

November 15, 2016

VIA E-MAIL

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Council of Europe Report DGI (2016)17 - .GAY TLD

Dear Chairman Crocker and Board of Directors,

dotgay LLC (“**dotgay**”) writes to request that the ICANN Board (“**Board**”) add to the materials it is reviewing in connection with dotgay’s application the Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (“**CoE Report**”).¹ The CoE is Europe’s leading human rights organization, with 47 member states (28 of which are also members of the European Union),² all of which are members of the European Convention on Human Rights. The CoE has observer status within ICANN’s Governmental Advisory Committee (GAC).

The CoE Report, standing alone, and certainly when taken together with the following materials, makes it abundantly clear that the EIU erred in its evaluation of dotgay’s application and that the Board is obligated to grant community priority status to dotgay’s application for the .GAY TLD:

¹ See Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

² See <http://www.coe.int/en/>.

- (i) the former ICANN Ombudsman Chris LaHatte's Report;³
- (ii) the ICC Expert's Determination regarding .LGBT;⁴
- (iii) the Expert Opinion of Professor William N. Eskridge of Yale Law School;⁵
- (iv) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts;⁶ and
- (v) the Dot Registry IRP Decision.⁷

The CoE Report identifies a long list of human rights principles, which the Board cannot avoid giving effect in evaluating dotgay's application. The Report amply supports the conclusions reached by the ICANN Ombudsman and the two independent expert reports submitted to ICANN on 13 September and 17 October 2016.

³ Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html> (determining that “[t]he board should grant the community application status to the applicant . . . [and] comply [] with its own policies and well established human rights principles”).

⁴ *The International Lesbian Gay Bisexual Trans and Intersex Association v. Afiliads Limited*, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf> (finding that the .GAY application “is designed to serve the gay community”).

⁵ Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf> (explaining how Prof. Eskridge shows that “the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement”).

⁶ Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf> (explaining how Prof. Badgett demonstrates that “withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community”).

⁷ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> (holding that the Board Governance Committee (“BGC”) “must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination”).

The CoE Report Applies Human Rights Principles to .GAY

The CoE Report affirms that human rights principles apply to ICANN.⁸ The Report's discussion of human rights and community applications shows that the Board should independently approve dotgay's .GAY application. To assist the Board with its analysis of the CoE Report, we attach particularly relevant excerpts of it, the import of which should be self-evident:

ICANN Must Protect Public Interest Values through Community TLDs

- Community TLDs should protect “vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.”⁹
- Community TLDs should protect “[p]luralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.”¹⁰

⁸ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

⁹ *Id.*, p. 34.

¹⁰ *Id.* (emphasis added).

ICANN's Commitment to Human Rights Requires that It Support Community gTLDs

- The Right to Freedom of Expression: “For Internet users at large, domain names represent an important way to find and access information on the Internet. . . . A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. *A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.* Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.”¹¹
- The Right to Freedom of Assembly and Association: “Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests. As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.”¹²

ICANN's gTLD Program Improperly Fails to Conform with Human Rights Principles

- The Right to Procedural Due Process: “ICANN's gTLD program, including community-based applications, needs to be based on procedural due process. . . . Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus

¹¹ *Id.*, p. 19 (emphasis added).

¹² *Id.*, p. 22.

access to justice, which is generally considered a human right or at least a right at the constitutional level.”¹³

- The Right to Non-Discrimination: “The general principle of equality and non-discrimination is a fundamental element of international human rights law. . . . ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority.”¹⁴

Through its discussion of these human rights, the CoE Report confirms the ICANN Ombudsman’s determination that ICANN has a commitment to human rights and that dotgay represents a community that “is real, does need protection and should be supported” by awarding dotgay community priority status.¹⁵ It further supports the Expert Opinion of Prof. M.V. Lee Badgett, which states that ICANN should provide a safe space on the Internet for the gay community to engage in economic activity and social change.¹⁶

The BGC and the EIU failed to uphold these basic human rights when it considered dotgay’s application for the .GAY TLD. In light of the CoE Report’s recent findings, the ICANN Ombudsman’s determination, the expert opinions submitted to ICANN, and the clearly incorrect determination by the EIU, the Board should correct this error by individually considering the .GAY application in accordance with Article 5.1 of the AGB and awarding the .GAY TLD to dotgay.

