

DotMusic Limited Reconsideration Request (“RR”)

April 14, 2018

1. Requestor Information

Requestors:

Name: DotMusic Limited

Address: Contact Information Redacted

Email: Constantinos Roussos, Contact Information Redacted

Requestor is represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, Contact Information Redacted

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2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

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

DotMusic Limited (“Requestor”) seeks reconsideration of the ICANN Board’s four resolutions, which concern the community priority evaluation (“CPE”) process review that was conducted by FTI Consulting, Inc.’s (“FTI”) Global Risk and Investigations Practice and

Technology Practice (the “CPE Review”).¹ The ICANN Board adopted the following resolutions on 15 March 2018:²

Resolved (2018.03.15.08), the Board acknowledges and accepts the findings set forth in the three CPE Process Review Reports.

Resolved (2018.03.15.09), the Board concludes that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary.

Resolved (2018.03.15.10), the Board declares that the CPE Process Review has been completed.

Resolved (2018.03.15.11), the Board directs the Board Accountability Mechanisms Committee [(“BAMC”)] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC [PDF, 42 KB] document.³

4. Date of action/inaction:

ICANN acted on 15 March 2018 by adopting resolutions 2018.03.15.08 through 2018.03.15.11 (the “Resolutions”).

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

Requestor became aware of the action on 15 March 2018, when the ICANN Board adopted the Resolutions.

¹ Exhibit 01, Adopted ICANN Board Resolutions (15 Mar. 2018), 2a, <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

² *Id.*

³ *Id.*

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

Requestor is materially affected by the Resolutions, which accept the findings of the CPE Review, because the BAMC intends to rely on the CPE Review to decide Requestor's Reconsideration Request 16-5 ("Request 16-5"). The BAMC's reliance on the procedurally and substantively deficient CPE Review directly affects Requestor's rights regarding its community priority application for the .MUSIC generic top-level domain ("gTLD"), which is the focus of Request 16-5. The ICANN Board's adoption of the Resolutions will materially affect and harm Requestor, and its Request 16-5, because (1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN's Bylaws.

6.1 The CPE Review is Procedurally and Methodologically Deficient.

The ICANN Board adopted the Resolutions despite the facially deficient methodology underlying the CPE Review. FTI, in performing its independent review of the CPE process, only relied upon documents from ICANN as part of its review, since the CPE Provider refused to produce documents and it did not accept submissions from community priority applicants.⁴ Furthermore, FTI only interviewed individuals associated with ICANN and the CPE Provider and those interviews were equally deficient. For example, even though the CPE Provider produced no documents, FTI interviewed only two of its staff members and none of its independent evaluators, project coordinators, or project directors.⁵ No interviews were requested or conducted of any person at DotMusic or any of its experts who have submitted extensive reports for the BAMC's consideration. Accordingly, the CPE Review is based only on interviews with the two CPE

⁴ Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

⁵ *Id.* at pp. 8-10, 14-15.

Provider staff members, six ICANN staff members, and documents produced only by ICANN.⁶ A review based on this limited, one-sided, and incomplete universe of documents cannot be considered independent.

The ICANN Board was aware that the CPE Review relies on an incomplete universe of information and documents for its conclusions on 15 March 2018, when it nonetheless accepted the CPE Review. ICANN Board member Avri Doria abstained from voting on the Resolutions specifically because she believed that the CPE Review lacked procedural credibility and did not perform proper due diligence:

I am abstaining from the vote on the acceptance of the report from FTI Consulting due to the fact that while I accept the path forward as defined in the motion, I cannot accept the report itself.

From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. In scope 2, the analysis of the application of criteria, while they described a rigorous methodology, the documentation describes their inability to fully apply that methodology. The report indicates that they were not able to obtain all of the required documentation from the CPE provider necessary for the full application of the process they had defined. Any scientific method, when the method cannot be rigorously applied, the results be viewed as, at best, tentative and should be treated with caution. Though FTI Consulting reports that there is no evidence of differential application of criteria, they cannot claim with certainty that there was no differential application in the absence of full and rigorous application of their chosen methodology.

