-jowell-to-board-as-googles-eric-schmidt-departs>, Ex.A31

<sup>108</sup> See <https://newgtlds.icann.org/en/applicants/cpe#invitations>

<sup>109</sup> See, <https://newgtlds.icann.org/en/applicants/cpe#invitations>

<sup>110</sup> See <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, February 12<sup>th</sup>, 2015, p.61, Ex.A30-1

## 9. What are you asking ICANN to do now?

Requesters ask that the result of the .MUSIC Report be overturned by ICANN, by awarding DotMusic an additional six (6) points (or a passing grade). These are the total points that were deducted by ICANN as a result of ICANN not consistently following the CPE process and not applying the proper scoring guidelines to DotMusic’s Application in accordance with the policies and procedures defined in the AGB. In fact, ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to substantial flaws in its rationale methodology and scoring process. Additionally a linear comparative analysis between DotMusic’s application and the prevailing CPE applications for .SPA, .RADIO, .ECO, .OSAKA, and .HOTEL leads to the conclusion ICANN contravened the CPE Process and did not employ “consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, document[ing] the way in which it has done so in each of the above mentioned community application cases.”<sup>111</sup>

DotMusic’s community Application clearly meets the **trust** claim (*See* ICANN’s 2007 Recommendations and Principles to launch the New gTLD Program, IGH CV-10) given its demonstrable global music community majority support, multi-stakeholder governance structure and music-tailored policies that serve a higher purpose, as outlined in its Application that .MUSIC:

1. Is exclusive only to legitimate members of the entire global music community;
2. Is governed and controlled by the global music community. Each music constituent community type has a governance seat on the multi-stakeholder .MUSIC Board (PAB);<sup>112</sup>
3. Is supported by organizations with members representing over 95% of music consumed globally (i.e. a majority);
4. Has enhanced safeguards to protect intellectual property, prevent cybersquatting and eliminate copyright infringement;
5. Has incorporated all IFPI intellectual property protection provisions that include policies to stop domain hopping, takedown policies in the case of piracy, authorization provisions, permanent blocks, privacy/proxy provision, true name/address mandates and trusted sender complaint policies amongst others;
6. Requires registrant validation via a mandatory two-step phone/email authentication process;
7. Protects names of famous music artists and brands by giving registration priority to those entities during a priority-based launch phase. .MUSIC also gives registration priority to community members belonging to legitimate Music Community Member Organizations to spur adoption, trust and safety;
8. Has domain naming conditions that eliminate cybersquatting and famous music brand trademark infringement. Registrants are only allowed to register their own name, acronym or “Doing Business As;”
9. Only allows legal music content and legal music usage; and
10. Will take down any domain infringing on any of its enhanced safeguards.

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<sup>111</sup> EIU Panel Process, p.3

<sup>112</sup> *See* Expanding multi-stakeholder Board at <http://music.us/board>

Aligned with its community-based mission, policies and PIC,<sup>113</sup> DotMusic's Application is the only applicant with music-tailored enhanced copyright protection safeguards that include:

- **Stopping Domain Hopping**: All domains that trusted senders...have sent over 10K notices against will be on the block domain list, which will continually be updated, unless there is evidence that the domain has been authorized by most of the applicable rights holders to use the content in question...
- **Take Down Policies**: DotMusic will require all registrants on music to have and implement policies that include the following: (i) upon receipt of a facially valid copyright take down notice, the registrant must search for all copies or links to access the noticed content on the site, and remove all such copies or links from its site; and (ii) it must implement a strong repeat infringer policy.... DotMusic will suspend the domain if the registrant fails to have or enforce such policies.
- **Stay Down and Repeat Offender**: DotMusic will suspend the domain if the registrant fails to have or enforce DotMusic takedown policies.Repeat offenders will be disallowed from registering.
- **Authorization**: Confirmation that "content that they otherwise have the right to post" means that the poster has express authorization to post the content.
- **Permanent Block**: Blocked domains will not be made available for registration by any third party unless there is a two third (2/3) vote by the Advisory Committee...
- **Privacy / Proxy**: Requirement that privacy/proxy services will be compliant with DotMusic's Name Selection policy (mandating that the domain is the name of the registrant, their acronym, "doing business as," description of their mission or activities) and discloses the beneficial registrant as per DotMusic's Registration Policies. If such disclosure is not made then the registrant will not be allowed to proceed with registration.
- **True name and address**: If a .MUSIC domain makes available any music owned or posted by a third party...(directly or indirectly), the domain must prominently post on the site the true name of the website operator, a contact person...phone number, physical address, and email address at which the contact person may be contacted.
- **Trusted Sender Complaint**: If .MUSIC receives a complaint from a trusted sender...then DotMusic will investigate the complaint and suspend the domain, giving the registrant reasonable time to fix compliance matter. The domain will be terminated if registrant does not fix the compliance matter or fails to respond to the complaint.<sup>114</sup>

The Board should note the level of support for DotMusic's Application and the Application's maximum score under its *Registration Policies* that are aligned with its community-based purpose (*Eligibility, Name Selection, Content and Use and Enforcement*<sup>115</sup>) as evidence that it is "in the best interest of the Internet community" for DotMusic to be awarded .MUSIC. ICANN Board/NGPC member George Sadowsky<sup>116</sup> hit the nail on the head on the *only* goal that matters: "*ensuring user trust in using the DNS*" and "*to strengthen user trust*:"

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process...it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the...community and/or Internet users in general..."We are

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<sup>113</sup> Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

<sup>114</sup> Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

<sup>115</sup> Report, *Registration Policies*, pp.6-7

<sup>116</sup> <https://www.icann.org/profiles/george-sadowsky>, <https://www.icann.org/resources/pages/board-of-directors> and <https://www.icann.org/resources/pages/new-gtld-program-committee-2014-03-21-en>

unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.<sup>117</sup>

In a statement the week after the release of the .MUSIC Report, ICANN CEO Fadi Chehade agreed that with respect to intellectual property infringement (which is at the heart of the Application’s enhanced safeguards), “*ICANN, where necessary and appropriate, shape the discussion and commit to be part of a solution. [ICANN] cannot simply put [its] head in the sand and say these issues are not of [ICANN’s] concern:*”

As issues such as intellectual property infringement...are addressed in other fora, ICANN ...where necessary and appropriate, shape the discussion and debate and commit to be part of a solution in keeping with our values and mission. We cannot simply put our head in the sand and say that these issues are outside of the logical infrastructure layer in which we operate and thus not of our concern. Some solutions within the economic and societal layers of digital governance require distributed, innovative and collaborative issue-specific networks, of which the technical community depending on the issue sometimes must be a key part. We must remain part of the global conversations on digital governance, aware and ready to act when necessary.<sup>118</sup>

Aligned with ICANN’s CEO’s own statements to protect the public interest and the music community’s intellectual property rights, **we request ICANN to overturn the .MUSIC CPE Report and approve DotMusic’s community application** because (i) of the preponderance of evidence and support that DotMusic’s application exceeds the criteria established for community priority evaluation in comparison to other prevailing CPE applicants;<sup>119</sup> (ii) ICANN inaction led to multiple CPE process violations, prejudicial errors and an unfair and inconsistent quality control process when evaluating DotMusic’s application (in itself and in comparison to others); and (iii) more importantly “it would be in the best interest of the Internet community” for ICANN to do so given the community application’s demonstrable support that represents over 95% of music consumed globally and DotMusic’s Public Interest Commitments and music-tailored *Registration Policies* (taken from a “holistic perspective” as required by ICANN Guidelines<sup>120</sup>) that scored

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<sup>117</sup> Booking.com B.V. v. ICANN, ICDR Case No. 50-2014-000247 (March 3, 2015) Final Declaration at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>, ¶ 119, Ex.A6

<sup>118</sup> Fadi Chehade (ICANN CEO), <https://icann.org/en/system/files/correspondence/chehade-to-icann-board-19feb16-en.pdf>, p.6, February 19, 2016, Ex.A33

<sup>119</sup> ICANN ignored DotMusic’s answers to Clarifying Questions, over 40 testimonies filed by independent experts (See Appendix A, p.36, Ex.A32), an independent Nielsen poll conducted with over 2,000 participants (See Appendix B, p.38, Ex.A32), and nearly 2,000 letters of support (See Ex.A19-1, A19-2, A19-3, A19-4 and A-19-5 and <https://gtldcomment.icann.org/applicationcomment/viewcomments>), which provide clear evidence that substantiates scoring maximum points under *Community Establishment, Nexus and Support*.

<sup>120</sup> The scoring of the *Registration Policies* section related to *Name Selection, Content and Use and Enforcement* is the only criterion to be graded from a “holistic perspective.” See CPE Guidelines, pp.12-14

maximum points. DotMusic also requests: (i) to meet with individual Board members; (ii) a meeting with the ICANN Board; and (iii) a hearing to clarify the positions expressed in this RR.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

DotMusic is a community applicant for .MUSIC. The justifications under which DotMusic has standing and the right to assert this RR are:

- i) Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.<sup>121</sup>
- ii) Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;<sup>122</sup>
- iii) Conflict of Interest Issues;
- iv) Failure to Consider Evidence filed; and
- v) Violation of ICANN Articles of Incorporation/Bylaws:
  1. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.<sup>123</sup>
  2. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>124</sup>
  3. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>125</sup>
  4. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>126</sup>
  5. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>127</sup>
  6. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.<sup>128</sup>
  7. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy [e.g. copyright law and setting certain royalty rates for music's regulated sector] and duly taking into account governments' or public authorities' recommendations.<sup>129</sup>

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<sup>121</sup> Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

<sup>122</sup> JAS established that “*the existence of a visible and well-publicized proactive quality program properly incented all evaluation panel vendors to be appropriately cognizant of evaluation consistency, accuracy, and process fidelity, and perform accordingly.*” The .MUSIC CPE lacked a “*proactive quality control process*” deficient of the Initial Evaluation “*unified approach,*” which “*substantially mitigated the risk of isolation and inconsistent or divergent evaluations,*” ICANN Initial Evaluation Quality Control Program Report, <https://newgtlds.icann.org/en/program-status/application-results/ie-quality-program-26aug14-en.pdf>, p.16. Also see Ex.A38 and Ex.A39

<sup>123</sup> ICANN Bylaws, Art. I, § 2.6

<sup>124</sup> ICANN Bylaws, Art. I, § 2.1

<sup>125</sup> ICANN Bylaws, Art. I, § 2.7

<sup>126</sup> ICANN Bylaws, Art. I, § 2.8

<sup>127</sup> ICANN Bylaws, Art. I, § 2.9

<sup>128</sup> ICANN Bylaws, Art. I, § 2.10

<sup>129</sup> ICANN Bylaws, Art. I, § 2.11

8. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>130</sup>
9. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>131</sup>

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.**

**Do you have any documents you want to provide to ICANN? Yes, see Exhibits**

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*

Respectfully Submitted,

Constantinos Roussos  
DotMusic Founder

Tina Dam  
DotMusic Chief Operating Officer

Cc: Jason Schaeffer  
DotMusic Legal Counsel

February 24, 2016

DotMusic Website: <http://music.us>

DotMusic Board: <http://music.us/board>

DotMusic Supporting Organizations: <http://music.us/supporters>

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<sup>130</sup> ICANN Bylaws, Art. II, § 3

<sup>131</sup> ICANN Bylaws, Art. III, § 1

# Exhibit 15

**INDEPENDENT REVIEW PROCESS**  
**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review  
Concerning ICANN Board Action re  
Determination of the Board Governance Committee  
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF  
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

**DECLARATION OF THE INDEPENDENT REVIEW PANEL**

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

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## I. INTRODUCTION

### A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of <sup>EIU Contact Information Redacted</sup>  
EIU Contact Information Redacted of the EIU  
(hereinafter <sup>EIU Contact Information Redacted</sup> Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. <sup>EIU Contact Information Redacted</sup> declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” <sup>EIU Contact Information Redacted</sup> Declaration, ¶ 3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12<sup>th</sup> 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

## II. PROCEDURAL HISTORY

### A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

Resolution (“ICDR”), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC (“Dot Registry”) no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit (“EIU”) to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU’s responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry’s Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry’s applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel’s order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN’s possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel’s request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry’s Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel’s request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
  - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the “Board,” and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties’ stipulations that the term “local law” as used in Article 4 of ICANN’s Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation’s Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, “[t]he Panel designate[d] the place of these proceedings as New York, New York.”

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of <sup>EIU Contact Information Redacted</sup> of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

### III. SUBMISSIONS OF THE PARTIES

#### A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13).

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

## B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶21, at 8, and ¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that “the ‘rules’ at issue when assessing the Board’s conduct with respect to the New gTLD Program include relevant provisions of the Guidebook.” Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination” and its request “that candidates include a ‘statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency” obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel’s question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to “respect the principles of fairness, transparency and . . . non-discrimination.” ICANN’s Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California’s business judgment rule applies to ICANN and “requires deference to actions of a corporate board of directors so long as the board acted ‘upon reasonable investigation, in good faith and with regard for the best interests of’ the corporation, and ‘exercised discretion clearly within the scope of its authority.’” Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4<sup>th</sup> 249, 265 (1999).

#### IV. DECLARATION OF PANEL

##### A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN’s Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are “relevant principles of international law and applicable international conventions” that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: \*\*\*

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”

74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports. See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN\_DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

## 2) The Relevant Provisions of the Articles and Bylaws and Their Application

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. Articles of Incorporation, Art. 4

In performing its mission, the following core values should guide the decisions and actions of ICANN:

\*\*\*\*

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website.”  
Bylaws, Art. IV.2.14 provides that “The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

Requests for [] independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board . . . .")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. Emphasis added.

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.” Bylaws, Art. IV, §2.11. The BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 \*\*\* I  
3 will tell you that the Board Governance  
4 Committee is aided by the Office of General  
5 Counsel, which also consults with Board  
6 staff.

7 The Office of General Counsel does  
8 submit recommendations to the Board  
9 Governance Committee, and of course, those  
10 documents are privileged. For that reason,  
11 we did not turn them over. We don't rely on  
12 them in issuing the Board Governance  
13 Committee reports, we don't cite them, and we  
14 don't produce them because they are prepared  
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee  
14 had the EIU, the three EIU reports, and it  
15 had the lengthy challenge submitted by Dot  
16 Registry regarding those reports. As I've  
17 said before, the Board Governance Committee  
18 does not go out and obtain separate  
19 substantive advice, because the nature of its  
20 review is not a substantive review.  
21 So I don't know what else it would  
22 need, but my understanding is that apart from  
23 privileged communication, what it had before  
24 it was the materials that I've just  
25 referenced, EIU's reports and Dot Registry's  
1 reconsideration requests, which had attached  
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that  
4 request and the CPE panel report, would it be  
5 correct to say that the diligence and care  
6 the Board Governance Committee took in having  
7 a reasonable amount of facts in front of it,  
8 were those two submissions an [sic] inquiry of  
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did  
12 the Board Governance Committee go about  
13 exercising its independent judgment in taking  
14 the decisions it took on the reconsideration  
15 requests? Again, with as much specificity as  
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I  
18 obviously have to refer you to is the report,  
19 the 23-page report of the Board Governance  
20 Committee. I, I don't have other materials  
21 that I have tendered to the panel to say that  
22 the Board members exercised their independent  
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by  
25 point through the complaints that Dot  
1 Registry asserted, evaluated each of those  
2 points independently, and reached the  
3 conclusions that they reached.  
4 MR. DONAHEY: Were there drafts of  
5 that 23-page report?  
6 MR. LEVEE: Yes.  
7 MR. DONAHEY: And were those  
8 produced?  
9 MR. LEVEE: They were not.  
10 MR. DONAHEY: And was that because  
11 they were privileged?  
12 MR. LEVEE: Yes.  
13 MR. KANTOR: Mr. LeVee, what exists  
14 in the record before this panel to show that  
15 the Board Governance Committee exercised its  
16 judgment independent from that of ICANN's  
17 staff, including office [of] general counsel?  
18 MR. LEVEE: The record is simply  
19 that the six voting members of the Board  
20 Governance Committee authorized this  
21 particular report after discussing the  
22 report. I cannot give you a length of time  
23 that it was discussed. I don't have a record  
24 of that, but I can tell you, as reflected in  
25 many other situations where similar questions  
1 have been asked, that the voting members of  
2 the Board take these decisions seriously.  
3 They are then reflected in minutes of the  
4 Board Governance Committee which are  
5 published on ICANN's website.  
6 Candidly, I'm not sure what else I  
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. \*\*\* I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.\

#### D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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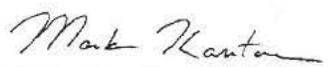
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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor". The signature is written in black ink and is positioned above a horizontal line.

Mark Kantor

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M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2015

For the Panel Majority

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Mark Kantor

A handwritten signature in blue ink, appearing to read "M. Scott Donahey", is written over a horizontal line.

M. Scott Donahey, Chair

## DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”). Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. *First*, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The applications never had a chance of succeeding. The “communities” proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of “communities” under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”<sup>1</sup> because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*<sup>2</sup>
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

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<sup>1</sup> AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘community’ is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”).

<sup>2</sup> ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.<sup>3</sup>

- Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

*The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.*<sup>4</sup>

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

- Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,<sup>5</sup> but ICANN clarified that staff conduct is not reviewable in an IRP,<sup>6</sup> and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.<sup>7</sup> The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”<sup>8</sup> The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.<sup>9</sup> Despite the Declaration’s statement to the contrary,<sup>10</sup> I cannot

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<sup>3</sup> I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

<sup>4</sup> Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

<sup>5</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

<sup>6</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

<sup>7</sup> *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

<sup>8</sup> Declaration ¶ 152. (Emphasis added.)

<sup>9</sup> *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

<sup>10</sup> *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

*Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"<sup>11</sup> the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."<sup>12</sup> This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

*These core values are deliberately expressed in very general terms, so that*

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<sup>11</sup> Declaration ¶ 151.

<sup>12</sup> See Declaration ¶¶ 149–50.

*they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, **situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.** Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. (Emphasis added.)*

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. *Fourth*, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.<sup>13</sup> Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements<sup>14</sup> and a 96-page expert report to reargue the merits of its CPE Applications,<sup>15</sup> none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”<sup>16</sup>
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”<sup>17</sup>
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”<sup>18</sup>
- Dot Registry introduced a fact witness to testify at the hearing<sup>19</sup> in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

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<sup>13</sup> See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

<sup>14</sup> See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

<sup>15</sup> See Expert Report of Michael A. Flynn dated 13 July 2015.

<sup>16</sup> See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

<sup>17</sup> See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

<sup>18</sup> See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

<sup>19</sup> See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry’s procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration’s analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to “skip to the front of the line” of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry “in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs.”<sup>20</sup> In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

\* \* \*

13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry’s Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN’s Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry’s Reconsideration Requests.<sup>21</sup> Therefore, I believe that the Declaration should not have addressed the BGC’s standard of review. As to the four violations, I have grouped them by subject matter (“Discrimination,” “Research,” “Independent Judgment,” and “Privilege”) and address each in turn.

### **Discrimination**

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry’s CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry’s applications and those submitted by other applicants.<sup>22</sup> A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually “complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants.”<sup>23</sup> A review of Dot Registry’s three Reconsideration Requests

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<sup>20</sup> Declaration ¶ 20.

<sup>21</sup> See Dot Registry’s Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry’s Additional Written Submission dated 13 July 2015, ¶ 42; Claimant’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20–21.

<sup>22</sup> See Declaration ¶¶ 98–100, 103–04, 122.

<sup>23</sup> Declaration ¶¶ 47–48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel’s failure to properly validate all letters of support and opposition; (2) the Panel’s repeated reliance on “research” without disclosure of the source or substance of such research; (3) the Panel’s “double counting”; (4) the Panel’s apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel’s failure to properly apply the CPE criteria in the AGB in making the Panel Determination.<sup>24</sup>*

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),<sup>25</sup> and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,<sup>26</sup> but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP<sup>27</sup> — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

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<sup>24</sup> See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

<sup>25</sup> See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

<sup>26</sup> See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

<sup>27</sup> See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

## Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.<sup>28</sup> The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

*Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.<sup>29</sup> (Emphasis added.)*

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”<sup>30</sup> The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”<sup>31</sup> My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”<sup>32</sup> The BGC disposed of Dot Registry’s argument as follows:

*The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.<sup>33</sup>*

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

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<sup>28</sup> Declaration ¶¶ 94–99, 106, 111, 115–22.

<sup>29</sup> Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

<sup>30</sup> Declaration ¶¶ 96–99.

<sup>31</sup> Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

<sup>32</sup> Declaration ¶ 95.

<sup>33</sup> Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”<sup>34</sup>

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”<sup>35</sup> In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

*[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”*

*[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).<sup>36</sup>*

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

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<sup>34</sup> Declaration ¶ 122.

<sup>35</sup> ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

<sup>36</sup> See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”<sup>37</sup> but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

### **Independent Judgment**

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”<sup>38</sup> It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”<sup>39</sup> Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.<sup>40</sup> The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.<sup>41</sup> In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”<sup>42</sup> Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.<sup>43</sup>

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<sup>37</sup> See Declaration ¶¶ 117–21.

<sup>38</sup> Declaration ¶ 126.

<sup>39</sup> Declaration ¶¶ 127, 147.

<sup>40</sup> Declaration ¶¶ 126, 140, 147.

<sup>41</sup> Declaration ¶¶ 127, 147.

<sup>42</sup> Declaration ¶ 141.

<sup>43</sup> Declaration ¶¶ 126, 147, 150.

25. The Declaration<sup>44</sup> relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

*The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.*

*The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.*

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."<sup>45</sup>
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.<sup>46</sup> ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)<sup>47</sup> that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.<sup>48</sup> The Panel, nonetheless, deems ICANN's position "simply not credible."<sup>49</sup> Credibility determinations have no place in this IRP, especially in relation to counsel.<sup>50</sup> The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

<sup>44</sup> See Declaration ¶¶ 128, 142, 149–50.

<sup>45</sup> Declaration ¶ 149.

<sup>46</sup> See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

<sup>47</sup> See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

<sup>48</sup> See Attestation of Elizabeth Le dated 17 June 2015.

<sup>49</sup> Declaration ¶ 151.

<sup>50</sup> Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”<sup>51</sup> make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.<sup>52</sup> Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*<sup>53</sup>

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”<sup>54</sup> The Declaration summarily dismisses those

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<sup>51</sup> Declaration ¶ 128.

<sup>52</sup> See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

<sup>53</sup> *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

<sup>54</sup> See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”<sup>55</sup> Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.
  
32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

### **Privilege**

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

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<sup>55</sup> Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.<sup>56</sup> It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.<sup>57</sup>

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.<sup>58</sup> Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.<sup>59</sup> As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.<sup>60</sup> This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

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<sup>56</sup> Declaration ¶¶ 133, 135-37, 143, 148-50.

<sup>57</sup> Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

<sup>58</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

<sup>59</sup> *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

<sup>60</sup> *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

## Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

*JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?*

*MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar*

*liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.*

*JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.<sup>61</sup>*

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.<sup>62</sup> The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.<sup>63</sup> Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.<sup>64</sup> In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

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<sup>61</sup> Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

<sup>62</sup> *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

<sup>63</sup> ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

<sup>64</sup> ICANN Bylaws, Article IV.3.21.

29 July 2016

*Charles N. Brower*  
Charles N. Brower

# Exhibit 16



**New gTLD Program**  
**Community Priority Evaluation Report**  
Report Date: 10 February 2016

Application ID:	1-1115-14110
Applied-for String:	MUSIC
Applicant Name:	DotMusic Limited

**Overall Community Priority Evaluation Summary**

<b>Community Priority Evaluation Result</b>	<b>Did Not Prevail</b>
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

**Panel Summary**

<b>Overall Scoring</b>	<b>10 Point(s)</b>	
<u>Criteria</u>	<u>Earned</u>	<u>Achievable</u>
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	3	4
#3: Registration Policies	4	4
#4: Community Endorsement	3	4
<b>Total</b>	<b>10</b>	<b>16</b>
<b>Minimum Required Total Score to Pass <u>14</u></b>		

<b>Criterion #1: Community Establishment</b>	<b>0/4 Point(s)</b>
<b>1-A Delineation</b>	<b>0/2 Point(s)</b>
<p>The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application is “delineated using established NAICS codes that align with the (i) characteristics of the globally recognized, organized Community, and (ii) .MUSIC global rotating multi-stakeholder Advisory Board model of fair representation, irrespective of locale, size or commercial/non-commercial status” (Application, 20A). The applicant lists over 40 categories of community member and identifies each with a North American Industry Classification System (NAICS) code that is further narrowed by the applicant’s requirement that “only those that are defined by and identify with the sub-set of the NAICS code that relates to “music” would qualify as a member of the Community.” According to the application, these categories, with the NAICS code cited by the applicant, are:

- Musical groups and artists (711130)
- Independent music artists, performers, arrangers & composers (711500)
- Music publishers (512230)
- Music recording industries (512290)
- Music recording & rehearsal studios (512240)
- Music distributors, promoters & record labels (512220)
- Music production companies & record producers (512210)
- Live musical producers (711130)
- Musical instrument manufacturers (339992)
- Musical instruments & supplies stores (451140)
- Music stores (451220)
- Music accountants (541211)
- Music lawyers (541110)
- Musical groups & artists (711130)
- Music education & schools (611610)
- Music agents & managers (711400)
- Music promoters & performing arts establishments (711300)
- Music promoters of performing arts with facilities (711310)
- Music promoters of performing arts without facilities (711320)
- Music performing arts companies (711100)
- Other music performing arts companies (711190)
- Music record reproducing companies (334612)
- Music, audio and video equipment manufacturers (334310)
- Music radio networks (515111)
- Music radio stations (515112)
- Music archives & libraries (519120)
- Music business & management consultants (541611)
- Music collection agencies & performance rights organizations (561440)
- Music therapists (621340)
- Music business associations (813910)
- Music coalitions, associations, organizations, information centers & export offices (813920)
- Music unions (813930)
- Music public relations agencies (541820)
- Music journalists & bloggers (711510)
- Internet Music radio station (519130)
- Music broadcasters (515120)
- Music video producers (512110)
- Music marketing services (541613)
- Music & audio engineers (541330)
- Music ticketing (561599)
- Music recreation establishments (722410)
- Music fans/clubs (813410) [Application, 20A]

The Panel notes that for some member categories noted above, the official NAICS code definition refers to a broader industry group or an industry group that is not identical to the one cited by the applicant. For example, “Music accountants” (541211) is defined in the NAICS as “Offices of Certified Public

Accountants”, and “Music lawyers” (541110) are defined as “Offices of Lawyers”.

In addition to the above-named member categories, the applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (Application, 20D). The application materials make clear that these entities, which may not be included in the list of member categories above, are strictly related to the functioning of those other categories within the defined community’s music-related activities.

The applicant thereby bounds community membership by way of well-defined categories. Therefore the Panel has determined that the applicant provides a clear and straightforward membership definition. The various categories relating to the creation, production, and distribution of music as well as the several other related entities that contribute to these music-related operations are clearly delineated as per AGB guidelines for the first criterion of Delineation.

However, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).

While the Panel acknowledges that many of these individuals would share a “commonality of interest” in music, according to the AGB this is not sufficient to demonstrate the requisite awareness and recognition of a community among its members. While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such cohesion is considerable enough that the community defined as a whole cannot be said to have the cohesion required by the AGB.

The Panel therefore determined that there is insufficient awareness and recognition of a community among the proposed community members, and that they do not therefore cohere as a community as required by the AGB. The defined community as a whole, in all its member categories, does not meet the AGB’s requirement for community awareness and recognition. Therefore, the Panel determined that the community as defined in the application satisfies one of the two conditions to fulfill the requirements for delineation, and therefore does not receive credit for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application is disperse geographically and across a wide array of music-related activities, including all the categories listed in the previous section, such as creation, production, and distribution, among others. The applicant has made reference to, and has documented support from, several organizations that are a dedicated subset of the defined community. However, based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.

According to the AGB, “organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” An “organized” community, according to the AGB, is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes individuals and organizations in all of the more than 40 member categories included by the application. Based on information provided in the application materials and the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories explicitly defined.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to obtain a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Panel determined that this application refers to a “community” construed to obtain a sought-after generic word as a gTLD string.

The applicant has a very large degree of support from musical organizations. Many of these organizations were active prior to 2007. However, the fact that each organization was active prior to 2007 does not mean that these organizations were active as a community prior to 2007, as required by the AGB guidelines. That is, since those organizations and their members do not themselves form a cohesive community as defined in the AGB, they cannot be considered to be a community that was active as such prior to 2007.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

*0/2 Point(s)*

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents... (Application, 20A)

However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.<sup>1</sup> Therefore, it fails the second criterion for Size.

The Panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

According to the application, “The Community has bought, sold, and bartered music for as long

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<sup>1</sup>As stated previously, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest... There should be: (a) an awareness and recognition of a community among its members...” Failing such qualities, the AGB’s requirements for community establishment are not met.

(“LONGEVITY”) as it has been made”. The Panel acknowledges that as an activity, music has a long history and that many parts of the defined community show longevity. However, because the community is construed, the longevity of the defined community as a whole cannot be demonstrated. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of “cohesion,” the community defined by the application does not meet the AGB’s standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB’s requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

<b>Criterion #2: Nexus between Proposed String and Community</b>	<b>3/4 Point(s)</b>
2-A Nexus	<b>2/3 Point(s)</b>
<p>The Panel determined that the application partially met the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string identifies but does not match the name of the community as defined in the application, and it is not a well-known short-form or abbreviation of the community. The application received a score of 2 out of 3 points under criterion 2-A: Nexus.</p>	
<p>To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.</p>	
<p>Because the community defined in the application is a collection of many categories of individuals and organizations, and because there is no single entity that serves all of these categories in all their geographic breadth, there is no “established name” for the applied-for string to match, as required by the AGB for a full score on Nexus. The community, as defined in the application, includes some entities that are only tangentially related to music, such as accountants and lawyers, and which may not be automatically associated with the gTLD string. However, the applicant has limited the subset of such professionals included in the defined community<sup>2</sup>. Moreover, the applicant has also included “musical groups and artists” and “independent music artists, performers, arrangers &amp; composers” in its defined community. The string MUSIC identifies these member categories, which include individuals and entities involved in the creation of music. Thus the applied-for string does identify the individuals and organizations included in the applicant’s defined community member categories due to their association with music, which the applicant defines as “the art of combining sounds rhythmically, melodically or harmonically” (Application, 20A).</p>	
<p>The Panel determined that the applied-for string identifies (but does not match) the name of the community as defined in the application without over-reaching substantially. It therefore partially meets the requirements for Nexus.</p>	
2-B Uniqueness	<b>1/1 Point(s)</b>

<sup>2</sup> The applicant lists over 40 categories of community member and identifies each with a North American Industry Classification System (NAICS) code that is further narrowed by the applicant’s requirement that “only those that are defined by and identify with the sub-set of the NAICS code that relates to “music” would qualify as a member of the Community.”

The Community Priority Evaluation panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application. The application received a maximum score of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application. The string as defined in the application demonstrates uniqueness, as the string does not have any other significant meaning beyond identifying the individuals, organizations, and activities associated with the music-related member categories defined by the applicant. The Community Priority Evaluation panel determined that the applied-for string satisfies the condition to fulfill the requirements for uniqueness.

<b>Criterion #3: Registration Policies</b>	<b>4/4 Point(s)</b>
<b>3-A Eligibility</b>	<b>1/1 Point(s)</b>
<p>The Panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.</p> <p>To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the applicant, this requirement is met by verifying registrants’ participation in one of the defined community member categories:</p> <p style="padding-left: 40px;">Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination, conflict of interest or “likelihood of material detriment to the rights and legitimate interests” of the Community:</p> <p style="padding-left: 40px;">(i) Qualification criteria as delineated by recognized NAICS codes corresponding to Community member classification music entity types. (Application, 20A)</p> <p>The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p>	
<b>3-B Name Selection</b>	<b>1/1 Point(s)</b>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated, community-based purpose of the applied-for gTLD. The applicant has included in its application several name selection rules that are consistent with its community-based purpose, which is “creating a trusted, safe online haven for music consumption” while ensuring that musicians’ rights are protected:</p> <p style="padding-left: 40px;">Names Selection Policy – to ensure only music-related names are registered as domains under .MUSIC, with the following restrictions:</p> <ol style="list-style-type: none"> <li>1) A name of (entire or portion of) the musician, band, company, organization, e.g. the registrants “doing business as” name</li> <li>2) An acronym representing the registrant</li> <li>3) A name that recognizes or generally describes the registrant, or</li> <li>4) A name related to the mission or activities of the registrant</li> </ol> <p>The Community Priority Evaluation panel determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
<b>3-C Content and Use</b>	<b>1/1 Point(s)</b>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Content and</p>	

Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated, community-based purpose of the applied-for gTLD. The application includes several content and use requirements, all of which are consistent with its community-based purpose of “creating a trusted, safe online haven for music consumption” while ensuring that musicians’ rights are protected:

The following use requirements apply:

- Use only for music-related activities
- Comply with applicable laws and regulations and not participate in, facilitate, or further illegal activities
- Do not post or submit content that is illegal, threatening, abusive, harassing, defamatory, libelous, deceptive, fraudulent, invasive of another’s privacy, or tortious
- Respect the intellectual property rights of others by posting or submitting only content that is owned, licensed, or otherwise have the right to post or submit
- Immediately notify us if there is a security breach, other member incompliance or illegal activity on .MUSIC sites
- Do not register a domain containing an established music brand’s name in bad faith that might be deemed confusing to Internet users and the Music Community
- Do not use any automated process to access or use the .MUSIC sites or any process, whether automated or manual, to capture data or content from any service for any reason
- Do not use any service or any process to damage, disable, impair, or otherwise attack .MUSIC sites or the networks connected to .MUSIC sites (Application, 20E)

The Community Priority Evaluation panel determined that the application satisfied the condition to fulfill the requirements for Content and Use.

**3-D Enforcement**

**1/1 Point(s)**

The Panel determined that the application meets the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures and coherent and appropriate appeals mechanisms. The application received a score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures for enforcing its policies, including random compliance checks and special monitoring. The application also references a dispute resolution process, and provides a clear description of an appeals process in the Public Interest Commitments (PIC). The PIC was utilized to verify that the applicant has appropriate appeals mechanisms. The Panel determined that the application satisfies both of the two requirements for Enforcement and therefore scores 1 point.

**Criterion #4: Community Endorsement**

**3/4 Point(s)**

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>.

The table below summarizes the review and verification of support and opposition documents for the DotMusic Limited application for the string “MUSIC”. Note that some entities provided multiple letters of support through one or more of the mechanisms noted above. In these cases, each letter is counted separately in the table below. For example, if a letter of support from an entity was received via attachments, and a

separate letter received via correspondence, each letter is counted as reviewed, valid for verification (where appropriate), verification attempted (where appropriate) and successfully verified (where appropriate).

**Summary of Review & Verification of Support/Opposition Materials as of 13 October 2015<sup>3</sup>**

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	157	0	0	0
Attachments to 20(f)	150	68	68	40
Correspondence <sup>4</sup>	331	160	160	40
<b>Grand Total</b>	<b>638</b>	<b>228</b>	<b>228</b>	<b>80</b>

**4-A Support**

***1/2 Point(s)***

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). The panel has not found evidence of a single such organization recognized by all of the defined community’s members as representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

**4-B Opposition**

***2/2 Point(s)***

<sup>3</sup> The table reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information. ICANN notified the applicant on 4 December 2015 that although the applicant submitted a high volume of correspondence, “Much of this correspondence was submitted well after the deadline...any correspondence dated later than 13 October 2015 or submitted from today on will not go through the Panel’s verification process and may not be considered by the Panel.”

<sup>4</sup> The Panel reviewed 53 pieces of correspondence that contained 331 individual letters.

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant verified opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application did not receive any letters of relevant and verified opposition. The Community Priority Evaluation Panel determined that the applicant satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

# Exhibit 17

# DotMusic Reconsideration Request (“RR”)

## 1. Requester Information

**Name:** DotMusic Limited (“DotMusic”)<sup>1</sup>

**Address:** Contact Information Redacted

**Email:** Constantine Roussos, Contact Information Redacted

**Counsel:** Jason Schaeffer, Contact Information Redacted

**Name:** International Federation of Musicians<sup>2</sup> (“FIM”)

**Email:** Benoît Machuel, Contact Information Redacted

**Name:** International Federation of Arts Councils and Culture Agencies<sup>3</sup> (“IFACCA”)

**Email:** Sarah Gardner, Contact Information Redacted

**Name:** Worldwide Independent Network<sup>4</sup> (“WIN”)

**Email:** Alison Wenham, Contact Information Redacted

**Name:** Merlin Network<sup>5</sup> (“Merlin”)

**Email:** Charles Caldas, Contact Information Redacted

**Name:** Independent Music Companies Association<sup>6</sup> (“IMPALA”)

**Email:** Helen Smith, Contact Information Redacted

**Name:** American Association of Independent Music<sup>7</sup> (“A2IM”)

**Email:** Dr. Richard James Burgess, Contact Information Redacted

**Name:** Association of Independent Music<sup>8</sup> (“AIM”)

**Email:** Charlie Phillips, Contact Information Redacted

**Name:** Content Creators Coalition<sup>9</sup> (“C3”)

**Email:** Jeffrey Boxer, Contact Information Redacted

**Name:** Nashville Songwriters Association International<sup>10</sup> (“NSAI”)

**Email:** Barton Herbison, Contact Information Redacted

**Name:** ReverbNation<sup>11</sup>

**Email:** Jean Michel, Contact Information Redacted

## 2. Request for Reconsideration of: X Board action/inaction

<sup>1</sup> <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

<sup>2</sup> <http://fim-musicians.org/about-fim/history>

<sup>3</sup> [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members) and [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members)

<sup>4</sup> <http://winformusic.org/win-members>

<sup>5</sup> <http://merlinnetwork.org/what-we-do>

<sup>6</sup> <http://impalamusic.org/node/16>

<sup>7</sup> <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

<sup>8</sup> <http://musicindie.com/about/aimmembers>

<sup>9</sup> <http://c3action.org>

<sup>10</sup> <https://nashvillesongwriters.com/about-nsai>

<sup>11</sup> <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

**3. Description of specific action you are seeking to have reconsidered.**

The above-referenced requesters request to have the .MUSIC Community Priority Evaluation (“CPE”) Report for Application ID. 1-1115-14110 (“Report”)<sup>12</sup> corrected and properly graded to accurately reflect the true nature of DotMusic’s *community establishment, community definition, support* and *nexus* based on established Applicant Guidebook (“AGB”) policies and processes.<sup>13</sup>

The Report provided a total score of ten (10) points, resulting in a failing grade for the Application’s request for Community Status. The result unfairly denied Music Community recognition and necessary intellectual property protection. A review of the Report evidences multiple prejudicial errors that ICANN, both directly and as extension of the Economist Intelligence Unit (“EIU”) Panel, either incorrectly applied ICANN-approved processes and policies, or completely failed to apply ICANN established processes and policies. Such material errors resulted in the incorrect evaluation of the Application, an improper scoring of points when compared to over forty-three (43) independent expert testimony letters (*See* Expert Chart, Exhibit A40)<sup>14</sup> and inconsistent, disparate treatment when compared to prevailing CPE Applicants (*See* CPE Comparison Chart, Exhibit A41).<sup>15</sup> Each error, when corrected and overturned, would result to a total Application score of sixteen (16) points. Despite a materially improper evaluation by the EIU, and the disclaimer contained in the Report that “[...] *these Community Priority Evaluation results do not necessarily determine the final result of the application,*” ICANN accepted the Report’s inaccurate results and changed the “*Contention Resolution Result*” to “*Into Contention.*”<sup>16</sup> Accordingly, DotMusic and other affected global organizations identified above (collectively referenced as the “Requesters”) seek to overturn the “*Contention Resolution Result*” to “*Prevailed Contention.*”

**4. Date of action/inaction:** February 10th, 2016 PST

**5. On what date did you became aware of action or that action would not be taken?**

February 10th, 2016 PST

**6. Describe how you believe you are materially affected by the action or inaction:**

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<sup>12</sup> DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, Ex.A1

<sup>13</sup> *See* AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, §4.2.3

<sup>14</sup> *See* Independent Expert Testimony Letters Scoring Chart, Ex.A40

<sup>15</sup> *See* linear CPE Comparison Chart, Ex.A41

<sup>16</sup> DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; *See* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>, Ex. A2

DotMusic is adversely affected by ICANN's actions and inactions. If DotMusic is not awarded .MUSIC, DotMusic, will suffer material brand dilution<sup>17</sup> and be subject to expensive auctions which (as agreed upon by the EU<sup>18</sup>) were designed to favor deep pocketed Applicants - such as Amazon and Google (who also have a prior history with the piracy of music: Google as a provider of ad networks to pirate sites and Amazon as a leading advertiser on pirate sites).<sup>19</sup> As set forth in the Application, DotMusic has an all-inclusive tent that is united by its core principles consistent with its articulated community-based purpose:

- Creating a trusted, safe online haven for music consumption and licensing
- Establishing a safe home on the Internet for Music Community (“Community”) members regardless of locale or size
- Protecting intellectual property & fighting piracy
- Supporting Musicians’ welfare, rights & fair compensation
- Promoting music and the arts, cultural diversity & music education
- Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both reaching commercial and non-commercial stakeholders.<sup>20</sup>

Per DotMusic’s Application and Public Interest Commitments (“PIC”),<sup>21</sup> .MUSIC will be launched as a safe haven for legal music consumption that ensures that .MUSIC domains are trusted and authenticated to benefit the interests of the Internet community and the global music community. DotMusic, its current and future music members and supporters will be adversely affected if the Report stands and DotMusic is awarded to any of the competing non-community applicants<sup>22</sup> (which will also be a disservice to the Internet user community in general) because competing applicants either: (i) lack the music community multi-stakeholder governance model to represent the community’s interests; and/or (ii) lack the extensive music-tailored safeguard policies that DotMusic has.<sup>23</sup>

Allowing the Report to stand would turn .MUSIC into an unsafe, unreliable and untrusted string governed by non-community interests that will create material harm to the legitimate interests

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<sup>17</sup> DotMusic holds the European community trademarks for “*DotMusic*” and “*MUSIC*.” Ex.A35, A37 and A38

<sup>18</sup> <http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/msg00016.html>

<sup>19</sup> <http://billboard.com/biz/articles/news/digital-and-mobile/6106454/online-pirates-thrive-on-legitimate-ad-dollars>, <http://venturebeat.com/2014/02/18/the-average-piracy-site-makes-4-4m-each-year-on-ads-from-amazon-lego-etc>

<sup>20</sup> Application, 18A. Also see 20C

<sup>21</sup> PIC, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, Ex.A3

<sup>22</sup> All of the competing non-community applicants in DotMusic’s contention set are existing gTLD portfolio registries (Google, Amazon, Donuts/Rightside, Radix, Minds & Machines and Famous Four Media).

<sup>23</sup> See Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27; Also see .MUSIC Applicant Comparison Chart, <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>, Appendix C, pp.43-45, Ex.A32

of the Music Community by increasing intellectual property infringement and other types of malicious abuse. Music is a sensitive string driven by content and copyright protection that must be operated responsibly within its regulated sector as outlined in the Application. The Music Community is one of the Internet's most vulnerable communities given the adverse effects of mass piracy, intellectual property infringement and malicious abuse on the web and the inefficiencies of the outdated 1998 DMCA Law to provide adequate music copyright protection online.<sup>24</sup> By not awarding .MUSIC to DotMusic, the Music Community will lose the only opportunity to offer assurance to Internet users that all .MUSIC sites are indeed trusted, safe and licensed, which will also help search engines provide a better user experience by replacing unsafe, insecure pirate sites (that dominate music-themed web search results today) with relevant and higher quality .MUSIC sites.<sup>25</sup>

By virtue of ICANN's actions and inactions, the public interest is harmed and the multi-stakeholder music community will not be able to ensure trust and reliability in the DNS for Internet users because the music community will not be able to govern the last remaining music-themed gTLD,<sup>26</sup> in violation of ICANN's "*key responsibilities is introducing and promoting competition*"<sup>27</sup> in the registration of domain names, while ensuring the security and stability of the domain name system (DNS)."<sup>28</sup> Further, ICANN disregards its own 2007 Recommendations and Principles that stated "*where an applicant lays any claim that the TLD is intended to support a particular community...that claim will be taken on trust*."<sup>29</sup>

Without a reserved, safe and reliable zone on the Internet dedicated to the Music Community, the community and the public will be harmed because the music community will be unable to promote a trusted and secure sector through enhanced safeguards. The Music Community (the

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<sup>24</sup> <https://www.google.com/transparencyreport/removals/copyright/?hl=en> e.g. One single DotMusic supporter, BPI, filed over 2 million URL takedown requests to Google for the week of February 15, 2016, *see*

<https://google.com/transparencyreport/removals/copyright/reporters/1847/BPI-British-Recorded-Music-Industry-Ltd>

<sup>25</sup> *See* <http://theverge.com/2015/11/23/9781752/google-takedown-requests-2015> and

<http://billboard.com/biz/articles/news/1083146/business-matters-legal-mp3-sites-are-still-buried-by-google-search-results>

<sup>26</sup> No community applicant has been awarded a music-themed string in the New gTLD Program.

<sup>27</sup> ICANN has awarded Amazon the .SONG and .TUNES music-themed strings. Amazon is also a competing applicant for .MUSIC. Allowing Amazon to possibly be awarded the three most relevant music-themed strings violates ICANN's Bylaws with respect to "promoting competition."

<sup>28</sup> <https://newgtlds.icann.org/en/about/program>

<sup>29</sup> <http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6, Ex.A4; Also *see* <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>. Ex.A5

defined “*logical alliance*” with members representing over 95% of music consumed globally) has been negatively affected by the Report.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

See Answer to Question 6 above.

**8. Detail of Board Action/Inaction – Required Information**

In this section, DotMusic presents the evidence required for ICANN to approve the request in this RR: **(8.1)** The relationship and contractual obligations between ICANN and the Economist with respect to the CPE process; **(8.2)** the AGB process and relevance of ICANN-approved GAC Category 1 and 2 Advice; **(8.3)** Comparisons to other CPE-prevailing community applications, demonstrating quality control deficiencies, unpredictability, inconsistencies, process failures, fairness issues and disparate treatment; and **(8.4)** Facts and procedural violations demonstrating that ICANN did not follow established processes in the evaluation of the Application in its grading as set forth in the .MUSIC Report, including material errors and omissions in determining the critical areas of *community establishment, nexus and support*. As a result of the material process, procedural errors and omissions set forth below, the Application was prevented from scoring the full 16 points and improperly did not receive a passing CPE grade.

**(8.1) The relationship and contractual obligations between ICANN and the EIU.**

Ultimately, ICANN makes the final decision on CPE results. The ICANN Board is responsible for the acts of its Staff and the EIU with respect to the CPE process because it is within ICANN’s sole discretion whether an applicant passes or fails. Pursuant to its contract with ICANN, the EIU provides “*recommended scores to ICANN for final review and approval*” and ICANN is “*free in its complete discretion to decide whether to follow [the EIU]’s determination and to issue a decision on that basis or not.*”<sup>30</sup> ICANN and the EIU specifically acknowledge that: “*each decision and all associated materials must be issued by ICANN in its own name only;*” that CPE results are “*ICANN’s final decision;*” and that “*ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue.*”<sup>31</sup> In a declaration, the EIU confirmed that:

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<sup>30</sup> <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b) (ii) (12 Mar. 2012) [Ex. C-40]), Ex.A7

<sup>31</sup> *Id.*, § 10(b) (iii)-(iv), (vii)

[t]he EIU is a privately held company working as a vendor to ICANN. We are not a gTLD decision-maker but simply a consultant to ICANN.<sup>32</sup>

Moreover, ICANN is the gatekeeper of all information exchanged between applicants and the EIU, including alerting the EIU of relevant GAC Advice pertaining to the existence of a “*cohesive*” regulated sector for the string evaluated to ensure scoring predictability and scoring consistency. ICANN and the EIU “*agreed that [the] EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.*”<sup>33</sup> Furthermore, the Report includes a disclaimer representing that ICANN is ultimately responsible for determining whether or not to implement the EIU evaluators’ conclusions.<sup>34</sup> While the Board may not be responsible for its Staff’s day-to-day operations, the Board is responsible for final CPE determinations, process, evaluations, and acceptance or rejection of the .MUSIC Report.

#### **(8.2) The AGB process and the relevance of ICANN-approved GAC Category 1 and 2 Advice.**

Per the AGB, Board decisions on certain strings are not merely a “box-ticking” administrative exercise by staff or consultants. The Board has accepted GAC Advice on many occasions to determine the fate of certain strings (e.g. .AMAZON and .AFRICA); and even superseding the determinations of Panels if deemed necessary by ICANN to serve the public interest (e.g. the Community Objections for .ISLAM and .HALAL). In relation to .MUSIC, the ICANN Board accepted GAC Advice with respect to Category 1 and Category 2 Safeguards,<sup>35</sup> but the Board took no action pertaining to GAC’s Advice to give “*preferential treatment for all applications which have demonstrable community support*” such as DotMusic’s. At the Singapore ICANN meeting in

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<sup>32</sup> EIU Declaration <https://icann.org/en/system/files/files/eiu-declaration-13apr15-en.pdf>, Pg.2, Ex.A8

<sup>33</sup> New gTLD Program Consulting Agreement, Statement of Work No.: 2, ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names p.6, § 10(b)(ii) (12 Mar. 2012) [<https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-40].), § 10(b)(iii)-(iv), (vii), Ex.A7

<sup>34</sup> See Report, p.9. Each CPE report states that “these Community Priority Evaluation results do not necessarily determine the final result of the application. *In limited cases the results might be subject to change.*” New gTLD Program, Report; see also New gTLD Program Consulting Agreement, p. 2 (26 July 2011) (“ICANN retains the right to inspect, to stop work, to prescribe alterations, and generally supervise the Contractor’s work to insure its conformity with the . . . Statement of Work”) [<https://www.icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, Ex. C-41], Ex.A9

<sup>35</sup> DotMusic’s Application was a community application with music-tailored enhanced safeguards that extended beyond the minimum GAC Advice requirements. To serve the public interest, the Internet community and the entire global music community, DotMusic also filed a PIC to reflect its accountability and to clarify its Application’s specifications, which also pertained to its *community definition, community establishment, nexus, registration policies* and *support*. See PIC

March 2014, GAC reiterated that advice to ICANN “to protect the public interest and improve outcomes for communities”<sup>36</sup> and to take “better account of community views and improving outcomes for communities”<sup>37</sup> (i.e. giving community applicants the benefit of the doubt). Throughout the process, ICANN has allowed non-community applicants to materially alter their applications to follow GAC Advice to either remain in contention or be awarded sensitive strings (such as .GMBH<sup>38</sup>). Because such change requests for non-community applicants were allowed and accepted (in response to GAC Advice), it is equally and reasonably fair to allow DotMusic to be awarded .MUSIC based on trust, GAC’s Advice favoring community applicants with demonstrable support and ICANN’s own acceptance that the music string has cohesion under an ICANN-approved regulated sector. It is also reasonable to award DotMusic this sensitive string, because the Application responsibly and conscientiously already had the requisite music-tailored enhanced safeguards that served a higher purpose when it filed its Application in 2012 (notably, DotMusic’s safeguards exceed GAC Category 1 Safeguard Advice). Further, it should have been clear to ICANN and the EIU that the Application exceeds the CPE criteria and serves the public interest, Internet community and music community, as outlined in the Application and confirmed in more detail throughout its PIC. For these reasons alone the .MUSIC Report should be overturned and a passing grade awarded to Applicant.

**(8.3) Comparisons to other CPE-prevailing community applications, demonstrate inconsistencies, unpredictability, process failures, fairness issues and disparate treatment.**

ICANN did not follow established procedures in the *community establishment, nexus* and *support* evaluation process, which resulted in a failing CPE grade. For example, the criterion concerning “*organization*” (that relates to having support from a “*recognized*” organization), the Report specifically failed to consider many globally-recognized organizations that are *mainly* dedicated to the music community addressed (“*logical alliance of communities that relate to music*”).

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<sup>36</sup> <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2> Section 3, 1a, p.4, ExA10

<sup>37</sup> <http://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf>, Register #18, Ex.A11

<sup>38</sup> Donuts was allowed to make material changes to their application to proceed with the delegation of .GMBH based on GAC advice and Donuts’ Public Interest Commitments (PIC), *See* <https://www.icann.org/en/system/files/correspondence/willett-to-metzger-28jan16-en.pdf>. ICANN rejected a similar change request by the .CPA community applicants. ICANN “deferred consideration of AICPA’s December 2014 Change Request, including changes made to reflect the principles of the Beijing Communiqué,” *See* <https://www.icann.org/en/system/files/files/reconsideration-request-15-17-aicpa-redacted-19sep15-en.pdf>, p.4

The FIM, an “*international federation of national communities of similar nature*”<sup>39</sup> representing the “*voice of musicians worldwide*” (musicians represent the overwhelming majority of the Music Community). This is contrary to the unsubstantiated, indefensible and undocumented opinion of ICANN that the FIM is not a “*recognized community institution(s)/member organization(s)*.”<sup>40</sup>

The IFPI, another globally recognized supporting organization, also exceeds the same criteria under *community establishment and support*. The IFPI is only associated with music and it is the globally-recognized organization that administers the International Standard Recording Code (ISRC), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community. The code was developed with the ISO technical committee 46, subcommittee 9 (TC 46/SC 9), which codified the standard as ISO 3901 in 1986.<sup>41</sup> The IFPI’s ISRC is “intentionally standardised under ISO,” globally structured<sup>42</sup> and “well established, widely accepted internationally”<sup>43</sup> Furthermore, it relates to the addressed music community defined by DotMusic, an “*organized and delineated logical alliance of communities that relate to music*.” The IFPI does not restrict ISRC codes to solely its members. In fact, ISRC eligibility is available and dedicated to the entire global music community, irrespective of whether they are members of organizations or not, are professionals or amateurs, are independent or non-independent, commercial or non-commercial:

Owners of recordings may for example be independent artists, record labels or recorded music groups. ISRC is available to all owners of recordings regardless of their membership<sup>44</sup> (or not) with any industry association.<sup>45</sup>

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<sup>39</sup> CPE Guidelines: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of...a logical alliance of communities,” <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.4, Ex.A12-1; Also see AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, 4-12, Ex.A13 and “Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,” Notes, 20A, A-14, Ex.A13

<sup>40</sup> The FIM is a globally-recognized music community organization with documented official relations with the United Nations Economic and Social Council (“ECOSOC”) (Ros C); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM is also consulted by the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”).

<sup>41</sup> [http://www.iso.org/iso/home/store/catalogue\\_tc/catalogue\\_detail.htm?csnumber=23401](http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401)

<sup>42</sup> <http://isrc.ifpi.org/en/isrc-standard/structure>

<sup>43</sup> <http://isrc.ifpi.org/en/why-use/benefits>

<sup>44</sup> DotMusic’s community application defines the community as “a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music: the art of combining sounds rhythmically, melodically or harmonically.” The IFPI’s ISRC codes do not restrict eligibility to members of select music organizations but are available to the entire music community as defined.

In fact, without the IFPI's ISRC codes there would not be legal music consumption because there would be no way to appropriately and efficiently attribute music to music community members.<sup>46</sup>

In the case of .HOTEL's CPE Report, the prevailing applicant received a full grade for "Organization" **because** the Panel found "*recognized community institution(s)/member organization(s)*,"<sup>47</sup> the International Hotel & Restaurant Association (IH&RA) and HOTREC:

the community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)...<sup>48</sup>

...The applicant possesses documented support from the recognized community institution(s)/member organization(s).<sup>49</sup>

In awarding .HOTEL the full two (2) points for *support*, the Panel concluded that the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines):

[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.<sup>50</sup>

The .HOTEL community applicant passed with full scores for *community establishment* and *support* where several entities were found to be *mainly dedicated to the community* and *recognized*, despite those organizations also representing other interests or sectors such as "restaurants" (or some being geographically focused like the AH&LA and the CHA). Conversely, the .MUSIC Report failed to provide full scoring to DotMusic stating that "[t]here is no single such organization recognized by all of the defined community's members as representative of the defined community in its entirety."<sup>51</sup> This finding is improper because there is no policy or rule that requires an organization to represent a community *in its entirety* in order to score the full two points under *support*. While there is an option requiring the "*authority to represent the community*," the Guidelines provided other alternative options available to score the full two points under "*support*." The CPE Guidelines define

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<sup>45</sup> <http://isrc.ifpi.org/en/using-isrc>

<sup>46</sup> Without the IFPI's ISRC codes, YouTube Music (which is consumed by over 1 billion YouTube users) would be unable to effectively credit the corresponding music copyright owner related to each music video, *see* <https://support.google.com/youtube/answer/6007080> and; For the same reason, nearly all digital music retailers rely on and require ISRC codes, including Apple iTunes<sup>46</sup> (the world's largest music retailer with over 43 million music tracks<sup>46</sup>, *see* <http://apple.com/itunes/working-itunes/sell-content/music-faq.html> and <http://apple.com/itunes/music> and <http://www.digitalmusicnews.com/2014/04/24/itunes800m>

<sup>47</sup> .HOTEL CPE, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6, Ex.A14

<sup>48</sup> Ibid, *community establishment*, p.2

<sup>49</sup> Ibid, *support*, p.6

<sup>50</sup> Ibid

<sup>51</sup> Report, p.3 and p.8

“recognized” as “*institution(s)/organization(s) that are clearly recognized by the community members as representative of that community*” i.e. not in their “*entirety*” but merely “*representative*.” According to the Oxford dictionary, the primary definition of “*recognize*” is to “identify.”<sup>52</sup> According to the Oxford dictionary, the definition of the adjective “*representative*” is “typical of a class, group, or body of opinion” or “containing typical examples of many or all types” or “to act and speak on behalf of a wider group.”<sup>53</sup>

Even if an “*entirety*” criterion (not specifically mentioned in the AGB or CPE Guidelines) is assessed, both the International Federation of Arts Councils and Culture Agencies (“IFACCA”) (the only international federation representing government culture agencies and arts councils globally covering all of the Application’s music categories and subsets in their entirety<sup>54</sup>) and ReverbNation (the world’s largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations in over 100 countries and across all of the Application’s music categories and subsets in their entirety<sup>55</sup>) qualify because they represent all the music categories and music subsets delineated in their entirety without discrimination globally. Based on the foregoing, it is clear that both co-requesters IFACCA and ReverbNation are “typical of a group” that is representative of the “music” community defined in its entirety. Therefore, it is clear that the Application had demonstrable support from multiple globally-recognized organizations mainly dedicated to the Music Community. ICANN’s and the EIU’s failure to properly evaluate the application and find support for the community is apparent when the .MUSIC Report is compared to other prevailing CPE Determinations. Thus, the rationale ICANN used to find that the International Hotel & Restaurant Association (IH&RA) is representative of “hotel” community should apply to IFACCA and ReverbNation in the case of Music Community. That is, if the IH&RA is found to be “recognized” and “representative” entity of the “hotel” community, then the IFACCA and ReverbNation are “representative” [of the music community] too because they share similar characteristics as the IH&RA and other entities found to have satisfy CPE in other determinations. Per the Guidelines:

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<sup>52</sup> [http://www.oxforddictionaries.com/us/definition/american\\_english/recognize](http://www.oxforddictionaries.com/us/definition/american_english/recognize)

<sup>53</sup> [http://www.oxforddictionaries.com/us/definition/american\\_english/representative](http://www.oxforddictionaries.com/us/definition/american_english/representative)

<sup>54</sup> [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members) and [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members)

<sup>55</sup> <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

*Consistency of approach in scoring Applications will be of particular importance...<sup>56</sup> and “[t]he panel must be able to exercise **consistent** and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible...<sup>57</sup>*

According to the CPE Guidelines, the contextual interpretation of community particularities requires in-depth knowledge and expertise of the community.<sup>58</sup> All the Music Community categories and Music Community subsets that DotMusic delineated as members are essential for the global music sector to operate. Further, the “*logical alliance of communities that related to music*” (or “*alliance of groups*”) functions with cohesion as a whole in a regulated sector to protect music under agreed-upon structures governed by copyright law and international treaties. Without this cohesion, there would be no regulated music sector, and more importantly, music would not exist as we know it.

There are other clear examples of error relating to: consistency, fairness, predictability, equal treatment and procedural violations pertaining to DotMusic’s CPE process in comparison to community applicants that have prevailed CPE for whom ICANN applied the right threshold to pass. For example, ICANN’s scoring of the prevailing .RADIO applicant, in which ICANN assessed the “*majority*” support criterion (thereby granting .RADIO full points), while in contrast for DotMusic’s Application ICANN did not assess the “*majority*” criterion as outlined earlier in this RR:

However, the [.RADIO] applicant possesses documented support from institutions/organizations representing a majority of the community addressed.<sup>59</sup>

The EIU also determined that all .RADIO, .HOTEL, .OSAKA, .ECO, .GAY and .SPA community applicants had “*cohesion*” for *community establishment*:

(i) The EIU established that the .RADIO had *cohesion* solely on the basis of being “*participants in this...[radio] industry*.”<sup>60</sup>

(ii) The EIU awarded .HOTEL full points for *community establishment* for a “*cohesive*” community definition that is comprised of “*categories [that] are a logical alliance of members*.”<sup>61</sup>

Even though DotMusic similarly presents music community based on “*logical alliance*” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper;

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<sup>56</sup> CPE Guidelines, p.22

<sup>57</sup> Ibid

<sup>58</sup> The CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined...community plays an important role,” CPE Guidelines, p.22

<sup>59</sup> .RADIO CPE, <https://icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7, Ex.A15-1

<sup>60</sup> Ibid, p.2

<sup>61</sup> .HOTEL CPE, p.2, Ex.A14

(iii) The EIU awarded full points to .OSAKA determining there was “*cohesion*” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;<sup>62</sup> Similarly, DotMusic’s “*logical alliance*” is “*related to music*” (i.e. has a tie) but its Application was penalized;

(iv) The EIU awarded .ECO full points, stating that “*cohesion and awareness is founded in their demonstrable involvement in environmental activities*” which “may vary among member categories.”<sup>63</sup> Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities;

(v) The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under *community establishment* establishing that there is stronger *cohesion* than DotMusic based on “*an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies*”<sup>64</sup> (emphasis added). In contradiction, the EIU determined DotMusic’s “*logical alliance*” operating under a regulated sector that is united by copyright lacked any “*cohesion*” of belonging to a community; and

(vi) The EIU awarded .SPA the full points under *community establishment* and *nexus*, while DotMusic scored zero points and three respectively. A perfunctory comparison between DotMusic’s application and the prevailing .SPA application reveals substantial bias and contradictions. Similarly, based on ICANN’s rationale for the .SPA CPE, it is evident that the .MUSIC application should have consistently and fairly received maximum points as well. According to the .SPA application:

The spa community primarily includes:

- Spa operators, professionals and practitioners
- Spa associations and their members around the world
- Spa products and services manufacturers and distributors

...The secondary community generally also includes holistic and personal wellness centers and organizations. While these secondary community organizations do not relate directly to the operation of spas, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.<sup>65</sup>

Yet, the .MUSIC Report penalized the Application under *community establishment* to the fullest extent possible (grading zero points) for lacking “*cohesion*” while the .SPA community applicant

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<sup>62</sup> .OSAKA CPE, p.2, Ex.A18

<sup>63</sup> .ECO CPE, p.2, Ex.A17

<sup>64</sup> .GAY CPE, p.2, Ex.A15-2

<sup>65</sup> .SPA Community Application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/123?t:ac=123>, 20A, Ex.A16-2

was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for *community establishment*. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their *inclusion* in industry organizations and *participation* in their events:

Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.<sup>66</sup>

In contrast, ICANN rejected DotMusic’s membership music categories and music subsets as not having the requisite awareness even though, similar to the spa community, all Music Community members also “*participate*” in music-related events and are included in music groups or music subsets as evidenced by DotMusic’s *majority* music (*logical alliance*) community support of organizations with members representing the overwhelming *majority* of music consumed globally.

Moreover, despite a general definition of the *spa community* that included entities with a non-essential, tangential relationship with the spa community and a *secondary community* that did *not relate directly* to the string, the .SPA applicant was also awarded a full score under *nexus*. In contrast DotMusic’s community *name*, the “*Music Community*,” which matches string, lost 1 point for *nexus*.

As illustrated, when compared to other CPE determinations (*See Exhibit A41*), had policies been followed and a consistent evaluation been applied, then the Application should have received maximum points that would have resulted in a passing CPE grade, a conclusion that is also supported by forty-three (43) separate independent experts (*See Exhibit A40*).

**(8.4) Facts and procedural violations show that ICANN did not follow its own processes in the determination of the .MUSIC Report, including critical areas relating to *community establishment, nexus and support*. ICANN is the party responsible for ensuring quality control and a predictable, consistent and fair CPE process.**

According to ICANN, “all applicants for a new gTLD registry should be evaluated against transparent and predictable criteria.”<sup>67</sup> There were multiple prejudicial errors and improper procedural issues with ICANN not following the AGB guidelines and requirements, including:

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<sup>66</sup> .SPA CPE Report, Community Establishment, p.2, Ex.A16-1

<sup>67</sup> According to the Oxford dictionary, the word “fully” is defined as “completely or entirely; to the furthest extent” or “without lacking or omitting anything,” [http://www.oxforddictionaries.com/us/definition/american\\_english/fully](http://www.oxforddictionaries.com/us/definition/american_english/fully)

(i) **Policy misapplication of ICANN-accepted GAC Advice adopted by ICANN before the CPE process began is a procedural error.** Contrary to the .MUSIC CPE Report, the ICANN Board accepted GAC Category 1 Advice that music is a cohesive “regulated sector.” This means that the ICANN Board also agrees that the music community has cohesion. By accepting GAC Advice and rendering a decision that music is: (i) a “*string likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm;*” and (ii) that it is a “*string that is linked to [a] regulated sector*” that “*should operate in a way that is consistent with applicable laws,*”<sup>68</sup> there is reasonable expectation that ICANN would apply this policy acceptance in all evaluations that are processed to ensure transparency, predictability and consistency. This misapplication of a policy adopted by ICANN before the CPE process began is a procedural error. As such, the New gTLD Program procedural process for DotMusic’s evaluation was unpredictable, lacking both transparency and consistency.

(ii) **Not properly identifying the community definition required in 20A that was labeled as a defined term in the Application in reference to the AGB (“Community”):**

The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature (“**Community**”)", that relate to music: the art of combining sounds rhythmically, melodically or harmonically (Application, 20A)

According to the AGB, the Question section for 20A explicitly states:

20A. Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to **this** question.<sup>69</sup>

ICANN not only disregarded DotMusic’s definition from 20A, the Report does not mention or properly reference DotMusic’s definition. Instead ICANN construed its own general definition from 20D contravening the AGB’s instructions that “*community priority evaluation*” for DotMusic “*will be scored based on the community identified in response to **this** question*” (i.e. the definition identified in the Application answer to 20A not 20D). According to the .MUSIC Report:

[T]he applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production and distribution, including government culture agencies and arts councils and other complementor organizations involved in support activities that are aligned with the .MUSIC mission” (**Application, 20D**).

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<sup>68</sup> <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, An.5, p.8, Ex.A34

<sup>69</sup> AGB, Attachment to Module 2, Evaluation Questions and Criteria, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>, Question, 20A, A-14

In other words, ICANN scored DotMusic’s application relying on critically incorrect variables and parameters. In assessing DotMusic’s definition of the Music Community, ICANN misapplied material policy and permitted material procedural defects and inconsistencies in CPE evaluations to occur, resulting in an improper conclusion that DotMusic did not prevail CPE.

(iii) **Not properly identifying the name of the community to address nexus** that was labeled as a defined term in the Application in reference to the AGB (“**Name**”). While the *name* of the community “*Music Community*” was acknowledged by the EIU, it was not applied under its scoring for *nexus*:

The name of the community served is the “Music Community” (“**Community**”) <sup>70</sup>

*The “MUSIC” string matches the name (“Name”) of the Community and is the established name by which the Community is commonly known by others.*<sup>71</sup> (See Application 20)

According to the Report:

The community as defined in the application is of considerable size, both in terms of geographical reach and number of members. According to the applicant:

The **Music Community**’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries... with a Community of considerable size with millions of constituents (Application, 20A)<sup>72</sup>

As evidenced, under *nexus*, ICANN misapplied the wrong “*name*” definition by not applying the Application’s *established name* (the “*Music Community*”) inaccurately determining that the “*there is no “established name” for the applied-for string to match...for a full score on Nexus.*”<sup>73</sup> It is beyond shadow of a doubt that the established name that the Application defines and identifies, the “*Music Community*,” exactly matches the string .MUSIC.

(iv) **Not applying the alternate criterion to earn maximum points for support** that corresponds “*documented support...from institutions/organizations representing a majority of the overall community addressed.*”<sup>74</sup> CPE Guidelines provide that if an applicant lacks “documented authority to represent the community”<sup>75</sup> then the Panel should consider alternative options as follows: First, the Panel should decide whether the applicant has “documented support from the

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<sup>70</sup> Application, 20A

<sup>71</sup> Ibid

<sup>72</sup> Report, p.4

<sup>73</sup> Report, *Nexus*, p.5

<sup>74</sup> AGB, *Support*, “Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2,” 4-18

<sup>75</sup> CPE Guidelines, pp.16-18

recognized community institution(s)/member organization(s) to represent the community?”<sup>76</sup> If the applicant meets this criterion then the full two (2) points are awarded. If not, the Panel should then consider whether:

[t]here are multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?<sup>77</sup>

The Application meets this “*majority*” criterion, but this option was not applied to the .MUSIC CPE process. The Application is a global music community initiative supported by organizations with members representing over ninety-five percent (95%) of music consumed globally (an overwhelming majority),<sup>78</sup> yet the “majority” criterion was not assessed by ICANN in the grading of *Support*. If one excluded all the music related to DotMusic’s supporting organizations and their members, then music as we know it today would not exist. In fact the majority of music would not be available for consumption or enjoyment (**emphasis added**). The absurdity of the findings of the .MUSIC Report is further shown by another key supporter of DotMusic, NAMM, the trade association that represents nearly all the major music instrument and products’ manufacturers.<sup>79</sup> Without NAMM’s members’ instruments and music products, music cannot be created. Therefore, it is clear that the Application has the support of the “*majority*” of the community addressed.

In summary of (i), (ii), (iii) and (iv), the evidence supports that there is prejudicial pattern of behavior by ICANN not to follow established process and instructions. No other applicant in the New gTLD Program has provided more evidence, correspondence and research to assist ICANN with the CPE process than DotMusic has to ensure a consistent, predictable and fair evaluation in comparison to other community applicants that have prevailed. Judging from the Report’s inconsistent and contradictory rationale and ICANN’s failure to follow due process, it appears that the objective was to find ways to reject DotMusic’s Application by relying on inaccurate facts and not giving DotMusic the same benefit of the doubt given to the CPE applicants that prevailed. At ICANN’s request, DotMusic also provided detailed answers to Clarifying Questions<sup>80</sup> (“CQ Answers”), including significant credible and reputable evidence substantiating DotMusic’s

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<sup>76</sup> CPE Guidelines, pp.17-18

<sup>77</sup> Ibid

<sup>78</sup> <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at Ex.A19-1, A19-2, A19-3, and A19-4; and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>79</sup> <https://www.namm.org/about>

<sup>80</sup> See Clarifying Questions (“CQ”), Ex.A20 and Answers to Clarifying Questions (“CQ Answers”), Ex.A21

Application’s position with respect to the *community definition, community establishment* (including “cohesion”), *nexus* and *support*. A cursory review of the CQ Answers would find support to overturn all the points deducted from the Application.

If the EIU carefully reviewed the CQ Answers then it would be clear what the *community definition (community establishment)* and the *name* of the community (*nexus*) were because it was explicitly identified multiple times.<sup>81</sup> As explicitly outlined in the CPE Guidelines, DotMusic’s “*logical alliance*” community definition explicitly meets criteria: “*With respect to “Delineation” and “Extension,” it should be noted that a community can consist of...a logical alliance of communities.*” This is also substantiated by the AGB, which explicitly states that in the case of a community of an “*alliance of groups*” (such as DotMusic’s Application), “*details about the constituent parts are required.*”<sup>82</sup> DotMusic’s community definition is a “*strictly delineated and organized logical alliance of communities that relate to music*” (Application, 20A) which unequivocally meets this criterion. Contradicting established procedure, the EIU improperly found that the “*logical alliance*” definition has no cohesion. Moreover, while DotMusic followed the AGB and CPE Guidelines and provided details on each of the delineated music categories and music subsets (i.e. the *constituent parts*) demonstrating how they form the “*logical alliance*” community definition, the Application was penalized to the maximum extent under the Report’s *community establishment* for doing so. Further, dictionary definitions for “*logical*”<sup>83</sup> and “*alliance*”<sup>84</sup> establish that these definitions require cohesion and the *requisite awareness*.

The degree of multitude of direct and indirect evidence make it beyond reasonable doubt that overlooking the Application’s *community definition* and *name* of the community identified was

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<sup>81</sup> See CQ Answers: The *community definition* of “logical alliance” is referred to and explicitly defined in seven (7) separate pages of the CQ Answers provided to the EIU at p.6, p.8, p.9, p.12, p.14, p.16 and p.17. Also see CQ Answers, *Community Establishment & Definition Rationale and Methodology*, Annex A (pp-22-43) defining the community as “a delineated and organized logical alliance of communities of similar nature related to music” at p.22, p.25, p.38. Also see Annexes’ table of contents (p.20), which include *Annex D Venn Diagram for Community Definition and Nexus* that explicitly defines and identifies the *community definition* relating to *community establishment* (See Application, 20A) and the *name* of the community “*music community*” relating to *nexus*.

<sup>82</sup> AGB, Attachment to Module 2, Evaluation Questions and Criteria: “*Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,*” Notes, 20A, A-14

<sup>83</sup> Oxford Dictionaries “**logical**” definition: (i) *1.Of or according to the rules of logic or formal argument;* (ii) *1.1 Characterized by or capable of clear, sound reasoning;* (iii) *1.2 (Of an action, development, decision, etc.) natural or sensible given the circumstances, see [http://oxforddictionaries.com/us/definition/american\\_english/logical](http://oxforddictionaries.com/us/definition/american_english/logical)*

<sup>84</sup> Oxford Dictionaries “**alliance**” definition: (i) *1. A union or association formed for mutual benefit, especially between organizations;* (ii) *1.1 A relationship based on an affinity in interests, nature, or qualities;* (iii) *1.2 A state of being joined or associated, see [http://oxforddictionaries.com/us/definition/american\\_english/alliance](http://oxforddictionaries.com/us/definition/american_english/alliance)*

grossly negligent resulting in a failing grade for the Application. The omission of the Application's *community definition* and *name* from the .MUSIC Report was a gross error because it would have been impossible to ignore them given that they were explicitly mentioned and identified a significantly number of times as evidenced in:

1. The Application, Q20A;
2. The Public Interest Commitments;
3. Nearly *two-thousand correspondence letters* to ICANN and the EIU;<sup>85</sup>
4. Public comments from supporters in ICANN's microsite relating to the Application;
5. Answers to Clarifying Questions that the EIU requested (emphasis added);
6. Testimonies from over 40 independent experts submitted to ICANN and the EIU;
7. An independent Nielsen poll identifying the *community definition*;

As set forth above, ICANN and the EIU contravened the established vital CPE Guidelines and EIU Panel Process procedures.

**(v) ICANN and the EIU contravened established CPE Guidelines and EIU Panel Process procedures.**

As the Board should be aware, CPE requires:

Consistency of approach in scoring Applications will be of particular importance...<sup>86 87</sup>

The EIU will fully cooperate with ICANN's quality control process...<sup>88</sup>

The Panel Firm exercises consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and documents the way in which it has done so in each case.<sup>89</sup>

Furthermore, ICANN affirmed in correspondence with DotMusic that "*in accordance with the CPE Panel's process document to help assure independence of the process, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team.*"<sup>90</sup> Contrary to this correspondence and the procedures outlined in the ICANN's EIU Panel Process document, ICANN also appears to play a critical role in instructing and subjectively guiding the EIU to reach certain determinations by providing the EIU

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<sup>85</sup> See Ex.A.19-4

<sup>86</sup> CPE Guidelines, p.22

<sup>87</sup> In an email exchange between ICANN and the EIU, there is evidence of a "quality control process" for "consistency of approach in scoring across applications" (in this case the CPE process for .LLP, .LLC and GMBH), comparing them for consistency purposes with the .MLS CPE Report: "*Can we have an example (such as was provided in MLS) as to what other meanings might exist?*" See C44, ICANN\_DR-00458, p.3, Ex.A27

<sup>88</sup> Ibid, pp.22-23

<sup>89</sup> EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3, Ex.A12-2

<sup>90</sup> See Ex.A23

with rationale, subjective redline edits, comments, presentations and other forms of communication before the final CPE determinations are released publicly.

Public documents disclosed to Dot Registry (the community applicant for .INC, .LLC, and .LLP) and its legal counsel Arif Ali, in an Independent Review Proceeding (“IRP”) against ICANN, present clear evidence that ICANN edited and materially redlined the CPE draft Determinations for .INC, .GMBH, .LLC and .LLC on the EIU’s behalf before their final release, providing substantive and subjective rationale, making substantive redlines as well as suggested edits, which is a serious violation of established procedure and puts ICANN Staff at the heart of CPE decision-making in violation of CPE established procedure.<sup>91</sup> For example, in an email from EIU to ICANN on June 2, 2014 the EIU makes ICANN suggested changes and even asks permission from ICANN to make the same changes to a different application:

From: EIU to ICANN  
Email Subject: Re: Updated draft results (4)

...I've made the suggested changes... Quick question: is there a reason why you didn't send back .INC? Should we make the same changes for that evaluation?<sup>92</sup>

On June 3<sup>rd</sup>, 2014, the most revealing email shows that ICANN is involved in the decision-making process for determining CPE results, including providing subjective feedback, discussing rationale and providing presentations to the EIU:

From: ICANN to EIU  
Email Subject: Re: Updated draft results (4)

...On my initial review they looked really good. We will discuss the rationale in the presentation tomorrow. I would ask we make one change to all of the reports prior to final version...<sup>93</sup>

Aside from the procedural, policy and quality control process violations by both ICANN and the EIU, it appears from the hands-on instructions, discussions, guidance and more importantly subjective decision-making rationale provided by ICANN to the EIU, that the EIU clearly lacked the necessary training and expertise to make consistent judgment even though the EIU Panel Process document required that:<sup>94</sup>

All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process

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<sup>91</sup> See <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, C042 – C044; Also see Ex.A25, Ex.A26 and Ex.A27

<sup>92</sup> See Ex.27, C044, ICANN\_DR\_00457, p. 2

<sup>93</sup> Ibid, C044, p. ICANN\_DR\_00456, p.1

<sup>94</sup> EIU Panel Process, p.2

included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.

EIU evaluators are highly qualified... and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.

ICANN and the EIU relied on false and inaccurate material information and refused to take the clearly identified and relevant information into consideration in their rationale and decision-making process, which contradicted established ICANN policies. ICANN's and the EIU's disregard of the *community definition, name* of the community and failure to apply the majority *support* criterion is quite worrisome given the time allotted to determine the Report (July 27, 2015 to February 10, 2016). In an IRP final declaration concerning the .ECO and .HOTEL community applications,<sup>95</sup> the IRP Panelists agreed and also echoed DotMusic's serious concerns and glaring problems with the CPE Process in general:

[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.<sup>96</sup> [T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.<sup>97</sup> ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure...ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.<sup>98</sup> The combination of these statements gives cause for concern to the Panel.<sup>99</sup> The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.<sup>100</sup> In conclusion,...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.<sup>101</sup>

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<sup>95</sup> Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.HOTEL/.ECO IRP”) <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>

<sup>96</sup> .HOTEL/.ECO IRP, ¶ 146, p.37, Ex.A28

<sup>97</sup> Ibid, ¶ 147, pp.37-38

<sup>98</sup> Ibid, ¶ 148, p.38

<sup>99</sup> Ibid, ¶ 149, p.38

<sup>100</sup> Ibid, ¶ 150, p.38

<sup>101</sup> Ibid, ¶ 158, p.39

(vi) **Google conflict of interest.** Finally, it bears noting that the multiple process violations evidenced in this RR are further exacerbated by the conflict of interest with Google, another .MUSIC applicant.<sup>102</sup> According to ICANN’s Panel Process document,<sup>103</sup> “*the following principles characterize the EIU evaluation process for gTLD applications: All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.”* However, Eric Schmidt, the chairman of Google, was a spokesperson,<sup>104</sup> a trustee<sup>105</sup> and on the board of Economist from November, 2013<sup>106</sup> to December, 2015.<sup>107</sup> DotMusic’s CPE process for .MUSIC conducted by the Economist began in July, 2015.<sup>108</sup> That means for about 5 months during DotMusic’s CPE evaluation the EIU had conflict of interest in its role of managing the CPE Process on behalf of ICANN. This potential conflict of interest supported by what appears to be a strong correlation in success and failure rates in CPE based on whether a community applicant was in Google’s contention set or not. As of February 10<sup>th</sup>, 2016, there were 22 community applicants that have gone through CPE.<sup>109</sup> Out of the 22 community applicants, 10 were in a contention set with Google. **None of the applicants in contention with Google prevailed CPE. The success rate to prevail CPE without Google in the contention set was approximately 42%** (i.e. 5 out of 12 applications). The EIU passed nearly half the community applications if they were not in a contention set with Google, while failing all applicants competing with Google (including DotMusic). This statistically significant difference is a substantial discrepancy following a strong correlative pattern. ICANN CEO Fadi Chehade and the Board acknowledged the significance and sensitivity of this conflict of interest at the Singapore ICANN Meeting *Public Forum* in February 2015,<sup>110</sup> yet nothing was done to ensure the Economist had no conflict of interest when CPE began in July 2015.

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<sup>102</sup> This is not the first time DotMusic reports a conflict of issue relating to .MUSIC. Doug Isenberg represented .MUSIC competitor Amazon in Community Objections (“CO”) filed by DotMusic, while also serving as a New gTLD Program Legal Rights Objection (“LRO”) panelist.

<sup>103</sup> EIU Panel Process, p.2

<sup>104</sup> <https://www.youtube.com/watch?v=kHSwRHeeCqg>, see Ex.A29, p.1; Also see Ex.A29, p.2

<sup>105</sup> See [http://www.economistgroup.com/pdfs/Annual\\_Report\\_2015\\_FINAL.pdf](http://www.economistgroup.com/pdfs/Annual_Report_2015_FINAL.pdf), p.18, Ex.A30-2

<sup>106</sup> Ibid, p.29; Also see The Economist Board retrieved on September 30, 2015:

[https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results\\_and\\_governance/board.html](https://web.archive.org/web/20150930040432/http://www.economistgroup.com/results_and_governance/board.html)

<sup>107</sup> See <http://www.theguardian.com/media/2015/dec/10/economist-appoints-tessa-jowell-to-board-as-googles-eric-schmidt-departs>, Ex.A31

<sup>108</sup> See <https://newgtlds.icann.org/en/applicants/cpe#invitations>

<sup>109</sup> See, <https://newgtlds.icann.org/en/applicants/cpe#invitations>

<sup>110</sup> See <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, February 12<sup>th</sup>, 2015, p.61, Ex.A30-1

## 9. What are you asking ICANN to do now?

Requesters ask that the result of the .MUSIC Report be overturned by ICANN, by awarding DotMusic an additional six (6) points (or a passing grade). These are the total points that were deducted by ICANN as a result of ICANN not consistently following the CPE process and not applying the proper scoring guidelines to DotMusic’s Application in accordance with the policies and procedures defined in the AGB. In fact, ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to substantial flaws in its rationale methodology and scoring process. Additionally a linear comparative analysis between DotMusic’s application and the prevailing CPE applications for .SPA, .RADIO, .ECO, .OSAKA, and .HOTEL leads to the conclusion ICANN contravened the CPE Process and did not employ “consistent judgment in making its evaluations in order to reach conclusions that are compelling and defensible, document[ing] the way in which it has done so in each of the above mentioned community application cases.”<sup>111</sup>

DotMusic’s community Application clearly meets the **trust** claim (*See* ICANN’s 2007 Recommendations and Principles to launch the New gTLD Program, IGH CV-10) given its demonstrable global music community majority support, multi-stakeholder governance structure and music-tailored policies that serve a higher purpose, as outlined in its Application that .MUSIC:

1. Is exclusive only to legitimate members of the entire global music community;
2. Is governed and controlled by the global music community. Each music constituent community type has a governance seat on the multi-stakeholder .MUSIC Board (PAB);<sup>112</sup>
3. Is supported by organizations with members representing over 95% of music consumed globally (i.e. a majority);
4. Has enhanced safeguards to protect intellectual property, prevent cybersquatting and eliminate copyright infringement;
5. Has incorporated all IFPI intellectual property protection provisions that include policies to stop domain hopping, takedown policies in the case of piracy, authorization provisions, permanent blocks, privacy/proxy provision, true name/address mandates and trusted sender complaint policies amongst others;
6. Requires registrant validation via a mandatory two-step phone/email authentication process;
7. Protects names of famous music artists and brands by giving registration priority to those entities during a priority-based launch phase. .MUSIC also gives registration priority to community members belonging to legitimate Music Community Member Organizations to spur adoption, trust and safety;
8. Has domain naming conditions that eliminate cybersquatting and famous music brand trademark infringement. Registrants are only allowed to register their own name, acronym or “Doing Business As;”
9. Only allows legal music content and legal music usage; and
10. Will take down any domain infringing on any of its enhanced safeguards.

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<sup>111</sup> EIU Panel Process, p.3

<sup>112</sup> See Expanding multi-stakeholder Board at <http://music.us/board>

Aligned with its community-based mission, policies and PIC,<sup>113</sup> DotMusic's Application is the only applicant with music-tailored enhanced copyright protection safeguards that include:

- **Stopping Domain Hopping**: All domains that trusted senders...have sent over 10K notices against will be on the block domain list, which will continually be updated, unless there is evidence that the domain has been authorized by most of the applicable rights holders to use the content in question...
- **Take Down Policies**: DotMusic will require all registrants on music to have and implement policies that include the following: (i) upon receipt of a facially valid copyright take down notice, the registrant must search for all copies or links to access the noticed content on the site, and remove all such copies or links from its site; and (ii) it must implement a strong repeat infringer policy.... DotMusic will suspend the domain if the registrant fails to have or enforce such policies.
- **Stay Down and Repeat Offender**: DotMusic will suspend the domain if the registrant fails to have or enforce DotMusic takedown policies.Repeat offenders will be disallowed from registering.
- **Authorization**: Confirmation that “content that they otherwise have the right to post” means that the poster has express authorization to post the content.
- **Permanent Block**: Blocked domains will not be made available for registration by any third party unless there is a two third (2/3) vote by the Advisory Committee...
- **Privacy / Proxy**: Requirement that privacy/proxy services will be compliant with DotMusic's Name Selection policy (mandating that the domain is the name of the registrant, their acronym, “doing business as,” description of their mission or activities) and discloses the beneficial registrant as per DotMusic's Registration Policies. If such disclosure is not made then the registrant will not be allowed to proceed with registration.
- **True name and address**: If a .MUSIC domain makes available any music owned or posted by a third party...(directly or indirectly), the domain must prominently post on the site the true name of the website operator, a contact person...phone number, physical address, and email address at which the contact person may be contacted.
- **Trusted Sender Complaint**: If .MUSIC receives a complaint from a trusted sender...then DotMusic will investigate the complaint and suspend the domain, giving the registrant reasonable time to fix compliance matter. The domain will be terminated if registrant does not fix the compliance matter or fails to respond to the complaint.<sup>114</sup>

The Board should note the level of support for DotMusic's Application and the Application's maximum score under its *Registration Policies* that are aligned with its community-based purpose (*Eligibility, Name Selection, Content and Use and Enforcement*<sup>115</sup>) as evidence that it is “in the best interest of the Internet community” for DotMusic to be awarded .MUSIC. ICANN Board/NGPC member George Sadowsky<sup>116</sup> hit the nail on the head on the *only* goal that matters: “*ensuring user trust in using the DNS*” and “*to strengthen user trust*.”

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process...it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the...community and/or Internet users in general.”...We are

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<sup>113</sup> Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

<sup>114</sup> Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27

<sup>115</sup> Report, *Registration Policies*, pp.6-7

<sup>116</sup> <https://www.icann.org/profiles/george-sadowsky>, <https://www.icann.org/resources/pages/board-of-directors> and <https://www.icann.org/resources/pages/new-gtld-program-committee-2014-03-21-en>

unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.<sup>117</sup>

In a statement the week after the release of the .MUSIC Report, ICANN CEO Fadi Chehade agreed that with respect to intellectual property infringement (which is at the heart of the Application’s enhanced safeguards), “*ICANN, where necessary and appropriate, shape the discussion and commit to be part of a solution. [ICANN] cannot simply put [its] head in the sand and say these issues are not of [ICANN’s] concern:*”

As issues such as intellectual property infringement...are addressed in other fora, ICANN ...where necessary and appropriate, shape the discussion and debate and commit to be part of a solution in keeping with our values and mission. We cannot simply put our head in the sand and say that these issues are outside of the logical infrastructure layer in which we operate and thus not of our concern. Some solutions within the economic and societal layers of digital governance require distributed, innovative and collaborative issue-specific networks, of which the technical community depending on the issue sometimes must be a key part. We must remain part of the global conversations on digital governance, aware and ready to act when necessary.<sup>118</sup>

Aligned with ICANN’s CEO’s own statements to protect the public interest and the music community’s intellectual property rights, **we request ICANN to overturn the .MUSIC CPE Report and approve DotMusic’s community application** because (i) of the preponderance of evidence and support that DotMusic’s application exceeds the criteria established for community priority evaluation in comparison to other prevailing CPE applicants;<sup>119</sup> (ii) ICANN inaction led to multiple CPE process violations, prejudicial errors and an unfair and inconsistent quality control process when evaluating DotMusic’s application (in itself and in comparison to others); and (iii) more importantly “it would be in the best interest of the Internet community” for ICANN to do so given the community application’s demonstrable support that represents over 95% of music consumed globally and DotMusic’s Public Interest Commitments and music-tailored *Registration Policies* (taken from a “holistic perspective” as required by ICANN Guidelines<sup>120</sup>) that scored

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<sup>117</sup> Booking.com B.V. v. ICANN, ICDR Case No. 50-2014-000247 (March 3, 2015) Final Declaration at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>, ¶ 119, Ex.A6

<sup>118</sup> Fadi Chehade (ICANN CEO), <https://icann.org/en/system/files/correspondence/chehade-to-icann-board-19feb16-en.pdf>, p.6, February 19, 2016, Ex.A33

<sup>119</sup> ICANN ignored DotMusic’s answers to Clarifying Questions, over 40 testimonies filed by independent experts (See Appendix A, p.36, Ex.A32), an independent Nielsen poll conducted with over 2,000 participants (See Appendix B, p.38, Ex.A32), and nearly 2,000 letters of support (See Ex.A19-1, A19-2, A19-3, A19-4 and A-19-5 and <https://gtldcomment.icann.org/applicationcomment/viewcomments>), which provide clear evidence that substantiates scoring maximum points under *Community Establishment, Nexus and Support*.

<sup>120</sup> The scoring of the *Registration Policies* section related to *Name Selection, Content and Use and Enforcement* is the only criterion to be graded from a “holistic perspective.” See CPE Guidelines, pp.12-14

maximum points. DotMusic also requests: (i) to meet with individual Board members; (ii) a meeting with the ICANN Board; and (iii) a hearing to clarify the positions expressed in this RR.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

DotMusic is a community applicant for .MUSIC. The justifications under which DotMusic has standing and the right to assert this RR are:

- i) Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.<sup>121</sup>
- ii) Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;<sup>122</sup>
- iii) Conflict of Interest Issues;
- iv) Failure to Consider Evidence filed; and
- v) Violation of ICANN Articles of Incorporation/Bylaws:
  - 1. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.<sup>123</sup>
  - 2. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>124</sup>
  - 3. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>125</sup>
  - 4. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>126</sup>
  - 5. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>127</sup>
  - 6. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.<sup>128</sup>
  - 7. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy [e.g. copyright law and setting certain royalty rates for music's regulated sector] and duly taking into account governments' or public authorities' recommendations.<sup>129</sup>

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<sup>121</sup> Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

<sup>122</sup> JAS established that “*the existence of a visible and well-publicized proactive quality program properly incented all evaluation panel vendors to be appropriately cognizant of evaluation consistency, accuracy, and process fidelity, and perform accordingly.*” The .MUSIC CPE lacked a “*proactive quality control process*” deficient of the Initial Evaluation “*unified approach,*” which “*substantially mitigated the risk of isolation and inconsistent or divergent evaluations,*” ICANN Initial Evaluation Quality Control Program Report, <https://newgtlds.icann.org/en/program-status/application-results/ie-quality-program-26aug14-en.pdf>, p.16. Also see Ex.A38 and Ex.A39

<sup>123</sup> ICANN Bylaws, Art. I, § 2.6

<sup>124</sup> ICANN Bylaws, Art. I, § 2.1

<sup>125</sup> ICANN Bylaws, Art. I, § 2.7

<sup>126</sup> ICANN Bylaws, Art. I, § 2.8

<sup>127</sup> ICANN Bylaws, Art. I, § 2.9

<sup>128</sup> ICANN Bylaws, Art. I, § 2.10

<sup>129</sup> ICANN Bylaws, Art. I, § 2.11

8. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>130</sup>
9. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>131</sup>

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.**

**Do you have any documents you want to provide to ICANN? Yes, see Exhibits**

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*

Respectfully Submitted,

Constantinos Roussos  
DotMusic Founder

Tina Dam  
DotMusic Chief Operating Officer

Cc: Jason Schaeffer  
DotMusic Legal Counsel

February 24, 2016

DotMusic Website: <http://music.us>

DotMusic Board: <http://music.us/board>

DotMusic Supporting Organizations: <http://music.us/supporters>

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<sup>130</sup> ICANN Bylaws, Art. II, § 3

<sup>131</sup> ICANN Bylaws, Art. III, § 1

# Exhibit 18



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March 17, 2016

Dr. Steve Crocker, ICANN Chair of the Board and New gTLD Program Committee (“NGPC”) Member;  
 Akram Atallah, ICANN Interim CEO;  
 Chris Disspain, ICANN Chair of the Board Governance Committee (“BGC”), Board and NGPC Member;  
 Cherine Chalaby, ICANN Chair of the NGPC, Vice-Chair of Board and BGC Member;  
 Thomas Schneider, ICANN Government Advisory Committee Chair, Board and NGPC Liaison;  
 Erika Mann, ICANN BGC, Board and NGPC Member;  
 Rinalia Abdul Rahim, ICANN BGC, Board and NGPC Member;  
 Mike Silber, ICANN BGC, Board and NGPC Member;  
 Dr. Bruce Tonkin, ICANN BGC and Board Member;  
 Suzanne Woolf, ICANN BGC and Board Liaison;  
 John Jeffrey, ICANN General Counsel; and  
 Chris LaHatte, ICANN Ombudsman

#### **Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC**

Dear ICANN and Board Governance Committee:

We write to you to remind you of the consensus GAC Category 1 Advice Resolutions that were accepted by the ICANN Board and NGPC in 2014, which set precedent for DotMusic’s CPE and RR.

As you may be aware, DotMusic (with Application ID 1-1115-14110)<sup>1</sup> and ten (10) other globally-recognized music community organizations recently filed a Reconsideration Request 16-5<sup>2</sup> (“RR”) concerning the .MUSIC CPE Report<sup>3</sup> (“Report”). The Report did not follow numerous established processes and policies or recognize international law, agreements, treaties or conventions concerning the music community.

To that end, in 2014 the ICANN Board and the NGPC accepted GAC Category 1 Advice that .MUSIC is a “string that is linked to regulated sector” that “*should operate in a way that is consistent with applicable laws*;<sup>4</sup> a Resolution that, in effect, agrees that all music groups that comprise the music community defined (“*logical alliance of communities that relate to music*”) participate as a whole in a regulated sector with demonstrated activities tied to music that cohere to copyright law, united under international treaties, agreements and conventions.<sup>5</sup> Despite this acceptance, the Report did not recognize the music community or

<sup>1</sup>DotMusic community Application (ID 1-1115-14110), <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1392>

<sup>2</sup><https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

<sup>3</sup>DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>4</sup><https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2

<sup>5</sup>The ICANN’s Board’s and NGPC’s Resolutions (2014.02.05.NG01) provide that the music community defined in its entirety abides to copyright law that provides protection for copyrightable work once it is created (i.e. “fixed in a tangible medium of expression”) regardless whether it is commercial or not. International conventions, treaties and agreements include the Berne Convention for the Protection of Literary and Artistic Works of 1886 with 170



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evaluate the Application in a manner that acknowledges that music is a globally regulated sector united by copyright law with cohesion and recognized international rights protections.

The Resolution, consistent with applicable international law and a cohesive music regulated sector, provides, in pertinent part:

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program. Resolved (2014.02.05.NG01), the NGPC adopts the "GAC Advice (Beijing, Durban, Buenos Aires): Actions and Updates" (5 February 2014), attached as Annex 1<sup>6</sup> to this Resolution, in response to open items of Beijing, Durban and Buenos Aires GAC advice as presented in the scorecard.<sup>7</sup>

This means that the ICANN Board and NGPC have accepted that the music community, in its entirety, has cohesion based on international law. The above-referenced Resolution alone should have led to a prevailing DotMusic CPE.<sup>8</sup>

Given the overlap between the ICANN Board, NPGC and the BGC, DotMusic believes it would be helpful for BGC members to be reminded of the relevancy of the 2014 Resolution to the CPE process and in assessing the RR in accordance to ICANN's Bylaws. The Bylaws establish that "*ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.*"<sup>9</sup> This Bylaw reflects the prohibition on discrimination where "*(i) similar cases are (ii) treated differently (iii) and without reasonable justification.*"<sup>10</sup>

As such, BGC members cannot render a RR determination that does incorporate established ICANN policy and Resolutions (2014.02.05.NG01) because it would violate ICANN's Bylaws and be grossly negligent and create irreparable harm to the Applicant and the Community.

Furthermore, at the Meeting of the ICANN Board on March 10, 2016, the Board affirmed the serious issues that were raised by an Independent Review Proceeding Panel concerning lack of consistency or predictability in the CPE process. The Board resolved that:

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contracting countries (See [http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15)) and the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 ("TRIPS") with 162 contracting countries (See [http://wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=231&group\\_id=22](http://wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22))

<sup>6</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>

<sup>7</sup> Approved Resolutions, Meeting of the New gTLD Program Committee, <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>, <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>, <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>

<sup>8</sup> The Reconsideration Request 16-5 includes additional process violations and other related issues. The lack of implementation of the ICANN Resolutions is only one of these. However, it is sufficient to overturn the CPE result.

<sup>9</sup> Bylaws, <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>, Art. II, § 3

<sup>10</sup> Saluka Investments B.V. v. The Czech Republic, UNCITRAL, <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>, p.67, ¶ 313



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Resolved (2016.03.10.11), the Board notes the Panel's suggestions, and: directs the President and CEO, or his designee(s), to ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations.<sup>11</sup>

ICANN must apply policy Resolutions in all evaluations to ensure transparency, predictability and consistency according to its Bylaws, regardless whether or not a Panel chooses to contravene ICANN process-related Resolutions or relevant facts originating from these Resolutions in its Report. As its consulting agreement with ICANN states, the Panel is a consultant. ICANN is the ultimate decision-maker.

We look forward to a positive result of the RR so that the Music Community is able to launch a safe, trusted and secure .MUSIC gTLD in a timely manner to serve the public interest and benefit the Music and general Internet Community.

Kind regards,

Tina Dam  
COO  
DotMusic

CC: Constantine Roussos  
Founder  
DotMusic

CC: Jason Schaeffer  
Legal Counsel  
DotMusic

Website: <http://www.music.us>  
Supporting Organizations: <http://www.music.us/supporters>  
Board: <http://www.music.us/board>

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<sup>11</sup> <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>

# Exhibit 19



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March 28, 2016

Chris Disspain, ICANN Chair of the Board Governance Committee (“BGC”), Board and NGPC Member;  
 Dr. Steve Crocker, ICANN Chair of the Board and New gTLD Program Committee (“NGPC”) Member;  
 Akram Atallah, ICANN Interim President and CEO;  
 Cherine Chalaby, ICANN Chair of the NGPC, Vice-Chair of Board and BGC Member;  
 Thomas Schneider, ICANN Government Advisory Committee Chair, Board and NGPC Liaison;  
 Erika Mann, ICANN BGC, Board and NGPC Member;  
 Rinalia Abdul Rahim, ICANN BGC, Board and NGPC Member;  
 Mike Silber, ICANN BGC, Board and NGPC Member;  
 Dr. Bruce Tonkin, ICANN BGC and Board Member;  
 Suzanne Woolf, ICANN BGC and Board Liaison;  
 John Jeffrey, ICANN General Counsel; and  
 Chris LaHatte, ICANN Ombudsman

**Re: Response to .MUSIC LLC’s (“Far Further”) Letter; International Law and Conventions**

Dear ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board:

We write in response to the letter submitted by Far Further<sup>1</sup> attempting to obstruct the .MUSIC Reconsideration Request 16-5<sup>2</sup> (“RR”). This repeated pattern of behavior of filing spurious letters and abuse of accountability mechanisms<sup>3</sup> is misguided and anti-competitive. The Far Further letter was intended to purposely derail the RR to serve the interests of Far Further’s shareholders not the interests of Far Further’s supporting organizations, many of whom are RR co-filers<sup>4</sup> or have supported the RR.<sup>5</sup> Please note that DotMusic’s application has received more support than all CPE applicants combined.<sup>6</sup>

On November 18<sup>th</sup>, 2014, the BGC rejected<sup>7</sup> a Reconsideration Request 14-45 filed by Far Further concerning their CPE Report (released on October 7, 2014), which scored 3 points and did not pass.<sup>8</sup>

The GAC Category 1 Resolutions were accepted by the Board and the NGPC on February 5<sup>th</sup>, 2014<sup>9</sup> (i.e. before Far Further’s CPE result).

<sup>1</sup> <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-music-llc-to-icann-22mar16-en.pdf>

<sup>2</sup> <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

<sup>3</sup> For example, Far Further attempted to obstruct DotMusic’s Public Interest Commitments (against the interests of the majority of Far Further’s supporting organizations that have also supported DotMusic) by filing a Reconsideration Request 15-6, which was rejected by the BGC on May 6<sup>th</sup>, 2015. See BGC Reconsideration Request Determination 15-6, <https://icann.org/en/system/files/files/determination-15-6-music-06may15-en.pdf>

<sup>4</sup> RR co-filers - the International Federation of Musicians, Association of Independent Music, American Association of Independent Music, Independent Music Companies Association and the Nashville Songwriters Association International - are also Far Further supporting organizations. Yet, Far Further opposes the RR against their interests.

<sup>5</sup> See letter from the International Federation for the Phonographic Industry, <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>

<sup>6</sup> DotMusic is supported by organizations with members representing over 95% of music consumed globally: See <http://music.us/supporters>. An overwhelming majority of Far Further’s supporting organizations have also supported DotMusic. DotMusic’s logical alliance of supporting music organizations is the largest ever amassed for a music cause.

