

Exhibit 33

dotgay LLC Reconsideration Request (“RR”)

1. Requestor Information

Requestor:

Name: dotgay LLC

Address: Contact Information Redacted

Email: Jamie Baxter Contact Information Redacted

Requestor is represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, 1900 K Street, NW Washington, DC 20006-1110

Email: Contact Information Redacted

Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

dotgay LLC (the “Requestor”) seeks reconsideration of ICANN’s response to its Documentary Information Disclosure Policy (“DIDP”) Request No. 20180115-1, in which ICANN refused to disclose certain requested documents pursuant to the DIDP.

On January 15, 2018, Requestor submitted a DIDP request (the “DIDP Request”) seeking disclosure of documentary information relating to FTI Consulting, Inc.’s (“FTI”) independent

review of the Community Priority Evaluation (“CPE”) process.¹ Specifically, Requestor submitted 21 document requests:

Request No. 1: All “[i]nternal e-mails among relevant ICANN organization personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;²

Request No. 2: All “[e]xternal e-mails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review;³

Request No. 3: The “list of search terms” provided to ICANN by FTI “to ensure the comprehensive collection of relevant materials;”⁴

Request No. 4: All “100,701 emails, including attachments, in native format” provided to FTI by ICANN in response to FTI’s request;⁵

Request No. 5: All emails provided to FTI that (1) are “largely administrative in nature,” (2) “discuss[] the substantive of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines;”⁶

¹ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

² Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 3 (citing Exhibit 2, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; Exhibit 3, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), p. 7, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

³ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, pp. 3-4 (citing Exhibit 2, Scope 1 Report, p. 6; Exhibit 3, Scope 2 Report, p. 7).

⁴ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 10).

⁵ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, p. 10).

⁶ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, pp. 11-12).

Request No. 6: All draft CPE Reports concerning .GAY, both with and without comments;⁷

Request No. 7: All draft CPE Reports concerning .GAY in redline form and/or feedback or suggestions given by ICANN to the CPE provider;⁸

Request No. 8: All draft CPE Reports reflecting an exchange between ICANN and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey;”⁹

Request No. 9: All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Cristina Flores, Russell Weinstein, and Christine Willett;¹⁰

Request No. 10: The 13 January 2017 engagement letter between FTI and ICANN;¹¹

Request No. 11: The original Request for Proposal (RFP) pertaining to FTI’s review of the CPE process;

Request No. 12: All of the “CPE Provider’s working papers associated with” dotgay’s CPE;¹²

Request No. 13: “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets;”¹³

⁷ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, p. 15).

⁸ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4(citing Exhibit 2, Scope 1 Report, pp. 13-16).

⁹ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 16).

¹⁰ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4 (citing Exhibit 2, Scope 1 Report, p. 13).

¹¹ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p 5 (citing Exhibit 4, Reference Materials – Board Submission No. 2017.09.23.0a (23 Sep. 2017), p. 363, <https://www.icann.org/en/system/files/bm/briefing-materials-1-2-redacted-23sep17-en.pdf>).

¹² Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5(citing Exhibit 5, FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017) (“Scope 3 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>., p. 6).

¹³ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 7).

Request No. 14: All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN organization personnel;”¹⁴

Request No. 15: All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel;”¹⁵

Request No. 16: FTI’s investigative plan used during its independent review;¹⁶

Request No. 17: FTI’s “follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided;”¹⁷

Request No. 18: All communications between ICANN and FTI regarding FTI’s independent review;

Request No. 19: All communications between ICANN and the CPE Provider regarding FTI’s independent review;

Request No. 20: All communications between FTI and the CPE Provider regarding FTI’s independent review; and

Request No. 21: All documents and communications regarding the scope of FTI’s independent review.

On February 14, 2018, ICANN responded to the DIDP Request (the “DIDP Response”) by denying all of the requests except for Request Nos. 10, 11, and 17—which ICANN claims “does not exist.”¹⁸ ICANN reasoned that the requested documents are not appropriate for disclosure based on the Nondisclosure Conditions.¹⁹

¹⁴ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

¹⁵ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

¹⁶ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 8).

¹⁷ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 5 (citing Exhibit 3, Scope 2 Report, p. 9).

¹⁸ See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

¹⁹ See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

4. Date of action/inaction:

ICANN acted on February 14, 2018 by issuing the DIDP Response.

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

Requestor became aware of the action on February 14, 2018, when it received the DIDP Response.

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

Requestor is materially affected by ICANN's refusal to disclose certain documents concerning FTI's independent review of the CPE because ICANN intends to rely on FTI's three reports (the "FTI Reports") in order to make a decision on Requestor's Reconsideration Request 16-3 ("Request 16-3"), which concerns Requestor's community application for the .GAY generic Top-Level Domain ("gTLD"). The procedural and substantive problems with the FTI Reports, as discussed further below, means that ICANN's reliance on the FTI Reports will materially and adversely affect Requestor's rights regarding Request 16-3 and its community application for the .GAY gTLD. Requestor cannot even properly analyze the conclusions contained in the FTI Reports because ICANN refuses to disclose the underlying documents. ICANN's decision to deny access to these documents both prevents a proper analysis of the FTI Reports and is made in violation of ICANN's own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness.

6.1 The Flaws in the Community Evaluation for .GAY and the FTI Reports

Requestor filed a community-based application for the .GAY gTLD. However, the Economist Intelligence Unit (the "EIU") determined that Requestor failed the CPE; ICANN

resultantly rejected the application. Requestor sought reconsideration of that determination through Request 16-3, which raises several problems with dotgay’s CPE.²⁰ As explained by Prof. William N. Eskridge of Yale Law School, the CPE 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; 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.²¹

In January 2017, ICANN retained FTI to review the CPE process and “the consistency in which the CPE criteria were applied” by the EIU.²² It concluded its independent review based on information and materials from ICANN and the EIU, and wrote the FTI Reports. On December 13, 2017, ICANN published the FTI Reports on the CPE process.²³ The first report, “Communications Between ICANN Organization and the CPE” (“Scope 1 Report”), concluded that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider.”²⁴ The “Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports” (“Scope 2 Report”) found that the EIU “consistently applied the CPE criteria throughout all

²⁰ Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), p. 7, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²¹ See Exhibit 7, Letter from Arif Ali, on behalf of dotgay LLC, to the ICANN Board attaching the Expert Opinion of Prof. William N. Eskridge (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>.

²² Exhibit 32, Letter from C. Disspain to A. Ali (10 Oct. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-to-ali-10oct17-en.pdf>.

²³ Exhibit 8, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

²⁴ Exhibit 2, Scope 1 Report, p. 17.

Community Priority Evaluations.”²⁵ And, finally, the “Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests” (“Scope 3 Report”) determined that the researched referenced in the CPE reports were reflected in the research materials.²⁶

Given that FTI reviewed the CPE process and whether the EIU consistently applied the CPE criteria, its findings directly affect the outcome of Request 16-3.²⁷ This is especially concerning for Requestor because Prof. William N. Eskridge, Jr. has identified significant problems with FTI’s purported “independent” review of the CPE process.²⁸ His examination of the Scope 2 Report, for instance, reveals that the report “is long on description and conclusory statements and short on actual evaluation.”²⁹ The fact that the FTI Reports are clearly supported by no independent analysis emphasizes the problems with both the “independent” review method used by FTI and the conclusions it reached in the reports.

6.2 ICANN Breached its Bylaws in the DIDP Response

Since Request 16-3 is currently pending before the ICANN Board, and the FTI Reports will likely impact the ICANN Board’s consideration of Request 16-3, Requestor filed the DIDP Request seeking various categories of documents concerning FTI’s independent review the CPE process and the FTI Report’s documentary basis. In submitting this DIDP Request, Requestor expected ICANN to “operate in a manner consistent with [its] Bylaws . . . , carrying out its

²⁵ Exhibit 3, Scope 2 Report, p. 57.

²⁶ Exhibit 5, Scope 3 Report, pp. 57-58.

²⁷ Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), p. 7, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²⁸ See Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

²⁹ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), ¶ 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets.”³⁰ ICANN failed to do so.

6.2.1 ICANN Must Comply with International Law and Conventions

The ICANN Bylaws require that it comply with international law and conventions. Pursuant to these laws and conventions, there is an “an international minimum standard of due process as fairness – based . . . on the universal views of all legal systems.”³¹ This principle is violated “when a decision is based upon evidence and argumentation that a party has been unable to address.”³² The Board Accountability Mechanisms Committee (“BAMC”) and ICANN Board have, respectively, already made and plan to make a decision based on the FTI Reports.³³ While Requestor has submitted numerous materials regarding the FTI Reports to the ICANN Board, such as the Second Expert Opinion of Professor William N. Eskridge, it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available. Requestor thus filed the DIDP Request in order to obtain those documents. The DIDP Response threatens Requestor’s due process rights by rendering it unable to properly address the one piece of significant evidence relevant to its Request 16-3—the FTI Reports—and therefore threatening its due process rights.

³⁰ Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(a).

³¹ Exhibit 12, Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law” 23 *Duke J. of Comparative and Int’l L.* 411, 422 (2013).

³² Exhibit 13, Charles T. Kotuby and Luke A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 179 (Mar. 15, 2017).

³³ Exhibit 14, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (Feb. 13, 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. . . . While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

6.2.2 ICANN Must Remain Accountable, Transparent, and Open

ICANN’s Bylaws also require that ICANN hold itself to high standards of transparency, accountability, and openness.³⁴ These standards require that ICANN (1) “employ[] open and transparent policy development mechanisms;”³⁵ (2) “apply[] documented policies neutrally and objectively, with integrity and fairness;”³⁶ and (3) “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”³⁷

ICANN has violated its transparency obligations by refusing to disclose the requested documents in lieu of hiding behind its Nondisclosure Conditions. By acting in a closed-off and non-transparent manner, ICANN only raises additional questions as to the credibility, reliability, and trustworthiness of the CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for Requestor’s .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3.³⁸

Instead of publishing the necessary documents for a critical analysis of the FTI Reports, and thus the basis for their erroneous conclusions regarding the CPE process, ICANN continues to try and avoid any accountability for its actions in regards to the CPE. This is most evident in its responses to the DIDP Request; ICANN, in an obvious attempt to side-step the disclosure of any responsive documents, attempts to argue that FTI’s independent review “includes the information responsive to” the requests.³⁹ However, the alleged ‘responsive information’ is the

³⁴ Exhibit 11, ICANN Bylaws, Arts. 1, 3-4.

³⁵ Exhibit 11, ICANN Bylaws, Art. 3, § 3.1.

³⁶ Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(v).

³⁷ Exhibit 11, ICANN Bylaws, Art. 1, § 1.2(vi).

³⁸ Exhibit 9, Reconsideration Request 16-3 (Feb. 17, 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

³⁹ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 13.

*exact same language stated by Requestor as the basis for its request for documents.*⁴⁰ The fact that “FTI provided ICANN organization with a list of search terms”⁴¹ does not in any way produce “[t]he ‘list of search terms’ provided to ICANN.”⁴²

6.3 The Public Interest Outweighs Any Compelling Reasons for Nondisclosure

ICANN cannot simply circumvent its own Bylaws by hiding behind the Nondisclosure Conditions because the public interest clearly outweighs any “compelling reasons” for nondisclosure. It is surprising how ICANN maintains that it can ask everyone affected by the FTI Reports to accept their conclusions without question, even where there are clear problems and contradictions contained within the reports. For instance, in clear contrast to FTI, the Dot Registry IRP Declaration found a close nexus between ICANN staff and the CPE Provider.⁴³ However, it is impossible to analyze whether ICANN unduly influenced the EIU without the underlying documents; these documents are given even greater import because ICANN argued that “the CPE Provider has not agreed [to disclose the documents] . . . and has threatened litigation.”⁴⁴ The problem with this excuse is compounded by the simple fact that the DIDP Request only asked for documents provided to FTI and, as such, ICANN has already disclosed those same documents to FTI as part of its review rather than keep them confidential. ICANN’s failure to disclose the requested documents only underscores the serious questions that have been raised by Requestor

⁴⁰ Compare Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, pp. 4-5 with Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

⁴¹ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14 (citing Scope 1 Report, p. 10).

⁴² Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 4.

⁴³ See Exhibit 31, *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>.

⁴⁴ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 9, <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

about the impartiality, independent legitimacy, and credibility of FTI's investigation. Such an action harms the global public interest, Requestor, and the entire gay community.

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.⁴⁵ Instead, ICANN deliberately chooses to hide behind waivable privileges as an excuse to not disclose the documents. ICANN admits that "ICANN organization's outside counsel, Jones Day — not ICANN organization — retained FTI. Counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN organization. Therefore, FTI's draft and working materials are protected by the attorney-client privilege under California law."⁴⁶ Not only did ICANN reject participation from all affected applicants and parties in the creation of the CPE Process Review methodology, ICANN also ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags. 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.

In order to resolve the serious questions concerning the credibility of FTI's investigation, it is critically important that ICANN disclose the requested materials to Requestor and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by Requestor that were denied by ICANN in its DIDP Response.

⁴⁵ Exhibit 15, 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>.

⁴⁶ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), p. 11, <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, pp. 13-14.

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. Its nondisclosure has negatively impacted the fair resolution of the .GAY gTLD in accordance with the ICANN Bylaws and international law, and raises serious questions about the consistency, transparency, and fairness of FTI's review of the CPE process. Openness, transparency, and accountability are key components of ICANN's identity and ICANN is purposefully ignoring them by impeding efforts to analyze the FTI Reports. As such, ICANN has only increased the likelihood of an expensive Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requestor'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 are no circumstances at this point in time for which the public interest in disclosing the information [that] outweighs the harm that may be caused by the requested disclosure" is untenable.⁴⁷ There is significant public interest in the information underpinning the FTI Reports, which may have a significant impact on the CPE process as a whole and the future of the New gTLD Program because both the ICANN Board and the BAMC may rely upon the FTI Reports in determining 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 credibility of the FTI investigation.

⁴⁷ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 22.

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

8.1 Background

Requestor elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant.⁴⁸ In response, Requestor, supported by multiple community organizations, filed a reconsideration request with the Board Governance Committee (“BGC”). The BGC granted the request because the EIU did not follow procedure during the CPE process. As a result, the Requestor’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.⁴⁹

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. Requestor therefore 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.⁵⁰ The ICANN Board, though, remained silent in regards to Request 16-3.

Almost a year later, and after numerous letters to ICANN,⁵¹ Requestor finally heard from

⁴⁸ Exhibit 16, 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>.

⁴⁹ See Exhibit 17, 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>.

⁵⁰ See Exhibit 18, 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>.

⁵¹ See Exhibit 19, 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 7, 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->

ICANN on April 26, 2017. Requestor 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. ... 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: ... 16-3 (.GAY)⁵²

8.2 The Prior DIDP Requests

In response to this new information regarding the delay, on May 18, 2017, Requestor filed a DIDP request in relation to the .GAY CPE (the “First DIDP Request”).⁵³ Requestor, 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.”⁵⁴ It asked ICANN for 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.”⁵⁵

Prior to responding to the First DIDP Request, ICANN issued the CPE Process Review

redacted-13sep16-en.pdf; Exhibit 18, 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 20, 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 21, 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>.

⁵² See Exhibit 22, 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>.

⁵³ Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

⁵⁴ Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

⁵⁵ Exhibit 23, dotgay DIDP Request (May 18, 2017), <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

Update on June 2, 2017.⁵⁶ The publication briefly described the scope of FTI’s independent review and its “two parallel tracks.”⁵⁷ No other information was provided to the Requestor regarding the CPE Review Process at issue in its Request until ICANN issued its inadequate formal response to the DIDP Request on June 18, 2017 (“First DIDP Response”).⁵⁸ The First DIDP Response disclosed none of the requested documents and instead maintained the secrecy that surrounds FTI’s “independent investigation of the CPE.”⁵⁹

In response to the CPE Review Process Update, and the lack of any additional information from ICANN, the Requestor sent ICANN a joint letter with DotMusic Limited on June 10, 2017 (the “Second DIDP Request”). The letter requested more information related to FTI’s review based on the CPE Review Process Update in order “to ensure the integrity of FTI’s review.”⁶⁰

However, on July 10, 2017, ICANN issued a response that simply reiterated already-provided information regarding the BGC’s decision to review the CPE Process and FTI’s independent review (“Second DIDP Response”).⁶¹ ICANN further denied the requests for information.⁶² ICANN, in providing such a response, failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy.⁶³

In response to the First DIDP Response and Second DIDP Response, Requestor initiated

⁵⁶ Exhibit 24, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

⁵⁷ Exhibit 24, Community Priority Evaluation Process Review Update (June 2, 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

⁵⁸ Exhibit 25, 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>.

⁵⁹ See Exhibit 26, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>.

⁶⁰ Exhibit 27, 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>.

⁶¹ Exhibit 28, Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁶² Exhibit 28, Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>.

⁶³ See Exhibit 29, Reconsideration Request 17-4 (Jul. 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

separate reconsideration requests for each DIDP request.⁶⁴ The processes for both of these requests have concluded and the matters are currently undergoing the Cooperative Engagement Process (“CEP”) pending ICANN’s consideration of Request 16-3.⁶⁵

8.3 The DIDP Request

After Requestor initiated the separate reconsideration requests, FTI concluded its independent review. On December 13, 2017, ICANN published the FTI Reports.⁶⁶ Requestor’s expert has reviewed the FTI Reports and concluded that (1) The FTI Reports are “based on a superficial investigative methodology wholly unsuited for the purpose of an independent review;”⁶⁷ (2) the Scope 2 Report “is long on description and conclusory statements and short on actual evaluation;”⁶⁸ and (3) the Scope 3 Report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to” the Requestor’s CPE.⁶⁹

Given Requestor’s concerns about the FTI Reports, it submitted a request for documents “to obtain the documents provided by ICANN to [FTI] in connection with FTI’s so-called

⁶⁴ See Exhibit 26, Reconsideration Request 17-3 (Jun. 30, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>; Exhibit 28, Reconsideration Request 17-4 (Jul. 25, 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>.

⁶⁵ See Exhibit 30, Cooperative Engagement and Independent Review Processes Status Update (Jan. 31, 2018), <https://www.icann.org/en/system/files/files/irp-cep-status-31jan18-en.pdf>, p. 1.

⁶⁶ Exhibit 8, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (Dec. 13, 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

⁶⁷ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 1.

⁶⁸ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 2.

⁶⁹ Exhibit 10, Letter from A. Ali to the ICANN Board attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (Jan. 31, 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>, p. 3.

independent review of ICANN’s [CPE].”⁷⁰ The specific requests, as described in **Question 3** above, sought information explicitly identified by ICANN and FTI related to the FTI Reports.⁷¹

ICANN responded to the DIDP Request on February 14, 2018.⁷² It argued that it could not disclose the requested documents because the EIU did not consent to the disclosure of documents.⁷³ However, all of the documents that Requestor seeks from ICANN has already been disclosed to FTI; it is not seeking documents that the EIU refused to provide to FTI.⁷⁴ And, yet, ICANN refused Request Nos. 1-9, 12-16, and 18-21 because the “CPE Process Review Reports includes the information responsive to these Items” and based upon the following Nondisclosure Conditions:

- Confidential business information and/or internal policies and procedures.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making processes by inhibiting the candid exchange of ideas and communications
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- 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. . . .
- 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[.] . . .

⁷⁰ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 1.

⁷¹ Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

⁷² See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

⁷³ See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

⁷⁴ See Exhibit 1, Request No. 20180115-1 (Jan. 15, 2018), <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>, p. 1.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual’s personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceeding of internal appeal mechanisms and investigations. ...
- 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.⁷⁵

As discussed in **Questions 6 and 7** above, the public interest warrants disclosure of documents related to FTI’s independent review of the CPE; disclosure is necessary to ensure that the independent review remains a fair, transparent, and independent process.

ICANN further confirmed that the three remaining document requests (Request Nos. 10, 11, and 17) do not exist: (1) “the 13 January 2017 engagement letter between FTI and ICANN;”⁷⁶ (2) “the original Request for Proposal (RFP) pertaining to FTI’s review of the CPE Process;”⁷⁷ and (3) “FTI’s follow-up communications with CPE Provider personnel to clarify details discussed in earlier interviews and in materials provided.”⁷⁸

9. What are you asking ICANN to do now?

Requestor asks ICANN to disclose the documents requested under Request Nos. 1-9, 12-16, and 18-21.

⁷⁵ See Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>.

⁷⁶ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 13.

⁷⁷ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 18.

⁷⁸ Exhibit 6, Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018), <https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>, p. 20.

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, Requestor 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 DIDP Request, especially since its gTLD application is at issue in the underlying 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

March 15, 2018

Date

Exhibit 34

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-2
5 JUNE 2018**

The Requestor, dotgay LLC, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (2018 DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).¹ Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.²

I. Brief Summary.

The Requestor submitted a community-based application for .GAY (Application or dotgay Application), which was placed in a contention set with three other .GAY applications.³ The Requestor participated in CPE, but did not prevail. The Requestor has challenged the CPE Provider's evaluation of its Application in Reconsideration Request 15-21 (Request 15-21), which the Board Governance Committee (BGC) denied,⁴ and in Request 16-3, which is pending.⁵

While Request 16-3 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.⁶ The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each

¹ Request 18-2, § 3, at Pg. 1-4.

² Request 18-2, § 6, at Pg. 6-10.

³ <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁴ BGC Determination on Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

⁵ Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

⁶ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.⁷ The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.⁸

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).⁹

On 15 January 2018, the Requestor submitted the 2018 DIDP Request. The Requestor sought 21 categories of documents and information relating to the CPE Process Review.¹⁰ On 14 February 2018, ICANN org responded to the 2018 DIDP Request (2018 DIDP Response). ICANN provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the 2018 DIDP Response. Notwithstanding the Nondisclosure Conditions, ICANN org "also evaluated the documents subject to these conditions . . . [and] 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."¹¹ Additionally, in response to three of the requested items, ICANN org explained that the requested documentary information did not exist.¹²

⁷ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁹ See <https://www.icann.org/news/announcement-2017-12-13-en>.

¹⁰ 2018 DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

¹¹ Response to DIDP Request No. 20180115-1; Request 18-2 Ex. 6, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

¹² *Id.*

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.¹³

On 15 March 2018, the Requestor filed the instant Reconsideration Request 18-2 (Request 18-2), which challenges certain portions of the 2018 DIDP Response. The Requestor claims that, in declining to produce certain requested documents responsive to Items No. 1-9, 12-16, and 18-21, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.¹⁴

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-2 to the Ombudsman for consideration, and the Ombudsman recused himself.¹⁵

The BAMC has considered Request 18-2 and all relevant materials and recommends that the Board deny Request 18-2 because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

¹³ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁴ Request 18-2, § 6, at Pg. 6-10.

¹⁵ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-2, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

II. Facts.

A. The CPE Provider's Evaluations of the Requestor's .GAY Application.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 April 2014, the Requestor's Application was invited and the Requestor accepted to participate in CPE.¹⁶

On 6 October 2014, the CPE panel issued a "First CPE Report," concluding that the Application did not qualify for community priority.¹⁷ The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report.¹⁸ The BGC granted reconsideration on Request 14-44 on the grounds that the CPE Provider had inadvertently failed to verify some letters of support for the Application.¹⁹ At the BGC's direction, the CPE Provider conducted a "Second CPE" of the Application. The Application did not prevail in the Second CPE.²⁰

On 22 October 2015, the Requestor sought reconsideration of the Second CPE Report (Request 15-21),²¹ and filed a DIDP Request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 DIDP Request).²² Following ICANN org's response to the 2015 DIDP Request,²³ the Requestor revised Request 15-21 to include a challenge the response to the 2015 DIDP Request in addition to the Second CPE

¹⁶ CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>. *See also* <https://newgtlds.icann.org/en/applicants/cpe#status>.

¹⁷ *See* CPE Report at 1.

¹⁸ 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>.

¹⁹ *Id.* at Pg. 2.

²⁰ *Id.*

²¹ *Id.*

²² DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

²³ 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>,

report.²⁴

On 1 February 2016, the BGC denied Request 15-21.²⁵ On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the Second CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.²⁶ On 26 June 2016, the BGC recommended that the Board deny Request 16-3.²⁷

B. The CPE Process Review.

While Request 16-3 was still pending, ICANN's Board directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).²⁸

Subsequently, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.²⁹ The BGC determined that, in addition to reviewing the process by which ICANN org interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).³⁰ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI

²⁴ Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

²⁵ BGC Determination on Request 15-21, at Pg. 1

²⁶ Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²⁷ BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

²⁸ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

²⁹ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

³⁰ *Id.*

Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-3, would be on hold until the CPE Process Review was completed.³¹

On 13 December 2017, ICANN org published the three reports issued in connection with the CPE Process Review.³²

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review (the 2018 Resolutions).³³

C. Relevant Prior DIDP Requests from the Requestor Seeking Documents Regarding the CPE Process Review.

While the CPE Process Review was pending, the Requestor submitted two DIDP Requests seeking documents and information relating to the CPE Process Review.³⁴ The Requestor subsequently filed two Reconsideration Requests, Requests 17-3 and 17-4, which

³¹ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

³² See <https://www.icann.org/news/announcement-2017-12-13-en>.

³³ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

³⁴ See DIDP Request No. 20170518-1, available at <https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf>.

challenged certain portions of ICANN org’s Responses to those two DIDP Requests.³⁵ The Board denied both Requests 17-3 and 17-4.³⁶

D. The 2018 DIDP Request.

On 15 January 2018, the Requestor submitted the 2018 DIDP Request, seeking 21 categories of documents.³⁷ On 14 February 2018, ICANN org responded to the 2018 DIDP Request. ICANN org provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org’s possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions. Notwithstanding the Nondisclosure Conditions, ICANN org “also evaluated the documents subject to these conditions . . . [and] 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.”³⁸ Additionally, ICANN org explained that the documentary information requested in three of the requested categories did not exist.³⁹

On 15 March 2018, the Requestor filed Request 18-2, seeking reconsideration of ICANN org’s determination not to produce Items No. 1-9, 12-16, and 18-21, which are discussed in detail below.

³⁵ Request 17-3, available at <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>. See also Request 17-4, available at <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>. Request 17-4 was filed in conjunction with DotMusic Limited.

³⁶ Board Action Regarding Request 17-3, available at <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b>; Board Action Regarding Request 17-4, available at <https://www.icann.org/resources/board-material/resolutions-2017-10-29-en#1.a>.

³⁷ See DIDP Request No. 20180115-1; Request 18-2 Ex. 1, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

³⁸ Response to DIDP Request No. 20180115-1; Request 18-2 Ex. 6, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

³⁹ Response to DIDP Request No. 20180115-1 at Items 10, 11, and 17.

On 23 March 2018, the Requestor submitted a letter to the BAMC concerning the CPE Process Review.⁴⁰ Among other things, the Requestor asserted that “[i]f transparency and accountability are indeed the Board’s objectives, then” ICANN org should disclose all of the documents requested in the 2018 DIDP Request.⁴¹ The Requestor asserted that if ICANN org did not agree to all of its conditions, “the Board cannot claim to have discharged its duty to promote and protect transparency and accountability in good faith.”⁴²

On 5 April 2018, the Requestor reiterated that, “[i]n order to provide ICANN with further substantive comments on the CPE Process Review,” the Requestor “must have” the items it sought in its 23 March 2018 letter, including the documents requested in the 2018 DIDP.⁴³

E. Relief Requested.

The Requestor asks the BAMC to “disclose the documents requested under Request Nos. 1-9, 12-16, and 18-21.”⁴⁴

III. Issues Presented.

The issues are as follows:

1. Whether ICANN org complied with established ICANN policies in responding to the DIDP Request, and particularly with respect to Item Nos. 1-9, 12-16, and 18-21; and
2. Whether ICANN org complied with its Core Values, Mission, and Commitments.⁴⁵

⁴⁰ 23 March 2018 letter from A. Ali to ICANN Board at Pg. 1-2, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

⁴¹ *Id.* at Pg. 4-5.

⁴² *Id.* at Pg. 5.

⁴³ Attachment 1, 5 April 2018 email from R. Wong to ICANN org.

⁴⁴ Request 18-2, § 9, at Pg. 18.

⁴⁵ Request 18-2.

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.⁴⁶

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁴⁷ 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.⁴⁸ Denial of a request for reconsideration of ICANN org 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.⁴⁹

⁴⁶ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

⁴⁷ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

⁴⁸ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

⁴⁹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

On 16 April 2018, the BGC determined that Request 18-2 is sufficiently stated and sent Request 18-2 to the Ombudsman for review and consideration.⁵⁰ The Ombudsman thereafter recused himself from this matter.⁵¹ Accordingly, the BAMC has reviewed Request 18-2 and all relevant materials, and issues this Recommendation.

B. The DIDP.

ICANN org 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 org's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN org's operational activities. In that regard, ICANN org publishes many categories of documents on its website as a matter of course.⁵² In addition, the DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already publicly available, is made available to the public unless there is a compelling reason for confidentiality.⁵³

The DIDP was developed through an open and transparent process involving the broader community. It was the result of an independent review of standards of accountability and

⁵⁰ Ombudsman Action Regarding Request 18-2, Pg. 1-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

⁵¹ *Id.*, Pg. 1.

⁵² See ICANN Documentary Information Disclosure Policy, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁵³ *Id.*

transparency within ICANN org, which included extensive public comment and community input.⁵⁴

Neither the DIDP nor ICANN org’s Commitments and Core Values supporting transparency and accountability obligate ICANN org to make public every document in ICANN org’s possession. The DIDP is limited to requests for *documentary information* already in existence within ICANN org that is not publicly available. Requests for information are not appropriate DIDP requests. Moreover, ICANN org 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.⁵⁵

In responding to a request for documents submitted pursuant to the DIDP, ICANN org adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).⁵⁶ 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 org’s website].”⁵⁷

The Nondisclosure Conditions identify circumstances for which ICANN org’s other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that are presumed not to be appropriate for public disclosure (and the *Amazon EU S.A.R.L.* Independent Review

⁵⁴ See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>; and <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁵⁵ *Id.*

⁵⁶ See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

⁵⁷ *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws).