It also appears in the report that only a portion of the evaluators were interviewed. In fact, the report states that FTI consulting only interviewed two of the evaluators from a larger set of evaluators. This appears to me to be another flaw in the application of their methodology.

Any definitive determination that there was no conclusive differential application of criteria would require a further in-

⁶ See *id.* at pp. 3-7, 13-14.

depth study of all CPE applications and would require not only the missing documentation but also require interviewing all of the evaluators and not just the two remaining employees of the evaluation teams.⁷

ICANN Board Member Avri Doria's concerns regarding the CPE Review were also raised before the ICANN Board prior to 15 March 2018 by several participants in the CPE process, including Requestor.⁸ Members of the .HOTEL contention set, represented by Flip Petillion, Crowell & Moring LLP ("Flip Petillion"), informed ICANN on 1 February 2018 that it lacked "diligence and care in the CPE process review:"

FTI recognized that it did not benefit from a complete data set, as the CPE Provider refused to give access to its email communication pertaining to the CPE process. No reason is provided as to why the CPE Provider refused access.

Remarkably, it seems that the vast majority of evaluators had left the CPE Provider before FTI started its review of the CPE process. Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process.

FTI's review of the CPE process was thus extremely limited.

Given its limited scope, no value can be attached to FTI's conclusion in the report that it found no evidence of undue influence of the ICANN organization on the CPE provider.⁹

Requestor further informed ICANN on 31 January 2018 that the CPE Review "is unreliable and incomplete because it was based on (1) selective information provided by ICANN; (ii) a flawed understanding of issues based on this incomplete and inconsistent evidence; and (iii) the adoption

⁷ Exhibit 03, Avri Doria, ICANN Board Meeting Transcript (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

⁸ See, e.g., Exhibit 04, "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (31 Jan. 2018), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>; Exhibit 05, Flip Petillion to ICANN BAMC (1 Feb. 2018), <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>; Exhibit 06, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

⁹ Exhibit 05, Flip Petillion to ICANN BAMC (1 Feb. 2018), p. 2, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>

of a flawed and inappropriate compliance-based investigative process by the FTI.”¹⁰ Despite the clearly articulated and supported concerns regarding the procedural basis for the CPE Review, the ICANN Board insisted on adopting a series of resolutions that will materially affect the outcome of Requestor’s Request 16-5.

6.2 The CPE Review Performed No Substantive Analysis of the CPE Process.

The CPE Review simply rubber-stamped the CPE process without any significant analysis. FTI not only performed no substantive review of the CPE process in order to reach its ultimate conclusions on these two issues but also concluded there are no issues with the CPE despite the significant evidence to the contrary.¹¹ Participants and interested parties in the CPE process have since raised concerns to ICANN about the (1) independence of the CPE Provider and (2) the discriminatory application of the CPE criteria based on their own substantive analyses.

FTI did not address any of the evidence, some of which is contained in the CPE Review, indicating that the CPE Provider lacked independence. The Independent Review Process (“IRP”) Panel in *Dot Registry v. ICANN* determined that “ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports.”¹² The CPE Review contains further evidence that the CPE Provider did not act independently from ICANN:

As a matter of fact, FTI’s report shows a lack of independence of the CPE provider. FTI’s Scope 1 report reveals that abundant phone calls were made between the CPE Provider and ICANN. It also mentions that ICANN advised at times that the CPE Provider’s conclusions were not supported by sufficient reasoning.

¹⁰ Exhibit 04, “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (31 Jan. 2018), p. 50, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>.

¹¹ See Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; see also Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

¹² Exhibit 08, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶ 93, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

ICANN was thus intimately involved in the evaluation process. The CPE Provider was anything but an independent provider. The abundant phone calls between ICANN and the CPE Provider to discuss “various issues” and ICANN’s influence on the CPE Provider’s rationale demonstrate that the CPE Provider was not free from external influence from ICANN. As a result, the CPE Provider was not independent.

