

# DotMusic Reconsideration Request (“RR”)

## 1. Requester Information

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

**Address:** Contact Information Redacted

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

February 10th, 2016 PST

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See Answer to Question 6 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>50</sup> Ibid

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>57</sup> Ibid

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

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

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

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

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

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

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

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

The spa community primarily includes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

According to the Report:

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

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

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

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

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

<sup>71</sup> Ibid

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

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

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

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

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

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

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

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

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

<sup>77</sup> Ibid

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As the Board should be aware, CPE requires:

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

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

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

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

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

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

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

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

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

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

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

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

From: EIU to ICANN

Email Subject: Re: Updated draft results (4)

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

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

From: ICANN to EIU

Email Subject: Re: Updated draft results (4)

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>97</sup> Ibid, ¶ 147, pp.37-38

<sup>98</sup> Ibid, ¶ 148, p.38

<sup>99</sup> Ibid, ¶ 149, p.38

<sup>100</sup> Ibid, ¶ 150, p.38

<sup>101</sup> Ibid, ¶ 158, p.39

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Non-discriminatory treatment: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>130</sup>
9. Transparency: ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>131</sup>

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

Yes

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

**Do you have any documents you want to provide to ICANN? Yes, see Exhibits**

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

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

Respectfully Submitted,

Constantinos Roussos  
DotMusic Founder

Tina Dam  
DotMusic Chief Operating Officer

Cc: Jason Schaeffer  
DotMusic Legal Counsel

February 24, 2016

DotMusic Website: <http://music.us>

DotMusic Board: <http://music.us/board>

DotMusic Supporting Organizations: <http://music.us/supporters>

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<sup>130</sup> ICANN Bylaws, Art. II, § 3

<sup>131</sup> ICANN Bylaws, Art. III, § 1