They include, among others:

- i. 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 (Internal Deliberative Process);
- 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 (Constituent Deliberative Process);
- iii. Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal 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 (Personal Privacy);
- iv. 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 (Nondisclosure Agreements);
- v. Confidential business information and/or internal policies and procedures (Confidential Business Information);
- vi. Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (Drafts); and
- vii. 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 (Privilege/Investigation).⁵⁸

Notwithstanding the above, documentary information that falls within any of the Nondisclosure Conditions may still be made public if ICANN organization determines, under the

⁵⁸ DIDP.

particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁵⁹

V. Analysis and Rationale.

A. ICANN org Adhered to Established Policies and Procedures in Responding to the DIDP Request.

1. The 2018 DIDP Response Complies with Applicable Policies and Procedures.

The Requestor asserts that ICANN org should have disclosed the documentary information requested in Items No. 1-9, 12-16, and 18-21 because the Requestor believes that the public interest in disclosing these materials outweighs the potential harm of disclosure.⁶⁰ As a preliminary matter, the BAMC notes that the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the 2018 DIDP Response. Instead, the Requestor claims that ICANN org is “hiding behind” those Nondisclosure Conditions and, in the Requestor’s view, ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.⁶¹ This represents a substantive disagreement with ICANN org’s discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted. However, the BAMC has reviewed the 2018 DIDP Response and, for the reasons discussed below, concludes that the 2018 DIDP Response complied with applicable policies and procedures, and that reconsideration is not warranted.

In the course of evaluating Request 18-2, ICANN org conducted a review of the documents identified by FTI as part of its review and determined that those documents

⁵⁹ *Id.*

⁶⁰ *See* Request 18-2.

⁶¹ *Id.* § 6, at Pg. 10.

responsive to Items No. 1-9, 12-16, and 18-21 that were not already publicly available are subject to Nondisclosure Conditions and that the public interest in disclosure does not outweigh the harm that may be caused by disclosing the information, for the reasons discussed below. In the course of that review, ICANN org also confirmed that most of the documents do not relate to ICANN org’s operational activities, and are therefore not appropriate subjects of DIDP requests.⁶²

a. The Response to Items No. 1, 2, 4, 5, and 9 Complies with Applicable Policies and Procedures.

Items No. 1, 2, 4, 5, and 9 sought the disclosure of emails relating to the CPE process:

- All “[i]nternal e-mails among relevant ICANN [org] personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review (Item No. 1);
- All “[e]xternal e-mails between relevant ICANN [org] personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including e-mail attachments)” that were provided to FTI by ICANN as part of its independent review (Item No. 2);
- All “100,701 emails, including attachments, in native format” provided to FTI by ICANN [org] in response to FTI’s request (Item No. 4);
- All emails provided to FTI that (1) are “largely administrative in nature,” (2) discuss[] the substan[ce] of the CPE process and specific evaluations,” and (3) are “from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines” (Item No. 5); and
- All documents provided to FTI by Chris Bare, Steve Chan, Jared Erwin, Christina Flores, Russell Weinstein, Christine Willett and any other ICANN staff (Item No. 9).⁶³

Consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, determined that certain of the documents responsive to the Items had

⁶² See DIDP.

⁶³ DIDP Request No. 20180115-1; Request 18-2 Ex. 1, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

already been published, and provided hyperlinks to the publicly available documents.⁶⁴ ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Internal Deliberative Process;
- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information;
- Drafts; and
- Privilege/Investigation.⁶⁵

Notwithstanding those Nondisclosure Conditions, ICANN org 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.⁶⁶

The Requestor does not challenge the applicability of these Nondisclosure Conditions. Indeed, as ICANN org noted in the 2018 DIDP Response, the Requestor *conceded* that the materials FTI relied on in the CPE Process Review reflect “ICANN’s deliberative and decision-making process concerning the CPE process,”⁶⁷ and are therefore subject to the first Nondisclosure Condition identified above.

According to the Requestor, because “ICANN [org] has already disclosed [the requested] documents to FTI as part of its review rather than keep them confidential,” ICANN org cannot

⁶⁴ See 2018 DIDP Response, at Pg. 2-11.

⁶⁵ 2018 DIDP Response, at Pg. 9-13.

⁶⁶ *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 9-13.

⁶⁷ DIDP Request No. 20180115-1, at Pg. 3.

now justify withholding them from the public.⁶⁸ As discussed further in Section V.B.1. below, ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”⁶⁹ ICANN org explained in the DIDP Response that it sought consent from the CPE Provider to release the information, but as the Requestor recognized in Request 18-2, the CPE Provider has not agreed to ICANN org’s request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. Nevertheless, the Requestor claims that ICANN org should still be required to produce these documents.⁷⁰ But, the Requestor points to no policy, procedure, or other commitment undertaken by ICANN that would require it to breach its contractual obligations to accommodate the Requestor.

The Requestor claims that the “DIDP Request only asked for documents provided to FTI and, as such, ICANN has already disclosed those same documents to FTI as part of its review rather than keep them confidential.”⁷¹ This argument completely ignores the fact that the CPE Provider consented to the disclosure of certain materials to FTI—and itself produced the CPE working papers to FTI. By contrast, the CPE Provider has *not* consented to disclosure of – and indeed has threatened litigation if ICANN org were to disclose – the same materials to the public. Accordingly, ICANN org remains bound by its contractual commitment to maintain confidentiality of the materials unless and until the CPE Provider agrees to the release of the

⁶⁸ Request 18-2, § 6, at Pg. 10-11.

⁶⁹ New gTLD Program Consulting Agreement between ICANN org and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

⁷⁰ Request 18-2, § 6, at Pg. 10-11.

⁷¹ *Id.* § 6, at Pg. 10.

information. For the reasons discussed in Section V.B.1 below, ICANN org’s policies and procedures do not require ICANN org to breach its contract with the CPE Provider to accommodate the Requestor’s request.

Additionally, because outside counsel retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN org, all of the disclosures were privileged (as discussed below) unlike the public disclosure that the Requestor seeks. The Requestor indirectly concedes the applicability of the Attorney-Client Privilege Nondisclosure Condition to ICANN org’s internal emails (Item No. 1) when it argues that “ICANN [org] deliberately chooses to hide behind waivable privileges,” and “ensured that critical items . . . be withheld based on the attorney-client privilege.”⁷² Regardless of this concession, the BAMC concludes that ICANN org applied the Nondisclosure Condition consistent with the DIDP when it determined that the attorney-client privilege applied here. As ICANN org explained in the 2018 DIDP Response, ICANN org’s outside counsel—not ICANN org—retained FTI as its agent to assist it with its internal investigation of the CPE process, and to provide legal advice to ICANN org.⁷³ Accordingly, FTI’s working materials, including ICANN’s internal emails, are protected by the attorney-client privilege.

b. The Response to Items No. 6-8 and 12-13 Complies with Applicable Policies and Procedures.

Items No. 6-8, 12, and 13 sought the disclosure of the CPE Provider’s work product:

- All draft CPE Reports concerning .GAY, both with and without comments (Item No. 6);

⁷² Request 18-2, § 6, at Pg. 11.

⁷³ 2018 DIDP Response, at PG. 11, citing FTI’s CPE Process Review Reports, each indicating that they were “Prepared for Jones Day,” ICANN org’s outside counsel; and citing *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 774 (2013).

- All draft CPE Reports concerning .GAY in redline form, and/or feedback or suggestions given by ICANN [org] to the CPE Provider (Item No. 7);
- All draft CPE Reports reflecting an exchange between ICANN org and the CPE Provider in response to ICANN’s questions “regarding the meaning the CPE Provider intended to convey” (Item No. 8);
- All of the “CPE Provider’s working papers associated with” dotgay’s CPE (Item No. 12); and
- “The CPE Provider’s internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets” (Item No. 13).⁷⁴

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, determined that certain of the documents responsive to the Items had already been published, and provided hyperlinks to the publicly available documents.⁷⁵ ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy (Items No. 12 and 13 only);
- Nondisclosure Agreements;
- Drafts; and
- Privilege/Investigation.⁷⁶

Notwithstanding those Nondisclosure Conditions, ICANN org 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, as discussed further below.⁷⁷

⁷⁴ DIDP Request No. 20180115-1.

⁷⁵ See 2018 DIDP Response, at Pg. 16-20.

⁷⁶ *Id.*

⁷⁷ *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 13.

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, it is clear that ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

c. The Response to Items No. 3 and 14-16 Complies with Applicable Policies and Procedures.

Items No. 3 and 14-16 sought the disclosure of FTI’s work product in the course of the CPE Process Review:

- The “list of search terms” provided to ICANN org by FTI “to ensure the comprehensive collection of relevant materials” (Item No. 3);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant ICANN [org] personnel” (Item No. 14);
- All notes, transcripts, recordings, and documents created in response to FTI’s interviews of the “relevant CPE Provider personnel” (Item No. 15); and
- FTI’s investigative plan used during its independent review (Item No. 16).⁷⁸

Again, consistent with the DIDP Response Process, ICANN org identified documents responsive to these Items, that certain of the documents responsive to the Items had already been published, and provided hyperlinks to the publicly available documents.⁷⁹ ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Drafts; and

⁷⁸ DIDP Request No. 20180115-1.

⁷⁹ See 2018 DIDP Response, at Pg. 14-15.

- Privilege/Investigation.⁸⁰

Notwithstanding those Nondisclosure Conditions, ICANN org 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, as discussed further below.⁸¹

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

d. The Response to Items No. 18-21 Complies with Applicable Policies and Procedures.

Items No. 18-21 sought the disclosure of correspondence and documents relating to the CPE Process Review and its scope:

- All communications between ICANN org and FTI regarding FTI’s independent review (Item No. 18);
- All communications between ICANN org and the CPE Provider regarding FTI’s independent review (Item No. 19);
- All communications between FTI and the CPE Provider regarding FTI’s independent review (Item No. 20); and
- All documents and communications regarding the scope of FTI’s independent review (Item No. 21).⁸²

Consistent with the DIDP Response Process, ICANN org identified documents responsive to Items No. 18-21, determined that certain of the documents responsive to the Items

⁸⁰ *Id.*

⁸¹ *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. *See id.* at Pg. 9-21.

⁸² DIDP Request No. 20180115-1.

had already been published, and provided hyperlinks to the publicly available documents.⁸³

ICANN org determined that the remaining documents responsive to the Items were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;
- Confidential Business Information; and
- Privilege/Investigation (Items No. 18 and 21 only).⁸⁴

Notwithstanding those Nondisclosure Conditions, ICANN org 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, as discussed further below.⁸⁵

For the same reasons discussed above concerning Items No. 1, 2, 4, 5, and 9, ICANN org adhered to the DIDP when it determined that these Nondisclosure Conditions—particularly those relating to the deliberative process, ICANN org’s contractual confidentiality obligations to the CPE Provider, and the attorney-client privilege, applied to the requested items.

2. ICANN Org 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.⁸⁶

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.⁸⁶ Information subject to these Nondisclosure Conditions are not appropriate for

⁸³ See 2018 DIDP Response, at Pg. 21-22.

⁸⁴ *Id.*

⁸⁵ *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.* at Pg. 21.

⁸⁶ DIDP.

disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN org 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.⁸⁷ In conformance with the DIDP Response Process, ICANN org undertook such an analysis with respect to each Item, and articulated its conclusions in the 2018 DIDP Response.

As explained above, the Requestor does not challenge the applicability of the Nondisclosure Conditions to the documentary information requested in Items No. 1-9, 12-16, and 18-21. Instead, the Requestor asserts that ICANN org should have concluded that the public interest in disclosing these documents outweighed the harm that may be caused by such disclosure.⁸⁸ According to the Requestor, the public interest in disclosing the requested documents stems from the fact that ICANN is “ask[ing] everyone affected by the [CPE Process Review] Reports to accept their conclusions without question, even where there are clear problems and contradictions contained within the reports.”⁸⁹ The Requestor claims that the “clear problem[.]” is that the Dot Registry IRP Panel concluded that there was “a close nexus between ICANN staff and the CPE Provider,” “in clear contrast to FTI.”⁹⁰ The Requestor claims that it cannot “analyze whether ICANN unduly influenced the [CPE Provider] without the underlying documents.”⁹¹ The Requestor’s claims do not support reconsideration.

⁸⁷ *Id.*

⁸⁸ Request 18-2, § 6, at Pg. 10-11, § 8, at Pg. 17.

⁸⁹ *Id.*, § 6, at Pg. 10.

⁹⁰ *Id.*

⁹¹ *Id.*

The Board’s decision to initiate the CPE Process Review was in part in response to issues raised in the Dot Registry IRP Panel Declaration.⁹² The Dot Registry IRP Panel considered the limited record before it in the context of that IRP, and observed that, based on that limited record, ICANN staff appeared to be “intimately involved in the [CPE] process.”⁹³ At the same time, the Panel emphasized that the Panel was “not assessing whether ICANN staff or the [CPE Provider] failed themselves to comply with obligations under the Articles [of Incorporation], the Bylaws, or the [Guidebook].”⁹⁴ In response, the Board undertook serious consideration of the Panel’s comments concerning how ICANN org may have interacted with the CPE provider and the CPE reports, and directed ICANN org to undertake the CPE Process Review.⁹⁵

To be sure, the Board did *not* direct that the CPE Process Review come to one conclusion over another and the Requestor has provided no evidence to the contrary. Instead, FTI was retained to assess—and reach its own conclusions concerning—three issues: (1) ICANN org’s interactions with the CPE Provider; (2) the way the CPE Provider applied the CPE criteria; and (3) the research referenced in the CPE Reports placed on hold. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. Accordingly, the Requestor’s belief that the conclusions in the CPE Process Review Reports are inconsistent with earlier analyses undertaken under different circumstances (such as the Dot Registry IRP) is no more than that—a belief—and it is immaterial. The Requestor provides no evidence to support this claim, because there is none. This baseless belief does not justify requiring ICANN org to permit the Requestor to

⁹² See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

⁹³ Dot Registry IRP Panel Declaration, ¶ 93, at Pg. 35, *available at* <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

⁹⁴ *Id.* ¶ 152, at Pg. 60.

⁹⁵ See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

conduct its own re-evaluation of the CPE process or of the CPE Process Review Reports, and does not demonstrate that the public interest in disclosing the documents FTI reviewed in the course of the CPE Process Review outweighs the harm that may come from disclosing those documents. This argument does not support reconsideration.

The Requestor next argues that the documents at issue in Request 18-2 “are given even greater import because . . . the CPE Provider has not agreed to disclose the documents and has threatened litigation.”⁹⁶ The Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure.

The Requestor also argues that ICANN org “failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.”⁹⁷ This argument fails because ICANN org *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.⁹⁸ There is no policy or procedure requiring that ICANN org to provide *additional* justification for nondisclosure.⁹⁹ Further, ICANN org explained why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. For example, ICANN org explained that the draft CPE reports and FTI’s notes of interviews of CPE Provider personnel reflected the CPE Provider’s Confidential Information, including its processes and methods for completing CPE reports and the Personal Information of CPE Provider personnel, two categories

⁹⁶ Request 18-2, § 6, at Pg. 10 (internal quotation marks and citations omitted).

⁹⁷ *Id.*, § 6 at Pg. 10-11.

⁹⁸ 2018 DIDP Response at Pg. 9-22.

⁹⁹ *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

of information for which ICANN org is contractually obligated to maintain confidentiality.¹⁰⁰ Accordingly, reconsideration on this basis is not warranted.

Relatedly, the Requestor asserts that rather than state compelling reasons for nondisclosure, ICANN org “deliberately cho[o]ses to hide behind waivable privileges as an excuse to not disclose the documents.”¹⁰¹ The Requestor claims that because ICANN org’s outside counsel retained FTI, “ICANN [org] ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole, an action that is deeply troubling and raises red flags.”¹⁰²

As an initial matter, the Requestor provides no basis—because there is none—for its unfounded assertions that: (1) ICANN org relied on outside counsel to “ensure[.]” that documents would not be subject to public disclosure “based on the attorney-client privilege loophole,” or (2) the documents in question “could expose both ICANN and the CPE Provider” of some unidentified wrong.

Second, the Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the 2018 DIDP Request.¹⁰³ No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor’s request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason not to disclose certain documents.¹⁰⁴

Third, the Requestor’s desire that ICANN org waive that privilege does not demonstrate that the public interest in disclosure outweighs the harm that may occur if privileged materials

¹⁰⁰ See 2018 DIDP Response at Pg. 12-17, 20-22. ICANN org also explained why the attorney-client privilege and the Nondisclosure Condition protecting documents whose disclosure might prejudice an internal investigation applied to certain of the items requested. *Id.* at Pg. 11-12.

¹⁰¹ Request 18-2, § 6, at Pg. 11.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ DIDP Nondisclosure Conditions.

are disclosed. Weakening the attorney-client privilege by forcing a client—here, ICANN org—to waive that privilege at the request of a third party like the Requestor poses a significant threat to ICANN org’s ability to trust that its future communications with counsel will be protected, and therefore undermines ICANN org’s ability to communicate candidly with counsel.¹⁰⁵ This potential harm outweighs the public interest in disclosing privileged materials. The BAMC notes that it is a fundamental principle of law that the invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. The BAMC therefore rejects the Requestor’s assertion that the attorney-client privilege is merely a “loophole” that ICANN org sought to take advantage of here, and its suggestion that ICANN org’s invocation of the privilege indicates that ICANN org had anything to hide. Accordingly, reconsideration is not warranted on these grounds.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because “ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology.”¹⁰⁶ Initially, the Requestor is incorrect in its assertion that ICANN org determined that applicants would not be interviewed or submit materials in the course of the CPE Process Review. FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports.¹⁰⁷ FTI acknowledged that certain applicants had requested that they be interviewed, but explained that “such interviews are not necessary or appropriate” to the

¹⁰⁵ *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”).

¹⁰⁶ Request 18-2, § 6, at Pg. 11.

¹⁰⁷ *See, e.g.* Scope 2 Report, at Pg. 3-9, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

investigation because neither the Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Guidebook and the CPE Guidelines, the CPE Provider did not interview the applicants.¹⁰⁸ Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.¹⁰⁹ Despite that conclusion, FTI ensured that it understood the concerns applicants raised in reconsideration requests and IRP proceedings concerning the CPE process.¹¹⁰ The Requestor has not identified a policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one. Accordingly, the Requestor has not demonstrated that FTI's decision not to interview or accept materials submitted by CPE applicants supports the public interest in disclosing the documents that FTI did consider in the course of the CPE Process Review. Reconsideration is not warranted on this basis.

B. ICANN Org Adhered to its Commitments and Core Values in Responding to the 2018 DIDP Request.

1. ICANN Org Adhered to its Commitments to Accountability, Openness, and Transparency in Responding to the 2018 DIDP Request.

The Requestor asserts that ICANN org's determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments to "operate to the maximum extent feasible in an open and transparent manner,"¹¹¹ "apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for

¹⁰⁸ *Id.* at Pg. 8.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at Pg. 8.

¹¹¹ ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

discriminatory treatment,”¹¹² and “[r]emain accountable to the Internet community through mechanisms defined in [the] Bylaws that enhance ICANN’s effectiveness.”¹¹³

As a preliminary matter, the BAMC notes that the DIDP was developed as the result of an independent review of standards of accountability and transparency, which included extensive public comment and community input. The DIDP—and particularly the Nondisclosure Conditions—balance ICANN org’s commitments to transparency and accountability against its competing commitments and obligations.¹¹⁴ This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without contravening its commitment to transparency.

As the *Amazon EU S.A.R.L.* Independent Review Process Panel noted in June of 2017:

[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.¹¹⁵

ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy

¹¹² ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(v).

¹¹³ *Id.*, Art. 1, § 1.2(a)(vi); Request 18-2, § 6, at Pg. 9-10. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-2. See Request 18-2, § 6, at Pg. 9. The BAMC considers Request 18-2 under the Bylaws in effect when the Requestors submitted the reconsideration request which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor’s claims under the 22 July 2017 version of the Bylaws.

¹¹⁴ *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

¹¹⁵ *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission.”¹¹⁶

A critical competing Core Value is ICANN org’s Core Value of operating with efficiency and excellence¹¹⁷ by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. ICANN org’s contract with the CPE Provider includes a nondisclosure provision, pursuant to which ICANN org is required to “maintain [the CPE Provider’s Confidential Information] in confidence,” and “use at least the same degree of care in maintaining its secrecy as it uses in maintaining the secrecy of its own Confidential Information, but in no event less than a reasonable degree of care.”¹¹⁸ Confidential Information includes “all proprietary, secret or confidential information or data relating to either of the parties and its operations, employees, products or services, and any Personal Information.”¹¹⁹ The materials that the CPE Provider shared with ICANN org, ICANN org’s counsel, and FTI reflect the CPE Provider’s Confidential Information, including confidential information relating to its operations, products, and services (i.e., its methods and procedures for conducting CPE analyses), and Personal Information (i.e., its employees’ personally identifying information).

As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, if appropriate ICANN org seeks consent from the contractor to release information.¹²⁰

Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain

¹¹⁶ ICANN Bylaws, 22 July 2017, Art. 1, Section 1.2(c).

¹¹⁷ ICANN Bylaws, Art. 1, Section 1.2(b)(v).

¹¹⁸ New gTLD Program Consulting Agreement between ICANN org and the CPE Provider, Exhibit A § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

¹¹⁹ <https://newgtlds.icann.org/en/applicants/cpe>.

¹²⁰ See, e.g., Response to Request 20150312-1 at Pg. 2, available at <https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf>.

information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org's request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org's contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

The community-developed Nondisclosure Conditions specifically contemplate nondisclosure obligations like the one in ICANN org's contract with the CPE Provider.¹²¹ Accordingly, the Requestor's generalized invocations of ICANN org's commitments to transparency, openness, and accountability do not support reconsideration here.

Additionally, the Requestor asserts that part of ICANN org's response to Item No. 3, in which ICANN org noted that the Scope 1 Report "includes the information responsive to" Item No. 3.¹²² The 2018 DIDP Response explained that

the Scope 1 Report states, "[i]n an effort to ensure the comprehensive collection of relevant emails, FTI provided ICANN org with a list of search terms and requested that ICANN org deliver to FTI all email (including attachments) from relevant ICANN org personnel that 'hit' on a search term. The search terms were [designed] to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation...the search terms were quite broad and included the names of ICANN org and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website."¹²³

The Requestor claims that this is "the exact same language" that the Requestor used in Item No. 3, which sought "[t]he 'list of search terms' provided to ICANN by FTI 'to ensure the

¹²¹ See DIDP (Nondisclosure Condition for "[i]nformation . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement").

¹²² 2018 DIDP Response, at Pg. 13.

¹²³ *Id.* at Pg. 13-14, *quoting* Scope 1 Report at Pg. 10.

comprehensive collection of relevant materials,”¹²⁴ and “an obvious attempt to side-step the disclosure of any responsive documents.”¹²⁵

ICANN org’s response did more than repeat the language in Item No. 3. First, as quoted above, ICANN org noted that the Scope 1 Report had explained that the search terms “included the names of ICANN org and CPE Provider personnel who were involved in the CPE process,” along with “words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website.”¹²⁶ Additionally, ICANN org explained that “documents responsive to Item [No.] 3” were not appropriate for disclosure because they were subject to certain Nondisclosure Conditions, and ICANN org determined that the public interest in disclosing documents reflecting the search terms did not outweigh the harm that may be caused by such disclosure.¹²⁷ For the reasons explained above, ICANN org’s determination concerning the disclosure of such documents was consistent with established policy and ICANN org’s commitments and core values. Accordingly, this argument does not support reconsideration.

2. ICANN Org Adhered to its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the 2018 DIDP Request.

The Requestor asserts that “[p]ursuant to [international] laws and conventions, there is an ‘international minimum standard of due process as fairness-based on the universal views of all legal systems,’” which is “violated ‘when a decision is based on evidence and argumentation that a party has been unable to address.”¹²⁸ The Requestor argues that the CPE Process Review did

¹²⁴ 2018 DIDP Request.

¹²⁵ Request 18-2, § 6, at Pg. 9.

¹²⁶ 2018 DIDP Response at Pg. 13-14, *quoting* Scope 1 Report at Pg. 10.

¹²⁷ *Id.* at Pg. 14, 22.

¹²⁸ Request 18-2, § 6, at Pg. 8 (quoting Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law,” 23 *Duke J. of Comparative and Int’l L.* 411, 422 (2013))

not provide due process to the Requestor because “it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available.”¹²⁹

The BAMC recognizes ICANN org’s commitment to conform with relevant principles of international law and conventions.¹³⁰ Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.¹³¹ ICANN org established the DIDP in support of its commitment to transparency and accountability and with extensive community input. That procedure and those specific commitments are not outweighed by ICANN org’s general commitment to conform with relevant principles of international law. ICANN org was not required to establish a DIDP, but instead did so voluntarily. Accordingly, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP, and the fact that certain Nondisclosure Conditions apply here does not demonstrate that ICANN org violated its commitment conform to relevant principles of international law.

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. “[T]he fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the Requestor.¹³² Accordingly, the Board was not obligated to direct ICANN org to undertake the

and Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* 179 (Mar. 15, 2017)).

¹²⁹ *Id.*

¹³⁰ ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

¹³¹ Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

¹³² *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

CPE Process Review at all, let alone set a particularly wide or narrow scope for it or for the disclosure of supporting materials to the Requestor.¹³³

The Requestor’s conclusory statement that because it did not have access to every document underlying the CPE Process Review Reports, the Requestor has been deprived of due process, does not support reconsideration. The Requestor asserts—based entirely on speculation—that the CPE Process Review Reports are “the one piece of significant evidence relevant to its Request 16-3.”¹³⁴ The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-3.

Further, when the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.¹³⁵ The Board noted that the Requestor’s arguments and challenges to the merits of the report issued by the CPE Provider in connection with its community application for the .GAY gTLD will be addressed in connection with Request 16-3,¹³⁶ and, additionally the BAMC is required to act “on the basis of the public written record, including information submitted by the Requestor.”¹³⁷ Accordingly, there is no basis for the Requestor’s assumption that the CPE Process Review Reports are “the one piece of significant evidence relevant to . . . Request 16-3,” particularly in light of the volume of materials

¹³³ For the same reasons, the Board was not required to “seek . . . input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation,” or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. See 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

¹³⁴ Request 18-2, § 6, at Pg. 8.

¹³⁵ See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, available at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹³⁶ See *id.*

¹³⁷ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(p).

submitted by the Requestor in support of Request 16-3.¹³⁸ This argument does not support reconsideration.

For all of the reasons discussed above, reconsideration is not warranted.

VI. Recommendation.

The BAMC has considered the merits of Request 18-2, and, based on the foregoing, concludes that ICANN org did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the 2018 DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 18-2.

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, in which case, the BAMC "shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request."¹³⁹ Request 18-2 was submitted on 15 March 2018. To satisfy the thirty-day target deadline, the BAMC would have to have acted by 14 April 2018. Due to scheduling, the first opportunity that the BAMC has to consider Request 18-2 is 5 June 2018, which is within 90 days of receiving Request 18-2.¹⁴⁰

¹³⁸ Request 18-2, § 6, at Pg. 8.

¹³⁹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

¹⁴⁰ *Id.*

Exhibit 35

Document information

Publication

Competing for the Internet - ICANN Gate - An Analysis and Plea for Judicial Review through Arbitration

Bibliographic reference

Chapter 2: The Regulatory Framework, in Flip Petillion, Competing for the Internet - ICANN Gate - An Analysis and Plea for Judicial Review through Arbitration, (© Kluwer Law International; Kluwer Law International 2017) pp. 5 - 62

Chapter 2: The Regulatory Framework

A ICANN AND ITS ROLE

1 Introduction

ICANN is the abbreviation for 'Internet Corporation for Assigned Names and Numbers', a not-for-profit public-benefit corporation formed in September 1998. (4) ICANN's primary mission is to coordinate, at the highest level, the Internet's systems of unique identifiers globally, (5) and in particular to ensure the stable and secure operation of the Internet's unique identifier systems, the Domain Name System or 'DNS'. (6)

The DNS is a hierarchical structure that permits the use of a stable and orderly system of unique identifiers, allowing computers to communicate over the Internet. The Internet is a network of computer networks. Every computer on this network has a unique identifying Internet Protocol address or 'IP address'. Each IP address can be substituted with an easy to remember set of characters or letters which becomes the domain name. Domain names have become part of website addresses, email addresses and File Transfer Protocol (FTP) servers. The DNS helps make the Internet more accessible by allowing users to type in a domain name instead of an IP address, for example typing 'www.wolterskluwer.com' rather than typing '85.17.2.5'. Even in a world where applications can be a substitute for more traditional webpages, and where the majority of traffic is generated via search engines and not via direct navigation, domain names have retained much of their original appeal. A domain name can provide a source of recognition and serve as an anchor of trust. When visiting the website of a brand owner, the domain name in the browser's address bar may give assurance that the visitor is dealing with the true brand owner. The DNS also enables a single domain name to be linked to multiple servers, making it possible to offer a redundancy solution in case a server is down. The DNS also offers crucial support for the technological developments known as the 'Internet of things'. Developed in the 1980s, (7) the DNS remains a critical backbone supporting the Internet and the digital economy.

As the invention of the Internet and the DNS predates the existence of ICANN by many years, it is interesting to look at how ICANN became the custodian of this critical infrastructure.

2 History of the Internet

a The Invention Of The Internet And The Dns

It is hard to imagine a world where computers are stand-alone devices unable to communicate with each other. In today's world, we are constantly connected to a vast network of computers and servers via our smartphones, personal computers and tablets. In modern households, refrigerators, home appliances and other electronic devices are also connected and monitored via the Internet. The Internet has fundamentally changed the way we live. However, it may come as a surprise to many that the origins of the Internet can be traced back as far as the 1960s.

Until the late-1960s, long-distance communications occurred over circuit-switched networks. In a circuit-switched network, a continuous physical connection is created between the sender and the receiver, which lasts for the duration of the communication. In a circuit-switched network, there can be only one communication session per circuit at any one time. The main advantage of a circuit-switched network is that it provides for a continuous stream of data or bits and that, for the duration of the connection, maximal use can be made of the available bandwidth. Once the connection has been established, there will be no delays caused by other users of the network.

But, its main advantage is also its biggest weakness: excess bandwidth in a circuit-switched network is unavailable to other connections on the same network, making the network inefficient for the communication of mass data among a broad user network. Already in the early to mid-1960s, researchers were developing a communication method using packets rather than circuits. The first paper on this so-called packet switching theory was published in 1961. (8) Via packet switching technology, the data is divided into smaller packets and these packets are sent through the network independently. (9) The packets are distributed over multiple communication sessions, allowing for a more efficient use of the network's capacity and the communication of bigger data, divided in small packets. When, in 1965, researchers managed to make the first long distance communication between a computer at the Massachusetts Institute of Technology (MIT) and a computer in California, they used a low speed dial-up telephone line. (10) The experiment showed that computers could work together over long distances, but reaffirmed the need for packet switching technology as the circuit switched telephone system proved to be inadequate for communicating computer data efficiently over long distances. (11) Researchers quickly understood that packet switching technology would be more efficient and would allow for the communication of data in excess

of the maximum capacity of single telephone lines.

