



Ms. Christine Willett
Vice-President gTLD Operations
ICANN
12025 Waterfront Dr., Suite 300
Los Angeles, CA 90094

Dear Ms. Willett:

We respectfully request that the following document is forwarded on to the CPE Panel that is to be appointed to evaluate the Community Application submitted by EFLUX.ART (Application ID 1-1675-51302).

We were notified of EFLUX.ART's invitation to CPE on February 19 2014. It has been repeated in numerous fora that any correspondence received by ICANN and/or posted to the Public Comment Forum within two weeks of the CPE invitation date would be directed to the appropriate CPE Panel.

We were well aware of the rules for Community Priority at the time we applied for the .art TLD and would therefore like to comment on this particular application in accordance with the above.

We also request that this letter and the following document are posted as public correspondence.

Respectfully yours,

Andrew Merriam
Business Development Coordinator
Top Level Design LLC
andrew@tldesign.co

Executive Summary

Top Level Design LLC, an applicant for the .art TLD, would like to offer an evaluation of EFLUX.ART LLC's Community Priority application for .art (Application ID 1-1675-51302), which we hope will be of use to the Community Priority Evaluation (CPE) Panel. It has been stated in numerous fora that CPE related letters submitted to ICANN and the public comment forum would be directed to the relevant CPE Panel.

We would like to underscore that if the rules set forth in the Applicant Guidebook (AGB) are followed, many community priority applications for generic strings will fail, and rightly so, given that ICANN has set the entry barrier quite high. We nevertheless recognize our vested business interests in this discussion and offer our evaluation in the spirit of the multistakeholder model and as an insistence that all CPEs rely solely on the rigorous criteria put forth in the AGB.

EFLUX.ART is claiming a very generic term as its community name, and the CPE process was designed to prevent this. As would be expected, EFLUX.ART's application does not pass our evaluation, **scoring only 3 of the 14 points necessary**. Here is a summary of the key areas of concern:

- There is no clear **delineation** to the "art community" as defined by EFLUX.ART, which focuses on its art-centric online newsletters, emails, and website. There is no clear awareness of community between those members; there is no clear longevity; it is not organized outside of EFLUX.ART's business dealings (pp. 3-5).
- The **extension** of EFLUX.ART's mailings and subscriptions, which is the locus of its "community," is represented by a distribution figure (100,000 art professionals) that is infinitesimal compared to potential members (2.1 mm full-time artists in the USA alone). Considering non-professional artists and other uses for the term "art" outside of EFLUX.ART's "community" further demonstrates that EFLUX.ART is neither sizable nor representative. Furthermore, there is no indication that EFLUX.ART's "community" is non-transient in nature (pp. 5-6).
- There is little **nexus** between the "community" described and the term "art," and EFLUX.ART's use of the latter to infer the former significantly overreaches what would be a natural use of the term. There is no indication that use of the word "art" would imply membership with EFLUX.ART to others, or even to the members (or rather, subscribers) of EFLUX.ART (pp. 7-9)
- EFLUX.ART's definition of "art" is not **unique**, in that there are multiple, significant definitions that are not in agreement with the applicant's restrictive and arguably

CPE Analysis	
Community Establishment	<p>2 Delineation 0</p> <p>There is no clear awareness between its members; there is no clear longevity; it is not organized outside of applicant's business</p>
	<p>2 Extension 0</p> <p>Membership is infinitesimal in relation to the global professional artist population</p>
Nexus btw string and community	<p>3 Nexus 0</p> <p>Applicant's use of "art" significantly overreaches and is not an identifier strictly associated with EFLUX.ART membership</p>
	<p>1 Uniqueness 0</p> <p>There are multiple, significant definitions that do not agree with the applicant's erroneous definition of "art"</p>
Registration Policies	<p>1 Eligibility 0</p> <p>Betrays the intention of Community Priority by only conditionally allowing its "members" access</p>
	<p>1 Name Selection 0</p> <p>There are no unique, community-oriented name selection policies detailed</p>
	<p>1 Content and Use 0</p> <p>The only defined use policy is not in-line with the realities of artistic creation</p>
	<p>1 Enforcement 0</p> <p>There are no concrete enforcement policies</p>
Community Endorsement	<p>2 Support 1</p> <p>EFLUX.ART has received numerous letters of support; but its supporters are lacking in notoriety and geographic diversity</p>
	<p>2 Opposition 2</p> <p>The only documented opposition comes from a competitive Community Priority applicant, which suffers from the same problems of representation and relevance as EFLUX.ART itself</p>
<p>16 Total Possible Points</p>	
<p>Points earned by EFLUX.ART 3</p>	

erroneous definition (pp. 9-10).