<sup>7</sup> BGC Determination 14-45, <https://icann.org/en/system/files/files/determination-music-18nov14-en.pdf>

<sup>8</sup> <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>



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Far Further chose not to file for relief or utilize other accountability mechanisms to challenge the BGC's Reconsideration Request 14-45 decision or any ICANN action/inaction relating to GAC Category 1 Resolutions. Rather than initiating a timely Independent Review Proceeding (or timely invoking any other ICANN accountability mechanism), Far Further waited nearly a year and a half after the BGC decision on their Reconsideration Request 14-45 to speak out – and only did so as to challenge DotMusic's RR. As such, any claim by Far Further is time-barred.<sup>10</sup> Furthermore, according to the BGC, Far Further did not identify any procedural failures with respect to their CPE. The BGC's Determination noted that Far Further (i) "*claim[ed] that the number of points awarded by the CPE Panel for various criteria was 'wrong';*" and (ii) did "*not claim that the CPE Panel violated established policy or procedure, but instead improperly challenge[d] the CPE Panels' substantive determination.*"

In contrast, the RR filed by DotMusic and co-requesters relate to process violations and contravening established procedures. Contrary to Far Further's flawed assertions that "*the BGC affirmed the Panel's determination not to award [Far Further] community status, and that BGC opinions "establish[] precedential value,"*" the BGC cannot determine the RR based on another applicant's application in this manner. While "*consistency of approach in scoring Applications*" is "*of particular importance*" to "*exercise consistent judgment...to reach conclusions that are compelling and defensible,*"<sup>11</sup> it is important to note that Far Further's application and Request for Reconsideration 14-45 are completely different to DotMusic's application (or those applications that have passed CPE) and RR. Agreeing to such an improper request would violate established AGB procedures to "*ensure applications are evaluated in an objective and independent manner*"<sup>12</sup> and to "*avoid any double-counting.*"<sup>13</sup> As such, the BGC must follow ICANN processes to provide fair and equitable, reasonable and non-discriminatory treatment.<sup>14</sup>

The claim by Far Further that DotMusic "*applied for community status for the same string, for essentially the same community*" is factually imprecise because DotMusic's definition of the music community ("*a strictly*

<sup>9</sup> See Approved ICANN Board Resolutions, <https://icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>; Also see <https://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>, <https://icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>

<sup>10</sup> See ICANN Accountability Mechanisms timing at <https://icann.org/resources/pages/mechanisms-2014-03-20-en>

<sup>11</sup> See CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

<sup>12</sup> See AGB, Module 2, Evaluation Procedures, 2.4.3.1, p. 2-33

<sup>13</sup> See AGB, Module 4.2.3, pp. 4-9 - 4-10 ("The sequence of the criteria reflects the order in which they will be assessed by the panel. The utmost care has been taken to avoid any "double-counting" - any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria")

<sup>14</sup> The BGC must conduct adequate diligence to ensure that ICANN's policies and procedures are applied fairly and in an open and transparent manner. It is well recognized under principles of international law that the obligations to treat entities fairly and equitably are "related to the traditional standard of due diligence," which international tribunals have defined as requiring the reasonable amount of prevention that one would expect well administered organization to provide. See e.g. CME v. Czech Republic, Partial Award of Sept. 13, 2001, <http://italaw.com/sites/default/files/case-documents/ita0178.pdf>, ¶614, p.174 (Unfair and inequitable treatment, ...unreasonable actions...are together a violation of the principles of international law); Lauder v. Czech Republic, Final Award of Sept. 2001, <http://italaw.com/sites/default/files/case-documents/ita0451.pdf>, ¶292, pp.67-68 (Fair and equitable treatment is related to the traditional standard of due diligence and provides a 'minimum international standard which forms part of customary international law.');

In addition, ICANN's obligation to conduct due diligence and exercise due care is an express area of focus when comparing contested actions of the Board to the Articles and Bylaws Art. IV, § 3(4)(b).



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*delineated and organized logical alliance of communities that relate to music*<sup>15</sup>) is entirely different from Far Further's stated community definition, which only covers four (4) million members and restricts registration to members of select music organizations.

Far Further lost three (3) points under *Registration Policies*, so even if they were awarded a full score in all other sections (including *Community Establishment* that relates to *cohesion*), Far Further would still not pass CPE. In contrast, DotMusic would pass CPE if the Panel followed established procedures and ICANN processes were "*in conformity with relevant principles of international law and applicable international conventions*" as mandated by ICANN's Articles of Incorporation that, among other things, calls for recognition of principles of international law and international conventions:

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.<sup>16</sup>

As such, the BGC should accept the RR and recognize music community *cohesion* through "*applicable international conventions*," such as the 1886 Berne Convention (that relates to the protection of copyright signed by 170 countries<sup>17</sup>).

On that subject, please further note that The Economist, the parent company of the Economist Intelligence Unit (the "EIU"), also recognizes the Berne Convention because The Economist is reliant on copyright cohesion and international law protection<sup>18</sup> to conduct its activities. According to The Economist's website:

Copyright is a property right that gives the creators of certain kinds of material rights to control the ways in which such material can be used. These rights are established as soon as the material has been created, with no need for official registration. Copyright applies globally and is regulated by a number of international treaties and conventions (including the Berne Convention, the Universal Copyright Convention, the Rome Convention and the Geneva Convention).<sup>19</sup>

The Economist's own words invalidate the EIU's CPE Report rationale that "*application materials and further research provide no substantive evidence of what the AGB calls "cohesion" – that is, that the various members of the community as defined by the application are 'united or form a whole.'"<sup>20</sup> Concluding that there is "*no substantive evidence*" that the music community defined in its entirety has no cohesion (i.e. does not unite cohesively under international music copyright or is reliant on international conventions) is not a compelling and defensible argument. Indeed, in The Economist's own words: "*copyright applies globally**

<sup>15</sup> As explicitly outlined in the AGB, DotMusic's "logical alliance" community definition explicitly meets the AGB criteria. According to the AGB, Module 4, 4.2.3, p. 4-12: "With respect to "Delineation" and "Extension," it should be noted that a community can consist of... a logical alliance of communities."

<sup>16</sup> ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 4

<sup>17</sup> Berne Convention for the Protection of Literary and Artistic Works of 1886 with 170 contracting countries (See [http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15))

<sup>18</sup> See The Economist website, *Terms of Use, "Governing Law and Jurisdiction,"* <http://economist.com/legal/terms-of-use>, ("*The Economist shall also retain the right to bring proceedings as to the substance of the matter in the courts of the country of your residence.*")

<sup>19</sup> See The Economist website, *Copyright Information,* <https://economist.com/rights/copyright.html>

<sup>20</sup> DotMusic .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, p.4



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and is regulated by a number of international treaties and conventions.” It thus appears that the EIU failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic's provision of thousands of pages of “*application materials and...research*” as “*substantive evidence*” of “*cohesion*,” including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified that:

The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the **Berne Convention**, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.<sup>21</sup>

To that end, as mentioned in our previous letter, in 2014, the members of the ICANN Board and the NGPC (who are also members of the BGC) accepted GAC Category 1 Advice that .MUSIC is a “*string that is linked to regulated sector*” that “*should operate in a way that is consistent with applicable laws;*”<sup>22</sup> a Resolution that, in effect, agrees that all music groups that comprise the music community defined (“*logical alliance of communities that relate to music*”) participate as a whole in a regulated sector with demonstrated activities tied to music that cohere to international copyright law, united under international treaties, agreements and conventions.

We hope it is helpful to have provided you with clarifications in response to Far Further’s letter and to raise pertinent issues relating to international law and conventions. Thank you in advance for your consideration.

Please let us know should you have any questions.

Kind Regards,

Tina Dam  
 COO  
 DotMusic

Cc: Constantine Roussos  
 Founder  
 DotMusic

Cc: Jason Schaeffer  
 Legal Counsel  
 DotMusic

Website: <http://www.music.us>  
 Supporting Organizations: <http://www.music.us/supporters>  
 Board: <http://www.music.us/board>

<sup>21</sup> See DotMusic Public Interest Commitments (“PIC”),

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6

<sup>22</sup> <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2

# Exhibit 20

# **Expert Legal Opinion**

**By Honorary Professor in International Copyright**

**Dr. Jørgen Blomqvist**

June 17, 2016

**Prepared for:**

International Corporation of Assigned Names and Numbers (“ICANN”);

Alliance of Music Communities Representing over 95% of Global Music Consumed (“Music Community”); and

DotMusic Limited (“DotMusic”)

**Expert Legal Opinion on ICANN’s .MUSIC Community Priority Evaluation Report for DotMusic’s Application with ID: 1-1115-14110 by:**

**Dr. Jørgen Blomqvist**

Honorary Professor in International Copyright, Ph.d

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## **About Honorary Professor Dr. Jørgen Blomqvist**

Dr. Jørgen Blomqvist is the Honorary Professor of International Copyright at the University of Copenhagen. He teaches international intellectual property law and undertakes research in the interpretation of the core international conventions on copyright and related rights, the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Formerly, Dr. Jørgen Blomqvist was Director, Copyright Law Division, at the World Intellectual Property Organization (“WIPO”) and he is continuously active in international development cooperation undertaking various ad-hoc assignments from WIPO, the European Commission and the Danish Patent and Trademark Office. In addition he is Secretary of the Danish Copyright Association and the Danish Group of the International Literary and Artistic Association (“ALAI”).

Dr. Jørgen Blomqvist has worked with copyright since 1976. From 1976 to 1990 as Secretary of the Copyright Law Review Commission under the Ministry of Culture, he played a central role in the preparation of the comprehensive law reform of 1995, and for a number of years he was also Legal Advisor and Deputy General Manager of KODA, the organization managing the performing rights of composers, writers and music publishers. He obtained his Ph.D in 1987 on a groundbreaking thesis on transfer of copyright ownership. In 1992 he was employed by the WIPO, a United Nations specialized agency in Geneva, from which he recently retired as Director of the Copyright Law Division.

Dr. Jørgen Blomqvist is counted among the leading experts in international copyright in the world, and he has in-depth experience with the substance of the international norms and their political background and development as well as with development cooperation in the field. Dr. Jørgen Blomqvist was awarded the 2015 Kockvedgaard Prize, which is awarded every two years by the Danish Association for Entertainment and Media Law for outstanding contributions to the subject area of entertainment and media law, and for his Ph.D thesis he was awarded the 1988 Gad’s Lawyers Prize. Dr. Jørgen Blomqvist has also authored the book “Primer on International Copyright and Related Rights.”<sup>1</sup>

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<sup>1</sup> See <http://www.amazon.com/Primer-International-Copyright-Related-Rights/dp/1783470968>

## Selected Publications by Honorary Professor Dr. Jørgen Blomqvist

2016

[Immaterielret og international frihandel \[Intellectual Property and International Free Trade\].](#) / Blomqvist, Jørgen

In: UfR, litterær afd., Vol. 2016, 18.03.2016, p. 166-174

The article describes the movement of international intellectual property law from multilateral WIPO treaties towards regional, bi- and plurilateral trade agreements. Based on the TPP Agreement it discusses the influence of international trade law on the international protection of intellectual property.

[Om fortolkning af Bernerkonventionen. Er Bernerkonventionen et maksimalistisk instrument? \[Interpretation of the Berne Convention. Is the Berne Convention a Maximalistic Instrument?\]](#) / Blomqvist, Jørgen

Liber Amicorum Jan Rosén. ed. / Gunnar Karnell; Annette Kur; Per Jonas Nordell; Daniel Wesman; Johan Axhamn; Stephan Carlsson. Visby, Sweden : Eddy.se AB, 2016. p. 153-167.

Based on the reference to protection “in as effective and uniform a manner as possible” in the Preamble of the Berne Convention, it has been claimed that the Berne Convention must be interpreted in such a way that it aims for the highest possible level of protection. That is not correct. When analyzing the wording of the Convention in its context it becomes clear that the reference is to the level of protection that the contracting parties were able to agree on. Accordingly, a balanced interpretation of the Convention is called for.

2015

[Denmark.](#) / Blomqvist, Jørgen

Copyright Throughout the World. ed. / Silke von Lewinski. Vol. 1 Rel. 7. ed. Eagan, MN : Thomson Reuters, 2015. p. 13.1-13.56.

[Indledning \[Introduction\].](#) / Blomqvist, Jørgen

Ophavsret og kulturarv: Bidrag til udvikling af kulturarvsjuraen. [Copyright and Cultural Inheritance: Contributions to the Development of the Law on Cultural Inheritance.] Ed. / Helle Porsdam; Erland Kolding Nielsen; Mia Rendix. Copenhagen : Det Kongelige Bibliotek, 2015. p. 9-11.

2014

[Primer on International Copyright and Related Rights.](#) / Blomqvist, Jørgen  
Cheltenham UK/Northampton, Massachusetts USA : Edward Elgar Publishing,  
Incorporated, 2014. 288 p.

The international law on copyright and related rights is comprehensive and complex, spanning over a large number of different treaties which have been compiled and amended over more than 125 years. This book gives a concise, but comprehensive introduction to the rules and their rationales. Its thematic approach makes it equally valuable to the student and the practitioner who needs both an introduction to and overview over the international law in the field. The book explains all treaties relevant today, from the 1886 Berne Convention to the WIPO Marrakesh Treaty of 2013 (288p).

2013

[Denmark.](#) / Blomqvist, Jørgen

Copyright throughout the World. ed. / Silke von Lewinski. Vol. 1 2013. ed. Eagan, MN,  
USA : Thomson Reuters, 2013. p. 13.1-13.97.

Chapter 13 on Danish copyright law in this seminal loose-leaf edition, edited by Silke von Lewinski and published by West.

2011

[Ophavsretsloven af 1961 i dens internationale sammenhæng \[The 1961 Danish Copyright Act Seen in its International Context\].](#) / Blomqvist, Jørgen

In: N I R, Vol. 2011, No. 6, 2011, p. 526-536.

A lecture held at the celebration of the 50<sup>th</sup> Anniversary of the Danish Copyright Act, analyzing both the international inspiration which helped form the Act and its own influence on foreign and international legislation.

International ophavsret [European and International Copyright]. / Schønning, Peter;  
Blomqvist, Jørgen

København : Djøf / Jurist- og Økonomforbundet, 2011. 502 p.

A commentary to the European Directives on copyright and related rights and a systematic description of the international conventions in the field.

[The Consistency of Mandatory Exceptions Treaties with International Conventions in the Field of Copyright and Related Rights.](#) / Blomqvist, Jørgen

Paper delivered at the 2011 ALAI Study Days in Dublin, publication by ALAI Ireland pending, available at <http://www.alaidublin2011.org/wp-content/uploads/2011/08/Jorgen-Blomqvist.pdf>.

2009

**Reflections on Article 15(4) of the Berne Convention.** / Blomqvist, Jørgen

In: Emlékkönyv Ficsor Mihály 70. születésnapja alkalmából, Barátaiktól [publication in honor of Dr. Mihály Ficsor at his 70th birthday], Szent István Társulat, Hungary, 2009, p. 54 - 63

2004

**The Future of the Berne Convention and the International Cooperation on Copyright and Related Rights.** / Blomqvist, Jørgen

In: Autorių teisės į literatūros, mokslo ir meno kūrinius, Vilnius 2004, p. 10 – 16

1992

**Non-voluntary Licensing in the Field of Radio, Television and Cable Distribution**

In: AIPJ vol 1992, p. 94 – 109.

**Copyright and Software Protection as viewed from the "traditional" Side of Copyright**

RIDA 1992, p. 2 – 50.

1987

**Overdragelse af ophavsrettigheder [Transfer of Copyright Ownership].** / Blomqvist, Jørgen

An analysis of the legal concepts of transfer and licensing of copyright and related rights and a study of the interpretation of the scope of transferred or licensed rights. Thesis. Copenhagen, Jurist- og Økonomforbundets Forlag 1987.

## The Relevant Facts

### Background on ICANN

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) was formed in 1998.<sup>2</sup> As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems. In particular, ICANN coordinates (i) the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as ‘DNS’); Internet protocol (‘IP’) addresses and autonomous system (‘AS’) numbers; and Protocol port and parameter numbers; (ii) the operation and evolution of the DNS root name server system; and (iii) policy development reasonably and appropriately related to these technical functions.”<sup>3</sup>
2. ICANN “is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes.” ICANN “is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501 (c)(3) of the Internal Revenue Code of 1986.” ICANN shall “pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (‘IP’) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (‘DNS’), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).”<sup>4</sup> ICANN operates “for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, [ICANN] shall cooperate as appropriate with relevant international organizations.”<sup>5</sup>
3. ICANN’s Core Values “guide the decisions and actions of ICANN: (1) Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet; (2) Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to those matters within ICANN’s mission requiring or significantly benefiting from global coordination; (3) To the extent feasible

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<sup>2</sup> ICANN, *What Does ICANN Do?* <https://www.icann.org/resources/pages/what-2012-02-25-en>

<sup>3</sup> ICANN Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en#I>, Article I, Section § 1

<sup>4</sup> ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 3

<sup>5</sup> ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, Article 4

and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties; (4) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making; (5) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment; (6) Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest; (7) Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process; (8) Making decisions by applying documented policies neutrally and objectively, with integrity and fairness; (9) Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected; (10) Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness; and (11) While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations."<sup>6</sup> According to its Bylaws, ICANN "shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."<sup>7</sup> Furthermore, ICANN's Bylaws state that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."<sup>8</sup>

4. ICANN is comprised of the Board of Directors,<sup>9</sup> Staff,<sup>10</sup> the Ombudsman,<sup>11</sup> the Nominating Committee,<sup>12</sup> three Supporting Organizations,<sup>13</sup> four Advisory Committees<sup>14</sup> and group of technical expert advisors.<sup>15</sup>

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<sup>6</sup> ICANN Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en#I>, Article I, Section § 2 (emphasis added)

<sup>7</sup> ICANN Bylaws, Article II *Non-Discriminatory Treatment*, <https://www.icann.org/resources/pages/governance/bylaws-en#II>, Section § 3

<sup>8</sup> ICANN Bylaws, Article III *Transparency*, Purpose, <https://www.icann.org/resources/pages/governance/bylaws-en#III>, Section § 1

<sup>9</sup> ICANN Bylaws, Article VI *Board of Directors*. <https://www.icann.org/resources/pages/governance/bylaws-en#VI>; ICANN, *Board of Directors*. Retrieved on May 4<sup>th</sup>, 2016 from <https://icann.org/resources/pages/board-of-directors>

<sup>10</sup> ICANN, *ICANN Staff*, <https://www.icann.org/en/about/staff>

<sup>11</sup> ICANN Bylaws, Article V *Ombudsman*. <https://www.icann.org/resources/pages/governance/bylaws-en#V>; ICANN, *The ICANN Ombudsman*. <https://www.icann.org/ombudsman>

<sup>12</sup> ICANN Bylaws, Article VII *Nominating Committee*, <https://www.icann.org/resources/pages/governance/bylaws-en#VII>; ICANN, *ICANN Nominating Committee*. <https://www.icann.org/resources/pages/nomcom-2013-12-13-en>

<sup>13</sup> See ICANN Bylaws: Article VIII, *Address Supporting Organization* ("ASO"), <https://www.icann.org/resources/pages/governance/bylaws-en#VIII> and <https://aso.icann.org>; Article IX, *Country Code Names Supporting Organization* ("CCNSO"), <https://www.icann.org/resources/pages/governance/bylaws-en#IX> and <http://ccnso.icann.org>; and Article X, *Generic Names Supporting Organization* ("GNSO"), <https://www.icann.org/resources/pages/governance/bylaws-en#X> and <http://gnso.icann.org/en>

<sup>14</sup> See ICANN Bylaws: Article XI, *Advisory Committees* (See <https://www.icann.org/resources/pages/governance/bylaws-en#XI>): the Governmental Advisory Committee ("GAC"), <https://gacweb.icann.org>; the Security and Stability Advisory Committee ("SSAC"), <https://www.icann.org/groups/ssac>; the Root Server System Advisory Committee ("RSSAC"),

## The Government Advisory Committee (“GAC”)

5. GAC “consider[s] and provide[s] advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”<sup>16</sup> GAC is comprised of “162 governments as Members and 35 Intergovernmental Organizations (‘IGOs’) as Observers.”<sup>17</sup> ICANN’s Bylaws have special provisions concerning interaction between the Board and the GAC: “The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.”<sup>18</sup>

## The ICANN New gTLD Program

6. ICANN “has as its mission to ensure a stable and unified global Internet. One of its key responsibilities is introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system (‘DNS’). In 2005, ICANN’s Generic Names Supporting Organization (‘GNSO’) began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet. The two-year policy development process included detailed and lengthy consultations with the many constituencies of ICANN’s global Internet community, including governments, civil society, business and intellectual property stakeholders, and technologists. In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with certain allocation criteria and contractual conditions. After approval of the policy, ICANN undertook an open, inclusive, and transparent implementation process to address stakeholder concerns, such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work included public consultations, review, and input on multiple draft versions of the Applicant Guidebook (‘AGB’). In June 2011, ICANN’s Board of Directors approved the Guidebook and authorized the launch of the New gTLD Program. The program’s goals include enhancing competition and consumer choice, and

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<https://www.icann.org/resources/pages/rssac-4c-2012-02-25-en>; and the At-Large Advisory Committee (“ALAC”), <https://atlarge.icann.org>

<sup>15</sup> See ICANN Bylaws, Article XI-A *Other Advisory Mechanisms*,

<https://www.icann.org/resources/pages/governance/bylaws-en#XI-A>; Also see *ICANN Groups*,

<https://www.icann.org/resources/pages/groups-2012-02-06-en>

<sup>16</sup> See ICANN Bylaws: Article XI, *Advisory Committees*,

<https://www.icann.org/resources/pages/governance/bylaws-en#XI>, Section § 2.1.

<sup>17</sup> ICANN GAC, <https://gacweb.icann.org/display/gacweb/How+to+become+a+GAC+member>

<sup>18</sup> See ICANN Bylaws: Article XI, *Advisory Committees*, Section § 2.1.j

enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name ('IDN') top-level domains. The application window opened on 12 January, 2012, [and closed on 12 April, 2012.] ICANN received 1,930 applications for new gTLDs. On 17 December, 2012, ICANN held a prioritization draw to determine the order in which applications would be processed during Initial Evaluation and subsequent phases of the program. These applications were processed by ICANN staff and evaluated by expert, independent third-party evaluators according to priority numbers.”<sup>19</sup>

### **ICANN’s New gTLD Program Committee (“NGPC”) of the Board**

7. On April 12, 2012, the ICANN Board established the New gTLD Program Committee (“NGPC”) delegating to the Board NGPC “all legal and decision making authority of the Board relating to the New gTLD Program.”<sup>20</sup> The NGPC handled all gTLD-Program matters for the Board until the NGPC was decommissioned on October 22, 2015.<sup>21</sup>

### **GAC Advice on the New gTLDs**

8. Section 3.1 of ICANN’s Applicant Guidebook describes the GAC’s special advisory role of giving public-policy advice: “3.1 GAC Advice on New gTLDs - ICANN’s Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues. The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors. The GAC can provide advice on any application... ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts [...]”<sup>22</sup>
9. Section 5.1 of ICANN’s Applicant Guidebook states that ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.<sup>23</sup>

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<sup>19</sup> ICANN, *About The Program*, <https://newgtlds.icann.org/en/about/program>; Application filing deadline was on April 12, 2012. See <https://www.icann.org/news/announcement-2012-03-29-en>

<sup>20</sup> ICANN Approved Board Resolutions (2012.04.10.01 to 2012.04.10.04), April 10, 2012. See <https://www.icann.org/resources/board-material/resolutions-2012-04-10-en>

<sup>21</sup> ICANN Approved Board Resolutions (2015.10.22.15), October 22, 2015. See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.c>

<sup>22</sup> AGB, § 3.1, pp. 3-2 to 3-3. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

<sup>23</sup> AGB, § 5.1, p.5-4. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

## GAC Consensus Advice and ICANN Board NGPC Resolutions on .MUSIC string

10. The ICANN Board NGPC accepted consensus GAC Category 1 Advice that .MUSIC is a “string that is linked to regulated sector” that “should operate in a way that is consistent with applicable laws.”<sup>24</sup> In effect, ICANN’s resolution for “GAC Category 1 Advice Implementation” established the .MUSIC string and its associated community (as a whole) are linked to a regulated sector that coheres to international copyright law, united under international treaties, agreements and conventions.<sup>25</sup>
11. The ICANN Board NGPC also accepted consensus GAC Advice to give “preferential treatment for all applications which have demonstrable community support,” “to protect the public interest and improve outcomes for communities” and to take “better account of community views and improving outcomes for communities.”<sup>26</sup>

### The Community Priority Evaluation (“CPE”)

12. The AGB provided detailed instructions to gTLD applicants and set forth the procedures as to how new gTLD applications were evaluated. The AGB provided that new gTLD applicants may designate their applications as either standard or community based, *i.e.*, “operated for the benefit of a clearly delineated community.”<sup>27</sup> Applicants for community-based gTLDs were expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have applied for a gTLD string strongly and specifically related to the community named in [their] application.”<sup>28</sup> If two or more applications were for identical or “confusingly similar” new gTLDs and complete all preliminary stages of evaluation, they are placed in a “contention set.”<sup>29</sup> An applicant with a community-based application that is placed in a contention set may elect to proceed with Community Priority Evaluation (“CPE”) for that application.<sup>30</sup> If the applicant elected to proceed to CPE, the application is forwarded to an independent, third-party provider for review.<sup>31</sup>
13. ICANN solicited Comparative Evaluation Panel Expressions of Interest (“EOI”) in 2009 from firms interested in providing an independent, third-party panel capable of

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<sup>24</sup> ICANN Board Letter to GAC, June 23, 2015. See <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2 and Annex 5, p.8

<sup>25</sup> See ICANN GAC Category 1 Safeguards at <https://newgtlds.icann.org/en/applicants/gac-advice/cat1-safeguards>; Also see ICANN GAC Category 1 Advice Implementation, New gTLD Advisory (Advisory number: R1-A01-0051), 19 March 19, 2014, <https://newgtlds.icann.org/en/applicants/advisories/gac-cat1-advice-19mar14-en>

<sup>26</sup> See GAC Singapore Communiqué, <https://gacweb.icann.org/download/attachments/27132037/Final%20Communiqué%20-%20Singapore%202014.pdf?version=2&modificationDate=1396429776778&api=v2> Section 3, ¶1a, p.4; Also see Annex 1 to NGPC Resolution 2013.09.10.NG03 – Scorecard in Response to GAC Durban Communiqué, ICANN Resolutions, <http://icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-10sep13-en.pdf>, Register #17 (2013-07-18 – Community Applications (Communiqué §7.b.i)) and Register #18 (2013-07-18 – Community Applications (Communiqué §7.b.ii.a)), p.7

<sup>27</sup> AGB, § 1.2.3.1. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

<sup>28</sup> *Ibid*, § 1.2.3.1

<sup>29</sup> *Ibid*, § 4.1

<sup>30</sup> *Ibid*, § 4.2

<sup>31</sup> See <http://newgtlds.icann.org/en/applicants/cpe>

performing the Community Priority Evaluation process. The consulting firm would contractually agree: (i) that the panel had “significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role;”<sup>32</sup> (ii) that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination;”<sup>33</sup> and (iii) provide ICANN with a “statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”<sup>34</sup>

14. ICANN’s staff selected The Economist Group’s Economist Intelligence Unit (“EIU”) to conduct Community Priority Evaluations in 2011.<sup>35</sup> The EIU agreed in the ICANN-EIU Statement of Work (“SOW”) contract that its activities will be bound by ICANN’s governance requirements and governance processes. ICANN’s Core Values were contractually imposed on the EIU through ICANN Bylaws.<sup>36</sup> The SOW stated that the Panel must “ensure that the evaluations are completed consistently and completely in adherence to the Applicant Guidebook” and follow “evaluation activities based on ICANN’s gTLD Program Governance requirements to directly support the Program Office governance processes.”<sup>37</sup> The Consulting Agreement also required the panel to “document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result” by (i) “document[ing] the evaluation and analysis for each question to demonstrate how the Panelist determined a score for each question based on the established criteria;” (ii) “provid[ing] a summary of the rationale and recommended score for each question;”<sup>38</sup> (iii) and “providing ad-hoc support and documentation as requested by ICANN’s Quality Control function as part of the overall gTLD evaluation quality control process” including “access to work papers as required verifying Panel Firm’s compliance.”<sup>39</sup>
15. The CPE Panel Process Document required that “all EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures. EIU evaluators are highly qualified and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.”<sup>40</sup>

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<sup>32</sup> New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest (“EOI”), Comparative Evaluation Panel, <https://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>, p.5

<sup>33</sup> Ibid, p.5

<sup>34</sup> Ibid, p.6

<sup>35</sup> See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>

<sup>36</sup> Governance Documents include ICANN’s Bylaws and Articles of Incorporation. See <https://icann.org/resources/pages/governance/governance-en>.

<sup>37</sup> EIU Contract and Statement of Work (“SOW”) with ICANN, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[ 2 ], p.8

<sup>38</sup> Ibid, p.5

<sup>39</sup> Ibid, p.12

<sup>40</sup> EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2

16. The CPE Guidelines required that “the panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role. The provider must be able to convene a panel capable of evaluating applications from a wide variety of different communities. The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and [...] The panel must be able to document the way in which it has done so in each case. EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to applications. All applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.”<sup>41</sup>
17. Once an applicant submits its materials in support of CPE, a panel constituted of EIU experts (known as a “CPE panel”) evaluates the application.<sup>42</sup> The CPE panel evaluates the application against the CPE criteria, using the CPE Guidelines as additional guidance, which include scoring rubrics, definitions of key terms, and specific questions to be scored.<sup>43</sup> If the application is found to meet the CPE criteria set forth in the AGB—meaning that the CPE panel awards the application at least 14 out of 16 possible points on those criteria—the application will prevail in CPE.<sup>44</sup> If an application prevails in CPE, it (and any other community based applications in the contention set that prevail in CPE) will proceed to the next stage of evaluation.<sup>45</sup> Other standard applications in a contention set will not proceed if the community-based application(s) have achieved priority,<sup>46</sup> an outcome based on the principles and policy implementation guidelines of the GNSO that applications representing communities be awarded priority in string contention.<sup>47</sup>
18. The CPE are set forth in Module 4 of the AGB. There are four principal criteria, each worth a possible maximum of 4 points: Community Establishment, the Nexus between

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<sup>41</sup> CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

<sup>42</sup> See Community Priority Evaluation Panel and Its Processes, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

<sup>43</sup> Ibid; CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>

<sup>44</sup> See AGB, § 4.2.2. The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of four points, See AGB, § 4.2.3

<sup>45</sup> AGB, § 4.2.2

<sup>46</sup> AGB, § 4.2.2

<sup>47</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program , <https://icann.org/en/minutes/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>, p.94; ICANN’s 2007 Recommendations and Principles for launching the New gTLD Program provided that “where an applicant lays any claim that the TLD is intended to support a particular community, that claim will be taken on trust, with the following exceptions: (i) the claim to support a community is being used to gain priority for the application [...] Under [this] exception[...], Staff Evaluators will devise criteria and procedures to investigate the claim.” <http://gns0.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6; Also see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

Proposed String and Community, Registration Policies and Community Endorsement.<sup>48</sup>  
An application must receive a total score of at least 14 points in order to prevail.

19. The first criterion is Community Establishment, which is comprised of two main sub-criteria: 1-A Delineation (worth 2 points) and 1-B Extension (worth 2 points). According to the AGB, “community” implies “more of cohesion than a mere commonality of interest” with (i) “an awareness and recognition of a community among its members;” (ii) an “understanding of the community’s existence prior to September 2007;” and (iii) “extended tenure or longevity—non transience—into the future.” Under the 1-A Delineation sub-criterion, the Community’s membership definition is evaluated to determine whether the Community is “clearly delineated [‘Delineation’], organized [‘Organization’], and pre-existing [‘Pre-Existence’].” Delineation requires “a clear and straightforward membership definition” and an “awareness and recognition of a community (as defined by the applicant) among its members.” Organization requires “documented evidence of community activities” and “at least one entity mainly dedicated to the community” (as defined by applicant). Pre-existence requires that the Community defined by the applicant “must have been active prior to September 2007.” Under the I-B Extension sub-criterion, the Community (as defined by applicant) must be of “considerable size [‘Size’] and longevity [‘Longevity’].” Size requires that the “community is of considerable size.”<sup>49</sup> Longevity requires that the community (as defined by applicant) “was in existence prior to September 2007.”<sup>50</sup> According to the AGB: “With respect to ‘Delineation’ and ‘Extension,’ it should be noted that a community can consist of [...] a logical alliance of communities (for example, an international federation of national communities of a similar nature).”<sup>51</sup>
20. The second criterion is the Nexus between Proposed String and Community, which is comprised of two main sub-criteria: 2-A Nexus (3 points possible) and 2-B Uniqueness (1 point). With respect to “Nexus,” for a score of 3, “the essential aspect is that the applied-for string is commonly known by others as the identification / name<sup>52</sup> of the community” i.e. “[t]he string matches the name of the community.”<sup>53</sup> Uniqueness means that the “[s]tring has no other significant meaning beyond identifying the community described in the application.”<sup>54</sup> According to the AGB: “With respect to ‘Uniqueness,’ ‘significant meaning’ relates to the public in general, with consideration of the community language context added. ‘Uniqueness’ will be scored both with regard to the community context and from a general point of view.”<sup>55</sup>

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<sup>48</sup> AGB, Section 4.2.3, pp.4-9 to 4-19

<sup>49</sup> AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

<sup>50</sup> AGB, “‘Longevity’” means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12

<sup>51</sup> AGB, p.4-12

<sup>52</sup> AGB, “‘Name’ of the community means the established name by which the community is commonly known by others,” p.4-13

<sup>53</sup> AGB, p.4-12

<sup>54</sup> AGB, p.4-13

<sup>55</sup> AGB, p.4-14

21. The third criterion is the Registration Policies. There is 1 point possible for each sub-criterion: 3-A Eligibility, 3-B Name selection, 3-C Content and Use and 3-D Enforcement.<sup>56</sup>
22. The fourth criterion is Community Endorsement, which has two sub-criteria, each worth 2 points: 4-A Support and 4-B Opposition. According to the AGB: “Support” means that the “Applicant is, or has documented support from, the recognized<sup>57</sup> community institution(s) / member organization(s).”<sup>58</sup> According to the AGB: “With respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions / organizations. In such cases there must be documented support from institutions / organizations representing a majority of the overall community addressed in order to score 2.”<sup>59</sup> According to the AGB: With respect to “Opposition,” 2 points are awarded if there is “no opposition of relevance.”<sup>60</sup> Also, “to be taken into account as relevant opposition [...] objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”<sup>61</sup>

### **The DotMusic Application Materials and .MUSIC CPE Process**

23. DotMusic with Application ID 1-1115-14110 was invited to CPE on July 29, 2015.<sup>62</sup> DotMusic accepted ICANN’s invitation, electing to have its .MUSIC community-based Application evaluated by the EIU CPE Panel (the “Panel”).<sup>63</sup> According to DotMusic’s Application Materials:
- a. The Mission and Purpose is: “Creating a trusted, safe online haven for music consumption and licensing; Establishing a safe home on the Internet for *Music Community* (“Community”) members regardless of locale or size; Protecting intellectual property and fighting piracy; Supporting Musicians’ welfare, rights and fair compensation; Promoting music and the arts, cultural diversity and music education; Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both commercial and non-commercial stakeholders;<sup>64</sup>
  - b. According to DotMusic’s Application, the “Community” was defined in 20A: “The Community is a strictly delineated and organized community of individuals,

<sup>56</sup> AGB, pp. 4-14 to 4-16

<sup>57</sup> AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

<sup>58</sup> AGB, p.4-17

<sup>59</sup> AGB, p.4-18

<sup>60</sup> AGB, p.4-17

<sup>61</sup> AGB, p.4-19

<sup>62</sup> See ICANN CPE microsite, <https://newgtlds.icann.org/en/applicants/cpe>

<sup>63</sup> See DotMusic’s .MUSIC Application Details on ICANN’s website, <https://gtdresult.icann.org/applicationstatus/applicationdetails/1392>

<sup>64</sup> See .MUSIC Application, 18A. Also see 20C, <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392> (emphasis added)

- organizations and business, a “logical *alliance* of communities of a similar nature (“COMMUNITY”)), that relate to music: the art of combining sounds rhythmically, melodically or harmonically;”<sup>65</sup>
- c. According to DotMusic’s Application, community establishment was described in 20A: “DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria “aligned with the community-based Purpose” and mitigate anti-trust and confidentiality / privacy concerns by protecting the Community of considerable size / extension while ensuring there is no material detriment to Community rights / legitimate interests. Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination;”<sup>66</sup>
  - d. According to the DotMusic Application, evidential examples of music community cohesion were described in 20A: “commonly used [...] classification systems such as ISMN, ISRC, ISWC, ISNI [...]”;<sup>67</sup>
  - e. According to DotMusic’s Application, the size and extensiveness of the community were described in 20A: “The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries [...] with a Community of considerable size with millions of constituents (‘SIZE’);”<sup>68</sup>

<sup>65</sup> See .MUSIC Application, 20A, para.3 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added); Also see DotMusic Public Interest Commitments: “... Community definition of a “logical alliance of communities of similar nature that relate to music” ...” at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

<sup>66</sup> See .MUSIC Application, 20A, para.1

<sup>67</sup> Ibid, 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12<sup>th</sup>, 2015 (See <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>): “The International Standard Music Number (ISMN) is a unique number for the identification of all notated music publications from all over the world. The ISMN is an ISO certified global standard number (ISO 10957:2009). See <http://www.ismn-international.org/whatis.html> and [http://www.iso.org/iso/home/store/catalogue\\_ics/catalogue\\_detail\\_ics.htm?csnumber=43173](http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=43173),” footnote 7, p.8; “The ISRC (International Standard Recording Code) is the international identification system for sound recordings and music video recordings. The ISRC is an ISO certified global standard number (ISO 3901:2001) and is managed by the IFPI. See <http://isrc.ifpi.org>, <https://www.usisrc.org/about/index.html> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=23401](http://www.iso.org/iso/catalogue_detail?csnumber=23401),” footnote 8, pp.8 to 9; “The ISWC (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical works. The ISWC has been approved by ISO (International Organization for Standardisation) as a global standard (ISO 15707:2001) and is managed by CISAC. See <http://www.iswc.org/en/faq.html> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=28780](http://www.iso.org/iso/catalogue_detail?csnumber=28780), footnote 9, p.9; “The International Standard Name Identifier (ISNI) is the ISO certified global standard number (ISO 27729) for identifying the millions of contributors to creative works and those active in their distribution. ISNI holds public records of over 8 million identities and 490,000 organizations. See <http://www.isni.org> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=44292](http://www.iso.org/iso/catalogue_detail?csnumber=44292),” footnote 10, p.9; Also see DotMusic Answers to Clarifying Questions, <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, pp. 121 to 122 of 993, Exhibit A21

<sup>68</sup> See .MUSIC Application, 20A, para.4 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

- f. According to DotMusic’s Application, the “Name” of the community defined was described in 20A: “The name of the community served is the ‘Music Community’ (‘Community’);”<sup>69</sup>
- g. According to DotMusic’s Application, the “Nexus between Proposed String and Community” was described in 20A and 20D: “The ‘MUSIC’ string *matches* the name (‘Name’) of the Community and is the established name by which the Community is commonly known by others.”<sup>70</sup> DotMusic “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in its answer to 20D: “The .MUSIC string relates to the Community by *completely representing* the *entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model;”<sup>71</sup>
- h. According to the DotMusic Application, DotMusic received “documented support” from multiple organizations representing a majority of the Community, as referenced in 20D: “See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support.”<sup>72</sup> According to the DotMusic Application Materials and DotMusic’s Support letters, the .MUSIC Application is supported by *multiple* recognized and trusted organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall Music Community defined, the “organized and delineated logical alliance of communities of similar nature that relate to music;”<sup>73</sup> and
- i. Documented support from multiple organizations for DotMusic’s .MUSIC community-based Application included the International Federation of Arts Councils and Culture Agencies<sup>74</sup> (“IFACCA”), the International Federation of Phonographic Industry<sup>75</sup> (“IFPI”), the International Federation of Musicians<sup>76</sup> (“FIM”), the

<sup>69</sup> Ibid, 20A, para.1

<sup>70</sup> Ibid, 20A, para.3 (emphasis added)

<sup>71</sup> Ibid, 20D, para.1 (emphasis added)

<sup>72</sup> Ibid, 20D, last paragraph

<sup>73</sup> See Support Letters from multiple organizations for DotMusic’s Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>74</sup> IFACCA is the is the only international federation representing a global network of arts councils and government ministries of culture with national members from over 70 countries covering all continents. See <http://ifacca.org>

<sup>75</sup> The IFPI, founded in 1933, is a globally-recognized music organization with official relations with United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status), a globally-recognized international organization with 195 country member states (See <http://en.unesco.org/countries/member-states>); World Intellectual Property Organization (WIPO) (Permanent Observer Status). See <http://ngo-db.unesco.org/r/or/en/1100064188> and [http://wipo.int/members/en/organizations.jsp?type=NGO\\_INT](http://wipo.int/members/en/organizations.jsp?type=NGO_INT). The IFPI represents the “recording industry worldwide” encompassing 63 countries with IFPI-affiliated national groups or music licensing companies as well as 63 global markets where the IFPI’s member companies operate in. The IFPI represents the majority of music consumed globally. See <http://www.ifpi.org>. The IFPI is also the globally-recognized organization that administers the International Standard Recording Code (ISRC), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community. See <http://isrc.ifpi.org/en/isrc-standard/structure> and <http://isrc.ifpi.org/en/why-use/benefits>. The IFPI also represents the three major label groups (Universal Music, Sony Music and Warner Music), which “control 78% of the global market.” See Credit Suisse Research and

International Confederation of Music Publishers<sup>77</sup> (“ICMP”), the International Artist Organisation (“IAO”),<sup>78</sup> the Featured Artist Coalition<sup>79</sup> (“FAC”), the International Society for Music Education<sup>80</sup> (“ISME”), the International Ticketing Association<sup>81</sup> (“INTIX”), the International Association of Music Information Centres<sup>82</sup> (“IAMIC”), the Worldwide Independent Network<sup>83</sup> (“WIN”), the International Music Products

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Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from [https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document\\_id=1034433411&extdocid=1034433411\\_1\\_eng\\_pdf](https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&extdocid=1034433411_1_eng_pdf)

<sup>76</sup> FIM is an international federation of national music communities representing the “voice of musicians worldwide.” The FIM, founded in 1948, is a globally-recognized music community organization with documented official roster consultative status relations with the United Nations Economic and Social Council (“ECOSOC”); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM is also consulted by the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”). See <http://www.fim-musicians.org>

<sup>77</sup> The ICMP, founded in 1991, is the “global voice for music publishing,” the world trade association representing the interests of the music publishing community internationally. ICMP’s mission is to increase copyright protection internationally, encourage a better environment for business and act as a music community forum for consolidating global positions. See [http://www.wipo.int/members/en/organizations.jsp?type=NGO\\_INT](http://www.wipo.int/members/en/organizations.jsp?type=NGO_INT). See <http://www.icmp-ciem.org>. The ICMP is a globally-recognized organization accredited by WIPO as an observer.

<sup>78</sup> The IAO is the umbrella association for national organizations representing the rights and interests of Featured Artists in the Music Industry. Our principal interests are transparency, the protection of intellectual property and a fair reflection of the value an artist's work generates. The IAO is a not-for-profit organization based in Paris that was officially founded by its six founder-members: FAC (UK), GAM (France), CoArtis (Spain), Domus (Germany), Gramart (Norway) and FACIR (Belgium). See <http://www.iaomusic.org>

<sup>79</sup> The FAC “represents the interests of Featured Artists within the national, European and International political arenas when relevant issues such as copyright law, music licensing are being debated.” See <http://thefac.org/about>

<sup>80</sup> The ISME was formed in 1953 by UNESCO “to stimulate music education as an integral part of general education.” The ISME represents an international, interdisciplinary, intercultural music community network striving to understand and promote music learning across the lifespan with presence in over 80 countries covering a network of millions of music community members. The ISME, the “premiere international organisation for music education”... “respects all musics and all culture” and believes that “every individual has a right to music education.” See <http://isme.org/general-information/4-isme-facts>

<sup>81</sup> INTIX is the only international ticketing organization mainly dedicated to ticketing that plays a vital role for the global Music Community by generating over \$20 billion in live music ticket sales every year. INTIX “is the leading forum for ticketing professionals, representing the most comprehensive view of the industry and its practices, products and services. INTIX represents members from over 25 countries.” See <http://intix.org> and <https://icann.org/en/system/files/correspondence/hoffman-to-icann-eiu-05may16-en.pdf>

<sup>82</sup> IAMIC, formed in 1958, is the only global network of international music information centres that is dedicated to the global music community by means of “facilitating the exchange of knowledge and expertise in the field of music documentation, promotion and information, leading to an increased international cooperation, performance and use of repertoire of music of all genres.” IAMIC is the “only international network of organisations that document, promote and inform on the music of their country or region in a diversity of musical genres.” See <http://iamic.net>

<sup>83</sup> WIN, formed in 2006, supports independent music trade associations globally and is a global forum for the professional independent music industry. It was launched in 2006 in response to business, creative and market access issues faced by the independent sector everywhere. For independent music companies and their national trade associations worldwide, WIN is a collective voice. It also acts as an advocate, instigator and facilitator for its membership. WIN exists to support the independent music community through interaction with representative trade organizations and groups, and working directly with international music industry bodies on issues of global significance. See <http://winformusic.org>

Association<sup>84</sup> (“NAMM”), the International Music Managers Forum<sup>85</sup> (“IMMF”), Jeunesses Musicales International<sup>86</sup> (“JMI”), the Independent Music Companies Association<sup>87</sup> (“IMPALA”), the Recording Industry Association of America<sup>88</sup> (“RIAA”), the National Music Publishers Association<sup>89</sup> (“NMPA”), the American Association of Independent Music<sup>90</sup> (“A2IM”), the Association of Independent Music<sup>91</sup> (“AIM”), the Merlin Network<sup>92</sup> (“Merlin”), the American Society of Composers, Authors & Publishers<sup>93</sup> (ASCAP), the Society of European Stage

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<sup>84</sup> NAMM is a globally-recognized music association formed in 1901 representing the international music products industry and community. NAMM is the not-for-profit association that promotes the pleasures and benefits of making music and strengthens the \$17 billion global music products industry. See <https://www.namm.org>

<sup>85</sup> The IMMF, formed in 1992, is the umbrella international organization representing entertainment manager members. The IMMF connects music managers around the world to share experiences, opportunities, information and resources. See <http://immf.com>

<sup>86</sup> JMI is the world’s largest music youth organization covering over 5 million music community members aged 13-30. JMI is the largest youth music non-governmental organization in the world, created in 1945 with the mission to “enable young people to develop through music across all boundaries” powered by its 230 staff members and 2,200 volunteers. See <http://www.jmi.net>. JMI is globally recognized and has consultative status with UNESCO and official roster consultative status relations with the United Nations’ ECOSOC. See <http://ngo-db.unesco.org/r/or/en/1100033233>

<sup>87</sup> IMPALA was formed in 2000 by prominent independent labels and national trade associations and has over 4,000 members. IMPALA is a non-profit making organization with a scientific and artistic purpose, dedicated to cultural SMEs, the key to growth and jobs in Europe. IMPALA enables the independents to leverage collective strength to punch above their weight. IMPALA’s mission is to grow the independent music sector, promote cultural diversity and cultural entrepreneurship, improve political access and modernize the perception of the music industry. See <http://www.impalamusic.org>

<sup>88</sup> The RIAA, founded in 1956, is a globally-recognized music association that represents the recording industry in the United States. By “Representing Music,” the RIAA is a trade organization that supports and promotes the creative and financial vitality of the major music companies. The RIAA’s members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. See <http://www.riaa.com/about-riaa>. The United States is the world’s largest market representing 26% of the entire physical music market and 71% of the digital music market. See Recording Industry Association of Japan Yearbook 2015: IFPI 2013, 2014. Top 20 Markets, p.24. Retrieved May 12, 2016 from <http://www.riaj.or.jp/e/issue/pdf/RIAJ2015E.pdf>. The United States represents 40.6% of global music market share. See 2014 NAMM Global Report at [https://www.namm.org/files/ihdp-viewer/global-report-2014/A7352D4907B25A95B2CE27A075D3956F/2014MusicUSA\\_final.pdf](https://www.namm.org/files/ihdp-viewer/global-report-2014/A7352D4907B25A95B2CE27A075D3956F/2014MusicUSA_final.pdf), p.6

<sup>89</sup> The NMPA, formed in 1917, is the largest U.S. music publishing trade association that “represents the rights of music publishers everywhere and works to protect their intellectual property.” Its mission is to protect, promote, and advance the interests of music’s creators. The NMPA is the voice of both small and large music publishers, the leading advocate for publishers and their songwriter partners in the nation’s capital and in every area where publishers do business. The goal of NMPA is to protect its members’ property rights on the legislative, litigation, and regulatory fronts. The NMPA is an active and vocal proponent for the interests of music publishers in the U.S. and throughout the world. See <https://www.nmpa.org/aboutnmpa/mission.asp>

<sup>90</sup> A2IM, formed in 2005, represents the Independent music community as a unified voice, representing a sector that comprises over 34.5% of the U.S music industry’s market share and as much as 80% of the music industry’s releases. A2IM represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community. See <http://a2im.org/about/mission>. A2IM also has Associate Members, such as Apple, Pandora Spotify and YouTube. See <http://a2im.org/groups/tag/associate+members>

<sup>91</sup> AIM is a trade body established in 1999 to provide a collective voice for the UK’s independent music industry. See <http://www.musicindie.com>

<sup>92</sup> Merlin is the global rights agency for the independent label sector, representing over 20,000 labels from 39 countries. Merlin serves the interests of the global independent music sector. See <http://merlinnetwork.org>

<sup>93</sup> ASCAP, formed in 1914, is a membership association of more than 525,000 composers, songwriters, lyricists and music publishers of every kind of music. Through agreements with affiliated international societies, ASCAP also

Authors and Composers<sup>94</sup> (“SESAC”), Broadcast Music, Inc<sup>95</sup> (“BMI”), the Nashville Songwriters Association International<sup>96</sup> (“NSAI”), The Recording Academy,<sup>97</sup> UK Music,<sup>98</sup> the British Phonographic Industry<sup>99</sup> (“BPI”), Bundesverband Musikindustrie<sup>100</sup> (“BVMI”), the Indian Music Industry<sup>101</sup> (“IMI”), the Indian Performing Right Society<sup>102</sup> (“IPRS”), the National Association of Recording

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represents hundreds of thousands of music creators worldwide. ASCAP protects the rights of ASCAP members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. ASCAP’s licensees encompass all who want to perform copyrighted music publicly. ASCAP makes giving and obtaining permission to perform music simple for both creators and music users. See <http://www.ascap.com/about>

<sup>94</sup> SESAC, founded in 1930, is a leading global performing rights organization representing songwriters and publishers and their right to be compensated for having their music performed in public. SESAC currently licenses the public performances of more than 400,000 songs on behalf of its 30,000 affiliated songwriters, composers and music publishers. See <http://www.sesac.com>

<sup>95</sup> BMI, founded in 1939, is the largest music rights organization. BMI is the bridge between songwriters and the businesses and organizations that want to play their music publicly. As a global leader in music rights management, BMI serves as an advocate for the value of music, representing more than 8.5 million musical works created and owned by more than 650,000 songwriters, composers and music publishers. BMI’s role is international in scope. The songwriters, composers and BMI represents include individuals from the more than 90 performing rights organizations around the world. See <http://www.bmi.com/about>

<sup>96</sup> The NSAI is the world’s largest international not-for-profit songwriters’ trade association. The NSAI was established in 1967 and is dedicated to protecting the rights of and serving aspiring and professional songwriters in all genres of music. See <http://www.nashvillesongwriters.com>

<sup>97</sup> The Recording Academy is a music organization of musicians, producers, recording engineers and other recording professionals dedicated to improving the quality of life and cultural condition for music and its makers. The Recording Academy, which began in 1957, is known for its GRAMMY Awards, the world’s most recognized music award. As the preeminent membership organization for thousands of musicians, producers, songwriters, engineers, and other music professionals, the Recording Academy’s mission is to advance artistic and technical excellence, work to ensure a vital and free creative environment, and act as an advocate on behalf of music and its makers. The Academy’s mission statement is simple, but represents the heart and soul of the organization’s efforts: to positively impact the lives of musicians, industry members and our society at large. See <http://grammy.org/recording-academy>

<sup>98</sup> UK Music promotes the interests of UK record labels, songwriters, musicians, managers, publishers, producers, promoters and collecting societies through high profile campaigns and events. UK Music represents the AIM, the British Academy of Songwriters, Composers and Authors (“BASCA”), the BPI, the Music Managers Forum (“MMF”), the Music Publishers Association (“MPA”), which includes collection societies Mechanical-Copyright Protection Society Ltd (“MCPS”) and Printed Music Licensing Ltd (“PMLL”), the Music Producers Guild (“MPG”), the Musicians Union (“MU”), the Phonographic Performance Limited, PRS for Music, UK Live Music Group and the FAC. See <http://ukmusic.org/about-us/our-members>. British artists constitute 13.7% of all global music sales and account for one (1) in seven (7) albums purchased by fans around the globe. See <http://billboard.com/biz/articles/6589962/brits-share-of-global-market-hits-five-year-high>

<sup>99</sup> The BPI represents the UK’s recorded music industry, which includes independent music companies and the UK’s major record companies – Universal Music, Sony Music, and Warner Music. Together, BPI’s members account for 85% of all music sold in the UK. See <http://www.bpi.co.uk>

<sup>100</sup> BVMI represents over 85% of music consumed in Germany, the world’s 3rd largest music market globally. See <http://www.musikindustrie.de>. Also see Recording Industry Association of Japan Yearbook 2015: IFPI 2013, 2014. Top 20 Markets, p. 24. Retrieved May 12, 2016 from <http://www.riaj.or.jp/e/issue/pdf/RIAJ2015E.pdf>

<sup>101</sup> IMI, formed in 1936, represents over 75% of all legal music in India. The IMI is the second oldest music industry organization in the world that was involved in protecting copyrights of music producers. See <http://indianmi.org>

<sup>102</sup> IPRS was founded in 1969 and is the representative body of music owners, composers, lyricists (or authors) and the publishers of music and is also the sole authorized body to issue licenses for usage of musical works and literary music in India. The IPRS is a very active member of the Copyright Enforcement Advisory Council set up by the Government of India to advise on copyright issues and their enforcement. See <http://www.iprs.org>

Industry Professionals<sup>103</sup> (“NARIP”),<sup>104</sup> (“PPL”), the Harry Fox Agency<sup>105</sup> (“HFA”), William Morris Endeavor<sup>106</sup> (“WME”), Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte<sup>107</sup> (“GEMA”), Future of Music Coalition<sup>108</sup> (“FMC”), the Society of Composers, Authors and Music Publishers of Canada<sup>109</sup> (“SOCAN”), Music Managers Forum<sup>110</sup> (“MMF”), ReverbNation,<sup>111</sup> TuneCore,<sup>112</sup> Believe Digital,<sup>113</sup> CDBaby,<sup>114</sup> TheOrchard,<sup>115</sup> LyricFind,<sup>116</sup> SonicBids,<sup>117</sup>

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<sup>103</sup> NARIP promotes education, career advancement and goodwill among record executives. Established in 1998 and based in Los Angeles, NARIP has chapters in New York, Atlanta, San Francisco, Phoenix, Houston, Las Vegas, Philadelphia and London, and reaches over 100,000 people in the music industries globally. See <http://narip.com>

<sup>104</sup> PPL represents Indian music organizations and owns, as assignee, and exclusively controls public performance rights and radio broadcasting rights in more than 500,000 songs (sound recordings) in Hindi, Telugu, Tamil, Bengali, Punjabi, Marathi, Malayalam, Bhojpuri and other Indian languages, including both film and non-film songs such as Ghazals, devotional, folk, pop, classical. See <http://www.pplindia.org>

<sup>105</sup> HFA, founded in 1927, represents over 48,000 affiliated publishers and is the leading provider of rights management, licensing, and royalty services for the U.S. music industry with authority to license, collect, and distribute royalties on behalf of musical copyright owners. In addition, the HFA provides affiliated publishers with the opportunity to participate in other types of licensing arrangements including lyrics, guitar tablatures, background music services and more. See <http://www.harryfox.com>

<sup>106</sup> WME is one of the world’s largest music talent agencies with offices in Beverly Hills, New York City, London, Miami, Nashville, and Dallas. See <http://www.wmeentertainment.com/0/cta/music>

<sup>107</sup> GEMA, founded in 1933, represents the copyrights of more than 69,000 members (composers, lyricists and music publishers) in Germany, as well as over two million copyright holders globally. GEMA is one of the largest societies of authors for musical works in the world with 30 million music works online through cooperation with international partner music organizations operating through a network of databases. See <https://www.gema.de>

<sup>108</sup> The FMC, founded in 2000, is a non-profit music organization with a mission in “supporting a musical ecosystem where artists flourish and are compensated fairly and transparently for their work. FMC works with musicians, composers and industry stakeholders to identify solutions to shared challenges and to ensure that diversity, equality and creativity drives artist engagement with the global music community, and that these values are reflected in laws, licenses, and policies that govern any industry that uses music.” See <http://futureofmusic.org>

<sup>109</sup> SOCAN is a not-for-profit organization that represents the Canadian performing rights of millions of Canadian and international music creators and publishers. SOCAN plays a leading role in supporting the long-term success of its more than 125,000 Canadian members, as well as the Canadian music industry. SOCAN distributes royalties to its members and peer organizations around the world. See <http://www.socan.ca/about>

<sup>110</sup> MMF is the world’s largest representative body of artist music managers. See <http://themmfm.net>

<sup>111</sup> ReverbNation is the world’s largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations in over 100 countries across all music constituent types. See <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues) and <https://reverbnation.com/fan-promotion> (Fans).

<sup>112</sup> TuneCore is the world’s leading digital distributor for online music and video. Founded in 2005, TuneCore offers musicians and other rights-holders the opportunity to place their music into online retailers such as iTunes, Google Play, AmazonMP3, Zune Marketplace, Rhapsody, eMusic, Spotify, and others for sale. TuneCore distributes between 15,000 and 20,000 newly recorded releases a month. TuneCore registers musicians’ songs worldwide in over 60 countries and is affiliated with ASCAP, BMI and SESAC. See <http://www.tunecore.com>

<sup>113</sup> Believe Digital, founded in 2004, is the largest, leading digital distributor and services provider for independent artists and labels. Believe Digital is integrated with over 350 digital music stores in the world, including all major online and wireless digital music stores. Believe Digital’s distribution network includes iTunes, Amazon, Deezer, Google, Spotify, YouTube, Vodafone, Orange and many more. See <http://believedigital.com/network>

<sup>114</sup> CD Baby, founded in 1998, is the world’s largest online distributor of independent music, with over 300,000 artists, 400,000 albums and 4 million tracks in its catalog. See <http://www.cdbaby.com>

<sup>115</sup> The Orchard was founded in 1997 to foster independence and creativity in the music industry. The Orchard is a music and video distribution company operating in more than 25 global markets. See <http://www.theorchard.com>

<sup>116</sup> LyricFind is the world’s leader in legal lyric solutions. Founded in 2004, LyricFind has amassed licensing from over 4,000 music publishers, including all four majors – EMI Music Publishing, Universal Music Publishing Group, Warner/Chappell Music Publishing, and Sony/ATV Music Publishing. LyricFind also built a database of those lyrics

Altafonte,<sup>118</sup> the League of American Orchestras,<sup>119</sup> BMAT,<sup>120</sup> INDMusic,<sup>121</sup> the Canadian Musical Reproduction Rights Agency<sup>122</sup> (“CMRRA”), the Canadian Independent Music Association<sup>123</sup> (“CIMA”), StoryAmp,<sup>124</sup> Americana Music Association<sup>125</sup> (“AMA”), the Australian Independent Record Labels Association<sup>126</sup> (“AIR”), Associacao Brasileira da Musica Independente - the Brazilian Association of Independent Music<sup>127</sup> (“ABMI”), the Archive of Contemporary Music<sup>128</sup> (“ARC”)

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available for licensing and service to over 100 countries. LyricFind tracks, reports, and pays royalties to those publishers on a song-by-song and territory-by-territory basis. See <http://lyricfind.com>

<sup>117</sup> Sonicbids, founded in 2001, enables artists to book gigs and market themselves online. It connects more than 450,000 artists with over 30,000 promoters and brands from over 100 different countries and 100 million music fans. See <https://www.sonicbids.com>

<sup>118</sup> Altafonte is the leading music distributor for Spanish independent labels and the leading independent digital distribution company in Iberia and Latin America. Altafonte distributes digital and physical music to over 100 platforms worldwide including Apple iTunes, Spotify, Amazon, Google Play, YouTube, Vevo, Shazam, Deezer, Pandora and others. See <http://altafonte.com/en>

<sup>119</sup> The League of American Orchestras leads, supports, and champions America’s orchestras and the vitality of the music they perform. Its diverse membership of approximately 800 orchestras totaling tens of thousands of musicians across North America. The League is the only national organization dedicated solely to the orchestral experience, and is a nexus of knowledge and innovation, advocacy, and leadership advancement for managers, musicians, volunteers, and boards. Founded in 1942 and chartered by Congress in 1962, the League links a national network of thousands of instrumentalists, conductors, managers and administrators, board members, volunteers, and business partners. See <http://www.americanorchestras.org>

<sup>120</sup> BMAT provides global music identification that monitors over 16 million songs and growing in over 3000 radios and televisions across more than 60 countries worldwide. See <http://www.bmat.com>

<sup>121</sup> INDMusic is a global music rights administration network which is YouTube Certified MCN. INDMUSIC, owned by Live Nation (“the largest live entertainment company in the world, connecting nearly 519 million music fans,” Live Nation Annual Report 2014 at [http://s1.q4cdn.com/788591527/files/doc\\_financials/2014/LYV-2014-Annual-Report.pdf](http://s1.q4cdn.com/788591527/files/doc_financials/2014/LYV-2014-Annual-Report.pdf), p.2), helps the global music community and its channel partners monetize their content on multiple platforms without sacrificing creative control or rights to their music content. The INDMusic community is composed of over 3.9 million network members and over 1900 channel partners. INDMusic community’s network reach is over 3.5 billion monthly network views. See <http://www.indmusicnetwork.com>

<sup>122</sup> Founded in 1975, the CMRRA is a music licensing collective representing music rights holders, who range in size from large multinational music publishers to individual songwriters. Together, they own or administer the vast majority of songs recorded, sold and broadcast in Canada. On their behalf, CMRRA issues licenses to individuals or organizations for the reproduction of songs on various media. See <http://www.cmr.ca/cmr/about>

<sup>123</sup> CIMA, founded in 1975, is the not-for-profit national trade association representing the English-language, Canadian-owned sector of the music industry. See <http://www.cimamusic.ca/about-cima>

<sup>124</sup> StoryAmp is the world’s leading music community for music artists, music publicists and music journalists. It provides artists and publicists the opportunity to connect and network with over 7000 music journalists globally. See <https://www.storyamp.com>

<sup>125</sup> The AMA is a music trade organization whose mission is to advocate for the authentic voice of American Roots Music around the world. The Americana Music Association works behind the scenes to foster an environment for growth: building infrastructure, creating networking opportunities and establishing channels, which allow the music community to work effectively and efficiently. See <http://americanamusic.org/who-we-are>

<sup>126</sup> AIR is a non-profit, non-government association dedicated to supporting the growth and development of Australia’s independent recording sector. AIR represents Australian owned record labels and independent artists based in Australia. See <http://www.air.org.au>

<sup>127</sup> ABMI was founded in January 2002. ABMI operates in the Brazilian market and global to promote the production and distribution of independent Brazilian music. Currently, the association represents the majority of record labels in Brazil. See <http://abmi.com.br>

<sup>128</sup> ARC, founded in 1985, is a not-for-profit archive, music library and research center. ARC contains more than 2.25 million sound recordings and over 22 million songs. ARC has electronically catalogued more than 300,000 sound recordings – more than any other public, university or private library. ARC also houses more than three million pieces of attendant support material including photographs, videos, DVDs, books, magazines, press kits,

Independent Music New Zealand<sup>129</sup> (“IMNZ”), PledgeMusic,<sup>130</sup> BureauExport - French Music Export Office,<sup>131</sup> Western Australian Music Association<sup>132</sup> (“WAM”), the Music British Columbia Industry Association<sup>133</sup> (“MusicBC”), Music Austria,<sup>134</sup> Manitoba Music,<sup>135</sup> Luxembourg Export Office<sup>136</sup> (“Music:LX”), Francophonie Diffusion,<sup>137</sup> the Alberta Music Industry Association<sup>138</sup> (“Alberta Music”), Pleimo,<sup>139</sup> Music Centre Slovakia,<sup>140</sup> Queensland Music Network<sup>141</sup> (“QMUSIC”), The Northern

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sheet music, ephemera and memorabilia. ARC also maintains a variety of informational databases, notably its Music Index of over 52,000 people working in the music industry. See <http://arcmusic.org>

<sup>129</sup> IMNZ is a non-profit trade association, the New Zealand voice for independent record labels and distributors. Its members release the bulk of New Zealand music, including commercially successful artists as well as niche music genres. IMNZ started in 2001. These labels and distributors collectively represent the majority of all musical acts in New Zealand. See <http://www.indies.co.nz>

<sup>130</sup> PledgeMusic is leading music global direct-to-fan platform that provides artists and labels with the tools needed to get fans to engage. PledgeMusic provides the artist or label with tools to fund, pre-sell, sell, and release their music while connecting directly with fans. See <http://www.pledgemusic.com>

<sup>131</sup> BureauExport is a French non-profit organization and network created in 1993 that helps French and international music professionals work together to develop French produced music around the world and to promote professional exchange between France and other territories. BureauExport members include labels, publishers, distributors, promoters, artist management offices or ensembles. BureauExport is a global network whose mission is to help French music professionals develop their artists internationally. See <http://www.french-music.org>

<sup>132</sup> WAM, founded in 1987, is the music body responsible for supporting, nurturing and growing all forms of contemporary music in Western Australia. WAM supports and promotes all forms and levels of Western Australian music, locally, nationally and internationally. See <http://wam.org.au/what-we-do>

<sup>133</sup> MusicBC represents the British Columbia music industry. Music BC is the only provincial music association that serves all genres, all territories and all participants in the industry from artists, to managers, agents, broadcasters, recording studios, producers and all other industry professionals. Music BC is a non-profit society established in 1994 dedicated to providing information, education, funding, advocacy, awareness and networking opportunities to develop and promote the spirit, growth and sustainability of the BC Music community. See <http://musicbc.org>

<sup>134</sup> Music Austria is the professional partner for musicians in Austria. Music Austria was founded in 1994 as an independent, non-profit association by the Republic of Austria to support of contemporary musicians living in Austria with advice and information and the distribution of local music through promotion in Austria and abroad. See <http://www.musicaustria.at>

<sup>135</sup> Manitoba Music is the hub of Manitoba’s vibrant music community and was established in 2000. Manitoba Music is a member-based, not-for-profit industry association representing over 750 members in all facets of the music industry, including artists and bands, studios, agents, managers, songwriters, venues, promoters, producers, and beyond. Manitoba Music serves all genres, from rock to roots, hip-hop to hardcore, country to classical, and everything in between. See <http://manitobamusic.com>

<sup>136</sup> Music:LX is a non-profit organization and network created in 2009 with the aim to develop Luxembourg music of all genres around the world and to promote professional exchange between Luxembourg and other territories. Music:LX helps its artists financially with the promotion of releases outside of Luxembourg and international tours and showcases. See <http://www.musiclx.lu>

<sup>137</sup> Francophonie Diffusion, founded in 1993, promotes artists and music from the Francophone area through a worldwide network of more than 1000 media, festivals and music supervisors worldwide located in 100 countries, provinces or territories. Francophonie Diffusion has been involved for 20 years in the promotion of artists from the Francophone area. See <http://www.francodiff.org/en>

<sup>138</sup> The Alberta Music, founded in 1980, is a music association dedicated to helping professionals in the music industry to succeed in their careers to “participate and assist in the overall development and improvement of the Alberta and Canadian recorded music industry, especially as it relates to Alberta.” See <http://albertamusic.org/about>

<sup>139</sup> Pleimo is an international music streaming platform which aggregates bands and music fans around the world. It offers a 360-degree platform for 250,000 artists to manage and promote their music. Music fans can also subscribe and listen to Pleimo’s catalog of over 5,000,000 songs. See <https://www.pleimo.com>

<sup>140</sup> Music Centre Slovakia was established by the Ministry of Culture of the Slovak Republic to encourage Slovak music culture by organizing concerts, bringing pieces of Slovak composers to the stages, publishing sheet music and music books, documenting the music life in Slovakia and promoting Slovak music culture abroad. See <http://hc.sk>

Territory Music Industry Association<sup>142</sup> (“MusicNT”), Music Victoria,<sup>143</sup> Music South Australia<sup>144</sup> (“Music SA”), Music New South Wales<sup>145</sup> (“MusicNSW”), Music Music/Musique New Brunswick<sup>146</sup> (“MNB”), Associacao de Musicos Artistas e Editoras Independentes - the Portuguese Independent Music Association<sup>147</sup> (“AMAIE”), Music Nova Scotia,<sup>148</sup> Brasil Música & Artes<sup>149</sup> (“BM&A”), Nimbit,<sup>150</sup> MusicTasmania,<sup>151</sup> BroadJam,<sup>152</sup> ProPlay,<sup>153</sup> Dart,<sup>154</sup> Flanders Music Centre,<sup>155</sup>

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<sup>141</sup> QMusic, founded in 1994, is a music association representing Queensland’s music industry. QMusic promotes the artistic value, cultural worth and commercial potential of Queensland music. See <http://qmusic.com.au>

<sup>142</sup> MusicNT supports the growth and development of original contemporary music in the Northern Territory. Music NT represents the Northern Territory’s music industry nationally and internationally. See <http://musicnt.com.au>

<sup>143</sup> Music Victoria is the independent voice of the Victorian contemporary music industry. An independent, not-for-profit, non-Government organization, Music Victoria represents musicians, venues, music businesses and music lovers across the contemporary music community in Victoria. Music Victoria provides advocacy on behalf of the music industry, actively supports the development of the Victorian music community, and celebrates and promotes Victorian music. See <http://www.musicvictoria.com.au/about>

<sup>144</sup> Music SA was established in 1997 as a not-for-profit organization committed to promoting, supporting and developing contemporary music in South Australia. See <http://www.musicasa.com.au>

<sup>145</sup> MusicNSW is the peak body representing Contemporary Music in New South Wales. It is not for profit Industry Association set up to represent, promote and develop the contemporary music industry in New South Wales, Australia. MusicNSW exists to support the creative and economic expansion of the NSW contemporary Music Industry through advocacy, resource assistance, activating growth of industry infrastructure, delivery of tailored initiatives and provision of advice and referrals. See <http://www.musicnsw.com/about>

<sup>146</sup> MNB is a provincial music industry association that provides a support network for musicians, managers, and businesses that are involved in the creation of music within the province of New Brunswick. MNB was established in 2006 and is a non-profit association with ties on regional, provincial, and national levels with government agencies and departments who enable lobbying and promoting New Brunswick's music industry and artists whenever possible. MNB’s primary responsibility is to represent the interests of its members and foster the New Brunswick music industry. See <http://musicnb.org>

<sup>147</sup> AMAEI represents the Portuguese music sector. See <http://www.amaei.pt>

<sup>148</sup> Music Nova Scotia, founded in 1989, fosters, develops and promotes the music industry in Nova Scotia. Music Nova Scotia is a music association devoted to advancing the careers of music industry professionals in songwriting, publishing, live performance, representation, production and distribution, and to help ensure that Nova Scotian musicians are heard globally. See <http://www.musicnovascotia.ca>

<sup>149</sup> The BM&A is a non-profit organization, founded in 2001 with the objective of encouraging and organizing the promotion of Brazilian music abroad, working with artists, record companies, distributors, exporters, collection societies and cultural entities. BM&A carries out activities on behalf of the whole sector, including organizing seminars, workshops, international market studies, trade fairs and promotion. See <http://bma.org.br>

<sup>150</sup> Nimbit, founded in 2002, is a music industry direct-to-fan platform. Nimbit provides solutions for thousands of self-managed artists, managers, and emerging labels to grow and engage their fanbase, and sell their music and merchandise online. See <http://nimbit.com>

<sup>151</sup> Music Tasmania is the peak body for Tasmania’s contemporary music community supporting and promoting Tasmanian music locally, nationally, and internationally. See <http://www.musictasmania.org>

<sup>152</sup> Broadjam, founded in 1999, is an online music community of over 120,000 musicians from over 150 countries that provides promotional tools and services for independent musicians, the music industry and fans around the world. See <http://www.broadjam.com>

<sup>153</sup> ProPlay provides recording artists with the opportunity to have their songs play adjacent to the songs of established artists of the same genre on music streaming providers that reach over 100 million music listeners each month. See <http://www.proplay.com>

<sup>154</sup> DartMusic is a music distribution platform dedicated to classical music. DartMusic distributes classical music into major online stores, such as iTunes, AmazonMP3 and others. DartMusic provides global digital distribution to musicians, labels and other rights-holders who work exclusively in classical music. See <http://www.dartmusic.com>

<sup>155</sup> Flanders Music Centre (Muziekcentrum Vlaanderen) is an organization established by the Flemish government to support the music sector and to promote Flemish music in Belgium and abroad. See <http://flandersmusic.be>

Conductors Guild,<sup>156</sup> MusicBrainz,<sup>157</sup> AdRev,<sup>158</sup> Membran,<sup>159</sup> SyncExchange,<sup>160</sup> the Center for Information and Resources for Contemporary Music - Le centre d'Information et de Ressources pour les Musiques Actuelles<sup>161</sup> ("IRMA"), and thousands more. In addition to organizational support, DotMusic's Application also received support from amateur, professional and globally-recognized music artists, including bands such as Radiohead.<sup>162</sup>

## Independent Expert Testimonies

24. DotMusic submitted forty-three (43) independent expert testimony letters that agreed unanimously that DotMusic met the Community Establishment, Nexus and Support criteria.<sup>163</sup> The experts were Dr. Argiro Vatakis, Dr. Askin Noah, Dr. Brian E Corner, Dr. Chauntelle Tibbals, Dr. Daniel James Wolf, Dr. David Michael Ramirez II, Dr. Deborah L Vietze, Dr. Dimitrios Vatakis, Dr. Dimitris Constantinou, Dr. Eric Vogt, Dr. Graham Sewell, Dr. Jeremy Silver, Dr. Joeri Mol, Dr. John Snyder, Dr. Jordi Bonada Sanjaume, Dr. Jordi Janer, Dr. Juan Diego Diaz, Dr. Juliane Jones, Dr. Kathryn Fitzgerald, Dr. Lisa Overholser, Dr. Luis-Manuel Garcia, Dr. Manthos Kazantzides, Dr. Michael Mauskapf, Dr. Mike Alleyne, Dr. Nathan Hesselink, Dr. Paul McMahon, Dr. Rachel Resop, Dr. Shain Shapiro, Dr. Sharon Chanley, Dr. Tom ter Bogt, Dr. Vassilis Varvaresos, Dr. Wendy Tilton, Dr. Wilfred Dolfsma, JD Matthew Covey Esq, Jonathan Segal MM, Lecturer David Loscos, Lecturer David Lowery, Lecturer Dean Pierides, Professor Andrew Dubber, Professor and Author Bobby Borg, Professor Heidy Vaquerano Esq, Professor Jeffrey Weber Esq and Stella Black MM.

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<sup>156</sup> The Conductors Guild, founded in 1975, represents the interests of music conductors worldwide. *See* <http://conductorsguild.org>

<sup>157</sup> MusicBrainz is the largest community-maintained open source encyclopedia of music information globally. The MusicBrainz music community has nearly 1.3 million members with a database covering nearly 1 million artists and nearly 18 million songs from over 200 countries. *See* <http://musicbrainz.org>

<sup>158</sup> AdRev is music multi-channel music network providing YouTube music creators the opportunity to improve monetization, discovery, programming, audience growth and production quality for their YouTube music video content. Adrev administrates and manages over 6 million music copyrights across 26.5 million music videos. The Adrev network has over 36 billion views annually. *See* <http://www.adrev.net>

<sup>159</sup> Membran Entertainment Group, founded in 1968, controls over 300,000 musical works. Through its label-management services, Membran offers labels, artists or producers with marketing, promotion and distribution services worldwide. *See* <http://www.membran.net>

<sup>160</sup> Sync Exchange is a global music licensing marketplace for musicians, rights holders, composers and music supervisors. *See* <http://syncexchange.com>

<sup>161</sup> IRMA is an organization supported by the music industry that was formed in 1986 by the French Government to provide information, guidance and resources to constituents involved in contemporary music. *See* <http://irma.asso.fr>

<sup>162</sup> Radiohead support letter for DotMusic's .MUSIC community Application, <https://www.icann.org/en/system/files/correspondence/obrien-to-icann-eiu-15dec15-en.pdf>

<sup>163</sup> *See* 43 independent expert letters scoring chart at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A40; Also *see* 43 independent expert letters at <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also *see* <http://music.us/expert/letters>

## The Independent Nielsen QuickQuery Poll

25. Before the .MUSIC CPE commenced, DotMusic submitted an independent poll conducted by Nielsen<sup>164</sup> as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria for Community Establishment and Nexus. According to DotMusic's Application, the "Name" of the community defined was the "music community"<sup>165</sup> and the definition of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."<sup>166</sup> The independent Nielsen QuickQuery survey was conducted from August 7, 2015, to August 11, 2015, with 2,084 neutral and diverse adults.<sup>167</sup> The survey examined whether or not the applied-for string (.MUSIC) was commonly-known and associated with the identification of the community defined by DotMusic by asking: "If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?" A substantial majority, 1562 out of 2084 (i.e. 3 in 4 or 75% of the respondents) responded positively, agreeing that (i) the applied-for string (.MUSIC) corresponds to the name of community addressed by the application (the "music community") and that (ii) the "music community" definition is "a logical alliance of communities of individuals, organizations and business that relate to music."

## Answers to CPE Clarifying Questions ("CQ")

26. On September 29th, 2015, DotMusic received five (5) CPE Clarifying Questions ("CQ") from ICANN and the EIU on Community Establishment and Nexus.<sup>168</sup> On October 29, 2015, DotMusic provided ICANN and the EIU with answers to CPE Clarifying

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<sup>164</sup> See Nielsen QuickQuery. Retrieved on May 11, 2016, from

<http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

<sup>165</sup> According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392;>

According to the DotMusic Application: "The 'MUSIC' string matches the name ('Name') of the Community and is the established name by which the Community is commonly known by others." See 20A, para.3

<sup>166</sup> According to the DotMusic Application: "The Community is a strictly delineated and organized community of individuals, organizations and business, a 'logical alliance of communities of a similar nature ('COMMUNITY')', that relate to music: the art of combining sounds rhythmically, melodically or harmonically." See 20A, para.3; Also see DotMusic Public Interest Commitments: "[...] Community definition of a 'logical alliance of communities of similar nature that relate to music' [...]" at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

<sup>167</sup> See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: "Q3505 If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?" <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A32, Appendix B, pp. 38 to 41; Also see Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3

<sup>168</sup> See Clarifying Questions ("CQ"), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A20

Questions (“CQ Answers”).<sup>169</sup> DotMusic also included supporting evidence to its answers in the Annexes of the CQ Answers. These included:

- a. *Community Establishment & Definition Rationale and Methodology*, which clarified the “community defined, ‘a delineated and organized logical alliance of communities of similar nature related to music’” and clarified the Community Establishment rationale and methodology;<sup>170</sup>
- b. *Venn Diagram for Community Definition and Nexus*, which clarified the relationship between eligibility and the cohesive music community’s definition as a “strictly delineated and organized logical alliance of communities related to music with [the] requisite awareness of [the] community defined,” while also clarifying that “non-music community members that lack recognition and awareness of the community defined” were “ineligible;”<sup>171</sup>
- c. *Music Sector Background: Music is a Copyright Industry for Clarifying Question D*, which clarified that “[t]he community defined by DotMusic – ‘a strictly delineated and organized community of individuals, organizations and business, a ‘logical alliance of communities of a similar nature’ that relate to music, the art of combining sounds rhythmically, melodically or harmonically’ -- functions in a regulated sector. Evidence to support this assessment includes recent ICANN Resolutions and GAC Advice that recognized music as a regulated, sensitive sector.”<sup>172</sup> DotMusic also provides evidence of music community cohesion under international copyright law and conventions, which “[a]ccording to WIPO,<sup>173</sup> these rights are defined within national copyright laws which are, in large part, shaped by international treaties, many of which are administered by WIPO. Copyright law defines the rights conferred on authors of original works, and those who perform them, as well as those who support their widespread dissemination [...] Under the 1886 WIPO Berne Convention for the Protection of Literary and Artistic Works, an original work is protected for a minimum of 50 years after the author’s death but in many jurisdictions that figure can be 70 years or more [...] Copyright includes economic rights which give the creator the right to authorize, prohibit or obtain financial compensation [...] Copyright also confers moral rights (Article 6b is of the Berne Convention) allowing the creator of a work to claim authorship in it (the right of paternity or attribution) and to object to any modification of it that may be damaging or prejudicial to them (the right of integrity) [...] Every piece of music is protected by copyright;”<sup>174</sup>
- d. *Independent Nielsen / Harris Poll for Community Establishment and Nexus*, which provided supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for Community Establishment and Nexus;<sup>175</sup> and

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<sup>169</sup> See Answers to Clarifying Questions (“CQ Answers”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A21

<sup>170</sup> Ibid, Annex A, p.26 of 993

<sup>171</sup> Ibid, Annex D, p.80 of 993

<sup>172</sup> Ibid, Annex F, p.93 of 993

<sup>173</sup> WIPO is a United Nations agency with 188 member states, which provides a global forum for intellectual property services, policy, and cooperation (See <http://www.wipo.int/about-wipo/en/index.html>). WIPO is also the leading provider of domain dispute and alternative dispute resolution services under the Uniform Dispute Resolution Policy (“UDRP”) adopted by ICANN (See <http://wipo.int/amc/en/domains> and <https://icann.org/resources/pages/udrp-rules-2015-03-11-en>)

<sup>174</sup> Ibid, Annex F, pp.97 to 99 of 993

<sup>175</sup> Ibid, Annex H, pp.102 to 105 of 993

- e. *Forty-three (43) Expert Testimonies*, which provided supporting evidence of forty-three (43) independent expert letters agreeing unanimously that DotMusic’s Application met the Community Establishment, Nexus and Support CPE criteria.<sup>176</sup>

### **The .MUSIC CPE Report for DotMusic’s Community-based Application**

27. The .MUSIC CPE Report (“Report”)<sup>177</sup> for Application ID. 1-1115-14110<sup>178</sup> provided a total score of 10 points out of 16 points: 4 points were deducted for the “Community Establishment” criterion, 1 point was deducted for the “Nexus between Proposed String and Community” criterion, and 1 point was deducted under the “Community Endorsement” criterion.

### **The Reconsideration Request**

28. DotMusic Limited (“DotMusic”),<sup>179</sup> the International Federation of Musicians<sup>180</sup> (“FIM”), the International Federation of Arts Councils and Culture Agencies<sup>181</sup> (“IFACCA”), the Worldwide Independent Network<sup>182</sup> (“WIN”), the Merlin Network<sup>183</sup> (“Merlin”), the Independent Music Companies Association<sup>184</sup> (“IMPALA”), the American Association of Independent Music<sup>185</sup> (“A2IM”), the Association of Independent Music<sup>186</sup> (“AIM”), the Content Creators Coalition<sup>187</sup> (“C3”), the Nashville Songwriters Association International<sup>188</sup> (“NSAI”) and ReverbNation<sup>189</sup> co-filed a Reconsideration Request 16-5 (“RR”)<sup>190</sup> requesting the ICANN Board Governance Committee to overturn the CPE Report based on CPE process violations and the contravention of established procedures by ICANN and the CPE Panel.<sup>191</sup> According to the RR, some of the ICANN violations of established procedures and policies include:

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<sup>176</sup> Ibid, Annex K, pp. 159 to 993 of 993

<sup>177</sup> DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>178</sup> DotMusic Application, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

<sup>179</sup> <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

<sup>180</sup> <http://fim-musicians.org/about-fim/history>

<sup>181</sup> [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members) and [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members)

<sup>182</sup> <http://winformusic.org/win-members>

<sup>183</sup> <http://merlinnetwork.org/what-we-do>

<sup>184</sup> <http://impalamusic.org/node/16>

<sup>185</sup> <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

<sup>186</sup> <http://musicindie.com/about/aimmembers>

<sup>187</sup> <http://c3action.org>

<sup>188</sup> <https://nashvillesongwriters.com/about-nsai>

<sup>189</sup> <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>,

(Industry), <https://reverbnation.com/venue-promotion> (Venues), and <https://reverbnation.com/fan-promotion> (Fans)

<sup>190</sup> See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

<sup>191</sup> Also see RR-related letter from the International Federation of the Phonographic Industry (“IFPI”) stating: “We believe the finding to be flawed [...] Given the scale of the music community’s support for the Dot Music application, it is difficult to understand what level of support a CPE applicant would need to demonstrate to prevail, and this gives rise to serious misgivings about the transparency, consistency, and accountability of the CPE process [...] highlighting the disparity between the decisions of the EIU Panel. Unfortunately, these inconsistencies have continued in the EIU Panel’s evaluation of the DotMusic Application. [...] we note with concern the different criteria that appear to have been applied to the .HOTEL and .MUSIC CPE applications respectively. Also of concern is the EIU Panel’s finding that DotMusic failed to provide documented support from ‘recognised community institution(s)/member organization(s).’ IFPI is a globally recognised organization [...] Our members operate in 61

- a. Disregard of International Laws and Conventions with respect to the defined Music Community’s “cohesion” in relation to music copyright;<sup>192</sup>
- b. Misapplication and disregard of “Community” Definition from 20A;
- c. Misapplication and disregard of “logical alliance” Community Definition that has “cohesion” and meets criteria according to the Applicant Guidebook (“AGB”);
- d. Misapplication and disregard of Community “Name” in Nexus;
- e. Misapplication and disregard of AGB “Majority” Criterion in Support;
- f. Misapplication and disregard of AGB “Recognized” organizations recognized by both the United Nations (“UN”) and the World Intellectual Property Organization (“WIPO”);<sup>193</sup>
- g. Disregard of global music federations “mainly” dedicated to Community recognized both by UN and WIPO;
- h. Misapplication of the AGB’s “Organized” definition in Community Establishment based on false facts and lack of compelling evidence that the Music Community defined is not organized under a regulated sector, international law and international conventions or treaties;
- i. Disregard of historical evidence that the Music Community defined existed before 2007 in Community Establishment;

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countries and IFPI has affiliated organisations, including national groups in 57 countries. We also administer the internationally recognised ISRC system. We therefore object to the EIU Panel’s finding,” <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>; Also see RR-related letter from the National Music Council, representing almost 50 music organizations (including the Academy of Country Music, American Academy of Teachers of Singing, American Composers Forum, American Federation of Musicians, American Guild of Musical Artists, American Guild of Organists, American Harp Society, American Music Center, American Orff-Schulwerk Association, Artists Against Hunger & Poverty, ASCAP, BMI, Chopin Foundation of the United States, Conductors’ Guild, Country Music Association, Delta Omicron International Music Fraternity, Early Music America, Interlochen Center for the Arts, International Alliance for Women in Music, International Federation of Festival, Organizations, International Music Products Association, Mu Phi Epsilon International Music Fraternity, Music Critics Association of North America, Music Performance Fund, Music Publishers Association of the United States, Music Teachers’ Association of California, Music Teachers National Association, National Academy of Popular Music, National Academy of Recording Arts & Sciences, National Association for Music Education, National Association of Negro Musicians, National Association of Recording Merchandisers, National Association of Teachers of Singing, National Federation of Music Clubs, National Flute Association, National Guild for Community Arts Education, National Guild of Piano Teachers, American College of Musicians, National Music Publishers’ Association, National Opera Association, Recording Industry Association of America, SESAC, Sigma Alpha Iota and the Songwriters Guild of America) and the International Music Council (an organization that UNESCO founded in 1949 representing over 200 million music constituents from over 150 countries and over 1000 organizations globally. See <http://www.imc-cim.org/about-imc-separator/who-we-are.html>). The letter stated that: “The international music community has come together across the globe to support the DotMusic Application, and we cannot comprehend how the application could have failed on the community criteria [...] We therefore object to the decision noted above, the basis of which is an apparent inconsistency in the application of the governing rules,” <https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

<sup>192</sup> Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>

<sup>193</sup> Also See RR-related IFPI Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>

- j. Misapplication of policy and disregard of ICANN-accepted GAC consensus Category 1 Advice in Community Establishment demonstrating the defined Community’s unity under a regulated sector;<sup>194</sup>
- k. Failure to compare and apply consistent scoring across all CPE applications and implement the quality control process to ensure fairness, transparency, predictability and non-discrimination;
- l. Failure to address the EIU’s conflict of interest with Google, a .MUSIC competing applicant. Google’s chairman, Eric Schmidt, was on The Economist Group board during DotMusic’s CPE in violation of the ICANN-EIU Statement of Work (“SOW”) and Expression of Interest (“EOI”), the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles; and
- m. Failure to undertake appropriate (if any) research to support compelling conclusions in the CPE Report, despite DotMusic’s (and DotMusic’s supporters’) provision of thousands of pages of “application materials and [...] research” as “substantive evidence” of “cohesion,” including DotMusic’s in-depth answers and supporting evidence in response to the EIU’s Clarifying Questions. The Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.

### **About Copyright, Copyright Law, International Copyright Conventions/Treaties and Collective Rights Management**

- 29. According to the World Intellectual Property Organization (“WIPO”): “Copyright is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.”... “[W]orks commonly protected by copyright throughout the world include [...] musical compositions.” ... “Copyright protection extends only to expressions.”<sup>195</sup>
- 30. According to WIPO: “There are two types of rights under copyright: (i) economic rights, which allow the rights owner to derive financial reward from the use of his works by others; and (ii) moral rights, which protect the non-economic interests of the author.”<sup>196</sup>
- 31. The public benefits of a robust copyright system are not solely economic. Copyright protects human rights. Article 27 of the Universal Declaration of Human Rights (UDHR),<sup>197</sup> adopted in 1948 by the UN General Assembly, states: “(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to

<sup>194</sup> Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>

<sup>195</sup> See WIPO, <http://www.wipo.int/copyright/en>

<sup>196</sup> Ibid

<sup>197</sup> United Nations, <http://www.un.org/en/universal-declaration-human-rights/index.html>; Also see U.N Guiding Principles on Business and Human Rights, ‘Protect, Respect and Remedy’ Framework, [http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf), p.5

share in scientific advancement and its benefits; and (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

32. The United States Supreme Court has stated that “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”<sup>198</sup> ... “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘science and useful Arts.’”<sup>199</sup> [...] “The immediate effect of [...] copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.”<sup>200</sup> When the United States Congress enacted the Copyright Act of 1909, it stated that “the enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, [...] but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings [...]”<sup>201</sup>
33. In general, “copyright laws state that the rights owner has the economic right to authorize or prevent certain uses in relation to a work or, in some cases, to receive remuneration for the use of his work (such as through collective management). The economic rights owner of a work can prohibit or authorize: (i) its reproduction in various forms, such as printed publication or sound recording; (ii) its public performance, such as in a play or musical work; (iii) its recording, for example, in the form of compact discs or DVDs; (iv) its broadcasting, by radio, cable or satellite; (v) its translation into other languages; and (vi) its adaptation, such as a novel into a film screenplay.” [...] “Examples of widely recognized moral rights include the right to claim authorship of a work and the right to oppose changes to a work that could harm the creator’s reputation.”<sup>202</sup>
34. In the majority of countries, and according to the Berne Convention: “copyright protection is obtained automatically without the need for registration or other formalities. Most countries nonetheless have a system in place to allow for the voluntary registration of works. Such voluntary registration systems can help solve disputes over ownership or creation, as well as facilitate financial transactions, sales, and the assignment and/or transfer of rights.”<sup>203</sup>

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<sup>198</sup> U.S. Supreme Court, *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), No. 83-1632, Decided May 20, 1985, 471 U.S. 53, <https://supreme.justia.com/cases/federal/us/471/539/case.html>

<sup>199</sup> U.S. Supreme Court, *Mazer v. Stein*, 347 U.S. 201 (1954), No. 228, Decided March 8, 1954, 347 U.S. 201, <https://supreme.justia.com/cases/federal/us/347/201/case.html>

<sup>200</sup> U.S. Supreme Court, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), No. 74-452, Decided June 17, 1975, 422 U.S. 151, <https://supreme.justia.com/cases/federal/us/422/151/case.html>

<sup>201</sup> H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909) (report accompanying the Copyright Act of 1909), <http://www.copyright.gov/history/1909act.pdf>

<sup>202</sup> Ibid

<sup>203</sup> Ibid

35. Copyright law “aims to balance the interests of those who create content, with the public interest in having the widest possible access to that content. WIPO administers several international treaties in the area of copyright and related rights: (i) the Beijing Treaty on Audiovisual Performances;<sup>204</sup> (ii) the Berne Convention for the Protection of Literary and Artistic Works;<sup>205</sup> (iii) the Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite;<sup>206</sup> (iv) the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms;<sup>207</sup> (v) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;<sup>208</sup> (vi) the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (co-administered by WIPO, ILO and UNESCO);<sup>209</sup> (vii) the WIPO Copyright Treaty (“WCT”);<sup>210</sup> and (viii) the WIPO Performances and Phonograms Treaty (“WPPT”).”<sup>211</sup>
36. According to WIPO: “copyright protection is automatic in all states [171 contracting parties<sup>212</sup>] party to the Berne Convention. Whilst there may be nuances to the particular national laws applicable in these states, in general there is a high degree of harmony.”<sup>213</sup>
37. According to the United States Copyright Office, a department of the Library of Congress: “An “international agreement” is defined as “(1) the Universal Copyright Convention; (2) the Geneva Phonograms Convention; (3) the Berne Convention; (4) the WTO Agreement; (5) the WIPO Copyright Treaty; (6) the WIPO Performances and Phonograms Treaty; and (7) any other copyright treaty to which the United States is a party.”<sup>214</sup>

<sup>204</sup> See WIPO, Beijing Treaty on Audiovisual Performances, <http://www.wipo.int/treaties/en/ip/beijing>

<sup>205</sup> See WIPO, Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne>

<sup>206</sup> See WIPO, Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, <http://www.wipo.int/treaties/en/ip/brussels>

<sup>207</sup> See WIPO, Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, <http://www.wipo.int/treaties/en/ip/phonograms>

<sup>208</sup> See WIPO, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, <http://www.wipo.int/treaties/en/ip/marrakesh>

<sup>209</sup> See WIPO, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, <http://www.wipo.int/treaties/en/ip/rome>

<sup>210</sup> See WIPO, WIPO Copyright Treaty, <http://www.wipo.int/treaties/en/ip/wct>

<sup>211</sup> See WIPO, WIPO Performances and Phonograms Treaty, <http://www.wipo.int/treaties/en/ip/wppt>

<sup>212</sup> See WIPO, *Berne Convention (Total Contracting Parties : 171)*, Retrieved on May 17, 2016 from [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15)

<sup>213</sup> See WIPO, *Frequently Asked Questions: Copyright*, [http://www.wipo.int/copyright/en/faq\\_copyright.html](http://www.wipo.int/copyright/en/faq_copyright.html)

<sup>214</sup> U.S. Library of Congress, U.S. Copyright Office, § 101. *Definitions*, <http://www.copyright.gov/title17/92chap1.html#101>; Also see list of countries indicating which international copyright convention and treaty agreements each country has signed and the date each agreement took effect at <http://www.copyright.gov/circs/circ38a.pdf>. *International Copyright Relations of the United States*, Circular 38a, Revised: April, 2016, pp. 3 to 9

38. According to the United States Copyright Office, a department of the Library of Congress: “International copyright conventions and treaties have been developed to establish obligations for treaty member countries to adhere to, and implement in their national laws, thus providing more certainty and understanding about the levels of copyright protection in particular countries.”<sup>215</sup> International Agreements and Treaties include: (i) Buenos Aires Convention (‘BAC’) of 1910. U.S. ratification deposited with the government of Argentina, May 1, 1911; proclaimed by the president of the United States, July 13, 1914; (ii) the Beijing Treaty on Audiovisual Performances (‘BTAP’). On June 26, 2012, the United States and 47 other nations signed the treaty; (iii) the Berne Convention for the Protection of Literary and Artistic Works. Appearing within parentheses in the country listing that follows is the latest act of the convention to which the country is party. Thus ‘Berne (Paris)’ means the Berne Convention as revised at Paris on July 24, 1971, and as amended on September 28, 1979. ‘Berne (Brussels)’ means the convention as revised at Brussels on June 26, 1948. ‘Berne (Rome)’ means the convention as revised at Rome on June 2, 1928. Other acts of the convention were revised at Stockholm on July 14, 1967, and at Berlin on November 13, 1908. In each case, a reference to a particular act signifies adherence only to the substantive provisions of the act. For example, the substantive provisions of Berne (Paris) include articles 1 to 21 and the appendix; articles 22 to 38 deal with administrative provisions of the convention. The effective date for U.S. adherence to the Berne Convention is March 1, 1989; (iv) Bilateral copyright relations with the United States by virtue of a proclamation, or treaty (‘Bilateral’). Where there is more than one proclamation or treaty, only the date of the first one is given; (v) Free Trade Agreement (‘FTA’). The United States has concluded comprehensive free trade agreements (many bilaterally, some regionally) with multiple countries. With the exception of the U.S.-Israel agreement, the FTAs contain chapters on intellectual property rights, which include substantive copyright law and enforcement obligations; (vi) the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (‘Phonograms’), Geneva, 1971. The effective date for the United States is March 10, 1974; (vii) Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (‘SAT’), Brussels, 1974. The effective date for the United States is March 7, 1985; (viii) Universal Copyright Convention (‘UCC Geneva’), Geneva, 1952. The effective date for the United States is September 16, 1955, the date the treaty entered into force. (ix) Universal Copyright Convention (‘UCC Paris’) as revised at Paris, 1971. The effective date for the United States is July 10, 1974, the date the treaty entered into force; (x) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (‘VIP’). This treaty was adopted on June 27, 2013. It will enter into force once 20 eligible parties, including countries or certain intergovernmental organizations, ratify it, (xi) the World Intellectual Property Organization (‘WIPO’) Copyright Treaty (‘WCT’), Geneva, 1996. The effective date for the United States is March 6, 2002, the date the treaty entered into force; (xii) the WIPO Performances and Phonograms Treaty (‘WPPT’), Geneva, 1996. The effective date for the United States is May 20, 2002, the date the treaty entered into force; (xiii) and the World Trade Organization (‘WTO’), established pursuant to the Marrakesh Agreement of April 15, 1994, to implement the Uruguay Round Agreements. The Agreement on Trade-

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<sup>215</sup> Ibid, *International Issues*, <http://www.copyright.gov/international-issues>

Related Aspects of Intellectual Property Rights ('TRIPS') is one of the WTO agreements. It includes substantive obligations for the protection of copyright and other intellectual property rights as well as their enforcement. The effective date of United States membership in the WTO is January 1, 1995."<sup>216</sup>

39. According to the United States Copyright Office, "in addition to international treaties and conventions, other instruments, such as free trade agreements, require member countries to comply with specific obligations."<sup>217</sup> The TRIPS is an international agreement administered by the WTO that provides minimum standards for copyright and many other forms of intellectual property ("I.P.") regulation.<sup>218</sup> The TRIPS agreement introduced intellectual property law into the international trading system and is a comprehensive international agreement on intellectual property covering 162 contracting parties.<sup>219</sup> According to Article 3, TRIPS requires WTO members to provide copyright rights to content producers including "performers, producers of sound recordings and broadcasting organizations." According to Article 7, the objective of TRIPS is the "protection and enforcement of all intellectual property rights shall meet the objectives to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."<sup>220</sup>
40. According to the WTO: "In *US - Section 110(5) Copyright Act*, the Panel emphasized the need, in the light of general principles of interpretation, to harmoniously interpret provisions of the TRIPS Agreement and the Berne Convention (1971) In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. [I]t is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body [...] [T]he legal status of the minor exceptions doctrine under the TRIPS Agreement is consistent with these general principles."<sup>221</sup>

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<sup>216</sup> Ibid, *International Copyright Relations of the United States*, Circular 38a, Revised: April, 2016, <http://copyright.gov/circs/circ38a.pdf>, pp.2 to 3

<sup>217</sup> Ibid, p.1

<sup>218</sup> Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)

<sup>219</sup> See WTO, *Members and Observers*, Retrieved on May 17, 2016 from [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm). Also see WIPO, *IP-related Multilateral Treaties - Agreement on Trade-Related Aspects of Intellectual Property Rights - Total Contracting Parties : 162*, Retrieved on May 17, 2016 from [http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=231&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22)

<sup>220</sup> WTO, *TRIPS, Part I - General Provisions and Basic Principles*, [https://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm)

<sup>221</sup> WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/trips\\_01\\_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_01_e.htm), para. 88; Also see WTO, *US - Section 110(5) Copyright Act*, June 15, 2000,

41. The Civil Code of California is a collection of statutes for the State of California. The Civil Code of California is made up of statutes which govern the general obligations and rights of persons within the jurisdiction of California. According to Section 980 of the California Civil Code: “The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.”<sup>222</sup> According to Section 989 of the California Civil Code: “The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.”<sup>223</sup>
42. In the United States, federal preemption begins with the Constitution's Supremacy Clause, which provides that “[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”<sup>224</sup> Federal laws and regulations may preempt state laws in three ways. The first is through express preemption, where the federal law or regulation explicitly states that it preempts state or local regulation. The Second is implied preemption where it can be inferred from the language of the federal law that state law is preempted. The third means of preemption is field preemption, which arises when there is a conflict between the state and federal regulation or where attempting to comply with both federal and state laws would create a conflict. Section 301 of the Copyright Act expressly addresses copyright preemption. Section 301(a) provides: “On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”<sup>225</sup> Section 106 provides copyright holders with the exclusive rights to reproduction, adaptation, publication, performance and display.<sup>226</sup> Section 301(f)(1) expands the preemption right to apply to the rights of attribution and integrity, enumerated in Section 106A of the Copyright Act, which includes the following rights: (i) to claim authorship of that work; (ii) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

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<https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3a%2fwt%2fds%2f160r-00.doc&> , WT/DS160/R, para.6.66, p.24

<sup>222</sup> California Civil Code, <http://leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=00001-01000&file=980-989>, § 980(a)(2)

<sup>223</sup> Ibid, § 989(a)

<sup>224</sup> U.S. Constitution, Article VI, cl.2, [http://www.archives.gov/exhibits/charters/constitution\\_transcript.html](http://www.archives.gov/exhibits/charters/constitution_transcript.html)

<sup>225</sup> U.S. Copyright Office, *Preemption with respect to other laws*, <http://www.copyright.gov/title17/92chap3.html#301>, Title 17 of the United States Code, § 301

<sup>226</sup> U.S. Copyright Office, *Exclusive rights in copyrighted works*, <http://www.copyright.gov/title17/92chap1.html#106>, Title 17 of the United States Code, § 106

(iii) to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; (iv) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right; and (v) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.<sup>227</sup> State laws which purport to expand or decrease these exclusive rights would be preempted by the Copyright Act, according to Section 301. To avoid a preemption claim, state law (whether common law or statutory) must regulate conduct other than that associated with those exclusive rights provided by the Copyright Act. The language of Section 301 creates a two-part test for determining preemption: First, whether the work is within the subject matter of the Copyright Act; and second, whether the state law creates rights equivalent to those exclusive rights protected by the Copyright Act.