The CoE Report Further Recognizes Problems with the EIU and the CPE Process

In addition to human rights considerations, the CoE Report confirms the significant problems with the EIU’s CPE of the .GAY gTLD, corroborating the Expert Opinion of

¹³ *Id.*, p. 25.

¹⁴ *Id.*, p. 26.

¹⁵ Ombudsman Report, <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

¹⁶ *See* Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

Prof. Eskridge of Yale Law School.¹⁷ The EIU clearly made fundamental errors of inconsistency and discrimination in following and applying its guidelines. The CoE Report criticizes the EIU for these inconsistencies, specifically highlighting the following issues with the EIU's consideration of .GAY:

The EIU's Inconsistent Acts during the CPE Process Raises Issues of Human Rights Violations, Unfairness, and Discrimination¹⁸

- “*First*, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to avoid any ‘double-counting’. . . . However, the EIU appears to double count ‘awareness and recognition of the community amongst its member’ twice.”¹⁹
- “*Second*, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others. The EIU appears to have been inconsistent in its interpretation of ‘Nexus’ Under Criterion 2 of the CPE process. *The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.* There is no evidence provided of the relative small and ‘more than small’ segments of the identified communities

¹⁷ See Letter to ICANN Board from A. Ali enclosing the Eskridge Report (13 Sept. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

¹⁸ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), pp. 9, 45, 49, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹⁹ *Id.*, p. 49 (emphasis added).

which justified giving a score of 0 to one applicant and 2 to another.”²⁰

- “The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a *majority* of the community. . . . ***By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.***”²¹
- “***Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.***”²²
- “***Third***, the EIU changed its own process as it went along.”²³
- “***Fourth***, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. ***An example***

²⁰ *Id.*, pp. 49-50 (emphasis added).

²¹ *Id.*, p. 51 (emphasis added).

²² *Id.* (emphasis added).

²³ *Id.* (emphasis added).

that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.”²⁴

- *Fifth*, “[t]here are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. . . . It would seem that the EIU prefers to award full points on 4A[, the Support prong of ‘Community Endorsement,’] for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.”²⁵

ICANN Improperly Accepts EIU Determinations without Question and without Possibility of Appeal

- “The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) ‘failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its

²⁴ *Id.*, pp. 51-52 (emphasis added).

²⁵ *Id.*, p. 57.

transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).’ The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws.”²⁶

- “ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN. This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a ‘decision’ which it will not question. Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.”²⁷

The CPE Process does not Conform with ICANN’s Core Principles, including Human Rights Principles

- “*In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.* Here, he took to task the fact that the BGC has ‘a very narrow view of its own jurisdiction in considering reconsideration requests.’ He points out that ‘it has always been open to ICANN to reject an EIU

²⁶ *Id.*, p. 60 (quoting *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016)).

²⁷ *Id.*, p. 64.

recommendation, especially when public interest considerations are involved.’ *As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it ‘has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency’.* We endorse his view and hope that our report will strengthen the argument behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.”²⁸

- “As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate. However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN’s mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in.”²⁹

As evidenced by these inconsistencies, the EIU clearly failed to “respect[] the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB.”³⁰ The BGC’s own failure to exercise its independent judgment when evaluating the EIU’s CPE in light of these principles, which it must do according to the Dot Registry Declaration, “must be corrected.”³¹

²⁸ *Id.*, pp. 69-70 (quoting Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>) (emphasis added).

²⁹ *Id.*, p. 31.

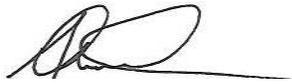
³⁰ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34.

³¹ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 60.

ICANN Must Proceed to Contracting with dotgay for .GAY

In light of the above considerations, we believe that there are more than sufficient grounds for the Board to act under Article 5.1 of the AGB and award the .GAY TLD to dotgay. The Board should grant dotgay's community priority application without any further delay and proceed to enter into a registry agreement with dotgay, which remains dedicated and enthusiastic about operating the .GAY registry.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif Hyder Ali', with a long horizontal flourish extending to the right.

Arif Hyder Ali
Partner