The U.S. Department of Defense was quick to recognize the military potential of a computer communication network. Already back in 1951, the U.S. Air Force had commissioned MIT to design an early-warning network to guard against a Soviet nuclear bomber attack. The network was to include a network of computers capable of communicating data about airplane movements in 'real time'. (12) The technical developments in the mid-1960s created an ideal environment for the Department of Defense, through its Advanced Research Project Agency (ARPA) to invest in a research project to build a decentralized communication network, and it did not take long for researchers to obtain USD 1 million in funding. (13) In 1967, the first plan for this communication network, the ARPANET, was published. (14) The plan was later refined to include packet switching technology, and the design was put into practice in September 1969 when the first packet switch, called Interface Message Processor (IMP), and a host computer were connected at the University of California, Los Angeles (UCLA). One month later, a second host computer and IMP were connected at the Stanford Research Institute (SRI), and on 29 October 1969, the first successful host-to-host message was sent from UCLA to SRI using the ARPANET. (15) Other institutions soon joined, connecting universities, the military and industries. In December 1970, researchers finished the development of a communication protocol, called the Network Control Protocol (NCP), which was implemented on the ARPANET throughout 1971 and 1972 and allowed ARPANET users to develop applications. (16) In 1972, email was introduced and quickly became one of the most popular applications on the ARPANET, allowing researchers to communicate better over long distances. (17) Also in 1972, the File Transfer Protocol (FTP) was developed, allowing the efficient and reliable transfer of files between host computers at remote locations and creating the possibility to store and access files at remote locations. (18)

However, the ARPANET was not the Internet, nor did it evolve into the Internet. It was a research project that connected at most about 200 people in a twenty-one-node network, and it was not very user-friendly. (19) The ARPANET's biggest achievement is probably that it brought together the people who later played a role in the technical development of the Internet. (20)

By the mid-1970s, many other computer networks emerged. *E.g.*, NASA established a computer network, the U.S. Department of Energy set up two, and the U.S. National Science Foundation (NSF) provided a grant to the Computer Science community to set up yet another network. (21) The majority of these early networks was intended for use within closed communities. Each network had its own design and characteristics with many different communication protocols, which made them incompatible with one another. In the early 1970s, researchers working on the ARPANET had been looking for ways to integrate radio and satellite networks into the ARPANET computer network. (22) The networks were largely incompatible; they operated in a completely different environment, using completely different transmission speeds and infrastructure. The researchers realized that the best way to integrate these networks was by establishing a gateway between the networks that would operate as a sort of translator between them. The idea of a router was born. Both networks would need to comply with the – yet to be developed – standards of the router, and the router's sole job would be to translate ARPANET packets into radio/satellite packets and *vice versa*. (23) The use of routers and the adoption of a universal protocol made interconnection between a virtually infinite number of networks possible.

The first version of a universal inter-networking protocol, or 'Transmission Control Protocol/Internet Protocol' (TCP/IP) was developed from 1974 onwards (24) and was deployed for military networks in 1982–1983. (25) Other networks also started using the TCP/IP to connect with each other in an expanding network of networks, which became known as the Internet. (26) From its early stages, the scope of this emerging Internet was international; the network of networks included the ARPANET and several U.S. research centers and universities as well as European institutes, such as University College London, the French Cyclades network, the British Post Office, etc. (27)

The connection between computers on the network was established using a unique numbering system. Such a system was first proposed by Jon Postel, who wrote in 1972:

'I propose that there be a czar (me?) who hands out official socket numbers for use by standard protocols. This czar should also keep track of and publish a list of those socket numbers where host specific services can be obtained.' (28)

Jon Postel became the first 'czar' for handing out unique numbers to network computers on the emerging Internet, and he refined the numbering system throughout the 1970s and the beginning of the 1980s. (29) In 1981, the addresses had a fixed length of four octets or 32 bits. (30) This addressing system became known by the name Internet Protocol version 4 (IPv4), (31) and was the first version that was effectively implemented on the ARPANET. (32) IPv4 has been replaced by Internet Protocol version 6 (IPv6), which uses 128 bits, theoretically allowing 2¹²⁸ IP addresses, (33) which is far more than the soon to be exhausted 2³² (approximately 4.29 billion) IP addresses available under IPv4. IPv4 however remains responsible for the majority of Internet traffic today, (34) and the transition to IPv6 creates technological challenges as demonstrated by the large number of publications dealing with transition mechanisms. (35)

Throughout the 1980s, the assignment of IP addresses remained in the hands of individuals;

¹⁰ first the ‘czar’, Jon Postel, (36) who handed over the assigning authority to fellow researcher Joyce Reynolds in 1983. (37) The first steps towards making the assigning authority more institutionalized came with the creation of IANA. IANA is mentioned for the first time in a publication of 1988. (38) Joyce Reynolds remained IANA’s contact until the 1990s. (39)

Computers on the Internet were able – as they still are today – to communicate efficiently via the IP addresses. The numeric IP addresses are less easily recognizable for humans. Every IP address that was assigned to a network was also assigned to the name of the network. (40) In the early stages, with a fairly limited number of computers on the network, it was relatively easy to navigate through the directory of names and numbers and to identify the correct computer. But as the network expanded, the directory became difficult to manage; the master file of the directory required constant updating, and all computers on the network needed a copy of the master file, which resulted in errors and slowness caused by the continual need to download the master file. (41) A more structured approach, adapted to the growing size of the Internet was required. In 1981, the idea to create a hierarchical name-space and to partition the name-space into different domains was brought forward. (42) The idea was further developed, (43) and ultimately resulted in the crystallization of a hierarchical structure, which became known as the DNS. (44)

¹¹ At the top of the DNS hierarchical structure is a single unique root. The unique root distinguishes the Internet from alternative networks. The root contains the root zone file and thirteen clusters of root name servers. (45) The root zone file is the list of Top Level Domains (TLDs), with references to the name servers for each TLD (the TLD name server). TLDs, such as .com, .org, .mil, .gov, .us, .eu, .fr, etc., appear at the right of the rightmost dot in an Internet address or domain name. The root name servers are specialized computers that provide connections between physical networks; (46) they operate as the place where the query for a unique IP address starts. The process is as follows: computers connect to the Internet, using a modem, Ethernet or other communication line. Connections are provided by Internet Service Providers (ISPs). When a computer wants to access a specific computer or server on the Internet (e.g., the server on which Google’s search engine is available or the server of Wolters Kluwer’s website), the ISP will initiate a query for the unique IP address. For example, when an Internet user wants to access Wolters Kluwer’s website using *wolterskluwer.com*, the ISP’s name server will start its query at one of the root name servers. The root name server will respond by giving the location of the TLD name server – the .com name server in our example – as it appears in the root zone file. The ISP’s name server will then query the TLD name server. The TLD name server, in turn, maintains records of all Second Level Domains (SLDs) in a specific TLD. In our example, ‘wolterskluwer’ is the SLD within the .com TLD. The operator of the TLD, named the ‘registry’ or ‘registry operator’, is responsible for maintaining accurate records of all SLD name servers, and will provide the ISP’s name server with the location of the SLD name server. The SLD name server is generally controlled by the domain name holder, who can use the domain name for e.g., the exchange of emails, file sharing or, since the invention of the World Wide Web (WWW) in 1989 and its implementation in 1990, (47) the publication of websites. The SLD name server can also operate as a second-level registry and refer to a sub-level domain.

The obvious benefit of the DNS hierarchical structure is that it is no longer necessary for each computer to have a full list of addresses for every other computer. Each computer needs only the address of an official root name server. (48) In practice, the root name servers will not be queried for every domain name request. The ISP’s servers will cache the information and rarely revisit the root name servers.

Another advantage of the DNS is that multiple IP addresses can be linked to a single domain name, allowing for redundancy and better performance.

b. Evolution of Governance Structure

(1) The Rapid Expansion of the Internet

¹² In the early stages of the Internet, one of the most important networks was the National Science Foundation NET (NSFNET), developed with the backing of the National Science Foundation (NSF). The NSF is a U.S. Government agency that has the statutory mission ‘to promote the progress of science; to advance the national health, prosperity and welfare; to secure the national defence.’ (49) Unlike most other early computer networks, the NSFNET was designed to be open to all academic users and not limited to mere handfuls of specialized contractors and researchers. (50) The NSFNET essentially provided the technical backbone to establish a fast growing network of networks. Between 1991 and 1992 the network almost doubled in size, going from connecting over 3,500 networks to over 6,000 networks. (51) The amount of data transferred increased from 1.3 trillion bytes per month in 1991 to 17.8 trillion bytes per month in 1994. (52) The popularity of the Internet was boosted by the invention of the WWW and the use of the Internet for commercial purposes.

Between 1991 and 1992, the NSF had assumed responsibility for coordinating and funding the management of the non-military part of the Internet infrastructure. (53) The NSF was granted statutory authority to allow commercial activity on the NSFNET in 1992, (54) and this created interest in the private sector. On 31 December 1992, the NSF entered into a cooperative agreement with Network Solutions, Inc. (NSI). (55) NSI took over responsibility for the coordination and maintenance of the DNS, and registered domain names in the generic gTLDs on a first come, first served basis. (56)

(2) The Commercialization of the Internet and Its Challenges

On 13 September 1995, the NSF allowed NSI to charge user fees for the registration of domain names. (57) NSI was authorized to impose an annual fee of USD 50 per second level domain name in .gov, .edu, .com, .net and .org, 30% of which was to be deposited into a separate account for the preservation and enhancement of the intellectual infrastructure of the Internet. (58) Nevertheless, NSI's monopoly over domain name registrations gave rise to criticism: concern grew over the stability and regulation of the DNS, and the number of trademark disputes regarding the Internet's naming system rapidly increased. (59) It was not long before the U.S. Government took steps to address the growing dissatisfaction about the absence of competition, the commercialization of the Internet and the lack of a formal and accountable structure to manage the Internet's critical infrastructure and functions. (60) The cooperative agreement between the NSF and NSI was set to expire on 30 September 1998. (61) The growing criticism and the upcoming expiry date created a clear incentive for the U.S. Government to affirm its authority over the Internet and to have an alternative Internet Governance system installed before the expiration of the contract.

(3) Privatizing Internet Governance

In response to the growing criticism concerning Internet Governance, and in anticipation of the expiry date of the cooperative agreement, the Clinton administration began privatization efforts in July 1997 in an attempt to increase competition and to promote international participation in the DNS. (62) The U.S. Department of Commerce (DoC) issued a request for comments to ascertain the views of the public regarding various DNS management proposals as well as the underlying policy issues. (63) The U.S. Government received 432 comments, (64) and it was clear from the start that the U.S. Government and the public recognized the global significance of the Internet, and that they were looking for an accountable and fair governance structure, aimed at increasing competition and relying on market mechanisms and self-governance by the private sector, with input from governments. (65) The tension between private sector-led self-governance and governmental input was apparent from the very start, and commentators asked for clarification about the role of governments and the limitation of their involvement. (66) To promote competition, there was immediate and considerable support for 'cautiously and judiciously' adding gTLDs once the new governance structure was in place. The public was concerned, however, about the stability of the system and the potential for a significant increase in domain name and trademark disputes, and it was wary of new governance mechanisms. (67) Almost twenty years later, these concerns are still very much alive.

(a) Creating Policy: The Green Paper

On 30 January 1998, the DoC issued a proposal to improve the technical management of Internet names and addresses. (68) The proposal, which became known as the 'Green Paper', was published on 20 February 1998, (69) and a public comment period ran until 23 March 1998. (70) The Green Paper set out a plan whereby the U.S. Government would gradually transfer existing IANA functions, the root system and the appropriate databases to a new not-for-profit corporation. (71) The plan was for the U.S. Government to transfer operational responsibility to the new entity, but to maintain policy oversight 'to assure stability until the new corporation is established and stable, phasing out as soon as possible'. (72)

Many commentators from the international community criticized the Green Paper, emphasizing the international scope of the Internet and the importance for the U.S. Government to acknowledge the Internet's inherently global nature and to involve the global community. (73) The European Community (now, the European Union) called for a more international approach in Internet governance, and expressed their concern that, 'in the name of the globalization and privatization of the Internet' the U.S. would claim and consolidate 'permanent US jurisdiction over the Internet as a whole.' (74) The United Nations, in connection with its Asia-Pacific Development Information Programme (APDIP) called for increased transparency and for the further progress and administration of the Internet 'in partnership with an organization which unmistakably represents the international community of Internet regulators, providers and users.' (75) It also warned that '[t]he call to relinquish government control over this critical resource may be premature and counter-productive', as 'in the vast majority of countries, access to the Internet depends wholly on Government engagement, participation and support'. (76) The Japanese Telecommunications Bureau shared the call for internationalization of the Internet's management and emphasized the need for democratic decision-making and fairness. (77) Similar concerns were expressed by the Internet industry and civil society in Asia, Australia and New Zealand. (78) The International Trademark Association (INTA) also noted 'the importance of incorporating and being mindful of the international and commercial nature of the Internet.' (79) In the U.S. itself, academics, companies and associations voiced a similar plea to include the international community. (80)

A significant number of commentators expressed their support for a proposed plan to hand substantial authority over Internet policy to a Swiss not-for-profit organization called CORE (International Council of Registrars). (81) The plan, that came to be known as the 'Generic Top-Level Domain Memorandum of Understanding' or 'gTLD-MoU' received support from the International Telecommunications Union (ITU), a UN agency. However, in May 1997, the U.S. Government had already indicated that it would not support the gTLD-MoU. (82) Although the gTLD-MoU received broad international support, there was no consensus concerning CORE's proposal, and the U.S. Government did not change its mind about the gTLD-MoU. But the U.S.

Government responded to the call for internationalization by transferring important policy decisions to the private sector rather than the U.S. Government. (83)

(b) Finalizing Policy: The White Paper

The final plan for privatization was laid down in a statement of policy, which became known as the 'White Paper'. The White Paper acknowledged the concerns of the international community and the call for fairness and transparency in the decision-making. (84) This plan was a compromise – it proposed increased involvement of the international community and the private sector, while maintaining U.S. leadership – and it was positively received. (85) As a result, the U.S. Government was able to reaffirm its handling of the transition to private sector management. The U.S. Government believed – and rightfully so, in view of the lack of an elaborated international legal framework on Internet governance – that 'it would be irresponsible to withdraw from its existing management role without taking steps to ensure the stability of the Internet during its transition to private sector management.' (86) The U.S. Government insisted that the corporation responsible for DNS policy-making be located in the U.S., officially '[b]ecause of the significant U.S.-based DNS expertise and in order to preserve stability', (87) although according to some, this was mainly inspired to respond to Congressional concerns. (88) In any event, the concern for stability and sufficient DNS expertise seemed legitimate, and the U.S. Government argued that 'the mere fact that the new corporation would be incorporated in the United States would not remove it from the jurisdiction of other nations.' (89) Nevertheless, the U.S. Congress continued to insist until much later that there be U.S. oversight. On 16 November 2005, the U.S. House of Representatives unanimously adopted a resolution stating that 'the authoritative root zone server should remain physically located in the United States and the Secretary of Commerce should maintain oversight of ICANN.' (90) The U.S. Senate also asked that the President 'continue to oppose any effort to transfer control of the Internet to the United Nations or any other international entity.' (91) Some considered, maybe naively, that the physical location in the U.S. had mainly symbolic relevance. (92) More skeptical voices considered it a 'myth that U.S. oversight is completely neutral and intrinsically harmless'; they warned against the opportunities for misuse and denounced the non-transparency of the power wielded. (93)

The White Paper maintained the guiding principles of the Green Paper for management and oversight of the DNS, namely stability, competition, private bottom-up coordination and representation. (94) The entity that was going to take over the management of the DNS had to commit to these principles. With respect to ensuring stability, the White Paper stated:

'The introduction of a new management system should not disrupt current operations or create competing root systems. During the transition and thereafter, the stability of the Internet should be the first priority of any DNS management system. Security and reliability of the DNS are important aspects of stability, and as a new DNS management system is introduced, a comprehensive security strategy should be developed.' (95)

Recognizing the success of the Internet, which because of its decentralized nature encourages innovation and maximizes individual freedom, the U.S. Government wanted a clear commitment from the corporation that was to manage the DNS that it would rely on competition and free market mechanisms:

'Where possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction.' (96)

The White Paper further stressed the importance of bottom-up governance and the need for the DNS custodian to operate for the benefit of the Internet community as a whole, and to develop sound, fair and widely accepted policies for the management of the DNS. (97) This could only be achieved through transparent decision-making. In this respect, the U.S. Government required that the new corporation's processes be 'fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders.' (98) The U.S. Government clarified:

'Typically this means that decision-making processes should be sound and transparent; the basis for corporate decisions should be recorded and made publicly available. Super-majority or even consensus requirements may be useful to protect against capture by a self-interested faction.' (99)

(c) The Challenges for Implementing Policies

Of course, it was not sufficient for the U.S. Government simply to formulate policies asserting control over the DNS. The U.S. Government needed to make sure that it effectively controlled the Internet's unique identifiers and that the stability of the DNS was maintained during the transition of DNS management to an accountable and fair governance structure.

The IANA functions – these include administrative tasks such as the allocation and assignment of IP address blocks, the assignment of technical protocol parameter numbers and maintenance of assigned values, and oversight of the operation of the Internet root server system (100) – were still performed by the Information Sciences Institute (ISI) of the University of Southern California (USC), where IANA was created (101) as part of a research project. (102) The IANA functions would have to be transitioned to the future DNS custodian. And, as mentioned above, the operational aspects of the Internet root server system were performed by NSI according to an agreement which was about to expire. (103) It was to be anticipated

that the researchers at USC would continue to take care of IANA, and that they would be cooperative in the transition. But to guarantee the cooperation of NSI, a commercial entity, was a bigger challenge. On 7 October 1998, the U.S. Government managed to extend the cooperative agreement with NSI, and NSI accepted that the U.S. Government would transfer its DNS obligations under the cooperative agreement to a new corporation, as was foreseen in the White Paper. (104) With this extension, the U.S. Government and NSI agreed to an amendment in which the U.S. Government affirmed its authority over the Internet's root zone. (105) The amended cooperative agreement also laid down the basis for a more competitive environment among domain name registrars by requiring NSI to develop a Shared Registration System (SRS), allowing multiple registrars to provide registration services within the gTLDs for which NSI acted as a registry. (106) The introduction of an SRS, together with equal access for accredited registrars to NSI's registry services, was necessary in order to introduce appropriate competition in the sales of domain names. Before the SRS, NSI was the sole registrar for the existing open gTLDs. A transitioning of the technical IANA functions performed by NSI to a new corporation was not part of the deal. As a result, the U.S. Government and the new corporation would remain dependent on NSI for the performance of these critical functions.

(d) ICANN Becomes the Internet's Steward

In response to the White Paper, the U.S. Government received a proposal from the Internet Corporation for Assigned Names and Numbers (ICANN), a Californian non-profit organization that was created upon the instigation of Jon Postel. (107) Jon Postel's involvement was critical. His 'U.S.-based DNS expertise' was used to justify the U.S. Government's decision to keep DNS management within the U.S., and the U.S. Government expressed the belief 'that the private sector organizers will want Dr. Postel and other IANA staff to be involved in the creation of the new corporation' for the management of the DNS. (108) But rather than the private sector contacting Jon Postel, it was Jon Postel and his lawyer who laid the foundations of this new corporation, and who reached out to a geographically diverse group of individuals to serve on the first (interim) ICANN Board. (109) The first ICANN Board members had little expertise in relation to DNS matters, (110) but that may have been seen by Jon Postel more as an advantage than an inconvenience; Jon Postel would serve as ICANN's CTO, (111) and a Board with less expertise would undoubtedly make technical coordination easier. Jon Postel was reputedly seen as a trusted figure 'by almost everyone interested in DNS policy.' (112) The formation of ICANN was near completion, (113) and negotiations between the U.S. Government and ICANN were at an advanced stage, when Jon Postel died suddenly on 16 October 1998. (114)

Despite the fact that ICANN had lost the figurehead on which its legitimacy and trust was based, (115) the negotiations with the U.S. Government continued. On 20 October 1998, the National Telecommunications and Information Administration (NTIA) informed ICANN that the DoC 'regards the ICANN submission as a significant step towards privatizing management of the domain name system.' (116) However, the U.S. Government indicated that there were remaining concerns *inter alia*, 'in the area of accountability (representational and financial), transparent decision-making processes, conflict of interest.' (117) The U.S. Government recommended that ICANN consult with the Boston Working Group (BWG), the Open Root Server Confederation (ORSC) and others who commented critically on ICANN's proposal. (118)

On 25 October 1998, ICANN installed its first interim Board, Chairman, President and CEO. (119) Not long thereafter, the members of the newly installed ICANN Board discussed changes to the draft Bylaws and decided to hold a conference call with representatives of the BWG and the ORSC on 31 October 1998. (120) Following these discussions, the ICANN Board unanimously adopted its original Bylaws on 6 November 1998, (121) and informed the NTIA the same day. (122) On 14 November 1998, ICANN organized a public meeting to explain its operating principles to the Internet community, and allowed the public to express its concerns. On 19 November 1998, a representative of the U.S. Government had a conference call with ICANN, which resulted in ICANN amending its Articles of Incorporation and Bylaws on 21 November 1998. (123)

Four days later, the U.S. Department of Commerce and ICANN entered into a Memorandum of Understanding (MOU), which was intended to allow ICANN to give the U.S. Government the necessary assurances 'that the private sector has the capability and resources to assume the important responsibilities related to the technical management of the DNS.' (124) The MOU – which was later also referred to as the Joint Project Agreement (JPA) – set various milestones for ICANN: it emphasized the importance of accountability to and representation of the global and functional diversity of the Internet and its users, (125) and required ICANN's collaboration on a plan for the possible expansion of the number of gTLDs, which was to take into account *inter alia*, the recommendation by the World Intellectual Property Organization (WIPO) concerning the development of a uniform approach to resolving trademark/domain name disputes involving cyberspiracy. (126)

The USC, which had been operating IANA as a research project, agreed to transfer the IANA functions to ICANN, subject to the approval of the U.S. Government. (127) Probably the most important aspect of the agreement was that the USC and ICANN recognized the authority of the U.S. Government over the IANA functions (rather than that of the USC's ISI, where IANA had been created). The recognition in this agreement of U.S. Government authority is what allowed the U.S. Government to transfer control gradually to the private sector. On 8 February 1999, the U.S. Government authorized ICANN to perform the IANA functions. (128)

On 26 February 1999, the DoC officially recognized ICANN as the new corporation envisioned in

the White Paper, and authorized ICANN to take over the obligations of the U.S. Government under the cooperative agreement with NSI. (129) Thus, on that date, the U.S. Government effectively granted management authority over the DNS to ICANN.

(e) Keeping Control over the Internet's Governance Structure

The U.S. Government kept its oversight role until recently. Paradoxical as it may seem, the U.S. Government's oversight role was intended to avoid overregulation and interference by governments; the U.S. Government felt it had to assert authority over the Internet in order to avoid a situation where a more international governance structure would allow European or other countries to impose new and more invasive controls on the Internet. (130) It was intended that the U.S. oversight be limited in time. The very purpose of the MOU was to allow a coordinated transition to the private sector and enable ICANN to show that it was capable of carrying out the DNS management functions in accordance with the principles of stability, competition, private bottom-up coordination, and representation. (131) The original MOU was scheduled to come to an end on 30 September 2000. (132) It was expected that, by then, ICANN would have matured into a representative and accountable organization, able to promote competition in the DNS, while maintaining its stable operation. (133) However, the U.S. Government has not relinquished its oversight role until 30 September 2016. The MOU remained in place until 2009, (134) when it was replaced by an Affirmation of Commitments (AoC) between the DoC and ICANN. (135)

In essence, the Internet governance structure has not changed since February 1999. Since that time, ICANN has been in charge of the IANA functions, and therefore responsible for creating the policies that govern the root zone. ICANN also manages important aspects of the cooperative agreement between the DoC and NSI, later Verisign, Inc. (Verisign). Verisign acquired NSI in 2000. After the acquisition, NSI continued to perform its registrar activities, but Verisign took over the registry operator business and the operational control of the Internet's root zone. Verisign kept the registry business when it sold NSI in 2003 and also continued its operational control of the Internet's authoritative root zone. As a result, when ICANN approves a change to the Internet's authoritative root zone, the U.S. Government directs Verisign to implement the change in the root.

The U.S. authority over the root has been severely criticized and characterized as a 'provocation to other governments.' (136) Critics denounce the fact that contract negotiations between the U.S. Government, ICANN and Verisign are largely non-transparent, and they condemn ICANN for favoring U.S.-based economic interests (as evidenced by the redelegation of .org to the Internet Society (ISOC), of .net (and more recently .com) to Verisign). (137)

On 14 March 2014, the NTIA announced the U.S. Government's renewed intent to relinquish its oversight role and conclude the privatization that had begun in 1997. (138) The aim was to complete the transition by 30 September 2015, the expiry date of the then current contract concerning IANA functions. However, the IANA functions contract has been extended until 30 September 2016 to allow ICANN more time to prepare for the transition. Until the transition was completed on 30 September 2016, the joint project between the U.S. Government and ICANN continued.

3 Evolution of ICANN's Role

a. The Early Days of ICANN

During the first year of the joint project between the DoC and ICANN to privatize DNS management, ICANN was able to maintain stability and set up a structure within ICANN to allow for the representation of different stakeholders. Already in August 1999, ICANN adopted the Uniform Domain Name Dispute Resolution Policy (UDRP), which changed the domain name landscape forever and dramatically improved the protection of trademarks on the Internet. (139) The UDRP was developed by WIPO, and provided for the establishment of a 'mandatory administrative procedure concerning abusive registrations' to be adopted 'uniformly across open gTLDs.' (140) The procedure is mandatory in the sense that the registration agreement requires all domain name registrations in an open gTLD to be subject to the administrative procedure if there is a claim initiated against the registration by a third party. Although the UDRP does not exclude the jurisdiction of the courts, the exemplary case administration carried out by WIPO (and later also by other dispute resolution providers) has meant that only a small fraction of the cases have in fact been re-tried in court.

This progress stands in sharp contrast to the concerns regarding accountability and competition. On 15 June 1999, ICANN issued a first status report identifying the progress made so far and the main challenges going forward. (141) ICANN was clearly dismayed and very critical about the lack of NSI cooperation in transforming the DNS into a more competitive environment. ICANN complained that NSI had failed to comply with its deadlines for creating a Shared Registration System (SRS) interface for its .com, .net and .org TLDs, (142) which should have ensured that competitive registrars could use the registry on the same terms as NSI's registrar branch. (143) ICANN saw NSI's behavior as an impediment to competition, and it criticized both the fact that NSI had challenged ICANN's authority regarding policy, and also the manner in which it did so. In this respect, ICANN stated:

'Finally, as a general proposition, NSI has to date refused to accept the policy authority of ICANN, although it continues to "participate" in the creation of ICANN institutions and policies. It has funded and encouraged a variety of ICANN critics, including some whose only common

cause with NSI would appear to be unhappiness with ICANN. In short, NSI has generally been an impediment, not a help, in the transition from government controlled monopoly to a private competitive DNS.' (144)

26 Despite ICANN's complaints, NSI's deadline under the Cooperative Agreement to deploy the SRS was pushed back several times. (145) Nevertheless, when ICANN made its second status report in June 2000, ICANN considered that it had completed its task of ensuring competition in registration services for gTLDs. (146) ICANN reported that the share of net new domain name registrations attributable to the NSI registrar dropped from 100% to under 50%, and that the retail registration pricing dropped from USD 35 per year to USD 10. (147)

ICANN also looked to increase competition at a registry level, and posted a call for new gTLD applications on 15 August 2000, shortly before the initial expiration date of the MOU. This first round of new gTLD applications is discussed in more detail in Chapter 2.C.1 and Chapter 4.A.

b Extending The Timeframe For Privatization

In spite of the progress made, the U.S. Government did not consider that the young ICANN was ready to take on the critical responsibility of managing the DNS without government oversight. On 11 September 2000, the MOU was extended until 11 September 2001 and amended to include specific tasks for ICANN, for example, to improve its accountability, enhance the root zone architecture and increase competition between TLD registries. (148) ICANN was asked to develop and test an independent review process to address claims by members of the Internet community who considered that they had been adversely affected by decisions in conflict with ICANN's bylaws or contractual obligations. (149) On 24 September 2001, the MOU was extended for yet another year. (150) And one year later, on 20 September 2002, the U.S. DoC reported that the terms of the MOU were to be extended again until 30 September 2003. This time, the U.S. Government and ICANN revised their commitments in detail. (151) The U.S. DoC expressed its concerns and disappointment about the progress made by ICANN:

'Clearly, ICANN's progress to date has been slower than expected and the organization still has much to accomplish before maturing into the stable and accountable entity necessary to complete transition of DNS management functions.