FTI’s attempt to minimize ICANN’s influence on the CPE Provider is unconvincing. FTI’s report shows (i) that ICANN made extensive comments on the draft reports prepared by the CPE Provider, (ii) that those drafts were discussed at length between the CPE Provider and ICANN, and (iii) that the working of the CPE Provider and ICANN became intertwined to such extent that it became “difficult to discern which comments were made by ICANN organization versus the CPE Provider”. It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or the CPE Provider.

One can only conclude from these findings that the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue. FTI’s report confirms ICANN’s intimate involvement in the CPE and the fact that the *Despegar et al.* IRP Panel was given incomplete and misleading information.¹³

Therefore, FTI clearly ignored evidence and minimized significant evidence in order to conclude that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring, or conclusions reached by the CPE Provider.”¹⁴

In addition to FTI’s dismissal of all evidence concerning the CPE Provider’s lack of independence from ICANN, FTI also ignored significant evidence that the CPE Provider discriminatorily and inconsistently applied the CPE criteria. Cherine Chalaby, member of the ICANN Board, and Mark Carvell, Vice Chair of ICANN’s Governmental Advisory Committee

¹³ Exhibit 05, Flip Petition to ICANN BAMC (1 Feb. 2018), p. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petition-to-icann-bamc-redacted-01feb18-en.pdf>

¹⁴ Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

(“GAC”), acknowledged the inconsistencies¹⁵ and unfairness¹⁶ in the CPE process. The community priority applicants, such as Requestor, have also repeatedly explained to ICANN how the CPE process is discriminatory and inconsistent.¹⁷ They are supported by independent legal experts that performed substantive evaluations of the CPE. For example, Requestor submitted to ICANN an expert report by Dr. Jørgen Blomqvist, honorary professor of international copyright at the University of Copenhagen, who concluded that the EIU improperly applied the CPE criteria to community priority applicants as part of the CPE process.¹⁸ The expert opinion by Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, further supports Dr. Blomqvist’s conclusions; he found that the CPE Review (1) shows an “incomplete understanding” of the CPE’s criteria,¹⁹ (2) contained “interpretive errors,” and (3) contained “errors of inconsistency and discrimination.”²⁰ These expert opinions were affirmed by the Council of Europe, a leading human rights organization with an observer status within the GAC that issued a report substantively analyzing the CPEs and concluding that the CPE Provider

¹⁵ Exhibit 09, ICANN, Transcript of Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 (“I personally would comment that I have observed inconsistencies applying the (AGB) scoring criteria for (CPE)’s and ... there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases.”).

¹⁶ *Id.* at p. 12 (“The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. That was not happening.”).

¹⁷ See Exhibit 10, Letter from Arif Ali on behalf of DotMusic Limited to ICANN Board (15 Dec. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>; see also Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), pp. 20-24, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

¹⁸ See Exhibit 12, Expert Legal Opinion by Honorary Professor in International Copyright Dr. Jørgen Blomqvist (17 June 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>.

¹⁹ Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), p. 74, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

²⁰ *Id.* at pp. 20-21.

inconsistently applied the CPE criteria.²¹ FTI did not address any of the aforementioned evidence in the CPE Review even though they all directly contradict its conclusions on the CPE process.²²

Rather, the CPE Review simply concluded that “the CPE Provider consistently applied the CPE criteria throughout all [CPEs]”²³ without adequately addressing any of the concerns from community priority applicants, legal experts, and ICANN members. Not once in the CPE Review did FTI directly address the concerns, evidence, and conclusions put forth by any of the community priority applicants and the Council of Europe. FTI simply defended the CPE process without performing any substantive analysis. As explained by Flip Petillion,

The second part of FTI’s report (Scope 2) was supposed to focus on the consistency – or better, lack of consistency – of CPE decisions.

