

APPENDIX 2: Materials and Arguments Submitted by the Requestor/ Its Supporters in Support of Request 16-5

SUBMISSION	ARGUMENT(S)
Request 16-5 and exhibits thereto ¹	<ul style="list-style-type: none"> • <i>See</i> BAMC Recommendation • Attached 41 exhibits, including, among other things: • 43 letters (each apparently substantially identical in content²) from individuals the Requestors asserted were independent experts “that agreed unanimously that DotMusic met the Community Establishment, Nexus and Support criteria.”³ • The results of an “Independent Nielsen/Harris Poll” which they claimed supported the same conclusions.⁴
17 March 2016 letter from DotMusic to the Board	<ul style="list-style-type: none"> • “[R]emind[ed]” the Board “of the <u>consensus</u> GAC Category 1 Advice Resolutions that were accepted by the ICANN Board and [New gTLD Program Committee (NGPC)] in 2014.”⁵ • Argued that because ICANN org had accepted the GAC Category 1 Advice, “the ICANN Board and NGPC have accepted that the music community, in its entirety, has cohesion based on international law.”⁶
“Expert Legal Opinion” of Dr. Jørgen Blomqvist, Honorary Professor in International Copyright	<ul style="list-style-type: none"> • Reiterated the arguments raised in Request 16-5.⁸

¹ Request 16-5 (<https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>).

² Compare, e.g., letter of Dr. Argiro Vatakis (http://music.us/expert/letters/Music_Expert_Letter_Dr_Argiro_Vatakis.pdf) with letter of Professor Bobby Borg, (http://music.us/expert/letters/Music_Expert_Letter_Professor_Author_Bobby_Borg.pdf).

³ See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>. See also Request 16-5, Ex. A40 (<https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf> (hyperlinks to each letter are available at page 308)).

⁴ Request 16-5, Ex. A32 at Pg. 38 (<https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>).

⁵ 17 March 2016 letter from Ali to ICANN Board (emphasis in original) (<https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>).

⁶ *Id.*

⁸ See *id.*

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(Blomqvist Opinion). ⁷	
“Expert Ethnomusicologist Opinion” of Dr. Richard James Burgess (Burgess Opinion). ⁹	<ul style="list-style-type: none"> • Asserted that the Requestors satisfied the CPE Criteria for Community Establishment, Nexus between Proposed String and Community, and Community Endorsement.¹⁰
DotMusic’s Presentation to the BGC ¹¹	<ul style="list-style-type: none"> • Presentation by Arif Ali: <ul style="list-style-type: none"> • The CPE Provider “singled out DotMusic for disparate treatment” • The CPE Provider did not act “fairly and openly.” • Presentation by Dr. Blomqvist. • Statement of Dr. Burgess.
DotMusic’s Response to BGC Question Posed at 17 September 2016 Presentation ¹²	<ul style="list-style-type: none"> • Among other arguments: • “A safe, authenticated and trusted .MUSIC can change this and generate billions of dollars worth of lost traffic and revenues to the global music community by merely replacing millions of pirated web results with .MUSIC official and trusted websites. A verified .MUSIC for music community members will also prevent impersonation and counterfeiting (e.g. unlicensed merchandising or ticketing).” • “Apart from increasing competition and consumer trust, another benefit under DotMusic’s approach is raising awareness for ICANN’s New gTLD Program as well as increasing adoption.” • “Awarding .MUSIC to a non-community applicant would negatively and significantly impact the global music community’s business model into the future because the opportunities of creating a safe haven for global music

⁷ <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>.

⁹ <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>.