27 [...] The Department has frankly been disappointed that ICANN's progress on the MOU tasks has moved so slowly. In fairness, the accomplishment of many of these tasks requires more than ICANN's unilateral effort. Further, it is not surprising that the completion of certain tasks has proven difficult or that initial thoughts on processes and structure require rethinking based upon experience. Nevertheless, the variety of criticisms expressed by the Internet community is of concern to the Department - and should be instructive to ICANN.' (152)

This latest 2002 one-year term extension of the MOU was considered critical for ICANN 'to make substantial progress on the remaining transition tasks.' (153) Progress was lacking with respect to critical tasks. *E.g.*, ICANN had made only little progress in concluding agreements with the root server system operators (that would stabilize ICANN's relationship with them) and in enhancing the root server system's architecture and security. (154) With respect to its accountability, ICANN had not yet implemented an independent review process 'for decisions that purport to conflict with the corporation's bylaws', and ICANN's reconsideration process that was put in place had had 'limited success in resolving the type of disputes it was intended to address.' (155) ICANN also failed in opening up the market for generic TLDs. The U.S. DoC complained that ICANN had 'not yet defined the process, procedures, and standards for ensuring predictability and transparency in the gTLD selection process long-term (including the timeframe within which new gTLDs were to be made available).' (156)

28 One year later, and although ICANN had implemented an independent review process, the U.S. Government did not consider ICANN's progress sufficient to justify it relinquishing its oversight role. Much work was still needed if ICANN were to evolve into 'an independent, stable, and sustainable DNS management organization.' (157) New, specific aims were added to the express goals of previous MOUs. (158) Among these aims was the definition and implementation of 'a predictable strategy for selecting new TLDs using straightforward, transparent, and objective procedures that preserve the stability of the Internet.' (159) The strategy development was to be completed by 30 September 2004, and its implementation was to commence by 31 December 2004. (160) The U.S. Government also continued to stress the need for more transparency and accountability and a formalization of ICANN's relationship with the root server system operators. (161) Unlike previous years, where the U.S. Government had allowed for a one-year extension of the MOU, ICANN was now given a three-year extension to accomplish these goals. (162)

At the end of this three-year period, the U.S. Government and ICANN agreed to amend the MOU on 29 September 2006. ICANN's efforts in defining and implementing strategies for selecting new TLDs were still limited to specific categories of TLDs and had shown that ICANN's evaluation process needed adjustment and took much longer than expected (*infra*). In 2006, the U.S. Government and ICANN agreed to extend the MOU/JPA for another three-year period. A few days before the execution of the amendment, an almost unanimous ICANN Board approved an 'Affirmation of Responsibilities', in which ICANN confirmed its commitment 'to the private sector management of the Internet DNS, by promoting the security and stability of the global Internet, while maintaining and promoting competition through its multi-stakeholder model.' (163) ICANN also affirmed and agreed to be guided by responsibilities in relation to security and stability, transparency, accountability, etc., (164) and it agreed to the inclusion of the

Affirmation of Responsibilities in the MOU/JPA with the U.S. DoC. (165)

At the beginning of 2008, the U.S. Government conducted a review of the MOU/JPA and received numerous comments from the Internet community. (166) The U.S. DoC observed that 'there was general consensus on the need to preserve the security and stability of the DNS and the recognition that ICANN is the appropriate technical coordinator of the Internet DNS.' (167) However, most commentators agreed that 'important work remain[ed] to increase institutional confidence through implementing effective processes that will enable: long term stability; accountability; responsiveness; continued private sector leadership, stakeholder participation; increased contract compliance; and enhanced competition.' (168)

c Working Towards A Transition To The Private Sector: From A Joint Partnership To An Affirmation Of Commitments

During a public meeting in February 2006 concerning the U.S. Government's review of the MOU/JPA, ICANN announced its intention to prepare a plan for developing a transition framework. (169) The ICANN Board believed that ICANN was meeting its responsibilities under the MOU/JPA and that the conditions had been 'sufficiently met [to allow] that the [MOU/JPA] conclude during the months up to September 2009.' (170) After this meeting, ICANN publicly stated on several occasions – somewhat optimistically, and possibly with a view to boosting the development of a transition plan – that the MOU/JPA would conclude by 30 September 2009. (171) In anticipation of a possible transition, ICANN developed a so-called implementation plan for improving institutional confidence (172) and sought public input. Between June 2008 and May 2009, ICANN organized no fewer than three public comment periods. (173) The third public comment phase coincided with the request for public comments by the U.S. Government 'regarding the progress of the transition of the technical coordination and management of the Internet DNS to the private sector, as well as the model of private sector leadership and bottom-up policy development which ICANN represents.' (174)

Although strong support existed for a full transition to the private sector, (175) many agreed that there were insufficient guarantees for accountability, protection against capture, transparency, etc., to terminate the oversight by the U.S. DoC. (176) ICANN's first president and CEO, Michael M. Roberts, participated in the U.S. Government's inquiry, and encapsulated the situation quite well:

'One overarching problem – accountability – still dominates the relationship between ICANN and the U.S. Government, and between ICANN and its broader community, as documented in the comments that ICANN's own outreach has received. Accountability is the predominant and common factor in ICANN's Presidential Strategy Committee's public comment process. If a solution can be found to the accountability dilemma, many other issues will be more manageable.

In 1998, the White Paper described an early termination of U.S. involvement in the affairs of ICANN:

"the U.S. Government would continue to participate in policy oversight until such time as the new corporation was established and stable, phasing out as soon as possible, but in no event later than September 30, 2000."

But after ten years, this goal has not been realized and ICANN is still saddled with not one, but two contracts tying it to the Department of Commerce. It is clear that accountability and independence are intertwined, and a decision on independence is also a decision on accountability. In this context, accountability means clarity with respect to process and structure such that governments and private sector stakeholders are assured of fair and equitable treatment in ICANN decisions. It is possible that the delays and related stakeholder concerns in ending the MOU/JPA are more a reflection of unease over the accountability problem than they are a lack of accomplishment on the various tasks set forth in these documents.' (177)

So accountability concerns remained, and ICANN started focusing on the role of governments quite late in the development of its proposed implementation plan for improving institutional confidence. It was not until 26 June 2009 that the ICANN Board decided that a joint working group must be established between the ICANN Board and the Government Advisory Committee (GAC) to review the GAC's role within ICANN. (178) This working group was also to engage with the broader ICANN community in a fully consultative process on the GAC's role within ICANN. (179)

The discussions on improving ICANN's accountability and on a possible full transition to the private sector came at a pivotal time for ICANN. After the ICANN Board had adopted the recommendations of ICANN's policy-making body, the Generic Names Supporting Organization (GNSO), for the introduction of new gTLDs in June 2008, (180) ICANN started detailed discussions on transforming these recommendations into a concrete process for opening up the Internet's name space. An enormous amount of energy was devoted to the development of this process, which became known as the new gTLD Program. Also in June 2008, ICANN's accountability mechanisms were put to the test, as ICANN was facing its first legal challenge for which the claimant used ICANN's Independent Review Process (IRP). (181) Both events – the development of the new gTLD Program and the IRP – together gave ICANN the opportunity to show that it was finally moving towards the opening up of the Internet's naming space in a predictable,

transparent and accountable manner. They provided ICANN with the chance to demonstrate that a transition could actually work.

The MOU/JPA between the U.S. DoC and ICANN was not renewed when it finally expired in September 2009. It was replaced by an Affirmation of Commitments (AoC), which was intended to be a longstanding agreement between the U.S. DoC and ICANN. (182) The AoC reaffirmed ICANN's commitments to *inter alia*: (i) ensure accountability, transparency and the interests of global Internet users, (ii) preserve security, stability and resiliency, and (iii) promote competition, consumer trust and consumer choice. (183) The AoC requires ICANN to perform regular compliance reviews and to improve its mechanisms so as to live up to its commitments on a continuing basis.

ICANN considered that the execution of the AoC completed the transition that had started in 1998. (184)

However, the AoC confirmed ICANN's relationship with the U.S. Government, and the U.S. Government did not relinquish its control over the IANA functions. ICANN continued to perform the IANA functions on behalf of the U.S. Government according to an agreement: the IANA functions contract with the NTIA. As a result, the AoC did not in fact complete the transition. Through the IANA functions contract, the U.S. Government maintained its control over changes in the authoritative Internet's root zone. The IANA functions contract has been up for renewal each year, providing the U.S. Government with remote, but real, oversight. Without control over the IANA functions, ICANN has no access to the Internet's root, and it would be impossible for ICANN to implement new policies affecting the root.

d Completion Of The Transition To The Private Sector

On 14 March 2014, in the aftermath of ICANN's most ambitious plan to date for introducing new gTLDs to the Internet's root, the NTIA announced its intent to transition out of its role as administrator of changes to the authoritative root zone file and as the historic steward of the DNS. (185) According to the NTIA, '[t]he timing [was] right to start the transition process.' (186) The NTIA invited ICANN to develop a transition plan and to propose it to the NTIA. The NTIA informed ICANN that the transition proposal 'must have broad community support and address the following four principles:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services; and
- Maintain the openness of the Internet. (187)

The NTIA's role was to remain unchanged while ICANN and the Internet community prepared their proposal for a transition plan. At the time of the NTIA announcement, the IANA functions contract was set to expire on 30 September 2015, (188) and the Internet community started working towards this informal (189) deadline.

On 17 and 18 July 2014, a multistakeholder group met in London with the purpose of supporting and coordinating the development of a proposal on the IANA functions stewardship transition. (190) By the beginning of September 2014, the group, named the IANA Stewardship Transition Coordination Group (ICG) had adopted a charter (191) and issued a Request for Transition Proposals for each of the three primary IANA functions to be developed by the communities and parties most directly affected by each of the primary functions. (192) The ICG also adopted a timeline to work towards a transition by September 2015. (193) The ICG's aim was to have a proposal concerning the IANA functions transition ready for final community review by 19 June 2015. This would allow the proposal to be finalized by 31 July 2015 for submission to the NTIA.

But the Internet community was expecting more than a simple acknowledgment by ICANN of its role facilitating its technical functions; the Internet community was expecting ICANN to affirm its accountability. (194) When the U.S. Government finally relinquishes its oversight role, the general expectation is that ICANN should be more accountable, not less. Therefore, concurrent with the work of the ICG, a CCWG was established within ICANN with a view to improving ICANN's accountability in light of the anticipated transition. (195)

On 4 May 2015, the CCWG published its initial draft proposal for public comment. (196) Commentators criticized the proposed accountability framework for being too narrow and not powerful enough. (197) This initial proposal was very inward focused, and it was generally felt that ICANN should be accountable to all stakeholders, including those outside ICANN. Moreover, the enforceability of the accountability system needed to be assured unambiguously, (198) a topic which has been heavily debated in multiple disputes. (199)

At the end of the public comment phase, it was clear to the NTIA that the transition would not occur before the expiry of the IANA functions contract in view of the status of ICANN's proposal and the time necessary for the U.S. Government to evaluate the plan. (200) The NTIA informed ICANN that it could exercise an option to extend the IANA functions contract for two years until September 2017, but feared that this would send the wrong signal to the Internet community, and give the impression either that it was not working hard to finish the transition plan or that the U.S. Government was reducing its efforts to complete the transition. (201) The

NTIA subsequently negotiated a one-year extension with ICANN of the IANA functions contract. (202)

On 3 August 2015, the CCWG published a second draft proposal for public comments. And on 30 November 2015, a new public comment period was initiated on a third draft. The second and third drafts also remained inward-looking, focusing mostly on increasing accountability for existing stakeholder groups. (203) Insufficient account was taken of other parties, who, though not necessarily represented at ICANN, were nevertheless likely to be severely impacted by ICANN's decisions. Some stakeholders within the ICANN community asked for increased limitations on the rights of third parties not involved in ICANN's policy development processes. (204) Although imposing such limitations would impede, rather than improve, ICANN's accountability, interest groups within the Internet community are of course primarily concerned with the promotion and protection of their own interests, rather than with the common good. This is a major reason why efficient external control mechanisms are of paramount importance, even for communities in which a large number of critical voices can be heard.

For as long as the IANA functions contract remained in place, the U.S. Government retained its external control mechanism, and its ability to encourage ICANN to improve its internal and external accountability. The relinquishing of the U.S. stewardship role over the IANA functions was to be done with great care. If it turns out that the transition has not been carried out properly, the global Internet community may face a largely introspective and unaccountable ICANN and a situation where established groups could effectively block new entrants from entering the market.

In this respect, it is not necessarily to be applauded that the NTIA has been pushing for the ICANN community 'to conclude on a proposal that is as simple as possible but still meets our conditions and the community's needs'. (205) By insisting on simplicity, it seems that the NTIA was prepared to accept a baseline solution rather than the best solution. It is also worrying that the ICANN community had agreed to work in two different streams. The now completed Work stream 1 was dedicated to identifying those accountability mechanisms that must be in place or committed to before the IANA stewardship transition; work stream 2 is dedicated to improving ICANN's accountability mechanisms only after the IANA stewardship transition. (206) Since its creation, it has proven virtually impossible to persuade ICANN to enhance its accountability without external pressure. Moreover, as will be explained in Chapter 5 and Chapter 6, ICANN has sought to interpret changes that were made with the purpose of improving ICANN's accountability as the complete opposite: amendments to the accountability framework that weakened its accountability. Recent comments by ICANN's external legal advisors in response to the community's attempts to improve ICANN's accountability and ICANN's positions in IRPs are illustrative of ICANN's reluctance to offer effective redress mechanisms. (207) Such redress mechanisms are of particular importance when ICANN evaluates applications for new Internet extensions. As each TLD string is a unique identifier, TLDs have the potential to become a high-value asset which is difficult to substitute. The delegation of new TLDs is one of ICANN's most visible and economically relevant activities. TLD applicants are entitled to a fair, equitable, transparent and non-discriminatory process, and because of the high stakes involved in a TLD application, it is unsurprising that ICANN's accountability mechanisms are tested intensively with regard to these issues. Until now, parties relying on ICANN's accountability mechanisms have been confronted with the inadequacies of those mechanisms, rather than being provided with a meaningful redress in a streamlined manner. It is unfortunate that, despite three rounds of new gTLD applications (*infra*, Chapter 2.C), ICANN has been unable to install efficient redress mechanisms to guarantee legal certainty through the observance of fundamental rights. What is more, rather than enhancing its accountability mechanisms, ICANN has sought to do the opposite by attempting to introduce a statute of limitations retroactively, arguing that applicants were not entitled to due process, and attempting to evade all responsibility through its commissioning of third parties.

On 10 March 2016, the ICANN Board published ICANN's IANA Stewardship Transition Proposal. (208) ICANN's proposal received general support from U.S. businesses (209) and members of civil society. (210) The ICANN Board adopted amended Bylaws on 27 May 2016 (211) and prepared amended Articles of Incorporation. (212) The amended Bylaws and Articles of Incorporation entered into force when the U.S. Government relinquished its IANA stewardship role.

On 9 June 2016, the NTIA announced that ICANN's proposal met the criteria to complete privatization (213) and transmitted its assessment report on the proposal to U.S. Congress. (214) It has since defended its assessment report with U.S. Senators. (215)

In the meantime, ICANN had been testing the technical processes for managing the IANA functions without U.S. oversight. (216) On 12 August 2016, ICANN submitted an implementation status report on the IANA stewardship transition, confirming that all transition tasks are completed or will be completed in advance of 30 September 2016. (217) In response, the NTIA informed ICANN on 16 August 2016 that it intended to allow the IANA functions contract to expire as of 1 October 2016. (218) Everyone was thus getting ready for a transitioning of the IANA stewardship to ICANN, and a final attempt by some members of U.S. Congress to stop the transition failed. Four U.S. states tried to block the transition by filing a request for a restraining order at the eleventh hour. (219) Their request was turned down, and the transition moved forward. (220) Unless the court order gets reversed in appeal or proceedings on the

merits result in a different outcome, it is unlikely that the complete privatization of the Internet and ICANN's control over it will be reversed any time soon. Although we may expect that ICANN will exercise its stewardship over the Internet in a responsible manner, one should not underestimate the risks associated with the complete privatization. In Chapter 7, Chapter 8 and Chapter 9, we identify these risks.

B GOVERNING PRINCIPLES

Unless stated otherwise, we refer to the governing principles as they existed before the transition of the IANA functions to ICANN. When mention is made of ICANN's Bylaws, we refer to the version of the Bylaws that was current before the transition on 1 October 2016. However, ICANN's newest Bylaws, which entered into force on 1 October 2016, did not change ICANN's essential obligations, but rather strengthened them.

1 Compliance with General Principles of International Law

ICANN is a non-profit public benefit corporation, incorporated under the laws of California. (221) ICANN's mission and the limits to its authority are defined in ICANN's Articles of Incorporation, Bylaws, and in agreements with competent authorities. Given ICANN's public benefit mission to 'operate for the Internet community as a whole' – *i.e.*, globally – ICANN is not bound by principles of the local laws in California only, but, first and foremost, ICANN must carry out 'its activities in conformity with relevant principles of international law and applicable international conventions.' (222)

38 ▲ The requirement to comply with principles of international law was deliberate. The original draft of ICANN's Articles of Incorporation did not include any reference to ▲▼ international law. (223) The fifth draft of ICANN's Articles of Incorporation – *i.e.*, the version of the Articles of Incorporation that ICANN submitted to the U.S. Government in response to the White Paper (224) – provided that ICANN should carry out its activities 'with due regard for applicable local and international law'. (225) This provision was added 'in response to various suggestions to recognize the special nature of [the] organization and the general principles under which it will operate.' (226) After negotiations with the U.S. Government and several Internet stakeholders, (227) ICANN augmented its obligations under international law on 21 November 1998. (228) From that date onwards, ICANN's Articles of Incorporation have provided 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 competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.' (229)

The Articles of Incorporation do not require ICANN merely to have 'due regard' for 'international law'; ICANN must act 'in conformity with relevant principles of international law and applicable international conventions'. As accepted both by legal scholars (230) and case law, (231) ICANN's requirement to act in conformity with relevant principles on international law includes conformity with 'the general principles of law recognized as a source of international law'. General principles of international law can thus be said to serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted.

39 ▲▼

2 Hierarchy of Legal Sources

In contrast with previous drafts of the Articles of Incorporation, ICANN's current version (232) puts principles of international law first, before applicable international conventions, local law and ICANN's Bylaws. ICANN reversed the order of the applicable rules in recognition of the international scope of its mission, and of the fundamental principle that international law prevails over domestic law. (233) As a result, any principles enshrined in Californian law, ICANN's Articles of Incorporation and/or ICANN's Bylaws will only apply to the extent that they are fully compatible with international law. ICANN's Articles of Incorporation and Bylaws must thus be interpreted in a way that is consistent with general principles of international law. If ICANN adopts secondary rules, such as policies and process, ICANN should warrant the compliance of these secondary rules with international law, national law, its Articles of Incorporation and its Bylaws; in that order.

In addition, we have always believed that ICANN's Articles of Incorporation and Bylaws should be interpreted in light of ICANN's AoC, which requires ICANN to comply with generally accepted good governance principles. Recent case law, (234) and, it seems, ICANN itself, (235) now accept this proposition. As a result, secondary rules, such as policies and process, must also be consistent with the AoC.

3 Applicable Norms

The applicable legal framework requires ICANN to act in good faith, to ensure fairness, non-discrimination, openness and transparency, accountability, and the promotion of competition. These requirements can be found in applicable norms of international law, domestic law, ICANN's Articles of Incorporation and its Bylaws. They are reiterated at different places in the

Bylaws, and some requirements are taken up as core values that ‘should guide the decisions and actions of ICANN.’ (236) ICANN’s Bylaws provide:

40 ▲ 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 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.’ (237)

Although a balancing exercise may be appropriate in some circumstances, ICANN’s discretion in applying its core values is not unfettered. While some of ICANN’s core values, such as the promotion of competition, may be subject to restrictions (e.g., to ensure compliance with essential requirements that preserve the stability and security of the Internet), other core values reflect more fundamental norms from which derogation must not be permitted.

a Act In Good Faith

Many of the guiding substantive and procedural rules in ICANN’s Articles and Bylaws – including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is that they arise from the general principle of good faith, which is considered to be the foundation of all law and all conventions. As stated by the International Court of Justice (ICJ), the principle of good faith is ‘[o]ne of the basic principles governing the creation and performance of legal obligations.’ (238)

The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action and recognizing legitimate expectations. The principle is considered so fundamental that it need not be explicitly stated in order to apply and no derogation is permitted. Many of ICANN’s obligations which arise from the general principle of good faith are taken up explicitly in ICANN’s governing documents. These obligations are discussed below (*infra*, under b, c and e).

b Apply Policies Neutrally, Fairly And Without Discrimination

ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Not only does this obligation arise from general principles of international law, it is also laid down repeatedly in ICANN’s governing documents. Article II(3) of ICANN’s current Bylaws is entitled ‘non-discriminatory treatment’ and provides that:▲▼

41 ▲ ‘ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.’

This prohibition on discrimination has been included in ICANN’s Bylaws since the corporation submitted its application in 1998 to operate as the DNS custodian. (239) In their original version ICANN’s Bylaws contained no example of a substantial and reasonable cause that could justify disparate treatment. (240) Following negotiations with U.S. Government officials and Internet stakeholders, ICANN added the promotion of effective competition as a possible justification for disparate treatment. (241) In 2002, ICANN changed the numbering of its Bylaws and added the title ‘non-discriminatory treatment.’ (242) Apart from these mainly cosmetic amendments, the article has never been changed, neither did it change with the entry into force of ICANN’s post-IANA transition Bylaws, adopted on 27 May 2016. The fact that the article on non-discrimination has remained unchanged ever since ICANN became the DNS custodian evinces the fundamental nature of the principle of non-discrimination as regards ICANN’s operations.

In addition, the prohibition on discrimination is not merely mentioned as a core value that ‘should guide’ ICANN’s actions and decisions; (243) ICANN dedicated a separate article in its Bylaws to non-discriminatory treatment, containing conclusive language that it ‘shall not’ act inequitably or single out a party for disparate treatment. It follows that the principle of non-discrimination is a cornerstone for ICANN’s actions and decisions.

c Remain Transparent

Another cornerstone for ICANN’s decision-making process is its obligation to operate in an open and transparent manner. ICANN’s commitment to transparency is contained in ICANN’s Articles of Incorporation, Bylaws and the AoC.

42 ▲ ICANN’s transparency obligation was already included in Article 4 of the draft Articles of Incorporation it proposed in response to the U.S. Government’s White Paper. Article 4, which, after adoption, remained unchanged in this respect, provided that ICANN ‘shall operate for the benefit of the Internet community as a whole, carrying out its activities [...] 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'. Similarly, Article III of ICANN's Bylaws has always stated that ICANN and its constituent bodies (244) 'shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness'.

These provisions have later been supplemented by the core values and commitments set out in ICANN's Bylaws, which specify that ICANN should employ '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.' (245) In addition, the AoC agreed between the U.S. DoC and ICANN also affirms ICANN's commitment to transparency, mentioning it as a key commitment. (246)

The emphasis ICANN has put on transparency is sensible. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting role that ICANN occupies. (247) The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken. (248)

The coupling of the terms 'open' and 'transparent' in ICANN's governing documents, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to denote the most developed dimension of transparency, namely openness in decision making. During ICANN's first public meeting, Esther Dyson, ICANN's first Chair, stated the following about ICANN's commitment to openness and transparency:

43 'But to me, being open isn't simply posting your minutes out. To be honest, when I read our minutes, I'm embarrassed. Like any legal minutes, they say almost nothing. And I think it is our duty and it's – frankly, we've got to do it or we won't win anybody's trust, not just to post our minutes, but to explain what we did, what ▲▼ was our reasoning. And sometimes that means we have to trust you, because we need to explain, well, we did this because, you know, there are these two points of view and we're trying to find a balance between them. And sometimes we need to make explicit things that our lawyers would prefer for us to keep implicit. But at some point, I'd rather say these things, I'd rather ask Frank[(249)] about his contract, I'd rather point out that there's tensions between the SO's and the rest of the community than simply try and hide it and pretend it's not there. So to me, transparency is not simply exposure, but explanation.' (250)

In 2009, when it executed the AoC, ICANN committed itself to providing a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN had relied. (251) ICANN committed itself to being transparent, so as to ensure that the outcomes of its decision-making would reflect the public interest; its decisions were to contain both a rationale and adequate explanation. (252) Since ICANN's inception (as has been confirmed in its governing documents), ICANN has been committed to maintaining and improving, at a continuing basis, robust mechanisms to support the most developed notion of transparency. (253)

d Promote Competition And Innovation

In performing its mission, ICANN is under an obligation to rely as far as possible on market mechanisms so as to promote and sustain a competitive environment. ICANN must be as non-interventionist as possible and its activities are limited to matters requiring, or significantly benefiting from, global coordination. The promotion and sustaining of a competitive environment was one of the primary reasons behind the U.S. Government's efforts to privatize the DNS management. (254) The focus on creating a more competitive environment has been present since the first MOU/JPA between the U.S. Government and ICANN, (255) and has been translated into ICANN's governing documents. Article 4 of ICANN's Articles of Incorporation calls for processes that 'enable competition and open entry in Internet-related markets'.

44 ICANN's Bylaws focus on promoting competition and innovation in three of ICANN's core values, namely: ▲▼

2. '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.

[...]

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.' (256)

In addition, the promotion of effective competition is the only acceptable justification for disparate treatment explicitly provided for in the ICANN Bylaws. (257) Finally, the AoC affirms the promotion of competition as a key commitment (258) and as a main goal during the expansion of the top-level domain space. (259)

e Remain Accountable

The fundamental principles which are considered in this Chapter 2.B.3 are not merely aspirational standards that ICANN may choose to adopt on a voluntary basis. They impose unambiguous commitments, and parties affected by ICANN's actions must be entitled to a meaningful review of ICANN's compliance with these fundamental obligations. ICANN has committed itself to ensuring accountability in the AoC, (260) and it has adopted both internal and external review mechanisms for accountability. Article IV(1) of ICANN's Bylaws sets forth that ICANN 'should be accountable to the community for operating in a manner that is consistent with the[...] Bylaws, and with due regard for the core values set forth in Article 1 of the[...] Bylaws.' One of ICANN's core values instructs ICANN to '[r]emain[...] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.' (261) As a result, ICANN has not merely committed itself to complying with its fundamental obligations; it has also committed itself to establishing mechanisms to redress any violation of those obligations.

C ICANN'S LIBERALIZATION EFFORTS

45 ▲ One of ICANN's missions and principal objectives is to promote competition and develop policy concerning the Internet's unique identifiers, in particular in the gTLD ▲▼ name space. Before ICANN's formation, the gTLD name space consisted of five limited-use gTLDs (262) and three gTLDs which operated upon a first-come, first-served basis. (263)

The gTLD name space coexists with the ccTLD name space. ccTLDs or country code Top Level Domains are TLDs which consist of the two-letter country codes from ISO 3166. (264), (265) ccTLDs are organized by an administrator for the country to which the ccTLD relates. (266) The public character of ccTLDs has always been recognized. Designated managers (or administrators) of ccTLDs are regarded as trustees of the TLD for both the nation and the global Internet community; they perform a 'public service on behalf of the Internet community.' (267) In 1998, there were well over 200 ccTLDs in existence administered by their corresponding governments or by private entities with the appropriate national government's acquiescence. (268)

While gTLDs and ccTLDs coexist in the Internet's name space, they are nonetheless different. National governments had – and, in the White Paper, the U.S. Government recognized that they would continue to have – authority to manage or establish policy for 'their own' ccTLD. (269) As ccTLDs used to be far greater in number than gTLDs, and because of the policy authority of national governments, there is a much wider variety in structure and use for ccTLDs than for gTLDs. (270) Because of this, ccTLDs can be perceived as a distinct market. In this regard, German courts have held that third parties wishing to sell or market products on the Internet may not treat the '.de' TLD as interchangeable with other generic or country code TLDs. (271) Key to these decisions was the fact that purchasers located in Germany prefer to search for websites using the '.de' TLD.

46 ▲ The original gTLD name space could also be seen as a collection of separate markets. In 1994, Jon Postel described the gTLD name space as follows: ▲▼

'Each of the generic TLDs was created for a general category of organizations. [...]

Of these generic domains, five are international in nature, and two are restricted to use by entities in the United States.

World Wide Generic Domains:

COM - This domain is intended for commercial entities, that is companies. [...]

EDU - This domain was originally intended for all educational institutions. Many Universities, colleges, schools, educational service organizations, and educational consortia have registered here. More recently a decision has been taken to limit further registrations to 4 year colleges and universities. Schools and 2-year colleges will be registered in the country domains [...].

NET - This domain is intended to hold only the computers of network providers, that is the NIC and NOC computers, the administrative computers, and the network node computers. The customers of the network provider would have domain names of their own (not in the NET TLD).

ORG - This domain is intended as the miscellaneous TLD for organizations that didn't fit anywhere else. Some non-government organizations may fit here.

INT - This domain is for organizations established by international treaties, or international databases.

United States Only Generic Domains:

GOV - This domain was originally intended for any kind of government office or agency. More recently a decision was taken to register only agencies of the US Federal government in this domain. State and local agencies are registered in the country domains [...].

MIL - This domain is used by the US military.' (272)

In 1994, the TLD landscape was able to serve the needs of the Internet community. Although the popularity and the growth pattern of the .com gTLD was already a source of concern, it was thought to be 'extremely unlikely that any other TLDs [would] be created.' (273) Instead, to solve the domain name scarcity in the .com TLD, the Internet community was considering subdividing the domain and allowing future commercial registrations only in the subdomains. (274)

However, these views rapidly changed. As explained above, NSI's monopoly over domain name registrations gave rise to criticism and there was a growing dissatisfaction concerning the absence of competition and the dominance of the .com domain. In May 1996, following discussions with fellow Internet engineers, Jon Postel wrote that 'the inherent perceived value of being registered under a single top level domain (.COM) is undesirable and should be changed', and he advocated open, free-market competition through the introduction of new gTLDs. (275) He considered that 'positive market forces dictate that this diversity, obtained through free competition, is the best means available to insure quality service to end-users and customers.' (276) He envisioned the creation of up to fifty new registries in 1996, each chartered to operate a maximum of three gTLDs for up to five years. (277) Although his plan for opening up the gTLD market did not deal with the issue of the (monopolistic) management of the then existing gTLDs, he did note that such gTLDs could come under the provisions of the plan when the existing sponsorship relationship came to an end (278) (and as mentioned above, the cooperative agreement between the NSF and NSI was set to expire on 30 September 1998). (279) In other words, Jon Postel and the members of the Internet community supporting his plan did not exclude the future introduction of a competitive process for the management of existing TLDs, and a re-evaluation every five years.

Jon Postel slightly reworked his draft plan following criticism from the Internet technical community. (280) He acknowledged the concern that NSI was 'apparently unconstrained by effective regulation or competition.' (281) He was not convinced that sharing a single top-level domain among competing registries would be manageable, but believed that the introduction of successful new TLDs could very quickly have a significant impact on competition and that it would in any event be beneficial:

'While new single registry top-level domains may allow only a limited form of competition, it is a better situation than we have now, and it can be generalized in the future. Thus there is no 'competition' argument to prevent creating new top-level domains.' (282)

However, the Internet community failed to reach consensus on the proposal, and international plans for the evolution of DNS administration failed. By the end of the 1990s, various proposals existed, all aimed at injecting competition into the gTLD system. But there was no united view on how to install a more competitive gTLD environment. (283) Some questioned whether it was possible to create a truly competitive environment. (284) However, the U.S. Government made clear that the creation of a competitive environment was one of the key tasks for the new custodian of the DNS. The U.S. Government expressed its conviction that 'competitive systems generally result in greater innovation, consumer choice, and satisfaction in the long run. Moreover, the pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically.' (285)

In recognition of this goal and with a view to promoting competition in the gTLD name space, ICANN has expanded the number of available gTLDs three times since its inception: in 2000, 2004 and 2011. Each application round has had its own distinct policies and processes, designed to enable varying degrees of competition while preserving the stability and security of the Internet's unique identifier system.

Applying for a new gTLD is a very complex process and cannot be compared with the simple registering of a domain name. In a new gTLD application, the applicant seeks to create and operate a registry business to support the Internet's DNS, and this involves a number of significant responsibilities as a successful applicant will run a critical piece of Internet infrastructure.