43. The United States legislation that directly addresses copyright on the internet is the Digital Millennium Copyright Act (“DMCA”) that was signed into United States law on October 28, 1998. The legislation implements two 1996 World Intellectual Property Organization (“WIPO”) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues. The DMCA is divided into titles. These titles include: (i) Title I, the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998,” implements the WIPO treaties; (ii) Title II, the “Online Copyright Infringement Liability Limitation Act,” creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities; (iii) Title III, the “Computer Maintenance Competition Assurance Act,” creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance or repair; and (iv) Title IV contains six miscellaneous provisions, relating to the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and for making ephemeral recordings, “webcasting” of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in the case of transfers of rights in motion pictures.<sup>228</sup> The DMCA also heightens the penalties for copyright infringement on the Internet.<sup>229</sup> The DMCA amended Title 17 of the United States Code to extend the reach of copyright, while limiting the liability of the providers of online services for copyright infringement by their users, an exemption from direct and indirect liability of Internet service providers and other intermediaries. This exemption was also adopted by the European Union in the

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<sup>227</sup> Ibid; Also *see* Title 17 of the United States Code, § 301(f)(1)

<sup>228</sup> U.S. Copyright Office, *Digital Millennium Copyright Act of 1998*, <http://copyright.gov/legislation/dmca.pdf>, p.1

<sup>229</sup> U.S. Government Printing Office, 17 United States Code (U.S.C), Title 17 – Copyrights, Chapter 5 – Copyright Infringement and Remedies, <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title17/html/USCODE-2010-title17-chap5-sec506.htm> , §506 – Criminal Offenses

Electronic Commerce Directive 2000.<sup>230</sup> The Copyright Directive 2001 implemented the 1996 WIPO Copyright Treaty in the EU.<sup>231</sup>

44. The rights of performing artists, notably including musicians and conductors, producers of phonograms (sound recordings) and broadcasting organizations, which are normally considered part of copyright protection in the United States, are normally referred to as “related” or “neighboring” rights in other countries and not least in Europe. The following international agreements, referred to above, deal exclusively or partially with such rights: The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; The Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite; the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; The WIPO Performances and Phonograms Treaty; The Beijing Treaty on Audiovisual Performances; and the TRIPS Agreements. In addition, most free-trade agreements which deal with copyright also contain provisions regarding related rights. While such rights in many respects resemble copyright, a term which in such countries is reserved for the protection of literary and artistic works, they are normally carefully tailored to suit the specific needs of protection for such subject matter. In particular, the term of protection is shorter and is counted from the year in which the performance, recording or broadcast took place, rather than the lifespan of the beneficiary as is typically the case regarding copyright in literary and artistic works.<sup>232</sup>
45. Most commonly, the rights under copyright and related rights are granted as exclusive rights, which mean that the individual owners of rights must consent to each single case of use of the protected works, performances and broadcasts. The only major deviance from this model is the broadcasting and other communication to the public of commercially published phonograms. In this case Article 12 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting organizations establishes a right of remuneration for the performers and producers of phonograms, which the Contracting Parties may opt out of by means of reservation (Article 16 of the Convention). Similar provisions are included in Article 15 of the WIPO Performances and Phonograms Treaty. This right is established in all the countries of the European Union and many other countries around the world, whereas it has only been established in a rudimentary form in the United States for digital broadcasting.<sup>233</sup>

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<sup>230</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML>, Official Journal L 178 , 17/07/2000 P. 0001 - 0016

<sup>231</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

<sup>232</sup> WIPO Intellectual Property Handbook: Policy, Law and Use, WIPO Publication No. 489(E), p.46 ff, [http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo\\_pub\\_489.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf)

<sup>233</sup> Mihály Ficsor: Collective Management of Copyright and Related Rights, WIPO Publication No. 855(E), Geneva 2002, pp. 78 to 84, [http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo\\_pub\\_855.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf); Digital Performance Right in Sound Recordings Act Of 1995 Public Law 104-39

46. In practice, it is not always feasible to obtain individual permissions or distribute equitable remuneration individually to all the rights owners involved when it comes to mass uses of protected works or objects of related rights. As Dr. Mihály Ficsor states in the WIPO publication “Collective Management of Copyright and Related Rights:” “At the time of the establishment of the international copyright system, there were certain rights – first of all the right of public performance of non-dramatical musical works – where individual exercise of the rights did not seem possible, at least not in a reasonable and effective manner; and since then, with the ever newer waves of new technologies, the areas in which individual exercise of rights has become impossible, or at least impractical, is constantly widening. Until the advent of digital technology and the global interactive network, it seemed that there were an increasing number of cases where individual owners of rights were unable to control the use of their works, negotiate with users and collect remuneration from them.”<sup>234</sup> “In the framework of a collective management system, owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and under appropriate conditions, collect such remuneration, and distribute it among the owners of rights. This may be regarded as a basic definition of collective management (however, [...] the collective nature of the management may, and frequently does also involve some other features corresponding to certain functions going beyond the collective exercise of rights in the strict sense).”<sup>235</sup>
47. Collective rights management has a cohesive structure and is widespread in the field of music. The rights of public performance, broadcasting and communication to the public of composers and lyric writers in their compositions and lyrics (if any), together with the corresponding rights acquired by music publishers normally managed by performing rights organizations, such as the American Society of Composers, Authors & Publishers (“ASCAP”), Broadcast Music Incorporated (“BMI”) and the Society of European Stage Authors and Composers (“SESAC”) in the United States, the Performing Rights Society (“PRS”) in the United Kingdom, Gesellschaft für musikalische Aufführungs und mechanische Verfielfältigungsrechte (“GEMA”) in Germany or the Indian Performing Rights Society (“IPRS”) in India. Outside the United States and particularly in Europe the rights to record musical works are managed collectively either by the said organizations (for example GEMA in Germany) or by similar organizations set up specifically for that purpose. In the United States the music publishers play a more independent role in such management, but collective management also takes place through the Harry Fox Agency. As regards the related rights of remuneration for broadcasting and other communication to the public of commercially published phonograms separate organizations exist in many countries set up by the national member organizations of The International Federation of Musicians (“FIM”) and the International Federation of Phonographic Industry (“IFPI”). In 2014, the authors’ rights societies for music collected €6.9 billion worldwide.<sup>236</sup>

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<sup>234</sup> Ficsor, *ibid*, p.16

<sup>235</sup> *Ibid*, p.17

<sup>236</sup> International Confederation of Societies of Authors and Composers (“CISAC”) Press release of October 27, 2015, <http://www.cisac.org/Newsroom/News-Releases/CISAC-publishes-new-Global-Collections-Report>

## Expert Legal Opinion

I, the undersigned Dr. Jørgen Blomqvist, Honorary Professor of International Copyright at the University of Copenhagen, have undertaken the expert role to provide an independent legal opinion on the well-foundedness of the ICANN Community Priority Evaluation (“CPE”) Report<sup>237</sup> for DotMusic’s community-based Application ID. 1-1115-14110<sup>238</sup> for the new gTLD string ‘.MUSIC.’ My legal expert opinion is based on the relevant facts presented herein in relation to music definitions, the CPE sections of “Community Establishment,” “Nexus between Proposed String and Community” and “Support” (under “Community Establishment”) as well as matters of international law, general principles of international copyright and related rights and international conventions, treaties and agreements as well as established practices regarding the management of copyright and related rights.<sup>239</sup>

### CPE Section on Community Establishment

48. Activities of Music Community members – regardless whether they are commercial or non-commercial – are reliant in one way or another on the regulated structure of the music sector and cohesion of general principles of international music copyright, international law as well as international conventions, treaties and agreements that relate to music copyright and activities. The CPE Panel’s conclusion that there is “no substantive evidence” that the Music Community defined in its entirety has cohesion (i.e. does not unite cohesively under music copyright or is reliant on international conventions for its activities) is *neither* a compelling *nor* a defensible argument. In fact, all of the Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions, management of rights and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.

49. ICANN’s Articles of Incorporation mandate that all of ICANN’s activities and decision-making must be “in conformity with relevant principles of international law and applicable international conventions.”<sup>240</sup> The Music Community participates<sup>241</sup> in a

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<sup>237</sup> CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>238</sup> DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

<sup>239</sup> DotMusic scored the full points under the CPE’s *Registration Policies* and *Opposition* (under *Community Endorsement*) sections, so my legal expert opinion will not include those sections because there is mutual agreement on their scoring grade.

<sup>240</sup> ICANN’s Articles of Incorporation provide that: “*The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations, ICANN Articles of Incorporation,*” <https://icann.org/resources/pages/governance/articles-en>, Article 4

<sup>241</sup> The EIU CPE Panel awarded the full *Community Establishment* points to the .ECO community applicant determining that “*cohesion and awareness is founded in their demonstrable involvement in environmental activities*” which “*may vary among member categories.*” (See .ECO CPE Report, <https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>, p.2). Inter alia, under DotMusic’s

regulated sector with activities tied<sup>242</sup> to music that must cohere to general principles of international music copyright, international law as well as international conventions, treaties and agreements, which are held together by a strong backbone of collective management of rights that channels permissions to use protected material and the remuneration for such use from the one end of the feeding chain (the authors, performers and producers) to the other (the music users) and vice versa. Accordingly, ICANN cannot deny Music Community “cohesion” when its own Articles of Incorporation mandate it to recognize applicable international conventions, such as the 1886 Berne Convention that relates to the protection of music copyright signed by 171 countries and which, for example, in its Article 14 *bis* (3) recognizes the specific situation for musical works.<sup>243</sup>

50. The Economist Group, the parent company of the EIU CPE Panel, also publicly recognizes the Berne Convention. The Economist is reliant on copyright cohesion under applicable laws and protection under international conventions<sup>244</sup> to conduct its primary activities. According to The Economist: “Copyright is a property right that gives the creators of certain kinds of material rights to control the ways in which such material can be used. These rights are established as soon as the material has been created, with no need for official registration. Copyright applies globally and is regulated by a number of international treaties and conventions (including the Berne Convention, the Universal Copyright Convention, the Rome Convention and the Geneva Convention).”<sup>245</sup>

51. It appears that the Panel failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic's provision of thousands of pages of “application materials and [...] research” as “substantive evidence” of “cohesion,” including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified in its Application materials that: “The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share

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Application, Music Community members, at the very least, also share similar category variance with members that also have demonstrable involvement in music-related activities.

<sup>242</sup> The EIU CPE Panel awarded the full *Community Establishment* points to the .OSAKA community applicant determining there was community “cohesion” because members “*self identify as having a tie to Osaka, or with the culture of Osaka.*” (See .OSAKA CPE Report, <https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members, at the very least, also self-identify as having a tie to music or with the culture of music.

<sup>243</sup> Berne Convention for the Protection of Literary and Artistic Works of 1886 with 171 contracting countries, See [http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) and [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283693](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693)

<sup>244</sup> See The Economist website, *Terms of Use*, “*Governing Law and Jurisdiction*,” <http://economist.com/legal/terms-of-use>, (“*The Economist shall also retain the right to bring proceedings as to the substance of the matter in the courts of the country of your residence.*”)

<sup>245</sup> See The Economist website, *Copyright Information*, <https://economist.com/rights/copyright.html>

and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.”<sup>246</sup>

52. The CPE Panel also ignored the significance of the Music Community’s regulated sector that is governed by general principles of international copyright law as well as international conventions, treaties and agreements as well as by the collective management of copyright and related rights. In fact, both the ICANN Board and the NGPC have admitted such a finding by accepting the GAC Category 1 Advice that .MUSIC is a “string that is linked to regulated sector” that “should operate in a way that is consistent with applicable laws.”<sup>247</sup> In effect, this ICANN-approved resolution reaffirms that all music groups (and music sub-groups) that comprise the Music Community defined have cohesion because they participate as a whole in a regulated sector with activities tied to music that cohere to general principles of international copyright law, international conventions, treaties and agreements.
53. According to the AGB: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of [...] a *logical alliance of communities* (for example, an international federation of national communities of a similar nature).”<sup>248</sup> As a requirement, the AGB also instructs applicants that in the case of a community of an “alliance of groups,” “details about the constituent parts are required.”<sup>249</sup>
54. According to DotMusic’s Application (and other Application Materials), the Music Community’s definition is a “strictly *delineated* and *organized community* of individuals, organizations and business, a “*logical alliance of communities of a similar nature* (‘COMMUNITY’), that relate to music” (Application, 20A, emphasis added). In this case, the “similar nature” component relates to DotMusic’s mission and purpose to protect intellectual property and promote music. The nature under which the Music Community operates is regulated following general principles of international copyright law as well as international conventions, treaties and agreements that relate to music copyright and activities, and it is tied together by strong mutual interests and unifying elements, including not least the collective management of copyright and related rights.
55. According to the requirements of the AGB, DotMusic’s definition of the Community meets the Community Establishment criteria of a “delineated” and “organized” community. In fact, DotMusic’s Music Community definition restricts the Music Community to a “delineated” and “organized” community, which by definition “implies ‘more of cohesion than a mere commonality of interest’” with “an awareness and recognition of a community among its members.” Along those lines, the “logical

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<sup>246</sup> See DotMusic Public Interest Commitments (“PIC”), <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6

<sup>247</sup> <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1 to 2

<sup>248</sup> AGB, p.4-12 (emphasis added)

<sup>249</sup> AGB, Attachment to Module 2, Evaluation Questions and Criteria: “*Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,*” Notes, 20A, A-14

alliance” of music communities has awareness and recognition of the community defined<sup>250 251</sup> because each supporting community member organization admitted so by providing written community endorsement letters supporting the community-based application and its mission and purpose, which include protecting copyright/intellectual property and promoting music.

56. Furthermore, the dictionary definition of a “*logical alliance*” is inherently cohesive. Dictionary definitions for “*logical*”<sup>252</sup> and “*alliance*”<sup>253</sup> meet the requirement of “*cohesion*” and the “*requisite awareness.*” In formation, an “alliance” requires an awareness and organization of all the groups in their entirety. For example, united in support of protecting music copyright and promoting legal music, a logical alliance of music communities (that were defined as the “Music Community”) filed comments to the U.S. Copyright Office to express “the Music Community’s list of frustrations with the DMCA.”<sup>254</sup> Another logical alliance comprised of nearly fifty (50) music communities, the National Music Council, also filed a submission to ICANN in support of DotMusic’s community-application and Reconsideration Request 16-5.<sup>255</sup> These are clear examples “*documented evidence of community activities*” that the Music Community is organized and united in protecting music copyright and promoting music.<sup>256</sup> These organized and united documented activities based on shared core principles demonstrate that the Music Community defined “implies more of cohesion than a mere commonality of interest.”

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<sup>250</sup> The EIU CPE Panel awarded the full *Community Establishment* points to the .GAY community applicant determining that there was “*an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies.*” (See GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members have an *explicit* recognition and awareness of *belonging* to a community that is united under the principles of protecting copyright/intellectual property and promoting legal music. The Music Community defined is comprised of a “*logical alliance*” (i.e. *allies*) that operates under a regulated sector and general principles of international copyright law and international conventions.

<sup>251</sup> The EIU CPE Panel awarded the full *Community Establishment* points to the .SPA community applicant determining that the defined spa community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their *inclusion* in industry organizations and *participation* in their events: “*Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.*”<sup>251</sup> (See .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.2). Inter alia, under DotMusic’s Application, Music Community members also recognize themselves as part of the music community as evidenced by their inclusion in music community member organizations and participation in their events.

<sup>252</sup> Oxford Dictionaries “*logical*” definition: (i) *1.Of or according to the rules of logic or formal argument;* (ii) *1.1 Characterized by or capable of clear, sound reasoning;* (iii) *1.2 (Of an action, development, decision, etc.) natural or sensible given the circumstances, see [http://oxforddictionaries.com/us/definition/american\\_english/logical](http://oxforddictionaries.com/us/definition/american_english/logical)*

<sup>253</sup> Oxford Dictionaries “*alliance*” definition: (i) *1. A union or association formed for mutual benefit, especially between organizations;* (ii) *1.1 A relationship based on an affinity in interests, nature, or qualities;* (iii) *1.2 A state of being joined or associated, see [http://oxforddictionaries.com/us/definition/american\\_english/alliance](http://oxforddictionaries.com/us/definition/american_english/alliance)*

<sup>254</sup> Comments of “Music Community” to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, April 1, 2016, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89806&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.2 to 3

<sup>255</sup> National Music Council letter to ICANN, March 28, 2016, <https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

<sup>256</sup> See Mission and Purpose, Application 18A and 20C. DotMusic’s mission and purpose includes the unified principles of “[p]rotecting intellectual property” and “[p]romoting music.”

57. The AGB also requires “at least one entity mainly dedicated to the community” defined. DotMusic’s application has many “recognized community institution(s)/member organization(s)” that are mainly dedicated to the music community addressed (i.e the “logical alliance of communities that relate to music”), that include the International Federation of Musicians (“FIM”) and the International Federation of Phonographic Industry (“IFPI”).
58. The FIM, founded in 1948, is a recognized international federation representing the “voice of musicians worldwide.”<sup>257</sup> The FIM’s global recognition is demonstrated by its official roster consultative status relations with the United Nations Economic and Social Council (“ECOSOC”); the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status); the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status); and the Organisation Internationale de la Francophonie (“OIF”). The FIM also consults the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (“IMC”).<sup>258</sup>
59. The IFPI, founded in 1933, is a recognized international federation “representing the “recording industry worldwide.” The IFPI represents the majority of music consumed globally.<sup>259</sup> The IFPI also represents the three major label groups (Universal Music, Sony Music and Warner Music), organizations that “control 78% of the global market.”<sup>260</sup>
60. The IFPI is only associated with music and it is the globally-recognized music organization that administers the International Standard Recording Code (“ISRC”), an international standard code for uniquely identifying sound recordings and music video recordings, which is reciprocally recognized across all segments of the Music Community.<sup>261</sup> The code was developed with the ISO technical committee 46, subcommittee 9 (TC 46/SC 9), which codified the standard as ISO 3901 in 1986.<sup>262</sup> The IFPI’s ISRC is “intentionally standardised under ISO,” globally structured<sup>263</sup> and “well established, widely accepted internationally.”<sup>264</sup> Furthermore, it relates to the addressed Music Community defined by DotMusic, an “organized and delineated logical alliance of communities that relate to music.” The IFPI does not restrict ISRC codes to solely its members. In fact, ISRC eligibility is available and dedicated to the entire global Music

<sup>257</sup> Musicians represent the overwhelming majority of the Music Community defined

<sup>258</sup> UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

<sup>259</sup> See IFPI, <http://www.ifpi.org>

<sup>260</sup> See Credit Suisse Research and Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from

[https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document\\_id=1034433411&extdocid=1034433411\\_1\\_eng\\_pdf](https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&extdocid=1034433411_1_eng_pdf)

<sup>261</sup> According to the DotMusic Application, evidential examples of music community cohesion were described in 20A: “commonly used [...] classification systems such as ISMN, ISRC, ISWC, ISNI [...]” The ISRC is administered by the IFPI on behalf of the entire Music Community.

<sup>262</sup> [http://www.iso.org/iso/home/store/catalogue\\_tc/catalogue\\_detail.htm?csnumber=23401](http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401)

<sup>263</sup> <http://isrc.ifpi.org/en/isrc-standard/structure>

<sup>264</sup> <http://isrc.ifpi.org/en/why-use/benefits>

Community, irrespective of whether they are members of organizations or not, are professionals or amateurs, are independent or non-independent, commercial or non-commercial: “Owners of recordings may for example be independent artists, record labels or recorded music groups. ISRC is available to all owners of recordings regardless of their membership<sup>265</sup> (or not) with any industry association.”<sup>266</sup> In fact, without the IFPI’s ISRC codes, legal music consumption as it cohesively functions currently would not exist in the manner that it does today because there would be no way to appropriately and efficiently attribute music to Music Community members.<sup>267</sup> The IFPI’s global recognition is also demonstrated by its official relations with United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Consultative Status), a globally-recognized international organization with 195 country member states<sup>268</sup> and the World Intellectual Property Organization (“WIPO”) (Permanent Observer Status).<sup>269</sup>

61. Based on the AGB criteria, both the IFPI and the FIM qualify as recognized community member organizations that are *mainly*<sup>270</sup> dedicated to the community addressed<sup>271</sup> with organized “documented activities” that are united under the shared Music Community core principles of protecting copyright and promoting music.

62. According to the AGB, *Pre-existence* requires that the Community defined by the applicant “must have been active prior to September 2007.”<sup>272</sup> *Longevity* effectively also requires that the community defined is not ephemeral or set up for the specific purpose of

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<sup>265</sup> DotMusic’s community application defines the community as “a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature,” that relate to music: the art of combining sounds rhythmically, melodically or harmonically.” The IFPI’s ISRC codes do not restrict eligibility to members of select music organizations but are available to the entire music community as defined.

<sup>266</sup> <http://isrc.ifpi.org/en/using-isrc>

<sup>267</sup> For example, without the IFPI’s ISRC codes, YouTube Music would be unable to effectively credit the corresponding music copyright owner related to each music video, *see* <https://support.google.com/youtube/answer/6007080> and; For the same reason, nearly all digital music retailers rely on and require ISRC codes, including Apple iTunes<sup>267</sup> (the world’s largest music retailer with over 43 million music tracks,<sup>267</sup> *see* <http://apple.com/itunes/working-itunes/sell-content/music-faq.html> and <http://apple.com/itunes/music> and <http://www.digitalmusicnews.com/2014/04/24/itunes800m>)

<sup>268</sup> *See* UNESCO, <http://en.unesco.org/countries/member-states>

<sup>269</sup> *See* UNESCO at <http://ngo-db.unesco.org/r/or/en/1100064188> and WIPO at [http://wipo.int/members/en/organizations.jsp?type=NGO\\_INT](http://wipo.int/members/en/organizations.jsp?type=NGO_INT)

<sup>270</sup> According to the Oxford Dictionaries, the definition of “mainly” is “*more than anything else.*” *See* [http://www.oxforddictionaries.com/us/definition/american\\_english/mainly](http://www.oxforddictionaries.com/us/definition/american_english/mainly)

<sup>271</sup> In the case of .HOTEL’s CPE Report, the prevailing .HOTEL community applicant received a full grade for “*Organization*” because the Panel found “recognized community institution(s)/member organization(s),” (*See* .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6) the International Hotel & Restaurant Association (“IH&RA”), the China Hotel Association (“CHA”), the American Hotel & Lodging Association (“AH&LA”) and HOTREC: “*the community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA) [...]*” (*See* .HOTEL CPE Report, *Community Establishment*, p.2) “[...] *The applicant possesses documented support from the recognized community institution(s)/member organization(s).*” (*See* .HOTEL CPE Report, p.6). According to the .HOTEL CPE Report, it is also noted that the Panel recognized that the nationally-based AH&LA and CHA were “recognized” organizations that were “mainly” dedicated to the hotel community. Consistently, DotMusic’s application had multiple recognized international federations and national organizations mainly dedicated to the music community.

<sup>272</sup> AGB, p.4-11

obtaining a gTLD approval.<sup>273</sup> Both the IFPI (founded in 1933) and the FIM (founded in 1948) are recognized community member organizations and international federations that are mainly dedicated to the community as defined by the applicant with records of activity beginning before 2007.<sup>274</sup> In fact, both the IFPI and the FIM were active and organized prior to the introduction of the Internet, top-level domains and ICANN.<sup>275</sup> The defined Music Community and its music-related segments were organized prior to 2007, united under shared core principles, such as the protection of music copyright and the promotion of music. In other words, none of the .MUSIC Application's supporting community organizations were set up for the specific purpose of obtaining gTLD approval. The pursuits of the community defined are of a lasting, non-transient nature (i.e. will continue to exist in the future). With respect to the collective management of music copyright, such activities started out in 1850 in France and were widespread in Europe during the first decades of the 20<sup>th</sup> Century.<sup>276</sup>

63. According to the AGB, the Community defined must be of “considerable size and have longevity. *Size* requires that the “community is of considerable size.”<sup>277</sup> According to DotMusic's Application, the size and extensiveness of the Music Community were shown in DotMusic's support letters from 20F and also described in 20A: “The Music Community's geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries...with a Community of considerable size with millions of constituents (“SIZE”).”<sup>278</sup> Moreover, according to DotMusic's Application materials, the community defined is supported by a logical alliance of music organizations with members that represent over 95% of music consumed globally. In sum, the community defined is of considerable size.
64. DotMusic's Application meets all the criteria under the *Community Establishment* section.

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<sup>273</sup> AGB, “‘Longevity’” means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12

<sup>274</sup> A similar example is the International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA”) and the International Spa Association (“ISA”). According to the .GAY CPE Report, “the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007.” (See .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3). According to the .SPA CPE Report: “The community as defined in the application was active prior to September 2007 [...] [T]he proposed community segments have been active prior to September 2007. For example, the International Spa Association, a professional organization representing spas in over 70 countries, has been in existence since 1991.” (See .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3). Consistent with the .SPA and .GAY CPE Reports' rationale for ISA and ILGA (an international federation with consultative status with UNESCO, see ILGA, <http://ilga.org/about-us>), both the IFPI and FIM have “records of activity before 2007” (The IFPI and the FIM were founded in 1933 and 1948 respectively) and are “mainly dedicated to the community” as defined by DotMusic.

<sup>275</sup> Internet Society, *Brief History of the Internet*, <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>

<sup>276</sup> Mihály Ficsor: *Collective Management of Copyright and Related Rights*, WIPO Publication No. 855(E), [http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo\\_pub\\_855.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/855/wipo_pub_855.pdf), p.19

<sup>277</sup> AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

<sup>278</sup> See .MUSIC Application, 20A, para.4 at

<https://gtdresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>

## CPE Section on Nexus between Proposed String and Community

65. According to DotMusic’s Application, the “Name” of the community defined was described in 20A: “The name of the community served is the “Music Community” (“Community”).”<sup>279</sup>
66. According to DotMusic’s Application, the “Nexus between Proposed String and Community” was described in 20A and 20D: “The “MUSIC” string *matches* the name (“Name”) of the Community and is the established name by which the Community is commonly known by others.”<sup>280</sup> DotMusic “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in its answer to 20D: “The .MUSIC string relates to the Community by [...] *completely representing the entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model [...].”<sup>281 282</sup>
67. Before the .MUSIC CPE commenced, DotMusic also submitted an independent poll conducted by Nielsen <sup>283</sup> as supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for Community Establishment and Nexus. An independent Nielsen QuickQuery survey was conducted from August 7, 2015, to August 11, 2015, with 2,084 diverse and neutral adults.<sup>284</sup> The survey examined whether or not

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<sup>279</sup> Application, 20A, para.1

<sup>280</sup> Ibid, 20A, para.3 (*emphasis added*)

<sup>281</sup> Ibid, 20D, para.1 (*emphasis added*)

<sup>282</sup> According to the .SPA community application, the defined spa community also included a secondary community that did not relate to the operation of spas: “The *secondary community generally* also includes holistic and personal wellness centers and organizations. While *these secondary community organizations do not relate directly* to the operation of spas, *they nevertheless often* overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.” (See .SPA community application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/123?t:ac=123>, 20A, para.3 (*emphasis added*)). The EIU CPE Panel awarded the .SPA community applicants the full points under both the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections despite the spa community defined by the applicant including a “secondary community” that “do[es] not relate directly” to the string. Inter alia, DotMusic’s Application, Music Community members are delineated and restricted to music categories and music subsets that *only* relate to music. According to DotMusic’s Application Materials, unrelated secondary communities that have a tangential relationship with the music community defined are not allowed, which is a higher threshold than the one allowed by the EIU CPE Panel in awarding maximum points for the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections of the .SPA CPE Report. Inter alia, DotMusic “restricts eligibility to Music Community members -- as explicitly stated in DotMusic’s Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes.” (See DotMusic Public Interest Commitments (“PIC”), PIC Enumerated Commitment #3, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.1). DotMusic’s defined community “...exclude[s] those with a passive, casual or peripheral association with the applied-for string.” (See Ibid, PIC Enumerated Commitment #4, p.2)

<sup>283</sup> See Nielsen QuickQuery. Retrieved on May 11<sup>th</sup>, 2016 from <http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

<sup>284</sup> See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: “Q3505 If you saw a website domain that ended in “.music” (e.g., www name music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?” <https://www.icann.org/en/system/files/files/reconsideration-16-5->

the applied-for string (.MUSIC) was commonly-known and associated with the identification of the community defined by DotMusic by asking: “If you saw a website domain that ended in “.music” (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?” A substantial majority, 1562 out of 2084 (i.e. 3 in 4 or 75% of the respondents) responded positively, agreeing that (i) the applied-for string (.MUSIC) corresponds to the name of community addressed by the application (the “music community”) and that (ii) the “music community” definition is “a logical alliance of communities of individuals, organizations and business that relate to music.” The Independent Nielsen Poll for Community Establishment and Nexus provided independent supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for the *Community Establishment* and the *Nexus Between the Proposed String and Community* sections.<sup>285</sup>

68. The applied-for string, MUSIC, is commonly known by others as the name of the community: the Music Community (i.e. the string matches the name of the community). With regard to the community context and from a general point of view, the string has no other significant meaning beyond identifying the community described in the application: the Music Community.

69. DotMusic’s Application meets all the criteria under the *Nexus between Proposed String and Community* section.

### **CPE Section on Support (under Community Endorsement)**

70. The AGB and CPE Guidelines allow communities that are supported and established through multiple organizations and institutions. The relevant provisions provide: “with respect to “Support,” the plurals in brackets for a score of 2, *relate to cases of multiple institutions/organizations*. In such cases there must be documented support from institutions/organizations representing a *majority of the overall community addressed in order to score 2.*”<sup>286 287</sup>

71. According to the DotMusic Application, DotMusic received “documented support” from multiple organizations representing a majority of the Community, as referenced in 20D: “See 20F for documented support from institutions / organizations representing majority of the Community and description of the process/rationale used relating to the expression of support.”<sup>288</sup> According to the DotMusic Application Materials and DotMusic’s Support letters, the .MUSIC Application is supported by multiple organizations with members representing over ninety-five percent (95%) of music consumed globally, a

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[dotmusic-exhibits-a25-redacted-24feb16-en.pdf](#), Exhibit A32, Appendix B, pp. 38 to 41; Also *see* Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3

<sup>285</sup> Ibid, Annex H, pp.102 to 105 of 993

<sup>286</sup> AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

<sup>287</sup> CPE Guidelines, p.18

<sup>288</sup> Application, 20D, last paragraph

*majority* of the overall Music Community defined, the “organized and delineated logical alliance of communities of similar nature that relate to music.”<sup>289</sup>

72. According to the AGB, another alternative for a score of 2 points under “Support” is possessing “documented support from, the recognized<sup>290</sup> community institution(s)/ member organization(s).”<sup>291</sup>
73. The level of global recognition of any music community organization should be analyzed within the context of the community that such institution is claiming to be a part of, not the public in general. The AGB does not require that one organization represent an “entire” community. In fact, it would be impossible for an institution to represent any community in its entirety unless the representation is associated with the core principles of music copyright protection that all community members share, or the administration of internationally-recognized and community-shared music attribution systems conducted on behalf of the entire community (such as the administration of the ISRC by the IFPI conducted on behalf of the community in its entirety). The concept of “community” is not strictly defined by the AGB. According to the Oxford Dictionaries, a “community” could be “a group of people living in the same place or having a particular characteristic in common,” “a body of nations or states unified by common interests,” “a feeling of fellowship with others, as a result of sharing common attitudes, interests, and goals” or “similarity or identity.” It generally refers to a “group of people” that may be considered as a “unit” that share similar interests, goals or values.<sup>292</sup> The community defined, the “delineated and organized logical alliance of communities of similar nature that relate to music” are united, *inter alia*, under the principles of copyright protection and legal music promotion. As defined, the Music Community has more of cohesion than a mere commonality of interest because it functions under a structured and regulated sector. Without such cohesion and structure, music consumption and usage as we know them today would not be possible.
74. The music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. Recognized organizations include the IFPI and the FIM. DotMusic’s application possesses documented support from the recognized community member organizations.<sup>293</sup>

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<sup>289</sup> See Support Letters from multiple organizations for DotMusic’s Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>290</sup> AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

<sup>291</sup> AGB, p.4-17

<sup>292</sup> Oxford Dictionaries, [http://www.oxforddictionaries.com/us/definition/american\\_english/community](http://www.oxforddictionaries.com/us/definition/american_english/community)

<sup>293</sup> According to the .HOTEL CPE Report, the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines): “[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.” (See .HOTEL CPE Report, p.6). Recognized organizations mainly dedicated to the hotel community included the nationally-based AH&LA and CHA.

75. DotMusic’s Application meets both “Support” options to meet a score of 2. DotMusic has “documented support from, the recognized community institution(s) / member organization(s)”<sup>294</sup> and “documented support from institutions/organizations representing a majority of the overall community addressed.”<sup>295</sup> DotMusic’s Application meets all the criteria for “Support” under the *Community Endorsement* section.

## Conclusion

76. I am in agreement with the forty-three (43) independent expert testimonies, which agreed unanimously that DotMusic’s Application met the *Community Establishment*, the *Nexus Between the Proposed String and Community* and the *Support* CPE criteria. Furthermore, the findings of the Nielsen Poll provided more independent supporting evidence to demonstrate that DotMusic’s Application met the CPE criteria for *Community Establishment* and *Nexus Between the Proposed String and Community*.

77. It is my legal expert opinion that DotMusic’s application meets the full criteria under *Community Establishment*, the *Nexus Between the Proposed String and Community*, and *Support* (under *Community Endorsement*).



Dr. Jørgen Blomqvist  
Honorary Professor in International Copyright, Ph.d

June 17, 2016

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<sup>294</sup> According to the .HOTEL CPE Report, the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines): “[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.” (See .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6). Recognized organizations mainly dedicated to the hotel community included the nationally-based AH&LA and CHA. Consistent with the .HOTEL CPE Report’s “Support” rationale, DotMusic’s Application also meets the “Support” criterion.

<sup>295</sup> According to the .RADIO CPE Report: “[T]he applicant possesses documented support from institutions / organizations representing a majority of the community addressed [...]The applicant received support from a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant. These entities represented a majority of the overall community. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support.” (See .RADIO CPE Report, <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7). Consistent with the .RADIO CPE Report’s “Support” rationale, DotMusic’s Application meets the “Support” criterion because it has support from recognized community organizations representing a majority of the overall community defined by the applicant.

# Exhibit 21

# Expert Ethnomusicologist Opinion

By Dr. Richard James Burgess<sup>1</sup>  
Doctor of Philosophy in Ethnomusicology

September 12, 2016

**Ethnomusicologist Expert Opinion on ICANN's .MUSIC Community  
Priority Evaluation Report for DotMusic's Application ID 1-1115-14110**

**Prepared for:**

International Corporation of Assigned Names and Numbers ("ICANN");

Organized alliance of music communities representing over 95% of global music consumed ("Music Community"); and

DotMusic Limited ("DotMusic")

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## Executive Summary

I respectfully submit my *independent* expert opinion as to why the Community Priority Evaluation (“CPE”) Report by the Economist Intelligence Unit (“EIU”) for DotMusic’s community-based .MUSIC Application (with ID 1-1115-14110) “that the application did not meet the requirements specified in the Applicant Guidebook” is incorrect.<sup>2</sup> In my view, based on a careful study of the materials provided to me,<sup>3</sup> DotMusic’s community Application was improperly denied in CPE by ICANN and the EIU (the “CPE Panel”).

Based on my expertise as an ethnomusicologist (Ph.D in Ethnomusicology), my professional music career experience spanning over 45 years,<sup>4</sup> and having reviewed DotMusic’s Application Materials for .MUSIC (including the Public Interest Commitments), expert testimonies submitted in support of the Application (43 in total), the results of an independent Nielson Poll, the ICANN Applicant Guidebook (“AGB”), the ICANN CPE Guidelines and the CPE determinations for .HOTEL, .SPA, .ECO, .RADIO, .OSAKA and .GAY by the EIU, my Expert Ethnomusicologist Opinion concludes that DotMusic fully meets all CPE criteria for a score of 16 points. Specifically:

- i. DotMusic’s Application satisfies the “Community Establishment” CPE criterion: DotMusic’s Application was graded 0 out of 4 points under the “Community Establishment” CPE criterion. However, in my opinion, DotMusic fully meets the CPE criterion for a score of 4 points because, inter alia:
  - a. The Community defined, the “delineated and organized logical alliance of music communities of similar nature,” is vast and diverse, yet clearly has cohesion under general principles of international copyright law and international music conventions and operates in a regulated music sector;
  - b. The requisite awareness of Community members is demonstrated in various ways: By the letters of support from the Community addressed; registration requiring awareness and compliance with shared values, purpose and mission; Community recognition by mandating Community member self-identification, including selecting music “community stakeholder” type; and Content and Use policies restricted to music-related Community content and legal music usage in terms of participation or activity;
  - c. There is also “more cohesion than commonality of interest” because DotMusic uses “organized, consistent and interrelated criteria to demonstrate Community Establishment verified using Community-organized, unified criteria that invoke a formal membership without discrimination;”
  - d. DotMusic’s Public Interest Commitments (PIC) also clarify that Community members are only those “with an active, non-tangential relationship with the applied-for string” with “the requisite awareness of the music community;”

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<sup>2</sup> See .MUSIC CPE Report for DotMusic Limited (the “CPE Report”), <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, p.1

<sup>3</sup> See Appendix B

<sup>4</sup> See Appendix A

- e. There are many *recognized* organizations *mainly* dedicated to the Community. Supporting organizations of such type include the International Federation of Phonographic Industry (IFPI) and the International Federation of Musicians (FIM) globally recognized by the United Nations and the World Intellectual Property Organization (WIPO). IFPI represents the majority of music consumption globally, while FIM represents musicians, the constituent type constituting the majority of the Community in size. Other supporting mainly dedicated organizations, such as A2IM and Reverbnation, have membership types that cover all of DotMusic’s constituent member categories in their entirety without discrimination; and
  - f. The alliance of music communities or music member categories pre-existed September 2007. For example, the IFPI and the FIM were formed in 1933 and 1948 respectively. Member categories that form the alliance (such as labels, publishers and musicians), international copyright law and the regulated music sector will continue to exist into the future.
- ii. DotMusic’s application fully satisfies the “Nexus” CPE criterion: DotMusic was graded 3 out of 4 points under the “Nexus Between the Proposed Community and String” CPE criterion. But, in my expert opinion, DotMusic fully meets the criterion for a score of 4 points because, inter alia:
- a. The name of the community served, the “Music Community,” is the “established name by which the Community is commonly known by others.” An overwhelming majority of over 2,000 participants in an independent Nielsen Poll agreed that the .MUSIC string matched the Community defined satisfying “commonly-known by others” criterion;
  - b. The .MUSIC string “relates to the Community by completely representing the entire Community” i.e. “It relates to all music-related constituents;”
  - c. DotMusic’s PIC re-clarifies that Community eligibility will “exclude those with a passive, casual or peripheral association with the applied-for string” so that the Community only “includes all music constituents represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents;” and
  - d. The string matches the Community because all music constituent types considered essential for Community to function are included.
- iii. DotMusic’s application fully satisfies the “Support” CPE criterion DotMusic was graded 1 out of 2 points under the “Support” CPE criterion. But, in my expert opinion, DotMusic fully meets the criterion for a score of 2 points because DotMusic’s Application has documented support from organizations with members representing over 95% of global music, an overwhelming majority, including support from the most globally-recognized organizations (e.g. IFPI and FIM) and organizations with member types representative of all of DotMusic’s music categories without discrimination (e.g. Reverbnation and A2IM).

## Expert Ethnomusicologist Opinion

I, the undersigned Dr. Richard James Burgess, have undertaken the expert role to provide an independent ethnomusicologist expert opinion (the “Expert Ethnomusicologist Opinion”) on the well-foundedness of the ICANN Community Priority Evaluation (“CPE”) Report<sup>5</sup> for DotMusic’s community-based Application (with ID 1-1115-14110)<sup>6</sup> for the .MUSIC string.<sup>7</sup>

My opinion will focus exclusively on Music Community definitions from my perspective:

- As an expert ethnomusicologist with a Ph.D in Ethnomusicology;
- Derived from a music career spanning more than 45 years, far-reaching Music Community participation and extensive professional experience as an ethnomusicologist, studio drummer, label owner, music association executive, music-computer programmer, recording artist, record producer, composer, author, manager, marketer and inventor;
- As CEO of one of the world’s leading trade associations representing the interests of the independent music community.

My Expert Ethnomusicologist Opinion relates to:

- (i) The ICANN gTLD Applicant Guidebook (“Guidebook”) CPE criteria of *Community Establishment*, the *Nexus between Proposed String and Community and Support*;
- (ii) Music Community *cohesion* and *requisite awareness and recognition* of the Community defined by DotMusic;
- (iii) General principles of international copyright and related rights and international conventions, treaties and agreements, including established practices regarding the Music Community management of copyright and the related economic and non-economic rights derived from copyright.

DotMusic scored the full points under the *Registration Policies* and *Opposition* CPE criteria. As such, my Expert Ethnomusicologist Opinion will not discuss those criteria because there is mutual agreement on their scoring.

I disclose that this Expert Ethnomusicologist Opinion is in my personal capacity. I have not received any compensation in exchange for providing this Expert Ethnomusicologist Opinion nor do I hold any sort of financial or shareholder interest in DotMusic Limited.

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<sup>5</sup> See .MUSIC CPE Report for DotMusic Limited (the “CPE Report”), <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>6</sup> See DotMusic community application, Application ID: 1-1115-14110, Prioritization Number: 448; See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

<sup>7</sup> For the purposes of my Expert Ethnomusicologist Opinion, I have primarily focused on Application Materials provided to me by DotMusic as identified in Appendix B, including the Applicant Guidebook, the CPE Guidelines, the DotMusic CPE Report, other relevant CPE Reports, the DotMusic Application, the DotMusic Public Interest Commitments, the DotMusic Answers to Clarifying Questions, the Independent Expert Testimonies and the Independent Nielsen Poll.

## Community Establishment CPE Criterion Is Satisfied

1. DotMusic was improperly graded 0 out of 4 points under the “Community Establishment” CPE criterion. DotMusic fully meets the “Community Establishment” CPE criterion for a score of 4 points. The Expert Ethnomusicologist Opinion agrees with the Expert Legal Opinion of Honorary Professor of International Copyright Dr. Jørgen Blomqvist<sup>8</sup> with respect to “Community Establishment.”
2. The Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist demonstrates that the Music Community has cohesion under general principles of international copyright law, international copyright conventions and treaties as well as collective rights<sup>9</sup> managed under a regulated music sector. Supplementing Honorary Professor Dr. Jørgen Blomqvist’s Expert Legal Opinion, I would also point to other examples of a regulated music sector, which include consent decrees for ASCAP and BMI, two music organizations that have supported DotMusic. According to the U.S. Department of Justice:

ASCAP and BMI are performing rights organizations that license public performance rights in compositions held by their hundreds of thousands of songwriter and publisher members. Since 1941, when the United States originally brought civil antitrust lawsuits against ASCAP and BMI, both organizations have been subject to consent decrees, which are designed to prevent anticompetitive effects arising from their collective licensing of music performance rights. Both consent decrees have been amended periodically since their entry. The ASCAP consent decree was last amended in 2001 and the BMI consent decree was last amended in 1994.<sup>10</sup>

3. Other examples of Music Community cohesion under general principles of international copyright law and conventions include many landmark cases in relation to music plagiarism and copyright infringement. Since the 1850s, federal courts from all around the world have published verdicts with respect to such cases. For example, the 1844 U.S. Court case *Millett v. Snowden* is one of the earliest reported music copyright infringement cases globally.<sup>11</sup> Other notable cases include the U.K. Court’s *Austin v.*

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<sup>8</sup> Honorary Professor Dr. Jørgen Blomqvist, Expert Legal Opinion, June 17, 2016 at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>

<sup>9</sup> See Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>, June 17, 2016, §§ 29 to 47, pp. 30 to 38

<sup>10</sup> U.S. Department of Justice, August 4, 2016. See <https://justice.gov/opa/pr/justice-department-completes-review-ascap-and-bmi-consent-decrees-proposing-no-modifications>

<sup>11</sup> *Millett v. Snowden*, 17 F.Cas. 374, No. 9600 (Cir. Ct. S.D. New York) [1844] at <http://mcir.usc.edu/cases/Before1900/Pages/millettvsnowden.html>

*Columbia Gramophone Co* (1923),<sup>12</sup> the Canada's Ontario Supreme Court's *Gondos v. Hardy* (1982),<sup>13</sup> Australia's *CBS Records Australia v. Guy Cross* (1989),<sup>14</sup> China's Beijing District Court's *Apollo Inc. v. Coca Cola* (2004),<sup>15</sup> and Taiwan's *People v. Hu* (2007).<sup>16</sup> Other examples are cases that relate to mass copyright infringement. The most prominent cases include *Napster (A&M Records, Inc. v. Napster, Inc.)*<sup>17</sup>, *Kazaa (Universal Music Australia Pty Ltd v Sharman License Holdings Ltd)*<sup>18</sup>, *LimeWire (Arista Records LLC et al v. Lime Wire LLC et al)*<sup>19</sup><sup>20</sup> *Grooveshark (UMG Recording Inc et al v. Escape Media Group Inc et al)*<sup>21</sup><sup>22</sup> and *Megaupload (Kim Dotcom v Her Majesty's Attorney-General)*.<sup>23</sup>

4. As the examples provided illustrate, the activities of Music Community members depend on the regulated structure of the music sector. My music career's viability, that has spanned over 40 years, has been sustainable because of the Music Community's reliance on general principles of international music copyright, international law as well as international conventions, treaties and agreements (such as the Berne Convention that relates to music copyright and music activities).
5. The CPE Report's conclusion that there is "no substantive evidence" that the defined Music Community in its entirety has cohesion<sup>24</sup> is not a compelling or a defensible statement. The Music Community in its entirety (across all music constituent member categories as described in DotMusic's Application) must unite cohesively under music copyright in order to function as it does today. It is more of cohesion than a

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<sup>12</sup> *Austin v. Columbia Gramophone Co.*, Mag. Cas. 398 (Eng.) [1923] at <http://mcir.usc.edu/cases/1920-1929/Pages/austincolumbia.html>

<sup>13</sup> *Gondos v. Hardy*, (1982) 38 O.R. (2d) 555 at <http://mcir.usc.edu/cases/1980-1989/Pages/gondoshardy.html>

<sup>14</sup> *CBS Records Australia v. Guy Cross*, (NSW) 15 IPR 385 [1989] at <http://mcir.usc.edu/cases/1980-1989/Pages/cbsguy.html>

<sup>15</sup> *Apollo Inc. v. Coca Cola (China) Inc.* [2004] at <http://mcir.usc.edu/cases/asiancase/apollo.html>

<sup>16</sup> *People v. Hu*, Taiwan Pingtung Appellate Court [2007] at <http://mcir.usc.edu/cases/2000-2009/Pages/peoplevhu.html>

<sup>17</sup> *A&M Records, Inc. et al v. Napster, Inc.*, 239 F.3d 1004 [2001] at <http://www.copyright.gov/docs/napsteramicus.html>

<sup>18</sup> *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* FCA 1587 [2005] at <https://jade.io/article/111640> ; Also see ARSTechnica, "Sharman Networks settles Kazaa file-sharing lawsuits. The RIAA and MPAA finally squeeze a legal settlement," July 27, 2006, at <http://arstechnica.com/uncategorized/2006/07/7363>

<sup>19</sup> *Arista Records LLC et al v. Lime Wire LLC*, 715 F. Supp. 2d 481 [2010] at <https://dockets.justia.com/docket/new-york/nysdce/1:2006cv05936/288038>

<sup>20</sup> See Reuters, "LimeWire to pay record labels \$105 million, ends suit," May 12, 2011, at <http://www.reuters.com/article/us-limewire-idUSTRE74B78320110512>

<sup>21</sup> *UMG Recording Inc et al v. Escape Media Group Inc et al*, U.S. District Court, Southern District of New York, No. 11-08407 [] at <https://dockets.justia.com/docket/new-york/nysdce/1:2011cv08407/387934>

<sup>22</sup> See Reuters, "Grooveshark copyright violations 'willful,' judge says before trial," April 24, 2015, at <http://www.reuters.com/article/us-music-lawsuit-grooveshark-idUSKBN0NF21120150424>

<sup>23</sup> *Kim Dotcom v Her Majesty's Attorney-General*, NZSC 199 [2014] at <https://forms.justice.govt.nz/search/Documents/pdf/jdo/55/alfresco/service/api/node/content/workspace/SpaceSStore/534ffa00-2598-41c5-81bd-4c80f4dd44a5/534ffa00-2598-41c5-81bd-4c80f4dd44a5.pdf>

<sup>24</sup> See CPE Report, p.3

commonality of interest because legal music activities and participation are established by general principles of international law. The global Music Community as a unit is reliant on international conventions for its activities. Without cohesion established under international law and music-related conventions (such as the Berne Convention), the Music Community would lack structure and as a result would not be able to provide music to consumers nor have any way to compensate musicians and corresponding rights holders. In effect, if the Music Community across all member categories lacked cohesion and an awareness and recognition of general principles such as music copyright protection established by international law, international conventions and a regulated sector then music consumption and the music industry as we know them today would not exist in their present form nor cohere. Mass copyright infringement cases (such as Napster, Limewire, Kazaa and Megaupload) showcase the importance of a regulated Music Community structure. Without cohesion and dependence under the current music regulatory framework that forms the basis of the music business and industry, the Music Community will have difficulties sustaining itself with respect to longevity because there will no longer be any protection of musical works or the ability for creators to be compensated or receive attribution. Furthermore, in the absence of international conventions and structures, Community members will no longer be able to make any sort of living through music.

6. ICANN has indicated in its Articles of Incorporation that all of its activities and decisions must be “in conformity with relevant principles of international law and applicable international conventions.”<sup>25</sup> All Music Community member types participate in a regulated sector with activities tied to music that must cohere to general principles of international music copyright law as well as international conventions, treaties and agreements, which are driven by collective management of rights that grant permission to use copyright-protected music content in exchange for some form of compensation and/or attribution for such usage. From a historical perspective, these principles temporarily give creators the sole right to copy and distribute their musical works. The idea that a creator should be able to control how their musical work is initially distributed goes way back in history. For example, in the U.S., the Founding Fathers understood creative musical works serve the public interest and that creators need an incentive to create music: the exclusive right to control their creation for a limited period of time. After that period expires, then the general public could legally copy or use that work for any purpose. The U.S. Supreme Court summarized: “[T]he ultimate aim is, by this incentive, to *stimulate artistic creativity for the general public good.*”<sup>26</sup>

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<sup>25</sup> ICANN’s Articles of Incorporation provide that: “*The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations, ICANN Articles of Incorporation,*” <https://icann.org/resources/pages/governance/articles-en>, Art. 4

<sup>26</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 [1975] at <https://supreme.justia.com/cases/federal/us/422/151/case.html>

These principles address Community cohesion, including the need and support for a regulated structure to ensure Music Community sustenance among each and every member included in Dotmusic's Application. Based on my professional music experience, this is because each member category delineated in DotMusic's Community definition is essential for the complete, proper and efficient functioning of the Community. In my professional music experience, all music constituent types delineated are interdependent and reliant on each other given the symbiotic nature of the Music Community and its regulated sector.

7. The Music Community definition and its requisite awareness and recognition among Community members through their explicit participation and compliance was clarified in DotMusic's Application Materials:

The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the "Community" definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations."<sup>27</sup>

From my perspective as an expert ethnomusicologist, it is essential to realize that the Community does not exist because of these international instruments; rather the instruments are a reflection of the fact that there is an organized Music Community. They satisfy a need of the Community, which is why the signatory states negotiated the treaties. All those who participate in music activities who demonstrably accept that they are subject to regulation is a reflection of having awareness and recognition that the Music Community exists. International instruments, such as the Berne Convention, are evidence of the existence of the Music Community. International treaties and agreements are a reflection of a need for rules that are accepted by a substantial number of nation states to serve the public interest and the public good with respect to those covered by the conventions. In my expert ethnomusicologist opinion, the existing international instruments provide the strongest evidence for Community existence that demonstrates awareness and recognition among its members.

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<sup>27</sup> See DotMusic Public Interest Commitments ("PIC"), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6

As such, the Expert Ethnomusicologist Opinion agrees with the definition of the Music Community as an “alliance” of music communities that are organized under a regulated music sector and general principles of international copyright law and conventions of similar nature. DotMusic’s definition of the Music Community as an organized and delineated “alliance” of music communities of similar nature is the most accurate and reflective definition of the Community. Based on my music experience, the dictionary definitions of “alliance” align entirely with how the Music Community organizes itself. An “alliance” is defined as “a union between groups etc.: a relationship in which people agree to work together,” “an association to further the common interests of the members” (i.e. more of cohesion than a commonality of interest), a “union by relationship in qualities” or “a treaty of alliance.”<sup>28</sup> While there may be many member category types, music constituents all are united under common principles, such as the protection of music. As the CEO of one of the world’s leading music trade organizations, I can testify that it is the norm that organizations representing diverse member category types work together as a united family to protect principles aligned with DotMusic’s articulated Mission and Purpose, such as protecting music, supporting fair compensation as well as promoting legal music and music education. In fact, the Community across all its member categories engages in joint initiatives and participates in international conferences and meetings, such as Midem catered to all music constituent types.<sup>29</sup> Community participation is thus not unwitting. It is based on active participation in activities that promote the best interests of the community – through debate, dissent, agreement. Simply because the Community across all member categories may not be in agreement or act together all the time does not mean that they disagree as to whether they are members of and participants in the Music Community identified by DotMusic.

8. The significance of general principles of international copyright and conventions may be considered more important from a commercial economic rights and music industry standpoint, but the importance of non-economic rights derived from copyright is just as critical from a moral and human rights perspective to enable music creativity and serve the public good. As per the 1948 United Nations’ Article 27 of the Universal Declaration of Human Rights: “(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; and (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>30</sup> While it may appear that friction exists between the commercial and non-commercial characteristics of Community members’ music activities and participation, there is no impact on the cohesion of the Community as a whole. For example, both amateur and professional musicians may choose to distribute their music for free to increase

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<sup>28</sup> See Merriam-Webster dictionary definition of “alliance” at <http://merriam-webster.com/dictionary/alliance>

<sup>29</sup> See Midem at <http://www.midem.com/discover>

<sup>30</sup> See United Nations, <http://www.un.org/en/universal-declaration-human-rights/index.html>; Also see U.N Guiding Principles on Business and Human Rights, ‘Protect, Respect and Remedy’ Framework, [http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf), p.5

awareness or leverage their music as a loss leader to stimulate other music-related activities, such as performing live (or vice-versa).

9. It is noteworthy to mention that prevailing CPE Applicants received full points under the “Community Establishment” CPE criterion in the absence of a cohesive, regulated sector that is bound by general principles of international copyright law and conventions, such as music. Prevailing community applicants’ cohesion and requisite awareness requirements under “Community Establishment” were satisfied by meeting a community-based characteristic, such as demonstrated participation, involvement, activities, having a tie, inclusion, an active commitment or self-identification. Based on my review of the CPE criteria and the applications that passed, DotMusic’s Application satisfied all of these characteristics that were deemed acceptable by the EIU CPE Panel for a full score under the “Community Establishment” CPE criterion.

For example, the .SPA community applicant satisfied the “Community Establishment” CPE criterion because its “Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.”<sup>31</sup> DotMusic also satisfies this criterion under the same rationale, in my view. According to DotMusic’s Application, one of the requirements include that Music Community members must self-identify and recognize themselves as part of the Community. This too may be evidenced by their inclusion in music community member organizations or participation in music-related events.

Another example, with a lower threshold for member “cohesion” and “requisite awareness” of the Community addressed, is the .ECO community applicant, which satisfied the “Community Establishment” CPE criterion. The .ECO community members’ “cohesion and awareness is founded in their demonstrable involvement in environmental activities...who “demonstrate active commitment, practice and reporting.” This involvement may vary among member categories.”<sup>32</sup> DotMusic’s Application must be seen to have satisfied this criterion as well under the same rationale: Music Community members (across all music member categories delineated) must have demonstrable involvement and active commitment in music activities.<sup>33</sup> Just as the .ECO community involvement may vary among member categories, the same applies for the Music Community’s member categories. However, the Music Community variance has more cohesion and robustness than .ECO’s community given that all Community members are also united under a regulated music sector and general principles of international copyright and conventions. Again, as I have stated, from my perspective as an expert ethnomusicologist, it is not the case that the Community exists because of the conventions; but that the conventions are evidence of the existence of the Community.

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<sup>31</sup> See .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.2

<sup>32</sup> See .ECO CPE Report at <https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>, p.2

<sup>33</sup> This is also a Content and Use commitment mandated under the DotMusic Application’s Registration Policies.

Furthermore, another example that shows that DotMusic’s Application exceeds the “Community Establishment” CPE criterion is comparing the .RADIO community application that satisfied the “Community Establishment” CPE criterion on the basis that .RADIO community members, as “participants in this clearly defined industry, have an awareness and recognition of their inclusion in the industry community.”<sup>34</sup> Under the same rationale, DotMusic’s Application satisfies the “Community Establishment” CPE criterion because Music Community members are also “participants” in a clearly defined music sector regulated by general principles of international copyright law and conventions and have an awareness and recognition that they are “included” in the Music Community by self-identifying themselves as part of the Community defined by selecting their delineated music member category type or identifying themselves as a member of a music community member organization.

The .OSAKA community applicant is another example of an application that satisfied the “Community Establishment” with a relatively and comparatively lower threshold than DotMusic’s Application. According to .OSAKA’s community application, the EIU CPE Panel determined that there was community “cohesion” because .OSAKA community members “self identify as having a tie to Osaka, or with the culture of Osaka.”<sup>35</sup> Similarly, under DotMusic’s Application, Music Community members must also self-identify as having a tie to music. In fact, the DotMusic Application not only requires that Community members “self-identify” as having a tie to music, all Community members must also select what music category delineation corresponds to them.

Similarly, the .HOTEL community application satisfied the “Community Establishment” CPE criterion for a community definition that was comprised of “categories [that] are a logical alliance of members” and “defined in terms of its association with the hotel industry.”<sup>36</sup> Likewise, the DotMusic Application’s Community definition is delineated by “member categories” and is a “logical alliance.” DotMusic’s Community definition also includes “business” in terms of its association with the music industry.<sup>37</sup>

In summary, a comparative analysis between prevailing CPE Reports and DotMusic’s CPE Report *convinces me as an ethnomusicologist* that DotMusic’s Application satisfies the “Community Establishment” rationale of all prevailing CPE Reports for .SPA, .ECO, .RADIO, .OSAKA and .HOTEL combined. In other words, DotMusic’s Application meets all the “Community Establishment” thresholds that have been accepted by the EIU CPE Panel in relation to prevailing community applicants, such as demonstrated participation, involvement, activities, having a tie, inclusion, active commitments or self-identification. While many community applications that have prevailed focused

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<sup>34</sup> See .RADIO CPE Report at <https://icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, pg.2

<sup>35</sup> See .OSAKA CPE Report at <https://icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>, p.2

<sup>36</sup> See .HOTEL CPE Report at <https://icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.2

<sup>37</sup> See Application 20A. The Community is defined as a “strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature that relate to music.”

primarily on “industry” (e.g. the CPE Reports for .RADIO and .HOTEL), DotMusic also included “industry” as part of its Community definition to accommodate the dual rights (economic rights and non-economic rights, such as moral and human rights) that are essential for the Music Community to function and be subject to a regulated sector.

10. As such and inter alia, the Expert Ethnomusicologist Opinion disagrees with the CPE Report conclusion that states that: “while individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such cohesion is considerable enough that the community defined as a whole cannot be said to have the cohesion required by the AGB. The Panel therefore determined that there is insufficient awareness and recognition of a community among the proposed community members, and that they do not therefore cohere as a community as required by the AGB.”<sup>38</sup> As someone who has spent his career participating in (as a musician), studying (as an ethnomusicologist and academic), organizing and advocating for (as head of a trade association) the Music Community, the EIU’s conclusion is simply incorrect and reflects a misunderstanding of the Community, its membership and activities. The CPE Report does not explicitly identify the music category or subset of the music categories types that relates to the “number of individuals” that “do not show such cohesion.” Moreover, the CPE Report provided no test, evidence or research to quantify what “considerable enough” is. The CPE Guidelines instruct ICANN and the EIU to provide “conclusions that are compelling and defensible” and “to document the way in which it has done so in each case.”<sup>39</sup> Not only did the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, I am not aware of any supporting research and documented evidence from the EIU to substantiate this particular CPE Report conclusion.

11. According to DotMusic’s Application Materials, “DotMusic expects that the substantial majority of all of its registrations will originate from the music entity type classified as “Musical groups and artists” [...] All music constituent types that are associated with the string must have a relationship with “music” and have the requisite awareness of DotMusic’s defined Community to be part of the Community.”<sup>40</sup> DotMusic clarified that “[w]hile some music constituent types in DotMusic’s definition and classification might comprise a minority in numbers (e.g. music lawyers) when compared to the primary and core constituent classification type (music groups and artists), the inclusion of every music constituent type is paramount to the purpose of the string. Every music constituent type critically contributes to the function and operation of the music sector within a regulated framework given the symbiotic overlapping nature of the Community as defined and structured. Music would not function as it does today without the

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<sup>38</sup> See .MUSIC CPE Report, p.3

<sup>39</sup> See CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

<sup>40</sup> See DotMusic Public Interest Commitments (PIC) at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.11

participation of all music constituent types. The inclusion of all music constituent types serves the public interest because it ensures the Community matches the nexus of the string without discrimination, while excluding peripheral, casual entities with a tangential relationship with the Community defined ... [T]he string's articulated community-based purpose and the string's Content and Use requirements [] mandate that usage only relates to music activities and licensed, legitimate music content.<sup>41</sup> "All components of the Application's Community Definition, Delineation and Registration Polices are not mutually exclusive. They must all be met to ensure eligibility..."<sup>42</sup> In other words, excluding any music category or subset of the music categories types as the CPE Report appears to suggest will compromise the AGB requirement that all category parts of the delineated alliance collectively must "form a whole." Excluding constituent types would in effect result in a "construed community" because of the symbiotic and overlapping nature of the music community. Further, it would be discriminatory and not match the Nexus requirements if DotMusic excluded any music constituent type that is essential for the functioning of the Music Community.

12. The CPE Report does not explicitly define nor identify the delineated constituent category type(s) that should have been excluded to enable the community defined to function cohesively as defined by the AGB. The CPE Report did not provide any research or analysis explaining which specific music constituent types are not essential to the Music Community to function as it does today and how these music constituent types' activities and participation lack cohesion in relation to regulatory nature music sector and how the music community organizes itself and functions today. As such, any suggestion that a particular delineated community type compromises the cohesiveness of the "community defined as a whole" is false, imprecise and undocumented. Not only did ICANN and the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, ICANN and the EIU did not provide any EIU supporting research and documented evidence to substantiate this particular CPE Report conclusion. That said, a few of the primary categories, such as Musical Groups and Artists, Independent Music Artists, Performers, Arrangers and Composers, Music Publishers, Music Recording Industries, Music Collection Agencies or Performance Rights Organizations, represent nearly all of the Music Community defined in size. Even if one considers the EIU's undefined music constituent types that, according to the CPE Report, lacked cohesion with the community defined (I do not agree to such a vague, non-specific and unsubstantiated assessment), they are not substantial in size in comparison to be "considerable enough" (or influential enough) to conclude that "community defined as a whole cannot be said to have cohesion." Moreover, one "member category" type alone that was delineated by DotMusic's Application is "considerable enough" based on research evidence presented by the EIU in a CPE Report concerning the .MUSIC string, which agrees that "Musical groups and artists" constitute the vast majority of the Community in numbers. According to a 2014 EIU CPE Report: "the

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<sup>41</sup> *Ibid*, p.15

<sup>42</sup> *Ibid*

number of amateur musicians worldwide ... is estimated to be about 200 million.”<sup>43</sup> As such, any other member category (or all other member categories combined) cannot be “considerable enough” in relation to the DotMusic’s “Musical groups and artists” member category to conclude that there is insufficient cohesion because such a conclusion would be inconsistent with the 2014 EIU CPE Report concerning the .MUSIC string. The difference between the size of the “Musical groups and artists” member category in numbers and the number comprised by other member categories (even collectively) is considerably substantial and is indicative of the high degree of cohesion of the Community defined.

13. According to DotMusic’s Applications Materials, including Support Letters and the Public Interest Commitments (PIC) document, the members of the defined community, the “logical alliance of communities of similar nature that relate to music” have the requisite awareness and recognition of the community addressed. In fact, as the CEO of a globally-recognized trade association representing the independent music community, I can testify that all the most recognized music organizations are indeed united under the shared principles of protecting music copyright and promoting legal music. With respect to DotMusic, the explicit written support of all these recognized organizations indicates clear requisite and awareness of the Community addressed as well as cohesion under unified principles aligned with DotMusic’s Mission and Purpose.
14. I also reviewed the PIC “Appendix PIC Clarification” section, which clarifies that “the applied-for string (.MUSIC) ... will be restricted to only members of the Community (defined in the Application as “a strictly delineated and organized community of individuals, organizations and business, a logical alliance of communities of similar nature that relate to music”) who have an active, non-tangential relationship with the applied-for string and the requisite awareness and recognition that they are a part of the defined Community.”<sup>44</sup>
15. Moreover, according to the DotMusic Application Materials and Support letters, the Community members’ “requisite awareness and recognition” of the community defined was met through the proactive, explicit and purposeful action of submitting expressed letters of support that were aligned cohesively with DotMusic’s articulated Mission and Purpose: “See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support;”<sup>45</sup> “To be aligned with its Mission, DotMusic has focused on

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<sup>43</sup> See .MUSIC LLC Application 1-959-51046 CPE Report, October 6, 2014, footnote 11, p.6. The EIU research is based on TheNextWeb, “Sezion lets anyone collaborate on a song, could be the Instagram for amateur musicians,” June 6, 2012, at <http://thenextweb.com/apps/2012/06/06/sezion-lets-anyone-collaborate-on-a-song-could-be-the-instagram-for-amateur-musicians>

<sup>44</sup> See DotMusic Public Interest Commitments (PIC) at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, Appendix PIC Clarification, p.5

<sup>45</sup> *Ibid*, 20D, last paragraph

expressions of support that cover an all-inclusive global, balanced and multi-stakeholder representation of the Community, as delineated in response to question 20(a), that collectively represents the majority of the recognized Community by size;<sup>46</sup> and “[...] the Community relates to the ... constituents represented or covered by the recognized institutions, federations, associations, organizations, Coalitions or any other music entities that have expressed their support.”<sup>47</sup> In addition, member “requisite awareness and recognition” of the Community addressed is also established by member participation, alignment and compliance with DotMusic’s eligibility requirements, values, purpose and mission as described in 20E: “[O]nly eligible members of the Music Community who comply with the values, purpose and mission...can participate.”<sup>48</sup>

16. Furthermore, according to DotMusic’s Eligibility Registration Policy, members of Community defined must agree and validate via a two-step authentication that they are members of the Community defined (i.e. have the requisite awareness and recognition of the Community defined) and agree to DotMusic’s Content and Use policies that restrict content and usage to music-related participation and legal music activity. If any member of the defined Community does not abide by DotMusic’s Registration Policies or agree to DotMusic’s aligned articulated Purpose then they are not eligible to register a .music domain because they would lack cohesion and the requisite awareness and recognition of the Community defined.
17. According to the AGB, an option that fulfills the criteria for a community definition under “Community Establishment” is a logical alliance of communities: “a community can consist of ... a logical alliance of communities. All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community.”<sup>49</sup> For the music community to function, the alliance of music communities must work together cohesively given the symbiotic and regulatory nature of the sector. Removing any delineated music constituent type addressed in DotMusic’s Application would not make the community function cohesively as it does today and therefore would not relate to a “real community.”
18. The Community as defined was not “construed to obtain a sought after generic word as a gTLD string” and was “active prior to September 2007.” As shown by the results of a Nielsen Poll that I have reviewed, the vast majority of the 2000 participants agreed that the community definition accurately matched the string by explicitly agreeing that “[a] website domain that ended in “.music” (e.g., www.name.music) would [be] associate[d] with musicians and/or other individuals or organizations belonging to the music

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<sup>46</sup> See Application 20F at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>, p.2

<sup>47</sup> *Ibid*

<sup>48</sup> See Application 20E

<sup>49</sup> See AGB, § 4.2.3, 4-12; Also see BGC Determination for DotKids Reconsideration Request 16-6, July 21, 2016, <https://www.icann.org/en/system/files/files/reconsideration-16-6-dotkids-bgc-21jul16-en.pdf>, p.12

community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)” i.e. the definition of an “organized. Furthermore, according to the Application Materials, the alliance of supporting organizations with members representing over 95% of global music consumed, represent a majority of the community defined. Any suggestion that such an alliance of music communities, representing the most recognized music organizations and the vast majority of music consumed, is considered a “construed community” and not a “real community” in relation to the “music” string cannot be viewed as a credible conclusion. Without this alliance, the music sector would not function (emphasis added). Again, not only did the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, the EIU did not provide any supporting research and documented evidence to substantiate this particular CPE Report conclusion.

According to the CPE Report, “based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories.” According to the CPE Report, “[a]n “organized” community, according to the AGB, is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. [...] Based on information provided in the application materials and the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories explicitly defined.”<sup>50</sup> According to the AGB, the definition of “‘Organized’ implies that there is at least one entity *mainly* dedicated to the community, with documented evidence of community activities.”<sup>51</sup> As such, the AGB does not require that an organization represents all members “in their entirety.” The language of both the AGB and the CPE Guidelines do not explicitly contain the words “entire” or “in their entirety.” However, even with such a requirement, many globally-recognized organizations that have supported DotMusic’s community application qualify as *mainly dedicated* to the community defined, such as the International Federation of Phonographic Industry (IFPI) and the International Federation of Musicians (FIM).

The IFPI’s formation date was 1933, which pre-existed the AGB’s requirements of community formation prior to September 2007.<sup>52</sup> The IFPI, “representing the recording industry worldwide,” is globally recognized by the United Nations. The IFPI has Consultative Status with the United Nations Educational, Scientific and Cultural Organization (UNESCO). The IFPI is also globally recognized by the World Intellectual Property Organization (WIPO). The IFPI has Permanent Observer Status with WIPO. IFPI also administers the International Standard Recording Code (ISRC) on behalf of the entire Music Community. The ISRC is based on the ISO 3901 International Standard Code for identifying music used by entire global Music Community.<sup>53</sup> The IFPI’s documented

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<sup>50</sup> See .MUSIC CPE Report, p.3.

<sup>51</sup> AGB, § 4.2.3, 4-11

<sup>52</sup> See IFPI, at <http://www.ifpi.org>

<sup>53</sup> See [http://www.iso.org/iso/home/store/catalogue\\_tc/catalogue\\_detail.htm?csnumber=23401](http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=23401), <http://isrc.ifpi.org/en/isrc-standard/structure> and <http://isrc.ifpi.org/en/why-use/benefits>

activities cohere with the Music Community's shared principles of protecting copyright and promoting music. The IFPI represents the three major label groups (i.e. Universal Music, Sony Music and Warner Music), that "control 78% of the global market,"<sup>54</sup> a majority.

The FIM also pre-existed September 2007. The FIM was founded in 1948.<sup>55</sup> The FIM represents the "voice of musicians worldwide," the member category that constitutes the vast majority of the Music Community defined in size. The FIM's global recognition is demonstrated by its official roster consultative status relations with the United Nations Economic and Social Council (ECOSOC), consultative status with UNESCO, and permanent observer status with the WIPO and the Organisation Internationale de la Francophonie (OIF). The FIM also consults the Council of Europe, the European Commission and the European Parliament. FIM is also a member of the International Music Council (IMC).<sup>56</sup> The FIM's documented activities also cohere with the Music Community's shared principles of protecting copyright and promoting music.

19. Furthermore, there are other supporting music organizations that are comprised of members covering the breadth of categories delineated by DotMusic's Application: A2IM and ReverbNation. The AGB mandated that "[f]or a community consisting of an alliance of groups, details about the constituent parts are required."<sup>57</sup> DotMusic provided details about the constituent parts of the community delineated in the form of music-only categories and category sub-sets:

- Musical groups and artists (711130)
- Independent music artists, performers, arrangers & composers (711500)
- Music publishers (512230)
- Music recording industries (512290)
- Music recording & rehearsal studios (512240)
- Music distributors, promoters & record labels (512220)
- Music production companies & record producers (512210)
- Live musical producers (711130)
- Musical instrument manufacturers (339992)
- Musical instruments & supplies stores (451140)
- Music stores (451220)
- Music accountants (541211)
- Music lawyers (541110)

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<sup>54</sup> See Credit Suisse Research and Analytics, Global Music, 25 June 2014. p.7 at <https://research-and-analytics.csfb.com/docView?docid=wbKkOP>

<sup>55</sup> See FIM at <https://www.fim-musicians.org>

<sup>56</sup> UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

<sup>57</sup> See AGB, Attachment to Module 2, Evaluation Questions and Criteria: "Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required," Notes, 20A, A-14

- Music education & schools (611610)
- Music agents & managers (711400)
- Music promoters & performing arts establishments (711300)
- Music promoters of performing arts with facilities (711310)
- Music promoters of performing arts without facilities (711320)
- Music performing arts companies (711100)
- Other music performing arts companies (711190)
- Music record reproducing companies (334612)
- Music, audio and video equipment manufacturers (334310)
- Music radio networks (515111)
- Music radio stations (515112)
- Music archives & libraries (519120)
- Music business & management consultants (541611)
- Music collection agencies & performance rights organizations (561440)
- Music therapists (621340)
- Music business associations (813910)
- Music coalitions, associations, organizations, information centers & export offices (813920)
- Music unions (813930)
- Music public relations agencies (541820)
- Music journalists & bloggers (711510)
- Internet Music radio station (519130)
- Music broadcasters (515120)
- Music video producers (512110)
- Music marketing services (541613)
- Music & audio engineers (541330)
- Music ticketing (561599)
- Music recreation establishments (722410)
- Music fans/clubs (813410)<sup>58</sup>

20. According to the CPE Report, DotMusic' Application "bounds community membership by way of well-defined categories. Therefore the Panel has determined that the applicant provides a clear and straightforward membership definition."

A2IM, an organization that I am currently the CEO of, which has supported DotMusic's community application, encompasses all music community constituent types as members without discrimination (referred to as Label Members and Associate Members),<sup>59</sup> such as (See corresponding music category in parentheses):

<sup>58</sup> See Application 20A; Also see .MUSIC CPE Report, p.2

<sup>59</sup> See A2IM members at <http://a2im.org/groups/tag/label+members> and <http://a2im.org/groups/tag/associate+members>; Also see DotMusic Application 20F, DotMusic Support Letters, A2IM at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>, pp. 22 to 26 of 413; Also see PIC, Appendix B, pp. 54 to 56 of 311

- All Access<sup>60</sup> (Category: Music News)
- Apple iTunes<sup>61</sup> (Category: Digital Music Retailer)
- Bandcamp<sup>62</sup> (Category: Music Services)
- Bandzoogle<sup>63</sup> (Category: Music Technology Services)
- Beggars Group<sup>64</sup> (Category: Recording Industry / Label. Artists include Adele and Radiohead)
- Big Machine<sup>65</sup> (Category: Recording Industry / Label. Artists include Taylor Swift and Tim McGraw)
- Billboard<sup>66</sup> (Category: Music Magazine and News)
- BMG Rights<sup>67</sup> (Category: Music Rights Management and Collection Agency)
- BureauExport<sup>68</sup> (Category: Music Export Office and Association)
- Coalition of Independent Music Stores (CIMS) (Category: Music Store)
- Concord Music Group<sup>69</sup> (Category: Recording Industry / Label. Artists include Paul McCartney, Tony Bennett and James Taylor)
- Citrin Cooperman<sup>70</sup> (Category: Music Accountant and Consulting)
- CMJ<sup>71</sup> (Category: Music Live Events)
- Dash Two<sup>72</sup> (Category: Music Agency)
- Disc Makers<sup>73</sup> (Category: Music Manufacturer)
- Imagem Publishing<sup>74</sup> (Category: Music Publishing)
- Merch Cat<sup>75</sup> (Category: Music Merchandising)
- Midem<sup>76</sup> (Category: Music Conference)
- Nielsen<sup>77</sup> (Category: Music Services and Technology)
- Pandora<sup>78</sup> (Category: Music Radio)
- Place<sup>79</sup> (Category: Music Software and App Developing Services)
- PledgeMusic<sup>80</sup> (Category: Music Fans)

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<sup>60</sup> See <http://a2im.org/groups/all-access>

<sup>61</sup> See <http://a2im.org/groups/apple>

<sup>62</sup> See <http://a2im.org/groups/bandcamp>

<sup>63</sup> See <http://a2im.org/groups/bandzoogle>

<sup>64</sup> See <http://a2im.org/groups/beggars-group>

<sup>65</sup> See <http://a2im.org/groups/big-machine-records>

<sup>66</sup> See <http://a2im.org/groups/billboard>

<sup>67</sup> See <http://a2im.org/groups/bmg-rights>

<sup>68</sup> See <http://a2im.org/groups/french-music-export-office>

<sup>69</sup> See <http://a2im.org/groups/concord-music-group>

<sup>70</sup> See <http://a2im.org/groups/citrin-cooperman>

<sup>71</sup> See <http://a2im.org/groups/cmj-network>

<sup>72</sup> See <http://a2im.org/groups/dash-two>

<sup>73</sup> See <http://a2im.org/groups/disc-makers>

<sup>74</sup> See <http://a2im.org/groups/imagem-music>

<sup>75</sup> See <http://a2im.org/groups/merchcat>

<sup>76</sup> See <http://a2im.org/groups/midem>

<sup>77</sup> See <http://a2im.org/groups/nielsen-musi>

<sup>78</sup> See <http://a2im.org/groups/pandora>

<sup>79</sup> See <http://a2im.org/groups/place>

- Reeperbahn Festival<sup>81</sup> (Category: Music Festival and Events)
- Reverbnation<sup>82</sup> (Category: Music Community of Artists, Industry and Fans)
- SiriusXM<sup>83</sup> (Category: Music Radio)
- Soundcloud<sup>84</sup> (Category: Music Community of Artists, Industry and Fans)
- Soundexchange<sup>85</sup> (Category: Performance Rights Music Collection Agency)
- Spotify<sup>86</sup> (Category: Music Streaming Services)
- Subpop Records<sup>87</sup> (Category: Recording Industry / Label. Artists include Soundgarden and Nirvana)
- Sullivan Street Studios<sup>88</sup> (Category: Music Studio)
- Synchtank<sup>89</sup> (Category: Music Licensing)
- The Syndicate<sup>90</sup> (Category: Music Marketing Services)
- The Good Seat<sup>91</sup> (Category: Music Ticketing)
- Traffic Control Group<sup>92</sup> (Category: Music Attorney)
- Tunecore<sup>93</sup> (Category: Digital Distributor)
- Vistex<sup>94</sup> (Category: Music Accountant)
- Vevo<sup>95</sup> (Category: Music Video Community)

A2IM also is affiliated with recognized organizations that relate to music, such as the Copyright Alliance,<sup>96</sup> MusicFirst,<sup>97</sup> the Worldwide Independent Network (WIN),<sup>98</sup> the Merlin Network,<sup>99</sup> and Music Matters.<sup>100</sup>

Another DotMusic supporting music organization that is representative of the community defined is Reverbnation,<sup>101</sup> an A2IM Associate Member and the world's

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<sup>80</sup> See <http://a2im.org/groups/pledgemusic>

<sup>81</sup> See <http://a2im.org/groups/reeperbahn-festival>

<sup>82</sup> See <http://a2im.org/groups/reverb-nation>

<sup>83</sup> See <http://a2im.org/groups/siriusxm>

<sup>84</sup> See <http://a2im.org/groups/soundcloud>

<sup>85</sup> See <http://a2im.org/groups/soundexchange>

<sup>86</sup> See <http://a2im.org/groups/spotify>

<sup>87</sup> See <http://a2im.org/groups/sub-pop-records>

<sup>88</sup> See <http://a2im.org/groups/sullivan-street-studios>

<sup>89</sup> See <http://a2im.org/groups/synchtank>

<sup>90</sup> See <http://a2im.org/groups/the-syndicate>

<sup>91</sup> See <http://a2im.org/groups/thegoodseat>

<sup>92</sup> See <http://a2im.org/groups/traffic-control-group>

<sup>93</sup> See <http://a2im.org/groups/tunecore>

<sup>94</sup> See <http://a2im.org/groups/vistex>

<sup>95</sup> See <http://a2im.org/groups/vevo>

<sup>96</sup> See <http://www.copyrightalliance.org>

<sup>97</sup> See <http://www.musicfirstcoalition.org>

<sup>98</sup> See <http://www.winformusic.org>

<sup>99</sup> See <http://www.merlinnetwork.org>

<sup>100</sup> See <http://whymusicmatters.com>

<sup>101</sup> See Reverbnation members at <https://reverbnation.com/band-promotion> (Artists/Bands), <https://reverbnation.com/industryprofessionals>, (Industry), <https://reverbnation.com/venue-promotion> (Venues)

largest music-dedicated community covering nearly 4 million musicians and industry individuals and organizations and other types of music constituents in over 100 countries across all music constituent types addressed by DotMusic's Application. As such, Reverbnation is representative of all the music categories and music subset categories delineated in community addressed in their entirety without discrimination globally.

21. According to the CPE Report, in relation to "Pre-Existence," the "community as defined in the application was not active prior to September 2007."<sup>102</sup> The EIU does not provide evidence or research to prove that the organized and delineated community defined did not exist before 2007. With respect to "Pre-existence," DotMusic described in 20A that "the Community has bought, sold, and bartered music for as long as it has been made... The foundation for the structured and strictly delineated Community only resulted from the interplay between the growing music publishing business and an emerging public music concert culture in the 18th century ("PRE-EXISTING")."<sup>103</sup> The "Pre-existence" criterion only inquires "when the community was formed as explicitly defined according to the statements in the application" (emphasis added).<sup>104</sup> Per the "statements in the application," the 18<sup>th</sup> century pre-dates September 2007. Moreover, the CPE Report states: DotMusic's Application "bounds community membership by way of well-defined categories. Therefore the Panel has determined that the applicant provides a clear and straightforward membership definition."<sup>105</sup>
22. If the CPE Report's purported Community definition of "member categories"<sup>106</sup> is considered then again the CPE Report fails to show how these "member categories" did not pre-exist 2007. In fact, all these Music Constituent categories (or constituent types) that delineate the "logical alliance of music communities" pre-existed 2007 and are essential for the Community to function as it does today. As such, the community definition cannot be construed. Furthermore, as I noted earlier, globally-recognized organizations such as the IFPI and the FIM were founded in 1933 and 1948 respectively with documented records of activity beginning before 2007.<sup>107</sup> As such, any assertion

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and <https://reverbnation.com/fan-promotion> (Fans); Also see DotMusic Application 20F, DotMusic Support Letters, Reverbnation at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>, pp. 338 to 339 of 413; Also see PIC, Appendix B, p. 158 of 311

<sup>102</sup> *Ibid*, p.4

<sup>103</sup> *Ibid*, 20A, last paragraph.

<sup>104</sup> According to the BGC Determination 16-6, the BGC determined that: "The CPE Panel is only asked to inquire when the community defined by the applicant was formed." See BGC Determination 16-6, <https://www.icann.org/en/system/files/files/reconsideration-16-6-dotkids-bgc-21jul16-en.pdf>, p.11; Furthermore, the BGC Determination 16-6 specified that "the first CPE criterion 'relates to the community as explicitly identified and defined according to the ... application.'" See BGC 16-6, footnote 40, p.11

<sup>105</sup> See .MUSIC CPE Report, p.3

<sup>106</sup> *Ibid*

<sup>107</sup> A similar example is the International Lesbian, Gay, Bisexual, Trans and Intersex Association ("ILGA") and the International Spa Association ("ISA"). According to the .GAY CPE Report, "*the ILGA, an organization mainly*

that the community as defined in the form of member categories or an alliance of music communities united under general principles of international copyright law and conventions did not pre-exist 2007 must be viewed as incorrect. Again, not only did the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, the EIU did not provide any supporting research and documented evidence that I have seen to substantiate this particular CPE Report conclusion.

### ***Extension – Size***

23. In relation to “Size,” the CPE Report states that the “community as defined in the application is of considerable size, both in terms of geographical reach and number of members” but “does not show evidence of “cohesion” among its members, as required by the AGB. Therefore, it fails the second criterion for Size.”<sup>108</sup> According to the AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have “only” some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of “considerable size.”<sup>109</sup> The AGB does not specify that “cohesion” is a “second criterion for Size” to fulfill the requirements under “Size.” As such, any assertion that the Community defined is not of considerable size must be viewed as incorrect. Again, not only did the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, the EIU did not provide any supporting research and documented evidence that I am aware of to substantiate this particular CPE Report conclusion.

### ***Extension – Longevity***

24. In relation to “Longevity,” the CPE Report states that “the Panel acknowledges that as an activity, music has a long history and that many parts of the defined community show longevity. However, because the community is construed, the longevity of the defined

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*dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007.”* (See .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3). According to the .SPA CPE Report: “*The community as defined in the application was active prior to September 2007 [...] [T]he proposed community segments have been active prior to September 2007. For example, the International Spa Association, a professional organization representing spas in over 70 countries, has been in existence since 1991.*” (See .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3). Consistent with the .SPA and .GAY CPE Reports’ rationale for ISA and ILGA (an international federation with consultative status with UNESCO, see ILGA, <http://ilga.org/about-us>), the IFPI, FIM, ReverbNation and A2IM all have documented “*records of activity before 2007*” and are “*mainly dedicated to the community*” as defined by DotMusic.

<sup>108</sup> *Ibid*, p.4.

<sup>109</sup> AGB, § 4.2.3, 4-11

community as a whole cannot be demonstrated.”<sup>110</sup> According to the AGB: “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature.” The Panel does not provide evidence that the community defined is not of “a lasting, non-transient nature.” With respect to “Longevity,” DotMusic described in 20A that “the Community has bought, sold, and bartered music for as long (“LONGEVITY”) as it has been made...”<sup>111</sup> In other words, as long as music is being made then the Community defined will continue to exist. As mentioned earlier, even if the CPE Report’s purported Community definition of “member categories”<sup>112</sup> is considered as the Community defined then again the CPE Report fails to show how these “member categories” will not continue into the future. In fact, all these Music Constituent categories (or constituent types) that delineate the “logical alliance of music communities” are essential for the Community to function as it does today and all are expected to have an extended tenure given the Community’s symbiotic nature. As such, the community definition cannot be construed. Any assertion that the community defined will not have an “extended tenure or longevity—non transience—into the future” cannot in my view be considered credible. There is no ambiguity or contradiction concerning the Community’s permanency because the music sector’s regulated structure has a long history of sustainability, which includes conventions that date from 1886 that will continue to exist into the future. Even certain rules or guidelines are modified to reflect the digital age or to adapt to other changes in the regulatory environment, the regulatory framework of the music sector will never disappear. Furthermore, the alliance of communities of similar nature that relate to music will not disappear as a whole. The alliance of music communities are expected to evolve over time but not disappear or be “ephemeral.” Again, not only did the EIU the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, the EIU did not provide any supporting research and documented evidence to substantiate this particular CPE Report conclusion.

25. In my expert opinion, DotMusic’s Application meets all the criteria under the *Community Establishment* section.

### **Nexus between Proposed String and Community CPE Criterion Is Satisfied**

26. My Expert Ethnomusicologist Opinion also agrees with the Expert Legal Opinion of Honorary Professor of International Copyright Dr. Jørgen Blomqvist with respect to the “Nexus between Proposed String and Community.” DotMusic was improperly graded 3 out of 4 points under the “Nexus between Proposed String and Community” CPE criterion. DotMusic fully meets the “Nexus between Proposed String and Community” CPE criterion for a score of 4 points.

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<sup>110</sup> See .MUSIC CPE Report, p.5

<sup>111</sup> *Ibid*, 20A, last paragraph.

<sup>112</sup> *Ibid*

27. My Expert Ethnomusicologist Opinion disagrees with the CPE Report’s statement that “the community defined in the application is a collection of many categories of individuals and organizations, and because there is no single entity that serves all of these categories in all their geographic breadth, there is no “established name” for the applied-for string to match, as required by the AGB for a full score on Nexus.”<sup>113</sup> Per the AGB, the Nexus requirement relates to the “Name” provided by the Applicant as the established name of the Community and whether the “Name” matches the .MUSIC string i.e. “[t]he string matches the name of the community”<sup>114</sup> not whether or not “there is a single entity that serves all the categories,” which is not a pre-requisite under the Nexus criterion based on the language of the AGB’s Nexus section. DotMusic’s Application Materials do not define the Community as “a collection of many categories.” The “member categories” relate specifically to the “delineation”<sup>115</sup> component of the Community definition. The Community definition relates to an “organized alliance of communities of similar nature that relate to music.”
28. As mentioned earlier, the AGB mandated that “[f]or a community consisting of an alliance of groups, details about the constituent parts are required.”<sup>116</sup> According to DotMusic’s Application Materials, the “Name” of the Community was the “Music Community,” the “Definition” of the Community was a “organized and delineated logical alliance of communities of similar nature that relate to music” and, because the community consisted of an “alliance of groups,” DotMusic delineated in detail all the “constituent parts” as “required” by the AGB. Under Nexus, the CPE Report concludes that DotMusic was not awarded the full points under “Nexus” “because there is no single entity that serves all of these categories in all their geographic breadth, there is no “established name” for the applied-for string to match, as required by the AGB for a full score on Nexus.”<sup>117</sup> As I see it, there is no such requirement for “Nexus” under the AGB. The “mainly dedicated” and “recognized” community member organization requirements relate to the “Community Establishment” and “Support” sections of CPE not “Nexus.” The “established name” of the Community (the “Music Community”) is unrelated to whether or not any music community organization is “recognized” or “mainly dedicated.” As mentioned earlier, according to DotMusic’s Application, the “[t]he name of the community served is the “Music Community” (“Community”).”<sup>118</sup> As evidenced in the Nielsen Poll and the Application Materials, “[t]he “MUSIC” string *matches* the name (“Name”) of the Community and is the established name by which

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<sup>113</sup> See CPE Report, p.5

<sup>114</sup> See AGB, p.4-12

<sup>115</sup> See Application 20A. The defined Community’s “constituent parts” were delineated based on music stakeholder type (i.e. member categories) in 20A: “[M]usic stakeholders [are] structurally organized using pre-existing, strictly delineated classes (“DELINEATION”).”

<sup>116</sup> See AGB, Attachment to Module 2, Evaluation Questions and Criteria: “*Descriptions should include: How the community is structured and organized. For a community consisting of an alliance of groups, details about the constituent parts are required,*” Notes, 20A, A-14

<sup>117</sup> See CPE Report, p.5

<sup>118</sup> Application, 20A, para.1

the Community is commonly known by others”<sup>119</sup> and “the .MUSIC string relates to the Community by [...] completely representing the entire Community.”<sup>120</sup> The entire Community is represented by the string and those unrelated to “music” are not part of the Community defined as per DotMusic’s Application Materials binding commitments “adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members ... that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community,”<sup>121</sup> “to exclude those with a passive, casual or peripheral association with the applied-for string”<sup>122</sup> and to “include[] all music constituents represented by the string.”<sup>123</sup>

29. In my expert opinion, DotMusic’s Application meets all the criteria under the *Nexus between Proposed String and Community* section.

### **Community Endorsement – Support CPE Criterion Is Satisfied**

30. My Expert Ethnomusicologist Opinion agrees with the Expert Legal Opinion of Honorary Professor of International Copyright Dr. Jørgen Blomqvist with respect to “Support.”<sup>124</sup> DotMusic was improperly graded 1 out of 2 points under the “Support” CPE criterion. DotMusic fully meets the “Support” CPE criterion for a score of 2 points.

31. According to the CPE Report, “[t]he panel has not found evidence of a single organization recognized by all of the defined community’s members as representative of the defined community in its entirety.”<sup>125</sup> The explicit language of the AGB and the CPE Guidelines do not explicitly describe any requirement to fulfill the “Support” criterion that mandates that “a single organization is recognized by all of the defined community’s members as representative of the defined community in its entirety.” The AGB requirement is that either an Application has documented support from a “recognized” organization or has support from the “majority” of the community defined. According to the AGB, “Support” means that the “Applicant is, or has documented support from, the recognized”<sup>126</sup> community institution(s) / member organization(s).”<sup>127</sup> “With respect to “Support,” the plurals in brackets for a score of 2,

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<sup>119</sup> *Ibid*, 20A, para.3 (emphasis added)

<sup>120</sup> *Ibid*, 20D, para.1 (emphasis added)

<sup>121</sup> See DotMusic Public Interest Commitments (PIC) at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>,

Enumerated Public Interest Commitment #3, p.1

<sup>122</sup> *Ibid*, Enumerated Public Interest Commitment #4, p.2

<sup>123</sup> *Ibid*, Enumerated Public Interest Commitment #5, p.2

<sup>124</sup> Honorary Professor Dr. Jørgen Blomqvist, § 70, p. 47

<sup>125</sup> See DotMusic CPE Report, p.8

<sup>126</sup> See AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

<sup>127</sup> See AGB, p.4-17

relate to cases of multiple institutions / organizations. In such cases there must be documented support from institutions / organizations representing a majority of the overall community addressed in order to score 2.”<sup>128</sup>

32. The AGB and CPE Guidelines allow communities that are supported and established through multiple organizations and institutions. The relevant provisions provide: “with respect to “Support,” the plurals in brackets for a score of 2, *relate to cases of multiple institutions/organizations*. In such cases there must be documented support from institutions/organizations representing a *majority of the overall community addressed* in order to score 2.”<sup>129 130</sup> According to the DotMusic Application, DotMusic received “documented support” from multiple organizations representing a majority of the Community, as referenced in 20D: “See 20F for documented support from institutions / organizations representing majority of the Community and description of the process/rationale used relating to the expression of support.”<sup>131</sup> According to the DotMusic Application Materials, DotMusic’s Support letters and my Expert Ethnomusicologist Opinion, the .MUSIC Application is supported by multiple organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall Music Community defined, the “organized and delineated logical alliance of communities of similar nature that relate to music.”<sup>132</sup>
33. According to the AGB, another alternative for a score of 2 points under “Support” is possessing “documented support from, the recognized<sup>133</sup> community institution(s)/ member organization(s).”<sup>134</sup> In my Expert Ethnomusicologist Opinion, the level of global recognition of any music community organization should be analyzed within the context of the community that such institution is claiming to be a part of, not the general public in general. It is not expected that the general public at large will have knowledge of recognized music community organizations, even though DotMusic supporting organizations (such as the IFPI, the RIAA and the FIM) have global recognition.
34. Furthermore, there is nothing in the AGB that mandates that one organization represent an “entire” community. Despite that, in my Expert Ethnomusicologist Opinion, the music organizations supporting the DotMusic Application are the most recognized and trusted

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<sup>128</sup> See AGB, p.4-18

<sup>129</sup> AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

<sup>130</sup> CPE Guidelines, p.18

<sup>131</sup> Application, 20D, last paragraph

<sup>132</sup> See Support Letters from multiple organizations for DotMusic’s Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>133</sup> AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

<sup>134</sup> AGB, p.4-17

music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. It is indisputable that DotMusic's application possesses documented support from the recognized community member organizations.<sup>135</sup>

35. My Expert Ethnomusicologist Opinion also agrees with the accuracy of the statements by the IFPI, submitted to the ICANN BGC on the 24<sup>th</sup> of February, 2016, concerning the CPE Report:<sup>136</sup>

We believe the finding to be flawed, not least in view of the support for the application provided by representative organisations from all areas of the music community, including IF PI. Given the scale of the music community's support for the Dot Music application, it is difficult to understand what level of support a CPE applicant would need to demonstrate to prevail, and this gives rise to serious misgivings about the transparency, consistency, and accountability of the CPE process.

On 5th March, IFPI co-signed a letter to ICANN from a coalition of national and international trade associations representing songwriters; recordings artists, music publishers, record labels, studio professionals, and performing rights societies around the world. In that letter we expressed our shared disappointment with the CPE process, highlighting the disparity between the decisions of the EIU Panel. Unfortunately, these inconsistencies have continued in the EIU Panel's evaluation of the DotMusic application. We have read DotMusic limited's Request for Reconsideration, and we note with concern the different criteria that appear to have been applied to the .HOTEL and .MUSIC CPE applications respectively.

Also of concern is the EIU Panel's finding that DotMusic failed to provide documented support from "recognised community institution(s)/member organization(s)". IFPI is a globally recognised organisation representing 1,300 record companies. Our members operate in 61 countries and IFPI has affiliated organisations, including national groups in 57 countries. We also administer the internationally recognised ISRC system. We therefore object to the EIU Panel's finding.

36. Furthermore, as noted earlier, other recognized supporting organizations, such as A2IM<sup>137</sup> and Reverbnation, are representative of the addressed community defined in

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<sup>135</sup> According to the .HOTEL CPE Report, the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines): "[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant." (See .HOTEL CPE Report, p.6). Recognized organizations mainly dedicated to the hotel community included the nationally-based AH&LA and CHA.

<sup>136</sup> See IFPI letter to ICANN BGC, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>

its entirety<sup>138</sup> without discrimination, with members across all the music categories and music subset of categories delineated by DotMusic's Application. As such, both A2IM and Reverbnation qualify as "recognized" community member organizations as per the AGB.

37. DotMusic's Application meets both "Support" options to meet a score of 2. DotMusic has "documented support from, the recognized community institution(s) / member organization(s)" <sup>139</sup> and "documented support from institutions/organizations representing a majority of the overall community addressed."<sup>140</sup> DotMusic's Application meets all the criteria for "Support" under the *Community Endorsement* section.

## Conclusion

38. Given the evidence presented, I am in agreement with the Expert Legal Opinion of Honorary Professor of International Copyright Dr. Jørgen Blomqvist and the forty-three (43) independent expert testimonies, which agreed unanimously that DotMusic's Application met the *Community Establishment*, the *Nexus Between the Proposed String and Community* and the *Support* CPE criteria.
39. Furthermore, the findings of the Nielsen Poll provided more independent supporting evidence to demonstrate that DotMusic's Application met the CPE criteria for *Community Establishment* and *Nexus Between the Proposed String and Community*.

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<sup>137</sup> The prevailing .HOTEL community applicant received a full grade for "Support" because the Panel found the nationally-focused China Hotel Association and American Hotel & Lodging Association were determined of be "recognized community institution(s)/member organization(s)." According to the .HOTEL CPE Report: "*The applicant possesses documented support from the recognized community institution(s)/member organization(s)*" (See .HOTEL CPE Report, at <https://icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6). Similarly, A2IM with its breadth and size of membership also qualifies as a "recognized" organization."

<sup>138</sup> There is no explicit language in the AGB that requires that an organization covers all community types in their entirety. Both A2IM and Reverbnation would still qualify if such a requirement applied.

<sup>139</sup> According to the .HOTEL CPE Report, the .HOTEL applicant fulfilled two options (either option was acceptable under the CPE Guidelines): "*[t]hese groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant.*" (See .HOTEL CPE Report,

<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6). Recognized organizations mainly dedicated to the hotel community included the nationally-based AH&LA and CHA. Consistent with the .HOTEL CPE Report's "Support" rationale, DotMusic's Application also meets the "Support" criterion.

<sup>140</sup> According to the .RADIO CPE Report: "*[T]he applicant possesses documented support from institutions / organizations representing a majority of the community addressed [...]The applicant received support from a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant. These entities represented a majority of the overall community. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support.*" (See .RADIO CPE Report, <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7). Consistent with the .RADIO CPE Report's "Support" rationale, DotMusic's Application meets the "Support" criterion because it has support from recognized community organizations representing a majority of the overall community defined by the applicant.

40. It is my Expert Ethnomusicologist Opinion that DotMusic's application meets the full criteria under *Community Establishment*, the *Nexus Between the Proposed String and Community*, and *Support*.

Dr. Richard James Burgess  
Ph.D in Ethnomusicology

September 12, 2016

## Appendix A

### About Dr. Richard Burgess<sup>141</sup>

Dr. Richard James Burgess is an Ethnomusicologist who is an English-born, New Zealand raised, American citizen. His professional experience includes studio drummer, music association executive, music-computer programmer, recording artist, record producer, composer, author, manager, marketer and inventor.

Burgess's music career spans more than 45 years. He came to prominence in the early 1980s as co-founder and co-lead singer of the Synthpop band Landscape, which released a top 10 hit in 1981 with the single "Einstein A Go-Go." Burgess is one of the main composers of Landscape's music, and made major lyrical contributions to the band's songs. After the band's break-up, he pursued a brief, moderately successful solo career releasing one mini-album, Richard James Burgess in 1984.

He launched his career as a producer with Spandau Ballet's debut UK hit "To Cut a Long Story Short," which marked the commercial beginnings of the New Romantic movement.

Burgess currently serves as the CEO of A2IM: the American Association of Independent Music.

### Early Years

Richard Burgess was born in London, England, and his family migrated to New Zealand in 1959. He showed an early interest in music, especially drums, and bought his first drum set at the age of 14. As a drummer, he gained experience in local bands including Fred Henry, Orange, Easy Street, The Lordships and Barry Saunders. Burgess also showed an early interest in recording production, buying a portable Tandberg tape recorder when he was sixteen to make amateur recordings.

Burgess studied electronics at college before turning to studies in music. In 1972 he left New Zealand to attend Berklee College of Music in Boston, and in 1973 moved to London to study at the Guildhall School of Music and Drama. He holds a PhD in Ethnomusicology from the University of Glamorgan (now the University of South Wales).

### Career

#### *Producer:*

In the early 1980s, Burgess emerged as the first producer of the New Romantic movement, producing Spandau Ballet's first two gold albums and first six charting singles. He won a Music

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<sup>141</sup> See <http://www.richardjamesburgess.com>, <http://www.audioculture.co.nz/people/richard-james-burgess> and [https://en.wikipedia.org/wiki/Richard\\_James\\_Burgess](https://en.wikipedia.org/wiki/Richard_James_Burgess)

Week magazine sales award as a producer, and has created twenty-four chart singles and fourteen charting albums. Other productions included recordings for Adam Ant, King, New Edition, Melba Moore, Colonel Abrams, America, Kim Wilde, Five Star, Tony Banks and Fish. He was also an ambient pioneer in producing the British group Praise. He produced, engineered and mixed albums by Rubicon and X-CNN under the pseudonym Caleb Kadesh and did several mixes using the pseudonym Cadillac Jack. He was co-producer, co-executive producer, project manager and an author for *Jazz: The Smithsonian Anthology* and is credited as associate producer on Tony Trischka's *Territory* and as a compiler of *Classic Piano Blues* for Smithsonian Folkways Recordings. Burgess's mixes and remixes include tracks for 9½ Weeks, *About Last Night* and artists Thomas Dolby, Lou Reed, Youssou N'Dour, and Luba.