- The applicant's **eligibility** criteria demonstrate a misuse of the Community Priority system, given that its stated intent is to initially reserve all names for internal use, with any access to its defined "community" described as merely "possible." Not only does it reserve the right to exclude its purported "community," it also reserves the right to open up registration to the wider "art world," which seems to imply open access (pp.10-11).
- EFLUX. ART fails to define any community-based policies around **name selection**, and instead outlines policies that are either required by ICANN or already deployed across TLD registries (p. 12).
- The only **content and use** policies defined by the applicant aim to prevent lewd, sexually explicit, offensive, etc., material from being displayed. It is interesting and inappropriate that these are the only such policies defined since many great artists and their work are known for being contentious, graphic, explicit, etc. This lone policy, like the entire application, seems to be employed with EFLUX.ART's business interests in mind rather than any wider artistic endeavors (pp. 13-14).
- There are no concrete **enforcement** policies; instead, EFLUX.ART once again uses modifiers like "may" and "will likely" to describe a potential system that could be put in place (p. 14).
- EFLUX.ART has received a number of letters of **support**. It does not, however, have a majority of recognized community members/organizations, and also lacks in diversity and notoriety amongst its supporters (pp. 15-16).
- There is a competing Community Priority applicant for .art, which implies an **opposition** of sorts; however, there is no indication that this other applicant is any more representative or relevant than EFLUX.ART itself, and so there is no opposition of relevance (pp. 16-17).

CPE Overview

The CPE is comprised of four criteria, each of them divided into sub-sections that are individually evaluated. They are:

- Community Establishment
- Nexus between Proposed String and Community
- Registration Policies
- Community Endorsement

We will now evaluate EFLUX.ART LLC's ("EFLUX.ART") application for .art using its application and the evaluation criteria published by ICANN in the AGB. The references to community evaluation scoring and defined terms, which preface each individual section of our analysis, come from §4.2.3 of the AGB.

We note that the CPE Panel may rely on some level of outside research, though this remains

undefined.¹

Criterion 1: Community Establishment

• Delineation

To receive 1 or 2 points for delineation, the AGB states that an application must invoke a “clearly delineated, organized, and pre-existing community.”

- Definition of “Community”: Usage of the expression “community” has evolved considerably from its Latin origin – “communitas” meaning “fellowship” – while still implying more of cohesion than a mere commonality of interest. Notably, as “community” is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience— into the future.
- “Delineation” relates to the membership of a community, where a clear and straightforward membership definition scores high, while an unclear, dispersed or unbound definition scores low.
- “Organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.
- With respect to “Delineation” and “Extension,” it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both “Delineation” and “Extension.” With respect to “Delineation,” if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.

EFLUX.ART’s definition of its community, “in its broadest sense,” is made up of “individuals, organizations, and companies who are actively involved, on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics.”²

It goes on to note that those individuals that are already involved in its more exclusive art community, through engagement of its website and newsletters, are already members of the art

1 ICANN. (2012). gTLD Applicant Guidebook. *Version 2012-06-04* (§4.2.3).

2 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20a.

3 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20b.

4 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20c.

5 Which seems to be more aptly described as a “network” rather than a “community.”

community. This community is tied-together through its “website and email lists and special projects. Its primary news digest – e-flux announcements – distributes information on some of the world’s most important contemporary art exhibitions, publications and symposia. Its Art & Education newsletter offers a similar digest focused on activities at art schools and academies, while its Art-Agenda newsletter covers events at commercial art galleries.”³

First of all, we must note that EFLUX.ART is defining two different “art communities,” one which is broad and that it ties to the “historical study of human art stretching back to the beginning of known time,” and then a more restricted view of the community, focused on a contemporary grouping of individuals, organizations, and companies involved either professionally and semi-professionally in one of the 9 fields of art that it explicitly mentions. EFLUX.ART is directly associated with the later; this is its own network of subscribers interested in news about the professional art world. This, however, does not appear to have significant overlap with other broad spheres of art, and does not take into account the many forms of art that are not specifically listed by EFLUX.ART or given placement in its distributed materials.