However, FTI’s [*sic*] did not analyse the consistency issues during CPE. The report simply sums up the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria. FTI did not examine the consistency between the reasons invoked by the CPE Provider. It also failed to examine whether the CPE provider was consistent in applying those reasons to the different applications. There is no analysis whatsoever as to the inconsistencies invoked by applicants in RfRs, IRPs or other processes.

Emblematic of the lack of analysis is the fact that FTI did not examine the gTLD applications underlying the CPE report. These gTLD applications are not even mentioned among the materials reviewed by FTI. Without reviewing the underlying applications, it is impossible to assess the consistent application of policies and standards. ...

The fact that those inconsistencies were left unaddressed by FTI is inexcusable. Requesters described the inconsistencies clearly and repeatedly. The *Despegar et al.* IRP Panel considered Requesters’

²¹ Exhibit 13, Eve Salomon and Kinanya Pijl, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 41-57, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

²² *Id.* at p. 3.

²³ Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 57, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

description of those inconsistencies to have merit. The existence of said inconsistencies has never been contested. And FTI's report simply ignores them.²⁴

Clearly, FTI's approach to the CPE Review was to simply describe the CPEs rather than evaluate their substance to determine whether the CPE Provider was actually adhering to the applicable guidelines. And, yet, the ICANN Board accepted FTI's conclusions by adopting the Resolutions and the BAMC will now apply the flawed determinations in the CPE Review to Requestor's Request 16-5—materially affecting the treatment of Requestor's community priority application.

6.3 ICANN Adopted the Resolutions in Violation of Its Bylaws.

In adopting the Resolutions, the ICANN Board violated its own Bylaws. It specifically breached the ICANN Bylaws requiring that the ICANN Board (1) comply with international law and conventions in an open and transparent process; (2) adhere to its Commitments and Core Values; and (3) employ procedures designed to ensure fairness and fact-based development.

First, ICANN has not complied with international law and conventions. ICANN is required to “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets.”²⁵ There is an “an international minimum standard of due process as fairness – based ... on the universal views of all legal systems.”²⁶ This principle is violated “when a decision is based upon evidence

²⁴ Exhibit 05, Flip Petition to ICANN BAMC (1 Feb. 2018), p. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petition-to-icann-bamc-redacted-01feb18-en.pdf>

²⁵ Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

²⁶ Exhibit 15, Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law” 23 *Duke J. of Comparative and Int'l L.* 411, 422 (2013).

and argumentation that a party has been unable to address.”²⁷ The BAMC and ICANN Board have both made a decision based on the CPE Review.²⁸ While Requestor has submitted numerous materials regarding the CPE Review to the ICANN Board, such as the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports,”²⁹ it has been unable to address the evidence supporting the CPE Review because they have not been made publically available.

In fact, ICANN has prevented any attempts by Requestor, and other interested parties, to obtain and review the underlying substance of the CPE Review. On 10 January 2018, Requestor sought disclosure of documentary information relating to the CPE Review (the “DIDP Request”) pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).³⁰ ICANN refused to disclose any of the requested documents.³¹ ICANN thus prevented Requestor from examining the evidence supporting the CPE Review in order to analyze the review’s results in violation of ICANN’s own Bylaws, which require that ICANN act in accordance with international law and with transparency, accountability, and openness. It is patently unfair to require a party to address criticisms of its conduct without providing that party with relevant and material information that would allow it to properly address those criticisms. ICANN’s stonewalling effectively puts in Requestor in a position that makes it virtually impossible for it to provide a detailed analysis of

²⁷ Exhibit 16, Charles T. Kotuby and Luke A. Sobota, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES 179 (15 Mar. 2017).

²⁸ Exhibit 17, “Preliminary Report | Regular Meeting of the ICANN Board” ICANN (4 Feb. 2018), <https://www.icann.org/resources/board-material/prelim-report-2018-02-04-en#2.e> (“Following the publication of the three reports on the CPE Process Review by FTI Consulting, the BAMC approved a recommendation to the Board on next steps relative to the CPE Process Review, which was scheduled to be considered by the Board at this meeting. ... While the BAMC taken the letters and reports into consideration as part of its recommendation to the Board, the proposed resolution has been continued to the Board’s next meeting in Puerto Rico to allow the Board members additional time to consider the new documents.”).