#### *Musician and Recording Artist:*

Burgess has played on many albums as a studio-drummer and percussionist, having worked with producers such as Tony Visconti, Peter Collins, Trevor Horn, Ian Levine, Robin Millar, Hugh Padgham, Mike Stone, Gary Langan, Barry Mason, Peter Dawkins, John Sinclair, Gary Lyons, and Junior Campbell. These include albums such as Adam Ant's *Strip* and The Buggles' *The Age of Plastic*. He also recorded jazz with the British National Youth Jazz Orchestra, Neil Ardley, Ian Carr and Nucleus, and the early *Landscape* recordings. He performed live with Graham Collier, OBE.

From 1975 through the early 1980s, Burgess co-produced, co-wrote, programmed, sang and played drums for the European electronica group *Landscape* with Christopher Heaton, Andy Pask, Peter Thoms and John Walters. The band's RCA Records album *From the Tea-rooms of Mars... To the Hell-holes of Uranus* yielded the international hits "Einstein A Go-Go" and "Norman Bates." As a Capitol Records solo artist, he charted singles on the Billboard Hot Dance Club Play chart, reaching No. 1 on the New York Dance Music Report chart.

#### *Innovator:*

Burgess defined the computer programmer's and sampler's role in modern music via his work in the 1970s, creating the first computer driven hit, "Einstein A Go-Go," using the Roland MC-8 Microcomposer. He is believed to be the first to record digital samples on a commercial recording with his programming of the Fairlight CMI on Kate Bush's *Never for Ever* album and Visage's single "Fade To Grey." He conceptualised and co-designed the first standalone electronic drum set, the hexagonal shaped Simmons SDS-V. He appeared on three separate occasions on the BBC Television program *Tomorrow's World* demonstrating his prototype of the SDSV, the Roland MC-8 Microcomposer, and the Fairlight CMI. He coined the name for the New Romantic movement of the early 1980s. His New York City productions of Colonel Abrams' gold singles "Trapped" and "I'm Not Gonna Let You" are widely considered to have been the precursors to house music.

#### *Educator and academic:*

Burgess is a member of the academic advisory committee for The Association for the Study of the Art of Record Production (ASARP, London College of Music). He has lectured on the subject of record production and the music business in the United States and in the United Kingdom. He wrote and presented the BBC World Service radio series Let There Be Drums. He taught drums at the Annapolis Music School in Maryland, and has taught classes on record production and the music business at The Omega Studios' School of Applied Recording Arts And Sciences.

*Author:*

Burgess' Oxford University Press book The Art of Music Production: The Theory and Practice, which was in 1994 originally entitled The Art of Record Production, is now in its fourth edition. In 2014 he published his second book for Oxford University Press, The History of Music Production. He has written many articles for technical and music magazines, as well as articles, papers and interviews for the academic Journal on the Association Art of Record Production (JARP), for which he is joint editor-in-chief.

*Manager and Marketer:*

In 1978 Burgess founded a management company, Heisenberg Ltd, which managed producers and engineers such as Phill Brown, Andy Jackson and Rafe McKenna in the UK and US. The company changed its name to Burgess World Co in the mid-eighties, and relocated from Los Angeles and New York in the mid-nineties where it managed many mid-Atlantic based artists including Jimmie's Chicken Shack.

From 2001 to 2016, Burgess was employed at Smithsonian Folkways Recordings where he was Associate Director for Business Strategies and Acting Director.

*Committees:*

Burgess was a member of the national steering committee for the Recording Academy's Producer and Engineer Wing and served as co-chair of the executive committee for Smithsonian Music, a pan-institutional music initiative. He has been Vice-President of the Washington, D.C. Chapter of the National Academy of Recording Arts and Sciences and co-chair for both the DC Chapter of the Producer and Engineer Wing, and the national Producer Compensation Committee.

**Awards and Achievements**

As a member of the avant-garde electronic group Accord (with Christopher Heaton and Roger Cawkwell), he was featured on BBC Radio 3 programmes Music in Our Time and Improvisation Workshop. With Landscape, he received the Greater London Arts Association's Young Jazz Musicians 1976 award, and the Vitavox Live Sound award. Accord was also selected by the Arts Council of Great Britain for its Park Lane Group Purcell Room concert series. He was featured in The A to Z of Rock Drummers.

## Curriculum Vitae of Dr. Richard Hames Burgess<sup>142</sup>

### ***Position***

CEO of American Association of Independent Music (A2IM)

### ***Sub disciplines***

Music, ethnomusicology, musicology, record/music production, history of the recording industry, jazz, blues, electronic music, music industry, music technology, audio technology, intellectual property, entrepreneurship, drums, history of the American drum set, drumming

### ***Education***

Ph.D., Cardiff School of Creative and Cultural Industries, University of South Wales,

Berklee College of Music: Jazz Performance and Composition,

Guildhall School of Music and Drama: Orchestral Percussion,

Christchurch Polytechnic Institute of Technology: Electronics and Communications

Smithsonian Institution, Senior Leadership Development Program

George Washington University, DC, USA, Project management certificate by ESI

Alan Dawson, Boston, USA, Drum set

Peter Ind, London, UK, Jazz theory and improvisation

Tony Oxley, London, UK, Drum set, percussion, theory and improvisation

Kurt Hans Goedicke, London, UK (London Symphony Orchestra), Timpani

James Blades, London, UK (LSO), Timpani and orchestral percussion

David Arnold, London, UK (Royal Philharmonic Orchestra), orchestral percussion

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<sup>142</sup> See <http://www.richardjamesburgess.com/c-v>

Bruno Tonioli, London, UK, Movement

Uta Hagen, New York City, USA, Drama

Pamela Dodds, London, UK, Voice training

Harry Voice, Christchurch, NZ, Music theory

Pete Ward, Christchurch, NZ, Drum set

Leon Jayet, Christchurch, NZ, Drum set

### ***Professional Employment Experience***

2016 – Present: President, American Association of Independent Music (A2IM)

2014 – 2016: Associate Director of Business Strategies at Smithsonian Folkways Recordings, Smithsonian Museum

2013 – 2014: Director of Marketing, Sales and Licensing at Smithsonian Folkways Recordings, Smithsonian Museum

2003 – 2013: Director of Marketing and Sales at Smithsonian Folkways Recordings, Smithsonian Museum

2001 – 2003: Director of Marketing at Smithsonian Folkways Recordings, Smithsonian museum

2007 – 2013: Director Resource Development, Center for Folklife and Cultural Heritage

2005 – present: Adjunct Professor Omega Studios School of Applied Recording Arts and Sciences

1996 – 2001: CEO and Chairman: Fowl Records Inc (USA), independent record label

CEO and Chairman: Creative Booking International Inc (USA), artist booking agency

CEO and Chairman: Burgess World Co (USA), major label artist management

1979-1998: CEO and Chairman: Longrally Ltd (London)

Independent music producer: US, UK and European major labels

Commercial studio owner and operator: (London)

1986-1990: President: Burgess Worldco Inc (Los Angeles, CA, NYC, NY, and London, UK), Management company for music producers, audio engineers and recording artists

Independent music producer: US, UK and European major labels

1990-1996: CEO and Chairman: Longrally Ltd (London)

Independent music producer: US, UK and European major labels Studio owner and operator:

1986-1990: President: Burgess Worldco Inc (Los Angeles, CA, NYC, NY and London, UK),  
Management company for music producers, audio engineers and recording artists

1980-1986: Co-owner Heisenberg Ltd, London, producer, engineer, and artist management  
company

1979-1996: Independent music producer: US, UK and European major labels

1971-1984: Major label recording artist (EMI, CBS, Polydor, RCA, Capitol)

1971-1979: Major label studio musician (drums and percussion)

### ***Book Publications***

1981 Rock Hardware: The Instruments, Equipment and Technology of Rock, ed. Tony Bacon, pub.  
Blandford Press. Contributed chapter on drums and electronic drums

1996 The Art of Record Production, 1st Edition, Omnibus Press/Music Sales

2000 The Art of Music Production, 2nd Edition, Omnibus Press/Music Sales

2002 The Art of Music Production, 3rd Edition, Omnibus Press/Music Sales

2012 The Art of Record Production, Ed. Frith/Zagorski-Thomas, Ashgate Publishing, Contributed  
interstitials.

2013 The Art of Music Production: The Theory and Practice, 4th Edition, Oxford University Press

2014 The History of Music Production, Oxford University Press

### ***Partial Discography***

2014 Serenata Guyanesa, Recording Engineer, Smithsonian Folkways Recordings (to be released)

2011 Various, Jazz: The Smithsonian Anthology, co-Prod, co-Exec. Prod., Project Director, co-  
liner notes writer, Smithsonian Folkways Recordings

2010 Ace Elijah, The Lonely Nights Are All That's Left, Producer, Engineer, Mixer, Drums, Marva

2009 Electrofied, Bad Case of the Blues, Producer, Engineer, Mixer, Drums, Composer, Artist, Marva

2008 Jimmie's Chicken Shack Fail on Cue, Mastering Engineer, Fowl

2008 Nethers, What the Wind Will Never Say, Mastering Engineer, Trade Root

2008 Various Artists, Classic Piano Blues, Co-Compiler, Smithsonian Folkways Recordings

2008 Tony Trischka, Territory, Associate Producer, Smithsonian Folkways Recordings

2007 Ace Elijah, Only a Fool Would Say, Producer, Mixer, Drums, Marva

2006 Electrofied, Sunday Morning Blues, Producer, Engineer, Mixer, Drums, Artist, Marva

2006 Ace Elijah, Deja Visite, Producer, Engineer, Mixer, Drums, Marva

2004 Jimmie's Chicken Shack, Re.Present, Manager, Executive Producer, Koch

2004 Various artists, cELLABration, DVD, Production supervisor, Smithsonian Folkways

2002 Shock, Dream Games/R.E.R.B. (Mix), Prod., eng., mix, prog., Keys, Memory Boy Records

1999 Imagination, Double Gold, Producer, Percussion, Programming, Arcade

1999 Jimmie's Chicken Shack, Bring Your Own Stereo, Manager, additional drums, Island

1997 Various Artists, Various Artists, Executive Producer, Fowl

1997 Jimmie's Chicken Shack, Pushing The Salmañilla Envelope, Manager, A&M

1996 Manfred Mann, Soft Vengeance, Producer, Engineer, Mixer, Drums, Grapevine

1996 Jimmie's Chicken Shack, 2 for 1, Record Label, Fowl

1995 Rubicon, Room 101, Prod., Eng., Mixer (Caleb Kadesh Pseudonym), prog., Beggars Banquet

1995 Libera, Libera, Producer, Mixer, Programmer, Percussion, Mercury

1994 Adam Ant, Strip, Producer, Engineer, Drums, Programmer, Epic

1994 XCNN, XCNN, Producer, Engineer, Sony

1994 Roman, Naked Stories, Producer, Engineer, Mixer, WEA

1992 George Lamond, In My Life, Writer, Columbia

1992 Neil Ardley, Kaleidoscope of Rainbows, Writer, Programmer, Keyboards, Amp

1992 Praise, Praise, Producer, Engineer, Mixer, Giant/Warner Bros

1991 Milli Vanilli, Real Milli Vanilli, Writer, Arista

1991 The Party, In My Life, Writer, Producer, Drums, Percussion, Keyboards, Programming, Hollywood

1990 Guys Next Door, Guys Next Door, Prod., Eng., Mix, Writer, Dm & Comp. Prog., Keys, Capitol

1990 Atooz, Shine A Light, Writer, Prod., Eng., Mix, Writer, Dm & Comp. Prog., Keys, EMI America

1989 Thomas Dolby, Aliens Ate My Buick, Producer, Mixer, Capitol

1989 Strength, Breaking Hearts, Producer, Engineer, Programming, Arista

1989 Don Johnson, Let It Roll Writer, Epic

1989 Pandance, Pandance, Producer, Engineer, Mixer, Programming, RCA

1988 Empire, Talk Free, Producer, Percussion, Programming, Parlophone

1988 Empire, This is My Word, Producer, Percussion, Programming, Parlophone

1988 Empire, My Imagination, Producer, Percussion, Programming, Parlophone

1988 Eighth Wonder, Fearless, Producer, Percussion, Programming, CBS

1988 Shriekback, Go Bang!, Programming, Percussion, Keyboards, Producer, Island

1988 When in Rome, When in Rome, Keyboards, Producer, Drum Programming, Virgin

1988 Mark Gregory, Someone's Been Sleeping in My Bed, Prod., Mix., Prog, Keys, Motown

1988 Funkrew, Funkrew, Producer, Mixer, Programmer, Keys, Arista

1988 Jaki Graham, Producer, Mixer, EMI

1988 Angie Dylan, Beast of Burden, Vinyl 12", Mixer, Engineer, Injection disco dance

1988 Brother Beyond, Chain-Gang Smile, Producer, Parlophone

1988 Eddie Chacon, Eddie Chacon, Producer, Mixer, programmer, percussion

1987 Lou Reed & Yossour N'Dour, The Secret Policeman's Third Ball, Producer, Mixer, Virgin

1987 Errol Brown, Body Rockin' 7" and 12" remixes, Producer, Percussion, Programming, RAK

1987 Five Star, Between the Lines, Producer, Percussion, Programming, RCA

1987 Imagination/Lee John, Closer, Producer, Percussion, Programming, RCA

1987 Living in a Box Living in a Box Producer, Percussion, Programming Chrysalis

1987 Heroes, Here We Are, Producer, Percussion, Programming, RCA

1987 Princess, Red Hot 7" and 12" remixes, Producer, Percussion, Keyboards, Programming, Polydor

1987 Princess, All For Love, Producer, Percussion, Keyboards, Programming, Polydor

1986 Red Bamboo, On The Line, Producer, Percussion, Keyboards, Programming, EMI

1986 Colonel Abrams, Colonel Abrams, Prod., Mix., Keys, Prog., Percussion, MCA

1986 Kim Wilde, Another Step, Producer, Percussion, Programming, MCA

1986 Five Star, Silk and Steel Producer, Drums, Percussion, Programming, RCA

1986 Chakk, 10 Days in an Elevator, Producer, Percussion, Programming, MCA

1986 Tony Banks, Shortcut To Somewhere, Producer., Dms., Perc., Prog., Charisma

1986 Virginia Astley, Hope in a Darkened Heart, Producer, Mixer, Percussion WEA

1985 Strange Advance, We Run, Remix, Capitol

1985 Doppelganger, Communication Breakdown, Producer, EMI-Manhattan Records

1985 King, Bitter Sweet, Producer, Mixer, Percussion, CBS

1985 The Nails, Let It All Hang Out, Remixer, RCA

1985 Nina Hagen, In Ekstasy, Producer, CBS

1985 Melba Moore, Read My Lips, Producer, Drum Programming, Percussion Programming, Capitol

1985 Spandau Ballet, The Singles Collection, Producer, Mixer, Chrysalis

1984 King, Steps in Time, Producer, Mixer, Remixer, Drums, Perc., Prog., CBS

1984 Adam Ant, Strip, Producer, Keyboards, Drums, Percussion, Programming, CBS

1984 Richard James Burgess, Richard James Burgess, Prod., Keys, Dms, Perc., Prog, artist, Capitol

1984 New Edition, New Edition, Prod., Eng., Mixer, Prog., Perc., Keys., MCA

1984 America, Perspective, Arr., Dms, Rhythm, Prod., Dm Prog., Synth Arr., Perc. Prog., Capitol

1987 Luba, Let It Go, Remixer, Percussion, Programming, (Producer – Daniel Lanois), Capitol

1984 Luba, Storm Before the Calm, Remixer (Producer – Daniel Lanois), Capitol

1983 Landscape III, You Know How To Hurt Me., L.Vox, Comp & Dm Prog., Perc., Writer, artist, RCA

1983 Landscape III, So Good, So Pure, So Kind., L.Vox, Comp & Dm Prog., Perc., Writer, artist, RCA

1982 Pamela Stephenson, Mr Wrong, Prod., Keys., Dms., Perc., Prog., Mix, Writer, Mercury

1982 Pamela Stephenson, Pretty Boys, Prod., Keys., Dms., Perc., Prog., Mix, Writer, Mercury

1982 Pamela Stephenson, Music Bitch Weekly, Prod., Keys., Dms., Perc., Prog., Mix, Mercury

1982 Pamela Stephenson, Italian Shoes, Prod., Keys., Dms., Perc., Prog., Mix, Writer, Mercury

1982 Spandau Ballet, Diamond, Producer, Mixer, Remixer, Percussion, Chrysalis

1982 Landscape, Manhattan Boogie-Woogie, Prod, LVox, Comp. & Dm Prog., Perc., Writer, art., RCA

1981 Shock, Dynamo Beat, Producer, Computer & drum Programming, Writer, RCA

1981 Spandau Ballet Journeys to Glory, Producer, Mixer, Remixer, Percussion, Chrysalis

1981 Landscape, Manhattan Boogie-Woogie, Prod., LV, Cmptr & Dm Prog., Perc., Writer, artist , RCA

1980 Visage, Visage, Fairlight, Computer and Drum Programming, Polydor

1980 Shock, Angel Face, Producer, Computer & Drum Programming, RCA

1980 Kate Bush, Never Forever, Fairlight Programmer, EMI

1979 Driver 67, Hey Mister Record Man, Drums, Logo Records

1979 Ian Carr, Jazzbuhne Berlin '79, Drums, Amiga

1979 Nucleus, Out of the Long Dark, Percussion, Capitol

1979 Neil Ardley, Harmony of the Spheres, Drums, Percussion, Decca

1979 Landscape, Landscape, Drums, Perc., Electronic Perc, Writer, artist, RCA

1979 Buggles, The Age of Plastic, Drums, Island

1979 James Wells, Explosion, Drums, AVI Records

1978 Landscape, Worker's Playtime, Drums, Percussion, artist, Event Horizon

1977 Easy Street, Under The Glass, Drums, Congas, Perc., Elec. Perc., artist, Polydor/ Capricorn

1977 Tony Visconti, Visconti's Inventory, Drums, Orchard

1977 Landscape, U2XME1X2MUCH, Drums, Percussion, Writer, artist, Event Horizon

1977 Charlie, No Second Chance, Percussion, Janus

1976 Easy Street, Easy Street, Drums, Percussion, artist, co-Producer Polydor/ Capricorn

1976 Robin Sarstedt, Drums, Percussion, London

1976 Barbara Dickson, Answer Me, Drums, Percussion, RSO Records

1975 Tim Rose, The Musician, Drums, Atlantic

1975 National Youth Jazz Orchestra, Return Trip, Drums, RCA

1975 Landscape, Thursday the Twelfth, Drums, Percussion, Artist, Jaguar

1971 Quincy Conserve, Epitaph, Drums, Percussion, EMI

1971 Suzanne, Drums, EMI

1971 Serenity, Piece of Mind, Drums, EMI

1971 Craig Scott, Smiley, Drums, EMI

1971 Hogsnort Rupert, Ways of Making You Laugh, Drums, EMI

1971 Shane, Straight Straight Straight, Drums, Percussion, EMI

### ***Articles***

2009 Smithsonian Folkways, Northern Irish Pipe Band Drumming (as yet unpublished), a study of Northern Irish Pipe Band Drumming

2008 Smithsonian Channel, The History of the American Drum Set (As yet unpublished) the multicultural history of the evolution and development of the American Drum Set

2008 Art of Record Production peer reviewed journal, Producer Compensation: Challenges and Options in the New Music Business, 6200 word article focusing on the challenges that producers are facing in seeking out sustainable sources of compensation in the changing music business environment of 2008.

1984 Trans Atlantic Films/ Channel 4, 4 American Composers by Peter Greenaway, Interviewed Philip Glass on camera regarding his work in the context of the history and development of 20th Century Music.

1981 Sounds, Einstein A Go-Go, review of the brand new Roland TR808 drum machine as part of a 12 page overview of new technology including Keyboards, Percussion, FX, TR808 etc

1982 Melody Maker, Synth Percussion: The New Age Beat (on the Musicians World Page). Evaluation of the present and future of technocussion including the Linn LM1, Roland TR808, TR606, Movement Computer Systems Percussion Synthesizer, Linn Drum, Oberheim DMX,

## Simmons Sequencer

1980, Musicians Only Road Test: The All Electronic Kit? A discussion of the capabilities of the, as then unreleased, SDS5 drum synthesizer.

1980 Musicians Only Road Test: What's the Use? Testing and reporting on the results of tests of AKG D12, D190 and D100 microphones.

1980, Musicians Only Staccato – with flare: Richard Burgess (Landscape) tests out the Cadency Theory Full page article reviewing the conceptually revolutionary Staccato flared drums

1980 Musicians Only Road Test: Fairlight Computer Keyboard Test of the very first commercial sampling machine the Fairlight CMI (cost £13,000) outside of Australia. RJB explains the system, its capabilities and shortcomings to Paul Colbert.

1979 Sound International, Skin and Syn: Drum Synthesis and Treatment examined by Richard Burgess, Six page comprehensive overview of the state of the art of electronic percussion

1979 Melody Maker, The Electric Almanac: Pew-pew-pewwww....! Review of the SDS3 drum synthesizer.

### ***Selected Features about Dr. Richard James Burgess***

1992 Audio Media, Tracks: Only U Ballad/Brand Nu Day, Feature on Praise Album and the use of the innovative and now obsolete quasi-surround sound technology Q sound and studio techniques and rationale utilized

1986 Sound Engineer and Producer, Going for Gold: Richard James Burgess – maintaining chart momentum

1982 Melody Maker, Talking Drums

1982 Eclectic Rock, The complete A-Z of Electronic Rock (Sb Publishing & Promotions Ltd

1982 International Musician, Picture This: Janet Angus brushes up on her Landscape Jun, 1981, The A-Z of Rock Drummers (pub. Proteus)

1981 Electronics and Music Maker, Landscape Explored. Discussion about the technology that RJB invented, discovered or used in an unusual or unique way with emphasis on the evolution of the sound creation and touch sensitivity features of the SDSV drum synthesizer, triggering it using MC-8 MicroComposer computer. Included the compositional rationale for and uses of technology and Landscape's innovative self-built 32 channel PA system using Quad 405 amps and Vitavox folded horn enclosures.

## ***Radio***

1984 BBC World Service, Let There Be Drums. Thirteen part BBC world service radio series featuring thirteen seminal rock drummers, negotiated, curated, wrote script, recorded, and presented.

## ***Television***

1984 Trans Atlantic Films/ Channel 4, 4 American Composers by Peter Greenaway, Interviewed Philip Glass on camera regarding his work in the context of the history and development of 20th Century Music. Many appearances on television as a musician and artist (performing and being interviewed) including the BBC's Top of the Pops from London, The Old Grey Whistle Test, Tomorrow's World, ITV's New Faces, Don Cornelius's Soul Train and other UK, US and European shows.

## ***Film Soundtracks***

1987 Tony Banks & Fish, Title track from Quicksilver, Producer., Dms., Perc., Prog., Charisma

1986 Nancy Shanks, About Last Night Producer, Programming, Percussion, Keyboards, EMI America

1986 Luba, Nine And A Half Weeks Remixer, Engineer, Percussion, Programming, Capitol

## ***Awards***

Music Week UK, Top Producer award;

British Arts Council, Young Musician;

Vitavox, Live Sound Award;

Park Lane Group, Young Musician Series

Greater London Arts Association, Young Jazz Musician,

Quadruple platinum album

Double platinum album

Two single Platinum albums,

Six Gold albums

Two Gold singles

Multiple Ampex Golden Reel awards

NARM Best Magazine Ad (Trade) 2006

One gold and two silver ADDY advertising awards

### ***Professional Affiliations***

MENSA

Society of Authors

Recording Academy (ex VP Board of Governors, DC, national steering committee member  
Producer and Engineer Wing)

Music Managers Forum (executive board member)

Musician's Union (UK)

PPL (Phonographic Performance Ltd)

MCPS-PRS (Mechanical Copyright Protection Society-Performing Right Society)

Music Producer's Guild (UK)

Society for Ethnomusicology

Association for the Study of the Art of Record Production (executive committee member),

Journal on the Art of Record Production, Joint-Editor-In-Chief, (London College of Music)

Washington Area Music Association (WAMA)

### ***Miscellany***

Frequent Speaker

Panelist

Moderator

Facilitator

Debater

Guest lecturer on the topics of music, the music business, record production, entrepreneurship, marketing, intellectual property (related to music) and the impact of technology on the music industry. Taught drums privately, drum clinician for Pearl Drums.

## Appendix B

### DotMusic's Application Materials for .MUSIC

1. According to DotMusic's Application Materials:
  - a) The Mission and Purpose is: "Creating a trusted, safe online haven for music consumption and licensing; Establishing a safe home on the Internet for *Music Community* ("*Community*") members regardless of locale or size; Protecting intellectual property and fighting piracy; Supporting Musicians' welfare, rights and fair compensation; Promoting music and the arts, cultural diversity and music education; Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community's best interest. The global Music Community includes both commercial and non-commercial stakeholders,"<sup>143</sup>
  - b) The "Community" was defined in 20A: "The Community is a strictly delineated and organized community of individuals, organizations and business, a "logical alliance of communities of a similar nature ("*COMMUNITY*")" that relate to music,"<sup>144</sup>
  - c) According to the AGB: "[For] a community consisting of an alliance of groups, details about the constituent parts are required."<sup>145</sup> The defined Community's "constituent parts" were delineated based on music stakeholder type (i.e. member categories) in 20A: "[M]usic stakeholders [are] structurally organized using pre-existing, strictly delineated classes ("*DELINEATION*")";"<sup>146</sup>
  - d) Community establishment was described in 20A: "DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria "aligned with the community-based Purpose" and mitigate anti-trust and confidentiality / privacy concerns by protecting the Community of considerable size / extension while ensuring there is no material detriment to Community rights / legitimate interests. Registrants will be verified using Community-organized, unified "criteria taken from holistic perspective with due regard of Community

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<sup>143</sup> See .MUSIC Application, 18A. Also see 20C, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392> (emphasis added)

<sup>144</sup> See .MUSIC Application, 20A, para.3 at <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392> (emphasis added); Also see DotMusic Public Interest Commitments: "... Community definition of a "logical alliance of communities of similar nature that relate to music" ..." at <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

<sup>145</sup> See AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, 4-12, Notes, 20(a)

<sup>146</sup> See Application 20A

- particularities” that “invoke a formal membership” without discrimination.”<sup>147</sup> Community cohesion was also established by member participation, alignment and compliance with DotMusic’s eligibility requirements, values, purpose and mission as described in 20E: “[O]nly eligible members of the Music Community who comply with the values, purpose and mission...can participate;”<sup>148</sup>
- e) Examples of other forms of Music Community “cohesion” included “commonly used [...] classification systems such as ISMN, ISRC, ISWC, ISNI [...]”<sup>149</sup>
- f) The breadth and size of the community defined were described in 20A: “The Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries [...] with a Community of considerable size with millions of constituents (‘SIZE’);”<sup>150</sup>
- g) With respect to “Pre-existence” and “Longevity” (i.e. transience into the future) DotMusic described in 20A that “the Community has bought, sold, and bartered music for as long (“LONGEVITY”) as it has been made... The foundation for the structured and strictly delineated Community only resulted from the interplay between the growing music publishing business and an emerging public music concert culture in the 18th century (“PRE-EXISTING”),”<sup>151</sup>

<sup>147</sup> See .MUSIC Application, 20A, para.1

<sup>148</sup> *Ibid*, 20E

<sup>149</sup> *Ibid*, 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12<sup>th</sup>, 2015 (See <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>): “The International Standard Music Number (ISMN) is a unique number for the identification of all notated music publications from all over the world. The ISMN is an ISO certified global standard number (ISO 10957:2009). See <http://www.ismn-international.org/whatis.html> and [http://www.iso.org/iso/home/store/catalogue\\_ics/catalogue\\_detail\\_ics.htm?csnumber=43173](http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=43173),” footnote 7, p.8; “The ISRC (International Standard Recording Code) is the international identification system for sound recordings and music video recordings. The ISRC is an ISO certified global standard number (ISO 3901:2001) and is managed by the IFPI. See <http://isrc.ifpi.org>, <https://www.usisrc.org/about/index.html> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=23401](http://www.iso.org/iso/catalogue_detail?csnumber=23401),” footnote 8, pp.8 to 9; “The ISWC (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical works. The ISWC has been approved by ISO (International Organization for Standardisation) as a global standard (ISO 15707:2001) and is managed by CISAC. See <http://www.iswc.org/en/faq.html> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=28780](http://www.iso.org/iso/catalogue_detail?csnumber=28780), footnote 9, p.9; “The International Standard Name Identifier (ISNI) is the ISO certified global standard number (ISO 27729) for identifying the millions of contributors to creative works and those active in their distribution. ISNI holds public records of over 8 million identities and 490,000 organizations. See <http://www.isni.org> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=44292](http://www.iso.org/iso/catalogue_detail?csnumber=44292),” footnote 10, p.9; Also see DotMusic Answers to Clarifying Questions, <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, pp. 121 to 122 of 993, Exhibit A21

<sup>150</sup> See .MUSIC Application, 20A, para.4 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

<sup>151</sup> *Ibid*, 20A, last paragraph

- h) The “Name” of the community defined was described in 20A: “The name of the community served is the ‘Music Community’ (‘Community’);”<sup>152</sup>
- i) The “Nexus between Proposed String and Community” was described in 20A and 20D: “The ‘MUSIC’ string *matches* the name (‘Name’) of the Community and is the established name by which the Community is commonly known by others.”<sup>153</sup> DotMusic “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in its answer to 20D: “The .MUSIC string relates to the Community by completely representing the entire Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model;”<sup>154</sup>
- j) According to the DotMusic Application Materials and Support letters, the Community members’ “requisite awareness and recognition” of the community defined was met through the proactive, explicit and purposeful action of submitting expressed letters of support that were aligned cohesively with DotMusic’s articulated Mission and Purpose: “See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support;”<sup>155</sup> “To be aligned with its Mission, DotMusic has focused on expressions of support that cover an all-inclusive global, balanced and multi-stakeholder representation of the Community, as delineated in response to question 20(a), that collectively represents the majority of the recognized Community by size;”<sup>156</sup> and “[...] the Community relates to the ... constituents represented or covered by the recognized institutions, federations, associations, organizations, Coalitions or any other music entities that have expressed their support.”<sup>157</sup> Member “requisite awareness and recognition” of the Community addressed was also established by member participation, alignment and compliance with DotMusic’s eligibility requirements, values, purpose and mission as described in 20E: “[O]nly eligible members of the Music Community who comply with the values, purpose and mission...can participate;”<sup>158</sup> and
- k) According to the DotMusic Application Materials and Support letters, the .MUSIC Application is supported by *multiple* recognized and trusted organizations with members representing over ninety-five percent (95%) of music consumed globally, a majority of the overall Music Community defined, the “organized and delineated logical alliance of communities of similar nature that relate to music.”<sup>159</sup>

<sup>152</sup> *Ibid*, 20A, para.1

<sup>153</sup> *Ibid*, 20A, para.3 (emphasis added)

<sup>154</sup> *Ibid*, 20D, para.1 (emphasis added)

<sup>155</sup> *Ibid*, 20D, last paragraph

<sup>156</sup> See Application 20F at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>, p.2

<sup>157</sup> *Ibid*

<sup>158</sup> See Application 20E

<sup>159</sup> See Support Letters from multiple organizations for DotMusic’s Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at

2. DotMusic also submitted “Public Interest Commitments” (PIC) with ICANN.<sup>160</sup> Both ICANN Staff and the BGC reviewed DotMusic’s PIC and determined that the PIC and the PIC Clarifications were “fully consistent with the [DotMusic’s] application for .MUSIC.”<sup>161</sup> The PIC document was also utilized by the CPE Panel during DotMusic’s CPE process as a clarification document as part of DotMusic’s Application Materials to verify statements from DotMusic’s Application<sup>162</sup> (emphasis added). According to its “Enumerated DotMusic Public Interest Commitments,” DotMusic “affirms its commitment to run a responsible TLD under a community-based governance structure, consistent with the following commitments and obligations,” including:

3. A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic’s Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community<sup>163</sup> [...]

4. ...DotMusic Limited commits to its Eligibility policy as explicitly stated in DotMusic’s Application to exclude those with a passive, casual or peripheral association with the applied-for string<sup>164</sup> [...]

5. A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic’s Application. As explicitly stated in its Application, DotMusic commits to: i. uphold its Community definition of a “logical alliance of communities of

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<https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>. According to the Worldwide Independent Network and MIDiA Research, DotMusic supporting organizations (representing the majors and the independents), constitute nearly all music consumption. See Worldwide Independent Market Report, “Global Music Market Share Model (05/16),” p.28 at <http://winformusic.org/files/WINTEL%202015.pdf>.

<sup>160</sup> See DotMusic Public Interest Commitments (PIC) at

<https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>

<sup>161</sup> See Minutes Board Governance Committee (BGC) Meeting Minutes, May 6, 2015, Reconsideration Request 15-6, Item 4 at <https://www.icann.org/resources/board-material/minutes-bgc-2015-05-06-en>

<sup>162</sup> For example, the DotMusic CPE Report shows that the EIU read and referenced the PIC as part of their CPE determination and grading: “The application also references a dispute resolution process, and provides a clear description of an appeals process in the Public Interest Commitments (PIC). The PIC was utilized to verify that the applicant has appropriate appeals mechanisms.” See DotMusic’s .MUSIC CPE Report at <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, p.7

<sup>163</sup> See DotMusic Public Interest Commitments (PIC) at

<https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, p.1

<sup>164</sup> *Ibid*, p.2

similar nature that relate to music” to incorporate all Music Community members.<sup>165</sup>

3. DotMusic also provided an Appendix to the Public Interest Commitment (PIC) document, for which ICANN added a disclaimer to on May 8, 2015 that it was provided “as clarification to the information provided in the PIC.” The PIC “Appendix PIC Clarification” section clarified its Commitments in relation to its Application’s Community definition that restricted only members that have the requisite awareness of the Community defined associated with the .MUSIC string:

A. Commitment of Community all-inclusiveness, non-discrimination and multi-stakeholder governance: The applied-for string (.MUSIC) will be governed under a multi-stakeholder model and will be restricted to only members of the Community (defined in the Application as “a strictly delineated and organized community of individuals, organizations and business, a logical alliance of communities of similar nature that relate to music”) who have an active, non-tangential relationship with the applied-for string and the requisite awareness and recognition that they are a part of the defined Community.<sup>166</sup>

4. Inter alia, the PIC document clarifies that:

The Community definition is a logical alliance of strictly delineated and organized communities of a similar nature relating to music. This defined Community and the expressions of support for the DotMusic Application represent a majority of the overall music community with a clear and straightforward membership. The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition).<sup>167</sup>

Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.<sup>168</sup>

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<sup>165</sup> *Ibid*, p.2

<sup>166</sup> See PIC, Appendix PIC Clarification, p.5

<sup>167</sup> See PIC Appendix PIC Clarification, p.6

<sup>168</sup> *Ibid*, p.10

As stated in DotMusic’s Application, the Community must have the requisite awareness and recognition from its members, who in turn must meet clear and straight-forward membership criteria with the Community:<sup>169</sup> *“The Community and the .MUSIC string share a core value system...subscribing to common ideals. (Application Answer to Question 20d).”*<sup>170</sup>

The defined Community is delineated and organized because it operates in a regulated sector that uses numerous globally-recognized standards and classification systems, which identify who the individual songwriters, publishers and rights holders are and which songs they are associated with so that Community members are appropriately compensated, regardless whether the constituent is a commercial, noncommercial or amateur entity: [...] *“such as ISMN, ISRC, ISWC, ISNI). (Application Answer to Question 20a).”*<sup>171</sup>

DotMusic expects that the substantial majority of all of its registrations will originate from the music entity type classified as “Musical groups and artists” (e.g. See North American Industrial Classification System (NAICS) code 71113020 or the United Nations Industrial Classification (ISIC) code 921421). All music constituent types that are associated with the string must have a relationship with “music” and have the requisite awareness of DotMusic’s defined Community to be part of the Community. In accordance with its articulated community-based purpose, DotMusic commits that all music constituent types are eligible for registration.<sup>172</sup>

The defined Community -- the clearly delineated and organized logical alliance of communities related to music -- represents the entire global Music Community in terms of size, locale extension and type: *“The Music Community encompasses global reaching commercial and non-commercial stakeholders, and amateur stakeholders (Application Answer to Question 20c).”*<sup>173</sup>

While some music constituent types in DotMusic’s definition and classification might comprise a minority in numbers (e.g. music lawyers) when compared to the primary and core constituent classification type (music groups and artists), the inclusion of every music constituent type is paramount to the purpose of the string. Every music constituent type critically contributes to the function and operation of the music sector within a regulated framework given the symbiotic overlapping nature of the Community as defined and structured. Music would not function as it does today without the participation of all music constituent

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<sup>169</sup> *ibid*

<sup>170</sup> *ibid*

<sup>171</sup> *ibid*, p.11

<sup>172</sup> *ibid*

<sup>173</sup> *ibid*, p.13

types. The inclusion of all music constituent types serves the public interest because it ensures the Community matches the nexus of the string without discrimination, while excluding peripheral, casual entities with a tangential relationship with the Community defined who would not otherwise have any fundamental need for a .music domain given the string's articulated community-based purpose and the string's Content and Use requirements that mandate that usage only relates to music activities and licensed, legitimate music content.<sup>174</sup>

All components of the Application's Community Definition, Delineation and Registration Polices are not mutually exclusive. They must all be met to ensure eligibility and a successful .music domain registration.<sup>175</sup>

The .MUSIC string is restricted to only music Community members with the requisite awareness of the Community as explicitly stated in DotMusic's Application.<sup>176</sup>

Eligibility: Only members of the Community can register a .music domain and must have a clear membership with the defined Community. As explicitly stated in DotMusic's Application, all members of the Community must have a clear membership and the requisite awareness and recognition of the Community they belong to since they have taken pro-active affirmative action to be part of the Community defined (i.e. they opted-in the Community in a formal, straight-forward manner). These eligibility policies ensure that casual entities with a tangential relationship with music and pirates are excluded since they compromise the Purpose of the applied-for string and would not otherwise have a legitimate claim or reason to register a .music. [...] If a member is determined not to be a member of the Community then the registrant would be violating DotMusic's Eligibility criteria resulting in the suspension of the registered .music domain.<sup>177</sup>

5. Inter alia, DotMusic's PIC document re-clarifies that:

The definition of the Community is "a strictly delineated and organized community of individuals, organizations and business, a logical alliance of communities of similar nature that relate to music. Supporting music-related organizations of relevance constituting a majority of the Community are referred to in the Application as Music Community Member Organizations ("MCMOs"). MCMOs require .music-accreditation from DotMusic which meet community-

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<sup>174</sup> *ibid*, p.15

<sup>175</sup> *ibid*

<sup>176</sup> *ibid*, p.16

<sup>177</sup> *ibid*, p.19

based criteria consistent with ICANN Applicant Guidebook's criteria for Community Establishment.<sup>178</sup>

DotMusic's definition of the Community covers all Community members associated with the string with a requisite awareness of the Community validated through their straight-forward association with a music-related community they identify with. The Music Community's geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries with a Community of considerable size with millions of constituents.<sup>179</sup>

The defined Community and expressions of support serve the public interest because they represent a majority of the overall music community with a clear and straightforward association and the requisite awareness of participation in the Community as defined. DotMusic's MCMOs collectively represent a majority of the Community.<sup>180</sup>

6. DotMusic's PIC document also describes several "recognized" organizations "mainly dedicated" to the community addressed, such as A2IM, the organization I am the CEO of.<sup>181</sup>

A clear example of an "entity dedicated to the community" with members that cover hundreds of millions of music constituents with formal boundaries is A2IM, the American Association of Independent Music. A2IM has two types of members: U.S independent Label members and Associate members. A2IM membership for Labels and Associates is invoked formally through an application, which if accepted requires annual membership dues.<sup>182</sup>

According to DotMusic's PIC document, the "reach of A2IM Associate membership covers hundreds of millions of entities."<sup>183</sup> Members include "organized and strictly delineated communities related to music"<sup>184</sup> with member types that are representative of the DotMusic's defined community in its entirety, including all music constituent types delineated in DotMusic's Application. Furthermore, "A2IM has Affiliate

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<sup>178</sup> PIC, Appendix B, p.48 of 311

<sup>179</sup> *Ibid*

<sup>180</sup> *Ibid*, p.49 of 311

<sup>181</sup> Also see DotMusic Application 20F, DotMusic Support Letters, A2IM at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>, pp. 22 to 26 of 413

<sup>182</sup> PIC, Appendix B, p. 54 of 311

<sup>183</sup> For example, the music community of A2IM Associate Member Soundcloud has over 12 million music creators with a catalog of over 135 million tracks serving over 175 million music listeners. See

<https://blog.soundcloud.com/2016/08/23/soundcloud-brings-music-fans-135-million-tracks>, August 23, 2016.

<sup>184</sup> *Ibid*

associations within the global music community. These include Affiliates such as MusicFirst, the Copyright Alliance, the Worldwide Independent Network (WIN) and Merlin. A2IM also represents a Coalition representing the interests of the Global Independent Music Community.”<sup>185</sup> “Cumulatively, A2IM’s Label and Associate Membership, A2IM’s Affiliates and the A2IM’s Global Independent Music Community Coalition, covers a majority of the global music community. Its cumulative membership is in the hundreds of millions of entities with formal boundaries belonging to strictly organized and delineated communities related to music as per the Community Definition and Size.”<sup>186</sup>

## Independent Expert Testimonies

7. DotMusic submitted forty-three (43) independent expert testimony letters to ICANN and the Panel that agreed unanimously that DotMusic met the Community Establishment, Nexus and Support criteria.<sup>187</sup> The experts were Dr. Mike Alleyne, Professor Bobby Borg, Stella Black MM, Dr. Sharon Chanley, Dr. Dimitris Constantinou, Dr. Brian E Corner, JD Matthew Covey Esq, Dr. Juan Diego Diaz, Dr. Wilfred Dolfisma, Professor Andrew Dubber, Dr. Kathryn Fitzgerald, Dr. Luis-Manuel Garcia, Dr. Nathan Hesselink, Dr. Jordi Janer, Dr. Manthos Kazantzides, Dr. Juliane Jones, Lecturer David Loscos, Lecturer David Lowery, Dr. Paul McMahan, Dr. Michael Mauskapf, Dr. Joeri Mol, Dr. Askin Noah, Dr. Lisa Overholser, Lecturer Dr. Dean Pierides, Dr. David Michael Ramirez II, Dr. Rachel Resop, Dr. Jordi Bonada Sanjaume, Jonathan Segal MM, Dr. Graham Sewell, Dr. Shain Shapiro, Dr. Jeremy Silver, Dr. John Snyder, Dr. Tom ter Bogt, Dr. Chauntelle Tibbals, Dr. Wendy Tilton, Professor Heidy Vaquerano Esq, Dr. Vassilis Varvaresos, Dr. Argiro Vatakis, Dr. Dimitrios Vatakis, Dr. Deborah L Vietze, Dr. Eric Vogt, Professor Jeffrey Weber Esq and Dr. Daniel James Wolf.
8. Dr. Jørgen Blomqvist is the Honorary Professor of International Copyright at the University of Copenhagen. Dr. Blomqvist teaches international intellectual property law and undertakes research in the interpretation of the core international conventions on copyright and related rights, the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Formerly, Dr. Blomqvist was Director of the Copyright Law Division at the World Intellectual Property Organization (WIPO). Dr. Blomqvist is active in international development cooperation undertaking various ad-hoc assignments from WIPO, the European Commission and the Danish Patent and

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<sup>185</sup> *Ibid*, p. 55 of 311

<sup>186</sup> *Ibid*, p. 56 of 311

<sup>187</sup> See 43 independent expert letters scoring chart at

<https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A40; Also see 43 independent expert letters at

<https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also see <http://music.us/expert/letters>

Trademark Office. In addition, Dr. Blomqvist is the Secretary of the Danish Copyright Association and the Danish Group of the International Literary and Artistic Association.

Dr. Blomqvist has worked with copyright since 1976. From 1976 to 1990 as Secretary of the Copyright Law Review Commission under the Ministry of Culture, Dr. Blomqvist played a central role in the preparation of the comprehensive law reform of 1995, and for a number of years was also Legal Advisor and Deputy General Manager of KODA, the organization managing the performing rights of composers, writers and music publishers. Dr. Blomqvist obtained his Ph.D in 1987 on transfer of copyright ownership. In 1992, Dr. Blomqvist was employed by the WIPO, a United Nations specialized agency in Geneva, from which Dr. Blomqvist recently retired as the Director of the Copyright Law Division. Dr. Blomqvist is counted among the leading experts in international copyright in the world with in-depth experience with the substance of the international norms and their political background and development as well as with development cooperation in the field. Dr. Blomqvist was awarded the 2015 Koktvedgaard Prize, which is awarded every two years by the Danish Association for Entertainment and Media Law for outstanding contributions to the subject area of entertainment and media law, and for his Ph.D thesis he was awarded the 1988 Gad's Lawyers Prize. Dr. Blomqvist has also authored the book "Primer on International Copyright and Related Rights."<sup>188</sup>

9. On June 17<sup>th</sup>, 2016, Honorary Professor Dr. Jørgen Blomqvist provided ICANN with an Expert Legal Opinion that established that DotMusic's Application exceeded the criteria to be awarded Community Priority under CPE, meeting the CPE requirements under the Community Establishment, Nexus and Support sections.<sup>189</sup> Dr. Blomqvist concluded:

I am in agreement with the forty-three (43) independent expert testimonies, which agreed unanimously that DotMusic's Application met the Community Establishment, the Nexus Between the Proposed String and Community and the Support CPE criteria. Furthermore, the findings of the Nielsen Poll provided more independent supporting evidence to demonstrate that DotMusic's Application met the CPE criteria for Community Establishment and Nexus Between the Proposed String and Community. It is my legal expert opinion that DotMusic's application meets the full criteria under Community Establishment, the Nexus Between the Proposed String and Community, and Support (under Community Endorsement).<sup>190</sup>

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<sup>188</sup> Honorary Professor, Dr. Jørgen Blomqvist, Expert Legal Opinion, *About Honorary Professor Dr. Jørgen Blomqvist*, June 17, 2016, pp.3 to 6 at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>,

<sup>189</sup> Honorary Professor, Dr. Jørgen Blomqvist, Expert Legal Opinion, June 17, 2016 at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>

<sup>190</sup> *Ibid*, ¶¶ 76-77, p.49

## The Independent Nielsen QuickQuery Poll

10. Before the .MUSIC CPE commenced, DotMusic submitted an independent poll conducted by Nielsen<sup>191</sup> as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria for Community Establishment and Nexus. According to DotMusic's Application, the "Name" "commonly-known by others as the name of the community" addressed was the "Music Community"<sup>192</sup> and the definition of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."<sup>193</sup> The independent Nielsen QuickQuery survey was conducted from August 7, 2015, to August 11, 2015, with 2,084 neutral and diverse adults.<sup>194</sup> The survey examined whether or not the applied-for string (.MUSIC) was "commonly-known" and associated with the name identification of the community defined by DotMusic by asking: "If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?" A substantial majority, 1562 out of 2084 (i.e. 3 in 4 or 75% of the respondents) responded positively, agreeing: (i) that the applied-for string (.MUSIC) corresponds to the name of community addressed by the application (the "music community"); and (ii) that the "music community" definition is "a logical alliance of communities of individuals, organizations and business that relate to music."

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<sup>191</sup> See Nielsen QuickQuery at <http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

<sup>192</sup> According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392;>

According to the DotMusic Application: "The 'MUSIC' string matches the name ('Name') of the Community and is the established name by which the Community is commonly known by others." See 20A, para.3

<sup>193</sup> According to the DotMusic Application: "The Community is a strictly delineated and organized community of individuals, organizations and business, a 'logical alliance of communities of a similar nature ('COMMUNITY')', that relate to music: the art of combining sounds rhythmically, melodically or harmonically." See 20A, para.3; Also see DotMusic Public Interest Commitments: "[...] Community definition of a 'logical alliance of communities of similar nature that relate to music' [...]" at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

<sup>194</sup> See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: "Q3505 If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?" <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A32, Appendix B, pp. 38 to 41; Also see Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3

# Exhibit 22

yourname.music



www.music.us

**DotMusic Presentation to  
ICANN Board Governance Committee**

**September 17, 2016**

**Presentation by Arif H. Ali, Dechert LLP,  
Washington, D.C.**

## **BGC's Duty to Ensure that the EIU and ICANN Staff Complied with ICANN's Articles & Bylaws**

- In performing its duties of reconsideration, the BGC must:
  - ensure that the EIU and ICANN staff complied with the principles of **fairness, transparency, and non-discrimination**, as set out in the ICANN Articles and Bylaws.

3

## **BGC Must Address the EIU's Discrimination Against DotMusic**

- The EIU Panel singled out DotMusic for disparate treatment.
  - Introduced a new “**cohesion plus**” test for establishing “awareness and recognition” among members.
    - DotMusic required to show not only that there is “commonality of interest” and “cohesion” among its members, but **also** show that “cohesion is considerable enough.” This is a cohesion plus test.
  - Yet, the EIU and ICANN staff **never** applied the “cohesion plus” test in approving .HOTEL, .OSAKA, and .RADIO.

4

- In .HOTEL, .OSAKA, and .RADIO, the EIU Panel applied a **different** standard to determine “awareness and recognition.”
  - .HOTEL: The application demonstrated “awareness and recognition” because “the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”
  - .OSAKA: The application demonstrated “awareness and recognition” because “of the clear association with the Osaka geographical area, as according to the applicant, the Osaka Community is largely defined by its prefectural borders.”
  - .RADIO: The application demonstrated “awareness and recognition” “because the community as defined consists of entities and individuals that are in the radio industry and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community,” and “membership in the (industry) community is sufficiently structured.”
- It appears that the EIU Panels applied the “commonality of interest” test, not the “cohesion” test in .HOTEL, .OSAKA, and .RADIO.

5

- In contrast, the EIU Panel, in DotMusic, **conceded** that there is a “commonality of interest” among members.
- The EIU Panel, however, proceeded to apply a “cohesion plus” test in determining “awareness and recognition” among DotMusic members:
  - Under Article II, Section 3 of the Bylaws, “ICANN shall not apply its standards, policies, procedures, or practices inequitably or **single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.” (Bylaws, Art. II, §3)
  - “While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such **cohesion is considerable enough** that the community defined as a whole cannot be said to have the cohesion required by the AGB.”
- The EIU Panel and ICANN staff in DotMusic violated ICANN’s Policy of Non-Discrimination:
  - Moreover, under the CPE Guidelines, the “evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. **Consistency of approach** in scoring Applications will be of particular importance.” (CPE Guidelines, p. 22)

6

## **EIU Also Failed To Act Fairly and Openly**

- The EIU Panel failed to explain how DotMusic's evidence was insufficient to show cohesion.
  - The panel concluded that DotMusic's application fails to demonstrate "delineation" because "the number of individuals included in the defined community. . . do not show such cohesion is considerable enough."
- The EIU panel concluded that DotMusic failed to fulfil the requirements for "organization" requirement based on the EIU's research.
  - For example, based on its "research," the EIU concluded that "there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories."
  - Yet, the EIU failed to disclose its research in violation of its obligation to provide "conclusions that are compelling and defensible" and "to document the way in which it has done so in each case."

7

## **Presentation by Dr. Jørgen Blomqvist**

**Honorary Professor in International Copyright,  
University of Copenhagen, Denmark**

8

**Statement of Dr. Richard Burgess  
Ph.D. in Ethnomusicology**

9



**Concluding Remarks  
&  
Questions**

10

# Exhibit 23

During the Requester's presentation to the ICANN Board Governance Committee's (BGC) on 17 September 2016, the BGC raised a question on how it will affect the community the Requester represents if .MUSIC is not delegated to the Requester.

Below are Requester's additional responses to the BGC's question.



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September 17, 2016

**DotMusic's Answer to ICANN BGC's Question concerning:**

- (i) The Benefits and Risks of .MUSIC; and**
- (ii) How .MUSIC affects the global Music Community's future Business Model**

Dear ICANN BGC Chair Chris Disspain, BGC Member Erika Mann and BGC Members:

Thank you for your question during DotMusic's Presentation to the BGC.

The global music community is reliant on the DNS for its activities. As such, the safe, trusted and secure management of .MUSIC is of great essence, especially since music fans primarily consume music online through web-related destinations (e.g. YouTube.com) or through apps (e.g. iTunes).

The biggest challenge concerning music activities on "open" domain extensions is one of trust, security and enabling fair compensation to music community members. Currently, it is impossible to identify whether or not a site is authentic, safe or legal. For example, a music fan searching for "The Scorpions Winds of Change MP3"<sup>1</sup> on Google will not know whether a site is licensed or not. In this particular example, 9 out of 10 results are pirated web destinations. For example, DotMusic supporter BPI has filed over 7 million takedown requests in the last 30 days alone.<sup>2</sup> In this particular case Google removed 98% of those requests due to infringing content. The DMCA law is also outdated to address this game of whack a mole in which an infringing link is removed from the search results, yet reappears again under a different URL from the same domain. Google rarely ranks licensed music websites for specific songs. Instead, the majority of song-related search results are YouTube links or pirated links.

RiskIQ found that "one out of every three content theft sites contained malware. The study found that consumers are 28 times more likely to get malware from a content theft site than on similarly visited mainstream websites or licensed content providers. And just as worrisome, merely visiting a content theft site can place a users' computer at risk: 45 percent of the malware was delivered through so called "drive-by downloads" that invisibly download to the user's computer—without requiring them to click on a link."<sup>3</sup>

The global music community is currently losing out on billions of dollars and billions of visitors that are redirected to unlicensed music websites because there is no way to identify a licensed site from an unlicensed site. A safe, authenticated and trusted .MUSIC can change this and generate billions of dollars worth of lost traffic and revenues to the global music community by merely replacing millions of pirated web results with .MUSIC official and trusted websites. A verified

<sup>1</sup> <https://www.google.com/search?q=Scorpions+Wind+of+Change+MP3>. Retrieved on September 17, 2016.

<sup>2</sup> <https://www.google.com/transparencyreport/removals/copyright/searchdata/reporters/?id=1847>

<sup>3</sup> <https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/0f03d298-aedf-49a5-84dc-9bf6a27d91ff.pdf>, p.1; ; Also see <https://forum.icann.org/lists/comments-new-gtld-safeguards-dns-abuse-15mar16/pdfPrzdUmRIZc.pdf>



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.MUSIC for music community members will also prevent impersonation and counterfeiting (e.g. unlicensed merchandising or ticketing).

DotMusic's safeguards and multi-stakeholder governance structure enable fair compensation for community members on the web, while also help increase competition with unlicensed sites, which currently have the upper hand over the limited number of legal music services available.<sup>4</sup> A licensed, verified and trusted .MUSIC domain with DotMusic's copyright enforcement safeguards<sup>5</sup> can provide search engines the signal they need to replace pirated music website results to ensure monies flow to community members.

According to Google, its search algorithm ranks trusted, high quality and secure websites higher than untrustworthy, low quality and unsafe websites.<sup>6</sup> DotMusic's music-tailored enhanced safeguards, such as copyright protection provisions and community member verification will provide search engines the signals to replace illegitimate music sites with .MUSIC sites resulting in impactful economic and non-economic benefits to the global music community. An alternative of an "open" .MUSIC without music community governance and safeguards will be abused because bad actors can leverage .MUSIC websites to conduct malicious activity.

Apart from increasing competition and consumer trust, another benefit under DotMusic's approach is raising awareness for ICANN's New gTLD Program as well as increasing adoption. Furthermore, an "open" .MUSIC is not a viable solution to be adopted as an industry standard because there will be no policies in place for responsible enforcement and protection of music rights. ICANN does not regulate content nor address issues of music copyright protection. DotMusic will be addressing these issues under a multi-stakeholder music community governance model and music-tailored enhanced safeguards. An "open" .MUSIC lacking such an organized, trusted and secure structure that is supported by the entire music sector will result in (i) a loss of billions of dollars of income; (ii) a lost opportunity to organize the music sector under a licensed industry standard that would result in additional economic and non-economic benefits to community members; and (iii) significant resources spent to counter bad actors using the perceived trust of .MUSIC domains to increase malicious abuse against both community members and consumers in general. Given the global music community's reliance on the DNS for its activities, the value of the .MUSIC domain extension is priceless because it represents the global music community. As such, it is an irreplaceable and invaluable asset.

Awarding .MUSIC to a non-community applicant would negatively and significantly impact the global music community's business model into the future because the opportunities of creating a safe haven for global music consumption and a legitimate global music and song database (which does not exist today), will entirely be lost. DotMusic's solution will also provide consumers and content providers choices that do not exist today and increase competition on the web, including

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<sup>4</sup> There are just over 400 legal music services available. See <http://www.pro-music.org/legal-music-services.php>

<sup>5</sup> <http://music.us/enhanced-safeguards>

<sup>6</sup> <https://webmasters.googleblog.com/2011/05/more-guidance-on-building-high-quality.html>



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mitigating the reliance of the global music community on tech companies for distribution of content and replacing pirated search results with legitimate ones.

In summary, a regulated top-level domain for music promotes internet security, resiliency, consumer choice and competition, which must be supported by ICANN to match ICANN's objectives to benefit the global public interest and fulfill the goals of the New gTLD Program.

Please do not hesitate to reach out to us if you have any more questions.

Respectfully Submitted,

Constantine Roussos  
DotMusic  
Founder

Paul Zamek  
EVP: Communications & Strategic Relationships  
DotMusic

Arif Ali  
DotMusic Legal Counsel  
Dechert

Website: <http://www.music.us>  
Supporting Organizations: <http://www.music.us/supporters>  
Board: <http://www.music.us/board>

# Exhibit 24



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December 6, 2016

**VIA E-MAIL**

ICANN Board Governance Committee (BGC)  
c/o Chris Disspain, ICANN BGC Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest**

Dear Chairman Disspain and members of the BGC:

DotMusic Limited ("DotMusic") writes to provide the Board Governance Committee (the "BGC") with additional information responsive to questions raised by the Committee during DotMusic's presentation on 17 September 2016. Following our presentation, we submitted a letter to the BGC addressing the Committee's questions regarding the economic implications of .MUSIC and its effects on the music community's business model (*see* Appendix A).<sup>1</sup> Now we write to supplement the information we previously provided to the BGC on the following public interest issues:

1. The economic and non-economic benefits of a community-based approach to .MUSIC;
2. The reasons why DotMusic's multi-stakeholder community-based application serves the global public interest and Internet users (as opposed to standard "open" applications); and
3. The serious .MUSIC-related concerns relating to (i) trust, (ii) security, (iii) fair compensation, (iv) mass copyright infringement, (v) malicious abuse, (vi) significant economic losses, (vii) consumer safety, and (viii) rights protection mechanisms and enforcement.

In addition to the benefits described below, we remind the BGC that there are added benefits to DotMusic's approach to operating the registry for the .MUSIC top-level domain ("TLD"), such as fostering consumer trust in the New gTLD Program and encouraging the adoption of new gTLDs.<sup>2</sup>

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<sup>1</sup> ICANN Board Governance Committee ("BGC") Agenda (17 Sept. 2016), <https://icann.org/resources/board-material/agenda-bgc-2016-09-17-en>.

<sup>2</sup> The global music community's adoption of .MUSIC as a trusted industry standard TLD for music is inevitable because DotMusic's community application is supported by organizations with members representing over 95% of global music consumed; *see also* CircleID, "How .MUSIC Will Go Mainstream and Benefit ICANN's New gTLD Program,"



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## **DotMusic’s Community-Based Approach Protects the Music Community from the Economic and Non-Economic Harm Associated with Abusive Registrations of .MUSIC**

DotMusic’s community-based approach to .MUSIC will prevent both economic and non-economic harm to the music community by implementing registration policies protective of the community. A sample of .MUSIC pre-registrations across registrars show that a non-community-based approach to the gTLD without such protections will result in the following:

1. Mass cybersquatting without cost-effective protection for music community members;
2. Mass copyright infringement and trademark infringement of artist and music brand names; and
3. Malicious abuse against internet users due to user confusion and impersonation.

According to United Domains, a leading registrar for pre-registrations of new gTLDs, the .MUSIC gTLD is the third most popular and pre-registered new gTLD, representing over 5% of all new gTLDs with 29,244 pre-registrations for .MUSIC out of a total 548,071 pre-registrations across all new gTLDs (see Appendix B).<sup>3</sup> A statistically significant sample of 470 .MUSIC pre-registrations<sup>4</sup> included a number of problematic and potentially harmful ones by persons or entities other than the name holder or authorized representatives of the name holder. Examples include the following:

1. Famous music artist names without dashes (e.g., JimiHendrix.music) (see Appendix D);
2. Famous music artist names with dashes (e.g., Alice-Cooper.music) (see Appendix E);<sup>5</sup>

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(January 6, 2016),

[http://circleid.com/posts/20161206\\_how\\_dot\\_music\\_will\\_go\\_mainstream\\_and\\_benefit\\_new\\_gtld\\_program](http://circleid.com/posts/20161206_how_dot_music_will_go_mainstream_and_benefit_new_gtld_program)

<sup>3</sup> United Domains, “The Top 50 New Domain Extensions” (retrieved 31 Oct. 2016),

<https://www.uniteddomains.com/newgtld-ranking>.

<sup>4</sup> The sample was taken by reviewing the available publicized .MUSIC pre-registrations through Archive.org. See Internet Archive WayBack Machine, Calendar View of 2012, “<http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>,” [https://web.archive.org/web/20120601000000\\*/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration](https://web.archive.org/web/20120601000000*/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration); see also Internet Archive

WayBack Machine, Calendar View of 2013, “<http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>,” [https://web.archive.org/web/20130601000000\\*/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration](https://web.archive.org/web/20130601000000*/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration).

<sup>5</sup> Internet Archive WayBack Machine, “<http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>” (6 Oct. 2012), <https://web.archive.org/web/20121029090945/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration/>.



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3. Famous music magazines and other music brand names (*e.g.*, Kerrang.music) (*see* Appendix D);
4. Trademarked brands of .MUSIC applicant Google (*e.g.*, GoogleMusic.music) (*see* Appendix F);<sup>6</sup>
5. Trademarked brands of .MUSIC applicant Amazon (*e.g.*, AmazonStore.music) (*see* Appendix G);<sup>7</sup>
6. Trademarked brands of Microsoft (*e.g.*, XboxLive.music) (*see* Appendix H);<sup>8</sup> and
7. Other trademarked brands.<sup>9</sup>

These problematic pre-registrations are especially significant because past pre-registrations for domain names on United Domains had a significantly high conversion rate to domain registrations: “82 percent of all .SHOP domain names pre-ordered through United Domains’ pre-registration were converted to successful domain registrations” (*see* Appendix C).<sup>10</sup> If this conversion rate is consistent with respect to .MUSIC, then nearly 25,000 of United Domains’ .MUSIC pre-registrations will be converted to .MUSIC domain registrations, even though many names were not pre-registered by their authorized representatives but by bad actors and cybersquatters. It is therefore a certainty that .MUSIC will be abused without the protections for the music community that DotMusic has committed to provide.

Further, while some brands may be protected by ICANN’s Rights Protection Mechanisms (“RPMs”), such as the Trade Mark Clearing House (“TMCH”) under the New gTLD Program, *nearly all music artists have not filed their tradenames in the TMCH* because it is either (1) too expensive or (2) they are unaware of the process. In fact, *most music artists do not have registered*

<sup>6</sup> Internet Archive WayBack Machine, “<http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>” (10 May 2012), <https://web.archive.org/web/20120510195422/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>; Internet Archive WayBack Machine, “<http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>” (14 Mar. 2013), <https://web.archive.org/web/20130314020025/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>.

<sup>7</sup> Internet Archive WayBack Machine, “<http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>” (1 Sept. 2013), <https://web.archive.org/web/20130901144106/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>.

<sup>8</sup> Internet Archive WayBack Machine, “<http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>” (21 Mar. 2012), <https://web.archive.org/web/20120321124104/http://www.uniteddomains.com/new-top-level-domain/music-domain-registration>.

<sup>9</sup> .MUSIC pre-registrations included brands such Bandcamp, Comcast, and Virgin.

<sup>10</sup> United Domains, “We’re number one! United Domains registers most .SHOP domains worldwide,” *United Domains*, <https://blog.uniteddomains.com/were-number-one-united-domains-registers-most-shop-domains-worldwide-910e5c269152>.



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*trademarks*. This means that speculators, cybersquatters, and even fans will be able to register artists' names without explicit permission from the artist. It is a certainty that impersonators will register .MUSIC domains to conduct malicious abuse, copyright infringement, and other illegal behaviors. Given the substantial size of the global music community, the economic damage that will result is enormous as artists will incur expenses trying to stop this abuse, and to claim and recover their names.

Despite ICANN's efforts to prevent such abuses, users are still able to register domain names under new gTLD registry business models, such as .SUCKS<sup>11</sup> and .FEEDBACK,<sup>12</sup> to target brands with financial resources. This issue is especially problematic with respect to .MUSIC because *most musicians do not have the financial resources to protect themselves from the certain abuse of their names if .MUSIC is run by an open registry*.

DotMusic's community-based application, however, incorporates enhanced music-tailored safeguards to address these issues.<sup>13</sup> For instance, it includes a .MUSIC Globally Protected Marks List to protect famous artists' names from being registered by bad actors and a Name Selection policy that requires registrants to register their names and disallows the registration of others' names.<sup>14</sup>

### **DotMusic's Community-Based Approach to .MUSIC Serves the Global Public Interest by Preventing DNS Abuse**

It is in the global public interest to approve .MUSIC as a community-based gTLD. DotMusic's application contains safeguards to prevent domain name system ("DNS") abuse – a significant problem for many new gTLDs. As Internet Identity ("IID"), a security company that provides threat data services and is led by a member of ICANN's Security and Stability Advisory Committee,<sup>15</sup> has

<sup>11</sup> See Gregory S. Shatan, President, Intellectual Property Constituency ("IPC") letter to Akram Atallah, President, ICANN's Global Domains Division (27 Mar. 2015), <https://www.icann.org/en/system/files/correspondence/shatan-to-atallah-27mar15-en.pdf>; see also Edith Ramirez, Chairwoman, United States Federal Trade Commission letter to John Jeffrey, ICANN General Counsel and Secretary (27 May 2015), <https://www.icann.org/en/system/files/correspondence/ramirez-to-jeffrey-27may15-en.pdf>.

<sup>12</sup> See *Adobe Systems Incorporated, et al v. Top Level Spectrum et al.*, Complaint for ICANN Compliance Investigation, Evaluation by PICDRP Standing Panel, and Remedies (24 Oct. 2016), <https://www.markmonitor.com/download/blog/FEEDBACK%20-%20PICDRP%20Complaint%20-%20Long%20Form.pdf>; *Adobe Systems Incorporated, et al v. Top Level Spectrum et al.*, Exhibits to Complaint for ICANN Compliance Investigation, Evaluation by PICDRP Standing Panel, and Remedies (24 Oct. 2016), <https://markmonitor.com/downloads/PICDRPexhibits>.

<sup>13</sup> See DotMusic's music-tailored enhanced safeguards, <http://music.us/enhanced-safeguards>.

<sup>14</sup> New gTLD Application Submitted to ICANN by: DotMusic Limited, String: MUSIC (16 May 2014), 20E <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>.

<sup>15</sup> Kevin Murphy, "IANN security advisor predicts 'hundred' of new gTLDs will 'go dark'" (4 Dec. 2015), available at <http://domainincite.com/19667-icann-security-advisor-predicts-hundreds-of-new-gtlds-will-go-dark>.



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explained, “most new gTLDs have failed to take off and many have already been riddled with so many fraudulent and junk registrations that they are being blocked wholesale.”<sup>16</sup>

ICANN itself has documented many of these issues in its “Revised Report on DNS Abuse and New gTLD Program Safeguards,”<sup>17</sup> revealing the potential DNS abuses facing .MUSIC if it is run as an open registry. ICANN identifies and describes such abuses as follows:

- **Phishing** uses both **social engineering** and technical subterfuge to steal consumers’ personal identity data and financial account credentials. . . .
- **Fast-flux** is a technique carried out by botnets in phishing, spam, and other malware delivery activities in which attacks are sent from a constantly shifting set of IP addresses, rendering detection very difficult.
- **Typo-squatting**—aka “URL hijacking”—is a form of **cyber-squatting** that relies on users making a typographical error when entering a website address into a web browser, and often directs users to malicious sites.
- **Malvertising** is advertising on a website or ad network that is set up to infect viewers with malware either every time it is seen or at various intervals based on time or number of hits.
- **Search engine poisoning** is an activity that manipulates search engines to display search results that link to malicious websites.
- **Spoofing attacks** are when a malicious actor impersonates another device or user in order to launch attacks against network hosts, steal data, spread malware, or bypass access controls. . . .
- **Domain shadowing** is another emerging form of DNS abuse in which criminals, using stolen or phished credentials, create numerous subdomains associated with existing legitimate domains in a registrant’s portfolio. The legitimate domains continue to function normally from the view of the registrant while these subdomains direct visitors to malicious sites.
- **DNS cache poisoning** is an attack in which a malicious actor tricks a name server into adding or modifying cached DNS data with malicious data. **Pharming** is one

<sup>16</sup> IID, “IID Predicts Massive Botnet Takeover of IoT Devices by 2017” (1 Dec. 2015), <http://internetidentity.com/press-release/iid-predicts-massive-botnet-takeover-of-iot-devices-by-2017>.

<sup>17</sup> ICANN, “ICANN Revised Report on DNS Abuse and New gTLD Program Safeguards” (18 Jul. 2016), <https://newgtlds.icann.org/en/reviews/dns-abuse/safeguards-against-dns-abuse-18jul16-en.pdf>.



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form of this activity in which a malicious actor coaxes a victim into clicking on a link—usually sent via spam email—which in turn infects the victim’s personal computer or server and redirects users to fraudulent websites where confidential personal information can be gathered.<sup>18</sup>

These abuses “exploit human weaknesses in the forms of greed, carelessness, and/or naiveté.”<sup>19</sup> The safeguards in DotMusic’s application will help prevent such abuse, therefore protecting the interests of Internet end-users and serving the global public interest.

### **DotMusic’s Community-Based Approach Addresses Copyright Infringement, Trust, and the High Risk of Consumer Harm in Music-Themed gTLDs**

According to the 2016 “Investing in Music” report (*see* Appendix L) released by the International Federation for the Phonographic Industry (IFPI) and the Worldwide Independent Network (WIN) – supporting organizations of DotMusic – “music is being crafted, created, produced and enjoyed in more ways than ever before in history”<sup>20</sup> while “the proportion of revenue invested in A&R (16.9%) remains higher than the equivalent spent on research and development (or R&D) by any other sector.”<sup>21</sup> Furthermore, “**360 licensed digital services worldwide bring significant costs**. Substantial investment goes into systems to manage the large and complex task of efficiently and securely distributing more than 40 million recordings, videos and images across multiple platforms.”<sup>22</sup> More importantly, the **costs to the music community resulting from music piracy are enormous because there are only 360 legal music services globally competing with thousands of pirate and unlicensed music websites**. The costs to consumers are significant as well because there is no way to distinguish a licensed from an unlicensed music website. The .MUSIC community TLD will serve the public interest by solving this problem by communicating with consumers and search engines that a .MUSIC domain is licensed, trusted and safe.

Google’s Transparency Report<sup>23</sup> foreshadows copyright problems facing .MUSIC if it becomes an open registry. The report shows widespread copyright infringement and *millions* of takedown requests for new gTLDs. For instance, during the week of 19 September 2016, there were 24,119,796 URL takedown requests for copyright infringement (*i.e.*, 143,570 takedown requests per hour).<sup>24</sup>

<sup>18</sup> *Id.*, pp. 9-11.

<sup>19</sup> *Id.*, p. 11 (emphasis omitted).

<sup>20</sup> IFPI/ WIN, 2016 Investing In Music Report, at <http://investinginmusic.ifpi.org> and <http://investinginmusic.ifpi.org/report/ifpi-iim-report-2016.pdf>, p.5

<sup>21</sup> *Id.*, p.10

<sup>22</sup> *Id.*, p.13

<sup>23</sup> Google, “Transparency Report” (retrieved 31 Oct. 2016), <https://www.google.com/transparencyreport/removals/copyright>.

<sup>24</sup> *Id.*; *see also* Robin Burks, “Google Copyright Takedowns Have Increased About 1 Billion Percent Since 2006,” *Tech Times* (7 Mar. 2016), <http://techtimes.com/articles/139220/20160307/google-copyright-takedowns-has-increased-about-one-billion-percent-since-2006.htm>; Ernesto, “Google Asked to Remove 558 Million ‘Pirate’ Links in 2015,”



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Many of these requests concern gTLDs with music-themed characteristics, such as .ROCKS (which has 72,369 domain registrations).<sup>25</sup> There are several infringing .ROCKS domain names with a significant amount of copyright infringement takedown requests, including: *torrents.rocks* (1,447,486 takedown requests), *extratorrent.rocks* (1,137,431), *kickass-torrent.rocks* (769,053), *kickasstorrent.rocks* (732,266), *kickasstorrents.rocks* (673,906), *kickass-torrents.rocks* (611,182), *kickasstorrentz.rocks* (530,482), *thepiratebay.rocks* (510,889), *kickass.rocks* (301,408), *mp3song.rocks* (208,360), and many others (see Appendix I).<sup>26</sup> In October 2016, the British Recorded Music Industry Ltd. (“BPI”), one of DotMusic’s supporters, alone requested 10,900,000 takedowns. These requests were valid attempts by BPI as, according to Google’s Transparency Report, “99.4% of URLs reported by [the BPI] are ultimately removed”<sup>27</sup> (see Appendix J).

As noted by ICANN and the Governmental Advisory Committee (“GAC”), .MUSIC is (i) a “string likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm;” and (ii) a “string that is linked to [a] regulated sector” that “should operate in a way that is consistent with applicable laws.”<sup>28</sup> As such, it is a certainty that .MUSIC—the most relevant and popular music-themed gTLD in the New gTLD Program—will experience exponentially more abuse and piracy than .ROCKS if it is operated as an open registry.<sup>29</sup> **Such a result will not serve the public interest.** Without community-based enhanced safeguards in place, the popular .MUSIC string, which invokes a high level of implied trust from Internet users, will be significantly harmed by bad actors and experience rampant piracy to the detriment of the Internet users and the music community as whole.

The .MUSIC gTLD needs proper safeguards in place to protect the music community. The United States Federal Trade Commission (“FTC”) “expressed concerns about the need for more consumer protection safeguards . . . highlighting *again* the potential for significant consumer harm . . . magnify[ing] both the abuse of the domain name system and the . . . challenges . . . in tracking down Internet fraudsters.”<sup>30</sup> Furthermore, .MUSIC community member organization Recording Industry Association of America (“RIAA”) has noted in its “2016 Notorious Markets List” to the Office of the U.S. Trade Representative (“USTR”) that it is exceedingly difficult to track, enforce

*TorrentFreak* (30 Dec. 2015), <https://torrentfreak.com/google-asked-remove-558-million-pirate-links-2015>; Ernesto, “Google Asked to Remove 100,000 ‘Pirate Links’ Every Hour,” *TorrentFreaks* (6 Mar. 2016), <https://torrentfreak.com/google-asked-to-remove-100000-pirate-links-every-hour-160306>.

<sup>25</sup> nTLDStats, “.ROCKS” (retrieved 31 Oct. 2016), <https://ntldstats.com/tld/rocks>.

<sup>26</sup> Google, “Transparency Report for .ROCKS” (retrieved 14 Nov. 2016), <https://www.google.com/transparencyreport/removals/copyright/explore/?q=.rocks>.

<sup>27</sup> Google, “Transparency Report Reporting Organization: BPI (British Recorded Music Industry) Ltd,” (retrieved 14 Nov. 2016), <https://www.google.com/transparencyreport/removals/copyright/searchdata/reporters/?id=1847>.

<sup>28</sup> Stephen Crocker, Chair, ICANN Board of Directors letter to Thoma Schneider, Chair, ICANN Governmental Advisory Committee (23 June 2015), pp. 1-2, Annex 5, p. 8, <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>.

<sup>29</sup> Rightside, the .ROCKS registry, is a co-applicant for .MUSIC in partnership with Donuts.

<sup>30</sup> Federal Trade Commission letter to Stephen Crocker, Chair, ICANN Board of Directors and Rod Beckstrom, ICANN President and CEO (16 Dec. 2011), pp. 1, 5, [https://www.ftc.gov/sites/default/files/documents/public\\_statements/icanns-plan-increase-available-generic-top-level-domains/111216letter-icann.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/icanns-plan-increase-available-generic-top-level-domains/111216letter-icann.pdf).



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against, and accurately associate various notorious websites because of one or more of the following practices:

- **Domain Hopping** – When sites are demoted in search engine search results, the sites often engage in domain hopping to a new top-level domain to reappear at the top of search results and/or get around certain court-ordered blocks;
- **Utilize Reverse Proxy Services** – To hide the actual hosting internet service provider, pirate sites frequently employ reverse proxy services like Cloudflare to obfuscate their IP address, creating obstacles to enforcement against such sites;
- **Privacy Protected Domain Name Registration** – Operators of pirate sites typically hide their identity behind privacy/proxy services or appear to submit false or incomplete registrant information, further creating obstacles to enforcement against these sites.<sup>31</sup>

DotMusic has committed to provide enhanced safeguards to address these practices, including policies to stop domain hopping, takedown policies in the case of piracy, authorization provisions, permanent blocks, privacy/proxy provision, true name/address mandates, and trusted sender compliance policies. DotMusic can therefore safeguard the global music community by operating the .MUSIC TLD.<sup>32</sup>

### The BGC Must Accept DotMusic’s Reconsideration Request 16-5

For these reasons, in addition to those already presented by DotMusic and its co-requesters,<sup>33</sup> DotMusic submits that it would be in the best interest of the Internet community and the New gTLD Program for the BGC to accept Reconsideration Request 16-5. DotMusic and its co-requesters urge the BGC to do so in order to ensure that .MUSIC is a safe, secure, and trusted gTLD with enhanced safeguards tailored to the music community. A .MUSIC registry operated by DotMusic would serve the global public interest, protect the global music community and Internet users, and instill consumer trust in .MUSIC domains.

<sup>31</sup> Recording Industry Association of America (“RIAA”), “2016 Special 301 Out-Of-Cycle Review of Notorious Markets” [Attachment, Bradley Buckles, RIAA Executive Vice President, Anti-Piracy letter to Probir Mehta, Assistant U.S Trade Representative for Innovation and Intellectual Property (7 Oct. 2016)], p. 2, [https://torrentfreak.com/images/RIAA\\_2016\\_Notorious\\_Markets\\_Submission\\_.pdf](https://torrentfreak.com/images/RIAA_2016_Notorious_Markets_Submission_.pdf).

<sup>32</sup> See New gTLD Application Submitted to ICANN by: DotMusic Limited, String: MUSIC (16 May 2014), 20E, 26, 28-29 at <https://gtdresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392> and Public Interest Commitments, <https://gtdresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>

<sup>33</sup> DotMusic’s co-requestors are: International Federation of Musicians, International Federation of Arts Councils and Culture Agencies, Worldwide Independent Network, Merlin Network, Independent Music Companies Association, American Association of Independent Music, Association of Independent Music, Content Creators Coalition, Nashville Songwriters Association International, and ReverbNation.



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Sincerely,

Constantine Roussos  
DotMusic  
Founder

Paul Zamek  
EVP: Communications & Strategic Relationships  
DotMusic

Website: <http://www.music.us>

Supporting Organizations: <http://www.music.us/supporters>

Governance Board: <http://www.music.us/board>

# **Appendix A**

## **Reconsideration Request 16-5:**

Response to ICANN BGC Question:  
DotMusic Presentation to Board

Re: .MUSIC economic implications and how  
it affects Music Community business model

Submitted to ICANN on September 17, 2016



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September 17, 2016

**DotMusic's Answer to ICANN BGC's Question concerning:**

- (i) The Benefits and Risks of .MUSIC; and**
- (ii) How .MUSIC affects the global Music Community's future Business Model**

Dear ICANN BGC Chair Chris Disspain, BGC Member Erika Mann and BGC Members:

Thank you for your question during DotMusic's Presentation to the BGC.

The global music community is reliant on the DNS for its activities. As such, the safe, trusted and secure management of .MUSIC is of great essence, especially since music fans primarily consume music online through web-related destinations (e.g. YouTube.com) or through apps (e.g. iTunes).

The biggest challenge concerning music activities on "open" domain extensions is one of trust, security and enabling fair compensation to music community members. Currently, it is impossible to identify whether or not a site is authentic, safe or legal. For example, a music fan searching for "The Scorpions Winds of Change MP3"<sup>1</sup> on Google will not know whether a site is licensed or not. In this particular example, 9 out of 10 results are pirated web destinations. For example, DotMusic supporter BPI has filed over 7 million takedown requests in the last 30 days alone.<sup>2</sup> In this particular case Google removed 98% of those requests due to infringing content. The DMCA law is also outdated to address this game of whack a mole in which an infringing link is removed from the search results, yet reappears again under a different URL from the same domain. Google rarely ranks licensed music websites for specific songs. Instead, the majority of song-related search results are YouTube links or pirated links.

RiskIQ found that "one out of every three content theft sites contained malware. The study found that consumers are 28 times more likely to get malware from a content theft site than on similarly visited mainstream websites or licensed content providers. And just as worrisome, merely visiting a content theft site can place a users' computer at risk: 45 percent of the malware was delivered through so called "drive-by downloads" that invisibly download to the user's computer—without requiring them to click on a link."<sup>3</sup>

The global music community is currently losing out on billions of dollars and billions of visitors that are redirected to unlicensed music websites because there is no way to identify a licensed site from an unlicensed site. A safe, authenticated and trusted .MUSIC can change this and generate billions of dollars worth of lost traffic and revenues to the global music community by merely replacing millions of pirated web results with .MUSIC official and trusted websites. A verified

<sup>1</sup> <https://www.google.com/search?q=Scorpions+Wind+of+Change+MP3>. Retrieved on September 17, 2016.

<sup>2</sup> <https://www.google.com/transparencyreport/removals/copyright/searchdata/reporters/?id=1847>

<sup>3</sup> <https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/0f03d298-aedf-49a5-84dc-9bf6a27d91ff.pdf>, p.1; ; Also see <https://forum.icann.org/lists/comments-new-gtld-safeguards-dns-abuse-15mar16/pdfPrzdUmRIZc.pdf>



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.MUSIC for music community members will also prevent impersonation and counterfeiting (e.g. unlicensed merchandising or ticketing).

DotMusic's safeguards and multi-stakeholder governance structure enable fair compensation for community members on the web, while also help increase competition with unlicensed sites, which currently have the upper hand over the limited number of legal music services available.<sup>4</sup> A licensed, verified and trusted .MUSIC domain with DotMusic's copyright enforcement safeguards<sup>5</sup> can provide search engines the signal they need to replace pirated music website results to ensure monies flow to community members.

According to Google, its search algorithm ranks trusted, high quality and secure websites higher than untrustworthy, low quality and unsafe websites.<sup>6</sup> DotMusic's music-tailored enhanced safeguards, such as copyright protection provisions and community member verification will provide search engines the signals to replace illegitimate music sites with .MUSIC sites resulting in impactful economic and non-economic benefits to the global music community. An alternative of an "open" .MUSIC without music community governance and safeguards will be abused because bad actors can leverage .MUSIC websites to conduct malicious activity.

Apart from increasing competition and consumer trust, another benefit under DotMusic's approach is raising awareness for ICANN's New gTLD Program as well as increasing adoption. Furthermore, an "open" .MUSIC is not a viable solution to be adopted as an industry standard because there will be no policies in place for responsible enforcement and protection of music rights. ICANN does not regulate content nor address issues of music copyright protection. DotMusic will be addressing these issues under a multi-stakeholder music community governance model and music-tailored enhanced safeguards. An "open" .MUSIC lacking such an organized, trusted and secure structure that is supported by the entire music sector will result in (i) a loss of billions of dollars of income; (ii) a lost opportunity to organize the music sector under a licensed industry standard that would result in additional economic and non-economic benefits to community members; and (iii) significant resources spent to counter bad actors using the perceived trust of .MUSIC domains to increase malicious abuse against both community members and consumers in general. Given the global music community's reliance on the DNS for its activities, the value of the .MUSIC domain extension is priceless because it represents the global music community. As such, it is an irreplaceable and invaluable asset.

Awarding .MUSIC to a non-community applicant would negatively and significantly impact the global music community's business model into the future because the opportunities of creating a safe haven for global music consumption and a legitimate global music and song database (which does not exist today), will entirely be lost. DotMusic's solution will also provide consumers and content providers choices that do not exist today and increase competition on the web, including

<sup>4</sup> There are just over 400 legal music services available. See <http://www.pro-music.org/legal-music-services.php>

<sup>5</sup> <http://music.us/enhanced-safeguards>

<sup>6</sup> <https://webmasters.googleblog.com/2011/05/more-guidance-on-building-high-quality.html>



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mitigating the reliance of the global music community on tech companies for distribution of content and replacing pirated search results with legitimate ones.

In summary, a regulated top-level domain for music promotes internet security, resiliency, consumer choice and competition, which must be supported by ICANN to match ICANN's objectives to benefit the global public interest and fulfill the goals of the New gTLD Program.

Please do not hesitate to reach out to us if you have any more questions.

Respectfully Submitted,

Constantine Roussos  
DotMusic  
Founder

Paul Zamek  
EVP: Communications & Strategic Relationships  
DotMusic

Arif Ali  
DotMusic Legal Counsel  
Dechert

Website: <http://www.music.us>  
Supporting Organizations: <http://www.music.us/supporters>  
Board: <http://www.music.us/board>

## **Appendix B**

### **United Domains:**

#### *The Top 50 New Domain Extensions*

*.MUSIC Ranked #3 Most Popular  
Domain Extension*

*29,237 total .MUSIC pre-registrations  
out of total 547,680 new gTLD pre-  
registrations*

*.MUSIC represents over 5% of total new  
gTLD pre-registrations at United  
Domain*

Find your domain

▾ Bulk search

Top 25 ▾

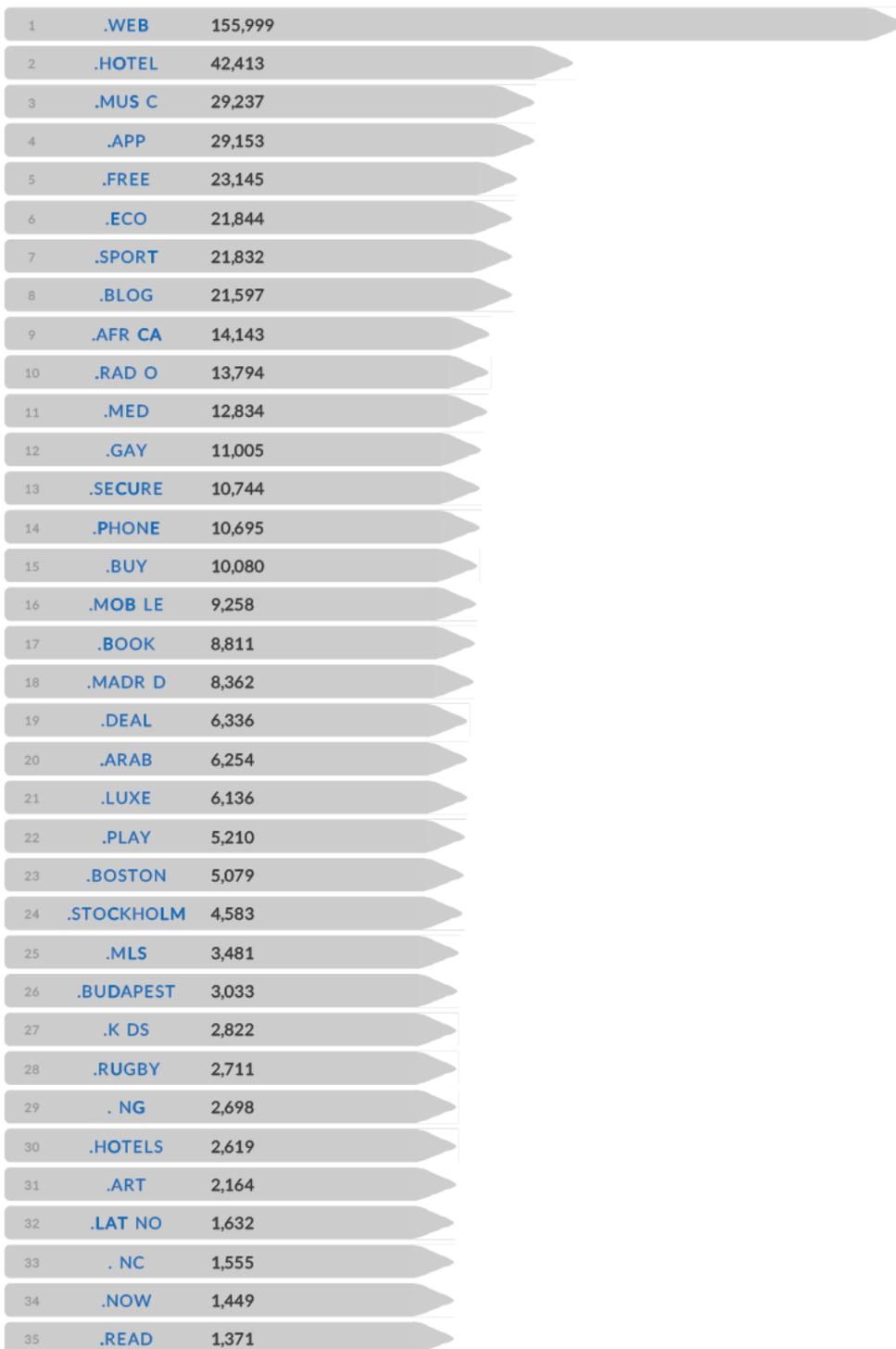
🔍 Search

Launching Nov 02: .doctor | Nov 21: .blog | Dec 14: .cam

## The Top 50 New Domain Extensions

Every day, our customers pre register and pre order countless unique new domain names. Our Top 50 List breaks down the upcoming new domain extensions our customers are the most excited about. Backed by consumer surveys and popular appeal, the extensions listed below are poised to make the most impact within their industries, fields, and geographic locations.

Click on any of the domain extensions to learn the details of its application and launch.



36	.MAP	1,309
37	.CAREER	1,306
38	.YOU	1,254
39	.CAM	1,043
40	.FOOD	1,032
41	.FORUM	1,000
42	.SEARCH	987
43	.BROKER	974
44	.PROD	972
45	.HOME	959
46	.DATA	938
47	.PAY	915
48	.MAIL	913
49	.FAN	803
50	.BEAUTY	775

547,680

To a Pre Reg s ra ons (rea me)

2,882

Pre Reg s ra ons h s Mon h (rea me)

199

Pre Reg s ra ons Today (rea me)

### Live Registration 444

Get your perfect domain name right away. Hundreds of domain extensions available now.

.ia (\$14.90) .bio (\$59.00) .center (\$19.00)  
 .click (\$19.00) .cloud (\$29.00) .club (\$29.00)  
 .co (\$24.90) .co.uk (\$9.90) .com (\$9.90)  
 .design (\$49.00) .digital (\$29.00) .info (\$14.90)  
 .link (\$19.00) .london (\$39.00) .me (\$14.90)  
 .ne (\$14.90) .nyc (\$39.00) .online (\$49.00)  
 .org (\$14.90) .photography (\$14.90) .rocks (\$9.90)  
 .se (\$29.00) .store (\$69.00) .us (\$9.90)  
 .work (\$9.90)

[See Our Full Domain Prices](#)

### Open for Pre-Order 3

Pre order your new domain name weeks before it's generally available.

.doctor (\$99.00) .cam (\$49.00) .bg (\$29.00)

[See All Domains For Pre Order](#)

### Free Pre-Registration 83

Be first to know when new domain extensions become available to register.

.arab .baby .basketball .boston .broker  
 .budapest .buy .career .coupon .dad  
 .dada .idea .eco .fan .health .home  
 .hobbies .joy .japan .luxury .madr  
 .makeup .map .med .meme .pay .phone  
 .png .pay .prod .room .rsvp  
 .safe .school .search .skin .sport  
 .you

[All Domains For Free Pre Registration](#)

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 Domain Features  
 Register new gTLDs  
 Domain Name Transfer  
 Create new account

#### Explore and Help

Help Center (FAQ)  
 Web Apps  
 Domain Privacy  
 Domain Prices  
 Affiliate Program

#### Company

Contact  
 Terms & Conditions  
 Domain Guides  
 Privacy Policy  
 Careers

#### More...

United Domains Blog  
 Top 50 New gTLDs  
 New gTLD Launch Sequence  
 namecheck.com

Payment Options:



## Appendix C

### **United Domains:**

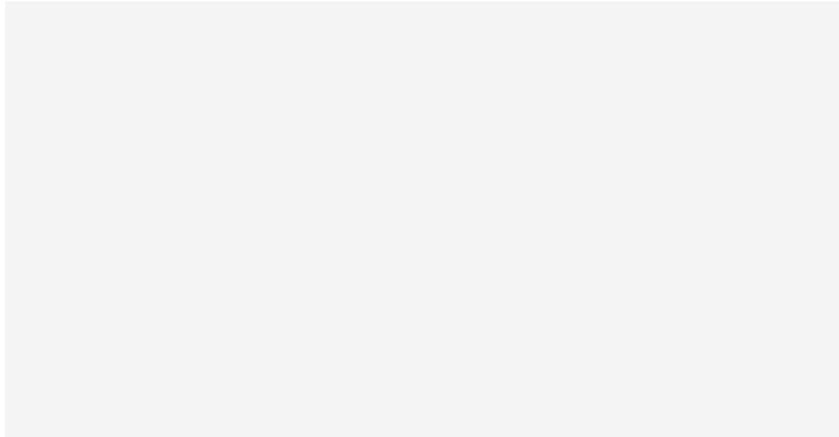
*82% of .SHOP domain pre-registrations converted to domain registrations*

*At the same conversion rate, the registrar United Domains will convert about 25,000 .MUSIC registrations out of the 29,237 .MUSIC pre-registrations*

United Domains [Follow](#)

United Domains is a leading domain name registrar based in Kendall Square in Cambridge, MA right next to MIT. Focus...  
Sep 27 · 2 min read

## We're number one! United Domains registers most .SHOP domains worldwide



United Domains registered the most .SHOP domain names on the extension's public launch day.

**A**fter a smashing launch day for .SHOP on Monday, September 26th, 2016, United Domains emerged as the world leader for total .SHOP domains registered. Some 82 percent of all .SHOP domain names pre-ordered through United Domains' pre-registration were converted to successful domain registrations.

This achievement cements United Domains' status as a world leader for new domain extensions.

### 1 million .SHOP domain registrations anticipated in first year

"We expect to see a rush for the most attractive domain names under the .SHOP domain extension," says Florian Huber, CEO of united-domains AG.

In the same vein, the registry for the .SHOP domain extension GMO Registry is confident that .SHOP will close out its first year with 1 million domains registered.

"Just as we associate addresses like Rodeo Drive in LA or the Avenue des Champs Élysées in Paris with shopping, we are aiming for .SHOP become the ultimate destination to shop online," explained GMO Registry CEO Hiro Tsukahara in a recent interview.

### A long-awaited new domain extension

The all-new .SHOP domain extension is ideal for services in the growing e-commerce industry, and allows tailor-made, relevant web addresses like "www.zando.shop", "www.ebook.shop", or "www.voqa.shop".

The annual registration fee for standard .SHOP domains is just \$49 per year, and .SHOP works with any website—even those that already have an associated domain name. Included in every domain registration is free email forwarding, URL forwarding, DNS management, and access to Web Apps, which makes it easy to connect a .SHOP domain to a website or email host.

New domain extensions like .SHOP have been gradually entering the market since February 2014 thanks to ICANN, an non-profit managing the Internet's many names and numbers. Whereas short, attractive and available .COM and .NET domains are often tough to find without having to pay a high markup on the domain aftermarket, new gTLDs open up a new landscape of distinct and relevant naming possibilities. Within the next few months, the new all-purpose .WEB is also expected to make its long-awaited debut.

**For more information about .SHOP domains and their availability, visit [www.uniteddomains.com/shop](http://www.uniteddomains.com/shop).**

Domains SEO Startup Marketing Domain Names



#### United Domains

United Domains is a leading domain name registrar based in Kendall Square in Cambridge, MA right next to MIT. Focused on the new generic top-level domains

Follow



#### United Domains

United Domains is a domain registrar based in Cambridge, Massachusetts. We have over a decade of experience in domain name registration and offer over 500 Top-Level Domains serving every industry and

Follow



Never miss a story from **United Domains** when you sign up for Medium. [Learn more](#)

SUBSCRIBE

## Appendix D

### United Domains:

*Random sample of .MUSIC domain pre-registrations includes famous artists (without dashes):*

*FleetwoodMac.music*

*JimiHendrix.music*

*Hendrix.music*

*Slash.music*

*DefLeppard.music*

*SystemOfADown.music*

*.MUSIC pre-registrations also include famous music magazines and brands:*

*Kerrang.music*

*Circus.music*

*Revolver.music*

*MetalHammer.music*

*NME.music*

# New Top Level Domain .MUSIC

## Free .MUSIC pre-registration is open!

Search multiple domain names, seperating names by line.

yourdomain1  
yourdomain2  
yourdomain3

**.MUSIC**

**Search** >>



Like
 Sign Up to see what your friends like.

## Learn more about .MUSIC

The music industry has shifted from a physical to a digital world. The Internet has become the first truly global distribution channel for all musicians by providing them with the opportunity to connect with fans, new audiences and exciting business prospects.

.music is the exclusive, global community-based top-level domain name that gives music entities a unique identity online and an industry standard for official music websites. The specialized .music web address enhances a brand's visibility online. It ensures that .music websites are associated with a memorable, self-explanatory and trusted badge restricted to the music community: www.YourName.music

.music paves the way for the next-generation of the Internet and the future of music by building a home for everything related to music. Since 2005, under the slogan "We Are Music," .music has embarked upon a global communication outreach campaign to launch the .music domain name and initiative. The .music initiative's mission is focused on:

- ▶ Music education and the study of music in school curriculums
- ▶ Fighting piracy and protecting the intellectual capital of music
- ▶ Musicians' welfare, rights & fair compensation
- ▶ Enriching society with artistic and cultural diversity
- ▶ Innovation in both the music and Internet space

.music will contribute proceeds from its domain name registrations to select not-for-profit organizations that support its mission, core values and five initiatives.

Artists will be able to create unique song .music web addresses to help them market new single releases more efficiently. Giving each song a dedicated address makes searching for songs on the web much faster and easier by simply entering it directly into a browser's address bar, such as: http://SongName.ArtistName.music. Users can also interact directly with the music, video, lyrics and tabs of each song as well as add their own user-generated content.

### Number of Pre-Registrations

**0 005 596**

[dotMusic](#)

Launch Date (est.) Mid. 2012

### Recently pre-registered

- ▶ hendrix.music
- ▶ riotnoise.music
- ▶ metalhammer.music
- ▶ revolver.music
- ▶ kerrang.music
- ▶ nme.music
- ▶ fleetwoodmac.music
- ▶ jimihendrix.music
- ▶ slash.music
- ▶ defleppard.music
- ▶ systemofadown.music
- ▶ soad.music
- ▶ afterhours.music
- ▶ circus.music
- ▶ novita.music

.Music Web Domain  
**musicextension**

## Appendix E

### United Domains:

*Random sample of .MUSIC domain pre-registrations includes famous artists (with dashes):*

*Alice-Cooper.music*

*Billy-Joel.music*

*Black-Sabbath.music*

*James-Brown.music*

*Frank-Zappa.music*

*Ozzy-Osbourne.music*

New Domains. New Opportunities.

est. for  
2013

## New Domain .MUSIC

### Pre-register .MUSIC domains today

Pre-register your .music new top level domain with United Domains for free.

yourdomain1  
yourdomain2  
yourdomain3

.MUSIC

**Free Pre-Registration** >>

Pre Registrations are free and non-binding

[Why Should I Pre-Register?](#)



Total number of  
.MUSIC Pre-Registrations:

**0,023,000** LIVE COUNTER

#### Recently Pre-Registered

- |                    |                     |
|--------------------|---------------------|
| monkeys.music      | vsua med a.music    |
| hgherground.music  | james brown.music   |
| ace cooper.music   | frank zappa.music   |
| by joe .music      | ozzy osbourne.music |
| back sabbath.music | eric capton.music   |

The internet has become the first truly global distribution channel for musicians by providing them with the opportunity to connect with fans, new audiences and exciting business prospects

Artists aren't the only ones who will benefit. .MUSIC will also give music enterprises a unique identity online and set the industry standard for official music websites. The specialized .MUSIC new gTLD will enhance a brand's visibility online by ensuring that .MUSIC websites are with both memorable and trusted

The .MUSIC new gTLD paves the way for the next generation of the internet and the future of music by building a home for everything related to music

- ▶ Music education and the study of music in school curricula
- ▶ Enriching society with artistic and cultural diversity
- ▶ Innovating in both the music and Internet space
- ▶ Fighting piracy and protecting the intellectual property of music

.MUSIC joins other popular communities applying for new gTLDs including .GREEN, .GAY and .SURF



### Applicants for the .MUSIC New gTLD

There are eight applicants for the .MUSIC new gTLD making it one of the most highly contested strings. Applicants include DotMusic Inc, DotMusic / CGRE Commerce Ltd, dotmusiclimited, Amazon Entertainment Names Inc, Victor Cross, Charleston Road Registry Inc (Google) and music LLC

### .MUSIC new gTLD details

#### Applicants

- DotMusic Inc.
- DotMusic / CGRE Commerce Ltd
- dotmusiclimited
- Amazon EU S.Ã r. .

### Free Newsletter Subscription

Subscribe to our newsletter to stay updated on .MUSIC

enter your email address

**Submit**

## Appendix F

### **United Domains:**

*Random sample of .MUSIC domain  
pre-registrations includes brands  
of .MUSIC applicant Google/  
Alphabet:*

*GoogleMusic.music  
YouTubeMusic.music*

You are here: ▶ New Top Level Domains

### New Domain .MUSIC

#### Pre-register .MUSIC domains today

Pre-register your .music new top level domain with

United Domains for free.

.MUSIC

yourdomain1  
yourdomain2

.MUSIC

Pre-Registrations are free and non-binding.

Why Should I Pre-Register?