Later in its application, it notes that “Given the diverse nature of what is considered “art”, and given the fact that the subjective affiliations with this term are manifold, there is no national or international group or organization that caters to the needs and interest of the members of the art community. For this reason [...] there is a clear need and demand from the art community to have a TLD that is specifically destined for and operated by members of the art community.”⁴

This is a clear admission on the part of EFLUX.ART that no organization, including itself and any of its members, have the authority and reach to act on behalf of the global “art community.” This also demonstrates that in EFLUX.ART’s model the .art TLD would be a catalyst to creating a community, rather than the natural outgrowth of a preexistent community dependent on the DNS for its activities.

Furthermore, we must note that EFLUX.ART has not demonstrated that its subscribers hold “an awareness and recognition of the community among its members,” in the sense that the subscription lists related to EFLUX.ART do not appear to be open to anyone but EFLUX.ART itself. So, *Artist 1* would have no way of knowing if *Artist 2* is subscribed to EFLUX.ART newsletters other than explicitly asking as much. There is also no “extended tenure or longevity – non transience – into the future,” given that EFLUX.ART’s activities are voluntary subscriptions, and so any member on its listservs can simply opt-out of future activities.

Thus, given that EFLUX.ART defines multiple “art communities,” and notes the operational focus on its own, which is largely a group of subscribers interested in its electronic mailings, it does not represent a clearly delineated community. EFLUX.ART goes on to note that any existent “art community,” or more likely plural *communities*, are global and amorphous in nature and that there is no authoritative structure involved.

3 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20b.

4 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20c.

It consequently should score **0 of 2 points**, as it fails to meet the burden set forth by the AGB that an application must invoke a “clearly delineated, organized, and pre-existing community.” The only aspect of this definition it fulfills is the fact that art as an activity certainly predates the establishment of the New gTLD Program. However, the significant historical context surrounding “art” only goes to show the inability of one organization to fully define and represent it as a cohesive group, thereby failing the “clearly delineated” and “organized” requirements.

- **Extension**

To score the full 2 points for “extension”, the AGB states that the applicant must demonstrate that its proposed community is of considerable size and longevity.

- “Extension” relates to the dimensions of the community, regarding its number of members, geographic reach, and foreseeable activity lifetime, as further explained in the following.
- “Size” relates both to the number of members and the geographic reach of the community, and will be scored depending on the context rather than on absolute numbers—a geographic location “community” may count millions of members in a limited location, a language “community” may have a million members with some spread over the globe, a “community” of service providers may have “only” some hundred members although well spread over the globe, just to mention some examples—all these can be regarded as of “considerable size.”
- “Longevity” means that the pursuits of a community are of a lasting, non-transient nature.

With regards to “extension,” we can only evaluate EFLUX.ART in terms of its own, subscription based “art community,”⁵ and not the broader art group that was also referenced in its response to 20a. The latter is so large, diffuse, and debated that it borders on unquantifiable, which EFLUX.ART LLC also recognizes in its response to 20c.

EFLUX.ART claims that its network reaches over 100,000 visual art professionals on a daily basis and that its daily digests are put together in cooperation with 2,000 art organizations.⁶ A 2001 report from the U.S.A. Bureau of Labor statistics shows that there are over 2.5 million professional artists in the U.S.A alone, with 2.1 million of those identifying an artist occupation as their primary employment.⁷ Thus, it is unequivocally clear that EFLUX.ART’s network, which is merely an online mailing subscription list, reaches only 0.047% of professional artists when compared against the U.S.A’s professional art population. This is an extremely non-

5 Which seems to be more aptly described as a “network” rather than a “community.”

6 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20b.

7 Bureau of Labor Statistics. (2002). *Artists in the United States – 2001*. Retrieved from,

<http://www.princeton.edu/~artspol/quickfacts/artists/artistemploy.html>

representative figure, and does not begin to tell the story of the global population of professional artists or non-professional artists. To consider these populations would decidedly push EFLUX.ART's representation to infinitesimal.

Furthermore, it is not clear whether EFLUX.ART's network extends beyond the mediums of "architecture, dance, sculpture, music, painting, poetry, film, photography and comics," which are explicitly mentioned by EFLUX.ART. There are many other categories of art that could arguably be included here, such as: performance art, textiles, fashion, digital media, ceramics, paper cutting, collage, literature, drawing, acting and theatre performance, metalwork, printmaking, etc. There are also broad categories related to other widely used definitions of "art" focused on expression, creativity, and mastery, such as culinary art and martial art.