²⁹ Exhibit 04, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (2 Feb. 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

³⁰ Exhibit 18, Request No. 20180110-1 (10 Jan. 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>. Requestor submitted 19 requests.

³¹ See Exhibit 19, Response to Request No. 20180110-1 (10 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>. ICANN argued that it appropriately determined that “certain documents are not appropriate for disclosure” pursuant to its Nondisclosure Conditions, and it can therefore deny the document request “without contravening its commitment to transparency.” *Id.* at p. 8. Although ICANN can still disclose documents covered by its Nondisclosure Conditions in the public interest, ICANN did not find that there was sufficient public interest to warrant disclosure.

the CPE Review’s deficiencies. Even so, the deficiencies that have been identified in the absence of the requested information are not only sufficient to justify ICANN’s rejection of the CPE Review, they undeniably support disclosure of the additional information that has been requested.

Second, the ICANN Board did not adhere to its Commitments and Core Values. Pursuant to its Bylaws, the ICANN Board must “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”³² ICANN’s adoption of the Resolutions breached four specific Commitments and Core Values:

1. The ICANN Board violated its Commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act” because it did not act for the public benefit by accepting the conclusions of reports that rubber-stamp an evaluation process for community applicants that legal experts, human rights organizations, and ICANN itself has recognized as problematic.
2. The ICANN Board violated its Commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] promote well-informed decisions based on expert advice.”³³ The ICANN Board is aware of *several* independent experts that concluded the CPE Review was procedurally and substantively deficient, as described in **Sections 6.1 and 6.2** above. Yet, it still supported the conclusions of *one* evaluator that employed a blatantly flawed review methodology and ignored all evidence contrary to its own conclusions.
3. The ICANN Board violated its Commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment.”³⁴ Any neutral, objective, and fair examination of the CPE Review would

³² Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2, <https://www.icann.org/resources/pages/governance/bylaws-en>.

³³ *Id.* at Article 3, Section, 3.1.

³⁴ *Id.* at Article 1, Section, 1.2(a)(v).

conclude that it is deficient, as explained in Requestor’s past submissions to the ICANN Board.³⁵ The ICANN Board thus made a decision in contravention of the aforementioned principles adopting the CPE Review.

4. The ICANN Board violated its Core Value to “[o]perat[e] with efficiency and excellence.”³⁶ It is evident that the knowing acceptance of a deficient independent evaluation does not constitute operating with any degree of excellence.

And, *third*, the ICANN Board violated the Bylaws requiring that it act “consistent with procedure designed to ensure fairness, including implementing procedures to ... encourage fact-based policy development work”³⁷ The CPE Review is based on an incomplete and unreliable universe of documents biased in favor of ICANN, as explained in **Section 6.1** above. The ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness, part of which requires ICANN to encourage fact-based work. The ICANN Board’s decision to adopt the Resolutions, therefore, violates ICANN’s Bylaws because it knowingly adopted the flawed CPE Review with utter disregard for basic notions of due process and fair play.

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

ICANN’s actions materially affect the global music community that has supported the Requestor’s application. Accepting the flawed and incomplete findings of the CPE Review has negatively impacted the timely, predictable, and fair resolution of the .MUSIC gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without

³⁵ See Exhibit 04, “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (31 Jan. 2018), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>;

³⁶ Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section. 1.2(b)(v), <https://www.icann.org/resources/pages/governance/bylaws-en>.

³⁷ *Id.* at Article 1, Section. 1.2(a)(iv).

an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake because an ICANN that lacks these principles undermines its own due diligence and decision-making process in matters that relate to the global public interest and in its determinations that materially affected parties.