2013



Total number of  
.MUSIC Pre-Registrations:

▶ 0 ▶ 0 ▶ 1 ▶ 4 ▶ 5 ▶ 5 ▶ 1

#### Recently Pre-Registered

- top10songs.music
- googemus.music
- youtubemus.music
- ephesus.music
- dentistry.music
- pastcsurgery.music
- oncology.music
- oncoogy.music
- entspectast.music
- entsurgeon.music

#### .MUSIC new gTLD details

Applicants	dotMusic
	Minds + Machines
Est. Launch	2013
Start Sunrise Period	n/a
Start Landrush Period	n/a
Category	Community
Est. Price Range	n/a

#### Free Newsletter Subscription

Subscribe to our newsletter to stay updated on MUSIC

enter your email address



## About the .MUSIC new gTLD

The Internet has become the first truly global distribution channel for musicians by providing them with the opportunity to connect with fans, new audiences and exciting business prospects

Artists aren't the only ones who will benefit. MUSIC will also give music enterprises a unique identity online and set the industry standard for official music websites. The specialized MUSIC new gTLD will enhance a brand's visibility online by ensuring that MUSIC websites are with both memorable and trusted

The MUSIC new gTLD paves the way for the next generation of the Internet and the future of music by building a home for everything related to music

- ▶ Music education and the study of music in school curricula
- ▶ Enriching society with artistic and cultural diversity
- ▶ Innovating in both the music and Internet space
- ▶ Fighting piracy and protecting the intellectual property of music

MUSIC joins other popular communities applying for new gTLDs including .GREEN .GAY and .SURF

#### Learn More about the .MUSIC Applicants

There are three known applicants vying for the MUSIC new gTLD including Minds + Machines, Far Further and MyTLD with Musicus

Minds + Machines is a subsidiary of Top Level Domain Holdings and is run by an experienced team who have helped launch 20 top level domains. Minds + Machines plans to provide the technical back end for MUSIC

## **Appendix G**

### **United Domains:**

*Random sample of .MUSIC domain  
pre-registrations includes  
trademarked brands of .MUSIC  
applicant Amazon:*

*AmazonStore.music*

## Face the .MUSIC

The Internet has forever changed how artists distribute their music, and the .MUSIC gTLD is poised to shake things up yet again. Pre-register .MUSIC and get into the groove.

www.

yourdomain1  
yourdomain2  
yourdomain3

.music

SEARCH



## Total Number of Pre-Registrations:

0,028,615 LIVE COUNTER

## Stepping Onto the World Stage

The Internet has become the first truly global distribution channel for musicians by providing them with the opportunity to connect with fans, new audiences and exciting business prospects.

Artists aren't the only ones who will benefit. .MUSIC will also give music executives a unique identity online and set the industry standard for official music websites. The specialized .MUSIC new gTLD will enhance a brand's visibility online by ensuring that .MUSIC websites are with both memorable and trusted.

### Ready for a Brand New Beat

The .MUSIC new gTLD paves the way for the next generation of the Internet and the future of music by building a home for everything related to music.

- ✓ Music education and the study of music in school curriculums
- ✓ Enriching social experiences and cultural diversity
- ✓ Innovation both in music and in the space
- ✓ Fighting piracy and protecting the intellectual capital of music

.MUSIC joins other popular communities applying for new gTLDs including .GREEN .GAY and .SURF

## Find Out More About .MUSIC's Applicants

There are eight applicants for the .MUSIC new gTLD making it one of the most contested strings. Applicants include DotMusic Inc., DotMusic / CGR E-Commerce Ltd., dotMusic Limited, Amazon Entertainment Names Inc., Victor Cross, Charleston Road Registry Inc. (Google) and music LLC.

### Why Pre Register?

- ✓ Stay Up to Date on the New gTLDs
- ✓ Be the First in Line for Registration
- ✓ Registration is free and non binding

### Recently Pre Registered

amazonsore.music	devou.music
hindcema.music	cabna.music
hochschule.music	eemenary.music
d.music	euphorc.music
her.music	zocker.music

### .MUSIC new gTLD details

Est. Launch	Q3/2015
Est. Sunrise Period	Q3/2015
Est. Price Sunrise	n/a
Est. Price	n/a
Applicants	Do Music Inc. Do Music / CGR E-Commerce Ltd. dotMusic Limited Amazon EU S.Ã r. Entertainment Names Inc. Victor Cross Charleston Road Registry Inc. music LLC

## Appendix H

### United Domains:

*Random sample of .MUSIC domain pre-registrations includes famous brand trademarks, such as Microsoft brands:*

*XBoxLive.music*

*WindowsPhone.music*

You are here: > New TLD Information

# New Top Level Domain .MUSIC

## .MUSIC pre-registration is open!

Pre registrations are free and non-binding

Search multiple domain names, separating names by line.

yourdomain1  
 yourdomain2  
 yourdomain3

**.MUSIC**

**Search >>**



**Like** 6 people like this Sign Up to see what your friends like

## Learn more about .MUSIC

The music industry has shifted from a physical to a digital world. The internet has become the first truly global distribution channel for all music fans by providing them with the opportunity to connect with fans, new audiences and exciting business prospects.

.music is the exclusive global community-based top level domain name that gives music enthusiasts a unique identity and an industry standard for official music websites. The specialized music web address enhances a brand's visibility and ensures that music websites are associated with a memorable, self-explanatory and trusted badge restricted to the music community. [www.YourName.music](http://www.YourName.music)

.music paves the way for the next generation of the internet and the future of music by building a home for everything related to music. Since 2005, under the slogan "We Are Music", .music has embarked upon a global community outreach campaign to launch the .music domain name and initiate the music industry's mission focused on:

- ▶ Music education and the study of music in schools and universities
- ▶ Fighting piracy and protecting the intellectual property of music
- ▶ Music fans' welfare, rights & fair compensation
- ▶ Enriching society with artistic and cultural diversity
- ▶ Innovation in both the music and Internet space

.music will contribute proceeds from its domain name registrations to select not-for-profit organizations that support its mission on core values and initiatives.

Artists will be able to create unique song .music web addresses to help them market new single releases more effectively. Giving each song a dedicated address makes searching for songs on the web much faster and easier by simply entering it directly into a browser's address bar, such as <http://SongNameArtistName.music>. Users can also interact directly with the music video lyrics and tabs of each song as well as add their own user-generated content.

### Number of Pre-Registrations



dotMusic  
Launch Date (est.) 2013

### Recently pre-registered

- ▶ mother.music
- ▶ qudfusion.music
- ▶ jsofficial.music
- ▶ hamptoncourthouse.music
- ▶ scaaondon.music
- ▶ frdge.music
- ▶ chnawhte.music
- ▶ deukemus.c.music
- ▶ deukesound.music
- ▶ deuke.music
- ▶ shaabom.music
- ▶ djufo.music
- ▶ epas.music
- ▶ xboxve.music
- ▶ windowsphone.music



# Appendix I

## Google Transparency Report

*Copyright infringement takedown requests for .ROCKS domains include:*

*torrents.rocks ( 1,447,486 )*

*extratorrent.rocks (1,137,431)*

*kickass-torrent.rocks (769,053)*

*kickasstorrent.rocks (732,266)*

*kickasstorrents.rocks (673,906)*

*kickass-torrents.rocks (611,182)*

*kickasstorrentz.rocks (530,482)*

*thepiratebay.rocks (510,889)*

*kickass.rocks (301,408)*

*mp3song.rocks (208,360)*



## Transparency Report

# Explore the data

Our data comes from the information provided by copyright owners and their representatives when they submit copyright removal requests. All tables are sorted in descending order by total number of URLs requested to be removed.

[Owners](#)[Domains](#)[Reporting Orgs](#)

Domain	Copyright Owners	Reporting Organizations	Requested URLs	% Domain URLs indexed
<a href="#">torrents.rocks</a>	837	134	1,447,486	<50%
<a href="#">extratorrent...</a>	348	65	1,137,431	≥50%
<a href="#">kickass-torrent.rocks</a>	933	98	769,053	≥50%
<a href="#">kickasstorre...</a>	598	103	732,266	<50%
<a href="#">kickasstorre...</a>	1,115	161	673,906	<10%
<a href="#">kickass-torrents.rocks</a>	880	85	611,182	<50%
<a href="#">kickasstorre...</a>	869	80	530,482	<50%
<a href="#">thepiratebay...</a>	304	80	510,889	≥50%
<a href="#">kickass.rocks</a>	442	87	301,408	<50%
<a href="#">pbp.rocks</a>	177	36	247,830	—
<a href="#">1337x.rocks</a>	342	86	244,441	<50%
<a href="#">tpb.rocks</a>	110	26	209,497	—
<a href="#">mp3song.roc...</a>	225	30	208,360	<50%
<a href="#">isohunt.rocks</a>	379	87	139,972	<5%
<a href="#">mp3clan.rocks</a>	854	11	60,380	<50%
<a href="#">piratebay.roc...</a>	461	96	46,769	<5%
<a href="#">mpe.rocks</a>	130	19	36,525	<10%
<a href="#">aiohow.rocks</a>	338	23	25,590	<1%
<a href="#">ddlvalley.rocks</a>	283	96	24,689	<50%
<a href="#">ebooks.rocks</a>	600	113	16,393	<5%



1 - 20 of 194



## **Appendix J**

### **Google Transparency Report**

*10,900,000 copyright infringement  
takedown requests by BPI in October, 2016*

*According to Google's Transparency  
Report, "99.4% of URLs reported by [the  
BPI] are ultimately removed"*



## Transparency Report

Reporting Organization:

BPI (British Recorded Music Industry) Ltd

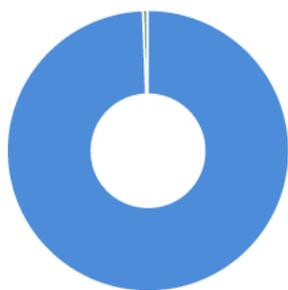
### Requests

FILTER BY ► [Month](#) Year All time

Sep 30, 2016 to Oct 31, 2016

# 10.9M

URLs requested to be removed



- Removed
- No Action Taken

99.4% of URLs reported by this organization are ultimately removed

# **Appendix K**

## **CircleID Post on .MUSIC**

*How .MUSIC Will Go Mainstream and  
Benefit ICANN's New gTLD Program*

January 6, 2016

## How .MUSIC Will Go Mainstream and Benefit ICANN's New gTLD Program

Jan 06, 2016 9:27 AM PST | Comments: 6 | Views: 39,413

By **Constantine Roussos**



Since the launch of the New gTLD Program in 2012, it has become evident that new gTLD registries overestimated the demand for new Top-Level Domain name extensions. Furthermore, new gTLD registries did not anticipate the hurdles in raising awareness, not to mention creating adoption for new domains. Even the most pessimistic New gTLD Program critic did not expect such uninspiring results. It was a wake up call for many in the domain industry. The New gTLD Program currently lacks credibility. No new gTLD has yet to go mainstream and capture the world's imagination.

### Obstacles to New gTLD Success: Competing with .COM, Awareness and Adoption

At the start of last year, [Inc. magazine](#) asserted in January 2015 that: "*given the challenges facing TLD adoption, it's unlikely that TLDs will make a huge marketing impact in 2015 unless there is some sort of game changing development.*"

At the same time, [Forbes](#) agreed with that assessment:

*"In contrast to the slippery territory of the new domains, the existing names are solidly established. The .COM extension has been around for almost 30 years, and every Fortune 500 company has a .COM registration. The top 50 global brands direct customers to a .COM homepage. Almost all educational institutions use a .EDU suffix. And others, like .ORG, clearly stand for nonprofit organizations. People have come to rely on these familiar domains and are more than a little hesitant to incur the costs and uncertainty of venturing into new territory. Not a single leading brand has switched its online identity to one of the new domains, despite all the hype surrounding their introduction a year ago."*

Many in the domain community also had some harsh words about the launch of ICANN's New gTLD Program.

Domain Name Wire (DNW) has been following ICANN's New gTLD Program closely since its

inception. In January 2014, DNW criticized the launch in a post titled "[New TLDs come out with a whimper](#)," followed by another [article](#) in March 2014 with harsh criticism stating that "*the launch of new domain names has been anything but smooth. Confusion. Frustration. Incompetence.*" Nearly 2 years later DNW [reviewed the New gTLD Program](#) asserting that "*[2015] wasn't a break-through year. Hundreds more top level domain names hit the market during 2015. But adoption of new domains didn't take off, proving what many in the industry have been saying: this is going to be a long, gradual process.*"

Dr. Paul Vixie, a pioneer of the internet's domain name system (DNS), took the criticism a step further according to [ZDNet](#):

*"I think it is a money grab. My own view is that ICANN functions as a regulator, and that as a regulator it has been captured by the industry that they are regulating. I think that there was no end-user demand whatsoever for more so-called DNS extensions, [or] global generic top-level domains (gTLDs). They're gradually rolling out, and they are all commercial failures."*

As one of the biggest proponents of the New gTLD Program throughout the years, I am dissatisfied with the results of the New gTLD Program. Before the launch of the New gTLD Program in 2012, all proponents of the New gTLD Program worked together following a culture of "*all for one and one for all*" with a shared vision to get the New gTLD Program approved and launched. Unfortunately, those collaborative dynamics quickly changed to the detriment of the New gTLD Program and ICANN.

Michael Berkens from [TheDomains](#) made an astute observation in January 2015, stating that "*the new gTLD [registries] better not hope it's a zero sum game where you can win if only someone else loses. Otherwise it could be an everyone loses scenario.*"

My opinion is unwavering: new gTLD success is about collaboration and co-operative competition, known as co-opetition, to spur trust and adoption. Co-opetition is defined as collaboration between business competitors in the hope of mutually beneficial results.

This is why I have been one of the biggest cheerleaders of community gTLDs. They are all about expanding the value pie by creating shared value to all community constituents. The value of the community-based network effect is seen in TLDs such as .EDU, .GOV and .ORG. Registrants involved in U.S. post-secondary education, U.S. government or non-profits will choose .EDU, .GOV and .ORG respectively over .COM because those TLDs stand for something that is trusted and is believable by the general public. Another example is .BANK which is carving out its niche by becoming the status quo for banks following the trust model. However, none of these success stories are achievable without community-based policies implemented, high quality content and usage relevant to those respective communities. Serving a higher purpose provides more meaning than the semantic value of the TLD.

Many new gTLD registries have made a colossal mistake trying to compete head-to-head with .COM under the non-differentiated factory approach of generically "open" TLDs. Most have employed identical marketing launches without offering a meaningful and innovative value proposition to

registrants. The marketplace has spoken. By following the same "old school" TLD marketing playbook, the most likely outlook for new gTLD registries are diminishing returns, especially for new gTLD registries that lack the economies of scale and scope competitive advantage. A non-differentiated gTLD competing head on with .COM (which shares all its attributes except the gTLD's novelty name) is a losing strategy and does not benefit ICANN's New gTLD Program or raise awareness.

The only successful route for new gTLD registries to compete is one based on "value innovation." This means to forget competing directly with .COM and making .COM irrelevant by strategically changing the playing field. Malcolm Gladwell's best seller "David and Goliath: Underdogs, Misfits and the Art of Battling Giants" [elaborates further](#):

*"Davids win all the time. The political scientist Ivan Arreguín-Toft recently looked at every war fought in the past 200 years between strong and weak combatants. The Goliaths, he found, won in 71.5% of the cases. Arreguín-Toft was analyzing conflicts in which one side was at least ten times as powerful — in terms of armed might and population — as its opponent, and even in those lopsided contests the underdog won almost 33% of the time...When an underdog fought like David, he usually won. But most of the time underdogs didn't fight like David."*

Bottom line, you cannot beat .COM fighting them under their own generically "open" and non-differentiated rules. .COM will always have a colossal home-court advantage. The reason is simple: .COM has billions of dollars spent in marketing to raise awareness, [over 120 million registrations](#) and decades of user recognition. Verisign is fortunate that they do not have to spend a dime in mainstream promotion because they have others — the .COM adopters — spending billions. The .COM adopters are those who prefer the status quo because educating the general public over a new gTLD is difficult, expensive and confusing. The only way to break the status quo is making a TLD the status quo by widespread community adoption.

The only way that a new gTLD can go mainstream is to share some of the same characteristics shared by .EDU, .GOV or other community-tailored TLDs that are aligned with a community-based purpose that would convince registrants to choose a new TLD as their first option over a .COM. Such an objective is insurmountable if a TLD follows a non-differentiated, open approach without any policies catering to their corresponding community. Laying the foundations for adoption is critical for success. It also takes widespread adoption from their corresponding communities for such a feat to happen.

There are some key questions most gTLD registries failed to answer: How can a new gTLD registry effectively differentiate itself to effortlessly convince the most appropriate registrants (i.e. the communities generally-associated with each gTLD) to register, develop and market those new domains as their official website and email address online? This is the only way to ensure that usage and compelling content from new gTLDs become more prevalent and eventually go mainstream. While some isolated domain name success stories with new gTLD are expected, such outliers do very little to increase awareness for the New gTLD Program helping all new gTLD registries as a result. Jeff Davidoff, Donuts chief marketing officer [stated](#) that *"pop culture usage is really going to accelerate the*

*movement. Nothing beats the power of pop culture to drive a movement.*" Such an assessment is precise but a few select movies and studios using a new gTLD will not impact nor change the widespread perception of new TLDs as "wastelands." [Will .music domains make the Internet better or just more of a crowded wasteland?](#) Isolated new gTLD success stories do not constitute adoption because of their limited reach and longevity. Ongoing marketing and community adoption is paramount to success.

### **How Awareness, Adoption and Differentiation Can Be Achieved**

The only way to spur mainstream awareness of ICANN's New gTLD Program is widespread industry adoption of a new gTLD that would create the multiplier network effect that would virally spread across all marketing channels fostering an environment of high quality, relevant and trusted content to increase exposure through higher search result rankings.

The only remaining gTLD that can accomplish this is the .MUSIC community-based gTLD. DotMusic is the only .MUSIC applicant that has followed unified principles, ideals and Mission aligned with the community-based purpose that the Community subscribes to, such as:

- creating a trusted identifier and safe haven for music consumption;
- protecting musicians' rights and intellectual property;
- fighting copyright infringement, supporting fair compensation and music education; and
- following a multi-stakeholder approach of representation of all types of global music constituents without discrimination.

To accomplish this objective, DotMusic developed its Mission and Registration Policies using a consensus-driven, bottom-up methodology via feedback and universal principles collected in its ongoing, extensive [public global Music Community communication outreach campaign](#) launched in 2008.

These principles and community-tailored policies to which the entire global music community subscribes to is the underlying reason why DotMusic has amassed the largest global music coalition ever assembled to support a music cause, including [organizations with members representing over 95% of global music](#). It bears noting that the [multi-stakeholder .MUSIC Governance Board](#) is comprised of the most trusted and globally recognized organizations associated with music.

DotMusic is expected to qualify as a "community" because it [exceeds the required Community Priority Evaluation \(CPE\) criteria consistent with previous prevailing EIU determinations](#) for .OSAKA, .HOTEL, .RADIO, .ECO, and .SPA. Thus far, DotMusic has received over 2,000 letters of support, more than all CPE applicants combined. DotMusic has also been supported by highly influential featured artists and the [International Music Organisation \(IAO\)](#) that represents featured artists globally. Such adoption would make .MUSIC a driving force for ICANN's New gTLD Program. Popular artists that have voiced support for the .MUSIC community initiative include [Radiohead](#), [Imogen Heap](#), [Travis](#), [Sandie Shaw](#) and many others. This unprecedented level of awareness resulted in monumental support before the

.MUSIC gTLD has even launched.

DotMusic's value-based innovation for a .MUSIC community-led initiative is one of creating differentiated value and making a difference that truly matters. For example, DotMusic does not allow parking pages. According to [nTLDStats](#), the vast majority of new gTLD domains, an astounding 71.35%, are parked (as of January 3rd, 2015). This unique policy for .MUSIC is one of the most innovative restrictions in the New gTLD Program because it mandates website development, usage and higher quality content. Legal music content and usage is king. Furthermore, .MUSIC can be the first TLD with copyright protection provisions and enforcement. These ensure .MUSIC is a safe haven for legal music consumption and licensing and to increase consumer trust and safety. These include policies to stop domain hopping, takedown policies in the case of mass piracy, authorization provisions, permanent blocks, privacy and proxy provisions, true name and address mandates, trusted sender complaint policies and many other [.MUSIC enhanced safeguards](#).

**DotMusic has created a strong, trusted brand for itself over the last decade and has raised unprecedented support and awareness in both the domain and music industries that will be leveraged by DotMusic to become the first new gTLD to be community and industry adopted and to go mainstream.** This feat cannot be achieved at such a scale under a .MUSIC gTLD model that lacks community-based policies serving the music community and has no multi-stakeholder governance structure. The semantic value of a new gTLD alone cannot convince an entire community to adopt it.

The semantic value of new gTLDs is currently the most prevalent value proposition to register a new domain. Semantic value, usage and general awareness will increase steadily over time for new gTLDs but more is needed to catapult that growth rate. It is a win-win situation for all players involved: ICANN will have more success stories to convincingly vindicate the launch of its New gTLD Program and to demonstrate that it has served the global public interest and increased competition, diversity and consumer choice. New gTLD registries (especially portfolio TLD registries) will also benefit because raised awareness and mainstream adoption of new gTLDs will persuade registrants to choose new gTLDs over .COM because the risk of confusion and lack of awareness of the existence of new gTLDs will have decreased. As more gTLDs are used and marketed globally, the growth of new gTLDs will increase dramatically given the multiplier effect benefiting all constituents involved.

### **The Way Forward: Collaboration and Co-opetition**

The way forward for the domain industry is co-opetition, in which new gTLD registries act with what all stakeholders recognize as partial congruence of interests. This approach of co-operative competition based on shared mutually-beneficial interests would be similar to the culture adopted by the new gTLD applicants before the New gTLD Program was launched. Sharing a similar purpose ultimately convinced ICANN to launch the New gTLD Program. Today, the challenge is convincing the general public to register new gTLDs and proving the New gTLD Program's critics wrong. As one of the biggest advocates of ICANN's New gTLD Program, it is my belief that the only way to achieve this is through genuine co-operative effort, collaboration and working together to figure out how we can

accelerate new gTLD growth and awareness.

The [Business Ethics Journal Review](#) emphasizes the benefits of cooperation:

*"Globalization has not just led to greater competition but also to an increase of cooperation. A successful business in times of globalization is not merely a good market actor but also an organization that is able to cooperate. It should be noted that from a theoretical point of view cooperation is a non-economic mode of social interaction (in opposition to exchange and competition) that, however, is highly relevant for concrete business practices since it might lead to positive economic consequences."*

It has been adequately proven that competing directly with .COM is an unsustainable, losing battle. For long term success, growing profitability and sustainability, new gTLD registries will eventually have to collaborate to re-align their interests and business strategies under a shared value model in a manner that is beneficial to all parties in the domain value chain. Creating this indirect competitive advantage is ultimately the only way to compete with .COM: One for all, and all for one.

### **.MUSIC Will Go Mainstream Benefiting the New gTLD Program and ICANN**

We believe that a community-based .MUSIC launch will propel ICANN's New gTLD Program to new heights benefiting all parties involved: the global music community, ICANN, new gTLD registries, registrars and society as a whole. A widespread, community-adopted .MUSIC has the highest chance of any gTLD to achieve the goal of a new gTLD going mainstream and becoming industry adopted to raise unprecedented new gTLD awareness with the general public.

As [Diffuser.fm points out](#), .MUSIC *"could be the biggest thing to happen to the web"* and live up to the expectations voiced in December 2015 at [Techcrunch Disrupt](#) as a *"game changing"* new gTLD and to become a *"global home and first-of-its-kind database for the music community"* as disclosed recently in [Billboard magazine](#).

DotMusic is in a prime position to jumpstart the New gTLD Program and create the necessary momentum to raise public awareness about new gTLDs. The domain community has a lot of positive developments to look forward to in 2016.

*This post is part of the original article ["How .MUSIC will go mainstream and benefit ICANN's New gTLD Program."](#) For more information, visit the [.MUSIC website](#).*

By [Constantine Roussos](#), Founder of DotMusic. Visit the blog maintained by Constantine Roussos [here](#).

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## **Appendix L**

### **IFPI/WIN "Investing in Music" Report 2016**



# INVESTING IN MUSIC



# THE VALUE OF RECORD COMPANIES





**M**aking music is about passion, inspiration, emotion and creative talent. However, it is not just a gift of human nature: it also requires an extraordinary amount of hard work, time, effort and sustained investment.

An enormous supporting cast of skilled, dedicated and passionate people are devoted to helping make the artist and their music a success. This behind-the-scenes community works in hundreds of different ways, in countless different roles, to support the artist and to take their work to a large audience of fans, often spanning the globe. It is no less important in today's music landscape than in the past – in fact it is more important. In a world of digital diversity and complexity, this help is needed more than ever before.

“Investing in Music” tells the story of the immense effort and skill of the team surrounding today's recording artists. It also shows how much financial investment is needed to help an artist pursue the career to which they aspire.

This is a truly impressive story, giving insight into the work of today's global music sector. As an artist who has witnessed their vital role over my long career, I salute the investors in music.

**PLÁCIDO DOMINGO**  
**CHAIRMAN, IFPI**

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# RECORD COMPANIES BRING INVESTMENT AND VALUE TO MUSIC

**M**usic does not just happen. Taking a song from a concept to a recording and then distributing it around the world takes a huge amount of work, time and effort, and an array of people. There are the writers and recording artists, the creators and performers. There are those who discover and nurture artists, those who produce the recordings and the videos, and those who market and promote them. And there is the distribution, in physical and digital formats, to thousands of retail partners and digital services.

All this can demand substantial up-front investment, well before a single stream plays or an album goes on sale.

Success often also requires a long-term vision. The vast majority of albums do not break even financially, and those that do take time to do so. Nor is the true value of every artist or album immediately recognised and appreciated.

Record companies remain the largest investor in music, ploughing in more than US\$4.5 billion in 2015, or about 27 per cent of their revenues, into A&R and marketing. They have sustained this investment through recent years, even as the industry weathered two decades of revenue decline.

The partnership between artists and labels goes far beyond the financial. Record companies nurture artists, allowing them to develop their sound, their craft and their careers. Labels' marketing expertise and resources enable them to create and deliver cutting-edge campaigns that engage fans around the world. They help manage thousands of partners spanning the globe, requiring local expertise in each market with networks of relationships and marketing

and promotional resources. They help develop local artists in diverse languages across genres from classical to hip hop.

The investment from the record industry has also been essential in driving music's digital transition. Record companies build out the systems and infrastructure that enable the licensing of some 360 digital music services with more than 40 million tracks. As a result, today's music industry helps connect artists and their music with fans in multiple new formats – from buying downloads to subscription streaming and more.

This report is about record companies' enduring value to music. In the digital world, the nature of their work has evolved, but their core mission remains the same. It is the mission of discovering and breaking new artists, building their careers and bringing the best new music to fans. These are the defining qualities of record companies' investment in music.



**FRANCES MOORE**  
CEO, IFPI



**ALISON WENHAM**  
CEO, WIN

**THE INVESTMENT FROM RECORD COMPANIES HAS BEEN  
ESSENTIAL IN DRIVING MUSIC'S DIGITAL TRANSFORMATION**

# THE VALUE OF RECORD COMPANIES

**US\$ 4.5  
BILLION**

global investment in A&R  
and marketing in 2015



**27%**

share of record company  
revenues invested in  
A&R and marketing

**360+**

music sites serviced by record  
labels worldwide

**US \$0.5 - \$2  
MILLION**

the typical cost  
of breaking a  
worldwide-signed  
artist in a major market  
such as US and UK





# Music is about hard work and substantial investment

Music is being crafted, created, produced and enjoyed in more ways than ever before in history.

Virtually every artist who reaches the charts has partnered with a record company. They do so by choice, in a landscape that offers artists more ways to release their music than ever before. They choose this route for good reason: to gain the experience, expertise and significant investment that a record deal brings.

A record company works with a constellation of different teams, all centred around the artist. There are songwriters and producers, A&R (artist and repertoire) professionals, marketing, publicity, promotion and video production teams, as well as those in merchandising, accounting and distribution.

Those working in A&R discover artists and help them refine their music. Other teams see that albums are produced

and recorded to meet the highest audio standards and converted into the hundreds of digital formats used by the digital music services. They also ensure that CDs and vinyl are manufactured and shipped to record stores and retail partners.



## RECORD COMPANIES PROVIDE SUPPORT IN THREE KEY WAYS:

### 1. DISCOVERING & NURTURING ARTISTS

enabling them to develop their sound and their craft.

### 2. PRODUCING THE WORK OF ARTISTS

producing their music and other forms of creative output (such as visual media or merchandise) so they can enjoy the greatest success creatively and commercially.

### 3. PROMOTING ARTISTS

Connecting them with fans in new and innovative ways.

Justin Bieber  
Photo courtesy of Def Jam Recordings

Sia  
Photo by Mary Ellen Matthews

Creative teams produce high-quality videos whilst promotional experts publicise and market artists and their music. Other teams manage essential backroom jobs: accounting for sales and consumption and delivering artists their royalty payments.

This work requires substantial investment. At the top end, a major international signing will cost between US\$0.5 million and US\$2 million to break in a major market such as the US or UK. That is the upfront investment only; it may or may not ever be recouped by the label on a specific album, which is why artist contracts often span several albums.

**A MAJOR INTERNATIONAL SIGNING WILL COST BETWEEN US\$0.5 MILLION AND US\$2 MILLION TO BREAK IN A MAJOR MARKET**

### Labels' typical investment in a major new signing

	<b>ADVANCES</b>	<b>US\$50,000 - 350,000</b>
	<b>RECORDING COSTS</b>	<b>US\$150,000 - 500,000</b>
	<b>VIDEO PRODUCTION</b>	<b>US\$25,000 - 300,000</b>
	<b>TOUR SUPPORT</b>	<b>US\$50,000 - 150,000</b>
	<b>MARKETING AND PROMOTION</b>	<b>US\$200,000 - 700,000</b>
	<b>TOTAL</b>	<b>US \$475,000 - 2,000,000</b>

#### ADVANCES

Advances are commonly paid to artists to allow them to concentrate on writing, rehearsing and recording. These advances are non-returnable, but recoupable against future royalties. Record companies are therefore taking the risk in this highly competitive market.

#### RECORDING COSTS

These can vary widely between different artists and can reach as high as US\$500,000 for projects with the most sought-after producers and session musicians.

#### VIDEO PRODUCTION

Virtually all new releases involve the production of a video. Costs vary widely from US\$1,500 for a very small-scale production to US\$500,000 for superstar projects.

#### TOUR SUPPORT

Labels in many cases provide tour support for their artists. The longer duration of campaigns in the streaming world means that artists can be on the road for a longer period, promoting their material through live performances. They need funding to sustain this and it is often the record company that provides it.

#### MARKETING AND PROMOTION

This is the biggest item of spending, where labels have a key impact. As consumers increasingly access music digitally, marketing efforts have shifted substantially online, where labels create campaigns that directly link fans to artists and services where they can access their music.



# Record labels are the primary investors in music

MUSIC COMPANIES INVEST

## US\$4.5 BILLION ANNUALLY

IN DISCOVERING, NURTURING AND PROMOTING ARTISTS

No other segment of the music sector invests in artists on anything like this scale. No other third parties or music distributors invest any comparable sums in artists' careers.



THE GLOBAL RECORDED MUSIC INDUSTRY IN 2016 IS HIGHLY INVESTMENT-INTENSIVE, PLOUGHING

## 27%

OF ITS REVENUE BACK INTO DEVELOPING AND MARKETING ARTISTS.

The companies have maintained this share over many years, even as they have weathered downturns in the market.

Sevin Alias  
Photo by Ruud Baan

## FOCUS ON: Investment in local repertoire

Music has a unique power to unite people around the world. It can also serve as a celebration of a culture or community. Record companies invest heavily in local music, helped by a streaming world that has transformed the opportunities for local acts to reach fans. The recovery of streaming-dominated markets such as Norway and The Netherlands has increased investment in local artists. In major non-English language markets such as France and Germany, national repertoire has grown in importance in recent years.

## Share of local acts in the national top 10 album chart, 2015:

ITALY	98%
FRANCE	98%
GERMANY	88%
UK	78%
NETHERLANDS	55%



### Local artists emerging through streaming

Streaming can help local artists cut through more effectively to their fan base. Dutch independent record company, Cloud 9, has been at the forefront of developing the urban music scene in The Netherlands – stepping up its spending on local acts by more than 300% in the last two years and signing pioneering local artists such as Sevn Alias.

**Sevn Alias**  
Photo by Ruud Baan



# Breaking down labels' US\$4.5 billion annual investment

Record companies' annual US\$4.5 billion investment (or about 27 per cent of their annual revenues) breaks down into two primary areas:

## A&R (or Artists & Repertoire), the discovery and development of artists

– representing more than US\$2.8 billion every year.

**Marketing**, the campaigns that promote artists and their music, bringing them to fans' attention around the world – which totals over US\$1.7 billion annually.

## US\$4.5 BILLION INVESTMENT



MARKETING & PROMOTIONAL CAMPAIGNS

US\$1.7 BILLION



ARTISTS & REPERTOIRE (A&R)

US\$2.8 BILLION

THIS INVESTMENT IN A&R HAS INCREASED FROM US\$2.5 BILLION IN 2013

The 1975  
Photo courtesy of Universal Music

## FOCUS ON:

### A&R (Artists and Repertoire) – nurturing talent

The ability to discover, nurture and break a recording artist is a defining skill and asset of the record companies. They invest US\$2.8 billion (or about 17 per cent of revenues) a year in discovering and developing artists, with a view to achieving commercial success with their acts. This investment in A&R has increased from US\$2.5 billion in 2013.

It is an activity full of risk. Some labels estimate the ratio of commercial success to failure as 1 in 4; others consider the chances to be much lower – less than 1 in 10. It is the record companies alone that shoulder this considerable risk.

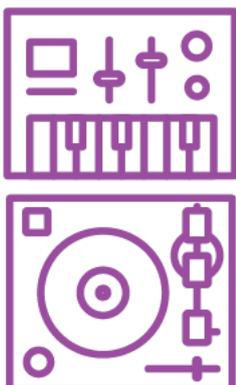
There are tens of thousands of artists on label rosters worldwide. Newly-signed artists are the lifeblood of a record company's business and around one-fifth of all roster artists are new signings from the previous 12 months.

In addition to financial support, a record company provides artists with access to a wealth of experience, expertise and a network of connections. They collaborate creatively with developing artists, helping them to realise their vision for how they want their music to sound and how they want to express this visually to their fans.

The early backing of a record label also acts as a signal to other players in the industry – from songwriters to record producers – that this artist has strong potential.

## How music's global 16.9% A&R investment compares with other sectors' R&D investment

Recorded music is an exceptionally investment intensive business. The proportion of revenue invested in A&R remains higher than the equivalent spent on research and development (or R&D) by any other sector. This is highlighted by the European Union's Industrial R&D Investment Scoreboard 2015.



## A&R INVESTMENT (OR R&D EQUIVALENT) BY INDUSTRY

# MUSIC 16.9%

PHARMACEUTICALS & BIOTECHNOLOGY	14.4%
SOFTWARE & COMPUTER SERVICES	10.1%
TECHNOLOGY HARDWARE & EQUIPMENT	8.0%
LEISURE GOODS	5.8%
AEROSPACE & DEFENCE	4.5%
ELECTRONIC & ELECTRICAL EQUIPMENT	4.5%
AUTOMOBILE & PARTS	4.4%
HEALTHCARE EQUIPMENT & SERVICES	3.8%
INDUSTRIAL ENGINEERING	2.9%
CHEMICALS	2.6%

Source: 2015 EU Industrial R&D Investment Scoreboard. R&D intensity is the ratio between R&D investment and the net sales of a company or group of companies

## FOCUS ON: Marketing – smarter, wider, better

Record companies invest more than **US\$1.7 billion annually** in marketing artists. They also assign expert teams to create and deliver the campaigns that break their music worldwide.

These teams will work with an artist to develop a bespoke campaign. They create content that tells a compelling story about the artist and their music and find the right channels to appeal to their future fan base.

A global marketing team at a major record company can coordinate as many as 1,500 marketing people worldwide. They will use their local connections and expertise to promote an act in individual markets around the world.



RECORD COMPANIES SPEND

**US\$1.7 BILLION**

**A N N U A L L Y**

**IN MARKETING ARTISTS**

### A streaming world

The streaming world has dramatically changed the economics of marketing new releases, creating new opportunities and risks. Streaming services can sustain the popularity of new releases over a long period of time, but they also require a longer period of marketing investment.

On streaming services, where revenue is generated by the number of times a track is listened to, it can take about a third longer, compared to physical and download formats, for a company to recoup its investment in an artist. Consequently, record companies are now funding and supporting sustained marketing campaigns for a longer period of time with the aim of achieving commercial success with their act.



**Maitre Gims**

**BREAKING**

**BEYOND  
BORDERS**

Congolese-born rapper and singer, Maitre Gims, first found success as a solo artist in France. Signed to Wati B, under exclusive licence to Jive Epic (a division of Sony Music France), he is now breaking through to other European countries while still singing and rapping in French.



**Sia**

Australian artist Sia has found success both as a songwriter, penning huge hits for Rihanna, Beyoncé and Katy Perry, and as a global superstar in her own right. Well known for being camera shy, her label helped promote the music with non-traditional marketing tactics led by creative visuals for multiple hit records. Her music resonates with fans around the globe.

## The 1975

The 1975 have found huge success with their recent album, topping both the UK and US charts and earning a Mercury Prize nomination in the UK. They have created a strong visual identity to distinguish their music and live performances.



## Christine and the Queens

Indie pop star, Christine and the Queens, is a French artist who has launched out of her native market to achieve huge success internationally since releasing her first EP in 2012. Developed in France by her record company, Because Music, and singing in two languages, she has now broken into the US, UK, other European markets and Australia in recent years.



**1,500**  
**MARKETING**  
**EXPERTS**

**Christine and the Queens**  
Photo by DR

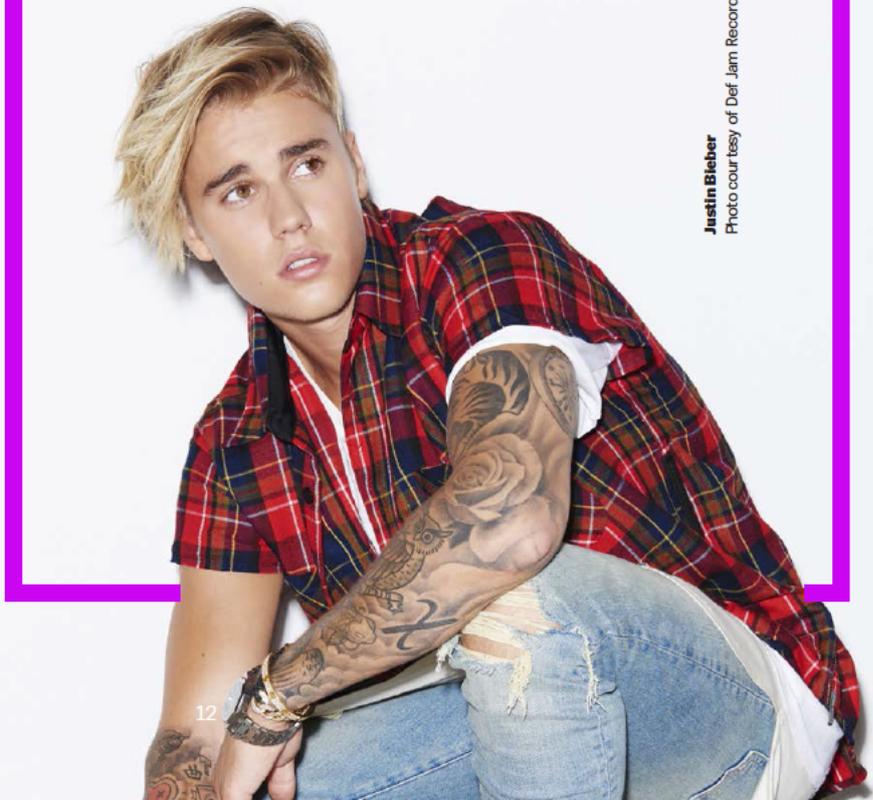
**The 1975**  
Photo courtesy of  
Universal Music

# HARNESING A GLOBAL TEAM -

## WITH LOCAL EXPERTISE

### Justin Bieber

With Justin Bieber's album, Purpose, his record company harnessed its global reach in coordination with local teams around the world. In total around 1,500 marketing experts were involved in launching it to his fans, helping to make it a huge global success.



**Justin Bieber**  
Photo courtesy of Def Jam Recordings



Li Ronghao  
Photo courtesy of Warner Music Group

# Developing the digital market

In addition to investing directly in artists, music companies also invest, along with distributors, in the fast-developing infrastructure of the digital market.

Servicing a supply chain with around 360 licensed digital services worldwide brings significant costs. Substantial investment goes into systems to manage the large and complex task of efficiently and securely distributing more than 40 million recordings, videos and images across multiple platforms. This ensures the right music is made available around the world in the right format.

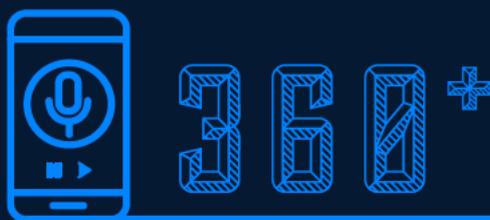
These systems also ensure the revenue generated can be tracked and distributed accurately whilst also providing huge amounts of data about where the music is being listened to in order to inform their approach to marketing and promoting artists.

## LI RONGHAO

Singer songwriter Li Ronghao has developed from a breakthrough artist in China to one of the biggest regional superstars, built up by Warner Music, enjoying success in Taiwan, Hong Kong, Singapore and Malaysia.

This investment remains constant as record companies adapt to keep pace with the needs of each individual digital service as well as those of the fans, artists and managers.

Record companies have also invested heavily in the development of “portals” that show artists and their managers how and where their music is being consumed and the revenues being generated. These are designed to be easily accessible and can provide up to date information that can be filtered in different ways to show an artist how their music is being listened to on digital services and around the world.



**MUSIC SITES  
SERVICED BY RECORD  
LABELS WORLDWIDE**

**SYSTEMS TO  
MANAGE MORE  
THAN 40 MILLION  
RECORDINGS**





# Unlocking new revenue streams

Anitta  
Photo courtesy of Warner Music Group

The record company's investment is the seed that can build a career generating an array of other revenue streams. Once a record company has helped an artist to break through to an audience with their music, further revenue opportunities can be developed.

These can directly relate to their music – such as licensing a track for use in a movie, TV programme or video game – or draw on the wider 'brand' of the artist – where they may endorse a product or even develop products of their own. Individual artists commonly earn up to 90 per cent of the revenues earned from a branding partnership, and music has been the catalyst for this.

## ANITTA

Brazilian recording artist Anitta is working with her record company to take her enormous success in Latin America to Europe and the US. She participates in partnerships with a number of leading brands including Danio-Nestlé, Fiat, Pepsi and Samsung.

A record company may have as many as 200 long-term brand partnerships active on behalf of their artists at any point in time. In careful collaboration with their artists, record companies actively seek out, develop and secure these opportunities.



## INDIVIDUAL ARTISTS COMMONLY EARN UP TO



**OF THE REVENUES FROM A BRAND PARTNERSHIP**



# Exhibit 25

**ARIF HYDER ALI**

Contact Information Redacted

Contact Information Redacted Direct

Contact Information Redacted Fax

December 15, 2016

**VIA E-MAIL**

ICANN Board Governance Committee (BGC)  
c/o Chris Disspain, ICANN BGC Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17**

Dear Chairman Disspain and members of the BGC:

We are writing on behalf of our client, DotMusic Limited (“DotMusic”), to request that the Board Governance Committee (the “BGC”) consider during its review of DotMusic’s Reconsideration Request 16-5 the Council of Europe’s recently published report, authored by Eve Salomon and Kinanya Pijl, entitled, “Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (the “CoE Report”).<sup>1</sup> The Council of Europe is Europe’s leading human rights organization, with 47 member states (28 of which are also members of the European Union).<sup>2</sup> The Council of Europe also has observer status within ICANN’s Governmental Advisory Committee (“GAC”).

The CoE Report provides additional support for the BGC to accept DotMusic’s Reconsideration Request 16-5 and approve DotMusic’s application for .MUSIC. Given the

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<sup>1</sup> Eve Salomon and Kinanya Pijl, Council of Europe Report on “Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Directorate General Human Rights and Rule of Law (DGI) (2016) 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>2</sup> See Council of Europe, Home Page, <http://www.coe.int/en/>.

Council of Europe’s global nature and remit and its participation in the GAC, we submit that the BGC must seriously consider the report’s findings in relation to .MUSIC.

### **The CoE Report Corroborates DotMusic’s Reconsideration Request 16-5**

The CoE Report identifies many of the same issues raised by DotMusic in Reconsideration Request 16-5 with respect to the community priority evaluation (“CPE”) of DotMusic’s application. It confirms that the CPE process was severely undermined by issues of inconsistency, disparate treatment, conflicts of interest, and lack of transparency in violation of ICANN’s Bylaws and Articles of Incorporation. Furthermore, it addresses the specific ways in which these failings harmed DotMusic. The following excerpts from the CoE Report speak for themselves on these issues:

#### *ICANN’s Current CPE Process Contains Substantial Flaws*

- “During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination.”<sup>3</sup>
- “[W]e have found that priority is given to some groups and not to others, with no coherent definition of ‘community’ applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority.”<sup>4</sup>

#### *ICANN and the EIU Treated DotMusic Differently Than Successful Community Applicants*

- “*First*, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to

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<sup>3</sup> *Id.*, p. 9.

<sup>4</sup> *Id.*, p. 16.

avoid any ‘double-counting’ – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria. However, the *EIU appears to double count ‘awareness and recognition of the community amongst its members’ twice*: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.”<sup>5</sup>

- “As an example, the .MUSIC CPE evaluation says:

*1A: However, according to the AGB, ‘community’ implies ‘more of cohesion than a mere commonality of interest’ and there should be ‘an awareness and recognition of a community among its members.’ The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls ‘cohesion’ – that is, that the various members of the community as defined by the application are ‘united or form a whole’ (Oxford Dictionaries).*

*1B: However, as previously noted, the community as defined in the application does not show evidence of ‘cohesion’ among its members, as required by the AGB.*

Although both 1A and 1B are part of the same criterion, the *EIU has deducted points twice for the same reason.*”<sup>6</sup>

- “It is also interesting to note that the *EIU Panel has not considered this question of ‘cohesion’ at all in the CPE for .RADIO, where the term does not appear.*”<sup>7</sup>
- “**Second**, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE

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<sup>5</sup> *Id.*, p. 49 (emphasis added).

<sup>6</sup> *Id.*, p. 49 (emphasis added).

<sup>7</sup> *Id.*, p. 49 (emphasis added).

processes, and some applicants were therefore subject to a higher threshold than others.”<sup>8</sup>

- “The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. ***Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a majority of the community . . . . By contrast, both .GAY and .MUSIC only scored 1 point.*** In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.”<sup>9</sup>
- “It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.”<sup>10</sup>
- ***“Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to***

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<sup>8</sup> *Id.*, p. 49 (emphasis added).

<sup>9</sup> *Id.*, p. 51 (emphasis added).

<sup>10</sup> *Id.*, p. 57.

improve their process over time, but that this did not affect the process as described in the AGB.”<sup>11</sup>

- **Fourth**, “[w]e found that although the Statement of Works (SOW) between ICANN and the EIU refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done. . . . A mere assessment of consistency and alignment with the AGB and CPE Guidelines does not suffice. Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU’s decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law).”<sup>12</sup>

***Improper Conflicts of Interest Existed During DotMusic’s CPE Process and Exist in the Overall CPE Process***

- “It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN’s vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest . . . In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that **Sir Robin Jacob** (Panellist) represented Samsung in a legal case, one of Google’s multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist.”<sup>13</sup>
- “It was pointed out to us that **Eric Schmidt** became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google’s former CEO). Google is in

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<sup>11</sup> *Id.*, p. 51 (emphasis added).

<sup>12</sup> *Id.*, p. 52.

<sup>13</sup> *Id.*, p. 41 (emphasis added).

contention with CBAs for a number of strings[, such as .MUSIC], which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of *Vint Cerf*, who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN's reputation for taking decisions on a fair and non-discriminatory basis."<sup>14</sup>

- “On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN's stated policy on community priority and the potential revenues that can be earned through the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.”<sup>15</sup>

***There is an Improper Lack of Transparency in ICANN's CPE Process***

- “The anonymity of panel members has been defended on the grounds that the Panels are advisory only. This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report, the EIU state, ‘We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.’ However, in

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<sup>14</sup> *Id.*, p. 47 (emphasis added).

<sup>15</sup> *Id.*

all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.”<sup>16</sup>

- “It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available presubmission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).”<sup>17</sup>

As seen by these excerpts, the CoE Report confirms that the CPE process was rife with issues of inconsistency, disparate treatment, conflicts of interests, and lack of transparency – especially in relation to DotMusic’s application. This is contrary to ICANN’s own commitments, Bylaws, and Articles of Incorporation. In the foreword to the CoE Report, Jan Kleijssen, the Council of Europe’s Director of Information Society and Action against Crime, reiterates ICANN’s commitment to make decisions in a fair, reasonable, transparent, and proportionate manner serving the public interest:

The ICANN Board’s commitment to a new bylaw on human rights recognises that the Internet’s infrastructure and functioning is important for pluralism and diversity in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the *public interest* . . . [P]articular attention is given to ICANN’s decision-making which should be as fair, reasonable, transparent and proportionate as possible.<sup>18</sup>

The failure of the EIU and ICANN staff to adhere to ICANN’s commitments when conducting CPEs further demonstrates how the process directly violated ICANN’s Bylaws and Articles of Incorporation. The CoE report therefore affirms DotMusic’s assertions in Reconsideration Request 16-5 concerning the CPE process for .MUSIC.

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<sup>16</sup> *Id.*, p. 53.

<sup>17</sup> *Id.*, p. 54.

<sup>18</sup> *Id.*, p. 3 (emphasis added).

### **DotMusic's Application Represents a Bona Fide Community and Serves the Public Interest**

Additionally, DotMusic satisfies the core considerations identified in the CoE Report for determining whether or not a community-based application should be awarded community priority status:

It seems to us that the core questions for ICANN to be assured of when giving priority to a [Community-based Applicant] are the first ones: "Is the applicant representing a bona fide community, and does it have the support of that community?" We would add a third question here: "Is the applicant properly accountable to the community it represents?" If the answers to those questions are "yes", then that should be the basis for awarding priority.<sup>19</sup>

The answer to each of those questions is "yes" with respect to DotMusic's community-based application. DotMusic represents an authentic, bona fide global music community supported by organizations with members representing over 95% of the consumed global music.<sup>20</sup> DotMusic's Registration Policies<sup>21</sup> also ensure that it is accountable to the music community.

The CoE Report also outlines the importance of trust, protecting vulnerable communities (such as the music community and music consumers), and enhancing safeguards for strings linked to a regulated sector (such as .MUSIC) in order to serve the public interest:

It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to

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<sup>19</sup> Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17, p. 58 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>20</sup> See .Music (DotMusic Limited), .Music Community Supporting Organizations, <http://www.music.us/supporters>; DotMusic Limited, Application Attachment 20f (Support Letters), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>.

<sup>21</sup> DotMusic scored maximum points in CPE under the Registration Policies section.

national regulation or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse. Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted. To award a community TLD to a community can – as such – *serve the public interest*.<sup>22</sup>

According to the “Declaration of the Committee of Ministers on ICANN, concerning human rights and the rule of law,”<sup>23</sup> in pursuing its *commitment to act in the general public interest*, ICANN should ensure that, when defining access to TLDs, an appropriate balance is struck between economic interests and other objectives of common interest, such as pluralism, cultural and linguistic diversity, and respect for the special needs of vulnerable groups and communities, such as the global music community.

#### **DotMusic is Committed to Facilitating Freedom of Expression for All Parties that Seek to Use the .MUSIC Community TLD**

The CoE Report also discusses .MUSIC in relation to the right to freedom of expression. The report explains how .MUSIC will enforce “legitimate” safeguards to protect the music community’s intellectual property rights and consumers against crime, thus facilitating the music community’s freedom of expression:

DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal,

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<sup>22</sup> *Id.*, p. 35 (emphasis added).

<sup>23</sup> Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true),

licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community. [T]hese arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime.<sup>24</sup>

Furthermore, the CoE Report asserts that there is a balancing act for evaluating whether a TLD supports the freedom of expression. It describes the balancing act as follows:

As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas. [But,] [a]t the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded.<sup>25</sup>

In accordance with serving the global public interest, DotMusic does not “undermin[e] free expression and restricting numerous lawful and legitimate uses of domain names.”<sup>26</sup> DotMusic’s Public Interest Commitments reiterate its commitment to restrict .MUSIC registration to music community members and *not* to exclude any registrants that have a legitimate interest in registering a .MUSIC domain “to express and seek opinions and ideas” in relation to music or to exclude any registrant who is part of the music community:

3. A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic’s Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes. . . .
5. A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents

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<sup>24</sup> *Id.*, p. 20.

<sup>25</sup> *Id.*, pp. 19-20 (emphasis added).

<sup>26</sup> *Id.*, p. 20.

represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.<sup>27</sup>

The CoE Report affirms that DotMusic will promote the right to freedom of expression through the .MUSIC TLD. It explains that DotMusic "intends to create a safe haven for legal music consumption . . . [through] enhanced safeguards, tailored policies, legal music, [and] enforcement policies."<sup>28</sup> It also reiterates the consensus that the objective of community-based applications is to *serve the public interest* and *protect vulnerable groups* (such as the music community) and *consumers from harm* (such as from malicious abuse):

There is consensus that community-based applications ought to serve the public interest, but without agreement about what "public interest" might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection.<sup>29</sup>

DotMusic's community-based application will protect the music community and the global public interest from harm. Therefore, we urge the BGC to seriously consider the CoE Report when evaluating DotMusic's Reconsideration Request 16-5, particularly with respect to the discussion of DotMusic's promotion of human rights and the general public interest through .MUSIC and the problems it identified with the CPE Process.

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<sup>27</sup> DotMusic Limited, Specification 11 Public Interest Commitments ("PIC"), pp. 1-2, <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>.

<sup>28</sup> Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17, p. 20, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

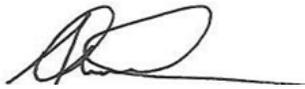
<sup>29</sup> *Id.*, p. 8.

**The BGC Must Accept DotMusic's Reconsideration Request 16-5 and Award DotMusic Community Priority for .MUSIC**

For these reasons and those already presented by DotMusic and its co-requesters,<sup>30</sup> DotMusic submits that the BGC must accept Reconsideration Request 16-5. Doing so is supported by the record and in the best interest of the public and the Internet community. Awarding DotMusic the right to operate the registry for .MUSIC would ensure that it is a safe, secure, and trusted gTLD that serves the global public interest and protects the global music community and Internet users.

Finally, we urge the BGC to take the additional step of awarding DotMusic community priority or, alternatively, recommending to the Board that it award DotMusic community priority for .MUSIC. The BGC and the Board are authorized to make this determination pursuant to the ICANN Bylaws and Module 5.1 of the Guidebook.<sup>31</sup>

Sincerely,



Arif Hyder Ali  
Partner

cc: John Jeffrey, General Counsel & Secretary, ICANN  
Amy Stathos, Deputy General Counsel, ICANN

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<sup>30</sup> DotMusic's co-requestors are the following: International Federation of Musicians, International Federation of Arts Councils and Culture Agencies, Worldwide Independent Network, Merlin Network, Independent Music Companies Association, American Association of Independent Music, Association of Independent Music, Content Creators Coalition, Nashville Songwriters Association International, and ReverbNation.

<sup>31</sup> See ICANN Bylaws, Art. 2, § 1 (Feb. 11, 2016); gTLD Applicant Guidebook, Module 5.1 (June 4, 2012) ("ICANN's Board has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of *the use of an ICANN accountability mechanism.*") (emphasis added).

# Exhibit 26

yourname.music



www.music.us

**DotMusic Presentation to  
ICANN Board Governance Committee**

**September 17, 2016**

**Presentation by Arif H. Ali, Dechert LLP,  
Washington, D.C.**

## **BGC's Duty to Ensure that the EIU and ICANN Staff Complied with ICANN's Articles & Bylaws**

- In performing its duties of reconsideration, the BGC must:
  - ensure that the EIU and ICANN staff complied with the principles of **fairness, transparency, and non-discrimination**, as set out in the ICANN Articles and Bylaws.

3

## **BGC Must Address the EIU's Discrimination Against DotMusic**

- The EIU Panel singled out DotMusic for disparate treatment.
  - Introduced a new “**cohesion plus**” test for establishing “awareness and recognition” among members.
    - DotMusic required to show not only that there is “commonality of interest” and “cohesion” among its members, but **also** show that “cohesion is considerable enough.” This is a cohesion plus test.
  - Yet, the EIU and ICANN staff **never** applied the “cohesion plus” test in approving .HOTEL, .OSAKA, and .RADIO.

4

- In .HOTEL, .OSAKA, and .RADIO, the EIU Panel applied a **different** standard to determine “awareness and recognition.”
  - .HOTEL: The application demonstrated “awareness and recognition” because “the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”
  - .OSAKA: The application demonstrated “awareness and recognition” because “of the clear association with the Osaka geographical area, as according to the applicant, the Osaka Community is largely defined by its prefectural borders.”
  - .RADIO: The application demonstrated “awareness and recognition” “because the community as defined consists of entities and individuals that are in the radio industry and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community,” and “membership in the (industry) community is sufficiently structured.”
- It appears that the EIU Panels applied the “commonality of interest” test, not the “cohesion” test in .HOTEL, .OSAKA, and .RADIO.

5

- In contrast, the EIU Panel, in DotMusic, **conceded** that there is a “commonality of interest” among members.
- The EIU Panel, however, proceeded to apply a “cohesion plus” test in determining “awareness and recognition” among DotMusic members:
  - Under Article II, Section 3 of the Bylaws, “ICANN shall not apply its standards, policies, procedures, or practices inequitably or **single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.” (Bylaws, Art. II, §3)
  - “While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such **cohesion is considerable enough** that the community defined as a whole cannot be said to have the cohesion required by the AGB.”
- The EIU Panel and ICANN staff in DotMusic violated ICANN’s Policy of Non-Discrimination:
  - Moreover, under the CPE Guidelines, the “evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. **Consistency of approach** in scoring Applications will be of particular importance.” (CPE Guidelines, p. 22)

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## **EIU Also Failed To Act Fairly and Openly**

- The EIU Panel failed to explain how DotMusic's evidence was insufficient to show cohesion.
  - The panel concluded that DotMusic's application fails to demonstrate "delineation" because "the number of individuals included in the defined community. . . do not show such cohesion is considerable enough."
- The EIU panel concluded that DotMusic failed to fulfil the requirements for "organization" requirement based on the EIU's research.
  - For example, based on its "research," the EIU concluded that "there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories."
  - Yet, the EIU failed to disclose its research in violation of its obligation to provide "conclusions that are compelling and defensible" and "to document the way in which it has done so in each case."

7

## **Presentation by Dr. Jørgen Blomqvist**

**Honorary Professor in International Copyright,  
University of Copenhagen, Denmark**

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**Statement of Dr. Richard Burgess  
Ph.D. in Ethnomusicology**

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**Concluding Remarks  
&  
Questions**

10

# Exhibit 27



New gTLD Program  
Community Priority Evaluation Report  
Report Date: 6 October 2014

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay llc

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	10 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
<b>Total</b>	<b>10</b>	<b>16</b>
<b>Minimum Required Total Score to Pass <u>14</u></b>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	

The community defined in the application (“GAY<sup>1</sup>”) is drawn from:

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA<sup>2</sup>. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The application further elaborates the requirements of the above individuals to demonstrate membership in the community:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

This community definition shows a clear and straightforward membership and is therefore well defined. Membership is “determined through formal membership with any of dotgay LLC’s [the applicant’s] Authentication Partners (AP) from the community”, a transparent and verifiable membership structure that adequately meets the evaluation criteria of the AGB.

In addition, the community as defined in the application has awareness and recognition among its members. The application states:

As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as “hubs” and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community. In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:

1. Have an active and reputable presence in the Gay Community
2. Have a mission statement that incorporates a focus specific to the Gay Community
3. Have an established policy that affirms community status for member enrolment
4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

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<sup>1</sup> In this report the community as defined by the application is referred to as the “GAY community” instead of the “gay community” or the “LGBTQIA community”. The “GAY community” is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD. “Gay community” or “LGBTQIA community” are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant’s defined community. This use is consistent with the references to these groups in the application.

<sup>2</sup> The Applicant notes with regard to its use of the term LGBTQIA that “LGBTQIA – Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community.” This report uses the term similarly.

Based on the Panel's research and materials provided in the application, there is sufficient evidence that the members as defined in the application would cohere as required for a clearly delineated community. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic scope and the community as defined is a global one. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization representative of the community defined by the applicant, as referred to above, has records of activity beginning before 2007. LGBTQIA individuals have been active outside of organizations as well, but the community as defined is comprised of members of [AP] organizations.

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. While the application does cite global estimates of the self-identified gay/LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, and ally) population (1.2% of world population), it does not rely on such figures to determine the size of its community. This is because the applicant requires that any such LGBTQIA individual also be a member of an AP organization in order to qualify for membership of the proposed community. According to the application:

Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members.

The size of the delineated community is therefore still considerable, despite the applicant's requirement that the proposed community members must be members of an AP.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community"<sup>3</sup>, and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .GAY community<sup>4</sup> are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of LGBTQIA individuals has accelerated since then, especially in recent decades and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater rates of visibility of LGBTQIA individuals, recognition of LGBTQIA rights and community organization, both in the US and other western nations as well as elsewhere.<sup>5</sup> While socio-political obstacles to community

<sup>3</sup> "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community.

<sup>4</sup> The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD.

<sup>5</sup> Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

organization remain in some parts of the world,<sup>6</sup> the overall historical trend of LGBTQIA rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a “presence in the Gay Community”, and also “incorporate a focus specific to the Gay Community.” By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

**Criterion #2: Nexus between Proposed String and Community**

**0/4 Point(s)**

**2-A Nexus**

**0/3 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community. To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.”

The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus. As cited above:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).

The application, therefore, acknowledges that “the world at large” understands the Gay community to be an entity substantially different than the community the application defines. That is, the general population understands the “Gay community” to be both those individuals who have “come out” as well as those who are privately aware of their non-heterosexual sexual orientation. Similarly, the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part. That is, the community as defined by the applicant refers only to the sub-set of individuals who have registered with specific organizations, the Authenticating Partners.

As the application itself also indicates, the group of self-identified gay individuals globally is estimated to be 1.2% of the world population (more than 70 million), while the application states that the size of the community it has defined, based on membership with APs, is 7 million. This difference is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

<sup>6</sup> <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

Moreover, while the applied-for string refers to many individuals not included in the application’s definition of membership (i.e., it “substantially over-reaches” based on AGB criteria), the string also fails to identify certain members that the applicant has included in its definition of the .GAY community. Included in the application’s community definition are transgender and intersex individuals as well as “allies” (understood as heterosexual individuals supportive of the missions of the organizations that comprise the defined community)<sup>7</sup>. However, “gay” does not identify these individuals. Transgender people may identify as straight or gay, since gender identity and sexual orientation are not necessarily linked.<sup>8</sup> Likewise, intersex individuals are defined by having been born with atypical sexual reproductive anatomy<sup>9</sup>; such individuals are not necessarily “gay”<sup>10</sup>. Finally, allies, given the assumption that they are heterosexual supporters of LGBTQIA issues, are not identified by “gay” at all. Such individuals may be an active part of the .GAY community, even if they are heterosexual, but “gay” nevertheless does not describe these individuals as required for Nexus by the AGB. As such, there are significant subsets of the defined community that are not identified by the string “.GAY”.

The Community Priority Evaluation panel has determined that the applied-for string does not match nor does it identify without substantially over-reaching the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

**2-B Uniqueness** **0/1 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application,*” according to the AGB (emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above.). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

**Criterion #3: Registration Policies** **4/4 Point(s)**

**3-A Eligibility** **1/1 Point(s)**

The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that:

.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.

The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Eligibility.

<sup>7</sup> This prevailing understanding of “ally” is supported by GLAAD and others: <http://www.glaad.org/resources/ally>

<sup>8</sup> <http://www.glaad.org/reference/transgender>

<sup>9</sup> [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex)

<sup>10</sup> “Gay” is defined by the Oxford dictionaries as “A homosexual, especially a man.” The applicant defines the community as “individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society.”

<b>3-B Name Selection</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .Gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
<b>3-C Content and Use</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”</p> <p>The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Content and Use.</p>	
<b>3-D Enforcement</b>	<b><i>1/1 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access. The Community Priority Evaluation panel has determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.</p>	

<b>Criterion #4: Community Endorsement</b>	<b><i>2/4 Point(s)</i></b>
<b>4-A Support</b>	<b><i>1/2 Point(s)</i></b>
<p>The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.</p>	

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). (While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent it. There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

*1/2 Point(s)*

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

# Exhibit 28



New gTLD Program  
Community Priority Evaluation Report  
Report Date: 8 October 2015

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	10 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
<b>Total</b>	<b>10</b>	<b>16</b>
<b>Minimum Required Total Score to Pass <u>14</u></b>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p> <p>In its application, dotgay LLC defines its community as follows:</p>	

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships...

The membership criterion to join the Gay Community is the process of 'coming out'. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible...

Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights. (Application, section 20(a))

The applicant relies on the "process of coming out" to delineate its members, who are individuals with non-normative sexual orientation or gender identities, as well as their allies<sup>1</sup>. The process of "coming out" is by nature personal, and may vary from person to person. Some individuals within the proposed community may not come out publicly, reflecting real or feared persecution for doing so. Similarly, membership in a community organization may not be feasible for the same reason. Furthermore, organizations within the applicant's defined community recognize "coming out" as a defining characteristic of individuals within the defined community.<sup>2</sup> Many such organizations advocate on behalf of individuals even though they are not members, precisely because their coming out publicly may be illegal or otherwise harmful. Therefore, the Panel recognizes that the standard of "coming out" – whether publicly or privately – as homosexual, bisexual, transgender, queer, intersex, or ally is sufficiently clear and straightforward to meet the AGB's requirements.<sup>3</sup>

In addition, the community as defined in the application has awareness and recognition among its members. There is an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies. As cited by the applicant in supporting materials, for example, the American Psychological Association recognizes the process of coming out as a key part of entering the community.<sup>4</sup> For many individuals, this awareness and recognition of community is made more explicit, such as by membership in organizations, participation in events, and advocacy for the rights of individuals with non-normative sexual orientations and gender identities. As the applicant states, organizations and individuals within the community also often cohere around areas of discrimination, whether in the workplace, marketplace, the media, or other areas. Regardless of whether this awareness and recognition of shared community is explicit or rather an implicit consequence of one's coming

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<sup>1</sup> The Panel, following the applicant's reference to "individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society", uses the phrase "non-normative sexual orientations and/or gender identities" throughout this document. The term "non-normative" is used both by the applicant as well as organizations, academics, and publications discussing the topic; it is not the Panel's terminology, nor is it considered to be derogatory in this context. This phrase refers to the same individuals usually referred to with the acronyms "LGBT", "GLBT", "LGBTQ", and others. Because issues related to these acronyms are relevant later in this document, they are not used here.

<sup>2</sup> See as examples <http://www.hrc.org/campaigns/coming-out-center> and [http://www.lalgbtcenter.org/coming\\_out\\_support](http://www.lalgbtcenter.org/coming_out_support)

<sup>3</sup> For allies, the "coming out" process may differ from that of individuals who are acknowledging privately or sharing publicly their own non-normative sexual orientation or gender identity. Nevertheless, there are risks associated even with supporting non-heterosexual individuals; making this support explicit is how allies can mark their awareness and recognition of the wider community and their sense of belonging to it. For example, large international organizations within the applicant's defined community, such as GLAAD, HRC, and PFLAG offer concrete avenues for individuals to "come out" as allies. See <http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>,

<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>, <http://community.pflag.org/page.aspx?pid=539>

<sup>4</sup> <http://www.apa.org/topics/lgbt/orientation.pdf>

out, the Panel has determined that the link among these individuals goes well beyond “a mere commonality of interest” and satisfies the AGB’s requirements for recognition and awareness.<sup>5</sup>

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic area and/or segment of the proposed community. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), an umbrella organization whose organizational members also include those representing allies. According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA’s website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

#### Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007. Individuals with non-normative sexual orientations and/or gender identities, as well as their supporters, have been increasingly active in many countries as they work to advance their acceptance and civil rights.<sup>6</sup>

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<sup>5</sup> Although the score on Delineation is unchanged since the first evaluation, the Panel’s analysis has changed due to the applicant’s response to a Clarifying Question regarding the role of Authentication Partners (APs). Previously, the Panel had understood the APs to be a mechanism of members’ awareness and recognition, but, as above, that is no longer the case and the role of APs is correctly understood to be relevant for the purposes of Section 3.

<sup>6</sup> See for example, advocacy in China, Guyana, and Argentina: <http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>, <http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>, [http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage\\_n\\_1018536.html](http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html)

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

1-B Extension

**2/2 Point(s)**

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

#### Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The application cites global estimates of the self-identified population of individuals with non-normative sexual orientations and/or gender identities, but relies on a more conservative size based on the number of such individuals who are affiliated with one or more of the applicant's community organizations:

Most studies place the global gay population at 1.2% (Williams 1996), higher in countries with existing gays rights protections projected at 4-6% (eg. Australia, Canada, United Kingdom, United States). Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay Community and the minimum pool from which potential registrants will stem.

As the applicant also acknowledges, estimating the size of the defined community is difficult because, for example, of the risks of individuals self-identifying in many parts of the world. The applicant instead offers a "minimum" size based on the 7 million individuals who are members of one or more of its "Authentication Partners", organizations serving as entry points for domain registration. Regardless of the method used to produce these estimates, the Panel has determined that the size of the delineated community is considerable.<sup>7</sup>

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

#### Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the community defined in the application are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of individuals with non-normative sexual orientations and/or gender identities and their supporters has accelerated since then, especially in recent decades, and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater visibility of these individuals,

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<sup>7</sup> The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally.

recognition of their civil and human rights, and community organization, both in the US and elsewhere.<sup>8</sup> While socio-political obstacles to community organization remain in some parts of the world,<sup>9</sup> the overall historical trend of increasing rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

**Criterion #2: Nexus between Proposed String and Community**

**0/4 Point(s)**

**2-A Nexus**

**0/3 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.

In order to identify the community defined by the applicant as required for Nexus, the applied-for string must “closely describe the community or the community members”, i.e. the applied-for string is what “the typical community member would naturally be called” (AGB). The Panel has therefore considered the extent to which the string “gay” *describes* the members of the applicant’s defined community and has evaluated whether “gay” is what these individuals *would naturally be called*. The Panel has determined that more than a small part of the applicant’s defined community is not identified by the applied-for string, as described below, and that it therefore does not meet the requirements for Nexus.

The community as defined by the application consists of

individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The applicant’s assertion that the applied-for string (“gay”) is the “most common” term used by members of its defined community to refer to all gay, lesbian, bisexual, transgender, queer, intersex, and ally individuals is central to its demonstration of Nexus. In order to support this claim, the applicant, in its application and in supporting materials received both prior to and since its initial evaluation, has offered evidence that the Panel has evaluated. The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the

<sup>8</sup> Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

<sup>9</sup> <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

media<sup>10</sup> as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider “gay” to be their “most common” descriptor, as the applicant claims. These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay”. Both within the community and outside of it, such as in the media, acronyms such as “LGBT,” “GLBT,” “LGBTQ,” or “LGBTQIA”<sup>11</sup> are used to denote a group of individuals that includes those described above, i.e. transgender, intersex and ally individuals. In fact, organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor “gay,” preferring one of the more inclusive terms<sup>12</sup>.

The first piece of evidence offered by the applicant to support the claim that “gay” is the “most common” term used to describe the defined community is the Oxford English Dictionary (OED) and its documentation of uses of the word “gay” over hundreds of years. It summarizes the shifting meaning of “gay” in order to show how the word has become embraced by at least a part of its defined community and to support its claim that it is the “most common” term for the entirety of its defined community. According to the applicant, the OED shows that “Gay by the early 20th century progressed to its current reference to a sexuality that was non-heterosexual” (application, 20(d)). The Panel agrees that the more derogatory uses of “gay” or uses unrelated to sexuality have largely fallen away, and that the word has come to refer to homosexual women as well as men, as the applicant asserts, citing the OED. However, the Panel’s review of the OED<sup>13</sup> as well as other sources (cited below) does not support the applicant’s claim that “gay” identifies or closely describes transgender, intersex, or ally individuals, or that “gay” is what these individuals “would naturally be called,” as the AGB requires. This is because “gay” refers to homosexuality (and to some extent non-heterosexuality more broadly), while transgender and intersex individuals may or may not identify as homosexual or gay, and allies are generally understood to be heterosexual.

The applicant acknowledges that its application attempts to represent several groups of people, namely lesbian, gay, bisexual, transgender, queer, intersex, and ally (LGBTQIA) individuals. It claims that all of these groups, or “sub-communities”, are identified by what it calls the “umbrella” term “gay”:

The term “gay” today is a term that has solidified around encompassing several sub-communities of individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. Within these sub-communities even further classifications and distinctions can be made that further classify its members but are equally comfortable identifying as gay, particularly to those outside their own sub-communities. As an example, it has become commonplace for celebrities to acknowledge their homosexuality with the now routine declaration of “Yup, I’m gay” on the cover of newsmagazines as the comedienne Ellen Degeneres did when she “came out” on the cover of TIME magazine.

Notably, “gay” is used to super-identify all these groups and circumstances. Whether homosexual, bisexual, transgender, intersex or ally, all members of the Gay Community march in the “gay pride parade” read the same “gay media” and fight for the same “gay rights.” Gay has become the prevalent term in how members of this community refer to themselves when speaking about themselves as demonstrated by the large number of organizations that use the term globally.

Despite the applicant’s assertions to the contrary, its own evidence here shows that “gay” is most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others. The applicant’s “umbrella term” argument does not accurately describe, for example, the many similar

<sup>10</sup> While a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the data in the applicant’s own analysis as well as on the Panel’s own representative samples of media.

<sup>11</sup> There is some variability to these acronyms but one or another of them is very commonly used throughout the community defined by the applicant to refer to Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Allies.

<sup>12</sup> While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes. Details of the Panel’s analysis follow.

<sup>13</sup> See “gay, adj., adv., and n.” *OED Online*. Oxford University Press, June 2015. Web. 19 August 2015.

transgender stories in the mass media where “gay” is not used to identify the subject.<sup>14</sup> In these cases, “transgender” is used because “gay” does not identify those individuals. With regard to the applicant’s argument that the various parts of its defined community are engaged in the same activities, such as “gay pride” events and “gay rights” advocacy, the Panel acknowledges that this is likely the case. However, transgender people’s participation in these activities no more identifies them as gay than allies’ participation in transgender rights advocacy identifies them as transgender. Indeed, there are many organizations focused on events and advocacy specific to the needs of transgender individuals<sup>15</sup> and they often take special care to separate labels of sexual orientation from those of gender identity/expression.<sup>16</sup> Similarly, the Panel has reviewed the literature of several organizations that advocate and provide services and support for intersex individuals and they clarify that sexual orientation is unrelated to being intersex.<sup>17</sup> That is, while such organizations would fall within the applicant’s defined community, they explicitly differ on the applicant’s assertion that the applied-for string “gay” identifies all LGBTQIA individuals. Thus, the applicant’s assertion that even the members of its so-called sub-communities “are equally comfortable identifying as gay” is in fact often not the case.

In materials provided in support of the application<sup>18</sup>, a survey of news media articles is analyzed in an effort to show that “gay” is the most common name used to refer to the community defined by the applicant. This analysis shows that indeed “gay” is used more frequently than terms such as “LGBT” or “LGBTQIA” in reference to both individuals and communities:

In the first random sample period (April 1-8, 2013), “gay” was used 2,342 times, “LGBT” 272 times, “lesbian” 1008 times, “queer” 76 times and “LGBTQ” 19 times. “LGBTQIAA” and “GLBTQ” were not used at all, demonstrating that “gay” remains a default generic term for the community. An overwhelming amount of the time these terms beyond gay were used in articles that also used gay. Said another way, “LGBT” was used in only 35 articles that did not also use the term “gay,” “lesbian” in 43 articles, “queer” in 55, and “LGBTQ” in 3. Data shows, thus, that “gay” is both the most frequently used term when referring to non-heterosexual gender identity and sexual orientation and is used as an umbrella term to cover the diversity.

Despite this claim, the analysis fails to show that when “gay” is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities. This is the key issue for the Panel’s consideration of Nexus. That is, the greater use of “gay” does not show that “gay” in those instances is used to identify all LGBTQIA individuals, as the applicant asserts and as would be required to receive credit on Nexus. Indeed, the Panel’s own review of news media<sup>19</sup> found that, while “gay” is more common than terms such as “LGBTQ” or “LGBTQIA”, these terms are now more widely used than ever, in large part due to their greater inclusivity and specificity than “gay”. Even several of the articles cited by the applicant in its reconsideration request<sup>20</sup> as evidence of its “umbrella term” argument do not show “gay” being used to identify the groups in question, nor is “gay” the most commonly used term to refer to the aggregate LGBTQIA community in these articles.<sup>21</sup> Furthermore, researching sources from the same periods as the

<sup>14</sup> As examples of cover stories that parallel the applicant’s own example from Time Magazine, see: <http://time.com/135480/transgender-tipping-point/> and <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>. In these two very prominent examples, the articles do not use “gay” to refer to their subjects.

<sup>15</sup> See for instance <http://transgenderlawcenter.org/>, <http://srtp.org/>, <http://transequality.org/>

<sup>16</sup> See National Center for Transgender Equality: <http://transequality.org/issues/resources/transgender-terminology>

<sup>17</sup> See for example the Organization International Intersex: <http://oii-usa.org/1144/ten-misconceptions-intersex>

<sup>18</sup> See <https://www.icann.org/en/system/files/correspondence/gudelunas-to-icann-eiu-evaluators-30apr14-en.pdf>, drafted and submitted by David Gudelunas a member of the dotGay LLC team according to its website, [http://dotgay.com/the-dotgay-team/#section=Jamie\\_Baxter](http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter)

<sup>19</sup> As noted above, while a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the applicant’s own analysis, as discussed here, as well as on the Panel’s own representative samples of media.

<sup>20</sup> See dotGay’s Reconsideration Request: <https://www.icann.org/en/system/files/request-dotgay-annexes-redacted-29nov14-en.pdf>

<sup>21</sup> See <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marchesor-clever-substitutes-pride-and-prejudice>, <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>, <http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>

applicant’s analysis for the terms “transgender” or “intersex” shows again that these terms refer to individuals and communities not identified by “gay”.<sup>22</sup> In other words, “gay” is not used to refer to these individuals because it does not *closely describe* them and it is not *what they would naturally be called*, as the AGB requires for partial credit on Nexus.

Finally, the Panel reviewed in detail the many letters of support submitted on behalf of the applicant by many LGBTQIA organizations worldwide. In addition to evaluating these letters of support, as noted in Section 4, the Panel examined how these organizations refer to their members and those for whom they advocate, noting in particular the words used to identify them. In a minority of cases, these organizations included in their letters the view that “gay” is an “umbrella term” for the LGBTQIA community, as argued by the applicant. However, even the organizations that made this claim in their letters do not use the term “gay” to identify their transgender, intersex, and/or ally members in their own organizational materials. In fact, the names of many of these organizations usually include a term other than “gay” such as “LGBTQ” or, in the case of some, “transgender” or “intersex”.

GLAAD, as an example of one of the applicant’s supporters, writes on its own website, “Transgender people have a sexual orientation, just like everyone else. Transgender people may be straight, lesbian, gay, or bisexual.”<sup>23</sup> Indeed, it is for this reason that GLAAD, like other organizations active in the defined community, have revised their names and use of labels specifically to be more inclusive of the individuals in their communities whom “gay” does not identify by using instead terms like LGBTQ or LGBTQIA.<sup>24</sup> Similarly, ally organizations such as PFLAG (Parents, Families and Friends of Lesbians and Gays) support the applicant and reiterate the importance of allies in the struggles facing the LGBTQIA community. However, not even these organizations use “gay” to describe allies. The Panel’s research and review of the applicant’s materials has demonstrated that even the applicant’s supporters recognize that “gay” is insufficient to identify the diversity of the LGBTQIA community, especially with regard to transgender, intersex, and ally individuals.

The Community Priority Evaluation panel has determined that the applied-for string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness	<b>0/1 Point(s)</b>
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The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application*,” (AGB, emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as it does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

<b>Criterion #3: Registration Policies</b>	<b>4/4 Point(s)</b>
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3-A Eligibility	<b>1/1 Point(s)</b>
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The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as

<sup>22</sup> While it is not possible for the Panel to review all the articles in the LexisNexis search results cited by the applicant, the Panel reviewed a representative sample of articles from the same time periods.

<sup>23</sup> See <http://www.glaad.org/transgender/transfaq>

<sup>24</sup> In 2013, to be more inclusive of transgender individuals by not including them in the label “gay” or “lesbian”, the organization’s name officially was changed to GLAAD, as opposed to being an acronym for Gay and Lesbian Alliance Against Defamation (<http://www.glaad.org/about/history>). This is reflective of the trend the Panel identified among organizations within the defined community towards greater inclusivity and away from names and labels that identified only gays and lesbians.

eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that registration in “.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.”

According to the application, and as the applicant has confirmed in follow-up materials, in order to register a domain, the applicant requires

community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations.

As the application explains, these Authentication Partners (APs) include some of the largest organizations dedicated to members of the defined community and these organizations will provide “the most trusted entry points into .gay” while “reducing risk to unqualified registrations”.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Eligibility.

**3-B Name Selection**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application fulfills the requirements for Name Selection.

**3-C Content and Use**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Content and Use.

**3-D Enforcement**

***1/1 Point(s)***

The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals

mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Enforcement.

**Criterion #4: Community Endorsement**

**2/4 Point(s)**

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support and opposition documents for the dotgay LLC application for the string “GAY”.

**Summary of Review & Verification of Support/Opposition Materials as of 5 September 2015<sup>25</sup>**

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	177	0	0	0
Attachments to 20(f)	128	128	128	51
Correspondence <sup>26</sup>	152	136	136	56
<b>Grand Total</b>	<b>457</b>	<b>264</b>	<b>264</b>	<b>107</b>

**4-A Support**

**1/2 Point(s)**

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

<sup>25</sup> The table below reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application both during the period of its previous evaluation and the present one. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information.

<sup>26</sup> The Panel reviewed 41 pieces of correspondence that contained 152 individual letters.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).

While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent them. There is no single such organization recognized by all of the defined community's members as the representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

*1/2 Point(s)*

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one source. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from one group of non-negligible size.<sup>27</sup> The opposition comes from a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application. The organization is of non-negligible size, as required by the AGB. The grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community and the opposition is not made for any reason forbidden by the AGB, such as competition or obstruction. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

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<sup>27</sup> The Panel has reviewed all letters of opposition and support, even when more than one letter has been received from the same organization. In those cases, as with all others, the Panel has reviewed each letter to determine the most current stance of each organization with respect to the application. In the case of this opposition, all letters have been reviewed.

# Exhibit 29

**RECOMMENDATION  
OF THE BOARD GOVERNANCE COMMITTEE (BGC)  
RECONSIDERATION REQUEST 16-3  
26 JUNE 2016**

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The Requester, Dotgay LLC, seeks reconsideration of the Board Governance Committee's (BGC's) denial of the Requester's previous reconsideration request, Request 15-21.

**I. Brief Summary.**

The Requester submitted a community application for .GAY (Application). Three other applicants submitted standard (meaning, not community-based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Application was community-based, the Requester was invited to and did participate in CPE in October 2014 (First CPE). The Requester's Application did not prevail in the First CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that the Requester had not prevailed in the First CPE (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE (Second CPE Report). As a result, the Application remains in contention with the other applications for .GAY. Just like all other contention sets, the .GAY contention set can be resolved by ICANN's last resort auction or by some other arrangement amongst the involved applicants.

The Requester sought reconsideration of the Second CPE Report and ICANN's acceptance of it (Request 15-21). After reviewing all of the relevant material, the BGC denied Request 15-21 (Determination on Request 15-21). The Requester has now submitted Reconsideration Request 16-3 (Request 16-3), challenging the Determination on Request 15-21

contending that the BGC erroneously determined that the EIU had adhered to all applicable policies and procedures in conducting the Second CPE. Request 16-3 is premised upon one, and only one, basis: the Requester argues that the EIU improperly permitted someone other than one of the “evaluators” to send verification emails to the authors of letters of support and opposition to the Application, which the Requester contends contravenes applicable policies and procedures.

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3. In response, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support. The Presentation, however, did not relate to the sole issue raised in Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application. Rather, the Presentation focused on the merits of the Second CPE Report, which is neither the subject of Request 16-3 nor a proper basis for reconsideration.

The Requester’s claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the EIU that materially or adversely affected the Requester, and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information. Instead, the Requester relies on a purely administrative step of the verification process that the EIU took in the course of administering the Second CPE. More specifically, the EIU delegated

the physical sending of verification emails for letters of support/opposition to a member of the EIU's core team to serve as a Verification Coordinator rather than one of the evaluators due to the large number of letters of support/opposition. That protocol did not affect the Requester, materially or adversely, as is required to support reconsideration. To the contrary, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation consistent with the Applicant Guidebook (Guidebook). Additionally, the substantive evaluation of the letters was performed by the evaluators in accordance with Module 4.2.3 of the Guidebook. As such, the BGC recommends that Request 16-3 be denied.

## **II. Facts.**

### **A. Background Facts.**

The Requester submitted a community application for .GAY.<sup>1</sup>

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.<sup>2</sup> Those applications were placed into a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in Module 4.2 of the Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.<sup>3</sup>

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<sup>1</sup> See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

<sup>2</sup> See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

<sup>3</sup> See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).<sup>4</sup> The First CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in the First CPE.<sup>5</sup>

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.<sup>6</sup>

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.<sup>7</sup> On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).<sup>8</sup>

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of it, and of the First DIDP Response.<sup>9</sup>

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.<sup>10</sup> The BGC directed that "the CPE Panel's Report shall be set aside, and that new [CPE] evaluators will be appointed to conduct a new CPE

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<sup>4</sup> *Id.*

<sup>5</sup> See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>6</sup> <https://www.icann.org/resources/pages/14-44-2014-10-22-en>.

<sup>7</sup> <https://www.icann.org/resources/pages/20141022-02-2014-10-31-en>.

<sup>8</sup> See <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

<sup>9</sup> See <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

<sup>10</sup> Determination of BGC, Reconsideration Request 14-44, *available at* <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf> at Pg. 31.

for the Application.”<sup>11</sup> In addition to directing that new evaluators conduct the second CPE of the Application, the BGC also recommended that the EIU consider including new members of the core team to assess the evaluation results.<sup>12</sup>

In furtherance of the BGC’s Determination on Request 14-44, the EIU administered the Second CPE, appointing two new evaluators as directed by the BGC, and one new core team member as the BGC suggested.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.<sup>13</sup>

On 22 October 2015, the Requester submitted Reconsideration Request 15-21, seeking reconsideration of the Second CPE Report and ICANN’s acceptance of it.<sup>14</sup>

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN’s DIDP (Second DIDP Request), seeking documents related to the Second CPE Report.<sup>15</sup> On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).<sup>16</sup>

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Request 15-21), which sought reconsideration of the Second CPE Report and ICANN’s acceptance of it, and of the Second DIDP Response.<sup>17</sup>

On 1 February 2016, the BGC issued the Determination on Request 15-21, finding that Request 15-21 should be denied.<sup>18</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>14</sup> <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

<sup>15</sup> See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

<sup>16</sup> See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

<sup>17</sup> See generally <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

The Requester submitted Request 16-3 on 17 February 2016.<sup>19</sup> Request 16-3 challenges the Determination on Request 15-21 on the sole basis that the person at the EIU who sent verification emails to the authors of letters of support and opposition to the Application was not a CPE “evaluator.”<sup>20</sup>

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3.<sup>21</sup> In response, Pursuant to Article IV, Section 2.12 of ICANN’s Bylaws, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support.<sup>22</sup> The Requester, however, did not address the sole issue that is the basis for Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application.<sup>23</sup> Instead, the

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(continued...)

<sup>18</sup> Determination on Request 15-21, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>19</sup> *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>. ICANN has also reviewed and considered several letters sent in support of Request 16-3, including one from Transgender Equality Uganda and one from Trans-Fuzja. (*See* <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.) In addition, ICANN also reviewed and considered two letters from CenterLink that the Requester submitted along with its Presentation materials, indicating CenterLink’s support of the Requester’s Application. (*See id.*)

<sup>20</sup> *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>21</sup> Request, § 8.7, Pg. 8.

<sup>22</sup> *See* <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

<sup>23</sup> *See* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

Presentation addressed the merits of the Second CPE Report, which is not the subject of Request 16-3 and is not a proper basis for reconsideration.<sup>24 25</sup>

**B. Relief Requested.**

The Requester asks that ICANN:

1. “[A]cknowledge receipt of this Reconsideration Request;”
2. “[D]etermine that the [Determination on Request 15-21] is to be set aside;”
3. “[I]nvite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;”  
and
4. “[D]etermine that, given the circumstances, any and all of its requests set out in § 9 of Requester’s Second Reconsideration Request be awarded, which are incorporated herein by reference.”<sup>26</sup>

**III. The Relevant Standards For Reconsideration Requests And CPE.**

**A. Reconsideration Requests.**

ICANN’s Bylaws provide for reconsideration of a staff or Board action or inaction in accordance with specified criteria, which include a requirement that the requester has been “materially [and] adversely affected” by the challenged action or inaction.<sup>27</sup> The Requester here

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<sup>24</sup> *Id.*

<sup>25</sup> The BGC also notes that it received and considered the 24 June 2016 letter from dotgay LLC, which can be found at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dotgay-to-icann-bgc-24jun16-en.pdf>.

<sup>26</sup> Request, § 9, Pgs. 8-9.

<sup>27</sup> Bylaws, Art. IV, § 2. Article IV, §§ 2.1-2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been materially and adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or

challenges both staff and Board action.<sup>28</sup>

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.<sup>29</sup> In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the EIU violated any established policy or procedure.

A Board action may be subject to reconsideration where it was undertaken “without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act,” or, where it was “taken as a result of the Board’s reliance on false or inaccurate material information.”<sup>30</sup> Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

## **B. Community Priority Evaluation.**

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(continued...)

(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

<sup>28</sup> While the Requester indicated that it challenged staff action (see Request, § 2, Pg. 1), the crux of Reconsideration Request 16-3 is a challenge to the BGC’s Determination on Request 15-21, and as such, challenges both Board and staff action.

<sup>29</sup> See BGC Recommendation on Reconsideration Request 13-5, *available at*

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>.

<sup>30</sup> Bylaws, Art. IV, § 2.

The standards governing CPE are set forth in Module 4.2 of the Guidebook. The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook's CPE provisions<sup>31</sup> and summarizing those provisions.<sup>32</sup> In addition, the EIU has published supplementary guidelines (CPE Guidelines) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.<sup>33</sup>

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.<sup>34</sup> CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.<sup>35</sup> A CPE panel's role is to determine whether the community-based application fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

#### **IV. Analysis And Rationale.**

The Requester seeks reconsideration of the Determination on Request 15-21, arguing that the BGC should have "confirm[ed]" that the EIU did not follow applicable policies and

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<sup>31</sup> The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

<sup>32</sup> CPE Panel Process Document, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>33</sup> CPE Guidelines, available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

<sup>34</sup> Guidebook, § 4.2.

<sup>35</sup> *Id.* at § 4.2.2.

procedures in conducting the Second CPE.<sup>36</sup> Specifically, the Requester claims that the EIU violated the CPE Panel Process Document because the person who sent verification emails to the authors of letters of support and opposition to the Application was a member of the core team (serving as a Verification Coordinator) and was not one of the two “evaluators” assigned to conduct the CPE.<sup>37</sup> However, the Requester fails to identify any conduct by the EIU that contradicts an established policy or procedure in a manner that materially and adversely affected the Requester.<sup>38</sup> The process of verifying letters is an administrative task.<sup>39</sup> Regardless of which person physically sent the verification emails, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation in accordance with Module 4.2.3 of the Guidebook, which included an evaluator’s substantive evaluation of the letters in compliance with the CPE Panel Process Document.

Moreover, the Requester does not identify any material information the BGC did not consider in reaching the Determination on Request 15-21, or any reliance upon false or inaccurate information.<sup>40</sup> The act of sending a verification email is not material, so long as the evaluators performed their task of evaluating the letters of support and opposition. There is no claim that the evaluators did not conduct the actual evaluation. As such, the Determination on Request 15-21 properly confirmed that reconsideration was not warranted based on the EIU’s decision to delegate the sending of verification emails to a Verification Coordinator, and thus the Determination on Request 15-21 does not itself warrant reconsideration.<sup>41</sup>

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<sup>36</sup> Request, § 8.6, Pg. 7.

<sup>37</sup> *Id.*, § 8.4, Pgs. 5-6.

<sup>38</sup> See Bylaws, Art. IV, §§ 2.1-2.

<sup>39</sup> See <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 2.

<sup>40</sup> See Bylaws, Art. IV, § 2.

<sup>41</sup> While Request 16-3 generally is styled as a request for the BGC to reconsider the Determination on Request 15-21, the Requester also argues that the “EIU ha[s] not respected the policies and processes” governing CPE. Request, § 8.6, Pg. 7.

**A. The EIU’s Letter Verification Process Did Not Violate Applicable Policies And Procedures In A Manner That Materially Or Adversely Affected The Requester.**

The Requester’s claims arise entirely out the CPE Panel Process Document’s provisions that an “evaluator” verifies letters of support and opposition to an application undergoing CPE, which the Requester claims did not occur here.<sup>42</sup> In other words, the Requester argues that reconsideration is warranted because the EIU did not adhere to the CPE Panel Process Document insofar as the person who physically sent the emails verifying the letters of support and opposition was not an “evaluator” but, instead, was another EIU employee.<sup>43</sup> However, the EIU’s decision to delegate this administrative task to an employee cannot support reconsideration, because it did not affect the substance of the Second CPE in any fashion and did not change the fact that the evaluators conducted the actual evaluation of the letters.

To start, the Determination on Request 15-21 already addressed this argument.<sup>44</sup> The Determination on Request 15-21 acknowledged that the verification emails were sent by a person “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”<sup>45</sup> The Determination on Request 15-21 also explained that the CPE Panel Process Document mandates that one of the two evaluators

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<sup>42</sup> CPE Panel Process Document at Pg. 5; Request, § 8.4, Pg. 5-6. Request 16-3 also contains a sentence arguing that the EIU appointed one of the same evaluators to conduct the Second CPE as performed the First CPE. Request, § 8.1, Pg. 3. The powerpoint to which the Requester referred during its Presentation also fleetingly touched upon this issue. (See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>, at Pg. 13.) However, other than in passing reference, Request 16-3 does not argue that reconsideration is warranted because the same evaluator conducted the Second CPE. Instead, that argument appears to be a vestige from the Requester’s Request 15-21, which raised that argument. (See Request 15-21, § 8.2, Pg. 5, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.) As explained in the Determination on Request 15-21, that argument fails to support reconsideration because it is factually inaccurate; ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and added a new core team member for the administration of the Second CPE. (Determination on Request 15-21 at Pgs. 28-29.)

<sup>43</sup> See Request, § 8.1, Pg. 3.

<sup>44</sup> Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>45</sup> *Id.*, Pgs. 28-29.

be “responsible for the letter verification process.”<sup>46</sup> Here, the CPE Panel members delegated the physical sending of the verification emails to a Verification Coordinator.<sup>47</sup> This procedure is in accord with the CPE Panel Process Document’s provision that a letter is verified when its author “send[s] an email *to the EIU* acknowledging that the letter is authentic.”<sup>48</sup> While the CPE Panel Process Document indicates that an “evaluator” will contact letter authors,<sup>49</sup> there is no policy or procedure that forbids the EIU from delegating the administrative task of sending the verification email to someone other than the actual “evaluator,” as the Determination on Request 15-21 correctly noted.

Moreover, the Requester has not demonstrated how it was materially or adversely affected by the EIU’s decision to delegate this administrative function to an administrative employee. On that ground alone, no reconsideration is warranted.<sup>50</sup> The identity of the person physically sending the verification emails did not have any impact upon the results of the verification or the results of the Second CPE as a whole; the verification results were communicated to both of the evaluators and the entire core team to permit a full and complete evaluation in accordance with the Guidebook, which included an evaluator’s substantive evaluation of the verified letters in compliance with the CPE Panel Process Document.<sup>51</sup> Nor is there anything inherently nefarious to the EIU’s decision in this regard; much as a company executive might delegate to her assistant the physical sending of emails sent on her behalf, the EIU evaluators assign the Verification Coordinator the task of physically sending the verification emails. In short, the Requester has not indicated how it was affected by the decision to delegate

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<sup>46</sup> See CPE Panel Process Document at Pg. 5; Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>47</sup> Determination on Request 15-21 at Pg. 29, fn. 102.

<sup>48</sup> CPE Panel Process Document at Pg. 5 (emphasis added).

<sup>49</sup> *Id.*

<sup>50</sup> Bylaws, Art. IV, §§ 2.1-2

<sup>51</sup> Guidebook § 4.2.3; CPE Panel Process Document at Pg. 5.

the sending of the verification emails to a Verification Coordinator, much less how it was materially or adversely affected, as is required to support a reconsideration request.<sup>52</sup>

Nonetheless, “[i]n an effort to provide greater transparency on an administrative aspect of the Community Priority Evaluation (CPE) process,” the EIU has provided “additional information regarding verification of letters of support and opposition” (EIU Correspondence).<sup>53</sup> The EIU Correspondence confirms that “the two evaluators assigned to assess a specific application review the letter(s) of support and opposition. For every letter of support/opposition received, both of the evaluators assess the letter(s) as described in the Guidebook, section 4.2.3 Criterion 4: Community Endorsement.”<sup>54</sup> As such, the EIU Correspondence confirms that the EIU complied with the CPE Panel Process Document’s instruction that an evaluator “assesses both the relevance of the organization and the validity of the documentation.”<sup>55</sup> The EIU Correspondence further explains that:

[t]he process of verification of letter(s) is an administrative task. . . . [F]or evaluations involving large numbers of letters of support or opposition, the EIU assigned its Project Coordinator, a senior member of the core team, to serve as Verification Coordinator and to take the purely administrative step of ensuring that the large volume of verification emails, as well as follow-up emails and phone calls, were managed efficiently.<sup>56</sup>

The need for a Verification Coordinator arose when an “administrative issue[] related to the verification of letters of support” occurred, namely certain entities submitted letters of support or opposition to multiple applications.<sup>57</sup> Because different evaluators were assigned to conduct CPE with respect to the various applications, those entities began to receive verification

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<sup>52</sup> See Bylaws, Art. IV, §§ 2.1-2.

<sup>53</sup> EIU Correspondence, *available at* <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 1.

<sup>54</sup> *Id.*

<sup>55</sup> CPE Panel Process Document at Pg. 5.

<sup>56</sup> EIU Correspondence at Pg. 2.

<sup>57</sup> *Id.*

emails from different people within the EIU.<sup>58</sup> The EIU “received complaints from the authors of the letters, who requested that they be contacted by a single individual,” thus the EIU assigned the Verification Coordinator the administrative task of sending all verification emails.<sup>59</sup> As the EIU Correspondence emphasizes, “the results of the verification [a]re communicated to both of the evaluators” and it is the evaluators who score the applications.<sup>60</sup>

In sum, the EIU Correspondence confirms that the Verification Coordinator sends the verification emails purely for administrative ease, and that the Requester was not affected (let alone materially or adversely) by the delegation of this administrative task from the evaluator to the Verification Coordinator. As such, the Requester has not identified any conduct on the part of the EIU that warrants reconsideration.

**B. The Requester Has Not Shown That The Determination on Request 15-21 Was The Result Of The BGC Failing To Consider Material Information, Or Considering False Or Inaccurate Information.**

The Requester argues that reconsideration of the Determination on Request 15-21 is warranted because *either*: (1) “the BGC should . . . have confirmed[] that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator”; *or* (2) the CPE Panel Process Document sets forth “a process that is more stringent than the one set forth in the Applicant Guidebook, which does not require the independent evaluator [to] perform such verification of support and objection.”<sup>61</sup> Reconsideration is not warranted on either ground, because the Requester has not shown that the BGC failed to consider material information or

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at Pg. 1.

<sup>61</sup> Request, § 8.6, Pg. 8.

relied on false or inaccurate information with respect to either issue. The Requester has not shown that either basis for reconsideration it poses actually took place.

First, as explained *supra*, the EIU substantively adhered to the CPE Panel Process Document and the Guidebook in administering the Second CPE, including with respect to the letter verification process. The Requester has not identified any material information the BGC failed to consider, or any false or inaccurate information it relied upon in reaching the Determination on Request 15-21 that no reconsideration was warranted with respect to the fact that an EIU administrative employee sent the verification emails during the Second CPE. As such, no reconsideration of the Determination on Request 15-21 is warranted.<sup>62</sup>

Second, the Requester argues that the BGC “erred in confirming that ‘none of the CPE Materials comprise an addition or change to the terms of the Guidebook.’”<sup>63</sup> As an initial matter, as the Determination on Request 15-21 explained, any challenge to the CPE materials (including the CPE Panel Process Document) is time-barred.<sup>64</sup> The Requester argues that through its reconsideration requests and the Determination on Request 15-21, it has discovered that the CPE Panel Process Document “introduces a concept that has not been included in the . . . Guidebook, which only refers to ‘evaluators’.”<sup>65</sup> However, the CPE Panel Process Document does not in fact comprise an addition or change to the terms of the Guidebook. The Guidebook provides that “[c]ommunity priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications.”<sup>66</sup> The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to

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<sup>62</sup> See Bylaws, Art. IV, § 2.

<sup>63</sup> Request, § 8.6, Pg. 8 (quoting Determination on Request 15-21 at Pg. 12).

<sup>64</sup> Determination on Request 15-21 at Pgs. 11-12.

<sup>65</sup> Request, § 8.5, Pg. 7.

<sup>66</sup> Guidebook § 4.2.2.

implement the Guidebook's CPE provisions<sup>67</sup> and summarizing those provisions.<sup>68</sup> The fact that someone other than an evaluator physically sends verification emails to authors of letters of support or opposition does not mean anyone other than a "community priority panel" has "review[ed]" the Application, as the Guidebook instructs.<sup>69</sup>

In sum, the Requester has not demonstrated that the Determination on Request 15-21 reflects a failure on the part of the BGC to consider material information, or that the BGC considered false or inaccurate information, in concluding either that the EIU substantively complied with the CPE Panel Process Document, or that the CPE Panel Process Document adheres to the Guidebook. Therefore, the BGC thinks that no reconsideration of the Determination on Request 15-21 is warranted.

#### **V. Recommendation.**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration. The BGC therefore recommends that Request 16-3 be denied. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 March 2016. However, the Requester sought, was

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<sup>67</sup> The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

<sup>68</sup> CPE Panel Process Document.

<sup>69</sup> Guidebook, § 4.2.2.

invited to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.<sup>70</sup>

The timing of the Presentation delayed the BGC's consideration of Request 16-3. The first practical opportunity to address Request 16-3 after receiving the Presentation was 26 June 2016.

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<sup>70</sup> See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

# Exhibit 30

AR F HYDER AL

Contact Information Redacted  
Contact Information Redacted Direct  
Fax

25 August 2016

**Via E-Mail**

Mr Göran Marby  
President and Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: ICANN Ombudsman Report dated 27 July 2016**

Dear Mr. Marby:

I am writing on behalf of my client, dotgay LLC (“dotgay”), to request that ICANN: (1) promptly, and by no later than Monday, August 29, 2016, post the Ombudsman’s investigative reports for Case No. 16-00177 issued on 15 July 2016 and 27 July 2016, regarding ICANN and the Economist Intelligence Unit’s treatment of dotgay’s application for .GAY (the “Report” or the “Ombudsman’s Report”); and (2) include the Report amongst the briefing materials that will be provided to the ICANN Board.