EFLUX.ART LLC seems to want to focus on what could be termed "fine art," especially given its focus on a professional or semi-professional barrier to entry, but the fact that it does not specifically call out theatre, drawing, printmaking, and other commonly accepted fine art disciplines is a glaring omission in its attempt to use the broad term "art" for the very limited group of subscribers and followers of its electronic mailings and website.

With regard to its longevity, public formation records show that EFLUX.ART LLC was formed in January 2012, seemingly to apply for the .art TLD on behalf of the older e-flux, which was established in 1999 in New York. Therefore, the e-flux organization predates the gTLD Program. However, juxtaposing its claim that, "*for over a decade*, the applicant for the .art TLD, e-flux, has been an established authority in the field of art[.]"⁸ with the 150 year history of modern art (not to mention centuries of classical art or art's role in ancient and pre-history) makes for a laughable comparison.

It is not clear that all activities of the EFLUX.ART LLC community share lasting, non-transient pursuits. It is, after all, a voluntary subscription-based membership and can therefore be easily opted out of at any time.

Note that we discuss the ways in which EFLUX.ART fails to procure global support and geographic diversity in the evaluation of the "Support" criterion (pp. 15-16).

Its defined "art community" is clearly much more restricted than the worldwide population that may lay claim to the word "art." While e-flux does predate the gTLD program, the extension of its "art community" is so significantly unrepresentative of professional artist statistics from the U.S.A, let alone the global professional art population, or non-professional population, or the many other applications for the term "art," it should not score any points. We score EFLUX.ART as deserving **0 of 2 possible points**.

Total Score, Criterion 1, Community Establishment: 0 / 4 points

⁸ EFLUX.ART LLC. Application ID 1-1675-51302. Response 18a. Emphasis added.

Criterion 2: Nexus Between Proposed String & Community

The second criterion, “Nexus between Proposed String and Community,” is worth a total of 4 points and is composed of two sub-criteria. The first, Nexus, is worth 3 points, while the second, Uniqueness, is worth 1 point.

- **Nexus**

To score the full 3 points, the AGB states that, “the string [must match] the name of the community or is a well-known short-form or abbreviation of the community.”

With respect to Nexus, for a score of 2 [out of 3], the applied-for string should *closely* describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.⁹

- “Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.
- “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.
- With respect to “Nexus,” for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.

EFLUX.ART’s chosen name for its community is “art,” and so ICANN Community Priority rules state that this should be the common name by which others know this group. There is no indication that reference to “art” or the “art community” would logically denote subscription to EFLUX.ART’s newsletters and print, or bring to mind EFLUX.ART at all. The applicant simply states, “The .art gTLD is identical to the established name of the community,”¹⁰ and fails to produce any corroborating evidence for this gross misrepresentation.

If a professional artist says, “I am engaged in art,” it would be an illogical step to conclude that they subscribe to EFLUX.ART’s mailings. If an art enthusiast states, “I like art,” it would not be natural to assume that they enjoy EFLUX.ART’s newsletters.

EFLUX.ART’s use of the term “art” overreaches substantially; it is an excessively broad term that it employs to refer to a small and insular grouping of individuals and groups that subscribe

⁹ ICANN. (2012). gTLD Applicant Guidebook. *Version 2012-06-04* (§4.2.3). Emphasis Added.

¹⁰ EFLUX.ART LLC. Application ID 1-1675-51302. Response 20d.

to EFLUX.ART's print and online mailings, while excluding non-professional artists and those engaged in arts other than the fine arts all together.

To appreciate exactly how unrepresentative EFLUX.ART's use of the term "art" is, it is important to define the term and briefly consider its long history in human development and some of the most contentious issues within the history of defining and appreciating art.

Oxford Dictionaries defines "art" a number of ways, including as "the expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power;" and also "the various branches of creative activity, such as painting, music, literature, and dance;" and finally as "subjects of study primarily concerned with the processes and products of human creativity and social life, such as languages, literature, and history (as contrasted with scientific or technical subjects)."¹¹

What constitutes "art" has been debated throughout history. EFLUX.ART itself notes that "[t]o describe the art community today would thus necessarily take into account two of its most dominant approaches: the historical study of human art stretching back to the beginning of known time; and the field of contemporary art[.]"¹² Prehistoric art, such as the drawings found in Lascaux Caves and other famous sites, has indubitably informed our understanding of art and its classification as a uniquely human activity. As far as modern art, Marcel Duchamp's readymades, such as *Fountain* (1917), provided a revolutionary rebuke of the academic approach to visual and fine arts, which began in 16th century Europe and extended well into the 19th century. Duchamp's work demanded to be called art on his interjection and classification alone and rejected the standard notions of what constitutes "art."¹³ Contemporary art continues to rework the relationship between the object, artist, and audience in a diverse range of mediums and thereby challenge what art is, who makes art, and the public's role in appreciating or validating art.