By accepting the findings of the CPE Review as final, ICANN is impeding the efforts of anyone attempting to understand the process FTI used to review the CPE process and compromises ICANN's own due diligence process, especially when taking into consideration the issues relevant to the CPE Provider's improper application of CPE criteria as described in Requestor's submissions.³⁸ This increases the likelihood of gTLD applicants resorting to the expensive and time-consuming IRP and/or legal action to safeguard the interests of the music community members, which have supported Requestor's application for .MUSIC, to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

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

The Requestor filed a community priority application for the .MUSIC gTLD. However, the CPE Provider recommended that ICANN reject the Requestor's community application.³⁹ Requestor subsequently made various submissions, including independent expert reports supporting its community application, showing that the CPE Provider's decision is fundamentally erroneous.⁴⁰ These submissions explain how the CPE Provider disparately treated Requestor's application by misapplying the CPE criteria, applying the CPE criteria differently than in other

³⁸ Exhibit 20, DotMusic's Presentation to the Board Governance Committee (17 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

³⁹ Exhibit 21, DotMusic Limited CPE Report (10 Feb. 2016), <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁴⁰ Exhibit 22, "Request 16-5: DotMusic Limited" ICANN (last visited 13 Apr. 2018), <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

gTLD community applications, failing to follow its own guidelines, discriminatorily treating the application, making several factual errors, and failing to act fairly and openly when it determined that the application failed to meet the CPE criteria.

ICANN began its own review of the CPE process in late 2016.⁴¹ The ICANN Board “direct[ed] [its] President and CEO, or his designee(s), to undertake an independent review” of the CPE process.⁴² ICANN did not disclose any substantive information about this review to the Requestor or other participants in the CPE process. However, since the review concerns an examination of the CPE process, it was apparent to Requestor early on that the review will directly affect the outcome of Request 16-5. Thus, on 5 May 2017, Requestor filed a DIDP request seeking various categories of documents concerning the Board Governance Committee’s (“BGC”) review of the CPE process (the “First DIDP Request”) in an attempt to learn more about the review.⁴³ ICANN did not disclose the substantive information requested in the First DIDP Request.⁴⁴

After Requestor submitted its First DIDP Request, ICANN finally disclosed additional information regarding the CPE review. On 2 June 2017, ICANN announced that FTI was reviewing the CPE process, and collecting information and materials from ICANN and the CPE Provider regarding the process.⁴⁵ In response, on 25 July 2017, the Requestor jointly filed another DIDP Request with dotgay LLC, another community priority applicant, on 10 June 2017 (the

⁴¹ Exhibit 22, Update on the Review of the New gTLD Community Priority Evaluation Process (26 Apr. 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁴² Exhibit 24, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁴³ Exhibit 25, Request 20170505-1 (5 May 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf>.

⁴⁴ Exhibit 26, Response to Request 20170505-1 (4 June 2017), <https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf>. Requestor began the reconsideration request process in regards to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the cooperative engagement process (“CEP”) with ICANN.

⁴⁵ Exhibit 27, Community Priority Evaluation Process Review Update (2 Jun. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

“Second DIDP Request”) to learn about FTI and the purview of its review.⁴⁶ This request was also denied in violation of ICANN’s commitment to transparency.⁴⁷

Requestor finally learned substantive information about FTI’s review on 13 December 2017, when ICANN decided to publish the results of FTI’s work.⁴⁸ Upon review of FTI’s three reports, Requestor found that they contained significant problems both in the substance of the reports and the procedures that FTI used to in its review.⁴⁹ For instance, FTI did not re-evaluate the CPE applications, examine the substance of the reference material cited in its own reports, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants. As FTI’s review is intended to “assist in the CPE review,”⁵⁰ Requestor sought to learn about FTI and its flawed reports on the CPE process, which makes several conclusions that may significantly impact Request 16-5.⁵¹ Therefore, Requestor submitted to ICANN the DIDP Request in order to obtain documents regarding the underlying substance of the CPE Review.⁵² ICANN again refused to disclose any of the requested documents.⁵³

Rather than provide Requestor with any substantive information regarding the CPE Review, and therefore permit a substantive analysis of FTI’s conclusions, the ICANN Board

⁴⁶ Exhibit 28, Request 20170610-1 (10 Jun. 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

⁴⁷ Exhibit 29, Response to Request 2-170610-1 (10 July 2017), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-response-10jul17-en.pdf>. Requestor began the reconsideration request process in response to this denial; after the ICANN Board denied this reconsideration request, Requestor began to the CEP with ICANN.