¹⁰ *Id.*

¹¹ <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

¹²

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	consumption and a legitimate global music and song database (which does not exist today), will entirely be lost.”
11 October 2016 “Joint Organisation Experts’ Opinion” ¹³	<ul style="list-style-type: none"> • The Application met the criteria for Community Priority.¹⁴
6 December 2016 Supplement to DotMusic’s Response to BGC Question Posed at 17 September 2016 Presentation ¹⁵	<ul style="list-style-type: none"> • “DotMusic’s Community-Based Approach Protects the Music Community from the Economic and Non-Economic Harm Associated with Abusive Registrations of .MUSIC.”¹⁶ • “DotMusic’s Community-Based Approach to .MUSIC Serves the Global Public Interest by Preventing DNS Abuse.”¹⁷ • “DotMusic’s Community-Based Approach Addresses Copyright Infringement, Trust, and the High Risk of Consumer Harm in Music-Themed gTLDs”¹⁸ • “The BGC Must Accept DotMusic’s Reconsideration Request 16-5”¹⁹
15 December 2016 letter from DotMusic ²⁰	<ul style="list-style-type: none"> • The Board should consider the Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (CoE Report)²¹ in its analysis of Request 16-5, including the CoE Report’s conclusions that: <ul style="list-style-type: none"> • The CPE Provider counts awareness and recognition of the community amongst its member twice in violation of the Guidebook’s commitment to avoid double-counting;²²

¹³ <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>.

¹⁴ *Id.*

¹⁵ <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf>.

¹⁶ *Id.* at Pg. 2.

¹⁷ *Id.* at Pg. 4.

¹⁸ *Id.* at Pg. 6.

¹⁹ *Id.* at Pg. 8.

²⁰ 15 December 2016 letter from Ali to ICANN <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

²¹ The CoE Report is available at <https://rm.coe.int/16806b5a14>.

²² 15 December 2016 letter from Ali to ICANN, at Pg. 2-3 <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

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	<ul style="list-style-type: none"> • The CPE Provider interpreted sub-criterion 4-A, Support, inconsistently across applications;²³ • The [CPE Provider] changed its own process as it went along;²⁴ • The CPE Provider had a conflict of interest in its consideration of the Application;²⁵ • There is a “fundamental conflict between ICANN’s stated policy on community priority and the potential revenues that can be earned through the auction process”;²⁶ • The CPE process lacks transparency;²⁷ • DotMusic’s arguments in support of the Application “appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime”;²⁸ and • DotMusic will “promote the right to freedom of expression through the .MUSIC TLD,” which “serve[s] the public interest and protect[s] vulnerable groups (such as the music community) and consumer from harm (such as from malicious abuse).”²⁹
2 February 2018 letter ³⁰	<ul style="list-style-type: none"> • Attached an “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” which argued that FTI did

²³ *Id.* at Pg. 4.

²⁴ *Id.* at Pg. 4-5.

²⁵ *Id.* at Pg. 5.

²⁶ *Id.* at Pg. 6.

²⁷ *Id.*

²⁸ *Id.* at Pg. 9-10, quoting CoE Report at Pg. 20.

²⁹ *Id.* at Pg. 11.

³⁰ <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>.

The Board responded to DotMusic’s 2 February 2018 letter through counsel on 5 March 2018, noting that the Board was “in the process of considering the issues raised in your letter and the accompanying analysis,” but that the Requestor’s accusations that “the FTI ‘compliance-focused investigation methodology’ was constructed in part to exonerate ICANN of any accountability and responsibility” were “as offensive as they are baseless,” and “insulting,” and concluded that “ICANN reject[ed] them unequivocally.” 5 March 2018 Letter from K. Wallace to A. Ali, at Pg. 1-2 (<https://www.icann.org/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf>). On 7 March 2018, DotMusic responded to counsel that the 5 March 2018 letter “selectively misrepresent[ed]” DotMusic’s arguments and “chose to reference items entirely out of context and in bad faith.” 7 March 2018 letter from A. Ali to K. Wallace (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-jones-day-07mar18-en.pdf>).