Thus, for EFLUX.ART to claim that the term "art" (and therefore the .art TLD) matches a community comprised of contemporary artists, organizations, individuals, and companies interested in its news mailings, announcements, and the e-flux website, limits the common use of the term "art" to a ridiculous degree. Even to restrict ourselves to looking at the contemporary art community, and disregarding how art can be defined and used to refer to many disciplines and activities not addressed by EFLUX.ART's business, we still find that its work is merely a voluntary aggregator of modern art news. There is every indication that an infinitesimal minority of peoples and groups alive and involved in "art" are also involved in EFLUX.ART's community

11 Art. (2014). In *Oxford Dictionaries*. Retrieved from http://www.oxforddictionaries.com/us/definition/american_english/art

12 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20a.

13 Rosenthal, Nan. "Marcel Duchamp (1887–1968)". In *Heilbrunn Timeline of Art History*. New York: The Metropolitan Museum of Art, 2000–. Retrieved from, http://www.metmuseum.org/toah/hd/duch/hd_duch.htm(October 2004)

of participants and readers.¹⁴ Thus, “art” is not the name or short-form abbreviation of the community referred to in this context. Given that the locus and structure of EFLUX.ART’s “art community” [sic] is the organization itself, it would be able to claim a .eflux TLD (“dot eflux”) via Community Priority, but not the more broad .art TLD. It, however, did not apply for .eflux.

The example used for scoring the Nexus sub-criterion, which is directly taken from the AGB, shows that even a global and well-known organization cannot apply for a term that is overly broad in nature and still score a 2. Given the use of the term “art” would not commonly be used to identify a subscriber to EFLUX.ART’s businesses, and its use of the term does, in fact, overreach substantially, the applicant **scores 0 of 3 possible points** on Nexus.

- **Uniqueness**

The second sub-criterion in Nexus Between Proposed String and Community is “Uniqueness.” It is worth a total of 1 point, and according to the AGB, is earned if the “string has no other significant meaning beyond identifying the community described in the application.”

- “Identify” means that the applied for string closely describes the community or the community members, *without over-reaching substantially* beyond the community.¹⁵
- “Significant meaning” relates to the public in general, with consideration of the community language context added

As we noted in “Nexus,” EFLUX.ART substantially overreaches in the way it uses a very broad term to refer to a very restrictive subset of individuals and organizations engaged in “art.”

Considering the aforementioned definitions of art, it is clear that the word has multiple, significant meanings beyond the highly restricted definition put forth by EFLUX.ART.

Again, *art* is defined in multiple, distinct ways by Oxford Dictionaries, including:

1. “the expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power;”
2. “the various branches of creative activity, such as painting, music, literature, and dance;”
3. “subjects of study primarily concerned with the processes and products of human creativity and social life, such as languages, literature, and history (as contrasted with scientific or technical subjects).”¹⁶

EFLUX.ART, however, states, “art in the context of Applicant’s and the Community’s usage, is a

¹⁴ We can even use EFLUX.ART’s definition of art which is seemingly restricted to what may be more aptly called “fine art” or “visual art.”

¹⁵ ICANN. (2012). gTLD Applicant Guidebook. *Version 2012-06-04* (§4.2.3). Emphasis Added.

¹⁶ Art. (2014). In *Oxford Dictionaries*. Retrieved from http://www.oxforddictionaries.com/us/definition/american_english/art

dictionary word and describes the result of creativity, products or services rendered by members of the art community.”¹⁷ Turning back to its definition of the “art community,” we are reminded that it narrowly defined this as, “individuals, organizations and companies who are actively involved, on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics.”¹⁸ This is in addition to the categories of users currently affiliated with EFLUX.ART’s mailings, which include museums, biennials, art fairs, magazines, and art book publishers and distributors.¹⁹

Thus, EFLUX.ART’s “art community” is a very particular subset of professionally oriented individuals and organizations that largely associate with what is usually termed, “fine art.” Clearly, there are other arts, such as evidenced in the above definitions from Oxford Dictionaries. Literature, language, and history are all absent from EFLUX.ART’s “art community;” drawing is not specifically mentioned, nor is theatre or drama; there is no recognition of other non-visual arts, such as the martial arts or culinary art; fashion and other applied arts are not addressed; it is unclear if graffiti or other street art is allowed within the EFLUX.ART “art community.” All of these other arts are “products of human creativity” and therefore are easily definable as art.