⁴⁸ Exhibit 30, “ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process” ICANN (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

⁴⁹ See Exhibit 04, Email from DotMusic to ICANN attaching the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (Feb. 2, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

⁵⁰ Exhibit 27, Community Priority Evaluation Process Review Update (2 Jun. 2017), p. 1, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁵¹ Exhibit 18, Request No. 20180110-1 (10 Jan. 2018), <https://www.icann.org/en/system/files/files/didp-20170610-1-ali-obo-dotgay-et-al-request-redacted-10jun17-en.pdf>.

⁵² *Id.*

⁵³ See Exhibit 19, Response to Request No. 20180110-1 (10 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

instead proceeded to adopt the procedurally and substantively deficient CPE Review—as described in **Section 6** above—on 15 March 2018.

9. What are you asking ICANN to do now?

Requestor asks ICANN to reconsider its 15 March 2018 action and reject both the Resolutions and the findings of the CPE Review. This is based on a plethora of factors, including

- (1) the lack of independence of the CPE Review, e.g. neglecting to interview any affected parties, such as DotMusic;
- (2) the DIDP requests filed by DotMusic and rejected by ICANN that would have enabled ICANN to be transparent and accountable, and make a reasonable, unbiased and compelling decision concerning the CPE Review;
- (3) the weakness of the research undertaken by the CPE Provider throughout the CPE process, e.g. the over-reliance on untrustworthy sources like Wikipedia;
- (4) the findings of the Council of Europe that the CPE process was flawed and inconsistent;
- (5) the findings of numerous experts that concluded that DotMusic was improperly and inconsistently graded in its CPE;
- (6) the findings of experts concerning evaluations of other community applicants that concluded that they were improperly and inconsistently graded in their CPE;
- (7) the findings of the *Dot Registry* IRP, which concluded ICANN staff were intimately involved in the CPE process in violation of its Bylaws;
- (8) the findings of the *Despegar* IRP, which concluded that the claim of inconsistencies between CPEs had some merit;⁵⁴
- (9) the scope of the CPE Review that did not include a substantive review of the CPE process, including looking into the appearance of conflicts of interest;

⁵⁴ Exhibit 31, *Despegar Online SRL et al. v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration (12 Feb. 2016), ¶ 146, <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

(10) FTI's admission that it was unable to fully apply their methodology because it was unable to obtain all of the required documentation from the CPE Provider necessary for the full application of the process they had defined;

(11) the lack of claim by FTI that there was no procedural improprieties given the absence of a full and rigorous application of their chosen methodology, especially since only two of the CPE Provider's staff were interviewed.⁵⁵

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

As stated above, Requestor is a community applicant for the .MUSIC gTLD that participated in the CPE process. Requestor's Request 16-5 contests the results of the CPE for .MUSIC and is currently before the BAMC. However, the CPE Review claims that there are no problems with the CPE process. The ICANN Board has decided to accept the CPE Review through the Resolutions and conclude its investigation of the CPE process despite being aware of the significant procedural and substantive problems with the CPE Review. Its acceptance of the flawed CPE Review will directly affect the BAMC's consideration of Request 16-5 and, therefore, Requestor and the community that Requestor seeks to support through the operation of .MUSIC as a community gTLD—the global music community.

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

No, the Reconsideration Request is filed on behalf of DotMusic Limited.

⁵⁵ See Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 9-10, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>; Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

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

Not applicable.

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

Yes, these documents are attached as Exhibits.

Terms and Conditions for Submission of Reconsideration Requests:

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



Arif Hyder Ali

April 14, 2018

Date