1 The First Round of 2000

On 30 April 1999, the World Intellectual Property Organization (WIPO) submitted a report to ICANN, which concluded that, 'on condition that [WIPO's] proposed improved practices for domain name registrations, [WIPO's] proposed administrative dispute-resolution procedure and [WIPO's] proposed measures for the protection of famous and well-known marks and for the suppression of abusive registrations of domain names are all adopted, new gTLDs can be introduced, provided that they are introduced in a slow and controlled manner which takes account of the efficacy of the proposed new practices and procedures in reducing existing problems.' (286) Upon analysis of WIPO's report and the comments it received, the ICANN Board decided on 27 May 1999 to refer the matter of introducing new gTLDs to ICANN's policy-making body. (287) In mid-April 2000, ICANN's policy-making body (288) recommended that the ICANN Board adopt a policy for the introduction of new gTLDs in a measured and responsible manner. (289) It was suggested that only a limited number of new gTLDs be introduced as a 'proof of concept' for possible future introductions. (290)

On 16 July 2000, the ICANN Board adopted the recommendation to organize a 'proof of concept' round for new gTLDs. (291) The plan was to issue a formal call for proposals for new gTLDs by 1 August 2000 and to allow applications until 1 October 2000. ICANN would then organize a fifteen-day public comment period, announce which applicants were selected to enter into negotiations for the operation of new gTLDs by 20 November 2000, and complete negotiations by 31 December 2000. (292)

On 15 August 2000, ICANN published application instructions (293) and criteria for assessing new gTLD proposals. (294) Interested applicants had to pay a non-refundable fee of USD 50,000

for the application to be considered, without any guarantee that their application would be selected for negotiation. (295)

ICANN's first priority was to preserve the stability of the Internet. Therefore, ICANN requested that applicants provide comprehensive strategies to assure the security and reliability of the DNS and well-thought-out plans to assure the Internet's continuing stability. (296) In evaluating proposals, ICANN staff intended 'to place significant emphasis on the completeness of the proposals and the extent to which they demonstrate that the applicant has a thorough understanding of what is involved, has carefully thought through all relevant issues, has realistically assessed the business, financial, technical, operational, and marketing requirements for implementing the proposal, has procured firm commitments for all necessary resources, and has formulated sound business and technical plans for executing the proposal'. (297) Other evaluation criteria included the potential of the proposed TLD operation: (i) to assist in the long-range management of the DNS, (ii) to enhance competition for registration services, (iii) to enhance the utility of the DNS, (iv) to meet previously unmet types of needs, (v) to enhance the diversity of the DNS, and (vi) to protect the rights of third parties appropriately. (298)

50 ▲ The application window of this proof of concept round in fact ran from 5 September 2000 to 2 October 2000, (299) and ICANN received forty-seven applications for over 200 ▲▼ new gTLDs. (300) By 10 November 2000, the applications had been evaluated by ICANN staff and outside advisors, and on 16 November, the ICANN Board selected seven new gTLD proposals to enter into contract negotiations. (301) Eventually, ICANN entered into registry agreements concerning these seven new gTLDs, and allowed for the .biz, .name, .info, .pro, .aero, .coop, and .museum gTLDs to be added to the Internet's root zone.

2 The Second Round of 2004

One of the ideas behind the 2000 proof of concept round was that the future introduction of additional gTLDs should be done only after careful evaluation of the initial introduction. (302) Upon the conclusion of the proof of concept round, ICANN set up a task force to devise an evaluation process and planning. In July 2002, this task force recommended that the ICANN Board consider to what extent it could start working on new gTLD rounds in parallel with this evaluation process. (303) In response to the task force's report, the ICANN Board instructed ICANN's President to produce a plan for action. (304)

On 18 October 2002, the then President of ICANN issued a 'Plan for Action regarding New gTLDs', which called for 'proposals for up to three more sponsored TLDs as an extension of the "Proof of Concept".' (305) The author of the plan for action was of the opinion that small, specialized TLDs, which were sponsored by and operated in the interest of a particular, defined community could be introduced relatively easily, whereas major issues in relation to the 'Proof of Concept' 'mostly affected unsponsored TLDs. (306) The introduction of only a few sponsored TLDs might allow ICANN to 'learn a bit more about the nature of the "market" for these kinds of new TLDs.'

51 ▲ (307) In December 2002, the ICANN Board instructed ICANN's President to develop a draft Request for Proposals (RFP) for a limited number of new sponsored gTLDs (or sTLDs). (308) Proposed selection criteria were posted for public comment in March ▲▼ 2003, (309) and a first draft RFP was published on 24 June 2003. (310) Meanwhile, ICANN had abandoned the proposed artificial limitation to three new sTLDs, (311) and had decided not to restrict the RFP for sTLDs to the applicants of the 2000 proof of concept round only. (312) The sTLD application process was to be open to both not-for-profits and other forms of entities that otherwise met the RFP criteria for a sponsoring organization, and was scheduled for completion in 2004. (313)

The sTLD application process was officially launched on 15 December 2003, when ICANN posted the final version of the RFP for sTLDs. (314) The application window lasted until 16 March 2004. (315)

Consistent with ICANN's fundamental obligations, the RFP specified that the selection procedure was based on 'principles of objectivity, non-discrimination and transparency.' (316) Applicants had to pay a non-refundable application fee of USD 45,000, and meet the following criteria:

- Sponsorship information: The proposed sTLD 'must address the needs and interests of a clearly defined community'. The application had to demonstrate: (i) support from the sponsoring organization, (ii) the appropriateness of the sponsoring organization and the policy formulation environment, and (iii) broad-based support for the sTLD from the intended community;
- Business plan information: Applicants had to demonstrate their methodology for introducing a new sTLD and their ability to implement a robust and appropriately resourced organization and submit a financial model outlining the financial, technical and operational capabilities of the organization;
- Technical standards: Applicants had to demonstrate their ability: (i) to ensure stable registry operation, (ii) to conform with best practice technical standards for registry operations, (iii) to offer a full range of registry services, and (iv) to assure continuity of registry operation in the event of business failure;
- 52 ▲ - Community value: Applicants had to demonstrate: (i) the added value of the proposed sTLD to the Internet name space, (ii) safeguards that protect the ▲▼ rights of others, (iii)

assurance of charter-compliant registrations and avoidance of abusive registration practices, (iv) assurance of adequate dispute-resolution mechanisms and (v) the provision of ICANN-compliant WHOIS services. (317)

ICANN received ten applications for nine sTLDs in response to the RFP. (318) A team of independent evaluators determined that two applications (319) satisfied all of the selection criteria. The other applicants were given an opportunity to provide additional clarifying information to the evaluators and the ICANN Board. (320) The sTLD application round ultimately resulted in ICANN's approval of the .post, .cat, .asia, .jobs, .mobi, .tel, .travel and .xxx gTLDs. (321)

3 The Third Round of 2011

Well before the launch of the second round of 2004, on 24 June 2003, the leadership of ICANN's policy body, now the GNSO Council, advised the ICANN Board that 'the namespace should be market driven and that organizations [should be] free to propose names that they believed would be of use to DNS users'. (322) On 31 October 2003, the ICANN Board accepted the GNSO's recommendation, and expressed ICANN's commitment to define and implement a predictable strategy for selecting new gTLDs using straightforward, transparent and objective procedures that preserve the stability of the Internet. The Board expressed the belief that ICANN should begin immediately with the development of a long-term policy for selecting new gTLDs, and requested that implementation commence before 31 December 2004. (323)

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It finally took the GNSO until October 2007 to complete its policy development work on new gTLDs, and to submit a set of principles and recommendations to ICANN's Board. (324) The GNSO gave the following reasons for introducing new gTLDs:

'The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.'

In developing its proposed policy, the GNSO collaborated with other ICANN policy development and advisory organizations; the GNSO consulted with the GAC, At-Large Advisory Committee (ALAC), Country Code Names Supporting Organization (ccNSO), and Security and Stability Advisory Committee (SSAC). (325) The ICANN Board of Directors adopted the GNSO's proposed policy in June 2008. (326) The implementation plan needed further development and Board approval. (327)

Key to the implementation plan was the development of an applicant guidebook, which had to provide new gTLD applicants with a step-by-step procedure and to inform prospective applicants what to expect during the application and evaluation periods. (328) A first draft applicant guidebook was released for public comment on 24 October 2008. (329) It took almost three years, seven versions of the applicant guidebook, fifty-eight explanatory memoranda and nearly fifty new gTLD-related public comment sessions before the ICANN Board approved the new gTLD program. (330) The application window was planned to open on 12 January 2012 and to close on 12 April 2012. (331) In fact, the application window was extended until 30 May 2012, following technical issues with the only application portal. (332) The Board envisaged some changes to the applicant guidebook following discussions with the GAC. (333) After the Board's approval of the new gTLD program, ICANN changed the applicant guidebook twice, once before the application window to reflect the outcome of the discussions with the GAC, (334) and a second time after the close of the application window. (335)

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The applicant guidebook, named the gTLD Applicant Guidebook (AGB), sets out an application process, an evaluation process, and an objection and dispute resolution process. The AGB had to reflect the principles and recommendations of the GNSO's new gTLD policy. In particular, the AGB had to guarantee that new gTLDs would be introduced in 'an orderly, timely and predictable way.' (336) Consistent with ICANN's fundamental obligations, the GNSO recommended that evaluation and selection procedure for new gTLD registries respect the principles of fairness, transparency and non-discrimination. (337) Transparent and predictable criteria, which were objective and measurable had to be made available to the applicants prior to the initiation of the process, and, normally, no subsequent selection criteria were to be used in the selection process. (338) The GAC agreed with this recommendation and stated as a principle that 'the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.' (339) The GNSO's new gTLD policy required that there be a base contract provided to applicants at the beginning of the application process. (340)

a The Application Process For A New Gtld

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Reflective of the GNSO's new gTLD policy, the AGB served as a manual for the application procedure – it guides the applicant through the process detailing the requisite documents and information, the financial and legal commitments and what to expect during the application and evaluation periods. The AGB contained a base registry agreement that

applicants were presumed to enter into upon the successful completion of the application and evaluation process. Having passed through all the application stages, applicants were expected to make their gTLD operational, and this is why a detailed plan for the launch and operation of the proposed gTLD had to be submitted as part of the application process. If a successful applicant did not progress the gTLD into the root system within twelve months of the gTLD being delegated, ICANN could terminate the registry agreement.

The AGB described in detail what information was required in order to apply successfully for a new gTLD. Generally speaking, ICANN required applicants for new gTLDs to describe their administrative, operational, technical and financial capability to launch and operate a new gTLD extension for a term of at least ten years. There were fifty different questions on the basis of which such capability was to be determined by external evaluators to be appointed by ICANN.


Applicants had to describe in detail their background and the mission and purpose of the applied-for gTLD. They had to demonstrate their operational and technical capability as well as their financial capacity to run the proposed gTLD registry. Applications had to include detailed business plans and contingency planning, identifying risks and worst-case scenarios. It is not surprising that ICANN asked for abundant and detailed information, given its responsibility for preserving the security, stability and global inter-operability of the Internet. As applicants apply to control a critical piece of the Internet infrastructure on which millions of Internet users may rely, extensive scrutiny of each applicant is necessary to ensure new gTLD registries will be able to comply with ICANN's contract and to follow all best practices and standards.

There are a number of distinct steps in the application process for new gTLDs:

- (1) Application preparation and submission;
- (2) Application evaluation;
- (3) Contract negotiation and execution; and
- (4) New gTLD delegation and testing.

After having completed these steps, the successful applicant for the TLD was able to start registering domain names in the TLD, allowing the introduction of websites and emails.

b What Was Icann Expected To Do?

ICANN was expected to review the applications regardless of whether or not it called upon third parties to help with the technical and financial evaluation or to solve objections. ICANN was expected to assess applicants' capabilities on the basis of objective, measurable and transparent criteria. The ICANN Board remained responsible for the new gTLD program, which implies in our view that ICANN had to perform  quality controls and that it was expected to assess whether the third party advice or resolution was reasoned and meaningful, and to take the appropriate time to perform the assessments.

(1) The Evaluation Phase

After the application window, there were several evaluation stages, each with its own estimated duration. During the evaluation process, ICANN had to check whether the application met the requirements. ICANN first checked whether an application was administratively complete (Have all mandatory questions been answered? Have all required supporting documents been provided in the proper format(s)? Have the evaluation fees been received?). Unless there were exceptional circumstances, an application that was not administratively complete was rejected.

Then, ICANN performed the initial evaluation. The initial evaluation started with a background screening of the applicant. Background screening criteria were introduced in recognition of ICANN's duty 'to protect the public interest in the allocation of critical Internet resources.' (341) ICANN affirmed the right to deny an otherwise qualified application, and gave applicants a list of circumstances that would ordinarily result in the automatic disqualification of an applicant. (342) The list contains various types of criminal or cybersquatting behavior. (343) Applicants also had to provide an explanation for 'any additional background information that may be found concerning the applicant or any individual named in the application, which may affect eligibility.' (344) Finally, applicants had to warrant that statements and representations in the application were true, accurate and complete in all material respects. A change in circumstances that would render any information provided in the application false or misleading had to be notified to ICANN in writing. (345) Background screening was needed to make sure that critical Internet resources were allocated to reliable parties.

Once the background screening was completed, ICANN checked whether the application met the administrative, operational, technical and financial requirements.

If an application passed the initial evaluation and there were no objections, no GAC Advice and no identity or confusing similarity with another (applied-for) gTLD, the application immediately moved to the delegation phase.

Applicants failing certain elements of the initial evaluation process were allowed to request an

extended evaluation. In the context of an extended evaluation, the applicant was entitled to exchange additional information with the evaluators in order to clarify information contained in the application. An additional payment was required. However, the same evaluation criteria were used during the initial and the extended evaluation.

To perform the evaluations, ICANN had selected independent evaluation panels which were to use a point scoring system to assess answers to the fifty questions posed in the application form and which were to consider, among other things, what influence the applied for gTLD could have on the stability of the DNS and whether the applied for gTLD was confusingly similar to existing gTLDs or other applications.

There was a minimum pass score applicable to most sections of the application form which had to be met for the application to progress.

Since it is not possible for two or more identical strings to occupy the Internet space, the String Contention procedure would come into effect should there be applications for identical strings. The String Contention procedure aimed in the first instance at a self-resolving of the contention by the parties by mutual agreement.

Also, if there were two or more applications for confusingly similar strings, only one application could be granted and therefore the String Contention procedures would also come into effect. Again, applicants were always given the opportunity to resolve the contention in a mutually acceptable settlement amongst themselves.

ICANN selected the various evaluation panelists through a call for 'Expressions of Interest'. Each panelist had to abide by the Code of Conduct and Conflict of Interest guidelines included in the Applicant Guidebook.

These were the main evaluation panels:

– String Similarity Panel

This Panel was tasked with assessing whether a proposed gTLD string was likely to result in user confusion due to similarity with any reserved name, any existing TLD, any requested Internationalized Domain Name (IDN) ccTLD, or any new gTLD string applied for in the same application round. This assessment had to take place as part of the string similarity review at the initial evaluation stage. (346)

– DNS Stability Panel

This Panel had to determine whether the proposed *string* might adversely affect the security or stability of the DNS. This was planned to occur during the DNS stability string review at the initial evaluation stage. (347)

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– Registry Services Panel

This Panel had to look for any adverse impact on security or stability of the *registry services* proposed in the application. If applicable, this review was planned to take place during the extended evaluation period. (348)

– Geographical Names Panel

This Panel was responsible for the review of each applied-for gTLD to determine whether it represented a geographic name. In the event that the string represented a geographic name and required government support, the panel was then to also review and verify the supporting documentation. (349)

– Technical Evaluation Panel

This Panel was expected to review the applicant's technical and operational capability to run a gTLD registry as proposed in its application. This review was to take place during the technical/operational reviews at the initial evaluation stage, and might also occur in the extended evaluation stage if necessary. (350)

– Financial Evaluation Panel

This Panel was asked to review the applicant's financial capability to maintain a gTLD registry against the relevant business, financial and organizational criteria contained in the Applicant Guidebook. This review was planned to take place during the financial review at the initial evaluation stage, and might also occur in the extended evaluation stage if necessary. (351)

On numerous occasions, ICANN has indicated that it followed the recommendations of its evaluation panels almost automatically. However, the lack of transparency in the selection of the panels and in their workings has given rise to severe criticism by applicants. (352)

(2) The Objection Phase

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The new gTLD program also gave various categories of third parties the opportunity to challenge the application for a particular gTLD via Alternative Dispute Resolution (ADR) mechanisms. Such challenges (called 'objections') could be initiated with so-called independent DRSP according to a pre-established set of rules. (353) Under these rules, objections could be based on the following grounds:

- String Confusion: (354) The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications. Objectors could be existing TLD operators or gTLD applicants in the current round.
- Legal Rights: The applied-for gTLD string infringes the existing legal rights of the objector. Objectors could be rights holders, for example, trademark holders.
- Community: There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted. Objectors could be an established institution associated with a clearly delineated community.
- Limited Public Interest: The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law such as racially abusive strings.

The ground for objection dictates which DRSP was to manage the dispute process: String Confusion Objections (SCOs) were managed by the International Centre for Dispute Resolution (ICDR). Legal Rights Objections (LROs) were managed by the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO). Limited Public Interest Objections and Community Objections were managed by the International Chamber of Commerce (ICC).

Parties were not prevented from taking a matter to court. However, decisions obtained through the ADR mechanisms established within the framework of the new gTLD program were likely to be quicker and easier to execute. We are not aware of any objection to an application for which the objector did not pursue the proposed ADR mechanism. In rare instances, court action has followed the outcome of an ADR decision. (355)

In the assessment of objections and the objection grounds, it should be kept in mind that the new gTLD program was launched with the goal of enhancing competition, consumer choice and innovation through the introduction of new gTLDs. ICANN designed the objection process to protect the legitimate rights of certain specific, defined groups, while also ensuring that objectors cannot prevent the delegation of legitimate TLDs. Accordingly, objections were only permitted on four specific grounds enumerated by ICANN: string confusion, legal rights, community opposition and limited public interest.

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(3) Delegation of New gTLDs

Once an application had passed all the evaluation and selection processes, including objection processes and final approval, it entered the pre-delegation stage. During this stage, the applicant entered into an agreement with ICANN and was expected to pass technical tests before the new gTLD was delegated to the root zone.

New gTLDs are being introduced carefully so that the process does not cause instability in the Internet. A maximum of 1000 new gTLDs can be delegated per year. ICANN planned to start with the evaluation and delegation of the IDNs. Other gTLDs were to be delegated according to a prioritization number that was provided in a draw.

The successful applicant for a particular new gTLD obtains an exclusive right to operate the applied for gTLD. Having become a registry operator, the applicant becomes a 'trustee' of the top-level domain for the global Internet community.

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- 229) ICANN, Articles of Incorporation, Article 4.
- 230) Expert Report of Jack Goldsmith, in ICDR Case No. 50 117 T 00224 08, 22 January 2009, pp. 12–16, §§ 23–27.
- 231) *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Independent Review Panel Declaration, 19 February 2010, para. 140.
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- 235) ICANN adopted new Bylaws on 27 May 2016, which incorporate the Affirmation of Commitments.
- 236) ICANN Bylaws, Article I(2).
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- 241) ICANN Bylaws, as adopted effective 21 November 1998, Article IV(1)(c), <https://www.icann.org/resources/unthemed-pages/bylaws-1998-11-23-en>.

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- 244) ICANN's constituent bodies were named subordinate entities until ICANN's 'new' Bylaws were adopted effective 15 December 2002.
- 245) ICANN Bylaws, Article I(2)(7). The core values, along with the concept of core values, were introduced with the 'new' Bylaws as adopted effective 15 December 2002.
- 246) Affirmation of Commitments, *supra*n. 135, Articles 3, 7, 9.1 and 10.
- 247) See A. Kotera, *Regulatory Transparency*, in P. Muchlinski, F. Ortino and C. Schreuer, *Oxford Handbook of International Investment Law* 619(2008); see Stacy Baird, *The Government at the Standards Bazaar*, 18 *Stanford Law & Policy Review* 35, 96–97 (2007).
- 248) See Sacha Prechal and Madeleine de Leeuw, *Dimensions of Transparency: The Building Blocks for a New Legal Principle?*, *Review of European Administrative Law* 51 (2007).
- 249) Esther Dyson referred to Frank Fitzsimmons, one of the nine initial directors of ICANN. He served on the ICANN Board from October 1998 to December 2002.
- 250) ICANN Public Meeting Transcript, Meeting Held in Cambridge, Massachusetts Saturday, 14 November, 9:00 am – 4:00 pm, 14 November 1998, <http://cyber.law.harvard.edu/icann/cambridge-1198/archive/transtransparency.html>, p. 222.
- 251) Affirmation of Commitments, *supra*n. 135, Article 7.
- 252) Affirmation of Commitments, *supra*n. 135, Article 9.1.
- 253) See Affirmation of Commitments, *supra*n. 135, Article 9.1.
- 254) See NTIA, *A Proposal to Improve Technical Management of Internet Names and Addresses – Discussion Draft*, <https://www.ntia.doc.gov/files/ntia/publications/dnsdrft.txt> (accessed 11 May 2016) ('Green Paper'); NTIA, *Management of Internet Names and Addresses: statement of policy*, https://www.ntia.doc.gov/files/ntia/publications/6_5_98dns.pdf, pp. 31742, 31743, 31744 at n. 18, pp. 31745–31746, 31747–31748, 31749, 31751.
- 255) Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, 25 November 1998, Articles II.A, II.C.2, IV, V.C.3.
- 256) ICANN Bylaws as amended on 15 December 2002, Article I(2)(2), (5)-(6); The duty to '[r]espect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination' has been taken up as a 'commitment in ICANN's Bylaws as amended on 1 October 2016, Article I(2)(a)(iii).
- 257) ICANN Bylaws as amended on 15 December 2002, Article II(3); ICANN Bylaws as amended on 1 October 2016, Article 2(3).
- 258) Affirmation of Commitments, *supra*n. 135, Article 3.
- 259) Affirmation of Commitments, *supra*n. 135, Article 9.3.
- 260) Affirmation of Commitments, *supra*n. 135, Articles 3 and 9.1.
- 261) ICANN Bylaws as amended on 15 December 2002, Article I(2)(10). With the adoption of its amended Bylaws of 1 October 2016, this core value has become a commitment.
- 262) .mil for use by the U.S. military, .gov for U.S. Government use, .edu for educational institutions (mainly in the U.S.), .int for international treaty organizations, and .arpa for infrastructural identifier spaces.
- 263) .com, .net and .org.
- 264) Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, p. 1.
- 265) ISO 3166 is a standard of the International Organization for Standardization that defines codes for the names of countries, dependent territories, and special areas of geographical interest and their principal subdivisions. The first part of ISO 3166 (referred to as ISO 3166-1 defines three sets of codes for the names of countries, dependent territories and special areas of geographical interest. ISO 3166-1 alpha-2 offers a set of two-letter country codes. It is the ISO 3166-1 alpha-2 codes that are used for ccTLDs.
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- 268) NTIA, *supra*n. 83, p. 31742.
- 269) NTIA, *supra*n. 83, 31744.
- 270) See Jon Postel, *Domain Name System Structure and Delegation*, Network Working Group Request for Comments # 1591, March 1994, <https://www.ietf.org/rfc/rfc1591.txt>, p. 1.
- 271) OLG Frankfurt am Main, decision from 29.04.2008, case number 11 U 32/04 ("VW.de"); LG Frankfurt am Main, decision from 14.10.1998, case number 2/06 O 283/98 ("Ambiente").
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- 275) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, May 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-00>, pp. 1, 3–4.
- 276) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, May 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-00>, p. 4.
- 277) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, May 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-00>, p. 8.
- 278) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, May 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-00>, p. 4.
- 279) *Supra* Chapter 2.A.2.b(2); ICANN, *Cooperative Agreement No. NCR-9218742*, <http://archive.icann.org/en/ansi/coopagmt-01jan93.htm> (accessed 11 May 2016).
- 280) NTIA, White Paper, 31743 ; Jon Postel, *New Registries and the Delegation of International Top Level Domains*, June 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-01>.
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- 282) Jon Postel, *New Registries and the Delegation of International Top Level Domains*, June 1996, <https://tools.ietf.org/html/draft-postel-iana-itld-admin-01>, p. 7.
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- 294) ICANN, *Criteria for Assessing TLD Proposals*, 15 August 2000, <http://archive.icann.org/en/tlds/tld-criteria-15aug00.htm>.
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- 297) ICANN, *Criteria for Assessing TLD Proposals*, 15 August 2000, <http://archive.icann.org/en/tlds/tld-criteria-15aug00.htm>.
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- 330) ICANN Resolution 2011.06.20.01, <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm>; ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, <http://www.icann.org/en/groups/board/documents/rationale-board-approval-new-gtld-program-launch-20ju...>
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- 354) 'String' refers to the sequence of letters that the gTLD is composed of.
- 355) *See.g.*, U.S. District Court, C.D. California, *Del Monte International GmbH v. Del Monte Corporation*, 995 F.Supp.2d 1107 (C.D. Cal. 2014).

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Exhibit 36



[GET STARTED \(/GET-STARTED\)](#)

[NEWS & MEDIA \(/NEWS\)](#)

[POLICY \(/POLICY\)](#)

[PUBLIC COMMENT \(/PUBLIC-COMMENTS\)](#)

[RESOURCES \(/RESOURCES\)](#)

[COMMUNITY \(/COMMUNITY\)](#)

[IANA STEWARDSHIP
& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

AMENDED AND RESTATED ARTICLES OF INCORPORATION OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

As approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016

The undersigned certify that:

1. They are the president and the secretary, respectively, of Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation.
2. The Articles of Incorporation of this corporation are amended and restated to read as follows:
 - I. The name of this corporation is Internet Corporation for Assigned Names and Numbers (the “**Corporation**”).
 - II. This Corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation 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, as amended (the “**Code**”), or the corresponding provision of any future

United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any future United States tax code. In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article IV hereof, 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 carrying out the mission set forth in the bylaws of the Corporation (“**Bylaws**”). Such global public interest may be determined from time to time. Any determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process.

- III. The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and 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.
- IV. Notwithstanding any other provision of these Articles:
 - a. The Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from United States income tax under § 501(c)(3) of the Code or (ii) by a corporation, contributions to which are deductible under § 170(c)(2) of the Code.
 - b. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall be empowered to make the election under § 501 (h) of the Code.
 - c. The Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.
 - d. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its directors, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article II hereof.

- V. To the full extent permitted by the California Nonprofit Public Benefit Corporation Law or any other applicable laws presently or hereafter in effect, no director of the Corporation shall be personally liable to the Corporation for or with respect to any acts or omissions in the performance of his or her duties as a director of the Corporation. Any repeal or modification of this Article V shall not adversely affect any right or protection of a director of the Corporation existing immediately prior to such repeal or modification.
 - VI. Upon the dissolution of the Corporation, the Corporation's assets shall be distributed for one or more of the exempt purposes set forth in Article II hereof and, if possible, to a § 501(c)(3) organization organized and operated exclusively to lessen the burdens of government and promote the global public interest in the operational stability of the Internet, or shall be distributed to a governmental entity for such purposes, or for such other charitable and public purposes that lessen the burdens of government by providing for the operational stability of the Internet. Any assets not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the Corporation is then located, exclusively for such purposes or to such organization or organizations, as such court shall determine, that are organized and operated exclusively for such purposes, unless no such corporation exists, and in such case any assets not disposed of shall be distributed to a § 501(c)(3) corporation chosen by such court.
 - VII. Any amendment to these Articles shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community, a California nonprofit association established by the Bylaws (the “**Empowered Community**”), following procedures set forth in Article 25.2 of the Bylaws.
 - VIII. Any transaction or series of transactions that would result in the sale or disposition of all or substantially all of ICANN (Internet Corporation for Assigned Names and Numbers)'s assets shall require (a) the affirmative vote of at least three-fourths of the directors of the Corporation, and (b) approval in writing by the Empowered Community prior to the consummation of the transaction, following procedures set forth in Article 26 of the Bylaws.
3. The foregoing amendment and restatement of Articles of Incorporation has been duly approved by the board of directors.
 4. The corporation has no members.

We further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of our own knowledge.

Date: 30 September 2016

Göran Marby, President

John Jeffrey, Secretary

Exhibit 37

DATE

06 March 2018

BY EMAIL

Contact Information Redacted

COPY

ICANN-Board@icann.org

SUBJECT

Community Application

Mr. Jamie Baxter
DOT.gay LLC
307 Seventh Avenue #305
New York, NY 10001
USA

Dear Sir,

I am writing you today in my capacity as Head of Institutional Relations at EBU to share with you our disappointing experience with the Community Priority Evaluation (CPE) process.

At the time, I was in charge of following on behalf of my organization all the policy implications of the application we submitted as a community for the DOT.radio TLD. Together with Personal Data Redacted, we went through the CPE process and our experience was that such process was far from being impartial and flawless. These considerations, as well as related concerns about the CPE, have already been directed to the ICANN Ombudsman and the Council of Europe (CoE) experts who prepared the report on TLD and Human Rights and are identical to those which affected the evaluation of the DOT.gay application.

The EBU was given 14 points out of the achievable 16 points on the rating scale, i.e., just enough points for DOT.radio to be recognized as a "community applicant" and granted community priority.

We obtained :

- 3 out of 4 points for Community Establishment
- 3 out of 4 points for Nexus between String and Community
- 4 out of 4 points on Registration Policies
- 4 out of 4 points for Community Endorsement

As we pointed out to the Ombudsman and the CoE experts, the criteria used by the EIU evaluators appeared completely unpredictable and unstable. No coherence could be found in the analyses carried out on various applications. As we have already stated publicly, there were frequent contradictions even within the same application, especially when compared to other parts of the ICANN's gTLD process.

These inconsistencies, as well as others, were brought to the attention of the Ombudsman and the CoE experts, but for obvious reasons, the EBU at that time was not very vocal, as we were still in the middle of the attribution process for DOT.radio. Now that we have been granted the DOT.radio TLD, we feel more free to bring to light the numerous and evident inconsistencies of the evaluation process. We also believe that had the process adhered more consistently to ICANN's own evaluation principles, our application would have been awarded all 16 points.

Unfortunately this was not the case either in relation to your application for TLD DOT.gay. Similarly, such inconsistencies and incoherencies had a devastating impact and, as a final result, prevented DOT.gay from obtaining community priority and recognition.

My purpose here is to sum up what happened to us in a very similar case to yours, hoping that the ICANN Board will arrive at the recognition that DOT.gay was refused community priority because of evident failures in the CPE process and inconsistent attribution of points. In the case of DOT.gay (as our experience shows as well) the evaluation score was wrongly calculated, due to inconsistencies against the criteria set by ICANN and even other EIU evaluations.