Therefore, we must conclude that “art” has multiple, significant meanings beyond the definition of “art” and association to the “art community” as outlined in EFLUX.ART’s application. It functions with a narrow definition of art that corresponds to its relatively new beginning within the larger history of art and also its own daily business operations. We score EFLUX.ART as **scoring 0 of 1 possible point.**

Total Score, Criterion 2, Nexus Between Proposed String & Community: 0 / 4 points

Criterion 3: Registration Policies

Criterion 3 is broken up into 4 sub-criteria, each worth 1 point, they are: Eligibility, Name Selection, Content and Use, and Enforcement

- **Eligibility**

In order to score the full 1 point for “Eligibility,” the AGB states that the registration policies must be restricted only to community members.

- “Eligibility” means the qualifications that organizations or individuals must have in order to be allowed as registrants by the registry.
- With respect to “eligibility” the limitation to community “members” can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant’s physical address be within the

17 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20d.

18 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20a.

19 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20b.

boundaries of the location.

EFLUX.ART seemingly intends to release names in three phases, with the eligibility criteria widening as this happens. Initially, the only eligible party will be EFLUX.ART itself, then,

“At a later stage, in addition to the Applicant and/or its subsidiaries, members of the art community *will possibly* be entitled to register domain names in .art. That is to say, one of the main eligibility criteria will be that the interested party wishing to register a domain name in the .art TLD is, directly or indirectly, a professional or semi-professional member of the art community.”²⁰

Then,

“After establishing credibility in this way, the domain would then be opened up to commercial entities and individuals within the art world.”²¹

So, EFLUX.ART and its subsidiaries are given priority access, and at a later time it “*will possibly*” allow the broader “art community” [sic] access, and, should it “establish credibility,” it will open it up to the wider “art world.”

These statements call EFLUX.ART’s entire use of the Community Priority system into question. That is, it is first and foremost interested in establishing a closed registry for its own corporate interests, and it does not fully commit to making domain names available to third-parties. Instead, it uses modifiers like “possibly” to reserve the right to exclude the very “art community” [sic] described up to this point. This is corroborated further by EFLUX.ART:

“In any event, the Applicant reserves the right to change or restrict any policies, procedures and practices at any point in time if it is of the opinion that there would be a risk that the reputation of the Applicant’s .art business would be damaged.”²²

Once again, EFLUX.ART primarily focuses on its business interests at the expense of allowing domain registration to its “art community” [sic]. The applicant then goes on to further disregard the rules of Community Priority and state that it may at some point in time open up registration to the wider “art world,” which is clearly different than the already addressed “art community.” That is to say that EFLUX.ART notes an interest in allowing those not in the “art community” [sic] but instead the “art world” to have access to its domain names, thereby compromising the very intent of a Community Priority TLD and essentially offering open registration.

These policies are blatantly contrary to the entire Community Priority rules and the specific

20 EFLUX.ART LLC. Application ID 1-1675-51302. Response 20e. Emphasis added.

21 *ibid.*

22 *ibid.*

eligibility requirements that require domain names only be allocated to those proven members of a purported community. EFLUX.ART warrants **0 of a possible 1 point**.

- **Name Selection**

In order to score the 1 total point for the “Name Selection” sub-criterion, the AGB states that the applicant must demonstrate that their registration rules are “consistent with the articulated community-based purpose of the applied-for gTLD.”

- “Name selection” means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.
- With respect to “Name selection,” “Content and use,” and “Enforcement,” scoring of applications against these sub-criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. [...] More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

EFLUX.ART fails to outline any Name Selection policy and instead just outlines processes that are found throughout the New gTLD Program. Its entire response under the “Name Selection” header is excerpted:

“The registration of domain names that could directly or indirectly damage, impair, or disrupt the activities of the Applicant, the integrity of any of the brands and-or any of the trademarks from the Applicant and-or its subsidiaries will not be allowed. Registrants will also need to represent and warrant that the registration of domain names complies with all applicable laws and does not infringe or otherwise violates the rights of any third party.