Dotgay notes that the Ombudsman’s conclusion that ICANN’s Board grant community priority status to dotgay, on the basis that such a step was required under ICANN’s own Articles and Bylaws, already has been broadly publicized within the ICANN community and in media outlets.<sup>1</sup> The posting of the Report by ICANN, however, is crucial to promote an understanding of the issues raised by the Ombudsman regarding the treatment of dotgay’s application in the ICANN community.<sup>2</sup>

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<sup>1</sup> See, e.g., [http://www.theregister.co.uk/2016/07/29/give\\_gays\\_dot\\_gay/](http://www.theregister.co.uk/2016/07/29/give_gays_dot_gay/).

<sup>2</sup> See, ICANN Ombudsman Framework.

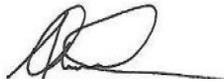
In addition, we note with concern that the Ombudsman's Report was not amongst the board briefing materials provided to ICANN's Board for consideration at its Special Meeting of 9 August 2016.

In the Recommendation to the Board issued by the Board Governance Committee ("BGC") on 26 June 2016, the BGC dismissed the request on technical grounds (improperly, in our view) and *specifically* encouraged dotgay to approach the Ombudsman with any complaints of unfairness:

*"If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter"* (Recommendation of 26 June 2016, § V, p.16).

Dotgay subsequently followed the BGC's Recommendation and cooperated with the Ombudsman's Investigation. The Ombudsman issued his report after completing his investigation, which included seeking comments from ICANN staff and dotgay. His conclusions vindicated dotgay's complaints about being treated unfairly and in a discriminatory manner. Accordingly, the ICANN Board must thoroughly and properly consider the Ombudsman Report during its future deliberations regarding dotgay's Reconsideration Request No. 16-3.<sup>3</sup>

We look forward to seeing the Ombudsman's Report posted on ICANN's website and included amongst the briefing materials provided to the ICANN Board when dotgay's application is tabled for consideration.



Arif Hyder Ali

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<sup>3</sup> See Reconsideration Request No. 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

cc: Steve Crocker, Chairman of the ICANN Board ([steve.crocker@icann.org](mailto:steve.crocker@icann.org))  
John Jeffrey, General Counsel and Company Secretary ([john.jeffrey@icann.org](mailto:john.jeffrey@icann.org))  
Scott Seitz, Chief Executive Officer, dotgay LLC Contact Information Redacted

# Exhibit 31

**ARIF HYDER ALI**

Contact Information Redacted

Contact Information Redacted Direct

Fax

September 13, 2016

**VIA E-MAIL**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay's  
Community Priority Application**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“dotgay”), to submit an independent expert opinion of Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, to the ICANN Board (“Board”) with the goal to assist the Board in evaluating dotgay’s reconsideration request (16-3) on September 15, 2016.<sup>1</sup> Prof. Eskridge is a world renowned expert both in legal interpretation and in sexuality, gender, and the law, and was recently ranked as one of the ten most-cited legal scholars in American history. Prof. Eskridge’s independent expert report explains, step-by-step, fundamental errors in the EIU’s reasons for denying dotgay’s community status.

Pursuant to the Independent Review Panel’s recent findings in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (July 29, 2016) (“Dot Registry Declaration”), which was accepted by the Board by way of its Resolutions 2016.08.09.11 and 2016.08.09.13 on August 9, 2016, it is imperative that the Board carefully reviews and considers Prof. Eskridge’s expert report prior to deciding dotgay’s reconsideration request (16-3).

First, the Board Governance Committee’s (“BGC”) June 26, 2016, recommendation to the Board to deny dotgay’s reconsideration request (16-3) was

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<sup>1</sup> Expert Report of Professor William N. Eskridge Jr., dated September 12, 2016, Exhibit 1

premised on a standard that was subsequently rejected by the Dot Registry Declaration. Specifically, the BGC rejected dotgay's request for reconsideration because dotgay did not "identify any misapplication of policy or procedure by the EIU that materially or adversely affected [dotgay], and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information." The Dot Registry Declaration, however, rejected this standard for reconsideration and held that "in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB."<sup>2</sup> At no point in dotgay's recourse to ICANN's accountability processes from 2014 to date has the Board scrutinized the CPE Report for consistency with the principles of fairness, transparency and non-discrimination; as Prof. Eskridge's Report demonstrates, the CPE Report would fail even the most lenient examination.

Second, the BGC's June 26, 2016 Recommendation improperly declined to consider dotgay's May 15, 2016, presentation and written summary of arguments because "the Presentation focused on the merits of the Second CPE Report." According to the Dot Registry Declaration, "the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations."<sup>3</sup> The BGC's failure to recognize its responsibility to ensure the EIU's compliance with these principles infected its decision to exclude from consideration whether the EIU had in fact been correct in its application of the Articles, Bylaws and AGB. This is troubling because, as explained by Prof. Eskridge in his report, the EIU failed to comply with ICANN's Articles and Bylaws.

Specifically, Prof. Eskridge explains that the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement between the applied-for string (.GAY) and the LGBTQIA community: (1) interpretive errors by misreading the explicit criteria laid out in ICANN's Applicant Guidebook ("AGB") and ignoring ICANN's mission and core values; (2) errors of inconsistency and discrimination by failure of the EIU to follow its own guidelines and its discriminatory application to dotgay's application

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<sup>2</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration, p. 34 (29 July 2016).

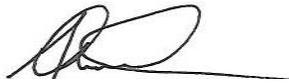
<sup>3</sup> *Id.* at p.34.

when compared with other applications; and (3) errors of fact, namely, a misstatement of important empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities. Prof. Eskridge's report, after discussing EIU's egregious reasoning behind rejecting dotgay's application, concludes that the EIU "engaged in a reasoning process that remains somehow mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory."

Finally, as dotgay has amply demonstrated in its submissions to the ICANN Board, it is entitled to the full two points in relation to community endorsement,<sup>4</sup> since it has the support of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) – a global human rights organization focused on the gay community with member organizations in 125 countries.

Accordingly, pursuant to the Board's obligation to exercise due diligence, due care, and independent judgment in reaching reconsideration decisions, we sincerely hope that the Board: (1) will review and agree with Prof. Eskridge's independent expert opinion that the EIU's evaluation of dotgay's community priority application was flawed, and (2) grant dotgay's community priority application without any further delay.

Sincerely,



Arif Hyder Ali  
Partner, Co-Chair of International Arbitration Group

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<sup>4</sup> See dotgay letter to ICANN Board of Directors (September 8, 2016) pp. 5-9. See also dotgay presentation to the Board Governance Committee (May 17, 2016) pp. 7-9 and Statement of Renato Sabbadini (May 17, 2016).

# **EXPERT REPORT**

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## **I. EXECUTIVE SUMMARY**

Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU) recommended that the application be denied; the major reason was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender. The CPE Report is fundamentally erroneous. The Report’s fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States. In short, the CPE Report and its recommendations should be rejected, and dotgay should be awarded full credit (4 of 4 points) for establishing the nexus of its string with the community.

## **II. QUALIFICATIONS OF THE EXPERT**

1. I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent legal opinion on the validity of the ICANN Community Priority

Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), evaluating dotgay's community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string ".gay".

2. I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,<sup>1</sup> leading monographs,<sup>2</sup> and dozens of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.<sup>3</sup>
3. My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN's gTLD Applicant Guidebook (AGB), especially Module 4.2.3, "Criterion #2: Nexus Between Proposed String and Community"; (iii) the history of the terminology in dispute, especially the term "gay" and its applicability to the community of sexual and

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<sup>1</sup> William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its third edition, with the fourth edition out next year). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, "by far," ever published in the field of legislation and suggesting that it would "alter the law school curriculum").

<sup>2</sup> For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

<sup>3</sup> According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (viewed September 8, 2016).

gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

### **III. BACKGROUND**

#### **A. DOTGAY'S APPLICATION**

4. Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by the Internet Corporation for Assigned Names and Numbers (ICANN).

#### **B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK**

5. The governing legal materials include ICANN's Bylaws and its Applicant Guidebook. The Bylaws establish ICANN's mission “to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN's “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).
6. Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

7. ICANN's Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay's application. See AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant "community," nexus between the proposed string and the community, registration policies, and community endorsement. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The CPE Panel of EIU awarded dotgay a score of 10 of 16 points, including a score of 0 of 4 points for Criterion #2, the nexus requirement that will be the focus of this Expert Report.

**C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY**

8. Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay's application. Dotgay's petition lost 4 of 4 possible points on Criterion #2, and I shall focus on that criterion, "Nexus Between Proposed String and Community (0-4 Points)." More particularly, I shall focus on the nexus requirement, which is responsible for 3 of the 4 points. (A uniqueness requirement accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)
9. An application merits **3 points** for the nexus requirement if "[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community." AGB, 4-12 (emphasis added). "Name" of the community means "the established name by which the community is commonly known by others." AGB, 4-13. "[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, 4-13.

10. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.

11. An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, 4-13.

#### **D. THE CPE REPORT’S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT**

12. In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus requirement. CPE Report, 4-6. Because dotgay secured 10 points from the remaining Criteria and needed 14 points for approval, Criterion #2 was the critical reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.

13. Recall that an application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, 5.

14. The CPE Report does not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not a “well known short-form or abbreviation of the community” defined in dotgay’s application, but it does read into the explicit requirement (“well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement is taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation.

15. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender,

intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

16. The Report did not identify the methodology the EIU followed to support these sweeping empirical statements. Instead, the Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, 5 note 12.
17. Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The CPE Report conceded this point (CPE Report, 7) but nevertheless claimed that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are “many similar transgender stories in the media where ‘gay’ is not used to identify the subject.” CPE Report, 6-7 and note 14.
18. The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, 7. The EIU Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, 7 and note 19.

19. The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, 8.
20. Based upon this reasoning, the CPE Report awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the CPE Report awarded 0 of 1 point for uniqueness. CPE Report, 8.

#### **IV. FUNDAMENTAL ERRORS IN THE CPE REPORT’S REASONING**

21. The CPE Report compiled by the EIU Panel is fundamentally incorrect in its approach to the nexus criterion and in its evaluation of the evidence of community nexus. The fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world.

##### **A. THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS**

22. Recall the requirements ICANN has set forth, explicitly, for the nexus requirement in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’ AGB, 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
23. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.
24. As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.<sup>4</sup> As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes.

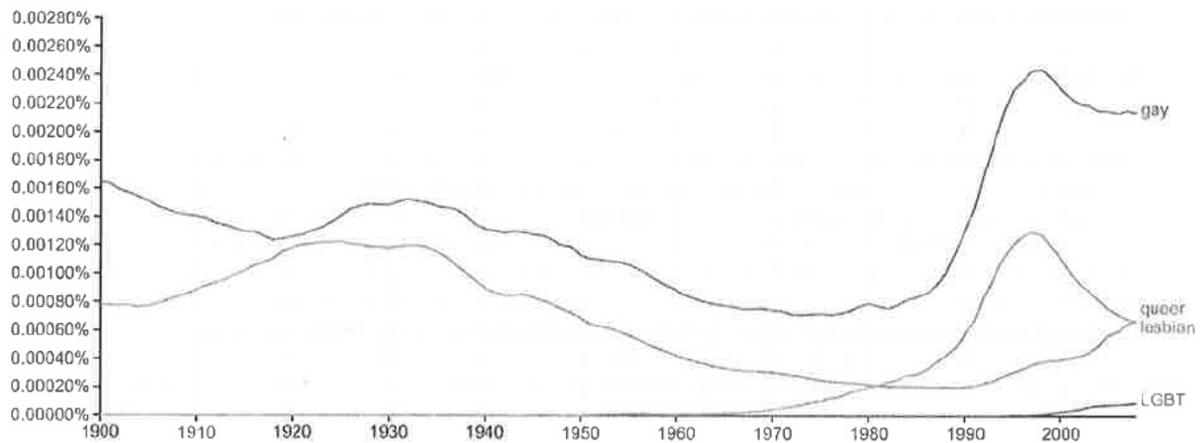
**1. The CPE Report Substantially Ignored The Primary Test: Is the Proposed String a “well known short-form or abbreviation of the community”?**

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<sup>4</sup> The proposition in text is explained and defended in Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

25. To begin with, a major problem is that the EIU Panel systematically ignored the Applicant Guidebook's focus on whether the proposed string (".gay") is "a well known short-form or abbreviation of **the community**" (3 points) or "closely describes **the community**" (2 points) (emphasis added in both quotations). Notice the precise language, especially the language I have set **in bold**. The proposed string does not have to be "**the only** well known short-form or abbreviation of the community" and does not have to be "**the only term that** closely describes the community" (bold type for language I am adding for contrast). More important, the primary focus is "the community," not just "community members" (who are an alternative focus for the 2-point score).

26. The overall community is sexual and gender nonconformists. This is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely embraced natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. "Gay" is a "well known short-form or abbreviation of the community" (the requirement for 3 points) and also "closely describes the community" (the requirement for 2 points). There is no requirement that "gay" must be the only umbrella term for the community or even that it be the most popular term—but in fact "gay" remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that "gay" has been a popular word for more than a century, but also demonstrates that once "gay rights" became ascendant in the 1990s, the term's dominance increased and consolidated.



*Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008*

## **2. The CPE Report Created an “Under-Reach” Criterion Not Found in or Supported by the Applicant Guidebook and Applied the Novel Criterion to create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws**

27. In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus criteria. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The CPE Report created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some**

**members** of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, 5 (emphasis added).

28. Where did this *Liberum Veto* come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, 4-12, nor was it taken from the Guidebook’s Definitions of “Name” or “Identify,” AGB 4-13. Yet the EIU Panel quoted the Applicant Guidebook for its statement of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake.

29. According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, 5 (quoting the AGB). Notice that the first part [1] of the CPE Report’s requirement is taken from the Guidebook’s nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so the Panel ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a *Liberum Veto*.

30. Moreover, the EIU Panel’s Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that the Guidebook defines “Identify” to mean that “the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**” AGB, 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application, like this:

*ICANN AGB Concern: Applied-For String > Community Defined in Application*

But that’s not the concern identified by the EIU Panel’s Liberum Veto analysis, which claims that the applied-for string (“gay”) “under-reaches” substantially short of the whole community. The Panel’s “under-reaching” concern flips the “over-reaching” concern of the Applicant Guidebook. The Panel’s worry that the applied-for string is much narrower than the community defined in the application, looks like this:

*EIU Panel Concern: Applied-For String < Community Defined in Application*

31. Although I shall document how the EIU Panel is mistaken in its application of its “under-reaching” analysis, note that this analysis and the Liberum Veto are errors by the EIU Panel and are contrary to the ordinary meaning of ICANN’s Applicant Guidebook. The “under-reaching” analysis and the Liberum Veto are also inconsistent with the CPE Guidelines, Version 2.0, prepared by the EIU itself. See EIU, CPE Guidelines, 7-8 (Version 2.0), analyzed below.

### 3. The CPE Report Ignored and Is Inconsistent with ICANN's Bylaws

32. Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN's mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support "broad, informed participation reflecting the \* \* \* cultural diversity of the Internet." ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.
33. There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—.gay—is ideally suited for these purposes.
34. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), "suicide.gay" (one of the community-operated websites proposed in the application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Expert Report) would think "suicide.gay" before they would think "suicide.lgbt" or "suicide.lgbtqia." See Figure 1, above. Indeed, many educated people (including the author of this Expert Report) cannot easily remember the correct order of the letters in the latter string ("lgbtqia"). Does a

Liberum Veto make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). Figure 2, below, is a dramatic illustration of this point: “gay suicide” is a common locution; the search of books published between 1950 and 2008 does not register significant usage for “LGBT suicide” or “LGBTQIA suicide.”

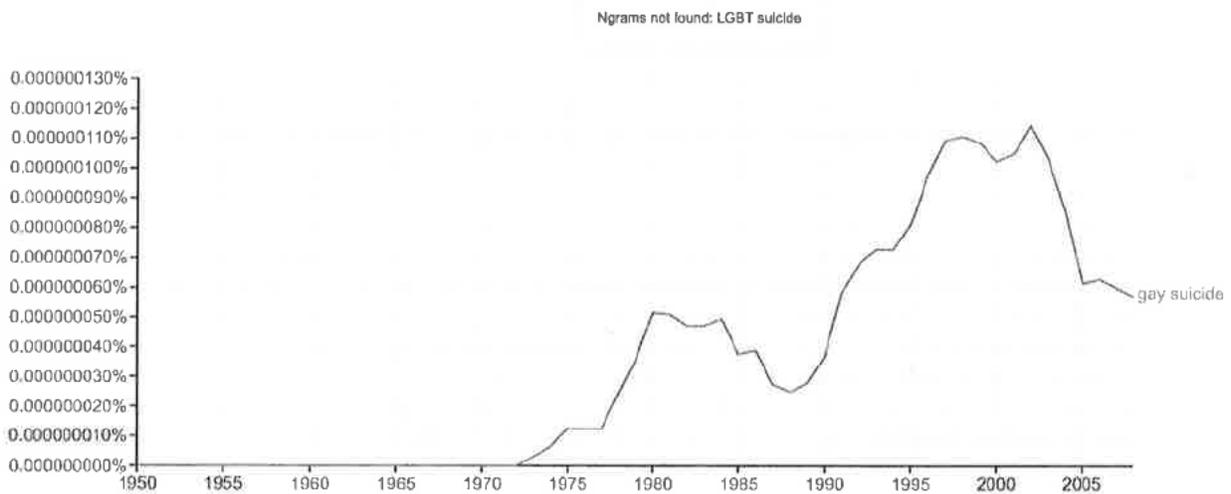


Figure 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the Corpus of Books published between 1950 and 2008

35. Not least important, recall that “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU has arbitrarily created an “under-reaching” test or requirement, without any notice in its own guidelines. Needless to say, other EIU Panel evaluations have ignored that criterion in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian

manner, namely, creating a Liberum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

**B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION**

**1. The CPE Report Is Inconsistent with the EIU's Own Guidelines**

36. Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string "identifies" the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full (3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application "identified" the community.
37. "Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string "must 'closely describe the community or the community members', i.e., the applied-for string is what 'the typical community member would naturally be called.'" CPE Report, 5.
38. Based upon this revision of the ICANN criterion, the CPE Report "determined that more than a small part of the applicant's defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus." CPE Report, 5. Specifically, the EIU Panel "determined that the applied-for string does not sufficiently identify some members of the

applicant’s defined community, in particular transgender, intersex, and ally individuals.”  
CPE Report, 5-6.

39. As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Indeed, this CPE Report’s unauthorized test is also directly inconsistent with the EIU’s own published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the EIU’s Guidelines quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, at 7 (emphasis added). The EIU’s Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

40. The EIU Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

*Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?*

*Does the string capture a wider geographic/thematic remit than the community has?*

EIU, CPE Guidelines, Version 2.0, at 8 (emphasis in original).

41. Given these Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE Report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka”. “Members of the community are defined as those who are within the Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, 2.
42. The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to this application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka probably self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. *Liberum Veto?*
43. Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular AirBnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” Dotgay CPE Report, 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

44. I must say that this kind of Libero Vetu evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for “.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the Dotgay CPE Report.

45. By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of 3 points for nexus. Osaka CPE Report, 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, 4. Yes, but the applicant defined the community much, much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Libero Vetu in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

## **2. The CPE Report Is Inconsistent with the EIU’s Own Previous Reports**

46. Dotgay’s application may not have been the first time the EIU has performed a nexus analysis suggesting an “under-reach” of an applied-for string, compared with the identified

community. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

47. An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether “.hotel” should be approved as a top-level domain. The EIU Panel may have performed a kind of “under-reach” analysis—but it was nothing as critical as that which it performed for dotgay’s application, even though the “.hotel” name was a much more dramatic illustration of “under-reach.”
48. The applicant wanted a domain that would serve the “global Hotel Community.” It defined its community in this way: “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” Hotel CPE Report, 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.
49. In the discussion of the nexus requirement, the EIU Panel observed that “the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s

sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

50. The EIU’s “under-reach” analysis of the Hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the Panel’s tolerant analysis in the Hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the dotgay CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in the current Expert Report (reported below).

51. Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 points, including 4 of 4 points for nexus and uniqueness. Like the “.hotel” applicant, the “.spa” applicant has more significant problems of “under-reach” than dotgay’s application has.

52. The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, 2. The EIU Panel awarded the

applicant 4 of 4 points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa” and would not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

**C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY’S APPLICATION**

53. Assume, contrary to any sound analysis, that the CPE Report correctly stated the Applicant Guidebook’s requirements for Criterion #2 (community nexus and uniqueness). Even under the EIU Panel’s excessively restrictive understanding of ICANN’s requirements, dotgay’s application would merit 4 of 4 points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

54. Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community

described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

55. The CPE Report makes no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor does it identify the methodology the EIU Panel followed to support these sweeping empirical statements. The remainder of this Expert Report will attempt to do that. The analyses contained in Appendix 2 will explain the methodology my research team and I followed for each of the Figures used below.

### **1. From Stonewall to Madrid: “Gay” as an Umbrella Term for Sexual and Gender Minorities, as Well as a Term for Homosexual Men**

56. In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”<sup>5</sup> European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.<sup>6</sup>

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<sup>5</sup> E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

<sup>6</sup> Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, 46-49.

57. Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he describes as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgyne,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common is that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological, feminine woman) and procreative sexual practices that were socially expected in this country. See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908). Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.
58. Most of these terms were at least somewhat derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.
59. An early literary example is Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicts a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a

woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed or posed as a man. (Such an explicit book would have been subject to immediate censorship.) Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

60. Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. (As the twentieth century progressed, meaning (1) has been almost completely eclipsed by meanings (2) and (3).) There was in this early, closeted era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity.

61. An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sends his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asks why the handsome leading man is thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line highly amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.<sup>7</sup>

62. In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. See Figure 1, above. Indeed, in many countries, "queer" to this day carries more negative connotations than "gay," which continues to make "queer" a less attractive generic term.

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<sup>7</sup> For a provocative analysis of the bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

63. A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City's Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the "Gay Revolution."<sup>8</sup> Sympathetic accounts of the Stonewall riots mobilized the popular term "gay" to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the "Gay Revolution." For example, Carter's account reports that this "Gay Revolution" began when a "butch dyke" punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that "special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. \* \* \* A common theme links those who resisted first and fought the hardest, and that is gender transgression."<sup>9</sup>

64. Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts almost universally described as a "gay bar." The patrons of the gay bar included homosexual and bisexual men who were insisting they be called "gay" and not the disapproved Greek terms ("homosexual" and "bisexual") that had been devised by the doctors. Many of the people in the "gay bar" were not homosexual men, but were lesbians,

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<sup>8</sup> David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

<sup>9</sup> *Id.* at 261; see *id.* at 150-51 (describing the first punch thrown by the "butch dyke," who floored a police officer).

gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends of these gender and sexual nonconformists.<sup>10</sup>

65. Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”<sup>11</sup> In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other “gay” groups. These groups included “gay” men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

66. Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many times since, Katz’s *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called “hermaphrodites” and “man-women”;<sup>12</sup> poet Walt Whitman, who celebrated “the love of

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<sup>10</sup> See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

<sup>11</sup> Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

<sup>12</sup> *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

comrades,” which he depicted as male bonding and intimate friendships;<sup>13</sup> “male harlots,” or prostitutes, on the streets of New York;<sup>14</sup> Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;<sup>15</sup> lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.<sup>16</sup> More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.<sup>17</sup>

67. Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.
68. Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as “LGB” (lesbian, gay, and bisexual) persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and

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<sup>13</sup> Id. at 509-12 (Whitman).

<sup>14</sup> Id. at 68-73 (male prostitutes, called “harlots” in a contemporary report).

<sup>15</sup> Id. at 317-90 (dozens of women who “passed” as men, many of whom marrying women).

<sup>16</sup> Id. at 118-27 (Smith), 787-97 (Goldman).

<sup>17</sup> Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of “Gay Los Angeles”); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the “gay male world” bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community. I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgendered people.”<sup>18</sup> Although many readers were taken aback that “gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

69. In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

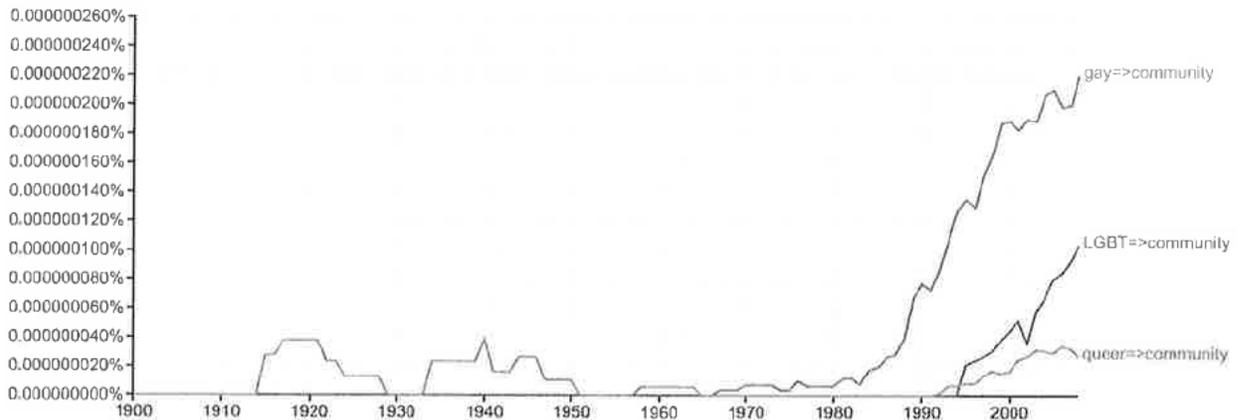
70. Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? Not at all. Recall that the requirement for the nexus requirement

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<sup>18</sup> William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“gay”) “is a well-known short-form or abbreviation of the community.” AGB, 4-12.

There are many, many specific examples indicating that it is.



*Figure 3. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)*

71. Figure 3, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (As with the other Figures, the methodology for the search is contained in Appendix 2.)

72. There are other corpuses that can be searched, and we have done so to check the reliability of the data in Figure 3. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed

Sept. 9, 2016). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. Specifically, we had 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

73. Does “gay community” generate a comparable number of hits? In our search of the BYU Corpus, we found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3A provides an illustration of these results.

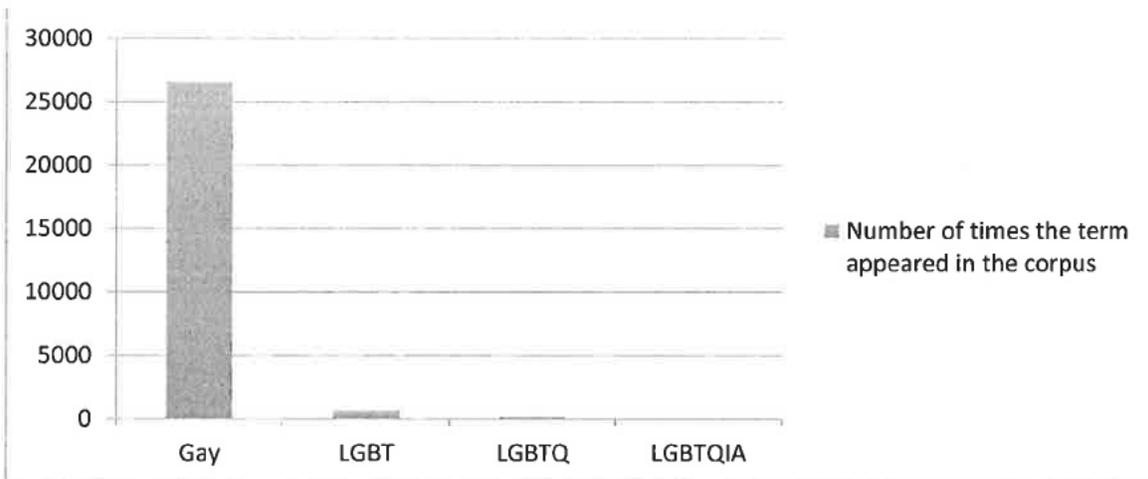


Figure 3A. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

74. How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points

for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

75. Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this unprecedented mass assault by a single person on American soil.<sup>19</sup> Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and “allies,” as well as many gay men.

76. Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.<sup>20</sup> Most of the victims were

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<sup>19</sup> We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

<sup>20</sup> For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed 9/2/16).

homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

77. Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”<sup>21</sup>

78. Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events”

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<sup>21</sup> E.g., *Highlights from New York's Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

all over the world, <https://www.nighttours.com/gaypride/> (viewed Sept. 9, 2016). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

79. There are also international gay pride events. In 2017, it will be World Pride Madrid, celebrating Spain's leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid's annual pride celebration was voted "best gay event in the world" by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as "Gay World Pride."<sup>22</sup> Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use "gay" **both** as a generic, umbrella term for sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

## **2. "Gay" Is an Umbrella Term for the Community That Includes Transgender, Intersex, and "Allied" Persons**

80. As illustrated by the accounts of the Orlando "gay bar" and the world-wide "gay pride" events, the term "gay" remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that "gay people," the generic term, remains the most popular use of the term "gay," with "gay men" and "gay women" also popular, but much less so.

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<sup>22</sup> E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

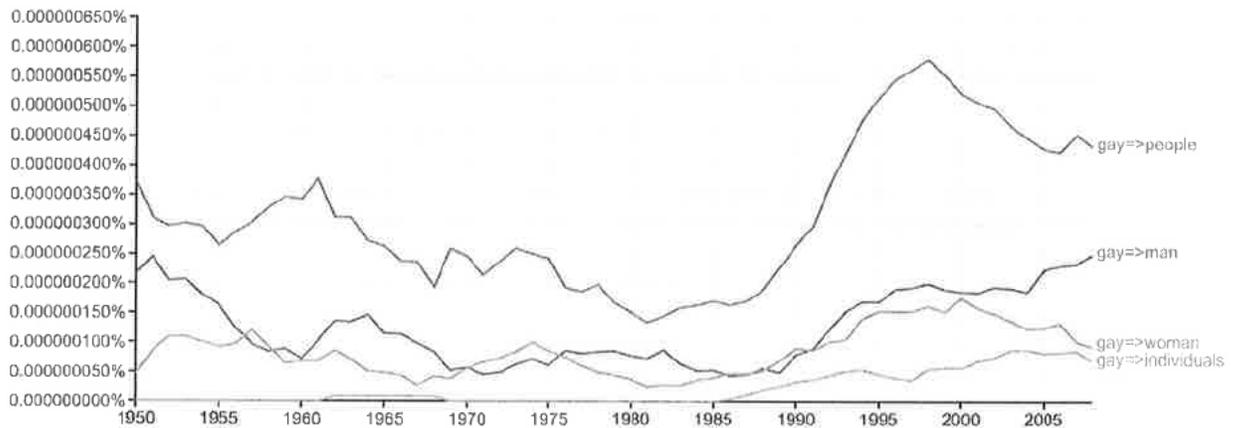


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

81. The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition, aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing. As I shall show, the EIU Panel did not browse very extensively.
82. To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term

makes it perfect for an Internet domain (".gay") for the community that consists of sexual and gender minorities.

83. Thus, almost all of the CPE Report's examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay's claim that "gay" is a "well known short-form or abbreviation for the community." The EIU Panel objected that dotgay's analysis "fails to show that when 'gay' is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities." CPE Report, 7. Although I do not believe the EIU Panel fairly characterized dotgay's application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

84. Consider the famous "Gay Games," an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. The stated purpose of the Gay Games is to foster "self-respect of lesbian, gay, bisexual, transgender, and all sexually-fluid or gender-varient individuals (LGBT+) throughout the world."<sup>23</sup> The mission of the Federation is "to promote equality through the organization of the premiere international LGBT and LGBT-friendly sports and cultural event known as the Gay Games."<sup>24</sup> Notice how the Federation uses the term "gay" as both a generic, umbrella term ("Gay Games") and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly,

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<sup>23</sup> Federation of Gay Games, *Purpose and Mission Statement*, ¶ 1, <https://gaygames.org/wp/about-the-fgg/about-the-federation/purpose-and-mission-statement-2/> (viewed Sept. 9, 2016).

<sup>24</sup> *Id.*, ¶ 2.

LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

85. Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

86. The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy.<sup>25</sup> “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted

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<sup>25</sup> CPE Report, 7; *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (viewed Sept. 9, 2016) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”<sup>26</sup>

87. In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.<sup>27</sup> *Gay Star News* is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.<sup>28</sup>

88. Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’ \* \* \*. But, as she affirms, there is a

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<sup>26</sup> E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

<sup>27</sup> Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

<sup>28</sup> Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

panoply of identities from which to choose in an expansive **gay L.A.**”<sup>29</sup> These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

89. Consider another recent example, James Franco. He is a famous actor who is as coy about his sexual orientation and gender identity as he is friendly and “allied” with the gay community. He is often asked whether he is “gay,” and his characteristic (and current) answer is that, yes, he is “gay,” even though he does not have sex with men and is neither transgender nor intersex.<sup>30</sup> In a March 2015 interview with himself, “Gay James Franco” said this: “Well, I like to think that I’m gay in my art and straight in my life. Although, I’m also gay in my life up to the point of intercourse, and then you could say I’m straight.”<sup>31</sup> James Franco is a friend, an ally, a co-explorer with sexual and gender nonconformists of all sorts. Like Raquel Gutierrez, he is part of a larger “gay community.” Both people illustrate how “gay” can be **both** a popular term referring to sexual orientation and activity **and** a generic, umbrella term referring to a sensibility or a community whose members do not conform to traditional gender and sexual norms.

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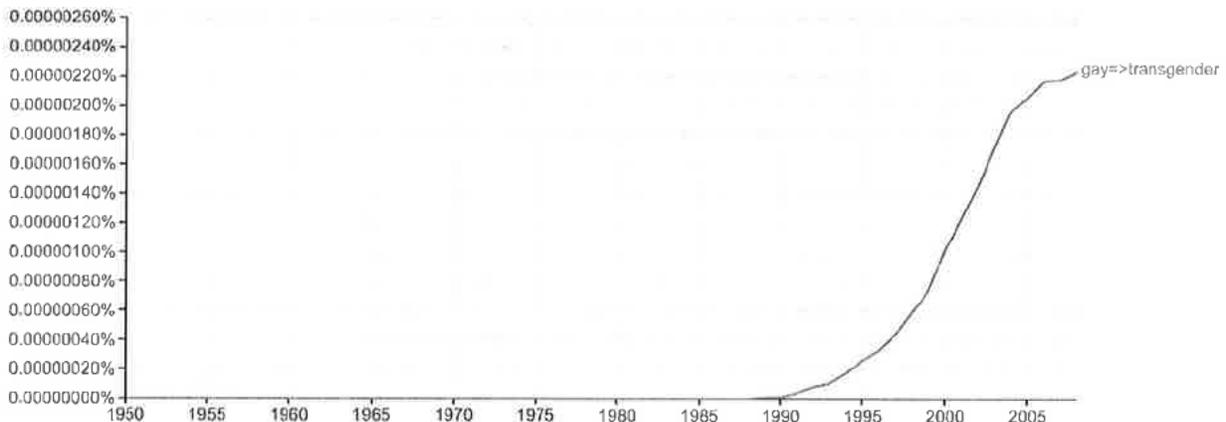
<sup>29</sup> Faderman & Timmons, *Gay L.A.*, 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

<sup>30</sup> *Understanding James Franco*, Rolling Stone, April 7, 2016 (account and quotations in text).

<sup>31</sup> J. Bryan Lowder, *James Franco Is Gay—Well, At Least Half of Him Is*, Slate, March 16, 2015.

Another example is Miley Cyrus, an announced “pansexual” who has recently been sporting clothes with the slogan “Make America Gay Again.”<sup>32</sup>

90. As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. My research associates and I have run a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” becomes associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.



*Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”*

<sup>32</sup> Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (viewed Sept. 9, 2016).

91. The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer and still-mysterious term, and it is not clear how many acknowledged intersex persons there are in the world. Most discussion of intersexuality in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon.

92. Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.<sup>33</sup>

93. Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website,

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<sup>33</sup> Federation of Gay Games, “Gender in Sport,” <https://gaygames.org/wp/sport/sports-policiesd/gender/> (viewed Sept. 9, 2016).

*Everyone Is Gay*.<sup>34</sup> The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.<sup>35</sup> While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

## V. CONCLUSION AND SIGNATURE

94. Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

95. Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly,

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<sup>34</sup> *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (viewed Sept. 9, 2016).

<sup>35</sup> E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (viewed Sept. 9, 2016).

ICANN's requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay's application. Indeed, dotgay's application more than meets the requirements actually laid out in the Applicant Guidebook.

96. Moreover, ICANN "shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN Bylaws, Art. II, § 3 ("Non-Discriminatory Treatment"). And ICANN "and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN Bylaws, Art. III, § 1.

97. Evaluating dotgay's application, the EIU has not acted in a completely "open and transparent manner," nor has it followed "procedures designed to ensure fairness." To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

98. Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and to grant dotgay's application, for it legitimately deserves at least 14 of 16 points (i.e., including 4 of 4 points for Criterion #2, the community nexus requirement).

**Respectfully submitted,**

**Date,** September 13, 2016



William N. Eskridge Jr.

John A. Garver Professor of Jurisprudence  
Yale Law School

## **APPENDICES**

### **APPENDIX 1**

#### **CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL**

##### **EDUCATION**

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha  
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

##### **POSITIONS HELD**

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995

Stanford, 1995

Toronto, 1999, 2001

Vanderbilt, 2003

Columbia, 2003

Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011

Fordham, 2008

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998

Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 - 1979

(SELECTED) PUBLICATIONS

*Books*

**Interpreting Law: A Primer on How to Read Statutes and the Constitution** (Foundation 2016)

**Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes** (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

**A Republic of Statutes: The New American Constitutionalism** (Yale 2010) (co-authored with John Ferejohn)

**"Dishonorable Passions": Sodomy Law in America, 1861-2003** (Viking 2008)

**Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence** (Oxford 2006) (co-authored with Darren Spedale)

**Equality Practice: Civil Unions and the Future of Gay Rights** (Routledge 2002)

**Legislation and Statutory Interpretation** (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

**Gaylaw: Challenging the Apartheid of the Closet** (Harvard 1999)

**Constitutional Tragedies and Stupidities** (NYU 1998) (co-authored and edited with Sanford Levinson)

**Sexuality, Gender, and the Law** (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

**The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment?** (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

**Dynamic Statutory Interpretation** (Harvard 1994)

**Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century** (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

**Legislation: Statutes and the Creation of Public Policy** (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

**A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem** (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

*(Selected) Articles*

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 *Hous. L. Rev.* 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 *Tex. L. Rev.* 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 *B.U.L. Rev.* 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 *Wis. L. Rev.* 411

“The New Textualism and Normative Canons,” 113 *Colum. L. Rev.* 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 *NYU Rev. L. & Soc. Change* 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 *St. Louis U.L. Rev.* 865 (2012)

“Vetogates and American Public Law,” *J.L. Econ. & Org.* (April 2012), available online at <http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.abstract>

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 *Geo. L.J.* 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 *Ga. L. Rev.* 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 *Washburn L.J.* 1 (2010)

“*Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 *Colum. L. Rev.* 1727 (2010) (with Connor N. Raso)

"The California Proposition 8 Case: What Is a Constitution For," 98 Calif. L. Rev. 1235 (2010)

"Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign," 57 UCAL L. Rev. 1333 (2010)

"The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy," Calif. L. Rev. (2009)

"A Pluralist Theory of Equal Protection," U. Pa. J. Const'l L. (2009)

"Constitutional Horticulture: Deliberation-Respecting Judicial Review," 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

"Vetogates, Preemption, *Chevron*," 83 Notre Dame L. Rev. 1441 (2008)

"The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*," 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

"America's Statutory 'Constitution,'" 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

"No Frills Textualism," 119 Harv. L. Rev. 2041 (2006) (book review)

"*Chevron* and Agency Norm Entrepreneurship," 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

"Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion," 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

"Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics," 114 Yale L.J. 1279 (2005)

"*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism," 2 Int'l J. Const'l L. 555 (2004)

"*Lawrence's* Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics," 88 Minn. L. Rev. 1021 (2004)

"Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century," 100 Mich. L. Rev. 2062 (2002)

"Structuring Lawmaking to Reduce Cognitive Bias: A Critical View," 87 Cornell L. Rev. 616 (2002)

"Channeling: Identity-Based Social Movements and Public Law," 150 U. Pa. L. Rev. 419 (2001)

"All About Words: Early Understandings of the 'Judicial Power' in Statutory Interpretation, 1776-1806," 101 Colum. L. Rev. 999 (2001)

"The Relationship Between Obligations and Rights of Citizens," 69 Fordham L. Rev. 1721 (2001)

"Super-Statutes," 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

- "Equality Practice: Reflections on the Jurisprudence of Civil Unions," 64 Alb. L.J. 853 (2001) (Sobota Lecture)
- "January 27, 1961: The Birth of Gaylegal Equality Arguments," 58 NYU Ann. Survey Am. Law 39 (2001)
- "No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review," 75 NYU L. Rev. 1327 (2000)
- "Destabilizing Due Process and Evolutive Equal Protection," 47 UCLA L. Rev. 1183 (2000)
- "Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions," 31 McGeo. L.J. 641 (2000)
- "The Circumstances of Politics and the Application of Statutes," 100 Colum. L. Rev. 558 (2000)
- "Multivocal Prejudices and Homo Equality," 100 Ind. L.J. 558 (1999) (Harris Lecture)
- "Norms, Empiricism, and Canons in Statutory Interpretation," 66 U. Chi. L. Rev. 671 (1999)
- "*Hardwick* and Historiography," 1999 U. Ill. L. Rev. 631 (Baum Lecture)
- "Relationships Between Formalism and Functionalism in Separation of Powers Cases," 22 Harv. J.L. & Pub. Pol'y 21 (1998)
- "Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?," 66 Geo. Wash. L. Rev. 1301 (1998)
- "Textualism, the Unknown Ideal," 96 Mich. L. Rev. 1509 (1998) (book review)
- "A Jurisprudence of 'Coming Out': Religion, Sexuality, and Liberty/Equality Collisions in Public Law," 106 Yale L.J. 2411 (1997)
- "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," 24 Fla. St. U.L. Rev. 703 (1997) (Mason Ladd Lecture)
- "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981," 25 Hofstra L. Rev. 817 (1997) (Visiting Scholar in Residence Lecture)
- "Willard Hurst, Master of the Legal Process," 1997 Wis. L. Rev. 1181
- "From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," 82 Iowa L. Rev. (1997) (Murray Lecture)
- "Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism," 68 U. So. Cal. L. Rev. 1447 (1995) (co-authored with Jenna Bednar)
- "Virtual Logrolling: How the Court, Congress, and the States Multiply Rights," 68 U. So. Cal. L. Rev. 1545 (1995)
- "Regulatory Variables and Statutory Interpretation," 73 Wash. U.L.Q. 1103 (1995) (co-authored with Judith Levi)

"Fetch Some Soupmeat," 16 *Cardozo L. Rev.* 2209 (1995)

"The Supreme Court, 1993 Term – Foreword: Law as Equilibrium," 108 *Harv. L. Rev.* 26 (1994) (co-authored with Philip Frickey)

"The Elastic Commerce Clause: A Political Theory of American Federalism," 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

"The Making of 'The Legal Process,'" 107 *Harv. L. Rev.* 2031 (1994) (essay, co-authored with Philip Frickey)

"From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct," 29 *Harv. C.R.-C.L. L. Rev.* 319 (1994) (co-authored with David Cole)

"The Economics Epidemic in an AIDS Perspective," 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

"Gaylegal Narratives," 46 *Stan. L. Rev.* 607 (1994)

"Post-Enactment Legislative Signals," 57 *Law & Contemp. Probs.* 75 (Winter 1994)

"The Judicial Review Game," 88 *Nw. U.L. Rev.* 382 (1993)

"Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet," 2 *Reconstruction* 52 (1993)

"The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell," 61 *Geo. Wash. L. Rev.* 1731 (1993)

"A History of Same-Sex Marriage," 79 *Va. L. Rev.* 1419 (1993)

"The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation," in *The Rule of Law (Nomos, 1993)* (co-authored with John Ferejohn)

"A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda," 102 *Yale L.J.* 333 (1992) (review essay)

"Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 *Vand. L. Rev.* 593 (1992) (co-authored with Philip Frickey)

"The Article I, Section 7 Game," 80 *Geo. L.J.* 523 (1992) (co-authored with John Ferejohn)

"Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale L.J.* 331 (1991)

"Making the Deal Stick: Enforcing the Original Constitutional Understanding," *J.L. Econ & Org.* (1991) (co-authored with John Ferejohn)

"Reneging on History? Playing the Court/Congress/President Civil Rights Game," 79 *Calif. L. Rev.* 613 (1991)

"The New Public Law Movement: Moderation as a Postmodern Cultural Form," 89 *Mich. L. Rev.* 707 (1991) (co-authored with Gary Peller)

"The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases)," 88 Mich. L. Rev. 2450 (1990)

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"Gadamer/Statutory Interpretation," 90 Colum. L. Rev. 609 (1990)

"The New Textualism," 37 UCLA L. Rev. 621 (1990)

"Statutory Interpretation as Practical Reasoning," 42 Stan. L. Rev. 321 (1990) (co-authored with Philip Frickey)

"Spinning Legislative Supremacy," 78 Geo. L.J. 319 (1989)

"Public Values in Statutory Interpretation," 137 U. Pa. L. Rev. 1007 (1989)

"Metaprocedure," 98 Yale L.J. 945 (1989) (review essay)

"Interpreting Legislative Inaction," 87 Mich. L. Rev. 67 (1988)

"Overruling Statutory Precedents," 76 Geo. L.J. 1361 (1988)

"Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation," 74 Va. L. Rev. 275 (1988)

"Dynamic Statutory Interpretation," 135 U. Pa. L. Rev. 1479 (1987)

"Legislation Scholarship & Pedagogy in the Post-Legal Process Era," 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

"*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem," 25 Va. J. Int'l L. 281 (1985)

"One Hundred Years of Ineptitude," 70 Va. L. Rev. 1083 (1984)

"The Iranian Nationalization Cases," 22 Harv. Int'l L.J. 525 (1981)

"*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA," 86 Yale L.J. 885 (1977) (student note)

#### ENDOWED LECTURES

Henry J. Miller Lecture, Georgia State University College of Law, "Marriage Equality, 1967-2017," September 15, 2016

Frankel Lecture, University of Houston Law Center, "Marriage Equality as a Testing Ground for Original Meaning," November 2014, published as "Marriage Equality and Original Meaning," 52 Hous. L. Rev. 1057 (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, "Marriage Equality's Cinderella Moment," September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, "Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012," November 15, 2012, published as "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," 93 B.U.L. Rev. 275 (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as "Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?"

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as "Noah's Curse and Paul's Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty"

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, "Administrative Constitutionalism," March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as "America's Statutory constitution," U.C. Davis L. Rev. (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as "The Supreme Court's Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)," 86 Geo. L.J. (2008)

Center for Religious Studies at Princeton University, November 2005, "Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia"

Lockhart Lecture at University of Minnesota School of Law, "Same-Sex Marriage and Equality Practice," October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as "Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion," Fla. L. Rev. (2005)

President's Lecture at Davidson College, March 2004, "The Case for Same-Sex Marriage"

Brennan Lecture at Oklahoma City University School of Law, March 2004, "*Lawrence v. Texas* and Constitutional Regime Shifts"

Dean's Diversity Lecture at Vanderbilt University School of Law, February 2000, "Prejudice and Theories of Equal Protection"

Steintrager Lecture at Wake Forest University, February 1999, "Jeremy Bentham and No Promo Homo Arguments"

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as "Multivocal Prejudices and Homo Equality," *Ind. L.J.* (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, "Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law"

Baum Lecture at the University of Illinois School of Law, November 1997, published as "*Hardwick* and Historiography," 1998 *U. Ill. L. Rev.*

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as "Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981," 25 *Hofstra L. Rev.* 817 (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as "Privacy Jurisprudence and the Apartheid of the Closet," 24 *Fla. St. U.L. Rev.* 703 (1997)

Murray Lecture at the University of Iowa, January 1996, published as "From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945," *Iowa Law Review* (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as "The Many Faces of Sexual Consent," 37 *Wm. & Mary L. Rev.* 47 (1995)

Donley Lectures at West Virginia University School of Law, published as "Public Law from the Bottom Up," 97 *W. Va. L. Rev.* 141 (1994)

## Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111<sup>th</sup> Congress, 1<sup>st</sup> Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111<sup>th</sup> Congress, 1<sup>st</sup> Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

*H.R. 1283, The Fairness in Asbestos Compensation Act*, House Comm. on the Judiciary, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999) (written testimony only) (jumbo consolidations in asbestos litigation)

Senate Comm. on the Judiciary, Senator Joseph Biden (Chair), Confirmation of Judge Stephen Breyer as Associate Justice, United States Supreme Court (1994) (consultation only)

*S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993*, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1<sup>st</sup> Sess. (1993)

*Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan*, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

*S. 2279, the Lobbying Disclosure Act of 1992*, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

*Statutory Interpretation and the Uses of Legislative History*, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101<sup>st</sup> Cong., 2d Sess. (1990)

*Adjustable Rate Mortgages (ARMs)*, Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98<sup>th</sup> Cong., 2d Sess. (1984)

## APPENDIX 2

### EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

#### **FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008***

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpora. Users may scour corpora for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the English Corpus of Books published in the United States from 1950 to 2008**

This Figure is a comparison of the frequency of “gay suicide” and “LGBT suicide” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/uniforms in the sample of books, what percentage of them are “gay suicide” and what percentage of them are “LGBT suicide.”

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 3. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”**

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”***

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

**FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”**

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

# Exhibit 32

ARIF HYDER ALI

October 17, 2016

**VIA E-MAIL**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's  
Community Priority Application No: 1-1713-23699**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“**dotgay**”), to submit the **independent Expert Opinion** of **Professor M.V. Lee Badgett**, the Director of the Center for Public Policy and Administration, and Professor of Economics at the University of Massachusetts Amherst. Professor Badgett is also co-founder and Distinguished Scholar at the Williams Institute on Sexual Orientation, Gender Identity Law and Public Policy at the UCLA School of Law, a research center recognized worldwide for LGBTI research and expertise. Professor Badgett has published widely, including having written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports. She has testified on her research before the U.S. Congress, several U.S. state legislatures, and in litigation. She has also been a consultant and contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues.

Professor Badgett’s Opinion will assist the ICANN Board (“**Board**”) in evaluating dotgay’s pending application (Application No: 1-1713-23699) for community priority status.<sup>1</sup> Prof. Badgett explains that withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community. She relies upon her research to show that the stigma, discrimination and violence faced by the community is real and leads to lower

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<sup>1</sup> Exhibit 1, Expert Report of Professor M.V. Lee Badgett, dated October 17, 2016.

incomes, poverty and lower mental and physical health among other unattractive outcomes. She notes that the internet has become the predominant safe space where members of the community can meet, share ideas and engage in collective action to create a more equal world. The .GAY TLD (as envisaged by the community applicant) is part of the effort to create that safe space for economic activity and social change. Prof. Badgett identifies the many and real benefits to the community from dotgay's Public Interest Commitments and registration policies. She also considers the harm that would befall the community in the absence of a community .GAY TLD (which is the likely outcome if dotgay's application for community priority status is unsuccessful).

In short, her reports adds another dimension of support to dotgay's application for community priority status, which has already been substantiated by dotgay's presentation and submissions to the ICANN Board, the **Expert Opinion of Professor William Eskridge Jr of Yale Law School**, and **ICANN Ombudsman's Report**, all of which conclusively demonstrate that dotgay's application is entitled to community priority status under ICANN's Articles, Bylaws and Applicant Guidebook. We urge ICANN to consider Professor Badgett's Expert Opinion together with the existing support on record.

Sincerely,



Arif Hyder Ali

**EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT IN  
SUPPORT OF DOTGAY'S COMMUNITY PRIORITY APPLICATION  
OCTOBER 17, 2016**

# EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT

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# EXPERT OPINION

## I. EXPERT OPINION

ICANN's failure to grant dotgay's community priority application for the .GAY top level domain name would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay economic community. That global economic community, made up of LGBTIA individuals exchanging ideas, knowledge, goods, and services, is a central priority of dotgay's application and mission. Below I describe the challenges and needs of the LGBTIA community and how .GAY could support or hinder efforts to achieve their full social and economic inclusion.

### **a. LGBTIA people experience stigma, discrimination, and violence around the world.**

A growing body of evidence demonstrates that LGBTIA people continue to face stigma, discrimination, and violence around the world. While some countries have moved closer to legal equality than others, many governments, employers, educational institutions, faith communities, families, and other social settings in every country continue to treat lesbian, gay, bisexual, transgender, and intersex people as less than fully equal in market, personal, and social interactions. These individual and institutional forms of exclusion from full and equal participation in life reduce access to education, employment, health care, and government services and increase exposure to unhealthy stress. Thus exclusion contributes to lower incomes, poverty, poorer mental and physical health, and other negative outcomes. These disparities are well documented in my own research cited below, and by research by many other scholars, governments, NGOs, and private research organizations. Much of this research is described in my books and reports (fully cited in Section II), including *Money, Myths, and Change: The Economic Lives of Lesbian and Gay Men*, *Sexual Orientation Discrimination: An International Perspective*, and "The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies."

### **b. To fight social exclusion, LGBTIA people need to create safe spaces to meet each other.**

In this context of exclusion, it is essential for LGBTIA people to be able to create spaces for themselves that enable them to survive and to expand safe spaces into the broader community. They need to meet and support each other, share ideas and knowledge, and engage in collective action to move toward a more equal world. In some countries at different moments in history, we know that markets have allowed the development of such

meeting places. Bookstores, newspapers, magazine, bars, and restaurants emerged in commercial spaces and became important locations that drew LGBTIA people together. More recently in some countries, such spaces have also been found in corporate employee resource groups or gay-straight alliances in educational settings. In many places, LGBTIA organizations have used such settings to create a social movement, economic opportunities, and a community of individuals, bound together in common interest and common challenges.

**c. The internet is now one of the most important spaces for LGBTIA people.**

Since the early 1990's, the internet has become that meeting space. Over time, the internet has largely replaced some physical locations and products—particularly gay newspapers, gay magazines, and gay bookstores—and greatly influenced others. The internet has proven to be conducive to creating cyberspace locations for LGBTIA people to meet and share their lives and knowledge. Organizations around the world have been able to use the privacy afforded Internet users and new technologies to grow their membership and to connect LGBTIA people with each other online and in person.

In the future, the global gay community will continue to be a creative source of new businesses and organizations that will be tied to the Internet. The community built around the life reality of being seen as “gay”—whether for lesbians, gay men, transgender men and women, intersex individuals, or bisexual people, along with the allies who support them—has developed that term that is recognizable and a form of common property. The .GAY TLD could be used on the internet to promote greater community-building that would lead to social change under the right circumstances.

**d. Of all of the applicants for the .GAY TLD, only dotgay has made public commitments to community accountability.**

Of the three .GAY applicants that filed public interest commitments, only one—dotgay—made public commitments specific to the gay community, and those commitments to community accountability are significant. Only dotgay expressed an intention and plan to proactively ensure that only members of the community will be allowed to register, an important consideration to prevent abuse that might be likely to occur if a commercial applicant owns .GAY, as discussed further below in section (f). In addition, only dotgay pledged to share a substantial proportion of profits with the community, and only dotgay committed to including members of the community in the development of policies for .GAY. Neither of the other two applicants filing public commitments expressed any knowledge of the challenges and potential concerns of the gay or LGBTIA community, much less any intention to promote the interests of the gay community. Indeed, the only time the word “gay” even appears in the public commitments of the other two applicants is in the term “.GAY”.

**e. Community accountability will be essential if .GAY is to enhance the economic, social, and legal well-being of LGBTIA individuals around the world.**

More specifically, .GAY has enormous potential to promote equality and prosperity for LGBTIA people if the development of .GAY is guided by dotgay, a community organization that would include the broad involvement of the gay community. Indeed, .GAY is highly unlikely to be a powerful platform for LGBTIA people if there is no community accountability. The value of .GAY would be diminished—or even negative—without community ownership.

As suggested by the analysis of public commitments in section (d), commercial ownership of the .GAY TLD would likely not balance community needs with stockholder goals. The failure to weigh community needs would greatly reduce the value of .GAY to LGBTIA organizations and businesses. Without community interaction and oversight, the pricing decisions, marketing strategies, and development of .GAY would not prioritize community benefit. For example, a purely financial incentive would exist to auction or sell domains like Pride.gay, Center.gay, Hate.gay, Lesbian.gay, Transgender.gay and Lambda.gay, Legal.gay, Health.gay to those willing to pay the most for it without considering the community's best interest. Such sales would likely price out existing and new organizations or businesses in the global LGBTIA community. It is highly unlikely that the winning bidders, lacking community oversight, would use such spaces as community resource hubs, as planned by dotgay. Commercial owners' lack of a vision for meeting the community's needs in developing .GAY would simply perpetuate the current economic and social disadvantages of LGBTIA people.

**f. Without community oversight, .GAY could become a source of activity that would harm LGBTIA people.**

If ICANN rejects dotgay's community priority application, effectively eliminating community oversight of .GAY, the platform would be highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people. For example, the very active efforts in many countries to commit LGBTIA people to coercive (but professionally discredited) "conversion therapies" could be greatly aided by a site that appears to be gay-supportive but is actually feeding personal information to anti-gay organizations or law enforcement. Such information could be used to publicly disclose someone's sexual orientation or to blackmail them into coercive and harmful treatment.

Such outcomes are not mere speculation. Research has uncovered many examples of police, governmental, and individual efforts to entrap, blackmail, or extort LGBTIA people, where consensual same-sex activity is criminalized, such as in countries as diverse as Zimbabwe, Iran, Kuwait, Kenya, Nigeria, India, and (historically) the United States. For examples, see "Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa," International Gay and Lesbian Human Rights Commission, 2011 (<https://www.outrightinternational.org/sites/default/files/484-1.pdf>). Today, at least 75 countries criminalize same-sex sexual activity, with a death penalty possible in 13 of those countries. In countries that have criminalized advocacy for homosexuals or for certain gay issues, such as Russia or Nigeria, allies participating in .GAY online forums might also be targeted. Thus an online platform seemingly tied to the gay community—while completely unaccountable to actual vital community interests—would be ripe for abuse by people,

organizations, and agencies that would use it to further the oppression of LGBTIA people. Such outcomes would both reduce the economic value of .GAY to its legitimate users in the community and would result in severe personal and economic harms to the individuals targeted.

If ICANN continues to reject dotgay's community priority application, which would provide community oversight of .GAY, these potential negative outcomes are plausible predictions and would make it harder for LGBTIA businesses and organizations to form and to operate effectively. While specific research has not been done to estimate the social and economic cost of these outcomes to the LGBTIA community, those costs would be real and would add to the existing stigma and discrimination faced by LGBTIA people around the world.

## II. QUALIFICATIONS

I offer my opinion as an expert on the economic impact of stigma, discrimination, and exclusion of the LGBTI people and on the larger economy. I base this opinion about .GAY on twenty-five years of research as a professor of economics, currently at the University of Massachusetts Amherst. For nine years I was also director of the School of Public Policy at UMass Amherst. My Ph.D. in economics is from the University of California, Berkeley. I am a cofounder of and Distinguished Scholar at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law, a research center that is recognized worldwide for LGBTI research and expertise.

*Published Works and Global Consulting:* I have written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports, all of which are listed on my CV below. This body of research includes work on many different countries. I have testified on my research to the U.S. Congress, several state legislatures, and in litigation. I have been a consultant or contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues, and I have attended numerous global conferences on LGBTI human rights and development. I have done speaking tours on these topics in Australia, Vietnam, Philippines, China, South Korea, and Peru, among other countries. I have been asked to speak to the ambassadors of the OECD and the board of directors of the Inter-American Development Bank, as well as numerous business audiences around the world.



Signed: \_\_\_\_\_

M. V. Lee Badgett

Date: October 17, 2016

**Full Curriculum Vitae of Professor M.V. Lee Badgett**

**M. V. LEE BADGETT**



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**CURRENT POSITION and AFFILIATIONS:**

Professor	Dept of Economics, Univ. of Massachusetts Amherst
Faculty	School of Public Policy, Univ of Mass Amherst
Williams Distinguished Scholar	Williams Institute, UCLA School of Law
Scholar-in-residence	Equal Employment Opportunity Commission
Fellow	Salzburg Global Seminar, LGBT Forum

**EDUCATION:**

	<b>DEGREE</b>	<b>DATE</b>	<b>FIELD</b>
University of California, Berkeley	Ph.D.	1990	Economics
Dissertation title: "Racial Differences in Unemployment Rates and Employment Opportunities"			
University of Chicago	A.B.	1982	Economics

**PREVIOUS POSITIONS:**

Director, School of Public Policy (formerly Center for Public Policy and Admin.) (2007-2016 name change), UMass Amherst  
Research Director, Williams Institute, UCLA School of Law (2006-2013)  
Assistant & Associate Professor, Dept. of Economics, University of Massachusetts-Amherst (1997-2008)  
(Adjunct) Professor, Whittier Law School (Summer 2011)  
Visiting Professor, UCLA School of Law (2005-2007; Summer 2008)  
Visiting Researcher, Amsterdam School for Social Science Research, University of Amsterdam (2003-2004)  
Co-founder & Research Director, Institute for Gay and Lesbian Strategic Studies (1994-2006)

Visiting Assistant Professor, Women's Studies and Lesbian and Gay Studies, Yale University (1995-1996)

Research Analyst, National Commission for Employment Policy, U.S. Department of Labor (Summer 1994)

Assistant Professor, School of Public Affairs, University of Maryland, College Park (1990-1997)

#### **CURRENT RESEARCH TOPICS:**

Connections between inclusion of LGBT people and economic development  
Sexual orientation and gender identity discrimination in labor markets and impact of public policy

Poverty in LGBT community

#### **COURSES TAUGHT:**

*Economics:* Microeconomics (University of Massachusetts)

Microeconomics and Public Policy (University of Massachusetts-Amherst)

Political Economy of Sexuality (University of Massachusetts-Amherst)

Labor Economics--undergraduate and Ph.D. level (University of Massachusetts-Amherst)

Feminist Economics (co-taught as part of Traveling Course at University of Minnesota)

*Policy:* Policy Analysis (University of Massachusetts-Amherst), Capstone course (University of Massachusetts-Amherst)

Social Inequality and Social Justice: Problems and Solutions (University of Massachusetts-Amherst)

Social Science and Public Policy on LGBT Issues (Whittier Law School Barcelona program; UMass Online)

Public Policy Seminar: Global LGBT Human Rights and Criminal Justice Reform in U.S. (Univ. of Mass.)

#### **BOOKS:**

*The Public Professor: How to Use Your Research to Change the World*, NYU Press, 2016.

*When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage*, New York University Press, 2009. Distinguished Book Award, American Psychological Assoc., Division 44, 2010; Korean translation published, Minumsa, 2016.

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*Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men*, University of Chicago Press, 2001.

#### **INSTITUTION-BUILDING PROJECTS**

- Led growth and transition into School of Public Policy from Center for Public Policy & Administration at UMass Amherst

- Co-founder, Institute for Gay and Lesbian Strategic Studies, merged with Williams Institute in 2006
- Co-builder of the Williams Institute on SOGI Law and Public Policy as founding research director
- Co-PI, *EEO DataNet*, Equal Employment Opportunity Network of academics and EEOC, funded by NSF grant.
- Co-founder and steering committee member, LGBT Poverty Collaborative (U.S.)

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“The Economic Benefits of Gay Marriage,” March 29, 2013, PBS News Hour Blog, The Business Desk, <http://www.pbs.org/newshour/businessdesk/2013/03/the-economic-benefits-of-gay-m.html>

“The Books that Inspired Lee Badgett,” blog post, LSE Review of Books, November 2012. <http://blogs.lse.ac.uk/lsereviewofbooks/2012/11/25/the-books-that-inspired-lee-badgett/>

Review of *Counted Out: Same-Sex Relations and Americans’ Definitions of Family*, in *Gender & Society*, August 2012, Vol. 26, No. 4, 674-676.

“Gay Marriage Good for Family and Economy,” *The Drum Opinion*, ABC Online (Australian Broadcasting Corp.), March 6, 2012.

“What Obama Should Do About Workplace Discrimination,” *New York Times*, February 6, 2012. <http://www.nytimes.com/2012/02/07/opinion/what-obama-should-do-about-workplace-discrimination.html>

“High Costs of Discrimination,” *Worcester Telegram*, M. V. Lee Badgett and Jody Herman, May 11, 2011.

Featured guest column, *The Economist* debate on marriage for same-sex couples, January 6, 2011, <http://www.economist.com/debate/days/view/638>.

“Summer of Love and Commitment,” *The Huffington Post*, September 3, 2008.

“Sexual Orientation, Social and Economic Consequences,” in *International Encyclopedia of the Social Sciences, 2<sup>nd</sup> Edition*, ed. William A. Darity, Jr., Macmillan Reference USA, 2008.

“The Wedding Economy,” *The New York Times*, January 7, 2007.

"The Closet Door's Open: What's Behind Hartford's Surge in Gay Population?" *The Hartford Courant*, Gary J. Gates and M. V. Lee Badgett, November 5, 2006.

"The Future of Same-Sex Marriage," *Social Work Today*, November 2006.

"The Gay Health Insurance Gap," [www.alternet.org](http://www.alternet.org), October 26, 2006.

"What's Good for Same-Sex Couples is Good for Colorado," *The Daily Camera*, Boulder, CO, October 28, 2006.

Book review of *Inheritance Law and the Evolving Family*, by Ralph Brashear, *Feminist Economics*, vol. 12, no. 1-2, 2006.

"Equality Doesn't Harm 'Family Values'", with Joop Garssen, *National Post* (Canada), August 11, 2004.

"Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia?" *Slate Magazine*, May 20, 2004, <http://slate.msn.com/id/2100884/>.

Brad Sears and Lee Badgett, "Tourism and Same-sex Marriage," *San Diego Union-Tribune*, June 2, 2004.

[http://www.signonsandiego.com/uniontrib/20040527/news\\_lz1e27sears.html](http://www.signonsandiego.com/uniontrib/20040527/news_lz1e27sears.html)

"Equality Is Not Expensive," *Connecticut Law Tribune*, April 19, 2004.

"Domestic Partner Bill Won't Be Burden to Business," *Orange County Register*, April 18, 2004, with Brad Sears.

"Economics" and "Boycotts", entries for *Encyclopedia of Gay, Lesbian, Bisexual, and Transgender History*, ed. by Marc Stein, Scribners, forthcoming December 2013.

"Recognizing California Couples: Domestic-Partner Law Attacked by Anti-Gay Senator Could Boost Flow of Cash to State," M. V. Lee Badgett and R. Bradley Sears, *Daily Journal*, October 14, 2003.

"A Win at Cracker Barrel," *The Nation*, February 10, 2003.

"Why I was a Dem for a Day," *Daily Hampshire Gazette*, June 2002.

Commentary on Boy Scouts of America, WFCR, Amherst, MA, August 13, 2001.

"Sexual Orientation," Richard Cornwall and M. V. Lee Badgett, entry for *Encyclopedia of Feminist Economics*, ed. by Meg Lewis and Janice Peterson, Edward Elgar, 2000.

"Lesbians, social and economic situation," entry for *International Encyclopedia of the Social and Behavioral Sciences*, forthcoming.

"One Couple's 'Penalty' remains another's privilege", with James Alm and Leslie A. Whittington, *Boston Globe*, September 3, 2000, p. E2.

"Domestic partner status unfair to gay couples," *Springfield Sunday Republican*, op-ed April 2, 2000, p. B3.

"Do Sexual Orientation Policies Help Lesbians?" in *Women's Progress: Perspectives on the Past, Blueprint for the Future*, Institute for Women's Policy Research, Fifth Policy Research Conference Proceedings, Washington, DC, 1998.

"Census Data Needed," letter to the editor, *The Washington Blade*, November 7, 1997, p. 37.

"Same-sex partners bring nurturing--and financial benefits--to the altar," op-ed piece with Gregory Adams, *Chicago Sun-Times*, June 8, 1996, p. 16.

"The Last of the Modernists: A Reply," *Feminist Economics*, Vol. 1, No. 2, 1995.

"Domestic Partner Recognition: Doing the Right--and Competitive--Thing," *Synthesis: Law and Policy in Higher Education*, Vol. 6, No. 4, Spring 1995.

"Equal Pay for Equal Families," *Academe*, May/June 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," in *Higher Education Collective Bargaining During a Period of Change*, Proceedings, Twenty-Second Annual Conference, April 1994, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, 1994.

"Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men," pamphlet published by National Organization of Gay and Lesbian Scientists and Technical Professionals and the Institute for Gay and Lesbian Strategic Studies, 1994. (Early version of book chapter of same title.)

Co-author and co-editor, *Labor and the Economy*, published by the Center for Labor Research and Education, Institute of Industrial Relations, UC Berkeley, 1989.

"Looking for the Union Label: Graduate Students at U.C.," *California Public Employee Relations*, No. 85, June 1990.

"Rusted Dreams: Documenting an Economic Tragedy," *Labor Center Reporter*, No. 219, October 1987.

"How the Fed Works," *Labor Center Reporter*, No. 177, November 1986.

**EXPERT WITNESS EXPERIENCE (LITIGATION 2009-2014):**

Written testimony, *Birchfield and Mocko v. Armstrong and Jones*, March 2016 (challenge to Florida's policies on death certificates for same-sex spouses)

Written testimony, *Whitewood et al. v. Wolf et al.*, February 2014 (challenge to Pennsylvania's marriage equality prohibition)

Written testimony, *Harris v. McDonnell*, No. 5:13-cv-00077 (W.D. Va.), December 2013 (challenge to Virginia's marriage equality prohibition)

Written testimony, *DeLeon v. Perry*, No. 5:13-cv-00982 (S.D. Tex.), November 2013 (challenge to marriage equality prohibition in Texas)

Written testimony, *Kitchen v. Herbert*, No. 2:13-cv-00217 (D. Utah), October 2013 (challenge to Utah's marriage equality prohibition)

Written testimony, *Darby/Lazaro v. Orr*, No. 12 CH 19718 (Ill. Cir. Ct., Cook Cnty.), April 2013 (challenge to Illinois' marriage equality prohibition)

Written testimony, *Sevcik v. Sandoval*, No. 2:12-cv-00578 (D. Nev.), 2012 (challenge to Nevada's marriage equality prohibition)

Written testimony and deposition, *Bassett v. Snyder*, No. 2:12-cv-100382012 (E.D. Mich.), 2012 and 2013 (challenge to Michigan's Domestic Partner Benefit Restriction Act).

Written testimony, *Glossip v. Missouri Dep't of Transp. and Highway Patrol Employees' Ret. Sys.*, No. 10-CC00434 (Mo. Cir. Ct., Cole Cnty.), 2011 (challenge to denial of death benefit to state trooper's surviving same-sex partner).

Written testimony, *Collins v. Brewer* (later *Diaz v. Brewer*), No. 2:09-cv-02402 (D. Ariz.), 2010 (challenge to Arizona's cancellation of domestic partner benefits).

Deposition and trial testimony, *Perry v. Schwarzenegger* (later *Perry v. Brown, Hollingsworth v. Perry*), No. 3:09-cv-02292 (N.D. Cal.), 2010 (challenge to California's Proposition 8).

**LEGISLATIVE WITNESS EXPERIENCE (Selected):**

U.S. Senate Committee on Health, Education, Labor, and Pensions, S.811, The Employment Non-Discrimination Act of 2011, June 12, 2012.

Written testimony, S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families, M. V. Lee Badgett, Ilan H. Meyer, Gary J. Gates, Nan D. Hunter, Jennifer C. Pizer, Brad Sears. July 2011.

U.S. House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Postal Service, and the District of Columbia on HR 2517: Domestic Partnership Benefits and Obligation Act of 2009, July 2009.

U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions, Testimony on Employment Non-Discrimination Act (HR 2015), September 2007.

Written and oral testimony on legislation or regulations in Alaska, California, Hawaii, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Vermont.

#### **SELECTED MEDIA APPEARANCES AND PROFILES:**

Featured solo panelist, *The Economist* "Pride and Prejudice: The Business and Economic

Featured economist, "Gay Myths Derailed by Economist Badgett's Data Research," by

Jeanna Smialek, *Bloomberg*, June 20, 2014,

<http://www.bloomberg.com/news/articles/2014-06-20/gay-myths-derailed-by-economist-badgett-s-data-research>

Featured guest, *Tell Me More*, NPR, June 10, 2013.

Featured guest, *Encounter*, Radio National, ABC (Australian Broadcasting Corp), October 9, 2011.

Featured guest, *Faith Middleton Show*, January 13, 2011.

<http://www.yourpublicmedia.org/content/wnpr/faith-middleton-show-when-gay-people-get-married>

Featured guest, "Same-Sex Marriage, Five Years On," *On Point*, National Public Radio, May 27, 2009. <http://www.onpointradio.org/2009/05/same-sex-marriage-five-years-on>

Featured guest, "Gay Commerce," *Talk of the Nation*, National Public Radio, 1997.

Featured guest, "Gay Market," *Odyssey: A Daily Talk Show of Ideas*, NPR nationally syndicated show, 2005.

[http://www.chicagopublicradio.org/DWP\\_XML/od/2005\\_05/od\\_20050512\\_1200\\_4906/episode\\_4906.ram](http://www.chicagopublicradio.org/DWP_XML/od/2005_05/od_20050512_1200_4906/episode_4906.ram)

Interviewed on *All Things Considered*, "Gay Marriage in Massachusetts, One Year Later," May 2005. <http://www.npr.org/templates/story/story.php?storyId=4655621>

Featured guest, *CNN American Morning*: "The Future of Marriage," June 2006.

[http://www.law.ucla.edu/williamsinstitute/images/CNN\\_AmericanMorning\\_FutureOfMarriage\\_LeeBadgett\\_062006.mov](http://www.law.ucla.edu/williamsinstitute/images/CNN_AmericanMorning_FutureOfMarriage_LeeBadgett_062006.mov)

#### **SELECTED PRESENTATIONS OF PAPERS SUBMITTED TO ACADEMIC CONFERENCES:**

“Assessing the best policy approach for reducing LGBT poverty,” M. V. Lee Badgett and Alyssa Schneebaum, APPAM research conference, Nov. 2015, Miami.

Invited panelist, Roundtable on Marriage Equality, American Political Science Association, Sept. 4, 2015, San Francisco.

Invited panelist, Roundtable on Employment Discrimination Against LGBT People, American Sociological Association meeting, August 25, 2015, Chicago.

“The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies,” Amherst College conference, LGBT Rights in the Americas and Beyond (May 2015), International Associate for Feminist Economics (Berlin, July 2015); Williams Institute Webinar, Feb. 25, 2015; Allied Social Science Associations (economist orgs) meeting, SF, January 2016

Roundtable participant at Institute for Development Studies (UK) panel, “Sexuality, law, and economic development: what are the key conversations and alliances?” Mar. 6, 2015.

“Assessing the effect of nondiscrimination policies related to sexual orientation and gender identity,” Badgett and Samantha Schenck. Presented at: Sexual Orientation Discrimination in the Labor Market, University of Paris 1 Pantheon-Sorbonne, 6/20/2012; International Association for Feminist Economics, Barcelona Spain. 6/27/2012; APPAM conference, November 2012.

“Waves of Change: Is Latin America Really Following Europe in Same-Sex Couples?,” at 8<sup>th</sup> Annual Update, Williams Institute, “Global Arc of Justice: Sexual Orientation Law Around the World, March 14, 2009.

“Gay poverty,” Presented at 2009 Allied Social Science Association Meeting; 2009 Association for Public Policy Analysis and Management Research Conference; 2008 IAFFE Research Conference, Torino, Italy, June 2008; Williams Institute Annual Update, February 2008.

“Registered Domestic Partnerships Among Gay Men and Lesbians: The Role of Economic Factors,” (with Gary J. Gates and Natalya Maisel), presented at 2007 APPAM Meeting, Washington, DC; 2008 Allied Social Science Associations Annual meeting, New Orleans.

“Predicting Same-Sex Marriage in Europe & the US,” Presented at 2008 IAFFE Research Conference, Torino, Italy, June 2008.

“Social Lab Outcomes: Same-Sex Couples and Legal Recognition,” Temple University Law School, “States as Social Laboratories,” October 20, 2007.

“The Double-Edged Sword in Gay Economic Life: Marriage and the Market.” Washington & Lee School of Law, Feb 2008.

“Why Marry?” Presented at 2006 IAFFE Research Conference, Sydney, Australia, July 2006; New School for Social Research, October 2006; Sociology Family Working Group, UCLA, 2006.

“An exploration of foster care and adoption among lesbians and gay men,” joint work with Jennifer Macomber, Kate Chambers, Gary Gates. Family Pride conference, Philadelphia, PA, May 2006.

“Survey Data on Sexual Orientation: Building a Professional Consensus,” presented at 2005 Joint Statistical Association Meetings, August 2005. Also presented to Canadian Population Society, June 2005; Williams Project Annual Update, UCLA Law School, February 2005.

“Alternative Legal Statuses for Same-sex couples and other families: Can Separate Be Equal Enough?” Presented at International Association for Feminist Economics, Washington DC, July 2005; APPAM, Washington, DC, November 2005; UCLA Law School 2006.

“Looking into the European Crystal Ball: What Can the U.S. Learn About Same-Sex Marriage?” Tulsa Gay and Lesbian History Project, October 2004; University of Connecticut, October 2004; Yale University, February 2005; American Psychological Association, August 2005; National Council of Family Relations (invited special session), 2005.

“Predicting Partnership Rights: Applying the European Experience to the United States,” Yale University Law School, March 5, 2005.

“Asking the Right Questions: Making the Case for Sexual Orientation Data,” Joint Statistical Meetings of the American Statistical Association, Toronto, August 2004; Williams Project Annual Update, UCLA, February 2005; Canadian Population Society, June 3, 2005.

“A New Gender Gap: Sex Differences in Registered Partnerships in Europe,” International Association for Feminist Economics research conference, London, August 2004.

“Variations on an Equitable Theme: International Same-sex Partner Recognition Laws,” Research Conference of International Associate for Feminist Economics, July 2002. Stockholm University, September 2003; University of Linz, Austria, November 2003; University of Amsterdam, June 2004; American Political Science Association, Chicago, September 2004.

“The Myth of Gay Affluence and Other Tale Tales: The Political Economy of Sexual Orientation,” University of California, San Diego, June 2002.

“A Family Resemblance: Legal Recognition of Same-Sex Partners in the United States,” Research Conference of International Association for Feminist Economics, Oslo, Norway, June 2001; University of Southern Maine, October 2001; University of Massachusetts, February 2002; Washington University Political Science Department, March 2002; University of Wisconsin, LaCrosse, April 2002.

"A Movement and a Market: GLBT Economic Strategies for Social Change," University of Wisconsin, LaCrosse, April 2002; Macalester College, April 2002.

"Job Gendering: Occupational Choice and the Marriage Market," Research Conference of International Association for Feminist Economics, Ottawa, CA, June 1999.

"Tolerance, Taboos, and Gender Identity: The Occupational Distribution of Lesbians and Gay Men," Research Conference of International Association for Feminist Economics, Amsterdam, The Netherlands, June 1998.

"The Impact of Affirmative Action on Public-Sector Employment in California," ASSA Meetings, 1997.

"Tolerance or Taboos: Occupational Differences by Sexual Orientation," presented at American Economic Association Meetings, January 1996, and American Psychological Association convention in Toronto, August 1996.

"A Race, Ethnicity, and Gender Analysis of the 1990-91 Recession," ASSA Meetings 1995.

"Choices and Chances: Is Coming Out at Work a Rational Choice?" The Sixth North American Lesbian, Gay, and Bisexual Studies Conference, University of Iowa, November 18, 1994.

"Civil Rights and Civilized Research: Constructing a Sexual Orientation Policy Based on the Evidence," Association for Public Policy Analysis and Management Research Conference, October 27, 1994

"Where the Jobs Went in the 1990-91 Downturn," National Conference on Race Relations and Civil Rights in the Post Reagan-Bush Era, The Roy Wilkins Center, Humphrey Institute, University of Minnesota, October 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," The American Political Science Association meeting, September 1994.

Panelist, "Developing Lesbian/Gay Studies in Economics," ASSA Meetings, 1994.

"The Rainbow at Work: Differences in the Economic Status of Women Workers in the United States," presented at the 5th International Interdisciplinary Congress on Women, 1993.

"The Economic Well-Being of Lesbians and Gay Men: Pride and Prejudice," December 1992, presented at 1993 ASSA Meetings.

"Affirmative Action in a Changing Legal and Economic Environment," revised, December 1992, presented at 1993 ASSA Meetings.

"The Effects of Structural Change on the Race and Gender Distribution of Employment," with Rhonda M. Williams, presented at Eastern Economic Association Meeting, 1992.

"Changes in Racial Inequality Among Women: Evidence from Unemployment Rates," presented at AEA Meetings, 1992.

"Labor Market Discrimination--Economic and Legal Issues for Gay Men and Lesbians," presented at AEA Meetings, 1992.

"Rising Black Unemployment: Changes in Job Stability or in Employability?" presented at National Economic Assoc., 1992.

"Rising Black Unemployment and the Role of Affirmative Action Policy," presented at APPAM Research Conference, October 1990.

**INVITED KEYNOTES AND OTHER PRESENTATIONS (Selected):**

"The Public Professor," book talks at University of Massachusetts Amherst, Duke University, University of North Carolina-Chapel Hill, Odyssey Bookstore, UCLA, Hunter College, Vanderbilt University, Georgia State University, University of Washington, January-May 2016; "Author meets critics" session at Southern Sociological Society, April 2016.

"The Marriage Equality Experience—An International Perspective," East China Normal University, Shanghai; Renmin University Beijing; Ewha University, Seoul; Korea University School of Law; March 2016.

"The Business Case for LGBT Equality and Inclusion," Sookmyung Women's University (SMU) Entrepreneurship Center, Seoul, Korea, March 11, 2016.

"Left Out—Lesbian, Gay, and Bisexual Poverty in the U.S." Franklin and Marshall College, Oct 21, 2015; Colorado State Univ, Nov 2015; Univ of Minnesota, Feb 2016.

"The Economic Cost of Stigma and Exclusion of LGBT People," Board of Directors of Inter-American Development Bank, Oct. 2, 2015 and March 6, 2015; Boston Consulting Group, Oct. 7, 2015; Salzburg Global LGBT Forum, June 14-18, 2015; Clinton Global Initiative learning call, April 8, 2015, World Bank Fall Meeting, Nov. 9, 2014; UN Development Programme Experts Meeting, Sept. 16-17, 2015.

US State Department Speaker Program: Oct. 12-18, 2014: Series of talks to government ministries, American Chamber of Commerce, universities, community groups, international agencies, Lima, Peru. August 12-21, 2015: Series of talks to Congress, universities, municipal policymakers, community groups, and other government agencies, The Philippines.

“Sexual Orientation and Gender Identity Diversity in Entertainment: Experiences and Perspectives of SAG-AFTRA Members,” Gender, Sexual Orientation, and Labor in Entertainment Panel at conference of UCLA Institute for Research on Labor and Employment, April 18, 2015.

Dublin City University, School of Applied Language and Intercultural Studies, and Marriage Equality; Keynote speaker for The Marriage Equality Experience: An International Perspective, my talk: When Gay People Get Married Dublin, Ireland, March 19, 2015.

Presentation at Overseas Development Institute and Kaleidoscope Trust meeting, London (by skype), “The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies” , Feb. 12, 2015.

Panelist, USAID Frontiers in Development, Sept. 2014.

Invited keynote speaker, “The Economic Cost of Homophobia,” The World Bank, March 12, 2014.

Invited speaker, “The Impact of LGBT Inclusion on Economic Outcomes,” OECD, Paris, February 12, 2014.

Invited Keynote Speaker, “Workshop on Comparative Experiences in Protection of LGBT Rights in the Family and Marriage Relations,” hosted by Ministry of Justice, Viet Nam, and UNDP, December 20-21, 2012, Hanoi.

“When Gay People Get Married,” London School of Economics and Politics, Keynote for LSE Pride Week, November 2012; Bryant University, November 2013; University of Pennsylvania Dept of Sociology, March 2014.

Keynote speaker at Roundtable, "Taking Poverty Out of the Closet," Horizons Foundation, San Francisco, March 19, 2012.

“The Impact of Allowing Same-sex Couples to Marry,” Australian National University College of Law. March 1, 2012; Gough Whitlam Institute, Sydney Australia, March 2, 2012.

Australian Parliament, Canberra, "The Impact of Allowing Same-Sex Couples to Marry," February 27, 2012.

Keynote lunch speaker, E-Marriage Symposium, Michigan State University Law School, “My Marriage, No Marriage,” November 11, 2011.

“When Gay People Get Married,” University of North Carolina Chapel Hill, October 13, 2011.

IAFFE, 2011, Hangzhou China: Roundtable on Sexuality and the Economy, Roundtable on Enhancing IAFFE's Vision in the 21<sup>st</sup> Century. June, 2011.

Panelist, "Same-Sex Marriage: Past, Present and Future," M. V. Lee Badgett, David Boies, and Nancy Cott, UCLA History Department, February 24, 2011.

Janus Lecture, Debate on same-sex marriage, Brown University, February 17, 2011.

Panelist, "Queering Where We Work: Bridging LGBTQ Policy Advocacy, Front-Line Activism, and Research," University of Toronto, Rotman School of Management, November 5, 2010.

"The Economic Value of Marriage," Drake Constitutional Law Center's Annual Symposium, The Same-Sex Marriage Divide, Drake University, Iowa. April 10, 2010.

Keynote address, "Out and Equal in the Workplace: Sexual Orientation Discrimination, Univ of Pittsburgh School of Law. March 18, 2010.

"When Gay People Get Married": Portland State Univ Portland, OR. 4/23/2010; University of Chicago Alumni Weekend, Chicago, IL; University of Chicago, June 3, 2010; Kennesaw State University, Atlanta, GA, March 24, 2010; Andrew Young School of Public Affairs; Georgia State University, March 25, 2010; and many other bookstores and locations.

"Challenges for LGBT Workers" Department of Labor at invitation of Assistant Secretary for Policy, January 29, 2010.

Keynote Address on Sexual orientation and economics, University of Illinois-Chicago, September 30, 2009.

Multiple talks, University of Minnesota, Duluth, April 2009.

"On the Road to Equality: Health Care for LGBT Americans," Opening address, 2007 National LGBT Health Expo, Washington, DC, November 2, 2007.

"Does diversity make a difference? A view from the marketplace." *Keynote Address*, 7th annual international conference on diversity in organizations, communities, and nations, Amsterdam, The Netherlands, July 1, 2007.

"Not-So-Gay Divorce: A Reason for Marriage," Gay Divorce Conference, King's College London, May 20, 2006.

"Thinking for Change/Changing our Thinking: Effective Research in GLBT Policy Debates", Presidential Invited Address, Division 44, American Psychological Association Convention, August 2005.

"Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men," University of Toronto, March 16-17, 2005.

Panelist, "Aging in the Gay Community," American Association of Retired Persons, June 2000.

"Money and Our Discontents," Keynote speech, Smart Women/Smart Money conference by the Astraea Foundation. November 1999.

"Homo Economics: The Myth of Gay Affluence and Other Tall Tales," University of Connecticut, March 1999; American University, October 1999.

Same-Sex Couples and Public Policy, panel member, University of Maryland, College Park, October 1999.

"A Bridge to the Future or the Road to Nowhere? Respectability and Lesbian and Gay Think Tanks," Remarks prepared for the Politics of Respectability Conference, University of Chicago, April 1999

Panelist, Unifying Anti-Subordination Theories, DePaul University Law School, February 1999.

"Lesbians, Gays, and Bisexuals in a Gender Agenda," Roundtable on Feminism and Public Policy, 1998 ASSA Meetings, Chicago, IL.

"Economic Issues for Lesbians," Workshop on Lesbian Health Research Priorities, Institute of Medicine, Board on Neuroscience and Behavioral Health, Washington, DC, October 6, 1997.

"Lesbians, Gays, Bisexuals, and Transgenders: Who Gives, How Much, and Why," OutGiving Conference, Aspen, CO, September 1997; Horizons Foundation and United Way, San Francisco, CA, October 1997; NGLTF Creating Change conference, San Diego, November 1997; Cream City Foundation Milwaukee, WI; Chicago, IL; Boston Foundation, February 1998.

"Lesbian and Gay Money: Is There a Gender Gap?" Towson State University, March 1997.

Panelist, "Out in the Workplace," University of Pennsylvania, February 10, 1997.

"Workplace Policy Issues for Lesbian, Gay, and Bisexual People," Gender, Race, Economics, and Public Policy Conference of the New School for Social Research, April 5, 1996.

Panelist, "Compensating for Gender, Race, and Class Inequalities: Is Affirmative Action the Means to Social Justice," A Future of Equality: Feminist Rethinkings of the Affirmative Action and Welfare Debates, Yale University Women's Center, March 30, 1996.

"Equal Pay for Equal Work," University of Delaware Lavender Scholars Series, March 7, 1996.

"Lesbian and Gay Think Tanks," Center for Lesbian and Gay Studies, CUNY Graduate School, February 9, 1996.

Panelist, Affirmative Action in the 21st Century, Chicago United, February 15, 1996.

"The Economic Status of Lesbians and Gay Men: Discrimination, Data, and Debate," Bureau of Labor Statistics, U.S. Department of Labor, June 15, 1995; Institution for Social and Policy Studies, Yale University, September 1995; University of Massachusetts, Boston, May 1996.

Panelist, "Gay Money: Power of the Purse," National Lesbian & Gay Journalists Association, October 19, 1995.

Panelist, Domestic Partner Benefits and Other Gay Rights Policy Issues: Creating Change on Campus, American Association of University Professors, June 9, 1995.

Prepared testimony, Select Education and Civil Rights Subcommittee, Committee on Education and Labor, U. S. House of Representatives, Testimony on the 30th Anniversary of the Equal Pay Act, 1994. (Hearing cancelled at the last minute.)

"Economic Evidence of Sexual Orientation Discrimination," Gay, Lesbian, and Bisexual Studies Faculty Seminars, Univ. of Massachusetts, Amherst, Dept. of Economics and Program for Gay, Lesbian, and Bisexual Concerns, May 11, 1994.

"The Economics of Being Lesbian, Gay, or Bisexual: Pride, Prejudice and Politics," Brown Bag Series in Gay, Lesbian, and Bisexual Studies, University of Massachusetts, Amherst, May 11, 1994.

"Thinking Homo/Economically," conference presentation, Center for Lesbian and Gay Studies, CUNY Graduate School, May 7, 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," Annual Conference, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, April 19, 1994. Also presented at the American Political Science Association meeting, September 1994.

"The Changing Contours of Discrimination: Race, Gender, and Structural Economic Change," presented at University of Michigan, School of Social Work, Profs. Mary Corcoran and Sheldon Danziger, March, 15, 1994.

"Redefining Families: Research and Policy," American Political Science Association meetings, Washington, D.C., September 3, 1993.

"A Cost/Benefit Analysis of Coming Out," presented at OUT Magazine press conference, broadcast on CSPAN, April 21, 1993.

**GRANTS:**

U.S. Department of State, Speaker's Grants for trip to Peru, October, 2014; Trip to The Philippines, August, 2015.

National Science Foundation, "Building an Interdisciplinary Equal Employment Opportunity Research Network and Data Capacity," 7/1/13 to 6/30/16 (\$245,216), co-PI.

Five Colleges Inc (from Mellon Foundation): Bridging the Liberal Arts and Professional Training in Public Policy & Social Innovation (\$178,000)

Five Colleges Inc: Social Justice Public Policy Practitioners-in-Residence (\$95,000)

Ford Foundation, 2003-2006 (2 grants), Data on Sexual Orientation (total \$600,000)

2002 Wayne F. Placek Award, American Psychological Foundation, "Health Insurance Inequality for Gay, Lesbian, and Bisexual People," with Michael A. Ash.

1995 Wayne F. Placek Award, American Psychological Foundation, "The Impact of Attitudes on Lesbian and Gay Male Earnings and Occupations." (\$15,000)

The Aspen Institute, Nonprofit Sector Research Fund, "Lesbian, Gay, and Bisexual Giving and Volunteering," 1996. (\$40,000)

**CONSULTANCIES:** World Bank; UN Development Programme; Pew Research Center

**BOARDS, PANELS, AND COMMITTEES:**

Board, Interdisciplinary Studies Institute, UMass Amherst, 2013-2016

Co-convenor of LGBT economists network, American Economic Association, 2016

Board, International Association for Feminist Economics, 2015-2017

Board member and Co-chair of Board, Wellspring Cooperative Corporation, 2014-present.

Chair, Diversity Committee, International Association for Feminist Economics, 2011-2013.

Association for Public Policy Analysis and Management (APPAM): Institutional representative, 2007-present and Vice Chair of Inst. Reps 2011-12; Program Committee for 2010 conference.

Nat'l Association of Schools of Public Administration and Affairs (NASPAA): Leslie Whittington Teaching Award Committee, 2010.

Advisory Committee for "Real Families, Real Facts: Research Symposia on LGBT-headed Families," Family Pride, held May 2006.

Planning committee and facilitator for research meeting held at Out & Equal Workplace conference, September 2005.

Reviewer, Wayne F. Placek Award, American Psychological Foundation

Women's Funding Network, Lesbian Donor Research Project Advisory Committee, 1997-1998

Visiting Lecturer and co-designer, Traveling Feminist Economics Ph.D. Course, Univ. of Minnesota, 1997-1998

**FELLOWSHIPS AND HONORS:**

School of Public Policy faculty created an annual "M. V. Lee Badgett Social Justice Award" for a graduating student, 2016

Women in Leadership Award, Williams Institute, UCLA School of Law, 2015.

Samuel F. Conti Faculty Fellowship, University of Massachusetts Amherst, 2013-2014.

“When Gay People Get Married,” Distinguished Book Award, American Psychological Association, Division 44, 2010; chosen for Diversity Book Club, Kennesaw State University, 2010.

Distinguished Faculty Lecture, University of Massachusetts-Amherst, November 9, 2009, and Chancellor’s Medal (the highest honor bestowed on individuals for exemplary and extraordinary service to the campus)

Named one of twenty most influential lesbians in academia, *Curve Magazine*, 2008

Rockwood Leadership Fellow in Lesbian, Gay, Bisexual, and Transgender Community & Advocacy, 2008-09

2005 Dukeminier Award for Best Sexual Orientation Law Review Article

College Outstanding Teacher Award, Social and Behavioral Sciences, University of Massachusetts, 2000-2001

Out 100, *Out Magazine*, 2001.

One of Our Best and Brightest Activists, *The Advocate*, 2000.

Lilly Fellow, Center for Teaching, University of Massachusetts- Amherst, 1999-2000

Certificate of Appreciation, Stonewall Center, 1999.

Certificate of Recognition, University of Maryland at College Park Diversity Initiative, 1994-95

Graduate Opportunity Fellowship, 1985-86, UC Berkeley

A.B. with General Honors, University of Chicago

Maroon Key Society, University of Chicago

Abram L. Harris Prize, 1978-79, 1979-80, University of Chicago

## **AFFILIATIONS**

Association for Public Policy Analysis & Management

American Economic Association

Editorial Board (and past Associate Editor), *Feminist Economics*

International Association for Feminist Economics (past and present board member)

Past editorial boards, *Sexuality Research and Social Policy*; *Sexuality & the Law (Social Science Research Network)*; *Law and Social Inquiry*

## **REFEREE:**

*Quarterly Journal of Economics*, *Industrial Relations*, *Journal of Human Resources*, *Feminist Economics*, *Journal of Policy Analysis & Mgmt.*, *Amer. Sociological Review*, *Review of Social Economy*, *Review of Economics and Statistics*, Columbia University Press, National Science Foundation, *Qualitative Sociology*, *Social Problems*, *Social Forces*, University of Wisconsin Press, *Journal of Population Economics*, Routledge Press, Princeton University Press, *Industrial and Labor Relations Review*, *Demography*, *American Journal of Sociology*, *Contemporary Economic Policy*, *Journal of Marriage and the Family*, *Cambridge Journal of Economics*, *Social Forces*, *Health Affairs*, and others

# Exhibit 33

ARIF HYDER ALI

Contact Information Redacted  
Contact Information Redacted Direct  
Fax

November 15, 2016

**VIA E-MAIL**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Council of Europe Report DGI (2016)17 - .GAY TLD**

Dear Chairman Crocker and Board of Directors,

dotgay LLC (“**dotgay**”) writes to request that the ICANN Board (“**Board**”) add to the materials it is reviewing in connection with dotgay’s application the Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (“**CoE Report**”).<sup>1</sup> The CoE is Europe’s leading human rights organization, with 47 member states (28 of which are also members of the European Union),<sup>2</sup> all of which are members of the European Convention on Human Rights. The CoE has observer status within ICANN’s Governmental Advisory Committee (GAC).

The CoE Report, standing alone, and certainly when taken together with the following materials, makes it abundantly clear that the EIU erred in its evaluation of dotgay’s application and that the Board is obligated to grant community priority status to dotgay’s application for the .GAY TLD:

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<sup>1</sup> See Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>2</sup> See <http://www.coe.int/en/>.

- (i) the former ICANN Ombudsman Chris LaHatte's Report;<sup>3</sup>
- (ii) the ICC Expert's Determination regarding .LGBT;<sup>4</sup>
- (iii) the Expert Opinion of Professor William N. Eskridge of Yale Law School;<sup>5</sup>
- (iv) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts;<sup>6</sup> and
- (v) the Dot Registry IRP Decision.<sup>7</sup>

The CoE Report identifies a long list of human rights principles, which the Board cannot avoid giving effect in evaluating dotgay's application. The Report amply supports the conclusions reached by the ICANN Ombudsman and the two independent expert reports submitted to ICANN on 13 September and 17 October 2016.

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- <sup>3</sup> Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html> (determining that “[t]he board should grant the community application status to the applicant . . . [and] comply [ ] with its own policies and well established human rights principles”).
  - <sup>4</sup> *The International Lesbian Gay Bisexual Trans and Intersex Association v. Afiliads Limited*, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf> (finding that the .GAY application “is designed to serve the gay community”).
  - <sup>5</sup> Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf> (explaining how Prof. Eskridge shows that “the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement”).
  - <sup>6</sup> Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf> (explaining how Prof. Badgett demonstrates that “withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community”).
  - <sup>7</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> (holding that the Board Governance Committee (“BGC”) “must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination”).

## The CoE Report Applies Human Rights Principles to .GAY

The CoE Report affirms that human rights principles apply to ICANN.<sup>8</sup> The Report's discussion of human rights and community applications shows that the Board should independently approve dotgay's .GAY application. To assist the Board with its analysis of the CoE Report, we attach particularly relevant excerpts of it, the import of which should be self-evident:

### ICANN Must Protect Public Interest Values through Community TLDs

- Community TLDs should protect “vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.”<sup>9</sup>
- Community TLDs should protect “[p]luralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.”<sup>10</sup>

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<sup>8</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>9</sup> *Id.*, p. 34.

<sup>10</sup> *Id.* (emphasis added).

### **ICANN's Commitment to Human Rights Requires that It Support Community gTLDs**

- The Right to Freedom of Expression: “For Internet users at large, domain names represent an important way to find and access information on the Internet. . . . A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. *A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.* Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.”<sup>11</sup>
- The Right to Freedom of Assembly and Association: “Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests. As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.”<sup>12</sup>

### **ICANN's gTLD Program Improperly Fails to Conform with Human Rights Principles**

- The Right to Procedural Due Process: “ICANN's gTLD program, including community-based applications, needs to be based on procedural due process. . . . Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus

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<sup>11</sup> *Id.*, p. 19 (emphasis added).

<sup>12</sup> *Id.*, p. 22.

access to justice, which is generally considered a human right or at least a right at the constitutional level.”<sup>13</sup>

- The Right to Non-Discrimination: “The general principle of equality and non-discrimination is a fundamental element of international human rights law. . . . ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority.”<sup>14</sup>

Through its discussion of these human rights, the CoE Report confirms the ICANN Ombudsman’s determination that ICANN has a commitment to human rights and that dotgay represents a community that “is real, does need protection and should be supported” by awarding dotgay community priority status.<sup>15</sup> It further supports the Expert Opinion of Prof. M.V. Lee Badgett, which states that ICANN should provide a safe space on the Internet for the gay community to engage in economic activity and social change.<sup>16</sup>

The BGC and the EIU failed to uphold these basic human rights when it considered dotgay’s application for the .GAY TLD. In light of the CoE Report’s recent findings, the ICANN Ombudsman’s determination, the expert opinions submitted to ICANN, and the clearly incorrect determination by the EIU, the Board should correct this error by individually considering the .GAY application in accordance with Article 5.1 of the AGB and awarding the .GAY TLD to dotgay.

### **The CoE Report Further Recognizes Problems with the EIU and the CPE Process**

In addition to human rights considerations, the CoE Report confirms the significant problems with the EIU’s CPE of the .GAY gTLD, corroborating the Expert Opinion of

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<sup>13</sup> *Id.*, p. 25.

<sup>14</sup> *Id.*, p. 26.

<sup>15</sup> Ombudsman Report, <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

<sup>16</sup> See Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

Prof. Eskridge of Yale Law School.<sup>17</sup> The EIU clearly made fundamental errors of inconsistency and discrimination in following and applying its guidelines. The CoE Report criticizes the EIU for these inconsistencies, specifically highlighting the following issues with the EIU's consideration of .GAY:

**The EIU's Inconsistent Acts during the CPE Process Raises Issues of Human Rights Violations, Unfairness, and Discrimination**<sup>18</sup>

- “***First***, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to avoid any ‘double-counting’ . . . . However, the EIU appears to double count ‘awareness and recognition of the community amongst its member’ twice.”<sup>19</sup>
- “***Second***, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others. The EIU appears to have been inconsistent in its interpretation of ‘Nexus’ Under Criterion 2 of the CPE process. ***The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.*** There is no evidence provided of the relative small and ‘more than small’ segments of the identified communities

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<sup>17</sup> See Letter to ICANN Board from A. Ali enclosing the Eskridge Report (13 Sept. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

<sup>18</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), pp. 9, 45, 49, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>19</sup> *Id.*, p. 49 (emphasis added).

which justified giving a score of 0 to one applicant and 2 to another.”<sup>20</sup>

- “The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a *majority* of the community. . . . ***By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.***”<sup>21</sup>
- “***Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.***”<sup>22</sup>
- “***Third***, the EIU changed its own process as it went along.”<sup>23</sup>
- “***Fourth***, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. ***An example***

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<sup>20</sup> *Id.*, pp. 49-50 (emphasis added).

<sup>21</sup> *Id.*, p. 51 (emphasis added).

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Id.* (emphasis added).

*that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.”<sup>24</sup>*

- *Fifth*, “[t]here are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. . . . It would seem that the EIU prefers to award full points on 4A[, the Support prong of ‘Community Endorsement,’] for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.”<sup>25</sup>

### **ICANN Improperly Accepts EIU Determinations without Question and without Possibility of Appeal**

- “The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) ‘failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its

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<sup>24</sup> *Id.*, pp. 51-52 (emphasis added).

<sup>25</sup> *Id.*, p. 57.

transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).’ The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws.”<sup>26</sup>

- “ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN. This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a ‘decision’ which it will not question. Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.”<sup>27</sup>

**The CPE Process does not Conform with ICANN’s Core Principles, including Human Rights Principles**

- “*In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.* Here, he took to task the fact that the BGC has ‘a very narrow view of its own jurisdiction in considering reconsideration requests.’ He points out that ‘it has always been open to ICANN to reject an EIU

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<sup>26</sup> *Id.*, p. 60 (quoting *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016)).