We find it shocking that the FTI Consulting investigation has ignored these inconsistencies and incoherencies, in spite of ICANN's responsibility as an organization to adhere to its non-discriminatory commitments in carrying out CPE and to ensure that all community applicants are treated equally and fairly. We hope that the ICANN Board will achieve enough clarity to set aside the FTI reports when addressing the case of DOT.gay.

At your disposal to provide further evidence if requested, I remain,

Yours sincerely,

Personal Data Redacted

Personal Data Redacted

(in charge of relations with ICANN)

EBU

OPERATING EUROVISION AND EURORADIO

Exhibit 38

From: Constantine Roussos

Date: Friday, February 2, 2018 at 1:47 PM

Subject: DotMusic Analysis of .MUSIC CPE Process & FTI Reports for ICANN Board

Dear Mr. Göran Marby, ICANN Board Chair Cherine Chalaby and ICANN BAMC Chair Chris Disspain:

Attached is DotMusic's "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (the "Analysis") in relation to ICANN's Community Priority Evaluation ("CPE") process and FTI Reports that were released by ICANN on 13 December 2017 (See [https://newgtlds.icann.org/en/applicants/cpe#process-review\[newgtlds.icann.org\]](https://newgtlds.icann.org/en/applicants/cpe#process-review[newgtlds.icann.org])).

We kindly request that the ICANN Board consider the substance of our Analysis during its upcoming Board Meeting that is scheduled for 4 February 2018. According to the Agenda items, the ICANN Board will be looking into the "Next Steps in New gTLD Programs Community Priority Evaluation (CPE) Process Review" (See [https://www.icann.org/resources/board-material/agenda-2018-02-04-en\[icann.org\]](https://www.icann.org/resources/board-material/agenda-2018-02-04-en[icann.org])).

We would also **request an opportunity to present our Analysis and findings to the ICANN Board** prior to any ICANN determination to ensure that **ICANN's decision** with respect to Reconsideration Request 16-5 **is based on substantive and accurate facts, procedural fairness, non-discrimination and transparency.**

Please distribute the Analysis to all ICANN Board members for their kind consideration before the scheduled 4 February 2018 Board Meeting.

Respectfully Submitted

--

Constantine Roussos
Founder
DotMusic

Jason Schaeffer
Legal Counsel
DotMusic

<http://music.us> [music.us]



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Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports

31 January, 2018

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A. Introduction and Background

1. On 13 December 2017, FTI Consulting prepared a Report for Jones Day¹ called the **Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports** ("Report").² On 13 December 2017, ICANN issued an announcement that:

The CPE Process Review was initiated at the request of the ICANN Board as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice,³ and consisted of three parts: (i) reviewing the process by which the ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN initiated the CPE Process Review (Scope 3).

FTI concluded that "there is no evidence that the ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process" (Scope 1) and that "the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook [] and the CPE Guidelines throughout each CPE" (Scope 2). ([See Scope 1 report](#) [PDF, 159 KB], Pg. 3; [Scope 2 report](#) [PDF, 312 KB], Pg. 3.)

For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the

¹ Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

² FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 December 2017). Prepared for Jones Day. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>

³ According to their website, FTI Consulting "conducts sophisticated investigations, uncovers actionable intelligence and performs value-added analysis to help decision-makers address and mitigate risk, protect assets, remediate compliance, make informed decisions and maximize opportunities." See <http://www.fticonsulting.com/services/forensic-litigation-consulting/global-risk--investigations-practice>



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reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

“The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process,” said Cherine Chalaby, Chairman of the ICANN Board. “Further, this CPE Process Review and due diligence has provided additional facts and information that outline and document the ICANN organization's interaction with the CPE Provider.”⁴

2. On January 2018, Arif Ali of Dechert LLP, DotMusic Limited's (“DotMusic”) legal counsel, sent a letter to ICANN that called into question the FTI Report's accuracy and reliability. In part, the letter stated:

... [T]he Board's adoption of the FTI's findings will be fundamentally inconsistent with the unfairness and inconsistency issues that Board itself recognized in the CPE process.

*As a neutral investigator hired by ICANN to pursue an “**independent review**” of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process. Instead, FTI sheltered the EIU's decisions, no matter how irrational or arbitrary, thus seriously calling into question its own credibility. As a result, FTI's findings are unreliable, unfair, and incorrect, while at the same time raising potential serious conflict of interest, bias and collusion concerns.*

Accordingly, we request that the ICANN Board take no action with respect to the conclusions reached by FTI, until DotMusic, and indeed all affected parties, have been provided with the underlying materials reviewed by the

⁴ ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 December 2017). See <https://www.icann.org/news/announcement-2017-12-13-en>



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FTI, and subsequently had an opportunity to respond to the FTI Report. To do otherwise would violate DotMusic's right to be heard.

DotMusic reserves all of its rights and remedies all available for whether within or outside of the United States of America.

3. This is an analysis of ICANN's Community Priority Evaluation process and the FTI Reports (the "Analysis"). Specifically:
 - a. Whether DotMusic's .MUSIC Report by the CPE Provider (EIU) conformed to the principles and methodology set forth in ICANN's Applicant Guidebook ("AGB").⁵
 - b. Whether DotMusic's .MUSIC CPE Report⁶ was consistent with the CPE Reports that passed CPE for .ECO,⁷ .HOTEL,⁸ .OSAKA,⁹ .RADIO¹⁰ and .SPA.¹¹ I will apply the same interpretation of the Applicant Guidebook (AGB) that has been adopted by the EIU in grading the applications that were successfully granted community priority status. The analysis will be restricted to CPE Reports that have prevailed CPE or have been awarded maximum scores in certain sections that the .MUSIC Report was not awarded full scores.¹² The analysis will not look into sections where the .MUSIC Report was awarded full points because those sections are not in dispute.
 - c. Whether this Analysis is consistent with other opinions concerning DotMusic's .MUSIC Report, such as the Council of Europe Report¹³ and opinions

⁵ ICANN, New gTLD Applicant Guidebook (4 June 2012). See <https://newgtlds.icann.org/en/applicants/agb> and <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

⁶ .MUSIC CPE Report for DotMusic Limited (10 February 2016). See <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁷ .ECO CPE Report (7 October 2014). See <https://icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>.

⁸ .HOTEL CPE Report (12 June 2014). See <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>

⁹ .OSAKA CPE Report (30 July 2014). See <https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>.

¹⁰ .RADIO CPE Report (10 September 2014). See <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

¹¹ .SPA CPE Report (22 July 2015). See <https://icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>.

¹² ICANN, Community Priority Evaluation and CPE Reports. See <https://newgtlds.icann.org/en/applicants/cpe>

¹³ Personal Data Redacted 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. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2, MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

<https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>



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filed by experts in (i) ethnomusicology;¹⁴ (ii) law and intellectual property;¹⁵ and (iii) organization¹⁶ respectively.

- d. Whether the FTI Report fulfilled its objectives to facilitate ICANN Board decision-making on the DotMusic Reconsideration Request 16-5,¹⁷ by taking an independent, complete and comprehensive look at the CPE Process. This analysis will examine the effectiveness of the FTI Report's evaluation methodology in relation to the issues outlined in DotMusic's Reconsideration Request 16-5 and any relevant recommendations on how the evaluation methodology and investigative process adopted by the FTI was appropriate or not for and if not, provide recommendations on how the process can be improved upon in a transparent, fair and neutral manner to benefit all affected parties.

B. Community Priority Evaluation Process Overview

4. The AGB provided the procedures and rules on how new gTLD applications were to be evaluated. According to the AGB, new gTLD applicants could designate their applications as either standard or community based ("operated for the benefit of a clearly delineated community").¹⁸ According to the AGB, Community Applicants must "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."¹⁹ If two or more applications were submitted for identical or "confusingly similar" strings and had completed all preliminary stages of evaluation then they were placed in a "contention set."²⁰ Community-based applicants could then elect to proceed with Community Priority Evaluation ("CPE") for that application.²¹ If the applicant elected to proceed to CPE, then the application was evaluated by The Economist Group's Economist Intelligence Unit ("EIU") that was selected by ICANN in 2011 to conduct Community Priority Evaluations.²²

¹⁴ Expert Ethnomusicologist Opinion by Personal Data Redacted (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-redacted-12sep16-en.pdf> Personal Data Redacted

¹⁵ Expert Legal Opinion by Personal Data Redacted (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-redacted-17jun16-en.pdf> Personal Data Redacted

¹⁶ Joint Organisation Experts' Opinion by Personal Data Redacted (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>

¹⁷ DotMusic Reconsideration Request 16-5. See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

¹⁸ AGB, § 1.2.3.1. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

¹⁹ Id., § 1.2.3.1

²⁰ Id., § 4.1

²¹ Id., § 4.2

²² See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>



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ICANN solicited Comparative Evaluation Panel Expressions of Interest (“EOI”) in 2009. The EIU confirmed in its EOI that it 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”²³ and that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.”²⁴ In addition, the EIU agreed to provide ICANN with a “statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”²⁵

5. The ICANN-EIU Statement of Work (“SOW”) agreement confirmed 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.”²⁶ In addition, the Panel confirmed that they would “document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result” by “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” [] “provid[ing] a summary of the rationale and recommended score for each question”²⁷ 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” that would include “access to work papers as required verifying Panel Firm’s compliance.”²⁸ The CPE Panel Process Document necessitated 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.”²⁹
6. According to ICANN’s CPE Guidelines, it was a requirement 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

²³ 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

²⁴ Id., p.5

²⁵ Id., p.6

²⁶ 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

²⁷ Id., p.5

²⁸ Id., p.12

²⁹ EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2



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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.”³⁰

7. If the application was determined to meet the CPE criteria set forth in the AGB by scoring at least 14 out of 16 possible points then the application prevailed in CPE and was thereby given priority, while the other standard applicants in the contention set did not proceed.³¹
8. The CPE process is set forth in Module 4 of the AGB. There are four principal criteria, each worth a maximum possible of 4 points: Community Establishment, the Nexus between Proposed String and Community, Registration Policies and Community Endorsement.³² As mentioned earlier, an application had to receive a total score of at least 14 points in order to pass CPE.
9. The first criterion is Community Establishment, which is comprised of two main sub-criteria: 1-A Delineation (2 points possible) and 1-B Extension (2 points possible). According to the AGB, the term “community” implies “more of cohesion than a mere commonality of interest” with “an awareness and recognition of a community among its members;” an “understanding of the community’s existence prior to September 2007” and with “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 defined by the community application 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.” 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 defined must be of “considerable size [‘Size’] and longevity [‘Longevity’].” Size requires that the “community is of considerable size.”³³ Longevity requires that the community defined “was in existence prior to September 2007.”³⁴ “With respect to ‘Delineation’ and ‘Extension,’ a community

³⁰ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

³¹ AGB, § 4.2.2

³² AGB, Section 4.2.3, pp.4-9 to 4-19

³³ 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

³⁴ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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can consist of [...] a logical alliance of communities (for example, an international federation of national communities of a similar nature).³⁵

10. The second criterion is the Nexus between Proposed String and Community, which has two main sub-criteria: 2-A Nexus (3 points possible) and 2-B Uniqueness (1 point possible). Under “Nexus,” for a score of 3, “the essential aspect is that the applied-for string is commonly known by others as the identification / name³⁶ of the community” so that “[t]he string matches the name of the community.”³⁷ Under “Uniqueness,” for a full score, it must be determined that the “[s]tring has no other significant meaning beyond identifying the community described in the application.”³⁸ “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.”³⁹
11. The third criterion is the Registration Policies section. 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.⁴⁰
12. The fourth criterion is Community Endorsement, which has two sub-criteria, each worth a possible 2 points (4-A Support and 4-B Opposition). Under “Support,” the “Applicant is, or has documented support from, the recognized⁴¹ community institution(s) / member organization(s).”⁴² “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.”⁴³ Under “Opposition,” 2 points are awarded if there is “no opposition of relevance.”⁴⁴ “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.”⁴⁵

³⁵ AGB, p.4-12

³⁶ AGB, “‘Name’ of the community means the established name by which the community is commonly known by others,” p.4-13

³⁷ AGB, p.4-12

³⁸ AGB, p.4-13

³⁹ AGB, p.4-14

⁴⁰ AGB, pp. 4-14 to 4-16

⁴¹ 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

⁴² AGB, p.4-17

⁴³ AGB, p.4-18

⁴⁴ AGB, p.4-17

⁴⁵ AGB, p.4-19



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DotMusic Application Materials and .MUSIC CPE Process

13. DotMusic Limited (with Application ID. 1-1115-14110⁴⁶) entered the CPE process on 29 July 2015.⁴⁷ According to DotMusic's Application materials provided to the CPE Panel and ICANN for evaluation:
 - a. The Mission and Purpose is “[c]reating 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.⁴⁸
 - 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: the art of combining sounds rhythmically, melodically or harmonically.”⁴⁹
 - c. 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.”⁵⁰

⁴⁶ DotMusic Application, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

⁴⁷ See ICANN CPE microsite, <https://newgtlds.icann.org/en/applicants/cpe>

⁴⁸ See .MUSIC Application, 18A. Also see 20C, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added)

⁴⁹ 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

⁵⁰ DotMusic Application, 20A, para.1



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- d. Examples of music community Organisation and Cohesion were described in 20A, which included “commonly used [] classification systems such as ISMN, ISRC, ISWC, ISNI [].”⁵¹
- e. The Size and Extension of the community defined were described in 20A, which stated that “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’).”⁵²
- f. The “Name” of the community defined was described in 20A. “The name of the community served is the ‘Music Community’ (‘Community’).”⁵³
- g. 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.”⁵⁴ DotMusic’s application “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in 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.”⁵⁵

⁵¹ Id., 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12th, 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,” 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,” 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, 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,” 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

⁵² DotMusic Application, 20A, para.4 at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>

⁵³ Id., 20A, para.1

⁵⁴ Id., 20A, para.3 (emphasis added)

⁵⁵ Id., 20D, para.1 (emphasis added)



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14. DotMusic's community application received "documented support" from multiple organizations representing a majority of the community. In 20D, DotMusic states "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."⁵⁶ According to the DotMusic Application Materials, the community defined and application is supported by *multiple* recognized organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall community defined in its application (defined as the "organized and delineated logical alliance of communities of similar nature that relate to music").⁵⁷

Independent Expert Letters⁵⁸

15. Forty-three (43) independent expert letters were also submitted to ICANN and the CPE provider that were in agreement that DotMusic's Application met the Community Establishment, Nexus and Support criteria.⁵⁹ The experts included Personal Data Redacted

⁵⁶ Id., 20D, last paragraph

⁵⁷ 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/s2dab2ba5pf6hx9f1j7cq5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁵⁸ The independent experts selected were from different fields of study. Having such diversity ensured that perspectives from different disciplines were applied to assess whether or not DotMusic's application met the CPE criteria in question. The independent expert letters agreed unanimously that the criteria were met.

⁵⁹ 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/w4r8b711mfs1ywww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also see <http://music.us/expert/letters>.



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The Independent Nielsen QuickQuery Poll

16. An independent poll conducted by Nielsen⁶⁰ was also submitted to ICANN and the CPE provider as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria in relation to the Community Establishment and Nexus sections. According to DotMusic's Application and the Independent Poll conducted by Nielsen, the "Name" of the community defined was the "Music Community"⁶¹ and the "Definition" of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."⁶² The independent Nielsen QuickQuery survey (August 7, 2015, to August 11, 2015) comprised of 2,084 adults.⁶³ Its objective was to evaluate whether or not the applied-for string "music" was commonly-known and associated with the identification of the community that was defined by DotMusic by asking the following question: "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 (75% of the respondents) responded positively, asserting that the applied-for string (music) corresponds to the name of community addressed by the application (the "music community") and that the "music community" definition derived from DotMusic's application can be accurately defined as "a logical alliance of communities of individuals, organizations and business that relate to music."

⁶⁰ See Nielsen QuickQuery. Retrieved on May 11, 2016, from

<http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

⁶¹ According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://qtdresult.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

⁶² 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://qtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁶³ 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



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Responses to CPE Clarifying Questions

17. On September 29th, 2015, DotMusic received Clarifying Questions from ICANN and the CPE Panel on Community Establishment and Nexus.⁶⁴ On October 29, 2015, DotMusic provided ICANN and the CPE Provider with responses to the Clarifying Questions,⁶⁵ which included:
- a. A “Community Establishment & Definition Rationale and Methodology” section clarifying the “community defined, ‘a delineated and organized logical alliance of communities of similar nature related to music’” and the Community Establishment rationale and methodology.⁶⁶
 - b. A “Venn Diagram for Community Definition and Nexus” section clarifying how the community defined matches the string, including clarification that “non-music community members that lack recognition and awareness of the community defined” were not part of the community defined because the community definition was a “strictly delineated and organized logical alliance of communities related to music with [the] requisite awareness of [the] community defined.”⁶⁷
 - c. A “Music Sector Background: Music is a Copyright Industry for Clarifying Question D” section clarifying that the “organized alliance” community defined by DotMusic functions in a regulated sector and as such must have organisation, cohesion and awareness across all its members. DotMusic also points to “ICANN Resolutions and GAC Advice that recognized music as a regulated, sensitive sector.”⁶⁸ DotMusic also clarifies that the community defined has cohesion under international copyright law, treaties and conventions e.g. music “rights are defined within national copyright laws which are, in large part, shaped by international treaties, many of which are administered by WIPO.⁶⁹ 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...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

⁶⁴ See Clarifying Questions (“CQ”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A20

⁶⁵ See Answers to Clarifying Questions (“CQ Answers”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A21

⁶⁶ Id., Annex A, p.26 of 993

⁶⁷ Id., Annex D, p.80 of 993

⁶⁸ Id., Annex F, p.93 of 993

⁶⁹ 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>)



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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.”⁷⁰

- d. A “Forty-three (43) Expert Testimonies” section providing forty-three (43) expert letters that supported the position that DotMusic’s Application met the Community Establishment, Nexus and Support CPE criteria.⁷¹
- e. An “Independent Nielsen / Harris Poll for Community Establishment and Nexus” section providing supporting evidence by the general public (over 2000 surveyed) to demonstrate that DotMusic’s Application met the CPE criteria for the sections of Community Establishment and Nexus.⁷²

The .MUSIC CPE Report

18. The .MUSIC CPE Report⁷³ was released on 10 February 2016, giving DotMusic a score of 10 out of 16 possible points. 4 points were deducted from the “Community Establishment” criterion section, 1 point was deducted from the “Nexus between Proposed String and Community” criterion section, and 1 point was deducted from the “Community Endorsement” criterion section. 14 points were required to pass CPE.

C. The Reconsideration Request 16-5

19. DotMusic,⁷⁴ the American Association of Independent Music⁷⁵ (“A2IM”), the Association of Independent Music⁷⁶ (“AIM”), the Content Creators Coalition⁷⁷ (“C3”), the Independent Music Companies Association⁷⁸ (“IMPALA”), the International Federation of Arts Councils and Culture Agencies⁷⁹ (“IFACCA”), the International Federation of Musicians⁸⁰ (“FIM”), the Merlin Network⁸¹ (“Merlin”), the Nashville Songwriters Association International⁸²

⁷⁰ Id., Annex F, pp.97 to 99 of 993

⁷¹ Id., Annex K, pp. 159 to 993 of 993

⁷² Id., Annex H, pp.102 to 105 of 993

⁷³ DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

⁷⁴ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

⁷⁵ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

⁷⁶ <http://musicindie.com/about/aimmembers>

⁷⁷ <http://c3action.org>

⁷⁸ <http://impalamusic.org/node/16>

⁷⁹ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁸⁰ <http://fim-musicians.org/about-fim/history>

⁸¹ <http://merlinnetwork.org/what-we-do>

⁸² <https://nashvillesongwriters.com/about-nsai>



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(“NSAI”), ReverbNation⁸³ and the Worldwide Independent Network⁸⁴ (“WIN”), co-filed a Reconsideration Request 16-5 (“RR”)⁸⁵ requesting that the ICANN Board Governance Committee reject the findings of the .MUSIC CPE Report based on numerous CPE process violations, including the contravention of established procedures by both ICANN and the CPE Panel.⁸⁶ Some of these violations of established procedures and policies included:

- a. Ignoring International Laws and Conventions in relation to cohesion under music copyright⁸⁷ and incorrectly determining that the music community defined has no organization, no cohesion and no awareness. Such a conclusion would wrongly suggest that the community defined as a whole does not have international music rights functioning under a regulated sector.

⁸³ <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)

⁸⁴ <http://winformusic.org/win-members>

⁸⁵ See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

⁸⁶ 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 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>

⁸⁷ 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>



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- b. Misapplying and ignoring the “Community” Definition defined 20A. Instead the CPE Panel used a sentence from 20D as the community definition even though the AGB required that the definition be stated explicitly in 20A.
- c. Misapplying and ignoring “logical alliance” Community Definition that has “cohesion” and fulfills the criteria based on the AGB.
- d. Misapplying and ignoring the Community “Name” under the Nexus section.
- e. Misapplying and ignoring the “Majority” criterion under the Support section.
- f. Misapplying and ignoring “Recognized” organisations that are recognized by the United Nations and the WIPO.
- g. Ignoring international music organisations that are “mainly” dedicated to the community defined and are recognized by United Nations and WIPO.
- h. Ignoring evidence that the Music Community defined existed prior to 2007.
- i. Misapplying policy in relation to GAC consensus Category 1 Advice accepted by ICANN that demonstrates that the community defined is united and legally-bound by a regulated sector.
- j. Discriminating by failing to compare and apply the same consistent grading methodology and rationale that was adopted by the CPE Panel in community applications that passed CPE. Instead the CPE Panel applied inconsistent point distribution in comparison to community applications that passed CPE.
- k. Failing to implement a quality control process to ensure fairness, transparency, predictability and non-discrimination in the CPE Process.
- l. Failing to address the CPE Panel’s conflict of interest with another competing applicant that is a violation of the ICANN-EIU Statement of Work and Expression of Interest, the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles.
- m. Failing to undertake, document and cite appropriate research to support the conclusions CPE Report’s conclusions in a compelling manner.



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D. Expert Opinions

20. Three (3) expert opinions were submitted to ICANN. The expert opinions were presented from three (3) perspectives and fields of study: ethnomusicology, law and intellectual property, and organization.
21. An Expert Legal Opinion was submitted by Personal Data Redacted on 17 June 2016 and said, in summary:⁸⁸
- a. *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.*
 - b. *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.” The Music Community participates in a regulated sector with activities tied 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*

⁸⁸ Expert Legal Opinion by Personal Data Redacted (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-en.pdf> Personal Data Redacted [-redacted-17jun16-en.pdf](#)



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example, in its Article 14 bis (3) recognizes the specific situation for musical works.⁸⁹

- c. *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..."⁹⁰*
- d. *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." 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.⁹¹*
- e. *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.⁹²*

⁸⁹ Personal Data Redacted, Expert Legal Opinion, pp. 39 - 40

⁹⁰ Id., p.40

⁹¹ Id., p.41

⁹² Id., p.48



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22. An Expert Ethnomusicologist Opinion was submitted by Personal Data Redacted on 12 September 2016 and said, in summary:⁹³
- a. *The CPE Report's conclusion that there is "no substantive evidence" that the defined Music Community in its entirety has cohesion 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 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 consumer 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 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.*⁹⁴
 - b. *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).*⁹⁵
 - c. *[E]ach member category delineated in DotMusic's Community definition is essential for the complete, proper and efficient functioning of the Community. In*

⁹³ Expert Ethnomusicologist Opinion by Personal Data Redacted (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

⁹⁴ Personal Data Redacted Expert Ethnomusicologist Opinion, pp. 7 - 8

⁹⁵ Personal Data Redacted Expert Ethnomusicologist Opinion, pp. 7 - 8



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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.

- d. *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.⁹⁶*
- e. *[T]he 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.”²⁸ 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.⁹⁷*
- f. *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*

⁹⁶ Id., p.9

⁹⁷ Id., p.10



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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"⁹⁸

- g. *[A]s 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" 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 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.⁹⁹*

⁹⁸ Id., p.14

⁹⁹ Id., p.24



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- h. *[I]n my Expert Ethnomusicologist Opinion, 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. It is indisputable that DotMusic's application possesses documented support from the recognized community member organizations.¹⁰⁰*
- i. *[R]ecognized supporting organizations, such as A2IM and Reverbnation, are representative of the addressed community defined in its entirety¹³⁸ 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.¹⁰¹*

23. A Joint Organisation Experts' Opinion was submitted by Personal Data Redacted on 11 October 2016 and said, in summary:¹⁰²

- a. *Based on our collective qualifications and decades of experience in organisation, our professional vocation as researchers, academics and professors/lecturers/teachers, and having reviewed the relevant parts of the documents that include the ICANN Applicant Guidebook ("AGB"), the CPE Guidelines, DotMusic's publicly-available Application Materials, the expert testimonies submitted in support of the Application (43 in total), the results of an independent Nielsen Poll concerning DotMusic's community "definition" and "name," DotMusic's Public Interest Commitments, the CPE Reports conducted by the Economist Intelligence Unit (the EIU) on behalf of ICANN for the community applications for the strings .HOTEL, .SPA, .ECO, .RADIO, .OSAKA, .CPA, .MERCK and .GAY, the Expert Legal Opinion by Honorary Professor Dr. Blomqvist and the Expert Ethnomusicologist Opinion by Dr. Burgess, it is our collective expert opinion (the "Joint Organisation Experts' Opinion) and conclusion that DotMusic fully meets all CPE criteria for a score of 16 points. The music community defined is indeed a "real community" that can be grounded in both organization theory and practice. Indeed one could argue that the music community defined has a significant level of cohesion because it is highly organised in nature and operates under a regulated sector under international principles of copyright law and conventions. The Joint Organisation Expert's Opinion also provides additional supporting perspectives in relation to what constitutes an organised, symbiotic and*

¹⁰⁰ Id., pp. 27 - 28

¹⁰¹ Id., pp. 28 - 29

¹⁰² Joint Organisation Experts' Opinion by Personal Data Redacted (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>



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interdependent community, including findings that, indeed, the music community defined and delineated is “real” and organised. The essential component of a “real community” is that it is linked by ties of commensalism, interdependence and symbiosis, including collective action by interest groups and associations that builds community legitimacy (Aldrich and Ruef). An organised community is a set of diverse, internally homogeneous populations that are fused together into functionally integrated systems based on interdependencies (Astley), with great emphasis on the relationships comprising a functioning community (Barnett, Henrich, and Douglas). In organisational ecology, community members are those that are essential to the viability of the other (Hannan and Freeman). Organised communities, such as the music community defined, are considered “real” and legitimate based on shared principles and a system of norms, values, beliefs, and definitions (Mark C. Suchman) and from a socio-political organisational theory perspective, a willingness to associate by environment (Aldrich and Fiol). Communities, such as the music community defined, emerge from relationships between units that involve competition, cooperation, dominance, and symbiotic interdependence (Aldrich and Ruef). An organised community is defined as a set of co-evolving organizational populations joined by ties of commensalism (Amos Hawley) and symbiosis (Aldrich and Ruef) through their orientation to a common technology (such as the Internet), normative order (such as a system of common values and principles), or legal regulatory regime (such as music copyright regulation by government).

- b. *DotMusic delineated all music constituent parts that would represent the essential music community members that would have a legitimate claim in music-related activities and music-related participation with respect to the string. As per the CPE Panel, the music community defined “bounds community membership by way of well-defined categories” and “provides a clear and straightforward membership definition” based on NAICS codes. This scientific methodology was not an attempt to construe a community to be awarded a sought-after string. In fact, this approach is the most common scientific model used by researchers, academics and institutions (e.g. the Creative Economy Coalition and UNESCO) for defining, organising and delineating creative communities that are comprised of essential, symbiotic and interconnected category groups. For a community to function, community resources include not only individual artistic and creative abilities, but also all the complementing support necessary for activities to be undertaken (Bunting, Jones and Wagner). Music community cohesiveness relies on all music community components and sub-components to work together in symbiosis. DotMusic sensibly excluded non-essential (i.e. those that would not have a legitimate claim to identify themselves as members of the community) and peripheral entities that are*



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unrelated to music from every “member category” to ensure the music community definition was precise and to make certain that the community addressed matches the string in relation to “music” in its entirety (without discriminating against legitimate music members, while at the same time preventing any overreach beyond the community defined). The music community defined is held together by shared sets of norms, values and practices and is defined in terms of an alliance, which by definition inherently has cohesion and organisation.

- c. *The Joint Organisation Experts’ Opinion also used the Ngrams humanities research tool to conduct statistical analyses and frequency charting on corpuses found in printed sources prior to 2008. Relevant terms, such as the “music industry,” the “music community,” the “IFPI” and the “RIAA,” were charted against other pertinent benchmarks to comparatively demonstrate that (i) the music community defined is organised (given the prevalence of the “music industry” term) and pre-existed 2007; (ii) the “music community” name is a well-known short-form of the community defined (and pre-existed 2007); and (iii) both the RIAA and IFPI are recognized organisations mainly dedicated to music (and pre-existed 2007). The Joint Organisation Experts’ Opinion also investigated whether the “music community” name was a well-known short form of the community defined. Both music community members and the global media use the term “music community” to correspond to the community defined, encompassing both commercial (i.e. business/industry) and non-commercial music stakeholders. The “music community” is the most popular name in common parlance to describe the community addressed to match the string.*
- d. *The Joint Organisation Experts’ Opinion concludes that DotMusic’s application satisfies the criteria for “Community Establishment,” “Nexus” and “Support.” Based on the evidence provided and our expertise in organisation theory, DotMusic’s application meets the AGB’s community priority threshold. This conclusion is consistent with 43 other independent expert opinions that were submitted prior to DotMusic’s CPE process and two other independent expert opinions submitted following the release of the CPE Report, namely, the Legal Expert Opinion by Honorary Professor Dr. Blomqvist and the Ethnomusicologist Expert Opinion by Dr. Burgess. In conclusion, we are also in agreement that DotMusic’s application should be granted community priority by ICANN.¹⁰³*

¹⁰³ Personal Data Redacted

, Joint Organisation Experts’ Opinion, pp. 3 - 5



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24. All Expert Opinions concluded that DotMusic's Application met the CPE criteria based on the guidelines set forth in the AGB.