Moreover, the Applicant will possibly draw up a list of reserved names which will not be available for registration and also put possibly special provisions in place for geographic names [...]. The applicant will however reserve the right to allocate to and register a domain name mentioned on the list of reserved names in the name of a party indicated by the Applicant.”²³

There is nothing in this response that curtails name selection to fall in line with the community purpose of the TLD. It notes that it intends to protect the registry interests and trademark; that third-party rights and trademarks will be respected and acknowledged by the registrant; and finally that the applicant can and may reserve names for itself that it then grants use of to a third-party. These are standard rights and responsibilities that are outlined in both the AGB and the Rights Protection Mechanisms document, and each registry is either required or able to do these exact same activities.

²³ *ibid.*

Given that ELFUX.ART does not address how members of its “art community” can prove themselves qualified for a .art SLD, and how that process will be upheld and challenged, the applicant **warrants a score of 0 of 1 possible points.**

- **Content and Use**

As the AGB states, the "Content and Use" sub-criterion is in place to ensure that “Policies include rules for content and use consistent with the articulated community-based purpose of the applied for gTLD.” It is also worth 1 point.

- “Content and Use” means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.
- Again, with respect to “Name selection,” “Content and use,” and “Enforcement,” scoring of applications against these sub- criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. [...] More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

In this section of its application, EFLUX.ART again fails to outline any unique policies catered to its “art community” [sic], and instead focuses on trademark and legal protections, which are in fact not unique and are required of all TLD applicants. The only policy herein that does not necessarily have its roots in the AGB, and is therefore not required of EFLUX.ART and every other applicant, is that “Community members shall not be allowed to use the services provided through the .art TLD to post, disseminate or communicate any obscene, lewd, excessively violent, harassing, sexually explicit or otherwise objectionable subject matter.”

This is a surprising policy that is absolutely at odds with much modern and contemporary art. In fact, many of these adjectives can be used to describe art and artists that have had profound and lasting impacts on art. Robert Mapplethorpe’s photography has surely had each one of those words attached to it by a critic or viewer, and this is arguably a significant reason he has such an indelible mark on contemporary photography. Adjectives such as these are tied to subjective evaluations and have been levelled at some of the greatest artists throughout art history. Researching the famous “*L’Origine du monde*” (1866), a frank painting of a female’s genitalia and abdomen by Gustave Courbet, will show that this historically controversial 19th century painting continues to incite debate, including when it was censored by Facebook in

2011.²⁴

It is undeniable that art as a whole has seen significant and regular controversy over what is appropriate in any number of artistic mediums; thus, for EFLUX.ART's only unique content and use policy to focus on restricting "obscene, lewd, excessively violent, harassing, sexually explicit or otherwise objectionable subject matter," shows that it is intent on ignoring the history of art and the broad application of the term in favor of its own restrictive and little-recognized definition of "art." Its remaining content policies are not unique to EFLUX.ART but are trademark and legal protections already envisioned for all TLD applicants. Thus, EFLUX.ART scores **0 of 1 possible points**.

- **Enforcement**

The last of the 4 sub-criteria of "Registration Policies," "Enforcement," is also worth 1 point. According to the AGB, "Enforcement" is met when "policies include specific enforcement measures (e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.

- "Enforcement" means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.
- Again, with respect to "Name selection," "Content and use," and "Enforcement," scoring of applications against these sub- criteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. [...] More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

EFLUX.ART fails to outline any specific enforcement procedures. It uses modifiers such as "likely" and "may" to describe a generic flagging and intervention strategy, but does not clearly commit to any such strategy or outline it in any implementable detail. It states:

"Community members that become aware of any third party violation of the terms and conditions applicable at that time *will likely* be invited and may be obliged to report this to the Applicant or its designee, *who may*, at its sole discretion delete any content and revoke, temporarily or permanently suspend, delete or cancel at any time the registration of domain names in the .art TLD. [...] The Applicant *may also implement* technical and operational

24 Le compte Facebook d'un artiste supprimé après la publication d'une photo de "L'Origine du monde. (2011, Feb 16). *Le Monde*. Retrieved from, http://www.lemonde.fr/technologies/article/2011/02/16/l-origine-du-monde-de-courbet-interdit-de-facebook_1481226_651865.html

measures to monitor the compliance with the applicable registration policies.”²⁵

Thus, EFLUX.ART continues to fail to define *specific* enforceable and implementable registration policies for its “art community” [sic], and so warrants a **0 of 1 possible point**.