<sup>27</sup> *Id.*, p. 64.

recommendation, especially when public interest considerations are involved.’ *As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it ‘has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency’.* We endorse his view and hope that our report will strengthen the argument behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.”<sup>28</sup>

- “As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate. However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN’s mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in.”<sup>29</sup>

As evidenced by these inconsistencies, the EIU clearly failed to “respect[ ] the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB.”<sup>30</sup> The BGC’s own failure to exercise its independent judgment when evaluating the EIU’s CPE in light of these principles, which it must do according to the Dot Registry Declaration, “must be corrected.”<sup>31</sup>

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<sup>28</sup> *Id.*, pp. 69-70 (quoting Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>) (emphasis added).

<sup>29</sup> *Id.*, p. 31.

<sup>30</sup> *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34.

<sup>31</sup> Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 60.

**ICANN Must Proceed to Contracting with dotgay for .GAY**

In light of the above considerations, we believe that there are more than sufficient grounds for the Board to act under Article 5.1 of the AGB and award the .GAY TLD to dotgay. The Board should grant dotgay's community priority application without any further delay and proceed to enter into a registry agreement with dotgay, which remains dedicated and enthusiastic about operating the .GAY registry.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif Hyder Ali', with a long horizontal stroke extending to the right.

Arif Hyder Ali  
Partner

# Exhibit 34

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ARIF HYDER ALI



12 March 2017

**VIA E-MAIL**

Mr. Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094	ICANN Board of Directors c/o Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094
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Dear President Marby and Members of the Board:

We write on behalf of our client, dotgay LLC (“dotgay”), to inquire when the ICANN Board (the “Board”) will issue its final decision on the 26 June 2016 Recommendation of the Board Governance Committee (“BGC”) on dotgay’s Reconsideration Request 16-3 regarding the .GAY top-level domain (the “Reconsideration Request”).<sup>1</sup> We further write to protest ICANN’s lack of transparency in its treatment of dotgay’s application and ICANN’s failure to provide any sort of response to dotgay’s various inquiries about that status of its application. ICANN’s actions and inaction continues to cause harm to the gay community, which today more than ever is need of a safe space on the Internet to protect and promote the ideals, principles and interests of the community.

Dotgay submitted its Reconsideration Request *more than one year ago* and *nearly nine months* have passed since the BGC issued its Recommendation. As we noted in our most recent correspondence of 30 January 2017, we find ICANN’s protracted delays in reaching a decision on dotgay’s Reconsideration Request and ICANN’s continued lack of

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<sup>1</sup> Reconsideration Request 16-3 (17 February 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

responsiveness to dotgay's inquiries about the status of its request troubling, particularly in light of ICANN's commitments to transparency enshrined in its governing documents.<sup>2</sup>

Although we understand that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"<sup>3</sup> and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports,"<sup>4</sup> ICANN cannot indefinitely delay resolving dotgay's Reconsideration Request. ICANN owes affected parties, like dotgay, a response to their inquiries regarding the nature and status of the independent review and information request. Again, we find ICANN's lack of communication disappointing and inconsistent with its duties of transparency.

With this letter, we renew our request that ICANN extend dotgay, and the global community that dotgay represents through its application, the common courtesy of a response to its inquiries regarding the anticipated resolution of dotgay's Reconsideration Request and disclosure of information about the nature of the independent review ICANN apparently has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. We are unaware of any rule of law, administrative procedure or corporate governance that would justify ICANN's silence and delays.

We look forward to your prompt response.

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<sup>2</sup> See letter from Arif H. Ali, to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017).

<sup>3</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures (17 September 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>4</sup> Minutes of the Board Governance Committee (18 October 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

Dotgay reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal stroke extending to the right.

Arif Hyder Ali

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

# Exhibit 35



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, which appears to read "Chris Disspain". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain  
Chair, ICANN Board Governance Committee

# Exhibit 36

ARIF HYDER ALI

Contact Information Redacted

5 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .MUSIC Application ID 1-1115-14110<sup>1</sup>**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report<sup>2</sup> found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").<sup>3</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless

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<sup>1</sup> DotMusic's .MUSIC community Application (ID 1-1115-14110), <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1392>; Also See [https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392](https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download%20application/1392?t:ac=1392)

<sup>2</sup> .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>3</sup> See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

there is a compelling reason for confidentiality.<sup>4</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.<sup>5</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>6</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

#### **A. Context and Background**

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

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<sup>4</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

<sup>5</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>6</sup> *Id.*

generally and specifically with respect to the CPE reports issued by the CPE provider”<sup>7</sup> and that the BGC may have requested from the CPE provider “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup>

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>10</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded

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<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

#### **B. Documentation Requested**

The documentation requested by DotMusic in this DIDP includes all of the “material currently being collected as part of the President and CEO’s review” that has been shared with ICANN and is “currently underway.”<sup>11</sup>

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit’s handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;

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<sup>11</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

# Exhibit 37

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#) [Français \(/fr\)](#)

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[RESOURCES \(/RESOURCES\)](#)

[COMMUNITY \(/COMMUNITY\)](#)

[IANA STEWARDSHIP](#)

[& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

## Resources

- ▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-2012-02-25-en\)](#)
- ▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)
- ▼ [Accountability \(/resources](#)

## ICANN (Internet Corporation for Assigned Names and Numbers) Documentary Information Disclosure Policy

*NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s website, unless there are exceptional circumstances requiring further redaction.*

ICANN (Internet Corporation for Assigned Names and Numbers)'s Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s operational activities, and within [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

/accountability)

▼ Accountability Mechanisms (/resources/pages/mechanisms-2014-03-20-en)

Reconsideration (/resources/pages/reconsideration-2012-02-25-en)

Independent Review (/resources/pages/irp-2012-02-25-en)

► Ombudsman (/resources/pages/ombudsman-2012-02-25-en)

► Empowered Community (/ec)

▼ Document Disclosure (/resources/pages/transparency-2012-02-25-en)

Disclosure Policy (/resources/pages/didp-2012-02-25-en)

DIDP Response Process (/en/system

A principal element of ICANN (Internet Corporation for Assigned Names and Numbers)'s approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN (Internet Corporation for Assigned Names and Numbers) makes available on its website as a matter of course.

Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may appeal a denial of disclosure

## Public Documents

ICANN (Internet Corporation for Assigned Names and Numbers) posts on its website at [www.icann.org](http://www.icann.org), numerous categories of documents in due course. A list of those categories follows:

- Annual Reports – <http://www.icann.org/en/about/annual-report> (/en/about/annual-report)
- Articles of Incorporation – <http://www.icann.org/en/about/governance/articles> (/en/about/governance/articles)
- Board Meeting Transcripts, Minutes and Resolutions – <http://www.icann.org/en/groups/board/meetings> (/en/groups/board/meetings)
- Budget – <http://www.icann.org/en/about/financials> (/en/about/financials)
- Bylaws (current) – <http://www.icann.org/en/about/governance/bylaws> (/en/about/governance/bylaws)
- Bylaws (archives) – <http://www.icann.org/en/about/governance/bylaws/archive> (/en/about/governance

[/files/files/didp-response-process-29oct13-en.pdf](#)

► [Reviews \(/resources/reviews\)](#)

[Expected Standards of Behavior \(/resources/pages/expected-standards-2016-06-28-en\)](#)

[Enhancing ICANN \(Internet Corporation for Assigned Names and Numbers\) Accountability and Governance \(https://community.icann.org/x/ogDxAg\)](#)

► [Governance \(/resources/pages/governance-2012-02-25-en\)](#)

► [Groups \(/resources/pages/groups-2012-02-06-en\)](#)

[Business \(/resources/pages/business\)](#)

[Civil Society \(/resources/pages/civil-society-2016-05-24-en\)](#)

[/bylaws/archive\)](#)

- [Correspondence – http://www.icann.org/correspondence/ \(/correspondence/\)](#)
- [Financial Information – http://www.icann.org/en/about/financials \(/en/about/financials\)](#)
- [Litigation documents – http://www.icann.org/en/news/litigation \(/en/news/litigation\)](#)
- [Major agreements – http://www.icann.org/en/about/agreements \(/en/about/agreements\)](#)
- [Monthly Registry reports – http://www.icann.org/en/resources/registries/reports \(/en/resources/registries/reports\)](#)
- [Operating Plan – http://www.icann.org/en/about/planning \(/en/about/planning\)](#)
- [Policy documents – http://www.icann.org/en/general/policy.html \(/en/general/policy.html\)](#)
- [Speeches, Presentations & Publications – http://www.icann.org/presentations \(/presentations\)](#)
- [Strategic Plan – http://www.icann.org/en/about/planning \(/en/about/planning\)](#)
- [Material information relating to the Address Supporting Organization \(Supporting Organization\) \(ASO \(Address Supporting Organization\)\) – http://aso.icann.org/docs \(http://aso.icann.org/docs/\) including ASO \(Address Supporting Organization\) policy documents, Regional Internet Registry \(RIR \(Regional Internet Registry\)\) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs](#)
- [Material information relating to the Generic Supporting Organization \(Supporting Organization\) \(GNSO \(Generic Names Supporting Organization\)\) – http://gns0.icann.org \(http://gns0.icann.org\) – including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents \(see \[http://gns0.icann.org/reference-documents.htm \\(http://gns0.icann.org/reference-documents.htm\\)\]\(#\)\), and council administration documents \(see \[http://gns0.icann.org/council/docs.shtml \\(http://gns0.icann.org/council/docs.shtml\\)\]\(#\)\).](#)

▶ [Complaints Office \(/resources/pages/complaints-office-2017-04-26-en\)](/resources/pages/complaints-office-2017-04-26-en)

▶ [Contractual Compliance \(/resources/pages/compliance-2012-02-25-en\)](/resources/pages/compliance-2012-02-25-en)

▶ [Registrars \(/resources/pages/registrars-0d-2012-02-25-en\)](/resources/pages/registrars-0d-2012-02-25-en)

▶ [Registries \(/resources/pages/registries-46-2012-02-25-en\)](/resources/pages/registries-46-2012-02-25-en)

▶ [Domain Name \(Domain Name\) Registrants \(/resources/pages/domain-name-registrants-2017-06-20-en\)](/resources/pages/domain-name-registrants-2017-06-20-en)

[GDD Metrics \(/resources/pages/metrics-gdd-2015-01-30-en\)](/resources/pages/metrics-gdd-2015-01-30-en)

▶ [Identifier Systems Security, Stability \(Security, Stability and Resiliency\) and Resiliency \(OCTO IS-SSR\) \(/resources/pages/octo-](/resources/pages/octo-)

- Material information relating to the country code Names Supporting Organization (Supporting Organization) (ccNSO (Country Code Names Supporting Organization)) – <http://ccnso.icann.org> (<http://ccnso.icann.org>) – including meeting agendas, minutes, reports, and presentations
- Material information relating to the At Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) – <http://atlarge.icann.org> (<http://atlarge.icann.org>) – including correspondence, statements, and meeting minutes
- Material information relating to the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) – <http://gac.icann.org/web/index.shtml> (<http://gac.icann.org/web/index.shtml>) – including operating principles, gTLD (generic Top Level Domain) principles, ccTLD (Country Code Top Level Domain) principles, principles regarding gTLD (generic Top Level Domain) Whois issues, communiqués, and meeting transcripts, and agendas
- Material information relating to the Root Server Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) – <http://www.icann.org/en/groups/rssac> ([/en/groups/rssac](http://www.icann.org/en/groups/rssac)) – including meeting minutes and information surrounding ongoing projects
- Material information relating to the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) – <http://www.icann.org/en/groups/ssac> ([/en/groups/ssac](http://www.icann.org/en/groups/ssac)) – including its charter, various presentations, work plans, reports, and advisories

## Responding to Information Requests

If a member of the public requests information not already publicly available, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) denies the information request, it will provide a written statement to the requestor

ssr-2016-10-10-en)

▶ [ccTLDs \(/resources/pages/cctlds-21-2012-02-25-en\)](/resources/pages/cctlds-21-2012-02-25-en)

▶ [Internationalized Domain Names \(/resources/pages/idn-2012-02-25-en\)](/resources/pages/idn-2012-02-25-en)

▶ [Universal Acceptance Initiative \(/resources/pages/universal-acceptance-2012-02-25-en\)](/resources/pages/universal-acceptance-2012-02-25-en)

▶ [Policy \(/resources/pages/policy-01-2012-02-25-en\)](/resources/pages/policy-01-2012-02-25-en)

▶ [Public Comment \(/public-comments\)](/public-comments)

[Root Zone \(Root Zone\) KSK Rollover \(/resources/pages/ksk-rollover-2016-05-06-en\)](/resources/pages/ksk-rollover-2016-05-06-en)

▶ [Technical Functions \(/resources/pages/technical-functions-2015-10-15-en\)](/resources/pages/technical-functions-2015-10-15-en)

▶ [Contact \(/contact\)](/contact)

▶ [Help \(/resources/pages\)](/resources/pages)

identifying the reasons for the denial.

## Defined Conditions for Nondisclosure

ICANN (Internet Corporation for Assigned Names and Numbers) has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship with that party.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN (Internet Corporation for Assigned Names and Numbers) Directors, ICANN (Internet Corporation for Assigned Names and Numbers) Directors' Advisors, ICANN (Internet Corporation for Assigned Names and Numbers) staff, ICANN (Internet Corporation for Assigned Names and Numbers) consultants, ICANN (Internet Corporation for Assigned Names and Numbers) contractors, and ICANN (Internet Corporation for Assigned Names and Numbers) agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates by inhibiting the candid exchange of ideas and communications.
- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal

[/help-2012-02-03-en](#)

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information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

- Information provided to [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.
- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.
- Trade secrets and commercial and financial information not publicly disclosed by [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#).
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) determines, under the particular circumstances, that the

public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to deny disclosure of information under conditions not designated above if ICANN (Internet Corporation for Assigned Names and Numbers) determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN (Internet Corporation for Assigned Names and Numbers) shall not be required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.

## Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN (Internet Corporation for Assigned Names and Numbers), the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which can be found at [http://www.icann.org/en/about/governance/bylaws \(/en/about/governance/bylaws\)](http://www.icann.org/en/about/governance/bylaws (/en/about/governance/bylaws)).

## DIDP Requests and Responses

Request submitted under the DIDP and ICANN (Internet Corporation for Assigned Names and Numbers) responses are available here: [http://www.icann.org/en/about/transparency \(/en/about/transparency\)](http://www.icann.org/en/about/transparency (/en/about/transparency))

## Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at [http://www.icann.org/en/groups/board/meetings \(/en/groups/board/meetings\)](http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings))) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at [http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm \(/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm\)](http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm (/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm)).

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To submit a request, send an email to [didp@icann.org \(mailto:didp@icann.org\)](mailto:didp@icann.org)



[You Tube](http://www.youtube.com/icannnews)

[\(<http://www.youtube.com/icannnews>\)](http://www.youtube.com/icannnews)



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## Who We Are

[Get Started \(/get-started\)](/get-started)

[Learning \(/en/about/learning\)](/en/about/learning)

[Participate \(/en/about/participate\)](/en/about/participate)

[Groups \(https://www.icann.org/resources/pages/groups-2012-02-06-en\)](https://www.icann.org/resources/pages/groups-2012-02-06-en)

[Board \(/resources/pages/board-of-directors-2014-03-19-en\)](/resources/pages/board-of-directors-2014-03-19-en)

[President's Corner \(/presidents-corner\)](/presidents-corner)

[Staff \(/organization\)](/organization)

[Careers \(https://www.icann.org/careers\)](https://www.icann.org/careers)

[Newsletter \(/en/news/newsletter\)](/en/news/newsletter)

[Public Responsibility \(https://www.icann.org/dprd\)](https://www.icann.org/dprd)

## Contact Us

[Locations \(https://forms.icann.org/en/contact\)](https://forms.icann.org/en/contact)

[Global Support \(/resources/pages/customer-support-2015-06-22-en\)](/resources/pages/customer-support-2015-06-22-en)

[Security Team \(/about/staff/security\)](/about/staff/security)

[PGP Keys \(/en/contact/pgp-keys\)](/en/contact/pgp-keys)

[Certificate Authority \(/contact/certificate-authority\)](/contact/certificate-authority)

[Registry Liaison \(/resources/pages/contact-f2-2012-02-25-en\)](/resources/pages/contact-f2-2012-02-25-en)

[Specific Reviews \(https://forms.icann.org/en/about/aoc-review/contact\)](https://forms.icann.org/en/about/aoc-review/contact)

[Organizational Reviews \(http://forms.icann.org/en/groups/reviews/contact\)](http://forms.icann.org/en/groups/reviews/contact)

[Complaints Office \(https://www.icann.org/complaints-office\)](https://www.icann.org/complaints-office)

[Request a Speaker \(http://forms.icann.org/en/contact\)](http://forms.icann.org/en/contact)

## Accountability & Transparency

[Accountability Mechanisms \(/en/news/in-focus/accountability/mechanisms\)](/en/news/in-focus/accountability/mechanisms)

[Independent Review Process \(/resources/pages/irp-2012-02-25-en\)](/resources/pages/irp-2012-02-25-en)

[Request for Reconsideration \(/groups/board/governance/reconsideration\)](/groups/board/governance/reconsideration)

[Ombudsman \(/help/ombudsman\)](/help/ombudsman)

[Empowered Community \(/ec\)](/ec)

## Governance

[Documents \(/en/about/governance\)](/en/about/governance)

[Agreements \(/en/about/agreements\)](/en/about/agreements)

[Specific Reviews \(/resources/reviews/aoc\)](/resources/reviews/aoc)

[Annual Report \(/about/annual-report\)](/about/annual-report)

[Financials \(/en/about/financials\)](/en/about/financials)

[Document Disclosure \(/en/about/transparency\)](/en/about/transparency)

[Planning \(/en/about/planning\)](/en/about/planning)

[KPI Dashboard \(/progress\)](/progress)

[RFPs \(/en/news/rfps\)](/en/news/rfps)

[Litigation \(/en/news/litigation\)](/en/news/litigation)

[Correspondence \(/en/news/correspondence\)](/en/news/correspondence)

## Help

[Dispute Resolution \(/en/help/dispute-resolution\)](/en/help/dispute-resolution)

[Domain Name Dispute Resolution \(/en/help/dndr\)](/en/help/dndr)

[Name Collision \(/en/help/name-collision\)](/en/help/name-collision)

[Registrar Problems \(/en/news/announcements/announcement-06mar07-en.htm\)](/en/news/announcements/announcement-06mar07-en.htm)

[WHOIS \(http://whois.icann.org/\)](http://whois.icann.org/)



# Exhibit 38



Response to Documentary Information Disclosure Policy Request

To: Mr. Danny Younger  
From: Amy Stathos, Senior Counsel  
Date: 24 October 2008  
Re: Request No. 20080924-1

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Thank you for your Request for Information, dated 24 September 2008, submitted pursuant to ICANN's Documentary Information Disclosure Policy (DIDP). For reference, attached to this letter is a copy of your request.

As you stated in your request, we understand that you are seeking information that will help you determine whether the answers provided to question 12 in the accreditation applications for Brandon Gray Internet Services Inc., dba NameJuice.com and EstDomains, Inc. are true and accurate, or whether instead there are material misrepresentations. To that end we understand that you are requesting copies of the registrar accreditation applications for these two registrars.

Please note that some of the information contained in the accreditation applications falls within the following Condition for Nondisclosure set out in the DIDP:

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

In view of this Condition for Nondisclosure, we have not provided copies of the applications. We will, however, provide the following information contained in the applications at Question Nos. 1, 9 and 12, and the corresponding answers.

I. Brandon Gray Internet Services Inc., dba NameJuice.com accreditation application, received by ICANN 13 October 2003:

Q: Name and business address of entity applicant.

A: Brandon Gray Internet Services In., 3986 St. Marys Avenue, North Vancouver, British Columba, Canada V7N 1Y3.

Q: Please list (i) all directors, (ii) all officers, (iii) all relevant managers, and (iv) any persons or entities owning five percent or more of your current or proposed business entity.



A: Director – Aris Morfopoulos; President - Aris Morfopoulos; Vice-President, Operation: Richard Lau; Secretary - Aris Morfopoulos; Owner (sole shareholder) - Aris Morfopoulos.

Q: Indicate whether (i) the applicant or any of its (ii) officers, (iii) directors, or (iv) managers:

a. within the past ten years, has been convicted of a felony or of a misdemeanor related to financial activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is similar or related to any of these;

b. within the past ten years, has been disciplined by the government of its, her, or his domicile for conduct involving dishonesty or misuse of funds of others;

c. is currently involved in any judicial or regulatory proceeding that could result in a conviction, judgment, determination, or discipline of the type specified in (a) or (b); or

d. is the subject of a disqualification imposed by ICANN and in effect at the time of this application.

If any of the above events have occurred, please provide details.

A: a. - No; b. - No; c. - No; d. - No.

II. EstDomains, Inc., received by ICANN on 23 August 2004

Q: Name and business address of entity applicant.

A: Critical Internet, Inc., 150 West Maynard, Apt. 1K, Columbus Ohio, 43232, USA.

Q: Please list (i) all directors, (ii) all officers, (iii) all relevant managers, and (iv) any persons or entities owning five percent or more of your current or proposed business entity.

A: (i) Bhavin Turakhia; (ii) Bhavin Turakhia and Divyank Turakhia; (iii) Bhavin Turakhia and Divyank Turakhia; (iv) Direct Information Pvt. Ltd.



Q: Indicate whether (i) the applicant or any of its (ii) officers, (iii) directors, or (iv) managers:

a. within the past ten years, has been convicted of a felony or of a misdemeanor related to financial activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is similar or related to any of these;

b. within the past ten years, has been disciplined by the government of its, her, or his domicile for conduct involving dishonesty or misuse of funds of others;

c. is currently involved in any judicial or regulatory proceeding that could result in a conviction, judgment, determination, or discipline of the type specified in (a) or (b); or

d. is the subject of a disqualification imposed by ICANN and in effect at the time of this application.

If any of the above events have occurred, please provide details.

A: a. No; b. No; c. No; d. No.

Note that effective 9 August 2005, Critical Internet, Inc. changed its name to EstDomains, Inc.

We believe that these questions and answers provide you with the information relevant to your request. Please let us know if we can be of any further assistance.

**From:** Danny Younger  
**Reply-To:**  
**Date:** Wed, 24 Sep 2008 11:47:06 -0700  
**To:** Kieren McCarthy  
**Cc:** John Jeffrey, Atlarge Staff, NA Discuss  
**Subject:** Information Request

Dear Mr. Jeffrey,

This is an "Information Request" pursuant to ICANN Accountability and Transparency Frameworks and Principles.

I seek to obtain a copy of the Registrar Accreditation Applications submitted by:  
(1) Brandon Gray Internet Services Inc., dba "NameJuice.com"  
(2) EstDomains, Inc.

I understand that "ICANN intends to conduct registrar accreditation in as open and transparent a manner as feasible. To that end, ICANN will be free to disclose and use information submitted in connection with an application in any manner and to anyone it deems appropriate."

I deem the request to be "reasonable" in view of published reports indicating that officers, directors or managers within these organizations have been convicted of a felony within the last ten years -- see

(1) <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00405e.html>

(2)

[http://voices.washingtonpost.com/securityfix/2008/09/estdomains\\_a\\_sordid\\_history\\_an.html?hpid=sec-tech](http://voices.washingtonpost.com/securityfix/2008/09/estdomains_a_sordid_history_an.html?hpid=sec-tech)

I seek to determine whether the answers provided to question 12 in the applications are true and accurate, or whether instead there are material misrepresentations that may lead to a loss of registrar accreditation per section 5.3.1 of the Registrar Accreditation Agreement.

Thank you,  
Danny Younger

# Exhibit 39

## Response to Documentary Information Disclosure Policy Request

To: Asvatha Babu on behalf of the Centre for Internet & Society

Date: 23 November 2016

Re: Request No. 20161024-2

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Thank you for your Request for Information dated 24 October 2016 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of The Centre for Internet & Society (CIS) on 24 October 2016. For reference, a copy of your Request is attached to the email forwarding this Response.

### **Items Requested**

Your Request seeks the disclosure of documentary information relating to the IANA Stewardship Transition Costs for FY15 as reported by ICANN. Specifically, you seek the following:

- 1) Under the expenses breakdown for Professional Services, what is the exact breakdown for "travel support including visas"?
- 2) Expected deliverables from the following parties as listed in their contracts mentioned in the report:
  - a) Albright Stonebridge Group LLC
  - b) Edelman
  - c) Interface Media
  - d) Rice Hadley Gates LLC
  - e) Summit Strategies International LLC
  - f) WBC Global
  - g) Wiley Rein LLP
  - h) Adler & Colvin
  - i) Sidley Austin LLP
  - j) Jones Day
  - k) Akin Grump Straus Hauer and Feld, LLP
  - l) Kountoupes Denham
  - m) Mehlman Castagnetti Rosen Bingel &
  - n) Thomas, Inc.
- 3) In the same report, what constitutes "other miscellaneous services"?

- 4) Under the head of "Education/Engagement/Advice", prominent lobbying firms are named. We request a detailed report explaining their work with and for ICANN, as distinguished from the work of the lobbyists.<sup>1</sup>

## Response

ICANN's DIDP is intended to "ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality." (See <https://www.icann.org/resources/pages/didp-2012-02-25-en> (emphasis added).) As part of its approach to transparency and information disclosure, ICANN makes available on its website at [www.icann.org](http://www.icann.org) a comprehensive set of materials concerning ICANN's operational activities as a matter of course. In the interest of transparency, ICANN has published information on the IANA transition costs on the IANA Transition Project Costs page, at <https://www.icann.org/resources/pages/iana-transition-project-costs>. The scope of the costs reported on this webpage includes the IANA Stewardship Transition Coordination Group (ICG) work, the Cross Community Working Group on Naming Related Stewardship Functions (CWG-Stewardship), the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) and any implementation work. The cost categories reported include the cost of staff support, travel and meetings costs, professional services (including legal advice), and administrative costs. The costs disclosed are exclusively direct costs and do not include any overhead allocation. The cost information is published quarterly, with FY17 Q1 (July 1, 2017 – September 30, 2016) being the most recent quarter. (<https://www.icann.org/resources/pages/iana-transition-project-costs>)

As a preliminary matter, the information reported on the IANA Transition Project Costs webpage are the costs summaries for FY15 and FY16. Your Request seeks the disclosure of documentary information relating the IANA Stewardship Transition Costs for FY15 only. The DIDP procedures do not require ICANN to create or compile summaries of any documented information. (<https://www.icann.org/resources/pages/didp-2012-02-25-en>) Responding to your Requests would require ICANN to parse out the reported data into FY15 and FY16. Nevertheless, as part of its commitment to transparency and accountability, ICANN has undertaken this effort to do so.

### Item 1

This item asks for the exact breakdown for "travel support including visas" under the "Professional Services" expenses category, appearing at <https://www.icann.org/en/system/files/files/iana-transition-expenses-professional-vendor-06sep16-en.pdf>. The travel costs responsive to your request are reported under the "Travel & Meetings – Supported Travelers" category at <https://www.icann.org/en/system/files/files/iana-transition-expenses-supported-traveler-08sep16-en.pdf>. "Professional Services" is a separate reporting category from "Travel &

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<sup>1</sup> <https://www.icann.org/en/system/files/files/iana-stewardship-expenses-professional-vendor-24feb16-en.pdf>

Meetings – Supported Travelers.” The expenses under the “Professional Services” category include: Education/Engagement/Advice, Telecom & Language Services, Root Zone Management Evaluation, Support, US Governmental Affairs (Lobbying), and Other. (<https://www.icann.org/en/system/files/files/iana-transition-expenses-professional-vendor-06sep16-en.pdf>)

## Item 2

This item requests the disclosure of expected deliverables from the following parties as listed in their contracts:

- a) Albright Stonebridge Group LLC
- b) Edelman
- c) Interface Media
- d) Rice Hadley Gates LLC
- e) Summit Strategies International LLC
- f) WBC Global
- g) Wiley Rein LLP
- h) Adler & Colvin
- i) Sidley Austin LLP
- j) Jones Day
- k) Akin Grump Straus Hauer and Feld, LLP
- l) Kountoupes Denham
- m) Mehlman Castagnetti Rosen Bingel &
- n) Thomas, Inc.

As a preliminary matter, except for subcategories (h) and (i) above, the contracts for the foregoing entities are subject to the following Defined Conditions of Nondisclosure and are therefore not appropriate for disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure, ICANN also evaluated the contracts to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no particular circumstances for which the public interest in disclosing the contracts in their entirety outweighs the harm that may be caused to ICANN, its contractual relationships, and its contractors' deliberative processes by the requested disclosure. However, in furtherance of ICANN's commitment to transparency, the following is a summary of the deliverables for the requested contracts as related to the reported activities.

Albright Stonebridge Group LLC (item (a)) was engaged to provide advice on stakeholder engagement in the U.S. and other additional markets.

Edelman (item (b)) was engaged to provide strategic counsel and support for the IANA stewardship transition, including media relations, stakeholder engagement, and market activation and support.

Interface Media (item (c)) was engaged to develop and create an animated infographic illustrating the relationship between major ICANN stakeholders with the main focus on accountability and the IANA transition process.

Rice Hadley Gates LLC (item (d)) was engaged to provide consulting services in the form of helping educate the community on the issue of the IANA stewardship transition.

Summit Strategies International, LLC (item (e)) was engaged to provide overall domestic and international strategy regarding the final phase of the IANA stewardship transition; to assist with outreach to domestic and international stakeholders; and to assess and advise on potential options and mechanisms related to implementation of the transition.

WBC Global (item (f)) was engaged to provide strategic counsel regarding outreach efforts and messaging related to the IANA stewardship transition.

Wiley Rein LLP (item (g)) was engaged to provide strategic counsel related to Internet governance-related issues impacting ICANN.

Adler & Colvin (item (h)) was engaged to be the primary source of advice to the Cross-Community Working Group on Enhancing ICANN Accountability on not-for-profit law and legal structures and processes to enhance accountability. The engagement letter is available at <https://community.icann.org/display/acctcrosscomm/Legal+Counsel>.

Sidley Austin LLP (item (i)) was retained to provide legal counsel to the Cross Community Working Group on Enhancing ICANN Accountability and to the Cross

Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions regarding governance and structures to enhance accountability. Sidley’s engagement letter for the Accountability work is also available at <https://community.icann.org/display/acctcrosscomm/Legal+Counsel>. For the CWG-Stewardship Work, the signed engagement letter can be accessed at a 6 March 2015 entry at <https://community.icann.org/display/gnsocwgdstwrdsdp/Client+Committee>.

Jones Day (item (j)) was engaged to provide legal advice as necessary to ICANN, including implementation assistance.

Akin Grump Straus Hauer and Feld, LLP (item (k)) was engaged to provide legal counsel in connection with the IANA Transition to the multistakeholder community with emphasis on both the U.S. House and Senate Appropriations Committees.

Kountoupes Denham (item (l)) was engaged to provide general federal government affairs representation to ICANN.

Mehlman Castagnetti Rosen Bingel & Thomas, Inc. (items (m) and (n)) was engaged to provide general federal government affairs representation to ICANN. Please note that ICANN is not aware of any entity named Thomas, Inc. for whom services were engaged for the IANA transition. Rather, Thomas, Inc. is last name of the firm “Mehlman Castagnetti Rosen Bingel &” that appears under item (m). As such, ICANN has combined items (m) and (n).

### Item 3

Item 3 asks for the breakdown of the “other miscellaneous services” category. The category of “other miscellaneous services” is comprised of costs that are grouped together because of a lower monetary value and / or represent a smaller amount of nonrecurring work. The costs breakdown is as follows:

- general consulting and analysis \$94K;
- language services support \$93K;
- communications and graphics/media work \$18K;
- discussion platform and other software \$18K;
- temporary staff augmentation \$2K; and
- visa services \$1K

### Item 4

This item seeks a detailed report explaining the work of the firms that are identified under the “Education/Engagement/Advice” category. These firms are: Albright Stonebridge Group LLC, Edelman, Interface Media, Rice Hadley Gates LLC, Summit Strategies International LLC, WBC Global, and Wiley Rein LLP. In response to Item 2 above, ICANN provided further information to explain the work that ICANN engages these firms to perform. ICANN does not have a separate report that provides further detail as requested.

This request is subject to the following DIDP Defined Conditions of Nondisclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Pursuant to the DIDP procedure, ICANN shall not be required to create or compile summaries of any documented information.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest.

We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 40

## Response to Documentary Information Disclosure Policy Request

To: Asvatha Babu on behalf of the Centre for Internet & Society

Date: 23 November 2016

Re: Request No. 20161024-8

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Thank you for your Request for Information dated 24 October 2016 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of The Centre for Internet & Society (CIS) on 24 October 2016. For reference, a copy of your Request is attached to the email forwarding this Response.

### Items Requested

Your Request seeks the disclosure of documentary information regarding financial contributions made by Regional Internet Registries (“RIRs”) to ICANN through the Number Resource Organization (“NRO”). Specifically, you seek the following:

- 1) Documents showing the reasons why ICANN possesses the breakdown of the FY03, FY04, and FY05 contributions but not for the other years.
- 2) According to ICANN’s response to an earlier DIDP, we found that the FY03 breakdown of NRO contribution to ICANN is as follows: **FY03: APNIC (US\$129,400), ARIN (US\$159,345), and RIPE (US\$206,255)** which adds up to **495,000**. However, in the FY03 financial report on the ICANN website, the revenue from Address Registry Fees = **535,000**. We would like to request documentation from ICANN that explains this discrepancy.

### Response

Your Request seeks the disclosure of documents relating to the financial contributions by the RIRs to ICANN. As a preliminary manner, we note that this is the third DIDP request that CIS has submitted seeking documentary information regarding the relationship between ICANN and the RIRs and the “current and historical data regarding details of contract fees paid by the 5 Regional Internet Registries, namely AfriNIC, ARIN, APNIC, LACNIC and RIPE NCC, to ICANN for each fiscal year [...] from 1999 till 2014.” (DIDP Request 20150206-1, *available at* <https://www.icann.org/en/system/files/files/cis-request-06feb15-en.pdf>; *see also*, DIDP Request 20151130-3 *available at* <https://www.icann.org/resources/pages/didp-20151130-3-cis-request-2016-01-04-en>.) Some of the information responsive to the current DIDP was provided in ICANN’s response to DIDP Request 20151130-3. (*See* DIDP Response to Request 20151130-3, *available at*

<https://www.icann.org/en/system/files/files/didp-20151130-3-cis-response-30dec15-en.pdf>.)

Item 1 asks for “[d]ocuments showing the reasons why ICANN possesses the breakdown of the FY03, FY04, and FY05 contributions but not for the other years.” As explained in our Response to CIS’s DIDP Request 20151130-3, the RIRs (through the NRO) voluntarily contribute to ICANN’s budget on an annual basis. (See <https://www.icann.org/en/system/files/files/plzak-to-twomey-17dec07-en.pdf> and <https://www.icann.org/en/system/files/files/akplogan-to-twomey-23mar09-en.pdf>.) The first contribution was made in FY00. With the exception of FY03 through FY05, since FY00 to the present, the annual contributions have been provided to ICANN as one aggregate amount, without any breakdown of the specific amounts contributed by each RIR. Because the RIRs do not contribute to ICANN on an individual basis (with the exception of FY03 through FY05) ICANN does not have the breakdown that is sought through the Request. ICANN does not have, nor does ICANN seek any information from the NRO or the individual RIRs as to how individual RIRs may have contributed towards the ICANN contribution. ICANN does not have any input as to whether the RIRs contribute collectively or through individual contributions. As such, ICANN does not have any documents responsive to this item.

Item 2 seeks documentation regarding the NRO contribution for FY03 as reported in our response to DIDP Request 20151130-3 as follows:

- FY03: APNIC (US\$129,400), ARIN (US\$159,345), and RIPE (US\$206,255)
- FY04: APNIC (US\$160,500), ARIN (US\$144,450), LACNIC (US\$5,350) and RIPE (US\$224,700)
- FY05: APNIC (US\$220,976), ARIN (US\$218,507), LACNIC (US\$25,431) and RIPE (US\$358,086)

(See DIDP Response 20151130-3, <https://www.icann.org/en/system/files/files/didp-20151130-3-cis-response-30dec15-en.pdf>.) As you correctly noted, the amount reported for FY03 does not add up to the number that reported in the FY03 financial report on the ICANN website as the revenue from Address Registry Fees of \$535,000. ICANN inadvertently attributed the contributions to the wrong years. The corrected figures are as follows:

- FY02-03: APNIC (US\$128,400), ARIN (US\$158,345), and RIPE (US\$206,255) = US\$495,000
- FY03-04: APNIC (US\$160,500), ARIN (US\$144,450), LACNIC (US\$5,350) and RIPE (US\$224,700) = US\$535,000

- FY04-05: APNIC (US\$220,976), ARIN (US\$218,507), LACNIC (US\$25,431) and RIPE (US\$358,086) = US\$823,000

### **About DIDP**

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We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 41

## Response to Documentary Information Disclosure Policy Request

To: Jennifer Standiford on behalf of the Registrar Stakeholder Group Executive Committee

Date: 12 March 2016

Re: Request No. 20160211-1

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Thank you for your Request for Information dated 11 February 2016 (the “Request”), which was submitted through the Internet Corporation for Assigned Names and Numbers’ (ICANN’s) Documentary Information Disclosure Policy (DIDP) on behalf of the Registrar Stakeholder Group Executive Committee. For reference, a copy of your Request is attached to the email forwarding this Response.

### Items Requested

Your Request seeks the disclosure of the following travel support data for the Intersessional Meetings of the Generic Names Supporting Organization’s (GNSO)’s Non-Contracted Parties House that occurred in Washington, D.C. in 2015 and Los Angeles, California in February 2016:

- 1) # of attendees by meeting (2015 and 2016)
- 2) # of travel support recipients by meeting (2015 and 2016)
- 3) # of travel support recipients that received air travel support and \$ amount per person by meeting (2015 and 2016)
- 4) # of travel support recipients that received hotel support and \$ amount per person by meeting (2015 and 2016)
- 5) # of travel support recipients that received per diem and \$ amount per person by meeting (2015 and 2016)
- 6) \$ Total amount of travel funding support provided by meeting (2015 and 2016)
- 7) \$ Average amount of travel funding support received by attendee by meeting (2015 and 2016)

### Response

The Intersessional Meeting of the GNSO’s Non-Contracted Parties House<sup>1</sup> was created to provide “the opportunity, outside of the pressures and schedule strains of an ICANN

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<sup>1</sup> As provided in ICANN’s Bylaws ([Article X, Section 3.8](#)), the Non Contracted Parties House is a component of the GNSO Council structure. For voting purposes, the GNSO Council (see [Article X, Section 3.1 of the Bylaws](#)) is organized into a bicameral House structure including the Non Contracted Parties House and Contracted Parties House. The Non Contracted Parties House includes members of the Commercial Stakeholder Group (six members), members of the Non-Commercial Stakeholder Group (six members), and an additional voting member appointed by the ICANN Nominating Committee - for a total of thirteen voting members.

Public Meeting to discuss longer-range substantial community issues and to collaborate with Senior ICANN Staff on strategic and operational issues that impact the community.” (<https://community.icann.org/display/neph/InterSessional+-+January+2013>.) The first “pilot” meeting took place in 2013. Since then, there have been two additional meetings, in January 2015 and February 2016. Your Request seeks travel support data for the 2015 and 2016 meetings.

The 2015 Intersessional Meeting of the GNSO’s Non-Contracted community (the “NCPH Intersessional 2015”) took place in January 2015 in Washington, D.C. (See <https://community.icann.org/display/neph/Intersessional+-+January+2015>.) Information about the NCPH Intersessional 2015 has been published on the community wiki under the GNSO page for the NCPH Intersessional 2015, at <https://community.icann.org/display/neph/Intersessional+-+January+2015>. Specifically, the following information has been published:

- NCPH Intersessional 2015 – Documents, <https://community.icann.org/display/neph/NCPH+Intersessional+2015+-+Documents>
- NCPH Intersessional 2015 – Meeting Agenda, <https://community.icann.org/display/neph/NCPH+Intersessional+2015+-+Meeting+Agenda>
- NCPH Intersessional 2015 – Recordings & Transcripts, <https://community.icann.org/pages/viewpage.action?pageId=51416553>
- Planning: Conference Calls, Recordings Transcripts, <https://community.icann.org/display/neph/Planning%3A+Conference+Calls%2C+Recordings%2C+Transcripts>
- Remote Participation – Attendees, <https://community.icann.org/display/neph/Remote+Participation+-+Attendees>
- Attendees, <https://community.icann.org/display/neph/Intersessional+-+January+2015#Headings-1649535705>
- Schedule, <https://community.icann.org/display/neph/Intersessional+-+January+2015#Headings--633276745>
- Venue, <https://community.icann.org/display/neph/Intersessional+-+January+2015#Headings-82541135>

The 2016 Intersessional Meeting of the GNSO’s Non-Contracted community (the “NCPH Intersessional 2016”) took place in February 2016 in Los Angeles, California. (See <https://community.icann.org/display/neph/Intersessional+-+January+2015>.) Information about the NCPH Intersessional 2016 has been published on the community wiki under the GNSO page for the NCPH Intersessional 2016, at

<https://community.icann.org/display/neph/Intersessional+-+February+2016>. Specifically, the following information has been published:

- NCPH Intersessional 2016 – Documents, <https://community.icann.org/display/neph/NCPH+Intersessional+2016+-+Documents>
- NCPH Intersessional 2016 – Meeting Agenda, <https://community.icann.org/display/neph/NCPH+Intersessional+2016+-+Meeting+Agenda>
- NCPH Intersessional 2016 – Recordings & Transcripts, <https://community.icann.org/pages/viewpage.action?pageId=56149573>
- NCPH Intersessional 2016 – Pre-Meeting Briefing, <https://community.icann.org/display/neph/NCPH+Intersessional+2016+-+Pre+Meeting+Briefing>
- Planning 2016: Conference Calls, Recordings Transcripts, <https://community.icann.org/display/neph/Planning+2016%3A+Conference+Calls%2C+Recordings%2C+Transcripts>
- Remote Participation – Attendees, <https://community.icann.org/display/neph/Remote+Participation+2016+-+Attendees>
- Attendees, <https://community.icann.org/display/neph/Intersessional+-+February+2016#Headings-1649535705>
- Schedule, <https://community.icann.org/display/neph/Intersessional+-+February+2016#Headings--633276745>
- Venue, <https://community.icann.org/display/neph/Intersessional+-+February+2016>

The data responsive to your request for the NCPH Intersessional 2015 and 2016 Meetings are provided below.

- 1) # of attendees (including staff) by meeting (2015 and 2016)
  - 2015: 63
  - 2016: 50
- 2) # of travel support recipients by meeting (2015 and 2016)
  - 2015: 36
  - 2016: 40
- 3) # of travel support recipients that received air travel support and \$ amount

per person by meeting (2015 and 2016)

- 2015: 35
- 2016: 37

The amount of air travel support provided per recipient is set forth in Attachments A and B to this DIDP Response for the years 2015 and 2016, respectively.

4) # of travel support recipients that received hotel support and \$ amount per person by meeting (2015 and 2016)

- 2015: 35
- 2016: 35

The amount of hotel travel support provided per recipient is set forth in Attachments A and B to this DIDP Response for the years 2015 and 2016, respectively.

5) # of travel support recipients that received per diem and \$ amount per person by meeting (2015 and 2016)

- 2015: 35
- 2016: 38

The amount of per diem provided per recipient is set forth in Attachments A and B to this DIDP Response for the years 2015 and 2016, respectively.

6) \$ Total amount of travel funding support provided by meeting (2015 and 2016)

- 2015 - US\$79,319.74
- 2016 - US\$79,999.53

7) \$ Average amount of travel funding support received by attendee by meeting (2015 and 2016)

- 2015 - US\$2,204
- 2016 - US\$2,051

Please note that the above data with the exception of Item 1 excludes any travel support that was provided for ICANN staff that attended the meetings as the number of staff that received travel support and the amount received depended on the location of the staff in relation to the meeting (i.e., whether the staff member resided in the city in which the meeting was being held) and whether the staff member was already in the Washington, DC and/or Los Angeles during the 2015 and 2016 meetings, respectively, for other projects. Moreover, any travel support provided for ICANN staff to attend the NCPH Intersessional 2015 and 2016 Meetings did not come out of the budget for community travel support and would necessarily involve a substantial amount effort and time to identify and segregate the staff travel support based upon projects/budgets. The burden of producing this data outweighs any benefits that may be derived from the information,

particularly given that the responsive data for the community members, for whom the Intersessional meetings were created, is being provided in response to the Request.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, which is contained within the ICANN Accountability & Transparency: Framework and Principles please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at MyICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest because as we continue to enhance our reporting mechanisms, reports will be posted for public access.

We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# GNSO NCPH Intersessional Meeting

## Washington D.C. , United States

### 11-14 January 2015

Report on Travel Support for GNSO Members  
US Dollars - Preliminary - Unaudited as of 03/01/2016

	First Name	Last Name	Group	Airfare	Hotel <sup>E</sup>	Per Diem /Stipend	Visas	Other	TOTAL	Full Support Equivalent
1	Walid	Al-Saqaf	GNSO	\$ 1,365.80	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 2,246.33	1
2	Ronald	Andruff	GNSO	\$ 478.20	\$ 580.53	\$ 200.00	\$ -	\$ 100.00	\$ 1,358.73	1
3	John	Berard	GNSO	\$ 577.20	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 1,357.73	1
4	Alain	Bidron	GNSO	\$ 1,575.10	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 2,355.63	1
5	David	Cake	GNSO	\$ 2,876.20	\$ 580.53	\$ 400.00	\$ -	\$ -	\$ 3,856.73	1
6	João Carlos	Caribé	GNSO	\$ 1,819.43	\$ 774.04	\$ 300.00	\$ -	\$ -	\$ 2,893.47	1
7	Mohamed Rafik	Dammak	GNSO	\$ 1,742.10	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 2,622.63	1
8	Avri	Doria	GNSO	\$ 268.20	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 1,048.73	1
9	William	Drake	GNSO	\$ 4,494.60	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 5,375.13	1
10	Heather	Forrest	GNSO	\$ 2,397.70	\$ 580.53	\$ 350.00	\$ -	\$ -	\$ 3,328.23	1
11	Eduardo	Fumes Parajo	GNSO	\$ 3,175.24	\$ 387.02	\$ 250.00	\$ -	\$ -	\$ 3,812.26	1
12	Grace	Githaiga	GNSO	\$ 1,810.10	\$ 580.53	\$ 350.00	\$ 160.00	\$ -	\$ 2,900.63	1
13	Adrian	Hall	GNSO	\$ 1,579.60	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 2,460.13	1
14	Anthony	Harris	GNSO	\$ 1,126.20	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 1,906.73	1
15	Anthony	Holmes	GNSO	\$ 910.20	\$ 580.53	\$ 250.00	\$ -	\$ -	\$ 1,740.73	1
16	Susan	Kawaguchi	GNSO	\$ 807.20	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 1,687.73	1
17	Markus	Kummer	Board Member		\$ 774.04	\$ -	\$ -	\$ -	\$ 774.04	1
18	Samuel	Lanfranco	GNSO	\$ 323.88	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 1,104.41	1
19	Marilia	Maciel	GNSO	\$ 1,819.43	\$ 387.02	\$ 250.00	\$ -	\$ -	\$ 2,456.45	1
20	Kiran	Malancharuvil	GNSO	\$ 634.20	\$ 580.53	\$ 250.00	\$ -	\$ -	\$ 1,464.73	1
21	John	McElwaine	GNSO	\$ 249.50	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 1,030.03	1
22	Joan	McKnight	GNSO	\$ 536.45	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 1,316.98	1
23	Stefania	Milan	GNSO	\$ 1,047.90	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 1,928.43	1
24	Edward	Morris	GNSO	\$ 810.90	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 1,691.43	1
25	Osvaldo	Novoa Bárcena	GNSO	\$ 2,399.68	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 3,280.21	1
26	Jimson	Olufuye	GNSO	\$ 2,509.10	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 3,389.63	1
27	Susan	Payne	GNSO	\$ 2,801.40	\$ 580.53	\$ 250.00	\$ -	\$ -	\$ 3,631.93	1
28	Stephanie	Perrin	GNSO	\$ 570.66	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 1,351.19	1
29	Danny	Reed	GNSO	\$ 639.70	\$ 387.02	\$ 150.00	\$ -	\$ -	\$ 1,176.72	1
30	Gregory	Shatan	GNSO	\$ 602.20	\$ 580.53	\$ 200.00	\$ -	\$ -	\$ 1,382.73	1
31	Matthew	Shears	GNSO	\$ 1,163.40	\$ 580.53	\$ 250.00	\$ -	\$ -	\$ 1,993.93	1

32	Martin	Silva Valent	GNSO	\$ 2,657.53	\$ 580.53	\$ 300.00	\$ -	\$ -	\$ 3,538.06	1
33	Klaus-Dieter	Stoll	GNSO	\$ 1,022.60	\$ 580.53	\$ 250.00	\$ -	\$ -	\$ 1,853.13	1
34	Rudi	Vansnick	GNSO	\$ 1,029.60	\$ 580.53	\$ 250.00	\$ -	\$ -	\$ 1,860.13	1
35	Zhang	Zuan	GNSO	\$ 1,513.50	\$ 580.53	\$ 400.00	\$ -	\$ -	\$ 2,494.03	1

**DROPS**

1	Mahmoud	Lattouf	GNSO	\$ 350.00	\$ -	\$ 300.00	\$ -	\$ -	\$ 650.00	0
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**TOTAL: \$ 49,684.70 \$ 20,125.04 \$ 9,250.00 \$ 160.00 \$ 100.00 \$ 79,319.74 35**

**STAFF**

1	Fadi	Chehadé								
2	Allen	Grogan (Remotely)								
3	Marika	Konings								
4	Chris	Mondini								
5	Cyrus	Namazi								
6	David	Olive								
7	Theresa	Swinehart								
8	Mary	Wong								
9	Karen	Lentz (Remotely)								
10	Brenda	Brewer								
11	Robert	Hoggarth								
12	Reed	Quinn								
13	Carlos	Reyes								
14	Benedetta	Rossi (Remotely)								

NOTICE: Where actual hotel, flight, and other expenses are not yet available they have been estimated based on number of authorized nights.

Full Support Equivalent: Some travelers only receive airfare, while other received only lodging and per diem; partially supported travelers appear as partial support.

**E = Estimate**

**GNSO NCPH Intersessional Meeting  
Los Angeles, California  
3-6 February 2016**

Report on Travel Support for GNSO Members  
US Dollars - Preliminary - Unaudited as of 03/01/2016

	First Name	Last Name	Group	Airfare	Hotel	Per Diem /Stipend	Visas	Other	TOTAL	Full Support Equivalent
1	Farzaneh	Badieï	GNSO	\$ 1,276.26	\$ 771.96	\$ 350.00	\$ -	\$ -	\$ 2,398.22	1
2	Alain	Bidron	GNSO	\$ 1,737.46	\$ 578.97	\$ 250.00	\$ -	\$ -	\$ 2,566.43	1
3	Marilyn	Cade	GNSO	\$ 276.20	\$ 578.97	\$ 200.00	\$ -	\$ -	\$ 1,055.17	1
4	Phil	Corwin	GNSO	\$ 313.20	\$ 578.97	\$ 200.00	\$ -	\$ -	\$ 1,092.17	1
5	Christian	Dawson	GNSO	\$ 313.20	\$ 385.98	\$ 150.00	\$ -	\$ -	\$ 849.18	1
6	William	Deacon	GNSO	\$ 127.20	\$ 385.98	\$ 150.00	\$ -	\$ -	\$ 663.18	1
7	Steve	DelBianco	GNSO	\$ 276.20	\$ 578.97	\$ 200.00	\$ -	\$ -	\$ 1,055.17	1
8	Avri	Doria	GNSO	\$ 1,202.94	\$ 771.96	\$ 300.00	\$ -	\$ -	\$ 2,274.90	1
9	Heather	Forrest	GNSO	\$ 922.36	\$ 385.98	\$ 250.00	\$ -	\$ -	\$ 1,558.34	1
10	Grace	Githaiga	GNSO	\$ 1,723.36	\$ 578.97	\$ 350.00	\$ 200.00	\$ -	\$ 2,852.33	1
11	Robin	Gross	GNSO	\$ 328.20	\$ 385.98	\$ 150.00	\$ -	\$ -	\$ 864.18	1
12	Carlos Raúl	Gutiérrez	GNSO	\$ 536.20	\$ 771.96	\$ 350.00	\$ -	\$ -	\$ 1,658.16	1
13	Johan	Helsingius	GNSO		\$ 578.97	\$ 300.00	\$ -	\$ -	\$ 878.97	1
14	Jennifer	Hodges	GNSO	\$ 273.20	\$ 385.98	\$ 200.00	\$ -	\$ -	\$ 859.18	1
15	Anthony	Holmes	GNSO	\$ 795.00	\$ 578.97	\$ 250.00	\$ -	\$ -	\$ 1,623.97	1
16	Markus	Kummer	Board Member	\$ -	\$ 385.98	\$ -	\$ -	\$ -	\$ 385.98	1
16	Samuel	Lanfranco	GNSO	\$ 385.92	\$ 578.97	\$ 150.00	\$ -	\$ -	\$ 1,114.89	1
17	Marília	Maciel	GNSO	\$ 618.65	\$ 578.97	\$ 300.00	\$ -	\$ -	\$ 1,497.62	1
18	Kiran	Malancharuvil	GNSO	\$ 193.20	\$ 578.97	\$ 200.00	\$ -	\$ -	\$ 972.17	1
19	Mark	McFadden	GNSO	\$ 1,356.66	\$ 578.97	\$ 300.00	\$ -	\$ -	\$ 2,235.63	1
20	Joan	McKnight	GNSO	\$ 379.92	\$ 578.97	\$ 200.00	\$ -	\$ -	\$ 1,158.89	1
21	Stefania	Milan	GNSO	\$ 823.66	\$ 578.97	\$ 300.00	\$ -	\$ -	\$ 1,702.63	1
22	Edward	Morris	GNSO	\$ 7,784.76	\$ 578.97	\$ 300.00	\$ -	\$ 168.64	\$ 8,832.37	1
23	Oliver	Muron	GNSO	\$ 951.32	\$ 385.98	\$ 250.00	\$ -	\$ -	\$ 1,587.30	1
24	Oswaldo	Novoa Bárcena	GNSO	\$ 3,708.16	\$ 578.97	\$ 300.00	\$ -	\$ -	\$ 4,587.13	1
25	Jimson	Olufuye	GNSO	\$ 1,353.00	\$ 771.93	\$ 350.00	\$ -	\$ -	\$ 2,474.93	1
26	Susan	Payne	GNSO	\$ 1,775.36	\$ 578.97	\$ 300.00	\$ -	\$ -	\$ 2,654.33	1
27	Stephanie	Perrin	GNSO	\$ 407.36	\$ 578.97	\$ 200.00	\$ -	\$ -	\$ 1,186.33	1
28	Joao	Rebello Caribe	GNSO	\$ 664.41	\$ 771.96	\$ 350.00	\$ -	\$ -	\$ 1,786.37	1
29	Lori	Schulman	GNSO	\$ 236.20	\$ 771.96	\$ 200.00	\$ -	\$ -	\$ 1,208.16	1
30	Gregory	Shatan	GNSO	\$ 313.20	\$ 385.98	\$ 150.00	\$ -	\$ -	\$ 849.18	1
31	Matthew	Shears	GNSO	\$ 1,814.96	\$ -	\$ 350.00	\$ -	\$ -	\$ 2,164.96	1
32	Martin	Silva Valent	GNSO	\$ 1,278.76	\$ 385.98	\$ 250.00	\$ -	\$ -	\$ 1,914.74	1
33	Klaus-Dieter	Stoll	GNSO	\$ 4,119.96	\$ -	\$ 350.00	\$ -	\$ -	\$ 4,469.96	1
34	Arun	Sukumar	GNSO	\$ 940.73	\$ 771.96	\$ 400.00	\$ -	\$ -	\$ 2,112.69	1
35	Tapani Jyrki	Tarvainen	GNSO	\$ 4,161.76	\$ 771.96	\$ 350.00	\$ -	\$ -	\$ 5,283.72	1
36	Rudi	Vansnick	GNSO	\$ 1,356.46	\$ 771.96	\$ 350.00	\$ -	\$ -	\$ 2,478.42	1
37	Brian	Winterfeldt	GNSO	\$ 350.00	\$ -	\$ 150.00	\$ -	\$ -	\$ 500.00	1
38	Zhang	Zuan	GNSO	\$ 1,969.46	\$ 771.96	\$ 350.00	\$ -	\$ -	\$ 3,091.42	1
<b>DROPS</b>										
1	Ayaovi Olevie Agbenyo	Kouami	GNSO	\$ -	\$ -	\$ -	\$ 160.00	\$ -	\$ 160.00	
2	Mohamed Rafik	Dammak	GNSO	\$ 1,340.16	\$ -	\$ -	\$ -	\$ -	\$ 1,340.16	
<b>TOTAL:</b>				<b>\$ 48,385.01</b>	<b>\$ 21,035.88</b>	<b>\$ 10,050.00</b>	<b>\$ 360.00</b>	<b>\$ 168.64</b>	<b>\$ 79,999.53</b>	<b>39</b>

**STAFF**

1	Carlos	Reyes
2	Rob	Hoggarth
3	David	Olive
4	Adam	Peake
5	Chantelle	Doerksen
6	Lars	Hoffman
7	Steve	Chan
8	Susie	Johnson
9	Mike	Brennan
10	Moises	Cirilo
11	Benedetta	Rossi (Remotely)
12	Maryam	Bakoshi (Remotely)

NOTICE: Where actual hotel, flight, and other expenses are not yet available they have been estimated based on number of authorized nights.

Full Support Equivalent: Some travelers only receive airfare, while other received only lodging and per diem; partially supported travelers appear as partial support.

**E = Estimate**

# Exhibit 42

## Response to Documentary Information Disclosure Policy Request

To: Asvatha Babu on behalf of the Centre for Internet & Society

Date: 23 November 2016

Re: Request No. 20161024-2

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Thank you for your Request for Information dated 24 October 2016 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of The Centre for Internet & Society (CIS) on 24 October 2016. For reference, a copy of your Request is attached to the email forwarding this Response.

### **Items Requested**

Your Request seeks the disclosure of documentary information relating to the IANA Stewardship Transition Costs for FY15 as reported by ICANN. Specifically, you seek the following:

- 1) Under the expenses breakdown for Professional Services, what is the exact breakdown for "travel support including visas"?
- 2) Expected deliverables from the following parties as listed in their contracts mentioned in the report:
  - a) Albright Stonebridge Group LLC
  - b) Edelman
  - c) Interface Media
  - d) Rice Hadley Gates LLC
  - e) Summit Strategies International LLC
  - f) WBC Global
  - g) Wiley Rein LLP
  - h) Adler & Colvin
  - i) Sidley Austin LLP
  - j) Jones Day
  - k) Akin Grump Straus Hauer and Feld, LLP
  - l) Kountoupes Denham
  - m) Mehlman Castagnetti Rosen Bingel &
  - n) Thomas, Inc.
- 3) In the same report, what constitutes "other miscellaneous services"?

- 4) Under the head of "Education/Engagement/Advice", prominent lobbying firms are named. We request a detailed report explaining their work with and for ICANN, as distinguished from the work of the lobbyists.<sup>1</sup>

## Response

ICANN's DIDP is intended to "ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality." (See <https://www.icann.org/resources/pages/didp-2012-02-25-en> (emphasis added).) As part of its approach to transparency and information disclosure, ICANN makes available on its website at [www.icann.org](http://www.icann.org) a comprehensive set of materials concerning ICANN's operational activities as a matter of course. In the interest of transparency, ICANN has published information on the IANA transition costs on the IANA Transition Project Costs page, at <https://www.icann.org/resources/pages/iana-transition-project-costs>. The scope of the costs reported on this webpage includes the IANA Stewardship Transition Coordination Group (ICG) work, the Cross Community Working Group on Naming Related Stewardship Functions (CWG-Stewardship), the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) and any implementation work. The cost categories reported include the cost of staff support, travel and meetings costs, professional services (including legal advice), and administrative costs. The costs disclosed are exclusively direct costs and do not include any overhead allocation. The cost information is published quarterly, with FY17 Q1 (July 1, 2017 – September 30, 2016) being the most recent quarter. (<https://www.icann.org/resources/pages/iana-transition-project-costs>)

As a preliminary matter, the information reported on the IANA Transition Project Costs webpage are the costs summaries for FY15 and FY16. Your Request seeks the disclosure of documentary information relating the IANA Stewardship Transition Costs for FY15 only. The DIDP procedures do not require ICANN to create or compile summaries of any documented information. (<https://www.icann.org/resources/pages/didp-2012-02-25-en>) Responding to your Requests would require ICANN to parse out the reported data into FY15 and FY16. Nevertheless, as part of its commitment to transparency and accountability, ICANN has undertaken this effort to do so.

### Item 1

This item asks for the exact breakdown for "travel support including visas" under the "Professional Services" expenses category, appearing at <https://www.icann.org/en/system/files/files/iana-transition-expenses-professional-vendor-06sep16-en.pdf>. The travel costs responsive to your request are reported under the "Travel & Meetings – Supported Travelers" category at <https://www.icann.org/en/system/files/files/iana-transition-expenses-supported-traveler-08sep16-en.pdf>. "Professional Services" is a separate reporting category from "Travel &

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<sup>1</sup> <https://www.icann.org/en/system/files/files/iana-stewardship-expenses-professional-vendor-24feb16-en.pdf>

Meetings – Supported Travelers.” The expenses under the “Professional Services” category include: Education/Engagement/Advice, Telecom & Language Services, Root Zone Management Evaluation, Support, US Governmental Affairs (Lobbying), and Other. (<https://www.icann.org/en/system/files/files/iana-transition-expenses-professional-vendor-06sep16-en.pdf>)

## Item 2

This item requests the disclosure of expected deliverables from the following parties as listed in their contracts:

- a) Albright Stonebridge Group LLC
- b) Edelman
- c) Interface Media
- d) Rice Hadley Gates LLC
- e) Summit Strategies International LLC
- f) WBC Global
- g) Wiley Rein LLP
- h) Adler & Colvin
- i) Sidley Austin LLP
- j) Jones Day
- k) Akin Grump Straus Hauer and Feld, LLP
- l) Kountoupes Denham
- m) Mehlman Castagnetti Rosen Bingel &
- n) Thomas, Inc.

As a preliminary matter, except for subcategories (h) and (i) above, the contracts for the foregoing entities are subject to the following Defined Conditions of Nondisclosure and are therefore not appropriate for disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure, ICANN also evaluated the contracts to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no particular circumstances for which the public interest in disclosing the contracts in their entirety outweighs the harm that may be caused to ICANN, its contractual relationships, and its contractors’ deliberative processes by the requested disclosure. However, in furtherance of ICANN’s commitment to transparency, the following is a summary of the deliverables for the requested contracts as related to the reported activities.

Albright Stonebridge Group LLC (item (a)) was engaged to provide advice on stakeholder engagement in the U.S. and other additional markets.

Edelman (item (b)) was engaged to provide strategic counsel and support for the IANA stewardship transition, including media relations, stakeholder engagement, and market activation and support.

Interface Media (item (c)) was engaged to develop and create an animated infographic illustrating the relationship between major ICANN stakeholders with the main focus on accountability and the IANA transition process.

Rice Hadley Gates LLC (item (d)) was engaged to provide consulting services in the form of helping educate the community on the issue of the IANA stewardship transition.

Summit Strategies International, LLC (item (e)) was engaged to provide overall domestic and international strategy regarding the final phase of the IANA stewardship transition; to assist with outreach to domestic and international stakeholders; and to assess and advise on potential options and mechanisms related to implementation of the transition.

WBC Global (item (f)) was engaged to provide strategic counsel regarding outreach efforts and messaging related to the IANA stewardship transition.

Wiley Rein LLP (item (g)) was engaged to provide strategic counsel related to Internet governance-related issues impacting ICANN.

Adler & Colvin (item (h)) was engaged to be the primary source of advice to the Cross-Community Working Group on Enhancing ICANN Accountability on not-for-profit law and legal structures and processes to enhance accountability. The engagement letter is available at <https://community.icann.org/display/acctcrosscomm/Legal+Counsel>.

Sidley Austin LLP (item (i)) was retained to provide legal counsel to the Cross Community Working Group on Enhancing ICANN Accountability and to the Cross

Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions regarding governance and structures to enhance accountability. Sidley’s engagement letter for the Accountability work is also available at <https://community.icann.org/display/acctcrosscomm/Legal+Counsel>. For the CWG-Stewardship Work, the signed engagement letter can be accessed at a 6 March 2015 entry at <https://community.icann.org/display/gnsocwgdstwrdsdp/Client+Committee>.

Jones Day (item (j)) was engaged to provide legal advice as necessary to ICANN, including implementation assistance.

Akin Grump Straus Hauer and Feld, LLP (item (k)) was engaged to provide legal counsel in connection with the IANA Transition to the multistakeholder community with emphasis on both the U.S. House and Senate Appropriations Committees.

Kountoupes Denham (item (l)) was engaged to provide general federal government affairs representation to ICANN.

Mehlman Castagnetti Rosen Bingel & Thomas, Inc. (items (m) and (n)) was engaged to provide general federal government affairs representation to ICANN. Please note that ICANN is not aware of any entity named Thomas, Inc. for whom services were engaged for the IANA transition. Rather, Thomas, Inc. is last name of the firm “Mehlman Castagnetti Rosen Bingel &” that appears under item (m). As such, ICANN has combined items (m) and (n).

### Item 3

Item 3 asks for the breakdown of the “other miscellaneous services” category. The category of “other miscellaneous services” is comprised of costs that are grouped together because of a lower monetary value and / or represent a smaller amount of nonrecurring work. The costs breakdown is as follows:

- general consulting and analysis \$94K;
- language services support \$93K;
- communications and graphics/media work \$18K;
- discussion platform and other software \$18K;
- temporary staff augmentation \$2K; and
- visa services \$1K

### Item 4

This item seeks a detailed report explaining the work of the firms that are identified under the “Education/Engagement/Advice” category. These firms are: Albright Stonebridge Group LLC, Edelman, Interface Media, Rice Hadley Gates LLC, Summit Strategies International LLC, WBC Global, and Wiley Rein LLP. In response to Item 2 above, ICANN provided further information to explain the work that ICANN engages these firms to perform. ICANN does not have a separate report that provides further detail as requested.

This request is subject to the following DIDP Defined Conditions of Nondisclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Pursuant to the DIDP procedure, ICANN shall not be required to create or compile summaries of any documented information.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest.

We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 43

## **PROCESS FOR RESPONDING TO ICANN'S DOCUMENTARY INFORMATION DISCLOSURE POLICY (DIDP) REQUESTS**

The following sets forth the process guidelines for responding to a DIDP Request.

1. Upon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested and the staff members who may be in possession of or have knowledge regarding information responsive to the Request.
2. Staff conducts interviews of the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.
3. Documents collected are reviewed for responsiveness.
4. A review is conducted as to whether the documents identified as responsive to the Request are subject to any of the Defined Conditions for Nondisclosure identified at <http://www.icann.org/en/about/transparency/didp>.
5. To the extent that any responsive documents fall within any Defined Conditions for Nondisclosure, a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.
6. Documents that have been determined as responsive and appropriate for public disclosure are posted in the appropriate locations on ICANN's website. To the extent that the publication of any documents is appropriate but premature at the time the Response is due, ICANN will so indicate in its Response to the DIDP Request and notify the Requester upon publication.
7. Staff prepares a Response to the DIDP Request within thirty calendar days from receipt of the Request. The Response will be sent to the Requester by email. The Response and Request will also be posted on the DIDP page at <http://www.icann.org/en/about/transparency> in accordance with the posting guidelines set forth at <http://www.icann.org/en/about/transparency/didp>.

# Exhibit 44

ARIF HYDER ALI

Contact Information Redacted

5 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .MUSIC Application ID 1-1115-14110<sup>1</sup>**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report<sup>2</sup> found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").<sup>3</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless

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<sup>1</sup> DotMusic's .MUSIC community Application (ID 1-1115-14110), <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1392>; Also See [https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392](https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:download%20application/1392?t:ac=1392)

<sup>2</sup> .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>3</sup> See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

there is a compelling reason for confidentiality.<sup>4</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.<sup>5</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>6</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

#### **A. Context and Background**

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

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<sup>4</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

<sup>5</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>6</sup> *Id.*

generally and specifically with respect to the CPE reports issued by the CPE provider”<sup>7</sup> and that the BGC may have requested from the CPE provider “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup>

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>10</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded

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<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

#### **B. Documentation Requested**

The documentation requested by DotMusic in this DIDP includes all of the “material currently being collected as part of the President and CEO’s review” that has been shared with ICANN and is “currently underway.”<sup>11</sup>

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit’s handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;

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<sup>11</sup> Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal line extending to the right.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

# Exhibit 45

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

**VIA E-MAIL DIDP@ICANN.ORG**

ICANN  
c/o Steve Crocker, Chairman  
Goran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning  
Community Priority Evaluation for .GAY Application ID 1-1713-23699**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report<sup>1</sup> found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.<sup>2</sup>

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.<sup>3</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

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<sup>1</sup> .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>

<sup>2</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>

<sup>3</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

*Documentary Information Disclosure Policy (DIDP) Requests.*<sup>4</sup> According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP’s Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>5</sup> We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

#### **A. Context and Background**

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the “BGC”).<sup>6</sup> Dotgay has sent several letters to ICANN noting that ICANN’s protracted delays in reaching a decision and ICANN’s continued lack of responsiveness to dotgay’s inquiries about the status of dotgay’s request represent a violation of ICANN’s commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting “an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider”<sup>7</sup> and that the BGC may have requested from the CPE provider “the materials and research

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<sup>4</sup> Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

<sup>5</sup> *Id.*

<sup>6</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; See also *dotgay’s* powerpoint presentation:

<sup>7</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>8</sup>

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.<sup>9</sup> Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation.<sup>10</sup>

Dotgay has received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:<sup>11</sup>

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but

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<sup>8</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>9</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

<sup>10</sup> Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>

<sup>11</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3. . . ." <sup>12</sup> According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

## **B. Documentation Requested**

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway."<sup>13</sup> Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

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<sup>12</sup> Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

<sup>13</sup> Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

1. All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>14</sup>
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm (“the evaluator”) undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

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<sup>14</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>15</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

dotguy reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

### **C. Conclusion**

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,



Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

# Exhibit 46



## **Community Priority Evaluation Process Review Update**

*2 June 2017*

The following is an update on the ongoing Community Priority Evaluation (CPE) process review.

### **Background on CPE Process Review**

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of CPE process, including certain concerns that some applicants have raised regarding the process. On [17 September 2016](#), the ICANN Board directed the President and CEO, or his designees, to undertake a review of the process by which ICANN has interacted with the CPE provider. In his [letter of 26 April 2017 to concerned parties](#), Chris Disspain, the Chair of the Board Governance Committee, provided additional information about the scope and status of the review. Below is additional information about the review, as well as the current status of the CPE process review.

### **CPE Process Review and Current Status**

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending [Requests for Reconsideration](#).

The review is being conducted in two parallel tracks by [FTI Consulting Inc.'s \(FTI\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists.

For more information about the CPE process, please visit <https://newgtlds.icann.org/en/applicants/cpe>.

# Exhibit 47

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

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Thank you for your request for documentary information dated 5 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

### **Response**

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and

Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (*See* Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.

#### Items 5-6

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board (Item 6). As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited. Rather than repeating those here, see Response to DIDP Request No. 20160429-1, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic->

[response-supporting-docs-15may16-en.pdf](#). The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

#### Item 7

Item 7 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application

#### Items 8

Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

#### Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

#### Item 10

Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

## **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 48

# DotMusic Reconsideration Request (“RR”)

## 1. Requester Information

Requester is represented by:

**Name:** Dechert LLP

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

Requester:

**Name:** DotMusic Limited (“DotMusic”)

**Address:** Contact Information Redacted

**Email:** Constantinos Roussos, Contact Information Redacted

**Counsel:** Arif Hyder Ali, Contact Information Redacted

## 2. Request for Reconsideration of:

**Board action/inaction**

**Staff action/inaction**

## 3. Description of specific action you are seeking to have reconsidered.

On September 17, 2016, the ICANN Board passed a Resolution requesting ICANN to conduct “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE

reports issued by the CPE provider.”<sup>1</sup> Further, on October 18, 2016, ICANN’s Board Governance Committee (“BGC”) requested it be provided “the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”<sup>2</sup> In so doing, the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.<sup>3</sup>

On January 30, 2017, DotMusic requested “an immediate update about the status of: (1) DotMusic’s Reconsideration Request 16-5 and the BGC’s best estimate of the time it requires to make a final recommendation on DotMusic’s Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider.”<sup>4</sup> DotMusic received no response. On April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that DotMusic had not received any communication from the independent evaluator. ICANN had not provided any details as to how the evaluator was selected, what its remit was, what information had been provided, whether the evaluator will seek to consult with the affected parties, etc.<sup>5</sup>

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN BGC Chair Chris Disspain (“BGC Letter”) indicating that the Reconsideration Request 16-5 was “on hold” and *inter alia* that:

The BGC decided to request from the CPE provider the materials and research

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<sup>1</sup> Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a> (emphasis supplied).

<sup>2</sup> Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

<sup>3</sup> ICANN Bylaws Art. IV. § 2.13 “The Board Governance Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. ***Any information collected by ICANN from third parties shall be provided to the Requestor.***”

<sup>4</sup> Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, January 30, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>

<sup>5</sup> Annex B, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCCK).<sup>6</sup>

On May 5, 2017, Arif Ali, on behalf of DotMusic, submitted a DIDP Request 20170505-1 ("DIDP Request")<sup>7</sup> requesting, *inter alia*:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the

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<sup>6</sup> See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

<sup>7</sup> See Annex C, DIDP Request at <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

investigation; and

10. All materials provided to ICANN by the evaluator concerning the Review.

DotMusic concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”

On May 15, 2017, in a letter to DotMusic, Jeffrey LeVee, on behalf of ICANN, reiterated the statements of BGC Chairman Chris Disspain and stated that certain questions concerning the CPE Review “will be addressed as part of ICANN’s response to the DIDP in due course.”<sup>8</sup>

In response, on May 21, 2017, Arif Ali, on behalf of DotMusic, responded that DotMusic does “not consider ICANN’s delays justified” and that “[r]egrettably, ICANN continues to breach its transparency obligations, ignoring DotMusic’s information requests concerning the review process currently being conducted by an independent evaluator. Particularly, ICANN has ignored the basic safeguards that DotMusic has proposed, *inter alia*, that the identity of the evaluator be disclosed; that DotMusic be provided access to the materials being reviewed by the evaluator; and that DotMusic’s right to be heard during the evaluation process and comment on the evaluation results be given full effect.” Further, the letter stated that “[i]t is clear that the delays and secrecy are thus impairing ICANN’s Board from discharging their oversight responsibilities. Withholding materials concerning DotMusic’s CPE evaluation does not merely result in a denial of DotMusic’s right to be heard; it also hampers the efficiency of the investigation, by disabling us from being

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<sup>8</sup> Annex F, <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>

able to identify the flaws in the EIU's results. We urge ICANN to reconsider whether continuing a pattern of secrecy and neglect to the right of applicants to fair treatment serves either ICANN's or the global music community's best interests."<sup>9</sup>

On June 4, 2017, ICANN responded to the DIDP Request,<sup>10</sup> stating that:

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017 (*sic*), FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review... [T]he scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

Moreover, ICANN denied critical items requested. Specifically:

Items 1- 4 ... With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6 Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board (Item 6). As detailed in the Community Priority Evaluation Process Review Update, the review is being conducted in two parallel tracks. ***The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early***

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<sup>9</sup> Annex G, <https://www.icann.org/en/system/files/correspondence/ali-to-Levee-21may17-en.pdf>

<sup>10</sup> Annex D, ICANN DIDP Response, June 4, 2017, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>

*March 2017.* This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

[...]

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited.

Item 8. Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

Item 10. Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors.
- ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

On June 10, 2017, Arif Ali, on behalf of DotMusic and dotgay, sent a joint letter to ICANN stating, *inter alia*, that:<sup>11</sup>

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

**First**, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

**Second**, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration

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<sup>11</sup> Annex H, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (10 June 2017).

- requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
  3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
  4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017, to date.

According to ICANN’s DIDP “*Defined Conditions of Nondisclosure:*”<sup>12</sup>

ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a **compelling** reason for confidentiality.

Information...may still be made public if ICANN determines, under the particular circumstances, that the **public interest** in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the **public interest** in disclosing the information.

ICANN’s default policy is to release all information requested unless there is a **compelling** reason not to do so. ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of **public interest** in terms of the DIDP Request.

ICANN signed an engagement letter with FTI to perform an ***independent*** review of the CPE Process based on the acceptance by ICANN’s Board of the systemic breaches of its Bylaws

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<sup>12</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>

in the CPE Process identified by the *Despegar* and *Dot Registry* IRP Declarations.<sup>13</sup> It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions. These materials critically include the items requested by DotMusic in its DIDP request that was denied by ICANN because ICANN “determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.” To prevent serious questions arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to DotMusic and the public to ensure full transparency, openness and fairness. This includes the items requested by DotMusic that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure and conflict check processes (Item 2), and the existence of the terms of appointment (Item 4) but also the underlying documents that substantiate ICANN’s claims.

ICANN’s assertion with regard to Item 5 that with the “exception of the correspondence between the ICANN organization and the CPE Provider regarding the evaluations, all materials provided to the evaluator are publicly available”<sup>14</sup> is undercut by ICANN’s admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP request.<sup>15</sup>

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<sup>13</sup> See Dot Registry Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>. See also Despegar Declaration, <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

<sup>14</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en> at p.4

<sup>15</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en> at p.3 (“The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017.”).

Further, ICANN’s claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel of the close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>16</sup>

In fact, *this is a unique circumstance where the “public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”* In addition, ICANN has not disclosed any “compelling” reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including DotMusic’s Reconsideration Request 16-5. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency and credibility of the FTI investigation.

**4. Date of action/inaction:**

June 4, 2017

**5. On what date did you become aware of action or that action would not be taken?**

June 5, 2017

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<sup>16</sup> See Dot Registry Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> at paras.93-101.

**6. Describe how you believe you are materially affected by the action or inaction:**

ICANN's actions and inactions materially affect the delineated and organized music community defined in DotMusic's application that is supported by organizations with members representing over 95% of global music consumed (the "Music Community") and DotMusic. Not disclosing these documents has negatively impacted the timely, predictable and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency and fairness of the CPE process. Without an effective policy to ensure openness, transparency and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency and openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

ICANN's action and inaction in denying the DIDP Request do not follow ICANN's Resolutions, its Bylaws or generally how ICANN claims to hold itself to high standards of accountability, transparency and openness. Such action and inaction raise additional questions as to the credibility, reliability and trustworthiness of the New gTLD Program's CPE process and its management by ICANN, especially in the case of the CPE Report and CPE process of DotMusic's application for the .MUSIC gTLD (Application ID: 1-1115-14110), which is subject to the CPE Reconsideration Request 16-5 ("CPE RR")<sup>17</sup> and is highly relevant to this Request.

A closed and opaque ICANN damages the credibility, accountability and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating

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<sup>17</sup> CPE RR 16-5, <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the DotMusic CPE RR. In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the Music Community that has supported the DotMusic community-based application for the .MUSIC string to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

The Reconsideration Request and Independent Review Process accountability mechanisms are the only recourse for applicants (or impacted requesters) in lieu of litigation. As such, ICANN must provide documents and Items in DIDP requests in which there is an appearance of gross negligence, conflicts of interest, multiple violations of established process, or even simply questions from the affected parties as to how a certain process was followed.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

See Answer to Question 6 above.

**8. Detail of Staff/Board Action/Inaction – Required Information**

See Answer to Question 6 above.

**9. What are you asking ICANN to do now?**

The Requester requests ICANN to disclose all the Items requested in the Request based on ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability) to serve the global public interest.

Such disclosure will increase transparency and provide DotMusic and the BGC with additional information to assist in evaluating the CPE Report as well as the EIU's decision-making process in issuing the CPE Report. As outlined in Reconsideration Request 16-5 (and incorporated here by reference), ICANN engaged in numerous procedural and policy violations (including material omissions and oversights), which lead to inconsistencies and substantial flaws in its rationale methodology and scoring process.

The Requester requests that the BGC apply the Documentary Information Disclosure Policy to the DIDP Request in the manner it was intended to operate to *“ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”* The Requester requests the BGC:

1. Review the ICANN Staff decision to withhold all the information requested, to ensure that each and every requested Item, documents and information request was considered and evaluated individually, and that the public interest test was applied to each individual item properly. The Requester requests that the Items and documents requested are disclosed;
2. To recognize and instruct Staff that ICANN's default policy is to release all information requested unless there is a **compelling** reason not to do so and, where such a compelling

reason for nondisclosure exists to inform the Requesters of the reason for nondisclosure pertaining to each individual item requested; and

3. Insofar as Items remain withheld, to inform the Requesters as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm. Withholding information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws.

As indicated in the CPE Reconsideration Request 16-5, the promise of independence, nondiscrimination, transparency and accountability has been grossly violated in the .MUSIC CPE as the misguided and improper .MUSIC CPE Report shows. As such, the disclosure of the Items and documents requested will ensure that the BGC can perform due diligence and exercise independent judgement to make a well-informed decision pertaining to this DIDP RR (and subsequently the CPE Reconsideration Request 16-5).

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

DotMusic is a community applicant for .MUSIC, an application supported by organizations with members representing over 95% of music consumed. The justifications under which the Requester has standing and the right to assert this reconsideration request are:

- i. Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way.<sup>18</sup>
- ii. Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;
- iii. Conflict of interest issues;
- iv. Failure to consider evidence filed; and
- v. Violation of ICANN Articles of Incorporation/Bylaws:
  - a. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.<sup>19</sup>
  - b. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.<sup>20</sup>
  - c. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.<sup>21</sup>
  - d. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.<sup>22</sup>
  - e. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.<sup>23</sup>
  - f. Remaining accountable to the Internet community through mechanisms that

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<sup>18</sup> Final Issue Report on New gTLD Subsequent Procedures, <https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf>, at pp.23-24

<sup>19</sup> ICANN Bylaws, Art. I, § 2.6

<sup>20</sup> ICANN Bylaws, Art. I, § 2.1

<sup>21</sup> ICANN Bylaws, Art. I, § 2.7

<sup>22</sup> ICANN Bylaws, Art. I, § 2.8

<sup>23</sup> ICANN Bylaws, Art. I, § 2.9

enhance ICANN's effectiveness.<sup>24</sup>

- g. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.<sup>25</sup>
- h. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>26</sup>
- i. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>27</sup>

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? No**

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.**

**12. Do you have any documents you want to provide to ICANN? Yes.** See exhibits in Annexes.

#### **Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate,*

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<sup>24</sup> ICANN Bylaws, Art. I, § 2.10

<sup>25</sup> ICANN Bylaws, Art. I, § 2.11

<sup>26</sup> ICANN Bylaws, Art. II, § 3

<sup>27</sup> ICANN Bylaws, Art. III, § 1

*and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



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Arif Hyder Ali

June 18, 2017

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Date

# Exhibit 49

To: Arif Ali on behalf of dotgay LLC

Date: 18 June 2017

Re: Request No. 20170518-1

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Thank you for your request for documentary information dated 18 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the Review):

1. All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm ("the evaluator") undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

## Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (See Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. (See Letter from Chris Disspain to Concerned Parties, 26 April 2017,

<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; see also, Minutes of BGC 18 October 2016 Meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.>)

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, ICANN undertook the process to find the most qualified evaluator for the review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1, 2, 3, 8, and 13

Items 1, 2, 3, 8, 9, and 13 seek the disclosure of overlapping categories of documents relating to the Review. Specifically, these items request the following:

- Documents relating to "ICANN's request to the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports" (Item 1);
- "[D]ocuments from the EIU provider to ICANN including but not limited to: (a) ICANN's request for 'the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,' and

(b) all communications between the EIU and ICANN regarding the request” (Item 2);

- “[D]ocuments relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation” (Item 3);
- Materials provided to the evaluator by the EIU (Item 8); and
- Materials provided to ICANN by the evaluator concerning the Review (Item 13).

As stated in ICANN’s [Response to DIDP Request 20170505-1](#) that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

#### Items 4, 5, 6, 7

Items 4 through 7 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 4), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 5), the date of appointment (Item 6), and the terms of instructions provided to the evaluator (Item 7). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive

conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

#### Item 9

Item 9 seeks the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board." As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>
- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previously submitted by dotguy. Rather than repeating those here, see Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>. The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing.

#### Item 10

Item 10 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application.

#### Items 11

Item 11 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 7 and 9. The information responsive to the overlapping items has been provided in response to Items 7 and 9 above.

#### Item 12

Item 12 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

#### **About DIDP**

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 50

## **dotgay LLC Reconsideration Request (“RR”)**

### **1. Requester Information**

Requester:

**Name:** dotgay LLC (“dotgay”)

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requester is represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

dotgay LLC (the “Requester”) seeks reconsideration of ICANN’s response to its DIDP Request, which denied the disclosure of certain categories of documents requested pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On May 18, 2017, the Requester submitted a DIDP request seeking disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”)

review of the Community Priority Evaluation (“CPE”) process (the “DIDP Request”).<sup>1</sup>  
Specifically, the Requester submitted 13 document requests as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the

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<sup>1</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

Review.<sup>2</sup>

Subsequently, on June 18, 2017, ICANN responded to the Requester's DIDP Request by denying the Requester's (1) five document requests (Request Nos. 1-3, 8 and 13) in whole, and (2) one document request (Request No. 9) in part. ICANN reasoned that (1) the documents under Request Nos. 1-3, 8 and 13 are not appropriate for disclosure "based on . . . [the] DIDP Defined Conditions of Non-Disclosure;" and (2) the documents under Request No. 9 concerning "the correspondence between the ICANN organization and the CPE provider regarding the evaluations" are not appropriate for disclosure for "the same reasons identified in ICANN's response to the DIDP previous[ly] submitted by dotgay."<sup>3</sup>

**4. Date of action/inaction:**

ICANN acted on June 18, 2017 by issuing its response to the DIDP Request.

**5. On what date did you become aware of action or that action would not be taken?**

The Requester became aware of the action on June 18, 2017, when it received ICANN's response to the DIDP Request.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requester is materially affected by ICANN's refusal to disclose certain categories of documents concerning the BGC's review of the CPE process at issue in the DIDP Request.

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<sup>2</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>3</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>; *see* Exhibit 3, Request No. 20151022-1, ICANN DIDP Response (Oct. 21, 2015), <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

By way of background, the Requester filed a community-based generic Top-Level Domain (“gTLD”) application for the string “.GAY.” However, the CPE report, authored by the Economist Intelligence Unit (the “EIU”), recommended that ICANN reject the Requester’s application for the .GAY gTLD. As evident from the Requester’s submissions, including an independent expert report by Prof. William Eskridge of Yale Law School, the CPE report is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (2) errors of inconsistency derived from the EIU’s failure to follow its own guidelines; (3) errors of discrimination, namely the EIU’s discriminatory treatment of dotgay’s application compared with other applications; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.<sup>4</sup>

In January 2017, ICANN retained an independent reviewer, FTI Consulting, Inc. (“FTI”), to review the CPE process and “the consistency in which the CPE criteria were applied” by the CPE provider. As part of the review, FTI is collecting information and materials from ICANN and the CPE provider. FTI will submit its findings to ICANN based on this underlying information.

FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requester’s Reconsideration Request 16-3 (“Request 16-3”), which is currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requester, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration

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<sup>4</sup> Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>

Requests related to CPE.” Thus, the Requester filed the DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process. In submitting this DIDP Request, the Requester expected ICANN to “operate in a manner consistent with [its] Bylaws” and “through open and transparent processes.”<sup>5</sup> ICANN failed to do so.

Specifically, according to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”<sup>6</sup> The Bylaws require that ICANN (1) “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”<sup>7</sup> (2) “employ[ ] open and transparent policy development mechanisms;”<sup>8</sup> (3) “apply[ ] documented policies neutrally and objectively, with integrity and fairness;”<sup>9</sup> and (4) “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”<sup>10</sup>

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>11</sup> ICANN’s failure to provide complete responses to the Requester’s DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>12</sup>

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<sup>5</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>6</sup> *Id.*, Art. 4, § 4.2(o).

<sup>7</sup> *Id.*, Art. 1, § 1.2(a).

<sup>8</sup> *Id.*, Art. 3, § 3.1.

<sup>9</sup> *Id.*, Art. 1, § 1.2(v).

<sup>10</sup> *Id.*, Art. 1, § 1.2(vi).

<sup>11</sup> *See id.*, Arts. 1, 3-4.

<sup>12</sup> Exhibit 4, CPE Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain categories of documents in the DIDP Request. Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.<sup>13</sup> It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI’s findings and conclusions.

To prevent serious questions from arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to the Requester and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by the Requester that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure, and conflict check processes (Request No. 2) but also the underlying documents that substantiate ICANN’s claims.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN’s action materially affects the global gay community represented by the Requester. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and insecure operation of the identifiers managed by ICANN. Accountability, transparency, and

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<sup>13</sup> ICANN’s Documentary Information Disclosure Policy (last visited June 29, 2017) (“If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.”), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed and opaque ICANN damages the credibility, accountability, and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the Requester's BGC presentation and accompanying materials.<sup>14</sup> In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requester's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>15</sup> This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>16</sup> ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that

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<sup>14</sup> See Exhibit 18, dotgay's Presentation to the Board Governance Committee (May 15, 2016), pp.2-3 <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>15</sup> See Exhibit 6, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>16</sup> ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 Background**

The Requester elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant later that year – having only received 10 points.<sup>17</sup> In response, the Requester, supported by multiple community organizations, filed a Reconsideration Request with the BGC. The BGC granted the request, determining that the EIU did not follow procedure during the CPE process. As a result, the Requester’s application was sent to be re-evaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.<sup>18</sup>

When this issue was brought before the BGC via another Reconsideration Request, though, the BGC excused the discriminatory conduct and the EIU’s policy and process violations. It refused to reconsider the CPE a second time. The Requester therefore filed a third Reconsideration Request, Request 16-3, on February 17, 2016 in response to the BGC’s non-response on many of

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<sup>17</sup> Exhibit 7, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>18</sup> See Exhibit 8, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>19</sup>

Almost a year later, and after numerous letters to ICANN,<sup>20</sup> on April 26, 2017, ICANN finally updated the Requester on the status of Request 16-3. The Requester received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>21</sup>

## 8.2 The DIDP Request

In response to this new information regarding the delay, on May 18, 2017, Arif Ali, on behalf of the Requester, filed the DIDP Request, in relation to the .GAY CPE.<sup>22</sup> The reason for

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<sup>19</sup> See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>20</sup> See Exhibit 10, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 14, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 13, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>21</sup> See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>22</sup> Exhibit 15, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

this request is twofold. *First*, the Requester sought to “ensure that information contained in documents concerning ICANN’s operational activities, within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>23</sup> *Second*, the Requester, like other gTLD applications, sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>24</sup> The Requester sought this information because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>25</sup>

As a result of this dearth of information from ICANN, the Requester made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, which are identified in **Question 3** above. The Requester concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”<sup>26</sup>

Prior to issuing its response to the DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to the DIDP Request.<sup>27</sup> ICANN explained that:

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.<sup>28</sup>

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.<sup>29</sup>

In response to ICANN's update on the CPE Review Process, and the lack of any additional information, the Requester sent ICANN a joint letter with DotMusic on June 10, 2017. The letter stated, *inter alia*, that:<sup>30</sup>

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

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<sup>28</sup> *Id.*

<sup>29</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>30</sup> Exhibit 17, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-leeve-10jun17-en.pdf>.

*First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

*Second*, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”

Accordingly, to ensure the integrity of FTI’s review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017.

### **8.3 ICANN’s Response to the Request**

However, on June 18, 2017, ICANN responded to the DIDP Request. ICANN issued a

response that provided the same information that had already been given to the Requester regarding the BGC's decision to review the CPE Process and to hire FTI in order to conduct an independent review.<sup>31</sup> ICANN further denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN's responses to these requests are as follows:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

*As stated in ICANN's Response to DIDP Request 20170505-1 that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:*

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
- *Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.*
- *Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.*

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<sup>31</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

- *Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.*<sup>32</sup>

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

*ICANN provided the same response as for Item 1.*<sup>33</sup>

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

*ICANN provided the same response as for Item 1.*<sup>34</sup>

Request No. 8: The materials provided to the evaluator by the EIU;

*ICANN provided the same response as for Item 1.*<sup>35</sup>

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

*While ICANN provided a list of materials that it provided FTI, but also determined that the internal “documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.”*<sup>36</sup>

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>37</sup>

*ICANN provided the same response as for Item 1.*<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Exhibit 2, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>38</sup> Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy as described in **Question 6** above.

**9. What are you asking ICANN to do now?**

The Requester asks ICANN to disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requester is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its Request for documents, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents – the gay community – is materially affected by ICANN's failure to disclose the requested documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

This is not applicable.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*



Arif Hyder Ali

June 30, 2017

Date

# Exhibit 51

10 June 2017

**VIA E-MAIL**

Chris Disspain  
Chair, ICANN Board Governance  
Committee  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.  
Jones Day  
555 South Flower Street  
Los Angeles, CA 90071 2300

**Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update**

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.<sup>1</sup> As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”<sup>2</sup> we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

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<sup>1</sup> See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

<sup>2</sup> Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.<sup>3</sup> In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.<sup>4</sup> At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Wayne. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic’s formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain’s 28 April 2017 letter and Mr. LeVee’s 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information<sup>5</sup> and *two weeks* before the investigator’s final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.”<sup>6</sup>

This is troubling for several reasons. ***First***, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

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<sup>3</sup> See *e.g.*, Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

<sup>4</sup> ICANN Madrid GDD Summit, May 9, 2017.

<sup>5</sup> See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

<sup>6</sup> 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."<sup>7</sup>

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

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<sup>7</sup> ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. [http://schr.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf), pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', written in a cursive style.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (ombudsman@icann.org)

# Annex A

## DotMusic Limited

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### Key Documents

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	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

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### Other Relevant Documents

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	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	<b>Description</b>
<b>5.</b>	Reconsideration Request 14-8 (4 March 2014)
<b>6.</b>	Revised Reconsideration Request 14-8 (5 March 2014)
<b>7.</b>	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
<b>8.</b>	Reconsideration Request 14-28 (7 June 2014)
<b>9.</b>	Letter from Constantine Roussos to ICANN (13 June 2014)
<b>10.</b>	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
<b>11.</b>	Letter from Constantine Roussos to ICANN (1 July 2014)
<b>12.</b>	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
<b>13.</b>	Letter from Rich Bengloff to ICANN (7 March 2015)
<b>14.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
<b>15.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
<b>16.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
<b>17.</b>	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
<b>18.</b>	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	<b>Description</b>
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	<b>Description</b>
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	<b>Description</b>
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	<b>Description</b>
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	<b>Description</b>
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	<b>Description</b>
<b>87.</b>	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
<b>88.</b>	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
<b>89.</b>	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
<b>90.</b>	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

# **Annex B** **dotgay LLC**

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## **Key Documents**

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<b>Tab</b>	<b>Description</b>
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

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## **Other Relevant Documents**

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<b>Tab</b>	<b>Description</b>
1.	Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

# Exhibit 52

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

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Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

### **Response**

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

#### Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

#### Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 53

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

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Thank you for your request for documentary information dated 5 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

### **Response**

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and

Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (*See* Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.

#### Items 5-6

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board (Item 6). As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited. Rather than repeating those here, see Response to DIDP Request No. 20160429-1, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic->

[response-supporting-docs-15may16-en.pdf](#). The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

#### Item 7

Item 7 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application

#### Items 8

Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

#### Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

#### Item 10

Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

## **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 54

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

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Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

### **Response**

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

#### Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

#### Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

# Exhibit 55

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

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Thank you for your request for documentary information dated 5 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of DotMusic Limited (DotMusic). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. The identity of the individual or firm undertaking the Review;
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review

### **Response**

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and

Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (*See* Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

#### Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN’s outside counsel, and all the parties that underwent CPE.

#### Items 5-6

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board (Item 6). As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>

- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
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- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previously submitted by DotMusic Limited. Rather than repeating those here, see Response to DIDP Request No. 20160429-1, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic->

[response-supporting-docs-15may16-en.pdf](#). The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

#### Item 7

Item 7 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application

#### Items 8

Item 8 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

#### Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

#### Item 10

Item 10 requests the disclosure of “[a]ll materials provided to ICANN by the evaluator concerning the Review.” As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

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- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

## **About DIDP**

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**Subject:** Re: [reconsider] Reconsideration Request 17-4  
**Date:** Thursday, August 24, 2017 at 3:48:06 AM Pacific Daylight Time  
**From:** Herb Waye (sent by <reconsider-bounces@icann.org>)  
**To:** Reconsideration  
**CC:** ombudsman  
**Attachments:** ATT00001.txt

Reconsideration Request 17-4

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 17.4.

Best regards,

Herb Waye  
ICANN Ombudsman

[https://www.icann.org/ombudsman\[icann.org\]](https://www.icann.org/ombudsman[icann.org])  
[https://www.facebook.com/ICANNOmbudsman\[facebook.com\]](https://www.facebook.com/ICANNOmbudsman[facebook.com])  
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

[https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf\[icann.org\]](https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf[icann.org])

Community Anti-Harassment Policy

[https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en\[icann.org\]](https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en[icann.org])

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Wednesday, August 23, 2017 at 10:00 AM  
**To:** Herb Waye <herb.waye@icann.org>  
**Subject:** Reconsideration Request 17 4

Dear Herb,

On 25 July 2017, dotgay LLC and DotMusic Limited (Requestors) submitted Reconsideration Request 17-14 (Request 17-4), seeking reconsideration of ICANN organization's response to the Requestors' request for documentary information regarding the Community Priority Process Review pursuant to the Documentary Information Disclosure Policy. Request 17-4 and Exhibits 1 to 55 in support thereof are available at [https://www.icann.org/resources/pages/reconsideration-17-4-dotmusic-dotgay-request-2017-07-28-en\[icann.org\]](https://www.icann.org/resources/pages/reconsideration-17-4-dotmusic-dotgay-request-2017-07-28-en[icann.org]).

The Board Accountability Mechanisms Committee (BAMC) has determined that Request 17-4 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, Section 4.2(l) states:

- (l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.
  - (i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.
  - (ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.
  - (iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

<https://www.icann.org/resources/pages/governance/bylaws-en/#article4.>[\[icann.org\]](#)

Please advise whether you are accepting Request 17-4 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(I)(iii). If you are accepting Request 17-4 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of Request 17-4.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 17-4  
11 OCTOBER 2017**

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The Requestors, dotgay LLC (dotgay) and DotMusic Ltd. (DotMusic), seek reconsideration of ICANN organization's response to the Requestors' request (Joint DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), for documents relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestors claim that, in declining to produce certain requested documents and information, ICANN organization violated its Core Values and policies established in the DIDP and Bylaws concerning non-discriminatory treatment, transparency, and accountability.<sup>2</sup>

**I. Brief Summary.**

dotgay and DotMusic submitted community-based applications for .GAY and .MUSIC, respectively; both applications participated in CPE and neither prevailed.<sup>3</sup> In October 2015, dotgay sought reconsideration of the CPE outcome (Request 15-21),<sup>4</sup> which the Board Governance Committee (BGC)<sup>5</sup> denied.<sup>6</sup> In February 2016, dotgay sought reconsideration of the

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<sup>1</sup> Request 17-4, § 3, at Pg. 1-2.

<sup>2</sup> Request 17-4, § 6, at Pg. 5-8.

<sup>3</sup> CPE Report on dotgay, 8 October 2015, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>; CPE Report on DotMusic, 10 February 2016, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>4</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>5</sup> Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

<sup>6</sup> BGC Determination on Request 15-21, at Pg. 1.

BGC's denial of Request 15-21 (see Request 16-3).<sup>7</sup> In February 2016, DotMusic sought reconsideration of the CPE determination and approval of DotMusic's application (Request 16-5).<sup>8</sup>

The ICANN Board thereafter directed ICANN organization to undertake the CPE Process Review to evaluate how ICANN organization interacted with the CPE provider. Later, the BGC decided that the CPE Process Review should also include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending reconsideration requests concerning CPE. The BGC also put the eight pending reconsideration requests relating to CPE on hold, including Requests 16-3 and 16-5, pending completion of the CPE Process Review.

On 10 June 2017, the Requestors submitted the Joint DIDP Request seeking documents and information relating to the CPE Process Review, some of which the Requestors had sought in prior DIDP requests. ICANN organization's response (Response to Joint DIDP Request) explained that, except for certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all other responsive documents had been published and identified in response to the Requestors' prior DIDP requests.<sup>9</sup> The Response to Joint DIDP Request provided hyperlinks to the responses to the prior DIDP requests, which in turn provided hyperlinks to publicly available responsive documents.<sup>10</sup> The Response to Joint DIDP Request further explained that two Items (Item Nos. 2 and 4) did not seek documentary information in

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<sup>7</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>8</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>9</sup> ICANN Responses to DIDP Requests No. 20170505-1 (DotMusic Ltd.), and 20170518-1 (dotgay LLC), incorporated by reference in ICANN's Response to DIDP Request No. 20170610-1 at Pg. 2.

<sup>10</sup> Response to Joint DIDP Request, at Pg. 2.

existence within ICANN.<sup>11</sup> Additionally, the Response to Joint DIDP Request explained that ICANN organization evaluated responsive documents subject to Nondisclosure Conditions to determine if the public interest in disclosing them outweighed the harm of disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>12</sup>

The Requestors then filed Reconsideration Request 17-4 (Request 17-4) challenging the Response to Joint DIDP Request. The Requestors suggest that ICANN organization violated ICANN's Core Values, established DIDP policies and the Bylaws concerning non-discriminatory treatment, transparency, and accountability.<sup>13</sup>

As required, ICANN organization transmitted Request 17-4 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>14</sup>

The BAMC has considered Request 17-4 and all relevant materials and recommends that the Board deny Request 17-4 because ICANN organization adhered to established policies and procedures in the Response to Joint DIDP Request. Specifically, ICANN organization followed the DIDP Response Process because it: (i) identified responsive documents; (ii) provided hyperlinks to those that were already publicly available; and (iii) for the remaining documents, it considered whether the documents were subject to Nondisclosure Conditions. Because ICANN organization determined that certain documents were subject to Nondisclosure Conditions, ICANN then considered whether the public interest in disclosing the documents outweighed the harm of disclosure, and found that it did not.

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<sup>11</sup> *Id.*

<sup>12</sup> DIDP Request No. 20170610-1, at Pg. 3; Request 17-4 Exhibit 1.

<sup>13</sup> Request 17-4, § 8, at Pg. 21.

<sup>14</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-4, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-ombudsman-action-request-24aug17-en.pdf>.