E. The Council of Europe Report

25. An independent Personal Data Redacted¹⁰⁴ report also analyzed the CPE Process and provided recommendations to ICANN. The report titled "*Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*"¹⁰⁵ (the "CoE Report") was written by Personal Data Redacted and submitted to ICANN.¹⁰⁶
26. The CoE Report revealed that the CPE Process was 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, the CoE Report addressed how these failings specifically harmed DotMusic:

a. CPE Process contained Major Flaws:

- i. *"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."*¹⁰⁷
- ii. *"[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 ofrt all responsibility for determining priority, despite the delegated third party*

¹⁰⁴ Personal Data Redacted is Europe's leading human rights organization, with 47 member states (28 of which are also members of the European Union). Personal Data Redacted also has observer status within ICANN's Governmental Advisory Committee

¹⁰⁵ Personal Data Redacted 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. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2, MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at <https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>

¹⁰⁶ Personal Data Redacted 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>.

¹⁰⁷ *Id.*, p. 9.



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(the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority.”¹⁰⁸

b. ICANN and the EIU treated DotMusic Differently than other Community Applicants that passed CPE:

i. *“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’ – 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.”¹⁰⁹*

- *“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.**”¹¹⁰*

- *“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.**”¹¹¹*

¹⁰⁸ *Id.*, p. 16.

¹⁰⁹ *Id.*, p. 49 (emphasis added).

¹¹⁰ *Id.*, p. 49 (emphasis added).

¹¹¹ *Id.*, p. 49 (emphasis added).



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- ii. **“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.”**¹¹²
- **“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.”**¹¹³
 - **“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.”**¹¹⁴
- iii. **“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 improve their process over time, but that this did not affect the process as described in the AGB.”**¹¹⁵
- iv. **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**

¹¹² *Id.*, p. 49 (emphasis added).

¹¹³ *Id.*, p. 51 (emphasis added).

¹¹⁴ *Id.*, p. 57.

¹¹⁵ *Id.*, p. 51 (emphasis added).



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*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)."*¹¹⁶

c. Improper Conflicts of Interest Existed During DotMusic's CPE Process:

- i. *"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 Personal Data Redacted 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."*¹¹⁷
- ii. *"It was pointed out to us that Personal Data Redacted became Personal Data Redacted . Google is in 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 Personal Data Redacted, who has been Personal Data Redacted since 2003 and who Personal Data Redacted (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."*¹¹⁸
- iii. *"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*

¹¹⁶ *Id.*, p. 52.

¹¹⁷ *Id.*, p. 41 (emphasis added).

¹¹⁸ *Id.*, p. 47 (emphasis added).



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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.”¹¹⁹

d. Lack of Transparency in the CPE Process:

- i. *“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 all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.”¹²⁰*
 - ii. *“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).”¹²¹*
27. The CoE Report confirms that the CPE Process had issues concerning 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, Personal Data Redacted 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

¹¹⁹ *Id.*

¹²⁰ *Id.*, p. 53.

¹²¹ *Id.*, p. 54.



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*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.¹²²*

28. The CoE report re-affirms DotMusic’s assertions in Reconsideration Request 16-5 concerning the CPE process for .MUSIC. According to DotMusic, the DotMusic Application Represents a Bona Fide Community and Serves the Public Interest and 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.¹²³

29. The CoE Report also outlines the significance of trust and protecting vulnerable communities (e.g., the music community and music consumers) while at the same time enhancing safeguards for strings linked to a regulated sector (such as music) to serve the global 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 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**.¹²⁴*

30. According to the “Declaration of the Committee of Ministers on ICANN, concerning human rights and the rule of law,”¹²⁵ 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,

¹²² *Id.*, p. 3 (emphasis added).

¹²³ Personal Data Redacted

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>.

¹²⁴ *Id.*, p. 35 (emphasis added).

¹²⁵ 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).



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such as pluralism, cultural and linguistic diversity, and respect for the special needs of vulnerable groups and communities, such as the global music community.

31. The CoE Report also mentions DotMusic in relation to the right to freedom of expression and how DotMusic 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, 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.¹²⁶

32. 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.¹²⁷

33. DotMusic does not “undermin[e] free expression and restricting numerous lawful and legitimate uses of domain names.”¹²⁸ 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:

¹²⁶ *Id.*, p. 20.

¹²⁷ *Id.*, pp. 19-20 (emphasis added).

¹²⁸ *Id.*, p. 20.



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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 represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.*¹²⁹
34. The CoE Report affirmed that DotMusic “intends to create a safe haven for legal music consumption . . . [through] enhanced safeguards, tailored policies, legal music, [and] enforcement policies.”¹³⁰ 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.*¹³¹

35. The authors of the CoE Report also made a presentation to ICANN during an ICANN webinar called “Community gTLD Applications and Human Rights”¹³² on 18 January 2017.¹³³

a. The Findings on Human Rights, the Public Interest and Communities:

¹²⁹ DotMusic Limited, Specification 11 Public Interest Commitments (“PIC”), pp. 1-2,

<https://qtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>.

¹³⁰ Personal Data Redacted, 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>.

¹³¹ *Id.*, p. 8.

¹³² ICANN, Community gTLD Applications and Human Rights webinar (2017),

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes>

¹³³ Personal Data Redacted, Community gTLD Applications and Human Rights presentation (2017) <https://community.icann.org/display/gnsononcomstake/Meeting+Notes?preview=/53772757/64063241/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf>



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- i. *“ICANN adopted a new Bylaw in May 2016 that explicitly commits ICANN to respect internationally recognized human rights.”*
- ii. *“However, the Community TLD [CPE] process failed to adequately protect the following human rights:*
 - *Freedom of expression*
 - *Freedom of association*
 - *Non-discrimination.”*
- iii. *“These rights fell short in large part because due process (itself a Human Right) did not meet acceptable standards.”*
- iv. *“ICANN lacks a clear vision on the purpose of community-based TLDs.”*
- v. *“There is no clear definition of “community” for the purpose of community-based applications: the initially broad definition of community as formulated by the GNSO has been severely restricted in the Applicant Guidebook, the Community Priority Evaluation (CPE) Guidelines and by the Economist Intelligence Unit (EIU). As a consequence, the process defeats the initial GNSO Policy intention.”¹³⁴*

b. The Findings on Process:

- i. *“Community Priority Evaluation*
 - *There is no external quality control of the Economist Intelligence Unit’s procedures and decisions, despite this being a term of the contract between the EIU and ICANN.*
 - *ICANN has devolved itself of all responsibility for determining community priority, despite the EIU insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN’s own accountability mechanisms are unable to hold ICANN (or the EIU) to account.”¹³⁵*
- ii. *“Accountability Mechanisms*
 - *Community-based applicants and their competitors have recourse to the following accountability mechanisms: reconsideration requests, the Independent Review Process, the ICANN*

¹³⁴ Id., p.2

¹³⁵ Id., p.3



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Ombudsman, and the court. These mechanisms have been of very limited value to community applicants.”

iii. *General Concerns*

- *“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, have led to accusations of unfairness and of discrimination.*
- *Maximum predictability of the behaviour of delegated decision-makers need to be guaranteed by ICANN.*
- *There are no appeal mechanisms in place.*
- *The lines of responsibility are unclear when it comes to delegated decision-makers.”¹³⁶*

c. Recommendations to Improve Process

- i. *“Having greater clarity of the purpose of Community TLDs and why ICANN has created a special regime for Communities. This should be firmly grounded in Human Rights.”*
- ii. *“Introducing a single appeal mechanism which can look at substance as well as process.”*
- iii. *“Ensuring that all the delegated decision making processes – for Community Objections, CPE and the accountability mechanisms –are all human rights compliant and quality controlled.”*
- iv. *“Review the role of the Economist Intelligence Unit. The credibility of the EIU has arguably been damaged by allegations of lack of transparency, collusion with ICANN staff, and conflicts of interest.”¹³⁷*
- v. *“Placing sufficient restrictions on the registry agreements for Community TLDs to deter purely commercial interests from applying. This would shift the burden of proof so that applicants would not need to prove they were, in fact, community-based as this would be a prima facie assumption. Instead, applications would be awarded to those who proved they had the most support from, and accountability to the community, and would provide the most benefit.”¹³⁸*

36. Personal Data Redacted authored an
 ICANN blog titled “Community consensus on the need for change regarding community-

¹³⁶ Id., p.4

¹³⁷ Id., p.5

¹³⁸ Id., p.6



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based new Generic Top-Level Domains (gTLDs)” on 18 January 2017 that encapsulated community conclusions in relation to the ICANN webinar that was organized by ARTICLE 19, the Council of Europe, and the Cross Community Working Party on ICANNs Corporate and Social Responsibility to Respect Human Rights:¹³⁹

- a. ‘Personal Data Redacted report on Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs) – Opportunities and challenges from a human rights perspective was presented. Its authors, Personal Data Redacted , raised concerns regarding the policies and procedures for community objections (i.e. inconsistency in who has standing to object, opaque decision-making) and community priority evaluations (i.e. uncertainty in appealing the decisions of the Economic Intelligence Unit).”
- b. “Concerns were expressed about the treatment of community applications in the ICANN process. Cherine Chalaby, ICANN Board member, underlined the need for an adequate rationale in dealing with all community applicants. Personal Data Redacted on subsequent gTLD procedures, considered the pre-screening of community applicants.”
- c. “In summary, it was generally agreed that ICANN’s policies and procedures should be as clear, fair, reasonable and transparent as possible in order to reduce inconsistency, increase predictability, ensure due process, eliminate discrimination and deter potential gaming.”¹⁴⁰

F. The FTI Reports

37. On 13 December 2017, FTI Consulting published the Reports it had prepared under instructions from Jones Day¹⁴¹ relating to the CPE Process (“FTI Report”).¹⁴²

¹³⁹ Personal Data Redacted ICANN, Community consensus on the need for change regarding community-based new Generic Top-Level Domains (gTLDs) (18 January 2017). See <https://community.icann.org/pages/viewpage.action?pagelD=64067496>

¹⁴⁰ Id.

¹⁴¹ Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

¹⁴² FTI Consulting, FTI Report (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf> (Communications Between ICANN Organization and the CPE Provider, Scope 1), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf> (Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2) and <https://www.icann.org/en/system/files/files/cpe-process->



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38. The **FTI Report Scope 1** pertained to “**Communications Between ICANN Organization and the CPE Provider.**”¹⁴³ It concluded:

*[T]hat there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI’s review of the written communications and documents described in Section III below and FTI’s interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.*¹⁴⁴

39. The **FTI Report Scope 2** pertained to the “**Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports.**”¹⁴⁵ It concluded:

[T]hat the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI’s review of the written communications and documents and FTI’s interviews with the relevant personnel []. Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider’s findings in this regard were not the result of inconsistent application of

[review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf](#) (Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3).

¹⁴³ FTI Report, Communications Between ICANN Organization and the CPE Provider, Scope 1 (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>

¹⁴⁴ Id., p.3

¹⁴⁵ FTI Report, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2 (13 December 2017), p.1. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>



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the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.¹⁴⁶

40. The **FTI Report Scope 3** pertained to the **Compilation of the Reference Material** relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests.¹⁴⁷ It concluded:

[FTI] observed that of the eight relevant CPE reports, two (.CPA and .MERCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers associated with the first .GAY evaluation.¹⁴⁸

G. Analysis

.MUSIC CPE and CPE Comparative Analysis

Community Establishment

41. The CPE Panel argues in the .MUSIC CPE Report that there is "no substantive evidence" that the defined "organized alliance of communities that relate to music" has no cohesion in its entirety. Such an argument is problematic because an "organized alliance" must have cohesion in order to be considered an alliance. In other words, the organizations that form the alliance must have awareness of each other and that each constituent group exists. In short, different constituents interconnect with each other and each constituent performs

¹⁴⁶ Id., p.3

¹⁴⁷ FTI Consulting, FTI Report, Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3 (17 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

¹⁴⁸ Id., pp. 57 - 58



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a function that is essential for the music industry to function the way it does. It is not possible to argue that constituent groups that make up the music community are not aware of each other, do not interact with each other, or do not understand how each constituent group functions within this logical alliance. If the CPE Panel's assertions are correct (they are not) then how can the music industry function without cohesion or organisation? More importantly, a lack of cohesion would also suggest that music copyright (and music rights in general) are non-existent or non-essential for each constituent to perform their activity. DotMusic provided various examples of internationally-recognized standards to showcase such cohesion, such as the International Standard Name Identifier (ISNI).¹⁴⁹

42. **It is also observed that the community definition provided by DotMusic is nowhere to be seen in the CPE Report.** The “organized logical alliance” community definition is disregarded and it appears that a new definition is developed by the CPE Panel to help rationalize its argument. Such a process error creates unintended consequences because applying the wrong community definition compromises how the community application is graded. The CPE Process should be re-evaluated based on this procedural error alone. The description of the “constituent parts” is not the definition of the community. In fact, the AGB mandates applicants that in the case of a community of an “alliance of groups” (which is exactly what the community defined by DotMusic is), that the “details about the constituent parts are required.”¹⁵⁰ It appears that the CPE Panel mistook the “details about the constituent parts” as the community definition (it is not).
43. DotMusic clarifies in its Application materials that “[t]he 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.”¹⁵¹

¹⁴⁹ The ISNI is an ISO Standard for the Public Identities of parties: that is, the identities used publicly by parties involved throughout the music industry in the creation, production, management, and content distribution chains. See <http://www.isni.org> and <http://www.isni.org/content/isni-music-industry>

¹⁵⁰ 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.**” See Notes, 20A, A-14

¹⁵¹ DotMusic Public Interest Commitments (“PIC”), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6



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44. A logical alliance of communities qualifies for a full score under 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).”¹⁵² DotMusic met the criteria for a full score by explicitly using similar AGB language to meet this requirement to define the community: “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”¹⁵³ In short, the community definition adopted by DotMusic is aligned with the language permitted by the AGB to meet the Community Establishment criteria of a **delineated** and **organized** community. One could assert that the definition mirrors the requirements of the AGB for Community Establishment in relation to music. In addition, since a letter of endorsement was required to be filed by each of these organizations that comprise the constituent parts, it cannot be debated that they had no awareness of the community defined and that they unite under the mission and purpose of the string that was described in DotMusic’s application. A community that formally files letters of support to endorse and participate under a united purpose implies more of a cohesion than a mere commonality of interest.
45. Another requirement under the AGB is that there is “at least one entity mainly dedicated to the community” that was defined. Such organizations include the International Federation of Phonographic Industry (“IFPI”) and the International Federation of Musicians (“FIM”) that are entirely dedicated to the community in areas, including the protection of music rights, a key area that the entire community in its entirety relies upon and is united behind. Without such protections and activities to support such protections, the community would not have an industry or be able to conduct any of its activities the way it does.
46. Founded in 1948, the FIM is a globally recognized international federation representing the “voice of musicians worldwide.”¹⁵⁴ For example, the FIM is recognized by the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, the World Intellectual Property Organization and the Organisation Internationale de la Francophonie¹⁵⁵
47. Founded in 1933, the IFPI is a recognized international federation “representing the “recording industry worldwide” and the majority of music consumed globally.”¹⁵⁶ The IFPI represents Universal Music, Sony Music and Warner Music, globally-recognized organizations that “control 78% of the global market.”¹⁵⁷

¹⁵² AGB, p.4-12

¹⁵³ DotMusic Application, 20A

¹⁵⁴ Musicians represent the majority of the music community defined in absolute numbers.

¹⁵⁵ UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

¹⁵⁶ IFPI, <http://www.ifpi.org>

¹⁵⁷ 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&ext_docid=1034433411_1_eng_pdf



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48. The FIM and IFPI both qualify as recognized community member organizations that are mainly dedicated to the community addressed with “documented activities” such as activities centered around the protection of music rights.
49. The CPE Panel awarded the .HOTEL community applicant with a full score for “Organization” because the Panel found “recognized community institution(s)/member organization(s)”¹⁵⁸ and has at least one organization mainly dedicated to the community:

“[T]he 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)”¹⁵⁹

“The applicant possesses documented support from the recognized community institution(s)/member organization(s).”¹⁶⁰

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 and similarly, DotMusic’s application had multiple recognized international federations (such as the FIM and the IFPI) and national organizations mainly dedicated to the music community.

50. Under the AGB, the community defined must be of “**considerable size** [‘Size’] and **longevity** [‘Longevity’].¹⁶¹ DotMusic’s application meets this criterion because it states that “[t]he 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”)**.”¹⁶² Under the Pre-existence criteria, the community defined by the applicant “must have been active prior to September 2007.”¹⁶³ Longevity also mandates that the community defined is not ephemeral or set up for the specific purpose of obtaining a gTLD approval.¹⁶⁴ With respect to pre-existence, the FIM and IFPI were founded in 1948 and 1933 respectively. Their activities that have had global impact on the entire music community (in areas such as the

¹⁵⁸ .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6

¹⁵⁹ Id., p.2

¹⁶⁰ Id., p.6

¹⁶¹ 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

¹⁶² See .MUSIC Application, 20A, para.4 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

¹⁶³ AGB, p.4-11

¹⁶⁴ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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protection of music rights) occurred **decades prior to 2007**. In short, the community defined was not set up for the specific purpose of obtaining gTLD approval. The music community defined has been organized for ages and did not create itself after 2007 for the sole purpose of applying for a top-level domain.

51. According to the .GAY CPE Report, “the [International Lesbian, Gay, Bisexual, Trans and Intersex Association] ILGA, an organization mainly dedicated to the community as defined by the applicant ... **has records of activity beginning before 2007.**”¹⁶⁵ Similarly, 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.”¹⁶⁶ Consistent with the .SPA and .GAY CPE Reports’ rationale for ISA and ILGA, both the FIM and the IFPI have “records of activity before 2007.” Similarly, the constituent segments of the community defined by DotMusic have also been active prior to September 2007. Consistent with both the .GAY and .SPA Reports’ rationale and grading threshold, the CPE Panel should have also awarded DotMusic with a full score under Community Establishment by applying the AGB criteria in a similar manner.
52. DotMusic’s application was consistent with (and in some cases exceeded) the Community Establishment rationale and “cohesion” threshold that the CPE Panel applied to be award the .ECO, .GAY, .HOTEL, .OSAKA, .RADIO and .SPA community applications with maximum points under Community Establishment. As stated in DotMusic’s Reconsideration Request 16-5:
- *“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.”¹⁶⁷ 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.”*
 - *“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”¹⁶⁸ (emphasis added). In contradiction, the EIU determined DotMusic’s “logical alliance” operating under a*

¹⁶⁵ .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3

¹⁶⁶ .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3

¹⁶⁷ .ECO CPE, p.2

¹⁶⁸ .GAY CPE, p.2



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regulated sector that is united by copyright lacked any “cohesion” of belonging to a community.”

- “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.”¹⁶⁹ 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.”
- “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;¹⁷⁰ Similarly, DotMusic’s “logical alliance” is “related to music” (i.e. has a tie) but its Application was penalized.”
- “The EIU established that the .RADIO had cohesion solely on the basis of being “participants in this...[radio] industry.”¹⁷¹
- “[T]he .MUSIC Report penalized the Application under community establishment to the fullest extent possible (grading zero points) for lacking “cohesion” while the .SPA community applicant 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.*¹⁷²

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.

¹⁶⁹ .HOTEL CPE, p.2

¹⁷⁰ .OSAKA CPE, p.2

¹⁷¹ Id., p.2

¹⁷² .SPA Report, p.2



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53. There has been no substantive engagement with the reasoning set out above in the FTI Reports. DotMusic’s reasoning is correct and DotMusic’s application meets all the criteria required under the Community Establishment section to score full points.

Nexus between Proposed String and Community

54. According to DotMusic’s Application, “[t]he **name** of the community served is the **“Music Community”** (“Community”).”¹⁷³
55. With respect to the “Nexus between Proposed String and Community,” DotMusic’s application states that “[t]he **“MUSIC”** string **matches** the name (“Name”) of the Community [**Music Community**] and is the established name by which the Community is commonly known by others.”¹⁷⁴ DotMusic explained “the relationship between the applied- or gTLD string and the community identified in 20A:” “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...**”¹⁷⁵ In other words, the string fully matches the music community. The music string has no other significant meaning beyond identifying the community described in the application.
56. This is consistent with the .SPA CPE Report that passed CPE and scored full points under Nexus. In fact, the DotMusic Nexus requirements exceeded the threshold that was applied by the CPE Panel in the case of the .SPA CPE to fulfill the criteria for full points. Even though DotMusic matched the community definition by “completely representing the entire Community” with the string by “relat[ing] to all music-related constituents using an all-inclusive, multi-stakeholder model,” DotMusic was not awarded a full score. In contrast, the CPE Panel awarded the .SPA community applicant a full score based on a lower threshold for meeting the full point criteria. In fact, the .SPA community admits that they did not completely represent the entire community but received a higher grade than DotMusic even though DotMusic completely represented the entire community. The CPE Panel permitted the .SPA community applicant to include a secondary community that was not directly related to spas and awarded the .SPA community applicant a full score: “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.”¹⁷⁶

¹⁷³ DotMusic Application, 20A, para.1

¹⁷⁴ Id., 20A, para.3

¹⁷⁵ Id., 20D, para.1

¹⁷⁶ .SPA community application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/123?t:ac=123>, 20A, para.3



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57. 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 stricter threshold than the one permitted by the CPE Panel to award full points for the .SPA community applicant under the Nexus between the Proposed String and Community section. 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"¹⁷⁷ and "exclude[s] those with a passive, casual or peripheral association with the applied-for string."¹⁷⁸ In comparison, the .MUSIC CPE exceeded the threshold that was applied for the .SPA CPE to be awarded full points under the Nexus section.
58. Again, there has been no substantive engagement by FTI with DotMusic's application or Reconsideration Request, and DotMusic's application meets all the criteria required under the Nexus between Proposed String and Community section to score full points.

Community Endorsement

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."¹⁷⁹ ¹⁸⁰

59. According to DotMusic's Application Materials, there is support from multiple organizations with members representing over ninety-five percent of global music consumption, which is a **majority**.¹⁸¹
60. Another alternative for scoring 2 points in "Support" is having "documented support from recognized ¹⁸² community institution(s)/ member organization(s)." ¹⁸³ The music

¹⁷⁷ DotMusic Public Interest Commitments ("PIC"), PIC Enumerated Commitment #3, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.1

¹⁷⁸ Id., PIC Enumerated Commitment #4, p.2

¹⁷⁹ AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

¹⁸⁰ CPE Guidelines, p.18

¹⁸¹ 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/s2dab2ba5pf6hx9f1j7cq5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

¹⁸² 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

¹⁸³ AGB, p.4-17



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organizations supporting the DotMusic Application are the most recognized and trusted music-related organizations in the world. They include many internationally-recognized organizations. Recognized organizations include the FIM and IFPI as mentioned earlier that have documented activities in areas that are representative of the community's united interests, such as the protection of music rights and copyright in general. As such, DotMusic's application has the documented support from the recognized community member organizations.

61. This is consistent with the .HOTEL CPE Report, in which the .HOTEL community applicant fulfilled both the options for meeting the AGB. According to the .HOTEL CPE Report, recognized organizations mainly dedicated to the hotel community included the American Hotel & Lodging Association (AHLA) and the China Hotel Association (CHA): **"These groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant."**¹⁸⁴
62. If the American and China hotel associations would suffice as recognized organizations mainly dedicated to hotels then international organizations, such as FIM (formed in 1948) and IFPI (formed in 1933), recognized by the United Nations and the World Intellectual Property Organisation, exceed the requirements in comparison to the acceptable threshold adopted by the CPE Panel for the .RADIO CPE because both the FIM and the IFPI are **globally-based (as opposed to nationally-based)** and have **pre-existed** both the AHLA (formed in 1953) and CHA (formed in 1996).
63. DotMusic's support rationale and documentation is also consistent with the .RADIO CPE Report, in which the .RADIO community applicant fulfilled the AGB Support criteria: "[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."¹⁸⁵ Under the same token, the DotMusic application also has the support from "a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant." As emphasized in DotMusic's application, its support comprised of recognized community organizations that "represented a majority of the overall community defined" by DotMusic.
64. In sum, DotMusic's Application meets both "Support" requirement options for attaining 2 points. DotMusic's application has "documented support from, the recognized community institution(s) / member organization(s)" as well as "documented support from institutions/organizations representing a majority of the overall community addressed."

¹⁸⁴ .HOTEL CPE Report, p.6

¹⁸⁵ .RADIO CPE Report, p.7



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DotMusic's application meets all the criteria required under the Support section of Community Endorsement to score full points.

Conclusion on .MUSIC CPE Analysis and CPE Comparison

65. DotMusic's application fulfills all the criteria under the sections of Community Establishment, the Nexus between the Proposed String and Community, and Support based on the AGB. In conclusion, **DotMusic should have passed CPE. Treating DotMusic's application differently from the decisions that have already been made in relation to RADIO, OSAKA and HOTEL would represent discriminatory treatment with no justification, in violation of ICANN's Bylaws.**¹⁸⁶ **DotMusic was close to passing, which makes the EIU's scoring inconsistencies even more troubling,** especially considering that DotMusic's community definition was disregarded, which in effect resulted to improperly awarding zero out of four points in Community Establishment. Applying the appropriate community definition as explicitly defined in 20A (not 20D) as mandated by the AGB would have led to a passing CPE grade for DotMusic.

FTI Reports Analysis

66. It is clear that the FTI Report was superficial in nature and did not fulfill the obligations that an independent investigation of this significance would warrant. ICANN's stated objective with the CPE Review was to conduct a **complete, independent investigation** that would answer all the questions that applicants raised through their reconsideration requests, especially in relation to accusations of discriminatory treatment and unfair and inconsistent grading by the EIU's CPE Panel.
67. The FTI Report raises more questions than it answers because it failed to conduct a comprehensive investigation to analyze the issues of inconsistency, unfairness and discriminatory treatment that everyone was expecting to be addressed based on ICANN's comments and representations. Only after such investigation is conducted can the ICANN Board make any determination concerning any of the pending reconsideration requests. There are many issues that the FTI did not adequately address in the CPE Process, including, whether:
- a. The EIU properly developed and applied additional criteria and processes after receiving the community applications in 2012 without

¹⁸⁶ ICANN Bylaws, Sections 1.2 and 3.1. See <https://www.icann.org/resources/pages/governance/bylaws-en>



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- giving the community applicants to change their applicants to reflect these changes.
- b. ICANN allowed the EIU to participate in the evaluation of community applications despite conflicts of interest.
 - c. ICANN allowed the EIU to grade community applications without having the necessary expertise, training and understanding of the CPE process and its rules.
 - d. The CPE Panel were indeed music experts, with suitable knowledge to score an application in relation to music.
 - e. The EIU permitted individuals who were not EIU CPE panelists (including ICANN Staff) to perform substantive tasks in CPE in violation of explicit rules.
 - f. The EIU acted consistently with the rules of the AGB in its collection of information and its interpretation of the AGB while applying the CPE criteria.
 - g. The EIU applied the CPE criteria consistent with the human rights principles and general principles of international copyright law and international conventions.
 - h. The EIU and ICANN improperly considered evidence supporting community applications, including reconsideration requests and expert opinions.
 - i. ICANN should have accepted CPE Reports despite these issues without reasonable and effective investigation or the option to appeal.
 - j. The CPE process adopted by ICANN conformed with ICANN's Core Principles.
 - k. ICANN's actions and inactions in relation to the CPE process were consistent with its own Bylaws and Articles of Incorporation.
68. What raises additional serious concerns is the decision by ICANN or ICANN's internal or external legal counsel to narrow the scope of the FTI Report to exclude many key issues that still remain unaddressed and are pending reconsideration request decisions by the ICANN board. How can the ICANN board make a determination on pending Reconsideration Requests with an incomplete investigation that did not address the most glaring issues?



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69. This leads to the inference that the FTI “compliance-focused investigation methodology” was constructed in part to exonerate ICANN of any accountability and responsibility. In its own admission, the FTI did:
- a. Not re-evaluate the CPE applications.
 - b. Not compare applications that passed CPE with applications that did not pass in light of issues concerning grading inconsistencies and discriminatory treatment.
 - c. Not evaluate the substance of the reference material.
 - d. Not assess the propriety or reasonableness of the research undertaken by the CPE Provider.
 - e. Not interview the CPE applicants to understand their concerns or objections to the treatment afforded to their application.
70. Without addressing these overarching issues, the FTI cannot reasonably conclude that:
- a. “There is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.”¹⁸⁷
 - b. “The CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook (“AGB”) and the CPE Guidelines throughout each CPE.”¹⁸⁸
 - c. “The CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).”¹⁸⁹
71. FTI purported to adopt a “compliance-focused investigation methodology” when evaluating the CPE Provider’s consistency in applying the AGB and the CPE Guidelines. It found that the “CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE.”¹⁹⁰

¹⁸⁷ Scope 1 Report, p. 17.

¹⁸⁸ Scope 2 Report, p. 3.

¹⁸⁹ Scope 3 Report, p. 4.

¹⁹⁰ Scope 2 Report, p. 21.



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72. According to FTI:

The scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.¹⁹¹

73. However, FTI ignores publicly available evidence that casts serious doubts on its findings concerning the CPE Provider's consistent application of the AGB and the CPE Guidelines. Contrary to independent reports and opinions, such as the Council of Europe report, expert opinions as well as opinions expressed by members of the ICANN Board, such as the current ICANN Chairman Cherine Chalaby, the FTI presents a rose-tinted picture of the CPE process. It appears that the FTI concludes that the CPE process had no serious flaws and was executed in alignment with the AGB and ICANN's Bylaws. This conclusion is neither supported by FTI's analysis or its investigative methodology.
74. FTI's conclusions lack objectivity and are superficial and unreliable. It appears the intent of the investigation was to advocate in favor of ICANN and the EIU, while disregarding serious issues presented in Reconsideration Requests, expert opinions and independent reports (such as the CoE Report).
75. What raises further concern is FTI's decision to reject expanding the scope of the investigation, which if legitimately pursued would have led to conclusions that would suggest that ICANN and the EIU violated established process, ICANN's Bylaws and Articles of Incorporation. The conclusions it actually did reach appear pre-determined and rationalizations to protect ICANN from accountability and responsibility for the failures of the CPE program.
76. It is not credible for FTI to conclude that ICANN did not unduly influence the CPE Provider, taking into consideration the findings by the independent review process ("IRP") panel in Dot Registry v. ICANN.¹⁹² Indeed one is left with the troubling sense that ICANN carefully tailored the narrow scope of the investigation and cherry-picked documents and information to share with the FTI to protect itself.
77. However, the FTI concluded that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process."¹⁹³ The FTI's conclusion was based on.

¹⁹¹ Scope 2 Report, p. 21.

¹⁹² Dot Registry v. ICANN IRP Final Declaration (29 July 2016). See <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

¹⁹³ Scope 1 Report, p. 3.