Criterion 4: Community Endorsement

The final criterion, “Community Endorsement,” analyzes whether or not the applicant has assembled the support of the authoritative organizations and structures that govern or facilitate functioning within the purported community.

Community Endorsement is split between the sub-criteria of “Support” and “Opposition.” Each is worth 2 points.

- **Support**

To qualify for the full 2 points, the AGB states, “Applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community.”

- “Recognized” means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of that community.
- “Relevance” and “relevant” refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.
- With respect to “Support,” it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.
- 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.
- The applicant will score a 1 for “Support” if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on “Support” if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation

²⁵ EFLUX.ART LLC. Application ID 1-1675-51302. Response 20e. Emphasis added.

showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.

- To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.

There is limited geographical representation, diversity, and notoriety found in Eflux's list of supporting "Art Institutions" (which is inclusive of museums, art centers, publications, art fairs, and galleries).²⁶ There is only one (1) South American entity; there are no entities from Australia or the Asia Pacific regions; there are no entities from Central America; there are no entities from many major population centers such as India, Brazil, Indonesia, etc.; greater than 60% of entities listed come from the U.S.A. or Western Europe; None (0) of the supporting museums listed rank within the world's top 100 most visited art museums.²⁷

Within its limited support, the supporting entities fall solely within the definition of "art" that pertains to "fine art" or "visual art." Thus, once again, it fails to address the other significant definitions for this broad term.

We conclude that EFLUX.ART has assembled a sizable list of supporters, but that these supporters cannot come close to meeting the high barrier of a "majority of the recognized community institutions/member organizations," which is required for a score of 2. Given that it has received some support, albeit it lacking in diversity, geographic reach, and notoriety, it may qualify for a **score of 1 of 2 possible points**.

- **Opposition**

The AGB states that to score 2 points there needs to be, "no opposition of relevance;" while 1 point may be scored if there is, "opposition from one group of non-negligible size." 0 points will be scored if there are two or more relevant groups in opposition.

- "Recognized" means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.
- "Relevance" and "relevant" refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.

26 Those entities that explicitly wrote in support of EFLUX.ART's application, not those that it lists as subscribers to its services. It may be worth noting that their most well-known subscribers did not submit letters of support.

27 List of Most Visited Art Museums in the World. (n.d.). Retrieved Feb 25, 2014 from Wikipedia.org:

http://en.wikipedia.org/wiki/List_of_most_visited_art_museums_in_the_world

We note that there is a competing applicant, Dadotart Inc., seeking Community Priority status for the .art TLD. This demonstrates a clear divergence in opinion of what the generic term “art” means and who could lay claim to the “art community” (if anyone). However, we also note that Dadotart Inc., should fail its CPE due to many of the same reasons as EFLUX.ART, namely that it is attempting to gain control of an exceedingly generic term and construct a “community” around the TLD. This is seemingly intended to facilitate its current business operations rather than protect and empower a clearly delineated community. Thus, while there is opposition to this application coming from another distinct part of the art(s) industry, we can not conclude that the organization in question is “recognized” or “relevant.” EFLUX.ART therefore scores **2 out of 2 possible points** on opposition.

Conclusion

This in-depth analysis closely follows the CPE process defined over many years of work across the ICANN community. The CPE process was designed to be rigorous and avoid false positives. We trust that the CPE Panel’s own careful evaluation of EFLUX.ART’s community application for .art will come to the same result.

EFLUX.ART sought to use the Community Priority process to gain exclusive rights over a generic term, which the CPE process was designed to prevent. Its “art community” [sic] is, in actuality, a network of voluntary subscribers to its electronic mailings, which represents just a drop in the ocean of “art.” It would be contrary to the defined CPE process, and the wider public interest, to see a potentially broad, vibrant TLD like .art used solely for one business’ interests, which are built primarily around a single website and newsletter.

We note that EFLUX.ART’s application will not be disregarded after it fails CPE and that it will enter the wider contention set for .art. Top Level Design LLC looks forward to an open and equitable process for determining the responsible registry for the .art TLD.

/s/

Andrew Merriam
Business Development Coordinator
Top Level Design LLC