## II. Facts.

### A. Background Facts.

#### 1. CPE Process Review

The Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by dotgay,<sup>15</sup> and by DotMusic,<sup>16</sup> during their respective presentations to the BGC, as well as issues identified in the Final Declaration from the Independent Review Process (IRP) initiated by Dot Registry, LLC.<sup>17</sup> As a result, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider. Later, the BGC decided that the CPE Process Review should also include a request for materials and research relied upon by the CPE panels.<sup>18</sup> The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>19</sup>

#### 2. DotMusic Limited

DotMusic submitted a community-based application for .MUSIC. DotMusic's Application participated in CPE,<sup>20</sup> and in February 2016, the CPE panel issued a CPE Report,

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<sup>15</sup> 15 May 2016 Presentation to the BGC, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>16</sup> 17 September 2016 Presentation to the BGC, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

<sup>17</sup> Dot Registry IRP Final Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>18</sup> 18 October 2016 Minutes of BGC Meeting, at Item 2, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>19</sup> 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2.

<sup>20</sup> CPE is a way of resolving string contention and will occur only if a community application is in contention and the applicant elects to pursue CPE for that application. See <https://newgtlds.icann.org/en/applicants/cpe>.

concluding that DotMusic’s application did not qualify for community priority.<sup>21</sup> On 24 February 2016, DotMusic filed Request 16-5 seeking reconsideration of the CPE Report.<sup>22</sup>

In April 2016, DotMusic submitted a DIDP request seeking documents relating to the CPE Report (2016 DotMusic DIDP Request).<sup>23</sup> In May 2016, ICANN organization responded to the 2016 DotMusic DIDP Request,<sup>24</sup> providing links to all the responsive, publicly available documents, furnished an email not previously publicly available,<sup>25</sup> explained that it did not possess documents responsive to several of the items, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>26</sup> DotMusic thereafter filed Request 16-7 challenging ICANN organization’s response to the 2016 DotMusic DIDP Request. In June 2016, the BGC denied Request 16-7.<sup>27</sup>

In May 2017, DotMusic submitted another DIDP request, seeking 10 categories of documents relating to the CPE Process Review (2017 DotMusic DIDP Request), including some items previously sought in the 2016 DotMusic DIDP Request.<sup>28</sup> Among other things, the 2017 DotMusic DIDP Request sought documents concerning “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” of the entity undertaking the CPE Process Review (Item No. 2), “[t]he materials provided to the evaluator by the EIU” (Item No. 5),

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<sup>21</sup> See CPE Report on DotMusic at 1.

<sup>22</sup> Request 16-5.

<sup>23</sup> See 2016 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

<sup>24</sup> Response to 2016 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

<sup>25</sup> 2016 DIDP Response at 3, 12, Attachment.

<sup>26</sup> *Id.*, Pgs. 1-7, 11-12.

<sup>27</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>. DotMusic has now filed four reconsideration requests: Request 16-5 (challenging the CPE determination), Request 16-7 (challenging the response to the 2016 DotMusic DIDP Request), Request 17-2 (challenging the response to another DIDP Request), and the instant request, Request 17-4 (challenging the response to the DIDP Request filed by DotMusic and dotgay).

<sup>28</sup> DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

and “[t]he materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board,” (Item No. 6), which are repeated in the Joint DIDP Request, the response to which is at issue in the instant Request 17-4.<sup>29</sup>

In June 2017, ICANN organization responded to the 2017 DotMusic DIDP Request,<sup>30</sup> providing 21 hyperlinks to publicly available responsive documents, noting that it did not have possession, custody, or control over certain requested documents, and explaining that certain other requested documents were subject to identified Nondisclosure Conditions and not appropriate for disclosure.<sup>31</sup>

On 18 June 2017, DotMusic sought reconsideration of ICANN organization’s response to several items requested in the 2017 DotMusic DIDP Request, including Item Nos. 2, 5, 6, and 8 (see Request 17-2).<sup>32</sup> On 23 August 2017, the BAMC recommended that ICANN’s Board deny Request 17-2 because ICANN organization’s response to the 2017 DotMusic DIDP Request adhered to the DIDP Response Process and did not violate ICANN’s Mission, Commitments, Core Values or established policies.<sup>33</sup> The Board denied Request 17-2 on 23 September 2017.<sup>34</sup>

### 3. dotgay LLC

dotgay submitted a community-based application for .GAY, and in early 2014, dotgay’s application was invited to and did participate in CPE. In October 2014, the CPE panel issued a “First CPE report,” concluding that dotgay’s application did not qualify for community

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<sup>29</sup> *Id.*

<sup>30</sup> Response to 2017 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>33</sup> BAMC Recommendation on Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>34</sup> ICANN Board Resolution 2017.09.23.08, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.a>.

priority.<sup>35</sup> dotgay filed Reconsideration Request 14-44, seeking reconsideration of the First CPE report.<sup>36</sup> The BGC granted reconsideration and at the BGC’s direction, the CPE provider conducted a “Second CPE” of dotgay’s application for .GAY; again it did not prevail.<sup>37</sup>

On 22 October 2015, dotgay sought reconsideration of the Second CPE report (Request 15-21).<sup>38</sup> On the same day, dotgay filed a DIDP request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 dotgay DIDP Request).<sup>39</sup> The 2015 dotgay DIDP Request sought, among other things, “policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered ‘policy’ under ICANN by-laws.”<sup>40</sup> ICANN organization responded to the 2015 dotgay DIDP Request on 21 November 2015, providing links to all the responsive, publicly available documents, furnishing an email not previously publicly available, explaining that it did not possess documents responsive to several of the requests, and explaining that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>41</sup> On 4 December 2015, dotgay revised Request 15-21 to challenge

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<sup>35</sup> See CPE Report on dotgay, 6 October 2014, at 1, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>36</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>37</sup> *Id.*; see also CPE Report on dotgay, 8 October 2015, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>38</sup> BGC Determination on Request 15-21, at Pg. 1

<sup>39</sup> DIDP Request No. 20151022-1 (2015 dotgay DIDP Request), at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

<sup>40</sup> *Id.* at Pg. 2. dotgay made an identical request in a 2014 DIDP Request. See DIDP Request No. 20141022-2 (2014 dotgay DIDP Request), at Pg. 2, <https://www.icann.org/en/system/files/files/lieben-request-22oct14-en.pdf>. ICANN organization responded that to the extent it had documents responsive to that request, the documents were subject to certain identified Nondisclosure Conditions. Response to 2014 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

<sup>41</sup> Response to 2015 dotgay DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

the response to the 2015 dotgay DIDP Request in addition to the Second CPE report.<sup>42</sup>

In February 2016, the BGC denied Request 15-21,<sup>43</sup> which dotgay later challenged (Request 16-3); dotgay did not challenge the BGC's determination concerning the response to the 2015 dotgay DIDP Request.<sup>44</sup> On 26 June 2016, the BGC recommended that the Board deny Request 16-3.<sup>45</sup> The Board was scheduled to consider Request 16-3 on 17 September 2016, but just four days earlier, dotgay submitted an independent expert report for the Board's consideration as part of its evaluation of Request 16-3.<sup>46</sup> Accordingly, the Board deferred consideration of Request 16-3 to provide time for review of the report.<sup>47</sup>

On 18 May 2017, dotgay submitted a second DIDP Request, which included the same 10 categories of documents requested in the 2017 DotMusic DIDP Request, and three additional categories of documents relating to the CPE Process Review (2017 dotgay DIDP Request).<sup>48</sup> Among other things, the 2017 dotgay DIDP Request sought documents concerning “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” of the entity undertaking the CPE Process Review (Item No. 5), “[t]he materials provided to the evaluator by the EIU” (Item No. 8), and “[t]he materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board,” (Item No.

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<sup>42</sup> Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

<sup>43</sup> BGC Determination on Request 15-21, at Pg. 1.

<sup>44</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>45</sup> BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>46</sup> Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

<sup>47</sup> Minutes of ICANN Board, 15 September 2016, <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.g>.

<sup>48</sup> 2017 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

9),<sup>49</sup> which, as discussed below, are repeated in the Joint DIDP Request at issue in the instant Request 17-4.

On 18 June 2017, ICANN organization responded to the 2017 dotgay DIDP Request and explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to eight of the 13 categories already have been published. The response to the 2017 dotgay DIDP Request further explained that the documents responsive to the remaining five categories were subject to certain Nondisclosure Conditions and were not appropriate for disclosure.<sup>50</sup>

On 30 June 2017, dotgay filed Request 17-3, challenging ICANN organization's determination not to produce certain responsive documents that were subject to Nondisclosure Conditions.<sup>51</sup> dotgay did not challenge the response to Item No. 5 in Request 17-3.<sup>52</sup>

On 23 August 2017, the BAMC recommended that ICANN's Board deny Request 17-3 because ICANN organization's response to the 2017 dotgay DIDP Request adhered to the DIDP Response Process and did not violate ICANN's Mission, Commitments, Core Values or established policies.<sup>53</sup> The Board denied Request 17-3 on 23 September 2017.<sup>54</sup>

#### 4. Request 17-4

The Joint DIDP Request "requests that ICANN":

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<sup>49</sup> *Id.*

<sup>50</sup> ICANN Response to 2017 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>51</sup> Request 17-3, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> BAMC Recommendation on Request 17-3, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

<sup>54</sup> ICANN Board Resolution 2017.09.23.09, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b>.

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.<sup>55</sup>

As noted above, Item Nos. 1 and 3 were previously requested in the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request.<sup>56</sup> On 10 July 2017, ICANN organization responded to the Joint DIDP Request,<sup>57</sup> explaining that, with the exception of certain documents that were subject to Nondisclosure Conditions set forth in the DIDP, all the remaining documents responsive to the Joint DIDP Request already had been published and identified in response to the Requestors’ prior 2017 DIDP requests.<sup>58</sup> The Response to Joint DIDP Request provided hyperlinks to the DIDP Responses to the Requestors’ prior DIDP requests, which provided hyperlinks to those publicly available responsive documents.<sup>59</sup> The Response to Joint DIDP Request further explained that two of the Items (Item Nos. 2 and 4) improperly sought

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<sup>55</sup> DIDP Request No. 20170610-1, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>; Request 17-4, Exhibit 1.

<sup>56</sup> Item No. 1 is very similar to Item No. 6 of the 2017 DotMusic DIDP Request and Item No. 9 of the 2017 dotgay DIDP Request. As noted above, both of those items sought documents containing information about the materials that ICANN provided to FTI to facilitate the CPE Process Review. DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; DIDP Request No. 20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>. Item No. 3 is a subset of Item No. 2 of the 2017 DotMusic DIDP Request and Item No. 5 of the 2017 dotgay DIDP Request. Both items sought documents containing information about “[t]he selection process . . . in relation to the appointment” of FTI. DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; DIDP Request No. 20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>57</sup> Response to Joint DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>58</sup> ICANN Responses to 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request, incorporated by reference in ICANN’s Response to DIDP Request No. 20170610-1 at Pg. 2.

<sup>59</sup> Response to Joint DIDP Request, at Pg. 2.

information not found in documents already in existence within ICANN and were not appropriate DIDP requests.<sup>60</sup> Notwithstanding this requirement, ICANN organization identified documents that contain information responsive to the requests and provided hyperlinks to those documents.<sup>61</sup> Additionally, the Response to Joint DIDP Request explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>62</sup>

On 25 July 2017, the Requestors filed Request 17-4, seeking reconsideration of ICANN organization's response to the Requestors' Joint DIDP Request and determination not to produce certain documents responsive to Item Nos. 1 through 4. The Requestors assert that the materials that ICANN organization identified are not responsive to Item Nos. 1 and 3, that ICANN has provided other requestors with information derived from documents in response to DIDP requests without providing underlying documents, and that the information the Requestors asked for "is more than likely contained in ICANN documents."<sup>63</sup> The Requestors argue that withholding materials containing information responsive to the Items increases the likelihood that "anyone attempting to understand" the CPE process will resort to IRP, which is "expensive and time-consuming," to safeguard their interests.<sup>64</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> DIDP Request No. 20170610-1, at Pg. 3; Request 17-4 Exhibit 1.

<sup>63</sup> Request 17-4, § 8, at Pg. 12, 22.

<sup>64</sup> Request 17-4, § 7, at Pg. 7.

On 23 August 2017, the BAMC concluded that Request 17-4 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.<sup>65</sup>

On 23 August 2017, ICANN organization transmitted Request 17-4 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN’s Bylaws.<sup>66</sup> Accordingly, the BAMC reviews Request 17-4 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

### **B. Relief Requested**

The Requestors asks the BAMC to disclose the documents requested in the Joint DIDP Request.<sup>67</sup>

### **III. Issues Presented.**

The issues are as follows:

1. Whether ICANN organization complied with established ICANN policies in responding to the Joint DIDP Request.
2. Whether ICANN organization complied with its Core Values, Mission, and Commitments in responding to the Joint DIDP Request.<sup>68</sup>

The BAMC notes that the Requestors indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-4 seeks reconsideration of staff and Board action or inaction.<sup>69</sup> The only subsequent discussion of Board action is the Requestors’ passing reference to Article 4, Section 4.2(o) of ICANN’s Bylaws, which states that the BAMC “shall . . . provide[] to the Requestor” any information “collected by ICANN from third parties” that is

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<sup>65</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>66</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-4, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-ombudsman-action-request-24aug17-en.pdf>.

<sup>67</sup> Request 17-4, § 9, at Pg. 22.

<sup>68</sup> Request 17-4, § 9, at Pg. 22.

<sup>69</sup> Request 17-4, § 2, at Pg. 1.

relevant to the Reconsideration Request.<sup>70</sup> The Requestors make no arguments concerning the BAMC's actions or inactions, and do not ask ICANN organization to take any action concerning this issue. Rather, the Requestors focus on ICANN organization's response to the Requestors' Joint DIDP Request.<sup>71</sup> Accordingly, the BAMC understands Request 17-4 to seek reconsideration of ICANN organization's response to the Requestors' Joint DIDP Request, and *not* reconsideration of Board action or inaction.<sup>72</sup>

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests**

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.<sup>73</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and

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<sup>70</sup> ICANN Bylaws, Art. 4, § 4.2(o).

<sup>71</sup> Request 17-4, §§ 6, 8-9 at Pg. 3-7, 9-22.

<sup>72</sup> Further, we note that the BAMC has not completed its consideration of Request 16-5, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

<sup>73</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

consideration.<sup>74</sup> Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>75</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>76</sup>

On 23 August 2017, the BAMC determined that Request 17-4 is sufficiently stated and sent Request 17-4 to the Ombudsman for review and consideration.<sup>77</sup> The Ombudsman thereafter recused himself from this matter.<sup>78</sup> Accordingly, the BAMC has reviewed Request 17-4 and issues this Recommendation.

## **B. Documentary Information Disclosure Policy**

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.<sup>79</sup> In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN

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<sup>74</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>75</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>76</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>77</sup> Ombudsman Action Regarding Request 17-4, Pg. 1-2.

<sup>78</sup> Ombudsman Action Regarding Request 17-4, Pg. 1.

<sup>79</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

organization make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.<sup>80</sup>

The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization’s operational activities, and within ICANN organization’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>81</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>82</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization’s website].”<sup>83</sup>

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- (i) Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>83</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;

- (ii) Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- (iii) Confidential business information and/or internal policies and procedures; and
- (iv) Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>84</sup>

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>85</sup>

## **V. Analysis and Rationale.**

### **A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The Joint DIDP Request.**

#### **1. The Response to Joint DIDP Request Complies With Applicable Policies And Procedures.**

The Response to Joint DIDP Request identified documentary information responsive to all four items. For Item Nos. 1 and 3, ICANN organization determined that all of the responsive documentary information already had been published on ICANN's website, and provided to the

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<sup>84</sup> DIDP.

<sup>85</sup> *Id.*

Requestors in response to prior DIDP requests.<sup>86</sup> The DIDP responses to those requests identified and provided the hyperlinks to 21 publicly available documents and websites compiling documents that contain information responsive to Item Nos. 1 and 3.<sup>87</sup>

The Response to Joint DIDP Request also explained that technically Item Nos. 2 and 4 were requests for information rather than documents, and therefore not appropriate DIDP requests. Notwithstanding this requirement, ICANN organization provided significant information responsive to Item Nos. 2 and 4 in the Status Update and in an earlier CPE Process Review update, and provided hyperlinks to those updates.<sup>88</sup> Finally, the Response to Joint DIDP Request explained that some of the documents responsive to Item Nos. 2 and 4 were subject to certain identified Nondisclosure Conditions.<sup>89</sup> The Response to Joint DIDP Request further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>90</sup>

The Requestors claim that ICANN organization's responses to Item Nos. 1 through 4 violated established policies and procedures.<sup>91</sup> However, the Requestors do not demonstrate that ICANN organization violated any established policy or procedure.<sup>92</sup> Instead, the Requestors focus on the *outcome* of the Joint DIDP Request. The Reconsideration Request process provides an opportunity to re-examine the *process* by which ICANN organization takes or foregoes action;

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<sup>86</sup> See Response to Joint DIDP Request at Pg. 2.

<sup>87</sup> Response to DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; and response to DIDP Request No. DIDP20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>88</sup> Response to Joint DIDP Request at Pg. 2.

<sup>89</sup> *Id.* at Pg. 2-3.

<sup>90</sup> Response to Joint DIDP Request at Pg. 3.

<sup>91</sup> Request 17-4, § 8, Pg. 21-22.

<sup>92</sup> *Id.*

the Requestors' general dissatisfaction with the outcome of the DIDP process is not grounds for reconsideration. Further, and as demonstrated below, ICANN organization's responses to Item Nos. 1 through 4 adhered to established policies and procedures.

The DIDP Response Process provides that “[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.”<sup>93</sup> Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions.<sup>94</sup> If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.<sup>95</sup>

**a. ICANN organization's response to Item No. 1 adhered to established policies and procedures.**

Item No. 1 asked ICANN organization to “[c]onfirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B.”<sup>96</sup> In its response, and consistent with the DIDP Response Process, ICANN organization referred the Requestors to ICANN's responses to the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request. Those responses addressed requests that captured the same information sought in the instant Item No. 1 and

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<sup>93</sup> DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> DIDP Request at Pg. 3.

provided information and hyperlinks to the documents appropriate for disclosure that are also responsive to the instant Item No. 1.<sup>97</sup>

The Requestors argue that information responsive to Item No. 1 “was not previously provided to Requestors,” because “ICANN [organization] has not confirmed ‘that FTI will review all of the documents submitted by DotMusic [and dotgay] in the cour[se] of their reconsideration requests.’”<sup>98</sup> The Requestor’s claim is unsupported. In its Responses to the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request, ICANN organization identified all the documents that it provided to FTI. The Response to Joint DIDP Request referred the Requestors to these documents.<sup>99</sup> FTI’s will determine what information is relevant to the CPE Process Review it is conducting. ICANN does not have possession, custody, or control of any documents that would “confirm[ ] ‘that FTI will review all of the documents submitted by DotMusic [and dotgay] in the cour[se] of their reconsideration requests’” because no such documents exist. FTI’s final CPE Process Review report may indicate the documents that FTI reviewed in the course of its evaluation, but the CPE Process Review is ongoing. Therefore, any request for the report or information that may be in the report is premature. ICANN organization’s response is consistent with the DIDP Response Process: it identified all responsive materials currently in existence and in its possession, custody, or control, and provided hyperlinks to the documents appropriate for disclosure. ICANN organization is not required to do more under the DIDP Response Process.

The Requestors disagree with ICANN organization’s response to Item No. 1, but they do not suggest that the response is contrary to the DIDP Response Process, nor do the Requestors

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<sup>97</sup> Response to Joint DIDP Request at Pg. 2.

<sup>98</sup> Request 17-4 § 8, Pg. 21.

<sup>99</sup> Response to Joint DIDP Request at Pg. 2.

provide anything to demonstrate how the response violates ICANN’s Mission, Commitments, or Core Values. Reconsideration is not warranted on these grounds.

**b. ICANN organization’s response to Item No. 3 adhered to established policies and procedures.**

Item No. 3 asked ICANN organization to “[d]isclose the details of FTI’s selection process, including the Requests for Proposals Process, and the terms under which FTI currently operates for ICANN.”<sup>100</sup>

The Requestors previously asked ICANN organization for information relating to “the selection process, disclosures, and conflicts checks undertaken in relation to the appointment of FTI” in the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request.<sup>101</sup> In response, ICANN organization identified and provided the hyperlink to the Status Update, which explained that FTI “was chosen to assist in the CPE review following consultation with various candidates.... because FTI has the requisite skills and expertise to undertake this investigation.”<sup>102</sup> The Response to Joint DIDP Request adhered to the DIDP Response Process, because ICANN organization published and provided hyperlinks to all documents in its possession that are appropriate for disclosure.<sup>103</sup> The only other documents in ICANN’s possession relating to the selection process are communications with ICANN organization’s outside counsel, and ICANN’s contract with FTI, which the Requestors indicate that they seek.<sup>104</sup> Those documents are not appropriate for disclosure under the DIDP because they comprise:

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<sup>100</sup> *Id.*

<sup>101</sup> *See* 2017 DotMusic DIDP Request at Pg. 4; 2017 dotgay DIDP Request at Pg. 5.

<sup>102</sup> Status Update

<sup>103</sup> DIDP; Response to Joint DIDP Request at Pg. 2.

<sup>104</sup> Request 17-4, § 6, at Pg. 22.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>105</sup>

As with Item No. 1, the Requestors do not suggest that ICANN organization’s response to Item No. 3 is contrary to the DIDP Response Process, nor do the Requestors provide any evidence demonstrating how this response violates ICANN’s Mission, Commitments, or Core Values. Reconsideration of the Response to Joint DIDP Request on Item No. 3 is not warranted.

**c. ICANN organization’s responses to Item Nos. 2 and 4 adhered to established policies and procedures.**

Item Nos. 2 and 4 sought the disclosure of the identities of “ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purpose[] of completing its ‘first track’ review” (Item No. 2) and “[c]onfirm[ation] that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review” (Item No. 4).<sup>106</sup> ICANN organization responded as follows:

[T]he DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the [CPE Process] Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update.<sup>107</sup>

The Requestors argue that information responsive to Item Nos. 2 and 4 “is more than likely contained in ICANN documents” and it “is in the public’s interest to disclose” those documents.<sup>108</sup> This argument misapplies the DIDP Response Process. Even if Item Nos. 2 and 4 were to be interpreted as requests for documents, the Response to Joint DIDP Request adhered to

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<sup>105</sup> DIDP.

<sup>106</sup> DIDP Request, at Pg. 4.

<sup>107</sup> Response to Joint DIDP Request at Pg. 2.

<sup>108</sup> Request 17-4, § 8, at Pg. 22.

the DIDP Response Process, because ICANN organization searched for and identified documents responsive to Item Nos. 2 and 4, reviewed those materials, and determined that they were subject to certain Nondisclosure Conditions discussed below.<sup>109</sup> Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>110</sup>

The Requestors also argue that “ICANN has provided past requestors with documents and information derived from documents when responding to DIDP Requests.”<sup>111</sup> The Requestors recognize that the DIDP Response Process “does not require ICANN to create or compile summaries of any documented information,” but argue that because ICANN organization has provided information in response to other DIDP Requests, ICANN organization should be required to do so here.<sup>112</sup> First, the DIDP Response Process does not *require* ICANN organization to document information not already available in documentary form. In some instances, ICANN organization has compiled documents in response to a DIDP request as part of ICANN’s efforts of improving upon the levels of reporting where feasible.<sup>113</sup> However, the fact that ICANN organization has summarized documentary information in response to other DIDP Requests does not obligate ICANN organization to summarize information *not* otherwise

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<sup>109</sup> DIDP Response Process.

<sup>110</sup> Response to Joint DIDP Request at Pg. 3.

<sup>111</sup> Request 17-4, § 8, Pg. 12.

<sup>112</sup> *Id.*

<sup>113</sup> *E.g.*, in ICANN’s response to DIDP Request No. 20141222-1, the requestor sought detailed reports of ICANN’s income and revenue from domain names for the years 1999 to 2014. No responsive document existed at the time ICANN organization provided its response to the DIDP request, but ICANN organization was in the process of preparing several reports that, once completed, would be responsive to the DIDP request and would increase the transparency of ICANN organization’s financial reporting. Accordingly, the response explained that once the report was complete and available in a publishable format, it would be published on ICANN’s website. Response to DIDP Request No. 20141222-1 at Pg. 2, <https://www.icann.org/en/system/files/files/cis-response-21jan15-en.pdf>.

contained in any documents in its possession, custody, or control in response to the Joint DIDP Request. Second, FTI has not yet completed its final report on the CPE Process Review; therefore, that document is not yet in ICANN organization's possession, custody, or control and therefore the request for its distribution is premature. Third, and as discussed below, the information requested in Item Nos. 2 and 4 is subject to Nondisclosure Conditions and not appropriate for disclosure. Accordingly, the Response to Joint DIDP Request adhered to the DIDP Response Process.

**2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>114</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>115</sup> In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the Response to Joint DIDP Request.

In response to Item Nos. 2 and 4, ICANN organization determined that any documents in its possession responsive to the Items were not appropriate for disclosure because they comprised:

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<sup>114</sup> DIDP.

<sup>115</sup> *Id.*

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>116</sup>

It is understandable why these Nondisclosure Conditions apply to the materials responsive to Item Nos. 2 and 4. Those Items request documents that go to the heart of the CPE Process Review deliberative and decision-making process and comprise information that may “compromise the integrity of” ICANN organization’s and FTI’s “deliberative and decision-making process”.<sup>117</sup> The DIDP specifically carves out documents revealing the deliberative and decision-making process as exempt from disclosure pursuant to the Nondisclosure Conditions and the potential harm of disclosing that information was deemed to outweigh any potential benefit of disclosure. Accordingly, the Response to Joint DIDP Request adhered to the DIDP Response Process in finding the materials subject to the Nondisclosure Conditions.

**3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**

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<sup>116</sup> Response to Joint DIDP Request at Pg. 2-3.

<sup>117</sup> DIDP Request at Pg. 5.

The DIDP states that documents subject to the Nondisclosure Conditions “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”<sup>118</sup> In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.<sup>119</sup>

DotMusic previously acknowledged that under the DIDP Response Process, it is “within ICANN’s sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure.”<sup>120</sup> Nevertheless, the Requestors suggest reconsideration is warranted because the Dot Registry IRP Final Declaration gave rise to a “unique circumstance where the ‘pubic interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.’”<sup>121</sup> However, the Dot Registry IRP Final Declaration did not establish that the public interest in disclosure outweighs the potential harm for each and every document in ICANN organization’s possession related to the CPE Process Review.<sup>122</sup>

As the Amazon EU S.A.R.L. IRP Panel noted in June of this year:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

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<sup>118</sup> *See id.*

<sup>119</sup> Response to Joint DIDP Request at Pg. 3.

<sup>120</sup> Request 16-7, § 3, Pg. 4.

<sup>121</sup> Request 17-4 § 7, Pg. 8.

<sup>122</sup> *See* ICANN Board Resolution 2016.08.09.11, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g>.

(*Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3.) To enable ICANN organization to balance its transparency commitment with the need to protect certain communications, the DIDP gives ICANN organization the discretion to decide whether the public interest (including transparency and fairness concerns) outweighs the potential harm of disclosure. Here, ICANN organization determined in its discretion that the public interest in disclosure did not outweigh the potential harm of disclosing documents that reflect the deliberative processes of ICANN, and documents that are subject to the attorney-client, attorney work product privilege, or any other applicable privilege. Accordingly, the argument does not support reconsideration.

**B. The Requestor’s Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration.**

The Requestors argue that ICANN “failed to adhere to its Bylaws by acting ‘through open and transparent processes’ when it issued the DIDP Response . . . and did not produce the requested information,” thereby violating certain Commitments and Core Values:<sup>123</sup>

- Operating in a manner consistent with [ICANN’s] Articles [of Incorporation] and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . through open and transparent processes that enable competition and open entry in Internet-related markets;<sup>124</sup>
- Employing open and transparent policy development mechanisms;<sup>125</sup>
- Applying documented policies neutrally and objectively, with integrity and fairness;<sup>126</sup>
- Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.<sup>127</sup>

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<sup>123</sup> Request 17-4, § 6, at Pg. 5-7.

<sup>124</sup> ICANN Amended and Restated Articles of Incorporation, 9 August 2016, § 2(III), <https://www.icann.org/resources/pages/governance/articles-en>. The Requestors also cite ICANN’s Bylaws, 22 July 2017, Art. 1, § 1.2(a), which similarly states that ICANN commits to “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole.” Request 17-4, § 6, at Pg. 5.

<sup>125</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

<sup>126</sup> *Id.*, Art. 1, § 1.2(a)(v).

However, the Requestors provide no explanation for how these Commitments and Core Values relate to the Response to Joint DIDP Request or how ICANN organization has violated these Commitments and Core Values.<sup>128</sup> The Requestors have not established grounds for reconsideration through its list of Commitments and Core Values.

## **VI. Recommendation**

The BAMC has considered the merits of Request 17-4, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in the Response to Joint DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-4.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-4 was submitted on 25 July 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 24 August 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-4 is 11 October 2017, which is within the requisite 90 days of receiving Request 17-4.<sup>129</sup>

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(continued...)

<sup>127</sup> *Id.*, Art. 1, § 1.2(a)(vi).

<sup>128</sup> *See generally* Request 17-4, § 6, Pg. 5-7.

<sup>129</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

ARIF HYDER ALI

Contact Information Redacted

10 June 2017

**VIA E-MAIL**

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**Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update**

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.<sup>1</sup> As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”<sup>2</sup> we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

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<sup>1</sup> See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

<sup>2</sup> Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.<sup>3</sup> In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.<sup>4</sup> At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic’s formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain’s 28 April 2017 letter and Mr. LeVee’s 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information<sup>5</sup> and *two weeks* before the investigator’s final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.”<sup>6</sup>

This is troubling for several reasons. ***First***, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

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<sup>3</sup> See *e.g.*, Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

<sup>4</sup> ICANN Madrid GDD Summit, May 9, 2017.

<sup>5</sup> See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

<sup>6</sup> 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."<sup>7</sup>

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

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<sup>7</sup> ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. [http://schr.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%20-en.pdf](http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf), pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal flourish extending to the right.

Arif Hyder Ali  
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)  
Herb Waye, ICANN Ombudsman (ombudsman@icann.org)

# Annex A

## DotMusic Limited

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### Key Documents

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	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

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### Other Relevant Documents

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	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	<b>Description</b>
<b>5.</b>	Reconsideration Request 14-8 (4 March 2014)
<b>6.</b>	Revised Reconsideration Request 14-8 (5 March 2014)
<b>7.</b>	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
<b>8.</b>	Reconsideration Request 14-28 (7 June 2014)
<b>9.</b>	Letter from Constantine Roussos to ICANN (13 June 2014)
<b>10.</b>	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
<b>11.</b>	Letter from Constantine Roussos to ICANN (1 July 2014)
<b>12.</b>	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
<b>13.</b>	Letter from Rich Bengloff to ICANN (7 March 2015)
<b>14.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
<b>15.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
<b>16.</b>	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
<b>17.</b>	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
<b>18.</b>	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	<b>Description</b>
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	<b>Description</b>
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	<b>Description</b>
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	<b>Description</b>
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	<b>Description</b>
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	<b>Description</b>
<b>87.</b>	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
<b>88.</b>	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
<b>89.</b>	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
<b>90.</b>	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

# **Annex B** **dotgay LLC**

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## **Key Documents**

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<b>Tab</b>	<b>Description</b>
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

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## **Other Relevant Documents**

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<b>Tab</b>	<b>Description</b>
1.	Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

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Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). For reference, a copy of your Request is attached to the email transmitting this Response.

### **Items Requested**

Your Request seeks the disclosure of the following information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

### **Response**

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

#### Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in [Response to DIDP Request 20170505-1](#) and [Response to DIDP Request 20170518-1](#).

#### Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the [26 April 2017 update from the Chair of the Board of the Governance Committee](#) and [2 June 2017 Community Priority Evaluation Process Review Update](#). This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

### **About DIDP**

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to [didp@icann.org](mailto:didp@icann.org).

## **Rebuttal to the BAMC’s Recommendation on Reconsideration Request 17-4**

DotMusic<sup>1</sup> and dotgay (collectively, “Requestors”) submit this rebuttal to the Board Accountability Mechanisms Committee’s (“BAMC”) Recommendation on Request 17-4 (the “Recommendation”).<sup>2</sup> The Recommendation affirmed ICANN’s DIDP Response of 10 July 2017 (“DIDP Response”),<sup>3</sup> which failed to disclose certain documents sought in Requestors’ DIDP Request of 10 June 2017 (“DIDP Request”),<sup>4</sup> and raised several issues that Requestors will address in this rebuttal. Particularly, Requestors will explain that Reconsideration Request 17-4 (“Request 17-4”)<sup>5</sup> is within the scope of the reconsideration process and that the DIDP Response violates ICANN’s Commitments and Core Values.

Requestors’ DIDP Request sought documents related to the independent review process by FTI.<sup>6</sup> The DIDP Request asked ICANN for the following:

Request No. 1: “Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;”

Request No. 2: “Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its ‘first track’ review;”

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in DotMusic and dotgay’s Reconsideration Request 17-4. *See* Exhibit 56, DotMusic and dotgay Reconsideration Request 17-4 (July 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

<sup>2</sup> Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

<sup>3</sup> Exhibit 2, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>4</sup> Exhibit 1, Request No. 20170610-1, dotgay and DotMusic DIDP Request (June 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>5</sup> Exhibit 56, DotMusic and dotgay Reconsideration Request 17-4 (July 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

<sup>6</sup> Requestors previously sought documents regarding the independent review process in separate DIDP requests. *See* Exhibit 6, DotMusic’s DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; Exhibit 7, dotgay’s DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

Request No. 3: “Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and”

Request No. 4: “Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.”<sup>7</sup>

As explained in Request 17-4, ICANN improperly refused to disclose these documents because it claimed that (1) the responsive information was previously provided<sup>8</sup> and (2) the documents are protected from disclosure by the DIDP Conditions of Non-Disclosure.<sup>9</sup>

### **1. Requestors Properly Sought Reconsideration of the DIDP Request**

In the Recommendation, the BAMC criticized Request 17-4 as outside the scope of the reconsideration process. It asserted that the “Reconsideration Request process provides an opportunity to re-examine the *process* by which ICANN organization takes or forgoes action; the Requestors’ general dissatisfaction with the outcome of the DIDP process is not grounds for reconsideration.”<sup>10</sup> This not only incorrectly described the reconsideration request process but also the purpose of Request 17-4.

The reconsideration process permits review of an action or inaction—not just the process used to take the action. Under ICANN’s Bylaws, a “Requestor may submit a request for reconsideration or review of an ICANN *action or inaction* to the extent that the Requestor has been adversely affected by . . . [o]ne or more Board or Staff *actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies)*.”<sup>11</sup> The

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<sup>7</sup> Exhibit 2, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>8</sup> *Id.* at p. 2.

<sup>9</sup> *Id.* at pp. 2-3.

<sup>10</sup> Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), pp. 17-8, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

<sup>11</sup> ICANN Bylaws, Art. 4, Section 4.2(c)(i) (emphasis added).

Bylaws do not limit the reconsideration process to re-examining “the *process* by which ICANN organization takes or foregoes an action.”<sup>12</sup> Rather, reconsideration requests provide an opportunity to re-examine an *action or inaction*. This is exactly what Requestors seek through Request 17-4. They seek reconsideration ICANN’s decision to deny certain document requests in the DIDP Response—an action that contradicts ICANN’s Commitments and Core Values.

Requestors did not simply submit Request 17-4 because of some “general dissatisfaction”<sup>13</sup> with the DIDP Response. As described in further detail below, the Board clearly violated its Commitments and Core Values by not disclosing certain documents requested in the DIDP Request. Request 17-4 asks ICANN to reconsider this decision because of this violation. It is thus properly within the purview of the reconsideration request process pursuant to ICANN’s Bylaws.<sup>14</sup>

## **2. ICANN’s DIDP Response Violates its Commitments, and Core Values**

ICANN and the BAMC violated ICANN’s Commitments and Core Values by rejecting the disclosure of certain requested documents. According to the BAMC, “Requestors provide no explanation for how these Commitments and Core Values relate to the Response to joint DIDP or how ICANN organization has violated these Commitments and Core Values.”<sup>15</sup> These claims are clearly unfounded.<sup>16</sup> Regardless, Requestors will clarify their position.

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<sup>12</sup> Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), p. 17, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

<sup>13</sup> *Id.* at p. 18.

<sup>14</sup> See ICANN Bylaws, Art. 4, Section 4.2(c)(i).

<sup>15</sup> Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), p. 27, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

<sup>16</sup> See Exhibit 56, DotMusic and dotgay Reconsideration Request 17-4 (July 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

## A. The Commitments and Core Values Relate to the DIDP Response

The DIDP relates to ICANN’s Commitments and Core Values, which require transparency. ICANN is committed to operating “through open and transparent processes.”<sup>17</sup> One of ICANN’s Core Values is to “seek[] and support[] broad, informed participation . . . to ensure that the bottom-up multistakeholder policy development process is used to ascertain the global public interest and that those processes are countable and transparent.”<sup>18</sup> The DIDP is clearly related to these Commitments and Core Values supporting transparency. In fact, it is “[a] principal element of ICANN’s approach to transparency and information disclosure.”<sup>19</sup> As the BAMC explained in the Recommendation, the DIDIP is the direct result of ICANN’s commitment to transparency:

## B. Documentary Information Disclosure Policy

ICANN organization *considers the principle of transparency to be a fundamental safeguard* in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. *A principal element of ICANN organization’s approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization’s operational activities. . . . In addition to ICANN organization’s practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information ‘concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,’ that is not already publically available.*<sup>20</sup>

ICANN’s Commitments and Core Values thus clearly relate to the DIDP, and therefore to the DIDP Request and DIDP Response as well.

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<sup>17</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>18</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>19</sup> Exhibit 37, ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>20</sup> Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), pp. 14-5, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf> (emphasis added).

Further, ICANN must comply with its Commitments and Core Values during the DIDP. ICANN, when performing its mission “to ensure the stable and secure operation of the Internet’s unique identifier systems,”<sup>21</sup> must “act in a manner consistent with [its] Bylaws”<sup>22</sup> and “in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”<sup>23</sup> These requirements apply to the DIDP as there is no exception carved out for the DIDP in ICANN’s Bylaws or Articles of Incorporation (the “Articles”)<sup>24</sup> and ICANN has not contested that its actions here are governed by these Commitments and Core Values.<sup>25</sup> The DIDP is therefore not only related to ICANN’s Commitments and Core Values but must also comply with both.

## **B. ICANN Violated Its Commitments and Core Values**

Yet, in responding to the DIDP Request, ICANN’s issued a DIDP Request in direct contravention of its Commitments and Core Values. The DIDP Response violated the principle of transparency; in making this decision, ICANN did not act in a fair and objective manner and avoided accountability through its refusal to disclose documents.

*First*, the DIDP Response violates ICANN’s Commitment and Core Values supporting the principle of transparency. This principle “is one of the essential principles in ICANN’s creation documents, and its name reverberated through its Articles and Bylaws.”<sup>26</sup> The Articles commit ICANN to “operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>27</sup> ICANN’s Bylaws

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<sup>21</sup> ICANN Bylaws, Art. 1, § 1.1(a).

<sup>22</sup> *Id.* at Art. 1, § 1.2(a).

<sup>23</sup> *Id.* at Art. 1, §1.2.

<sup>24</sup> *See id.*; *see also* ICANN Articles of Incorporation.

<sup>25</sup> *See generally* Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

<sup>26</sup> Exhibit 15, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, <https://www.icann.org/en/system/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>27</sup> ICANN Articles of Incorporation, § 2.III.

reaffirm the same Commitment, explicitly stating that “ICANN must operate in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes.”<sup>28</sup> And, in addition to dedicating an entire Article on transparency,<sup>29</sup> the Bylaws reaffirm that the processes for policy development, such as the evaluation of a CPE provider, must be “accountable and transparent.”<sup>30</sup>

ICANN, despite its commitments to transparency, refuses to disclose relevant information about the independent review. The DIDP Response again rejected an attempt to obtain additional information about FTI’s independent review. Even though the DIDP remains the only mechanism for applicants to obtain this information from ICANN, yet again ICANN has stymied its Commitment to transparency by refusing to disclose documents pursuant to the DIDP.

ICANN maintained this lack of transparency by claiming that some of the requested documents from the DIDP Request are subject to the DIDP Nondisclosure Conditions.<sup>31</sup> However, rather than identifying the documents subject to those conditions and explaining how the Nondisclosure Conditions apply, ICANN simply listed several conditions that apparently apply to the requested documents.<sup>32</sup> Somehow, both ICANN and the BAMC expect Requestors to understand how these conditions apply to unknown documents and to simply accept that these documents are apparently covered by the Nondisclosure Conditions.

Yet, even if the Nondisclosure Conditions applied to the documents, the documents should still be disclosed because the public interest clearly outweighs any potential harm. Under the

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<sup>28</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>29</sup> *See id.* at Art. 3 (“TRANSPARENCY”). Article 3 concerns ICANN’s Commitment to “operate to the maximum extent feasible in an open and transparent manner.” *Id.* at Art. 3, § 3.1.

<sup>30</sup> *Id.* at Art. 1, § 1.2(b)(ii).

<sup>31</sup> Exhibit 2, ICANN’s DIDP Response (July 10, 2017), p. 2, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>32</sup> *Id.* The BAMC further admits that there are documents responsive to all four requests. *See* Exhibit 57, BAMC Recommendation on Reconsideration Request 17-4 (Oct. 11, 2017), pp. 20-2, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-bamc-recommendation-request-11oct17-en.pdf>.

Nondisclosure Conditions, “[i]nformation that falls within any of the conditions. . . may still be made public if ICANN determined, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”<sup>33</sup> ICANN’s secretive review of the CPE process will affect the evaluation process for community gTLD applications.<sup>34</sup> It could change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.<sup>35</sup> The independent review is therefore significant to Requestors, the other gTLD applicants that have applied for community gTLDs, and the entire Internet community, which will be indisputably affected by whether ICANN approves community gTLDs. The public is clearly interested in the information that ICANN is refusing to disclose through the DIDP Response. And there is little harm in disclosure of documents related to the independent review, given that the DIDP Request only asks for documents related to the conduct of a review that concerns the public. Yet, ICANN has refused to disclose the information.

Thus, in rejecting the DIDP Request, ICANN has improperly closed-off the possibility of obtaining additional information on the independent review in clear contradiction of its own stated Commitment to and Core Value of transparency.

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<sup>33</sup> Exhibit 37, ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>34</sup> The current CPE evaluation process, which is currently mired with complaints, has disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants. *See* Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>. And, yet, ICANN summarily accepted the CPE determinations.

<sup>35</sup> *See* Exhibit 35, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017) (identifying seven other gTLD strings with pending reconsideration requests), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

*Second*, ICANN violated its Commitment to and Core Value supporting fairness. The principle of fairness not only requires the disclosure of documents connected with an unfair CPE process but also those documents covered by the Nondisclosure Conditions because of the public interest. ICANN’s refusal to disclose documents fails to uphold the principle of fairness. ICANN has specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).<sup>36</sup>

ICANN further made the Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”<sup>37</sup>

ICANN’s DIDP Response is therefore in clear violation of its Commitment to fairness. The CPE process is currently facing a myriad of complaints regarding its unfair treatment of community gTLD applicants because it has disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants.<sup>38</sup> Yet, ICANN continues to unfairly exclude community applicants and the Internet community from the

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<sup>36</sup> ICANN Bylaws, Art. 3, § 3.1.

<sup>37</sup> *Id.* at Art. 1, § 1.2(a)(v).

<sup>38</sup> See Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in a blatantly unfair decision that keeps affected applicants uninformed and raises several red flags regarding the integrity of the independent review itself.

ICANN's actions are therefore in contravention of its Commitments to and Core Values of fairness, and its dedication to neutrality, objectiveness, integrity, and openness. In all fairness, given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any Nondisclosure Conditions.

*Third*, ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community in violation of its Commitments and Core Values. Through its Bylaws, ICANN has committed itself to “[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness.”<sup>39</sup> It has adopted two significant Core Values that reaffirm this Commitment: (1) “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;”<sup>40</sup> and (2) “[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable

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<sup>39</sup> ICANN Bylaws, Art. 1, § 1.2(a)(vi).

<sup>40</sup> *Id.* at Art. 1, § 1.2(b)(ii).

and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community.”<sup>41</sup>

The DIDP Response, and the Recommendation supporting it, contradicts these Commitments and Core Values. As explained prior, ICANN has prohibited informed participation in the review by the Internet Community. It is operating in near complete secrecy regarding the independent review process. This secrecy permits ICANN to avoid all accountability for its actions during the review in violation of its Commitments and Core Values.<sup>42</sup>

### 3. Conclusion

Therefore, it is clear that ICANN failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC further perpetuated this violation by recommending that the Board deny Request 17-4. In addition to the reasons stated in the Request 17-4,<sup>43</sup> the Board should grant Request 17-4 and produce the requested documents regarding the CPE independent review.



Arif Hyder Ali

October 26, 2017

Date

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<sup>41</sup> *Id.* at Art. 1, § 1.2(b)(v).

<sup>42</sup> ICANN will be unable to operate in a fully effective manner as its secrecy prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

<sup>43</sup> Exhibit 56, DotMusic and dotgay Reconsideration Request 17-4 (July 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

# **Exhibit 56**

## **DotMusic Limited and dotgay LLC Reconsideration Request (“RR”)**

### **1. Requestor Information**

Requestors:

**Name:** DotMusic Limited (“DotMusic”)

**Address:** Contact Information Redacted

**Email:** Constantinos Roussos, Contact Information Redacted

**Name:** dotgay LLC (“dotgay”)

**Address:** Contact Information Redacted

**Email:** Jamie Baxter, Contact Information Redacted

Requestors are represented by:

**Counsel:** Arif Hyder Ali

**Address:** Dechert LLP, Contact Information Redacted

**Email:** Contact Information Redacted

### **2. Request for Reconsideration of:**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

DotMusic Limited and dotgay LLC (the “Requestors”) seek reconsideration of ICANN’s response to their joint DIDP Request, which denied the disclosure of certain information requested

pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

On June 10, 2017, the Requestors sought disclosure of documentary information relating to ICANN’s Board Governance Committee’s (the “BGC”) review of the Community Priority Evaluation (“CPE”) process through an independent review process by FTI Consulting, Inc. (“FTI”) (the “DIDP Request”).<sup>1</sup> Specifically, the Requestors submitted four requests as follows:

Request No. 1: “Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;”

Request No. 2: “Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its ‘first track’ review;”

Request No. 3: “Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and”

Request No. 4: “Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.”<sup>2</sup>

Subsequently, on July 10, 2017, ICANN responded to the DIDP Request by asserting that the “information responsive to Items 1 and 3 were previously provided” to the Requestors, and the information requested in Items 2 and 4 (1) “is not an appropriate DIDP request” because it does not concern documentary information and (2) “is subject to the [ ] DIDP Conditions of Non-Disclosure.”<sup>3</sup>

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<sup>1</sup> Exhibit 1, Request No. 20170610-1, dotgay LLC and DotMusic Limited DIDP Request (June 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

<sup>2</sup> Exhibit 2, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>3</sup> *Id.*

**4. Date of action/inaction:**

ICANN acted on July 10, 2017 by issuing its response to the DIDP Request (the “DIDP Response”).

**5. On what date did you become aware of action or that action would not be taken?**

The Requestors became aware of the action on July 10, 2017, when they received the DIDP Response.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requestors are materially affected by ICANN’s refusal to disclose certain information concerning FTI’s independent review of the CPE process, as requested in the DIDP Request.

By way of background, the Requestors filed separate community-based generic Top-Level Domain (“gTLD”) applications: DotMusic applied for the “.MUSIC” string and dotgay applied for the “.GAY” string. However, the Economist Intelligence Unit (the “EIU”) recommended that ICANN reject the Requestors’ community applications.<sup>4</sup> Since the Requestors received the EIU’s decision, they made various submissions, including independent expert reports in support of their separate community applications,<sup>5</sup> that show the EIU’s decision is fundamentally erroneous. These submissions explain how the EIU Panel disparately treated DotMusic’s application by misapplying the CPE criteria, applying the CPE criteria differently than in other gTLD community

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<sup>4</sup> Exhibit 3, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>; Exhibit 4, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>5</sup> Request 16-5: DotMusic Limited, <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en> (listing documents submitted in support of DotMusic’s Reconsideration Request 16-5); Request 16-3: dotgay LLC, <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en> (listing documents submitted in support of dotgay’s Reconsideration Request 16-3).

applications, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria. dotgay’s submissions show that the EIU, in evaluating dotgay’s community application, misapplied the CPE criteria, failed to follow its own guidelines, discriminatorily treated the application, and made several factual errors that demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities.

In January 2017, ICANN retained an independent reviewer, FTI, to review the CPE process and “the consistency in which the CPE criteria were applied.” FTI is collecting information and materials from ICANN and the CPE provider as part of its review process and will then submit its findings to ICANN based on this underlying information. FTI’s findings relating to “the consistency in which the CPE criteria were applied” will directly affect the outcome of the Requestors’ Reconsideration Requests—DotMusic submitted Reconsideration Request 16-5 (“Request 16-5”) and dotgay submitted Reconsideration Request 16-3 (“Request 16-3”). Both reconsideration requests are currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain’s April 26, 2017 letter to the Requestors, which stated that FTI’s review “will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.”<sup>6</sup>

Thus, on May 5, 2017, DotMusic filed a DIDP Request seeking various categories of documents concerning the BGC’s review of the CPE process (the “DotMusic DIDP Request”).<sup>7</sup> Subsequently, dotgay filed a DIDP Request also seeking documents concerning the BGC’s review of the CPE process on May 18, 2017 (the “dotgay DIDIP Request”).<sup>8</sup> In submitting these two

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<sup>6</sup> Exhibit 5, Update on the Review of the New gTLD Community Priority Evaluation Process (Apr. 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>7</sup> Exhibit 6, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

<sup>8</sup> Exhibit 7, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

requests, the Requestors expected ICANN to “operate in a manner consistent with [its] Bylaws . . . through open and transparent processes.”<sup>9</sup> ICANN failed to do so when it denied certain requests made in both DotMusic’s DIDP Request on June 4, 2017 and dotgay’s DIDP Request on June 18, 2017.<sup>10</sup>

The Requestors had also filed the DIDP Request in pursuit of supplemental information regarding FTI’s independent review process. Once again, ICANN failed to adhere to its Bylaws by acting “through open and transparent processes” when it issued the DIDP Response on July 10, 2017 and did not produce the requested information.<sup>11</sup>

Specifically, ICANN must “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . through open and transparent processes that enable competition and open entry in Internet-related markets.”<sup>12</sup> According to Article 4 of ICANN’s Bylaws, “[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor.”<sup>13</sup> The Bylaws require that ICANN “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;”<sup>14</sup> “employ[ ] open and transparent policy development mechanisms;”<sup>15</sup> “apply[ ] documented policies neutrally and objectively, with integrity and

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<sup>9</sup> ICANN Bylaws, Art. 1, § 1.2(a).

<sup>10</sup> Exhibit 8, ICANN’s Response to DotMusic Limited’s DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>; Exhibit 9, Request No. 20170518-1, ICANN’s Response to dotgay’s DIDP Request (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>11</sup> Exhibit 10, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>12</sup> Amended and Restated Articles of Incorporation, § 2(III).

<sup>13</sup> ICANN Bylaws, Art. 4, § 4.2(o).

<sup>14</sup> *Id.*, Art. 1, § 1.2(a).

<sup>15</sup> *Id.*, Art. 3, § 3.1.

fairness;”<sup>16</sup> and “[r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.”<sup>17</sup>

ICANN’s Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness.<sup>18</sup> ICANN’s failure to provide complete responses to the DIDP Request raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program’s CPE process and its management by ICANN, especially in the case of the CPE process for the .MUSIC gTLD application (Application ID: 1-1115-14110), which is the subject of Request 16-5, and the .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.<sup>19</sup>

Moreover, the public interest clearly outweighs any “compelling reasons” for ICANN’s refusal to disclose certain information. It is surprising that ICANN maintains that it can hire FTI to undertake such a review without providing all the materials that will be used to inform FTI’s findings and conclusions to affected parties and without confirming that FTI would even consider documents submitted by the affected parties.

It is of critical importance that ICANN confirm the scope of the material provided to FTI in the course of its review and the details of the review proves in order to ensure full transparency, openness, and fairness. This includes the names of the ICANN employees, officials, executives, board members, agents, etc. that were interviewed by FTI during its independent review process. By providing this information to applicants, ICANN will prevent serious questions from arising concerning the independence and credibility of FTI’s investigation. For similar reasons of

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<sup>16</sup> *Id.*, Art. 1, § 1.2(v).

<sup>17</sup> *Id.*, Art. 1, § 1.2(vi).

<sup>18</sup> *See id.*, Arts. 1, 3-4.

<sup>19</sup> Exhibit 11, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

transparency and independence, ICANN must disclose not only the details of FTI's selection process but also the underlying documents.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN's action through the DIDP Response materially affects the two global communities supporting the DotMusic and dotgay applications: the global music community and the global gay community. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .MUSIC and the .GAY gTLDs, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and openness are professed to be the key components of ICANN's identity and are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed ICANN damages its credibility, accountability, and trustworthiness. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to understand the process that the EIU followed in evaluating community applications, especially the parts relevant to the EIU's improper application of CPE criteria as described in Requestor's submissions.<sup>20</sup> This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to

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<sup>20</sup> See Exhibit 12, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; see also Exhibit 13, dotgay's Presentation to the Board Governance Committee (May 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

safeguard the interests of their separate community members, which have supported DotMusic's .MUSIC application<sup>21</sup> and dotgay's .GAY application, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in disclosing the identities of individuals interviewed by FTI during its independent review process and in confirming that FTI will disclose its final report to the public is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.<sup>22</sup> This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>23</sup> ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the requested items will undermine both the integrity and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining reconsideration requests related to the CPE process, including Request 16-5 and Request 16-3. In conclusion, failure to disclose the requested items does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

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<sup>21</sup> See Exhibit 14, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf> (identifying co-requestors for reconsideration of DotMusic's CPE Evaluation).

<sup>22</sup> See Exhibit 15, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶¶ 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>23</sup> ICANN's Documentary Information Disclosure Policy (last visited Jun. 29, 2017) ("Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. "), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

## **8. Detail of Staff/Board Action/Inaction – Required Information**

### **8.1 The Community Applications Serving as the Bases for the DIDP Request**

The Requestors elected to obtain their respective gTLDs by undergoing the CPE process as community applicants. However, both Requestors discovered that the CPE process, as implemented by the EIU, discriminatorily treated community applicants and are now contesting the EIU's final determinations on their applications.

#### **8.1.1 DotMusic's community application for .MUSIC**

The .MUSIC CPE process for DotMusic's application was initiated in mid-2015. Nearly a year later, DotMusic discovered that it did not prevail as a community applicant.<sup>24</sup> In response to this denial, DotMusic, supported by multiple community organizations, filed Request 16-5 on Feb. 24, 2016.<sup>25</sup> Now, over a year later, and after numerous submissions to ICANN<sup>26</sup> and a presentation before the BGC,<sup>27</sup> DotMusic still has not received a determination from the BGC regarding Request 16-5.

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<sup>24</sup> Exhibit 16, DotMusic Limited CPE Report (Feb. 10, 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>25</sup> Exhibit 17, CPE Reconsideration Request 16-5 (Feb. 24, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>26</sup> *See, e.g.*, Exhibit 18, Letter from DotMusic Limited to the BGC (Mar. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>; Exhibit 19, Letter from DotMusic Limited to the BGC (Mar. 28, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>; Exhibit 20, Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (Jun. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>; Exhibit 21, Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>; Exhibit 22, DotMusic's Presentation to the Board Governance Committee (Sep. 12, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>; Exhibit 23, DotMusic's Additional Responses to a Question by the Board Governance Committee during the 17 September 2016 Presentation (Sep. 19, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf>; Exhibit 24, Supplement to DotMusic's Additional Responses to a Question by the BGX during the 17 Sep. 2016 Presentation (Dec. 6, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf>; Exhibit 25, Letter from Dechert LLP on behalf of DotMusic Limited to the BGC (Dec. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

<sup>27</sup> *See* Exhibit 26, DotMusic's Presentation to the Board Governance Committee (12 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

### 8.1.2 dotgay's community application for .GAY

Similar to DotMusic, dotgay's CPE evaluation of the .GAY gTLD was initiated in early 2014. dotgay discovered that it did not prevail as a community applicant later that year.<sup>28</sup> In response, dotgay filed a reconsideration request with the BGC, which was granted because the BGC determined that the EIU did not follow procedure during the CPE process. As a result, the BGC sent dotgay's community application to the EIU for re-evaluation. However, the second CPE produced the same results based on the same arguments—the EIU rejected dotgay's application.<sup>29</sup>

When dotgay submitted another reconsideration request to the BGC in regards to this rejection, though, the BGC excused the discriminatory conduct and the EIU's policy and process violations. It refused to reconsider the CPE a second time. Therefore, dotgay filed a third reconsideration request, Request 16-3, on February 17, 2016 in response to the BGC's non-response on many of the issues highlighted in the second reconsideration request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.<sup>30</sup> For nearly a year afterwards, despite numerous letters to ICANN,<sup>31</sup> dotgay had still not received a final determination by the ICANN Board.

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<sup>28</sup> Exhibit 27, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>29</sup> See Exhibit 28, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>30</sup> See Exhibit 29, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>31</sup> See Exhibit 30, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; Exhibit 31, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; Exhibit 32, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; Exhibit 33, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf>; Exhibit 34, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board

### **8.1.3 The BGC’s Decision to Place the Requestors’ Reconsideration Requests on Hold**

Then, on April 26, 2017, ICANN finally updated both Requestors on the status of Request 16-5 and Request 16-3 through a general update to several gTLD applicants with pending reconsideration requests. The Requestors received a letter from ICANN BGC Chair Chris Disspain indicating that their reconsideration requests were “on hold” and that:

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC’s consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>32</sup>

This update on the status of their reconsideration requests failed to provide the Requestors with any significant information on the BGC’s review of the CPE process, despite the fact that their requests had been pending for over a year.

### **8.2 The Requestors’ Prior DIDP Requests**

As a result of this dearth of information, the Requestors submitted separate DIDP requests to ICANN.<sup>33</sup> ICANN’s DIDP “is intended to ensure that information contained in documents

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(March 12, 2017), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>.

<sup>32</sup> Exhibit 35, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>33</sup> Exhibit 36, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>34</sup> It serves as a principle element of ICANN’s approach to transparency and information disclosure.”<sup>35</sup> In accordance with this principle and policy, ICANN has provided past requestors with documents and information derived from documents when responding to DIDP Requests.<sup>36</sup> While the “DIDP procedures do not require ICANN to create or compile summaries of any documented information[,] . . . as part of its commitment to transparency and accountability, ICANN has undertaken [ ] effort[s] to do so” in the past.<sup>37</sup>

### 8.2.1 DotMusic’s DIDP Request

Acting in accordance with ICANN’s DIDP process, DotMusic submitted the DotMusic DIDP Request on May 5, 2017. DotMusic sought information to further its investigation of the “numerous CPE process violations and the contravention of established procedures,” as described in Request 16-5,<sup>38</sup> *and* information regarding the CPE process as it concerned its Request 16-5 because “the BGC Letter does not transparently provide any meaningful information besides that

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<sup>34</sup> Exhibit 37, ICANN Documentary Information Disclosure Policy (lasted visited Jul. 17, 2017), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>35</sup> *Id.*

<sup>36</sup> See Exhibit 38, ICANN Response to Request No. 20080924-1 (Oct. 24, 2008), <https://www.icann.org/en/about/transparency/20080924-1/younger-response-24oct08-en.pdf> (providing information to applicant not contained in a specifically-identified document); Exhibit 39, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf> (same); Exhibit 40, ICANN Response to Request No. 20161024-8 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-8-cis-response-23nov16-en.pdf> (same); Exhibit 41, ICANN Response to Request No. 20160211-1 (Mar. 12, 2016), <https://www.icann.org/en/system/files/files/didp-20160211-1-rrsg-response-12mar16-en.pdf> (same).

<sup>37</sup> Exhibit 42, ICANN Response to Request No. 20161024-2 (Nov. 23, 2016), <https://www.icann.org/en/system/files/files/didp-20161024-2-cis-response-23nov16-en.pdf>. In responding to any request submitted pursuant to the DIDP, ICANN staff first identifies all documents responsive to the DIDP request and then reviews those documents to determine whether they call under any of the DIDP’s Nondisclosure conditions. And, if they do, ICANN staff determined whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure. Exhibit 43, Process for Responding to DIDP Requests (Oct. 29, 2013), <http://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>38</sup> Exhibit 44, DotMusic Limited’s First DIDP Request (May 5, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

there is a review underway and that the RR is on hold.”<sup>39</sup>

DotMusic made ten separate requests to ICANN in the DotMusic DIDP Request. These requests were as follows:

1. The identity of the individual or firm (“the evaluator”) undertaking the Review;”
2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
3. The date of appointment of the evaluator;
4. The terms of instructions provided to the evaluator;
5. The materials provided to the evaluator by the EIU;
6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
7. The materials submitted by affected parties provided to the evaluator;
8. Any further information, instructions, or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
9. The most recent estimates provided by the evaluator for the completion of the investigation; and
10. All materials provided to ICANN by the evaluator concerning the Review.<sup>40</sup>

DotMusic concluded in its request that “[t]here are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

and credibility of such an independent review.”<sup>41</sup>

### 8.2.2 dotgay’s DIDP Request

dotgay also filed a DIDP request, which is related to the .GAY CPE.<sup>42</sup> It sought to “ensure that information contained in documents concerning ICANN’s operational activities, with within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”<sup>43</sup> Further, like other gTLD applicants, dotgay sought *any* information regarding “how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc.”<sup>44</sup> because “both the BGC Letter and Mr. LeVee’s letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold.”<sup>45</sup>

As a result of this dearth of information from ICANN, the Requestor made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, as follows:

Request No. 1: All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,”<sup>15</sup> and (b) all communications between the EIU and ICANN regarding the request;

Request No. 3: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

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<sup>41</sup> *Id.*

<sup>42</sup> Exhibit 45, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Request No. 4: The identity of the individual or firm (“the evaluator”) undertaking the Review;

Request No. 5: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

Request No. 7: The terms of instructions provided to the evaluator;

Request No. 8: The materials provided to the evaluator by the EIU;

Request No. 9: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;

Request No. 10: The materials submitted by affected parties provided to the evaluator;

Request No. 11: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

Request No. 12: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.<sup>46</sup>

Like DotMusic, dotgay concluded in its DIDP Request that “there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN’s deliberative and decision-making process concerning the CPE process. On the other hand, ICANN’s failure to provide this information would raise serious questions concerning ICANN’s accountability and compromise the transparency, independence and credibility of such an independent review.”<sup>47</sup>

### **8.3 ICANN’s Response to the Prior DIDP Requests**

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

Prior to responding to the DotMusic DIDP Request and the dotgay DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to both requests.<sup>48</sup> ICANN explained that:

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.<sup>49</sup>

No other information was provided to the Requestors regarding the CPE review at issue in its Request until ICANN issued its formal responses to their prior DIDP Requests.

### **8.3.1 ICANN's Response to the DotMusic DIDP Request**

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<sup>48</sup> Exhibit 46, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>49</sup> *Id.*

ICANN first responded to the DotMusic DIDP Request on June 4, 2017.<sup>50</sup> ICANN's response provided the same information that had already been given to DotMusic on June 2, 2017 regarding the ICANN's decision to review the CPE process and to hire FTI to conduct an independent review of the CPE process.<sup>51</sup> ICANN further denied Requests Nos. 1-6, 8 and 10. ICANN's responses to these requests were as follows:

Items 1-4: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

Items 5-6: . . . With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publically available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDIP previous submitted by DotMusic Limited. . . .

Item 8: . . . This item overlaps with Items 4 and 5. . . .

Item 10: . . . These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure.<sup>52</sup>

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<sup>50</sup> Exhibit 47, ICANN's Response to DotMusic Limited's First DIDP Request (June 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

ICANN, in providing such responses to the DotMusic DIDP Request, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and DIDP Policy. DotMusic thus submitted Reconsideration Request 17-2 (“Request 17-2”) in response.<sup>53</sup>

### **8.3.2 ICANN’s Response to the dotgay DIDP Request**

ICANN finally responded to the dotgay DIDP Request on June 18, 2017. It provided the same basic information that had already been given on June 2, 2017 to dotgay, and on June 4, 2017 to DotMusic.<sup>54</sup> ICANN denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN’s responses to these requests were as follows:

Items 1, 2, 3, 8, and 13 . . .

As stated in ICANN’s Response to DIDP Request 20170505-1 that you submitted on behalf of DotMusic Limited, these documents are not appropriate for disclosure based on the [ ] applicable DIDP Defined Conditions of Non-Disclosure. . . .

Item 9 . . .

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previous submitted by dotgay.<sup>55</sup>

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<sup>53</sup> Exhibit 48, Reconsideration Request 17-2 (Jun. 18, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>54</sup> Exhibit 49, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>55</sup> *Id.*

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy. dotgay thus submitted Reconsideration Request 17-3 (“Request 17-3”) in response.<sup>56</sup>

#### 8.4 The DIDP Request

In response to ICANN’s insufficient documentary disclosures on June 2 and 4, 2017, the Requestors sent ICANN a joint letter on June 10, 2017. The letter stated, *inter alia*, that:

ICANN selected FTI Consulting, Inc. (“FTI”) seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the “first track” of review relating to “gathering information and materials from the ICANN organization, including interview and document collection.” This is troubling for several reasons.

**First**, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI’s identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI’s appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

**Second**, FTI has already completed the “first track” of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN’s prior representations that FTI will be “digging very deeply” and that “there will be a full look at the community priority evaluation.” Specifically, ICANN (i) “instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process,” and that (ii) “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a full look at the community priority evaluation, as opposed to just a very

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<sup>56</sup> Exhibit 50, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

limited approach of how staff was involved.”<sup>57</sup>

Furthermore, the Requestors made an additional DIDP Request in the joint letter for additional information. The Requestors asked ICANN to provide the following information:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.<sup>58</sup>

## **8.5 ICANN’s Response to the DIDP Request**

On July 10, 2017, ICANN’s responded to the DIDP Request by denying all four information requests.<sup>59</sup> According to ICANN, its DIDP is only intended to provide “documentary information already in existence within ICANN that is not publically available.”<sup>60</sup> And, as such, it refused the four requests for the following reasons:

### Items 1 and 3

. . . The information responsive to Items 1 and 3 were previously provided in Response to DIDIP Request 20170505-1 and Response to DIDIP Request 20170518-1.

### Items 2 and 4

. . . As noted above, the DIDP is limited to requests for documentary

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<sup>57</sup> Exhibit 51, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> Exhibit 52, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>60</sup> *Id.*

information already in existence within ICANN that is not publically available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update. This request for information is not an appropriate DIDIP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure. . . .

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances at this point in time for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.<sup>61</sup>

Regarding ICANN’s denial of Items 1 and 3, this information was not previously provided to Requestors. ICANN has not confirmed “that FTI will review all of the documents submitted by DotMusic . . . in the court of their reconsideration requests.”<sup>62</sup> The documents referenced in ICANN’s response—ICANN’s prior responses to the DotMusic DIDP Request and the dotgay DIDP Request—simply claim that ICANN provided FTI with materials relevant to the Reconsideration Requests at issue, and does not in any way confirm that FTI will review the documents.<sup>63</sup> Further, ICANN clearly did not disclose “the details of FTI’s selection process . . . and the terms under which FTI currently operates for ICANN”<sup>64</sup> to the Requestors in its prior responses to the Requestors’ information

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Exhibit 53, ICANN’s Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>64</sup> Exhibit 54, ICANN’s DIDP Response (July 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

requests.<sup>65</sup> The Requestors and other gTLD applicants have not yet received any details regarding ICANN's contract with FTI, even though the contract itself is a document in ICANN's possession.

Further, regarding ICANN's denial of Items 2 and 4, both items request information that is more than likely contained in ICANN documents and that is in the public's interest to disclose. The Requestors seek simply the identity of individuals interviewed by FTI and not the substance of those interviews and seeks confirmation that FTI's final report will be available to the gTLD applicants. Disclosure of such information to the gTLD applicants is necessary to ensure that the independent review remains a fair, transparent, and independent process, as discussed in **Sections 6 and 7** above.

**9. What are you asking ICANN to do now?**

The Requestors ask ICANN to disclose the documents requested in the DIDP Request.

**10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As stated above, the Requestors are community applicants for gTLD strings and the organizations that issued the DIDP Request to ICANN. They are materially affected by ICANN's decision to deny the DIDP Request, especially since its gTLD application is at issue in the underlying request. Further, the communities supporting their applications—the music community and the gay community—are materially affected by ICANN's failure to disclose the requested

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<sup>65</sup> See Exhibit 55, ICANN's Response to Request No. 20170505-1 (Jun. 4, 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

documents.

**11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes, this Reconsideration Request is being brought on behalf of DotMusic and dotgay.

**11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?**

Yes, there is a causal connection between the circumstances and the harm for both DotMusic and dotgay, as explained above in **Sections 6 through 8**.

**12. Do you have any documents you want to provide to ICANN?**

Yes, these documents are attached as Exhibits.

**Terms and Conditions for Submission of Reconsideration Requests:**

*The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.*

# **Exhibit 57**

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 17-4  
11 OCTOBER 2017**

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The Requestors, dotgay LLC (dotgay) and DotMusic Ltd. (DotMusic), seek reconsideration of ICANN organization’s response to the Requestors’ request (Joint DIDP Request), pursuant to ICANN’s Documentary Information Disclosure Policy (DIDP), for documents relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestors claim that, in declining to produce certain requested documents and information, ICANN organization violated its Core Values and policies established in the DIDP and Bylaws concerning non-discriminatory treatment, transparency, and accountability.<sup>2</sup>

**I. Brief Summary.**

dotgay and DotMusic submitted community-based applications for .GAY and .MUSIC, respectively; both applications participated in CPE and neither prevailed.<sup>3</sup> In October 2015, dotgay sought reconsideration of the CPE outcome (Request 15-21),<sup>4</sup> which the Board Governance Committee (BGC)<sup>5</sup> denied.<sup>6</sup> In February 2016, dotgay sought reconsideration of the

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<sup>1</sup> Request 17-4, § 3, at Pg. 1-2.

<sup>2</sup> Request 17-4, § 6, at Pg. 5-8.

<sup>3</sup> CPE Report on dotgay, 8 October 2015, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>; CPE Report on DotMusic, 10 February 2016, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>4</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>5</sup> Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

<sup>6</sup> BGC Determination on Request 15-21, at Pg. 1.

BGC's denial of Request 15-21 (see Request 16-3).<sup>7</sup> In February 2016, DotMusic sought reconsideration of the CPE determination and approval of DotMusic's application (Request 16-5).<sup>8</sup>

The ICANN Board thereafter directed ICANN organization to undertake the CPE Process Review to evaluate how ICANN organization interacted with the CPE provider. Later, the BGC decided that the CPE Process Review should also include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending reconsideration requests concerning CPE. The BGC also put the eight pending reconsideration requests relating to CPE on hold, including Requests 16-3 and 16-5, pending completion of the CPE Process Review.

On 10 June 2017, the Requestors submitted the Joint DIDP Request seeking documents and information relating to the CPE Process Review, some of which the Requestors had sought in prior DIDP requests. ICANN organization's response (Response to Joint DIDP Request) explained that, except for certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all other responsive documents had been published and identified in response to the Requestors' prior DIDP requests.<sup>9</sup> The Response to Joint DIDP Request provided hyperlinks to the responses to the prior DIDP requests, which in turn provided hyperlinks to publicly available responsive documents.<sup>10</sup> The Response to Joint DIDP Request further explained that two Items (Item Nos. 2 and 4) did not seek documentary information in

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<sup>7</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>8</sup> Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

<sup>9</sup> ICANN Responses to DIDP Requests No. 20170505-1 (DotMusic Ltd.), and 20170518-1 (dotgay LLC), incorporated by reference in ICANN's Response to DIDP Request No. 20170610-1 at Pg. 2.

<sup>10</sup> Response to Joint DIDP Request, at Pg. 2.

existence within ICANN.<sup>11</sup> Additionally, the Response to Joint DIDP Request explained that ICANN organization evaluated responsive documents subject to Nondisclosure Conditions to determine if the public interest in disclosing them outweighed the harm of disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>12</sup>

The Requestors then filed Reconsideration Request 17-4 (Request 17-4) challenging the Response to Joint DIDP Request. The Requestors suggest that ICANN organization violated ICANN's Core Values, established DIDP policies and the Bylaws concerning non-discriminatory treatment, transparency, and accountability.<sup>13</sup>

As required, ICANN organization transmitted Request 17-4 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>14</sup>

The BAMC has considered Request 17-4 and all relevant materials and recommends that the Board deny Request 17-4 because ICANN organization adhered to established policies and procedures in the Response to Joint DIDP Request. Specifically, ICANN organization followed the DIDP Response Process because it: (i) identified responsive documents; (ii) provided hyperlinks to those that were already publicly available; and (iii) for the remaining documents, it considered whether the documents were subject to Nondisclosure Conditions. Because ICANN organization determined that certain documents were subject to Nondisclosure Conditions, ICANN then considered whether the public interest in disclosing the documents outweighed the harm of disclosure, and found that it did not.

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<sup>11</sup> *Id.*

<sup>12</sup> DIDP Request No. 20170610-1, at Pg. 3; Request 17-4 Exhibit 1.

<sup>13</sup> Request 17-4, § 8, at Pg. 21.

<sup>14</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-4, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-ombudsman-action-request-24aug17-en.pdf>.

## II. Facts.

### A. Background Facts.

#### 1. CPE Process Review

The Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by dotgay,<sup>15</sup> and by DotMusic,<sup>16</sup> during their respective presentations to the BGC, as well as issues identified in the Final Declaration from the Independent Review Process (IRP) initiated by Dot Registry, LLC.<sup>17</sup> As a result, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider. Later, the BGC decided that the CPE Process Review should also include a request for materials and research relied upon by the CPE panels.<sup>18</sup> The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).<sup>19</sup>

#### 2. DotMusic Limited

DotMusic submitted a community-based application for .MUSIC. DotMusic's Application participated in CPE,<sup>20</sup> and in February 2016, the CPE panel issued a CPE Report,

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<sup>15</sup> 15 May 2016 Presentation to the BGC, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

<sup>16</sup> 17 September 2016 Presentation to the BGC, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

<sup>17</sup> Dot Registry IRP Final Declaration, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>18</sup> 18 October 2016 Minutes of BGC Meeting, at Item 2, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>19</sup> 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2.

<sup>20</sup> CPE is a way of resolving string contention and will occur only if a community application is in contention and the applicant elects to pursue CPE for that application. See <https://newgtlds.icann.org/en/applicants/cpe>.

concluding that DotMusic’s application did not qualify for community priority.<sup>21</sup> On 24 February 2016, DotMusic filed Request 16-5 seeking reconsideration of the CPE Report.<sup>22</sup>

In April 2016, DotMusic submitted a DIDP request seeking documents relating to the CPE Report (2016 DotMusic DIDP Request).<sup>23</sup> In May 2016, ICANN organization responded to the 2016 DotMusic DIDP Request,<sup>24</sup> providing links to all the responsive, publicly available documents, furnished an email not previously publicly available,<sup>25</sup> explained that it did not possess documents responsive to several of the items, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>26</sup> DotMusic thereafter filed Request 16-7 challenging ICANN organization’s response to the 2016 DotMusic DIDP Request. In June 2016, the BGC denied Request 16-7.<sup>27</sup>

In May 2017, DotMusic submitted another DIDP request, seeking 10 categories of documents relating to the CPE Process Review (2017 DotMusic DIDP Request), including some items previously sought in the 2016 DotMusic DIDP Request.<sup>28</sup> Among other things, the 2017 DotMusic DIDP Request sought documents concerning “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” of the entity undertaking the CPE Process Review (Item No. 2), “[t]he materials provided to the evaluator by the EIU” (Item No. 5),

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<sup>21</sup> See CPE Report on DotMusic at 1.

<sup>22</sup> Request 16-5.

<sup>23</sup> See 2016 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf>.

<sup>24</sup> Response to 2016 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf>.

<sup>25</sup> 2016 DIDP Response at 3, 12, Attachment.

<sup>26</sup> *Id.*, Pgs. 1-7, 11-12.

<sup>27</sup> BGC Determination on Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf>. DotMusic has now filed four reconsideration requests: Request 16-5 (challenging the CPE determination), Request 16-7 (challenging the response to the 2016 DotMusic DIDP Request), Request 17-2 (challenging the response to another DIDP Request), and the instant request, Request 17-4 (challenging the response to the DIDP Request filed by DotMusic and dotgay).

<sup>28</sup> DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

and “[t]he materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board,” (Item No. 6), which are repeated in the Joint DIDP Request, the response to which is at issue in the instant Request 17-4.<sup>29</sup>

In June 2017, ICANN organization responded to the 2017 DotMusic DIDP Request,<sup>30</sup> providing 21 hyperlinks to publicly available responsive documents, noting that it did not have possession, custody, or control over certain requested documents, and explaining that certain other requested documents were subject to identified Nondisclosure Conditions and not appropriate for disclosure.<sup>31</sup>

On 18 June 2017, DotMusic sought reconsideration of ICANN organization’s response to several items requested in the 2017 DotMusic DIDP Request, including Item Nos. 2, 5, 6, and 8 (see Request 17-2).<sup>32</sup> On 23 August 2017, the BAMC recommended that ICANN’s Board deny Request 17-2 because ICANN organization’s response to the 2017 DotMusic DIDP Request adhered to the DIDP Response Process and did not violate ICANN’s Mission, Commitments, Core Values or established policies.<sup>33</sup> The Board denied Request 17-2 on 23 September 2017.<sup>34</sup>

### 3. dotgay LLC

dotgay submitted a community-based application for .GAY, and in early 2014, dotgay’s application was invited to and did participate in CPE. In October 2014, the CPE panel issued a “First CPE report,” concluding that dotgay’s application did not qualify for community

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<sup>29</sup> *Id.*

<sup>30</sup> Response to 2017 DotMusic DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>.

<sup>33</sup> BAMC Recommendation on Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf>.

<sup>34</sup> ICANN Board Resolution 2017.09.23.08, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.a>.

priority.<sup>35</sup> dotgay filed Reconsideration Request 14-44, seeking reconsideration of the First CPE report.<sup>36</sup> The BGC granted reconsideration and at the BGC’s direction, the CPE provider conducted a “Second CPE” of dotgay’s application for .GAY; again it did not prevail.<sup>37</sup>

On 22 October 2015, dotgay sought reconsideration of the Second CPE report (Request 15-21).<sup>38</sup> On the same day, dotgay filed a DIDP request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 dotgay DIDP Request).<sup>39</sup> The 2015 dotgay DIDP Request sought, among other things, “policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered ‘policy’ under ICANN by-laws.”<sup>40</sup> ICANN organization responded to the 2015 dotgay DIDP Request on 21 November 2015, providing links to all the responsive, publicly available documents, furnishing an email not previously publicly available, explaining that it did not possess documents responsive to several of the requests, and explaining that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.<sup>41</sup> On 4 December 2015, dotgay revised Request 15-21 to challenge

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<sup>35</sup> See CPE Report on dotgay, 6 October 2014, at 1, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

<sup>36</sup> BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>37</sup> *Id.*; see also CPE Report on dotgay, 8 October 2015, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

<sup>38</sup> BGC Determination on Request 15-21, at Pg. 1

<sup>39</sup> DIDP Request No. 20151022-1 (2015 dotgay DIDP Request), at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

<sup>40</sup> *Id.* at Pg. 2. dotgay made an identical request in a 2014 DIDP Request. See DIDP Request No. 20141022-2 (2014 dotgay DIDP Request), at Pg. 2, <https://www.icann.org/en/system/files/files/lieben-request-22oct14-en.pdf>. ICANN organization responded that to the extent it had documents responsive to that request, the documents were subject to certain identified Nondisclosure Conditions. Response to 2014 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

<sup>41</sup> Response to 2015 dotgay DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

the response to the 2015 dotgay DIDP Request in addition to the Second CPE report.<sup>42</sup>

In February 2016, the BGC denied Request 15-21,<sup>43</sup> which dotgay later challenged (Request 16-3); dotgay did not challenge the BGC's determination concerning the response to the 2015 dotgay DIDP Request.<sup>44</sup> On 26 June 2016, the BGC recommended that the Board deny Request 16-3.<sup>45</sup> The Board was scheduled to consider Request 16-3 on 17 September 2016, but just four days earlier, dotgay submitted an independent expert report for the Board's consideration as part of its evaluation of Request 16-3.<sup>46</sup> Accordingly, the Board deferred consideration of Request 16-3 to provide time for review of the report.<sup>47</sup>

On 18 May 2017, dotgay submitted a second DIDP Request, which included the same 10 categories of documents requested in the 2017 DotMusic DIDP Request, and three additional categories of documents relating to the CPE Process Review (2017 dotgay DIDP Request).<sup>48</sup> Among other things, the 2017 dotgay DIDP Request sought documents concerning “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” of the entity undertaking the CPE Process Review (Item No. 5), “[t]he materials provided to the evaluator by the EIU” (Item No. 8), and “[t]he materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board,” (Item No.

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<sup>42</sup> Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

<sup>43</sup> BGC Determination on Request 15-21, at Pg. 1.

<sup>44</sup> Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

<sup>45</sup> BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

<sup>46</sup> Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

<sup>47</sup> Minutes of ICANN Board, 15 September 2016, <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.g>.

<sup>48</sup> 2017 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

9),<sup>49</sup> which, as discussed below, are repeated in the Joint DIDP Request at issue in the instant Request 17-4.

On 18 June 2017, ICANN organization responded to the 2017 dotgay DIDP Request and explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to eight of the 13 categories already have been published. The response to the 2017 dotgay DIDP Request further explained that the documents responsive to the remaining five categories were subject to certain Nondisclosure Conditions and were not appropriate for disclosure.<sup>50</sup>

On 30 June 2017, dotgay filed Request 17-3, challenging ICANN organization's determination not to produce certain responsive documents that were subject to Nondisclosure Conditions.<sup>51</sup> dotgay did not challenge the response to Item No. 5 in Request 17-3.<sup>52</sup>

On 23 August 2017, the BAMC recommended that ICANN's Board deny Request 17-3 because ICANN organization's response to the 2017 dotgay DIDP Request adhered to the DIDP Response Process and did not violate ICANN's Mission, Commitments, Core Values or established policies.<sup>53</sup> The Board denied Request 17-3 on 23 September 2017.<sup>54</sup>

#### 4. Request 17-4

The Joint DIDP Request "requests that ICANN":

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<sup>49</sup> *Id.*

<sup>50</sup> ICANN Response to 2017 dotgay DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>51</sup> Request 17-3, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

<sup>52</sup> *Id.*

<sup>53</sup> BAMC Recommendation on Request 17-3, <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf>.

<sup>54</sup> ICANN Board Resolution 2017.09.23.09, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b>.

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its “first track” review;
3. Disclose the details of FTI’s selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.<sup>55</sup>

As noted above, Item Nos. 1 and 3 were previously requested in the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request.<sup>56</sup> On 10 July 2017, ICANN organization responded to the Joint DIDP Request,<sup>57</sup> explaining that, with the exception of certain documents that were subject to Nondisclosure Conditions set forth in the DIDP, all the remaining documents responsive to the Joint DIDP Request already had been published and identified in response to the Requestors’ prior 2017 DIDP requests.<sup>58</sup> The Response to Joint DIDP Request provided hyperlinks to the DIDP Responses to the Requestors’ prior DIDP requests, which provided hyperlinks to those publicly available responsive documents.<sup>59</sup> The Response to Joint DIDP Request further explained that two of the Items (Item Nos. 2 and 4) improperly sought

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<sup>55</sup> DIDP Request No. 20170610-1, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>; Request 17-4, Exhibit 1.

<sup>56</sup> Item No. 1 is very similar to Item No. 6 of the 2017 DotMusic DIDP Request and Item No. 9 of the 2017 dotgay DIDP Request. As noted above, both of those items sought documents containing information about the materials that ICANN provided to FTI to facilitate the CPE Process Review. DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; DIDP Request No. 20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>. Item No. 3 is a subset of Item No. 2 of the 2017 DotMusic DIDP Request and Item No. 5 of the 2017 dotgay DIDP Request. Both items sought documents containing information about “[t]he selection process . . . in relation to the appointment” of FTI. DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; DIDP Request No. 20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

<sup>57</sup> Response to Joint DIDP Request, <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

<sup>58</sup> ICANN Responses to 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request, incorporated by reference in ICANN’s Response to DIDP Request No. 20170610-1 at Pg. 2.

<sup>59</sup> Response to Joint DIDP Request, at Pg. 2.

information not found in documents already in existence within ICANN and were not appropriate DIDP requests.<sup>60</sup> Notwithstanding this requirement, ICANN organization identified documents that contain information responsive to the requests and provided hyperlinks to those documents.<sup>61</sup> Additionally, the Response to Joint DIDP Request explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>62</sup>

On 25 July 2017, the Requestors filed Request 17-4, seeking reconsideration of ICANN organization's response to the Requestors' Joint DIDP Request and determination not to produce certain documents responsive to Item Nos. 1 through 4. The Requestors assert that the materials that ICANN organization identified are not responsive to Item Nos. 1 and 3, that ICANN has provided other requestors with information derived from documents in response to DIDP requests without providing underlying documents, and that the information the Requestors asked for "is more than likely contained in ICANN documents."<sup>63</sup> The Requestors argue that withholding materials containing information responsive to the Items increases the likelihood that "anyone attempting to understand" the CPE process will resort to IRP, which is "expensive and time-consuming," to safeguard their interests.<sup>64</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> DIDP Request No. 20170610-1, at Pg. 3; Request 17-4 Exhibit 1.

<sup>63</sup> Request 17-4, § 8, at Pg. 12, 22.

<sup>64</sup> Request 17-4, § 7, at Pg. 7.

On 23 August 2017, the BAMC concluded that Request 17-4 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.<sup>65</sup>

On 23 August 2017, ICANN organization transmitted Request 17-4 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN’s Bylaws.<sup>66</sup> Accordingly, the BAMC reviews Request 17-4 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

### **B. Relief Requested**

The Requestors asks the BAMC to disclose the documents requested in the Joint DIDP Request.<sup>67</sup>

### **III. Issues Presented.**

The issues are as follows:

1. Whether ICANN organization complied with established ICANN policies in responding to the Joint DIDP Request.
2. Whether ICANN organization complied with its Core Values, Mission, and Commitments in responding to the Joint DIDP Request.<sup>68</sup>

The BAMC notes that the Requestors indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-4 seeks reconsideration of staff and Board action or inaction.<sup>69</sup> The only subsequent discussion of Board action is the Requestors’ passing reference to Article 4, Section 4.2(o) of ICANN’s Bylaws, which states that the BAMC “shall . . . provide[] to the Requestor” any information “collected by ICANN from third parties” that is

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<sup>65</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>66</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-4, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-ombudsman-action-request-24aug17-en.pdf>.

<sup>67</sup> Request 17-4, § 9, at Pg. 22.

<sup>68</sup> Request 17-4, § 9, at Pg. 22.

<sup>69</sup> Request 17-4, § 2, at Pg. 1.

relevant to the Reconsideration Request.<sup>70</sup> The Requestors make no arguments concerning the BAMC's actions or inactions, and do not ask ICANN organization to take any action concerning this issue. Rather, the Requestors focus on ICANN organization's response to the Requestors' Joint DIDP Request.<sup>71</sup> Accordingly, the BAMC understands Request 17-4 to seek reconsideration of ICANN organization's response to the Requestors' Joint DIDP Request, and *not* reconsideration of Board action or inaction.<sup>72</sup>

#### **IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.**

##### **A. Reconsideration Requests**

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.<sup>73</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and

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<sup>70</sup> ICANN Bylaws, Art. 4, § 4.2(o).

<sup>71</sup> Request 17-4, §§ 6, 8-9 at Pg. 3-7, 9-22.

<sup>72</sup> Further, we note that the BAMC has not completed its consideration of Request 16-5, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

<sup>73</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

consideration.<sup>74</sup> Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>75</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>76</sup>

On 23 August 2017, the BAMC determined that Request 17-4 is sufficiently stated and sent Request 17-4 to the Ombudsman for review and consideration.<sup>77</sup> The Ombudsman thereafter recused himself from this matter.<sup>78</sup> Accordingly, the BAMC has reviewed Request 17-4 and issues this Recommendation.

## **B. Documentary Information Disclosure Policy**

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.<sup>79</sup> In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN

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<sup>74</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>75</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>76</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>77</sup> Ombudsman Action Regarding Request 17-4, Pg. 1-2.

<sup>78</sup> Ombudsman Action Regarding Request 17-4, Pg. 1.

<sup>79</sup> See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

organization make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.<sup>80</sup>

The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization’s operational activities, and within ICANN organization’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.<sup>81</sup>

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>82</sup> The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN organization’s website].”<sup>83</sup>

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- (i) Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>83</sup> *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;

- (ii) Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- (iii) Confidential business information and/or internal policies and procedures; and
- (iv) Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>84</sup>

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>85</sup>

## **V. Analysis and Rationale.**

### **A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The Joint DIDP Request.**

#### **1. The Response to Joint DIDP Request Complies With Applicable Policies And Procedures.**

The Response to Joint DIDP Request identified documentary information responsive to all four items. For Item Nos. 1 and 3, ICANN organization determined that all of the responsive documentary information already had been published on ICANN's website, and provided to the

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<sup>84</sup> DIDP.

<sup>85</sup> *Id.*

Requestors in response to prior DIDP requests.<sup>86</sup> The DIDP responses to those requests identified and provided the hyperlinks to 21 publicly available documents and websites compiling documents that contain information responsive to Item Nos. 1 and 3.<sup>87</sup>

The Response to Joint DIDP Request also explained that technically Item Nos. 2 and 4 were requests for information rather than documents, and therefore not appropriate DIDP requests. Notwithstanding this requirement, ICANN organization provided significant information responsive to Item Nos. 2 and 4 in the Status Update and in an earlier CPE Process Review update, and provided hyperlinks to those updates.<sup>88</sup> Finally, the Response to Joint DIDP Request explained that some of the documents responsive to Item Nos. 2 and 4 were subject to certain identified Nondisclosure Conditions.<sup>89</sup> The Response to Joint DIDP Request further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.<sup>90</sup>

The Requestors claim that ICANN organization's responses to Item Nos. 1 through 4 violated established policies and procedures.<sup>91</sup> However, the Requestors do not demonstrate that ICANN organization violated any established policy or procedure.<sup>92</sup> Instead, the Requestors focus on the *outcome* of the Joint DIDP Request. The Reconsideration Request process provides an opportunity to re-examine the *process* by which ICANN organization takes or foregoes action;

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<sup>86</sup> See Response to Joint DIDP Request at Pg. 2.

<sup>87</sup> Response to DIDP Request No. 20170505-1, <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>; and response to DIDP Request No. DIDP20170518-1, <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf>.

<sup>88</sup> Response to Joint DIDP Request at Pg. 2.

<sup>89</sup> *Id.* at Pg. 2-3.

<sup>90</sup> Response to Joint DIDP Request at Pg. 3.

<sup>91</sup> Request 17-4, § 8, Pg. 21-22.

<sup>92</sup> *Id.*

the Requestors' general dissatisfaction with the outcome of the DIDP process is not grounds for reconsideration. Further, and as demonstrated below, ICANN organization's responses to Item Nos. 1 through 4 adhered to established policies and procedures.

The DIDP Response Process provides that “[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request.”<sup>93</sup> Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions.<sup>94</sup> If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.<sup>95</sup>

**a. ICANN organization's response to Item No. 1 adhered to established policies and procedures.**

Item No. 1 asked ICANN organization to “[c]onfirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B.”<sup>96</sup> In its response, and consistent with the DIDP Response Process, ICANN organization referred the Requestors to ICANN's responses to the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request. Those responses addressed requests that captured the same information sought in the instant Item No. 1 and

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<sup>93</sup> DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> DIDP Request at Pg. 3.

provided information and hyperlinks to the documents appropriate for disclosure that are also responsive to the instant Item No. 1.<sup>97</sup>

The Requestors argue that information responsive to Item No. 1 “was not previously provided to Requestors,” because “ICANN [organization] has not confirmed ‘that FTI will review all of the documents submitted by DotMusic [and dotgay] in the cour[se] of their reconsideration requests.’”<sup>98</sup> The Requestor’s claim is unsupported. In its Responses to the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request, ICANN organization identified all the documents that it provided to FTI. The Response to Joint DIDP Request referred the Requestors to these documents.<sup>99</sup> FTI’s will determine what information is relevant to the CPE Process Review it is conducting. ICANN does not have possession, custody, or control of any documents that would “confirm[ ] ‘that FTI will review all of the documents submitted by DotMusic [and dotgay] in the cour[se] of their reconsideration requests’” because no such documents exist. FTI’s final CPE Process Review report may indicate the documents that FTI reviewed in the course of its evaluation, but the CPE Process Review is ongoing. Therefore, any request for the report or information that may be in the report is premature. ICANN organization’s response is consistent with the DIDP Response Process: it identified all responsive materials currently in existence and in its possession, custody, or control, and provided hyperlinks to the documents appropriate for disclosure. ICANN organization is not required to do more under the DIDP Response Process.

The Requestors disagree with ICANN organization’s response to Item No. 1, but they do not suggest that the response is contrary to the DIDP Response Process, nor do the Requestors

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<sup>97</sup> Response to Joint DIDP Request at Pg. 2.

<sup>98</sup> Request 17-4 § 8, Pg. 21.

<sup>99</sup> Response to Joint DIDP Request at Pg. 2.

provide anything to demonstrate how the response violates ICANN’s Mission, Commitments, or Core Values. Reconsideration is not warranted on these grounds.

**b. ICANN organization’s response to Item No. 3 adhered to established policies and procedures.**

Item No. 3 asked ICANN organization to “[d]isclose the details of FTI’s selection process, including the Requests for Proposals Process, and the terms under which FTI currently operates for ICANN.”<sup>100</sup>

The Requestors previously asked ICANN organization for information relating to “the selection process, disclosures, and conflicts checks undertaken in relation to the appointment of FTI” in the 2017 DotMusic DIDP Request and 2017 dotgay DIDP Request.<sup>101</sup> In response, ICANN organization identified and provided the hyperlink to the Status Update, which explained that FTI “was chosen to assist in the CPE review following consultation with various candidates.... because FTI has the requisite skills and expertise to undertake this investigation.”<sup>102</sup> The Response to Joint DIDP Request adhered to the DIDP Response Process, because ICANN organization published and provided hyperlinks to all documents in its possession that are appropriate for disclosure.<sup>103</sup> The only other documents in ICANN’s possession relating to the selection process are communications with ICANN organization’s outside counsel, and ICANN’s contract with FTI, which the Requestors indicate that they seek.<sup>104</sup> Those documents are not appropriate for disclosure under the DIDP because they comprise:

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<sup>100</sup> *Id.*

<sup>101</sup> *See* 2017 DotMusic DIDP Request at Pg. 4; 2017 dotgay DIDP Request at Pg. 5.

<sup>102</sup> Status Update

<sup>103</sup> DIDP; Response to Joint DIDP Request at Pg. 2.

<sup>104</sup> Request 17-4, § 6, at Pg. 22.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>105</sup>

As with Item No. 1, the Requestors do not suggest that ICANN organization’s response to Item No. 3 is contrary to the DIDP Response Process, nor do the Requestors provide any evidence demonstrating how this response violates ICANN’s Mission, Commitments, or Core Values. Reconsideration of the Response to Joint DIDP Request on Item No. 3 is not warranted.

**c. ICANN organization’s responses to Item Nos. 2 and 4 adhered to established policies and procedures.**

Item Nos. 2 and 4 sought the disclosure of the identities of “ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purpose[] of completing its ‘first track’ review” (Item No. 2) and “[c]onfirm[ation] that ICANN will disclose FTI’s final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review” (Item No. 4).<sup>106</sup> ICANN organization responded as follows:

[T]he DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the [CPE Process] Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update.<sup>107</sup>

The Requestors argue that information responsive to Item Nos. 2 and 4 “is more than likely contained in ICANN documents” and it “is in the public’s interest to disclose” those documents.<sup>108</sup> This argument misapplies the DIDP Response Process. Even if Item Nos. 2 and 4 were to be interpreted as requests for documents, the Response to Joint DIDP Request adhered to

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<sup>105</sup> DIDP.

<sup>106</sup> DIDP Request, at Pg. 4.

<sup>107</sup> Response to Joint DIDP Request at Pg. 2.

<sup>108</sup> Request 17-4, § 8, at Pg. 22.

the DIDP Response Process, because ICANN organization searched for and identified documents responsive to Item Nos. 2 and 4, reviewed those materials, and determined that they were subject to certain Nondisclosure Conditions discussed below.<sup>109</sup> Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>110</sup>

The Requestors also argue that “ICANN has provided past requestors with documents and information derived from documents when responding to DIDP Requests.”<sup>111</sup> The Requestors recognize that the DIDP Response Process “does not require ICANN to create or compile summaries of any documented information,” but argue that because ICANN organization has provided information in response to other DIDP Requests, ICANN organization should be required to do so here.<sup>112</sup> First, the DIDP Response Process does not *require* ICANN organization to document information not already available in documentary form. In some instances, ICANN organization has compiled documents in response to a DIDP request as part of ICANN’s efforts of improving upon the levels of reporting where feasible.<sup>113</sup> However, the fact that ICANN organization has summarized documentary information in response to other DIDP Requests does not obligate ICANN organization to summarize information *not* otherwise

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<sup>109</sup> DIDP Response Process.

<sup>110</sup> Response to Joint DIDP Request at Pg. 3.

<sup>111</sup> Request 17-4, § 8, Pg. 12.

<sup>112</sup> *Id.*

<sup>113</sup> *E.g.*, in ICANN’s response to DIDP Request No. 20141222-1, the requestor sought detailed reports of ICANN’s income and revenue from domain names for the years 1999 to 2014. No responsive document existed at the time ICANN organization provided its response to the DIDP request, but ICANN organization was in the process of preparing several reports that, once completed, would be responsive to the DIDP request and would increase the transparency of ICANN organization’s financial reporting. Accordingly, the response explained that once the report was complete and available in a publishable format, it would be published on ICANN’s website. Response to DIDP Request No. 20141222-1 at Pg. 2, <https://www.icann.org/en/system/files/files/cis-response-21jan15-en.pdf>.

contained in any documents in its possession, custody, or control in response to the Joint DIDP Request. Second, FTI has not yet completed its final report on the CPE Process Review; therefore, that document is not yet in ICANN organization's possession, custody, or control and therefore the request for its distribution is premature. Third, and as discussed below, the information requested in Item Nos. 2 and 4 is subject to Nondisclosure Conditions and not appropriate for disclosure. Accordingly, the Response to Joint DIDP Request adhered to the DIDP Response Process.

**2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.**

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.<sup>114</sup> Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.<sup>115</sup> In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the Response to Joint DIDP Request.

In response to Item Nos. 2 and 4, ICANN organization determined that any documents in its possession responsive to the Items were not appropriate for disclosure because they comprised:

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<sup>114</sup> DIDP.

<sup>115</sup> *Id.*

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents;
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications;
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.<sup>116</sup>

It is understandable why these Nondisclosure Conditions apply to the materials responsive to Item Nos. 2 and 4. Those Items request documents that go to the heart of the CPE Process Review deliberative and decision-making process and comprise information that may “compromise the integrity of” ICANN organization’s and FTI’s “deliberative and decision-making process”.<sup>117</sup> The DIDP specifically carves out documents revealing the deliberative and decision-making process as exempt from disclosure pursuant to the Nondisclosure Conditions and the potential harm of disclosing that information was deemed to outweigh any potential benefit of disclosure. Accordingly, the Response to Joint DIDP Request adhered to the DIDP Response Process in finding the materials subject to the Nondisclosure Conditions.

**3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public’s Interest In Disclosing The Information.**

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<sup>116</sup> Response to Joint DIDP Request at Pg. 2-3.

<sup>117</sup> DIDP Request at Pg. 5.

The DIDP states that documents subject to the Nondisclosure Conditions “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”<sup>118</sup> In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.<sup>119</sup>

DotMusic previously acknowledged that under the DIDP Response Process, it is “within ICANN’s sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure.”<sup>120</sup> Nevertheless, the Requestors suggest reconsideration is warranted because the Dot Registry IRP Final Declaration gave rise to a “unique circumstance where the ‘pubic interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.’”<sup>121</sup> However, the Dot Registry IRP Final Declaration did not establish that the public interest in disclosure outweighs the potential harm for each and every document in ICANN organization’s possession related to the CPE Process Review.<sup>122</sup>

As the Amazon EU S.A.R.L. IRP Panel noted in June of this year:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.

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<sup>118</sup> *See id.*

<sup>119</sup> Response to Joint DIDP Request at Pg. 3.

<sup>120</sup> Request 16-7, § 3, Pg. 4.

<sup>121</sup> Request 17-4 § 7, Pg. 8.

<sup>122</sup> *See* ICANN Board Resolution 2016.08.09.11, <https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g>.

(*Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3.) To enable ICANN organization to balance its transparency commitment with the need to protect certain communications, the DIDP gives ICANN organization the discretion to decide whether the public interest (including transparency and fairness concerns) outweighs the potential harm of disclosure. Here, ICANN organization determined in its discretion that the public interest in disclosure did not outweigh the potential harm of disclosing documents that reflect the deliberative processes of ICANN, and documents that are subject to the attorney-client, attorney work product privilege, or any other applicable privilege. Accordingly, the argument does not support reconsideration.

**B. The Requestor’s Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration.**

The Requestors argue that ICANN “failed to adhere to its Bylaws by acting ‘through open and transparent processes’ when it issued the DIDP Response . . . and did not produce the requested information,” thereby violating certain Commitments and Core Values:<sup>123</sup>

- Operating in a manner consistent with [ICANN’s] Articles [of Incorporation] and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . through open and transparent processes that enable competition and open entry in Internet-related markets;<sup>124</sup>
- Employing open and transparent policy development mechanisms;<sup>125</sup>
- Applying documented policies neutrally and objectively, with integrity and fairness;<sup>126</sup>
- Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.<sup>127</sup>

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<sup>123</sup> Request 17-4, § 6, at Pg. 5-7.

<sup>124</sup> ICANN Amended and Restated Articles of Incorporation, 9 August 2016, § 2(III), <https://www.icann.org/resources/pages/governance/articles-en>. The Requestors also cite ICANN’s Bylaws, 22 July 2017, Art. 1, § 1.2(a), which similarly states that ICANN commits to “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole.” Request 17-4, § 6, at Pg. 5.

<sup>125</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

<sup>126</sup> *Id.*, Art. 1, § 1.2(a)(v).

However, the Requestors provide no explanation for how these Commitments and Core Values relate to the Response to Joint DIDP Request or how ICANN organization has violated these Commitments and Core Values.<sup>128</sup> The Requestors have not established grounds for reconsideration through its list of Commitments and Core Values.

## **VI. Recommendation**

The BAMC has considered the merits of Request 17-4, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in the Response to Joint DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-4.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-4 was submitted on 25 July 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 24 August 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-4 is 11 October 2017, which is within the requisite 90 days of receiving Request 17-4.<sup>129</sup>

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(continued...)

<sup>127</sup> *Id.*, Art. 1, § 1.2(a)(vi).

<sup>128</sup> *See generally* Request 17-4, § 6, Pg. 5-7.

<sup>129</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).