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- a. Documents provided by ICANN concerning the CPE review process and evaluations.¹⁹⁴
 - b. Interviews of six ICANN staff members “who interacted with the CPE Provider over time regarding CPE;”¹⁹⁵
 - c. Interviews of only two CPE Provider staff members “of the core team for all CPEs that were conducted” between 2013 and 2016.¹⁹⁶
 - d. Working papers, draft reports, notes, and spreadsheets provided by the CPE Provider concerning the CPE process and evaluations.¹⁹⁷
78. Such a conclusion is unreliable and incomplete because it was based on (i) selective information provided by ICANN; (ii) a flawed understanding of issues based on this incomplete and inconsistent evidence; and (iii) the adoption of a flawed and inappropriate compliance-based investigative process by the FTI.
79. The evidence shows that the FTI’s conclusion that there were no procedural failures, inconsistencies or disparate treatment in the CPE process is unsupported and is not consistent with numerous independent reports and expert opinions. There appears to be a general consensus that the CPE Process lacked transparency, was flawed, inconsistent and unfair.
80. FTI’s finding that ICANN did not unduly influence the CPE Provider or engaged in any impropriety in the CPE Process is also **inconsistent with the IRP Panel’s final and binding declaration in the Dot Registry case, which concluded that ICANN was “intimately involved” in the CPE process.**¹⁹⁸ The FTI’s evaluation was based on inadequate and incomplete document collection from the EIU, self-serving and one-sided statements made by ICANN and the EIU, and lacking any participation from community applicants (despite requests by some applicants, such as DotMusic).
81. In contrast to the FTI investigation, the Dot Registry IRP Declaration was credible, neutral and trustworthy because: (i) it was determined by a neutral 3-person panel without any conflicts of interest or agenda; involved (ii) declarations under oath by 5 factual witnesses and 1 expert witness; (iii) seven hours of hearing; (iv) extensive documents produced by

¹⁹⁴ Scope 1 Report, pp. 3-7.

¹⁹⁵ Scope 1 Report, p. 13.

¹⁹⁶ Scope 1 Report, p. 14; see ICANN, Community Priority Evaluation (last visited 10 Jan. 2018), <https://newgtlds.icann.org/en/applicants/cpe>.

¹⁹⁷ Scope 1 Report, p. 6.

¹⁹⁸ *Dot Registry*, ¶ 93. The *Dot Registry* decision is final and binding on ICANN. See *Dot Registry*, ¶ 73; see also ICANN Bylaws (16 Feb. 2016), Art. IV, §§ 3.11(c), 3.11(d), 3.21.



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both ICANN and Dot Registry; and (v) extensive written submissions by both ICANN and Dot Registry. The *Dot Registry IRP* panel concluded that:

- a. "ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports;"¹⁹⁹ and
 - b. The review of the documents concerning an ongoing exchange between the CPE Provider and ICANN concerning .INC revealed that the CPE report for .INC specifically states that certain determinations are based in the CPE Provider's research.²⁰⁰ The panel, however, found that the origin of this research "comes from ICANN staff" who not only told the CPE Provider that they wanted to add "a bit more to express the research and reasoning that went into [the] statement," but also proposed the *exact language* to include in the CPE.²⁰¹
82. FTI's conclusion that ICANN was not engaged in "any impropriety in the CPE Process" is deeply flawed, improper and inconsistent with the final and binding decision of the Dot Registry IRP panel. FTI's finding that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process"²⁰² appears to be based on incomplete and self-serving information provided largely by ICANN in a manner that would exonerate ICANN of any wrong-doing or failing to follow its Bylaws.
83. On 18 January 2017, Article 19,²⁰³ a U.K. based human rights organization, and the CoE organized a webinar on Community Top-level Domains (TLDs) and Human Rights to discuss the CPE process, ICANN's accountability mechanisms, and concepts for the next gTLD application rounds. The speakers included ICANN Chairman Cherine Chalaby, ICANN Government Advisory Committee Vice-Chair Mark Carvell, and ICANN Vice-Chairman Chris Disspain.
84. ICANN Chairman Cherine Chalaby confirmed in his personal capacity that he observed inconsistencies with the CPE process:

In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE and that's a personal observation and there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases. So this is one of the recommendations, the

¹⁹⁹ *Dot Registry*, ¶ 93.

²⁰⁰ *Dot Registry*, ¶ 94.

²⁰¹ *Dot Registry*, ¶ 98.

²⁰² Scope 1 Report, p. 3.

²⁰³ Article 19 (last visited 10 Jan. 2018), <https://www.article19.org>.



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recommendation of fixing that area, I think that it is an important recommendation that ought to be taken into account very seriously.²⁰⁴

85. Likewise, ICANN Personal Data Redacted stated:

But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.

[...]

*The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. **That was not happening.** Became as I say an issue of increasing concern for many of us on the GAC.²⁰⁵*

86. In light of the Dot Registry IRP declaration, independent expert opinions and the findings of the Council of Europe Report directly discrediting and refuting FTI's conclusions, the FTI conclusion that the "CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE"²⁰⁶ is unreliable, especially considering ICANN members' own admission that there were indeed problems with the CPE process. Given such overwhelming evidence, it would be unreasonable for the ICANN Board to accept the conclusions of the FTI Report and reject DotMusic's Reconsideration Request 16-5. Accepting the FTI's conclusions without a holistic and substantive investigation would be considered gross negligence, a violation of ICANN's Bylaws and an attempt to purposefully conceal fundamental flaws in the CPE process that even ICANN's current Chairman (and other ICANN members) observed and recognized.
87. It is problematic for ICANN to announce that it was conducting "an **independent review**" of the CPE Process²⁰⁷ that would be comprehensive and neutral, when the facts indicate

²⁰⁴ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

²⁰⁵ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), p. 12, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 (emphasis added).

²⁰⁶ Scope 2 Report, p. 21.

²⁰⁷ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance



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a secretive and ICANN-controlled process that was incomplete and narrow in focus. The public comments made by ICANN legal counsel John Jeffrey and Vice-Chair Chris Disspain now appear inconsistent with the intent of the objective of conducting a fair, neutral and complete investigation that would address all the issues presented in pending Reconsideration Requests in order to assist the ICANN Board in its reconsideration decision-making.

John Jeffrey stated that the FTI:

*[The FTI would be “digging in very deeply,” have “a full look at the community priority evaluation,”²⁰⁸ and “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.”²⁰⁹ “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.”²¹⁰*

In an ICANN session with DotMusic’s Constantine Roussos at the Madrid ICANN GDD Summit in 2017, ICANN CEO Göran Marby (who was a session panelist²¹¹) and ICANN Vice-Chair Chris claimed that they did not know who the investigator was despite the investigation being in progress for months. Furthermore, the Vice-Chairman stated that DotMusic would be able to present to the Board after the FTI Report would be released before the Board would decide upon the Reconsideration Request 16-5:

Constantine Roussos:

Hi, this is Constantine from DotMusic. I have a question about timing and transparency...

One: Who is the auditor, their name?;

Two: How is this transparent when we don’t know who is doing it?; and

Three: When is there going to be a decision?

Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

²⁰⁸ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²⁰⁹ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²¹⁰ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²¹¹ 2017 Global Domain Division (GDD) Summit Notes (9 May 2017), p.9. See <https://www.icann.org/en/system/files/files/notes-action-items-gdd-summit-madrid-30may17-en.pdf>



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...[W]e're sitting around waiting, sending letters and asking what is going on, please let us know. So, I do not want to sound harsh but we need some help here. It is not only us, it is a few other applicants as well. Everyone is doing their business but we're just sitting on the sidelines waiting.

Chris Disspain:

Hi. How are you? Annoyed, right?... It is a very difficult situation. We have an IRP decision that made some suggestions about stuff that was happening that we felt was important to investigate.

... As to presentations that you made and changes to the BGC or possibly a new committee, I understood and it would be in my view, it would not be sensible in my view for the currently constituted BGC or any newly constituted accountability mechanisms committee to make a decision without giving you an opportunity to present again ...It may be, to be perfectly honest, that stuff comes out from the investigation, the review, that that you might want to talk about in a presentation...

Constantine Roussos: *Who is the auditor?*

Chris Disspain:

Who is here that knows who the auditor is? Anyone? Does anyone know who the auditor is? Anyone know who is running the investigation? Someone? Do we have anyone from legal here who can answer that?

Göran Marby: *...Can't remember the name. I was jetlagged.*

Constantine Roussos: *Will they contact us?*

Chris Disspain:

...I don't know the answer to that question. ... Let me be very clear... If they decide they need to talk you, they will talk to you.... Right? But it is not for us to decide. It is up to them to decide. ...It is so independent that I do not know who it is. That's how independent it is.²¹²

88. Another issue that was problematic was ICANN engaging in a new process to create updated CPE Guidelines with the EIU that were finalized on 27 September, 2013,²¹³ nearly

²¹² ICANN GDD Industry Summit, Review of ICANN Process Documentation Initiative (9 May 2017). See <https://participate.icann.org/p4icilv7esy/?launcher=false&fcsContent=true&pbMode=normal> (0:46:50 to 0:53:10). Also see <https://www.icann.org/gddsummit>

²¹³ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>



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a year and a half after community applicants such as DotMusic submitted their applications. This would be acceptable if community applicants were allowed to update their applications prior to CPE to reflect these critical updates that would be used to evaluate their community applications. However, ICANN decided to introduce new rules (published on 5 September 2014) that were not explicitly stated in the AGB that prohibited community applicants from changing relevant portions of their application²¹⁴ to reflect these new CPE Guidelines.

89. One of the areas that the CPE Guidelines required the EIU to follow was to consistently score community applications using the same approach for all applications. In other words, the grading thresholds and substantive rationales adopted must be consistent throughout all the CPE process. ICANN in return would provide the quality control required to ensure this:

“Consistency of approach in scoring Applications will be of particular importance...”²¹⁵

“The EIU will fully cooperate with ICANN’s quality control process...”²¹⁶

90. It is clear that the EIU and ICANN did not fulfill these obligations. What is striking is that the FTI purposely chose to follow a compliance-driven investigation methodology approach. This approach raises many unanswered questions. Why did the FTI narrow their scope and not conduct a comparative analysis of the grading inconsistencies and disparate treatment of applications that scored lower despite providing similar rationales? How can the same language of the AGB be interpreted differently and the scoring application from one application to another deviate so greatly? What exactly was the quality control process if it failed to meet both the AGB rules and the subsequent CPE Guidelines?
91. An IRP final declaration concerning the .ECO and .HOTEL community applications (the .ECO/.HOTEL IRP)²¹⁷ also outlines the serious concerns and glaring problems with the CPE process, including ICANN’s own admission that there was “no quality review or control process:”

²¹⁴

New gTLD Application Change Request Process and Criteria. See <https://newgtlds.icann.org/en/applicants/global-support/change-requests>. Also see ICANN New gTLD Advisory (Advisory number: R1-A01-CR), Change Requests (5 September 2014) at <https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>

²¹⁵ CPE Guidelines, p.22

²¹⁶ Id., pp.22-23

²¹⁷ 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 “.ECO/.HOTEL IRP”) (12 February 2016). See <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>



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[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.²¹⁸... [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.²¹⁹ ...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.²²⁰ The combination of these statements gives cause for concern to the Panel.²²¹ 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.²²² 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.²²³

92. Despite the findings of the .HOTEL/.ECO IRP declaration (and the Dot Registry IRP), the FTI narrowed the investigation methodology to exclude any substantive review of applications that would address the issues of discriminatory treatment and inconsistent point distribution between community applicants who prevailed and those who did not and are subject to a reconsideration request. It appears from the .HOTEL/.ECO IRP declaration (and the instructions provided to the FTI in relation to what investigative methodology to adopt) 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

²¹⁸ .ECO/.HOTEL IRP, ¶ 146, p.37

²¹⁹ Id., ¶ 147, pp.37-38

²²⁰ Id., ¶ 148, p.38

²²¹ Id., ¶ 149, p.38

²²² Id., ¶ 150, p.38

²²³ Id., ¶ 158, p.39



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EIU followed established policy or procedure.” As indicated in the .ECO/.HOTEL Panel, such a methodology is unacceptable and improper because it gives the EIU ultimate power to discriminate against certain applicants without any repercussions or the need to justify why one applicant was treated differently than another in relation to approach and marking. Since ICANN performed quality control, ICANN clearly did not follow establish policy or procedure and was in violation of its Bylaws and Core principles in relation to fairness and non-discrimination.

93. Another problematic area was the level and quality of the research that was undertaken by the CPE panel. The CPE Reports lacked adequate research citations and consistent judgment to reach conclusions that were compelling and defensible, including documentation. According to the EIU Panel Process document rules:

*“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.**”²²⁴*

94. According to the FTI Report (Scope 3), the primary research sources adopted by the EIU in making their determinations were two: Google searches and Wikipedia. As is well known, 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.**”²²⁵
95. It would be reasonable that any panel “with significant demonstrated expertise” in the area of a “defined community” (for example the music community) would not need to perform Google searches or resort to using Wikipedia as primary research and basis for decision-making. Both ICANN and the FTI never released the names of the experts that evaluated DotMusic’s application in numerous DIDP requests filed by DotMusic. As such, it is impossible to accept that the CPE Panel did possess the necessary qualifications for CPE or the necessary expertise or knowledge in relation to the music community (or many of the other communities graded). This absence of qualification is likely based on the low quality of the CPE Reports’ research and references.
96. Using Google searches as a credible source of references is problematic due to the “filter bubble” concern. This refers to a phenomenon that occurs with many of the websites that we use: algorithms (mathematical equations) use our search history and personal information to tailor results to us. So the exact same search, using exactly the same search words, can return different results for different individuals. This is called personalization.²²⁶

²²⁴ EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3

²²⁵ CPE Guidelines, p.22

²²⁶ University of Illinois at Urbana-Champaign, LibGuides, Ways of the Web: Filter Bubbles and the Deep Web: Home. See <http://guides.library.illinois.edu/filterbubbles>. Also see Eli Pariser, The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think (24 April 2012) at <https://www.amazon.com/Filter-Bubble-Personalized-Changing-Think/dp/0143121235>



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In other words, if the CPE Panel was inclined to fail an applicant and conducted specific research on Google towards that end then Google's algorithms would skew the results towards that end.

According to Google:

*"Previously, we only offered Personalized Search for signed-in users, and only when they had Web History enabled on their Google Accounts. What we're doing today is expanding Personalized Search so that we can provide it to signed-out users as well. This addition enables us to customize search results for you based upon 180 days of search activity linked to an anonymous cookie in your browser."*²²⁷

97. More troubling is the usage of Wikipedia as a credible source of research to reach compelling and defensible decisions. Wikipedia's "Wikipedia:Risk disclaimer"²²⁸ confirms that information on Wikipedia may be inaccurate or misleading:

USE WIKIPEDIA AT YOUR OWN RISK

PLEASE BE AWARE THAT ANY INFORMATION YOU MAY FIND IN WIKIPEDIA MAY BE INACCURATE, MISLEADING, DANGEROUS, ADDICTIVE, UNETHICAL OR ILLEGAL.

Some information on Wikipedia may create an unreasonable risk for readers who choose to apply or use the information in their own activities or to promote the information for use by third parties.

None of the authors, contributors, administrators, vandals, or anyone else connected with Wikipedia, in any way whatsoever, can be responsible for your use of the information contained in or linked from these web pages.

Furthermore, a look at Wikipedia's "Wikipedia:General disclaimer"²²⁹ makes no guarantee of the validity of information:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY

Wikipedia is an online open-content collaborative encyclopedia; that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has

²²⁷ Google Official Blog, Personalized Search for everyone, (4 December 2009). See <https://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html>.

²²⁸ Wikipedia: Risk disclaimer. See https://en.wikipedia.org/wiki/Wikipedia:Risk_disclaimer.

²²⁹ Wikipedia: General disclaimer. See https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer



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necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information.

*That is not to say that you will not find valuable and accurate information in Wikipedia; much of the time you will. However, **Wikipedia cannot guarantee the validity of the information found here.** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.*

98. British Medical Journal's Research has also warned against using Wikipedia as a trusted source of citations and research:

An increasing number of peer reviewed academic papers in the health sciences are citing Wikipedia. The apparent increase in the frequency of citations of Wikipedia may suggest a lack of understanding by authors, reviewers, or editors of the mechanisms by which Wikipedia evolves. Although only a very small proportion of citations are of Wikipedia pages, the possibility for the spread of misinformation from an unverified source is at odds with the principles of robust scientific methodology and could potentially affect care of patients. We caution against this trend and suggest that editors and reviewers insist on citing primary sources of information where possible.²³⁰

99. Many universities do not allow students to reference Wikipedia in their papers, thus demonstrating its inappropriateness for the use in expert evaluations such as CPE. According to the Massachusetts Institute of Technology:

Wikipedia is Not a Reliable Academic Source

Many of us use Wikipedia as a source of information when we want a quick explanation of something. However, Wikipedia or other wikis, collaborative information sites contributed to by a variety of people, are not considered reliable sources for academic citation, and you should not use them as sources in an academic paper.

The bibliography published at the end of the Wikipedia entry may point you to potential sources. However, do not assume that these sources are reliable – use the same criteria to judge them as you would any other source. Do not consider the Wikipedia bibliography as a replacement for your own research.²³¹

²³⁰ Personal Data Redacted

BMJ Research, References that anyone can edit: review of Wikipedia citations in peer reviewed health science literature, DOI 348, (6 March 2014). See <https://doi.org/10.1136/bmj.g1585>.

²³¹ Massachusetts Institute of Technology,



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100. Yale University goes one step further to claim that the mere action of using and referencing Wikipedia as a source for your work will “position your work as inexperienced and immature.” Instead Yale advises “to move beyond Wikipedia and write from a more knowledgeable, expert stance.”

According to Yale University:

Wikipedia merits additional attention because of its recent growth and popularity. Some professors will warn you not to use Wikipedia because they believe its information is unreliable. As a community project with no central review committee, Wikipedia certainly contains its share of incorrect information and uninformed opinion. And since it presents itself as an encyclopedia, Wikipedia can sometimes seem more trustworthy than the average website, even to writers who would be duly careful about private websites or topic websites. In this sense, it should be treated as a popular rather than scholarly source.

But the main problem with using Wikipedia as an important source in your research is not that it gets things wrong. Some of its contributors are leaders in their fields, and, besides, some print sources contain errors. The problem, instead, is that Wikipedia strives for a lower level of expertise than professors expect from Yale students. As an encyclopedia, Wikipedia is written for a common readership. But students in Yale courses are already consulting primary materials and learning from experts in the discipline. In this context, to rely on Wikipedia—even when the material is accurate—is to position your work as inexperienced and immature.

...Of course, if you do use language or information from Wikipedia, you must cite it—to do otherwise constitutes plagiarism. The advice here is not to hide what Wikipedia contributes to your ideas, but rather to move beyond Wikipedia and write from a more knowledgeable, expert stance.²³²

101. Another key finding that was troubling is the research concerning: (i) whether or not certain supporting organizations for DotMusic were recognized organizations; (ii) whether or not there were organizations that were mainly dedicated to the music community with respect to music activities; and (iii) whether or not the supporting organizations collectively represented a majority of the community defined. In order to score the Community Establishment section and the Support section (in which DotMusic lost 5 points collectively) and answer these questions, the CPE panel should have investigated all of DotMusic’s supporters to determine whether the criteria set forth in the AGB was fulfilled. Support letters were sent by thousands of entities.

Academic Integrity at MIT - A Handbook for Students, Citing Electronic Sources. See <https://integrity.mit.edu/handbook/citing-your-sources/citing-electronic-sources>

²³² Yale University, Center for Teaching and Learning, Citing Internet Sources. See <https://ctl.yale.edu/writing/using-sources/citing-internet-sources>.



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102. However, the CPE panel only researched a few of these organisations according to the findings of the FTI Report. The organisations that independent experts deemed to be “recognized” and “mainly dedicated” to the defined community (such as the IFPI, the FIM and ReverbNation for example) were not researched or assessed. **There was some research conducted on a few of DotMusic’s supporters, but most of their international organizations were not investigated** according to the findings of the FTI Report (Scope 3). As such, **it would have been impossible to grade the sections of Community Establishment and Support without any knowledge of the supporting organizations, their international breadth and scope, and whether collectively they represented a majority of the “logical alliance” community definition that was presented in DotMusic’s application** (emphasis added). The lack of research by the CPE panel is inadequate to make conclusions that would be regarded as defensible, compelling and credible, let alone provide enough insight to grade the Community Establishment and Community Endorsement sections of the CPE process.
103. One factor that is important to weigh is whether or not the FTI Report can be regarded as independent and neutral. After all, ICANN has claimed that the investigation would be independent. The investigation was not independent. The key reasons that have led to this conclusion are the following:
- a. The scope of the investigation was too narrow and did not fulfil its obligations to conduct a holistic and comprehensive look at the CPE process and the issues that the ICANN Board was asked by applicants to reconsider. Most of these issues were not investigated because of the compliance-based investigative methodology adopted. For example, many crucial disputes that would have rendered the CPE process a violation of the AGB rules and ICANN Bylaws would be the lack of transparency of the CPE process (e.g. the names of the expert panellists were unknown), the lack of research and low quality sources used to make decisions, the appearance of conflicts of interest and the inconsistency of the approach and scoring of community applications that would suggest disparate treatment and discrimination.
 - b. None of the complaining parties that were subject to Reconsideration Requests were interviewed by the FTI. What was deeply concerning was that the affected parties, such as DotMusic, did request to be interviewed but the FTI declined and did not give applicants the opportunity to provide information, ask and answer questions and participate.
 - c. The scope of the investigation’s scope and methodology was not developed and determined by all affected parties (ICANN and the affected applicants). It was a controlled investigation driven by ICANN and its outside legal counsel Jones Day.



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104. The FTI contends that it “incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally...”²³³
105. However, the steps taken by the FTI in its investigation would not lead to a conclusion by reasonable person that the investigation was independent or proper given that the expectations were that the investigation would be comprehensive, transparent and would allow all affected parties to participate in its development and execution.
106. Personal Data Redacted shared “Best Practices for Conducting Board-Managed, Independent, Internal investigations.”²³⁴ One of the best practices was to ensure that the investigator is aware that the interests of management may not be aligned with the purpose of the investigation, especially if the investigation is based on examining whether or not management violated certain processes and established rules. If the investigator does not adopt the necessary investigative methodology to ensure neutrality and prevent one-sided bias then the investigation will not be deemed independent, fair and impartial:

[I]f an allegation of fraud merits an independent investigation, that independence has to be diligently guarded.... Bondi and Biegelman shared many practical tips and strategies based on more than 56 years of combined experience, but kept returning to one common theme: if an allegation of fraud merits an independent investigation, that independence has to be diligently guarded [...] While an independent investigation shouldn't be antagonistic, pitting the investigators against management, it is important to realize “the interests of management and investigators may not be aligned.”

107. According to the Association of Certified Fraud Examiners (ACFE) 2015 Fraud Examiners Manual under “Investigation - Planning and Conducting a Fraud Examination,” the ACFE advocates adopting the following investigation methodology:

When conducting a fraud examination to resolve signs or allegations of fraud, the fraud examiner should assume litigation will follow, act on predication, approach cases from two perspectives, move from the general to the specific, and use the fraud theory approach.

[]

Fraud examinations must adhere to the law; therefore, fraud examiners should not conduct or continue fraud examinations without proper predication. Predication is

²³³ FTI Report (Scope 2), p.4

²³⁴ Personal Data Redacted ACFE, Putting the 'Independent' into Board-Managed, Independent, Internal Investigations. See <http://www.acfe.com/article.aspx?id=4294973663>.



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the totality of circumstances that would lead a reasonable, professionally trained, and prudent individual to believe that a fraud has occurred, is occurring, and/or will occur. In other words, predication is the basis upon which an examination, and each step taken during the examination, is commenced.²³⁵

[]

If a fraud examiner cannot articulate a factual basis or good reason for an investigative step, he should not do it. Therefore, a fraud examiner should reevaluate the predication as the fraud examination proceeds. That is, as a fraud examination progresses and new information emerges, the fraud examiner should continually reevaluate whether there is adequate predication to take each additional step in the examination.

[]

Fraud examiners should approach investigations into fraud matters from two perspectives: (1) by seeking to prove that fraud has occurred and 2) by seeking to prove that fraud has not occurred. To prove that a fraud has occurred, the fraud examiner must seek to prove that fraud has not occurred. The reverse is also true. To prove fraud has not occurred, the fraud examiner must seek to prove that fraud has occurred. The reasoning behind this two-perspective approach is that both sides of fraud must be examined because under the law, proof of fraud must preclude any explanation other than guilt.²³⁶

[]

In most examinations, fraud examiners should start interviewing at the periphery of all possible interview candidates and move toward the witnesses appearing more involved in the matters that are the subject of the examination.²³⁷

[]

Generally, the investigation portion of the initial assessment will involve:

- *Contacting the source, if the investigation was triggered by a report or complaint.*
- *Interviewing key individuals.*
- *Reviewing key evidence.²³⁸*

²³⁵ ACFE 2015 Fraud Examiners Manual, Investigation - Planning and Conducting a Fraud Examination, p.3.104. See https://acfe.com/uploadedFiles/Shared_Content/Products/Books_and_Manuals/2015%20Sample%20Chapter.pdf

²³⁶ Id., p.3.105

²³⁷ Id., p.3.106

²³⁸ Id., p.3.122



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108. According to the ACFE Fraud Examiners Manual:

An investigation must have goals or a purpose, which should be identified at the outset so the team members can achieve them. Goals also help keep the investigation focused and on task, and they can serve as an energizer, as long as they are specific, well defined, and measurable. []

Although the basic goal for most fraud investigations is to determine whether fraud occurred, and if so, who perpetrated it, fraud investigations might be designed to achieve a number of different goals, such as to:

- *Prevent further loss or exposure to risk.*
- *Determine if there is any ongoing conduct of concern. []*
- *Review the reasons for the incident, investigate the measures taken to prevent a recurrence, and determine any action needed to strengthen future responses to fraud.²³⁹*

[]

When planning an investigation, the stakeholders should identify the scope (the boundaries or extent of the investigation), which will vary depending on the facts and circumstances.

To determine the scope, those responsible should use the following guidelines:

- *Consider the ultimate goals of the investigation.*
- *Develop a list of key issues raised in the initial assessment.*

[]

- *Consider broadening the scope if the allegations indicate a failure in the company's compliance program.²⁴⁰*

[]

²³⁹ Id., p.3.137

²⁴⁰ Id., p.3.138



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Before beginning a fraud examination, the investigation team should develop a course of action to make sure it addresses every relevant issue.²⁴¹

109. The FTI did not follow most of these recommendations, thus undermining its own credibility and its reliance on the AFSCE approach. It is a reasonable inference that its failure to do so was because its objective was to exonerate ICANN and the CPE panel. The opaqueness, lack of transparency and narrow scope of the investigation would lead a reasonable person to conclude this.
110. The Association of Certified Fraud Examiners, Institute of Internal Auditors, and The American Institute of Certified Public Accountants co-authored a guide titled *“Managing the Business Risk of Fraud: A Practical Guide”* (“the Guide”).²⁴² The Guide “provides credible guidance from leading professional organizations that defines principles and theories for fraud risk management and describes how organizations of various sizes and types can establish their own fraud risk management program.”²⁴³
111. The Guide notes that one of the most important factors to consider in an investigation plan are the goals of the investigation and what “[s]pecific issues or concerns should appropriately influence the focus, scope, and timing of the investigation.”²⁴⁴

Specifically, the Guide frameworks how an investigation should be conducted, outlining that investigations generally include many key tasks, one of which is:

Interviewing, including:

- i. Neutral third-party witnesses.
 - ii. Corroborative witnesses.
 - iii. Possible co-conspirators.
 - iv. The accused.²⁴⁵
112. The FTI inappropriately rejected DotMusic’s request to be interviewed for the purposes of conducting an independent review of the CPE Process because specific issues or concerns influenced the focus, scope, and timing of the investigation.
113. On 10 June 2017, soon after ICANN issued the CPE Process Review Update to announce that ICANN selected FTI in November 2016 to undertake an independent review of various

²⁴¹ Id., p.3.141

²⁴² Association of Certified Fraud Examiners (ACFE), Institute of Internal Auditors, The American Institute of Certified Public Accountants. *Managing the Business Risk of Fraud: A Practical Guide*, See https://www.acfe.com/uploadedfiles/acfe_website/content/documents/managing-business-risk.pdf.

²⁴³ Id., pp. 5 - 6

²⁴⁴ Id., p. 41

²⁴⁵ Id., p. 43



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aspects of the CPE process,²⁴⁶ DotMusic requested ICANN to speak with FTI.²⁴⁷ It was only *after* FTI completed its investigation and its findings were published by ICANN that DotMusic learned about FTI's decision not to interview the CPE applicants, including DotMusic, because neither the AGB nor the CPE Guidelines "provide for applicant interviews."²⁴⁸ However, FTI believed it was necessary to interview six ICANN employees "to learn about their interactions with the CPE Provider;"²⁴⁹ and two CPE Provider staff members even when the AGB and CPE Guidelines are silent on the question of interviews of ICANN and the CPE Provider. And, further, FTI reviewed materials, including claims raised in all relevant reconsideration requests that were available only after the CPE evaluation was complete.²⁵⁰

114. FTI, however, believed that it was "not necessary or appropriate" to interview the CPE applicants because: (1) the AGB and the CPE Guidelines do not provide for applicant interviews; and (2) the CPE Provider did not interview applicants during its evaluation process. FTI's decision is irreconcilable with its duty to conduct an independent investigation.
115. As a neutral and impartial investigator instructed by ICANN to conduct "an independent review"²⁵¹ of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants (e.g. DotMusic) to ensure a fair and thorough investigation was conducted about the CPE Process. This is a contributing factor to FTI's findings being unreliable, unfair, and incorrect.

H. Conclusion

116. The Dot Registry IRP decision highlights ICANN's obligation to exercise due diligence and care, independent judgment, and transparency in reviewing community applications. The DotMusic Reconsideration Request has been pending for nearly 2 years, which is an unreasonably long time for the Board to make a decision. ICANN's Bylaws mandate the ICANN Board to make decisions based on procedural fairness, non-discrimination and transparency while settling disputes in a predictable and timely manner.

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 DotMusic Limited

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 DotMusic Limited

²⁴⁶ ICANN, Community Priority Evaluation Process Review Update (2 June 2017), <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

²⁴⁷ Letter from Arif Ali on behalf of DotMusic Limited to ICANN Board (10 June 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

²⁴⁸ Scope 2 Report, p. 8.

²⁴⁹ Scope 1 Report, p. 13.

²⁵⁰ See Scope 1 Report, pp. 3-6; ICANN Bylaws (22 July 2017), Art. 4.

²⁵¹ Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).