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	<p>not “substantive[ly] engage[] with” DotMusic’s concerns about the CPE Report because:</p> <ul style="list-style-type: none"> • FTI did not acknowledge perceived errors in the CPE Report;³¹ • FTI improperly decided not to expand the scope of the investigation beyond the scope set by the Board;³² • FTI’s methodology “was constructed in part to exonerate ICANN of any accountability”;³³ • FTI did not consider whether the CPE Provider had expertise and understanding of the CPE Process or whether the CPE Panel that evaluated the Application “were indeed music experts”;³⁴ • FTI did not re-evaluate the CPE applications, interview the CPE applicants, or consider other reports that “cast[] serious doubts on [FTI’s] findings”;³⁵ • The documents that FTI reviewed were “carefully tailored” by ICANN, to “narrow [the] scope of the investigation and cherry-pick[] documents and information to share with the FTI to protect itself.”³⁶ • FTI’s findings were not credible or consistent with other reports and opinions.³⁷
<p>23 March 2018 letter from DotMusic to ICANN³⁸</p>	<ul style="list-style-type: none"> • “[R]eject[ed] BAMC’s invitation to make a telephonic presentation limited to 30 minutes” and “reject[ed] ICANN’s attempt to impose an artificial two weeks deadline” for supplemental briefing. Instead, the Requestor asserted that “[i]f transparency and accountability are indeed the Board’s objectives, then” ICANN organization should:

³¹ See, e.g., DotMusic CPE Process Review Letter, at ¶¶ 38, 44.

³² See, e.g. *id.*, ¶ 75, at Pg. 49; *id.* ¶¶ 67g, 67i, 67j, 67k, at Pg. 47; *id.* at ¶ 69c-d, at Pg. 48.

³³ *Id.*, ¶ 69, at Pg. 48.

³⁴ *Id.*, ¶ 67c-d, at Pg. 47.

³⁵ *Id.*, ¶ 69a, 69e, 73, at Pg. 48-49.

³⁶ *Id.*, ¶ 77, at Pg. 49.

³⁷ *Id.*, ¶¶ 76-77, 79, at Pg. 49-50.

³⁸ 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5
<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

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	<ul style="list-style-type: none"> (i) Disclose all documents requested in DIDP Requests No. 20180115-1 and 20180110-1; (ii) Provide the Requestor at least 3 months to review the documents; (iii) Allow the Requestor “a meaningful opportunity to submit additional materials in support” of its application, “without artificial constraints (e.g., a 10-page limit); (iv) “[I]dentify specific concerns in writing that it may have regarding the applications” after the Requestor submits its supplemental submission; (v) Provide the Requestor the opportunity for an in-person oral presentation to the BAMC; (vi) Bear the costs and expenses for the Requestor to review the requested documents and prepare its additional submissions; (vii) Undertake a substantive review of the merits of the Application.³⁹ <ul style="list-style-type: none"> • The Requestor asserted that if ICANN organization does not agree to all of the above conditions, “the Board cannot claim to have discharged its duty to promote and protect transparency and accountability in good faith.”⁴⁰
5 April 2018 email from Requestor to BAMC ⁴¹	<ul style="list-style-type: none"> • “In order to provide ICANN with further substantive comments on the CPE Process Review,” DotMusic “must have” certain of the items it sought in its 23 March 2018 letter.
Request 18-5 ⁴²	<ul style="list-style-type: none"> • Challenged the 2018 Resolutions, arguing that: <ul style="list-style-type: none"> • The CPE [Process R]eview is procedurally and methodologically deficient;

³⁹ *Id.*

⁴⁰ *Id.* at Pg. 5.

⁴¹ 5 April 2018 email from R. Wong to ICANN organization (<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-2-14jun18-en.pdf>).

⁴² Request 18-5 (<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>).

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	<ul style="list-style-type: none"><li data-bbox="630 233 1279 310">• The CPE [Process] Review failed to perform a substantive analysis of the CPE process; and<li data-bbox="537 342 1390 420">• The [2018] Resolutions were adopted in violation of ICANN's Bylaws."⁴³

⁴³ *Id.*, § 6, at Pg. 3.