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ICANN  
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April 29, 2016

**RE: .MUSIC Community Priority Evaluation (“CPE”) for .MUSIC Application ID 1-1115-14110<sup>1</sup> Request under ICANN’s Documentary Information Disclosure Policy (“DIDP”)**

Dear ICANN:

This request is submitted under ICANN’s Documentary Information Disclosure Policy by DotMusic Limited (“DotMusic” or “Requestor”) in relation to ICANN’s .MUSIC Community Priority Evaluation (“CPE”). The .MUSIC CPE Report<sup>2</sup> (the “CPE Report”) found that DotMusic’s community-based Application (the “Application”) did not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in the Reconsideration Request 16-5 (“RR”).<sup>3</sup>

Some of the ICANN violations of established procedures and policies include:

1. Disregarding International Laws and Conventions with respect to the defined Music Community’s “cohesion” in relation to music copyright;<sup>4 5</sup>
2. Misapplication and disregard of “Community” Definition from 20A;
3. Misapplication and disregard of “logical alliance” “Community Definition that has “cohesion” and meets criteria according to the Applicant Guidebook (“AGB”);
4. Misapplication and disregard of Community “Name” in Nexus;
5. Misapplication and disregard of AGB “Majority” Criterion in Support;
6. Misapplication and disregard of AGB “Recognized” organizations recognized by both the United Nations (“UN”) and the World Intellectual Property Organization (“WIPO”);<sup>6</sup>

<sup>1</sup> DotMusic’s .MUSIC community Application (ID 1-1115-14110), <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1392>; Also See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>, DIDP Ex.A1

<sup>2</sup> .MUSIC CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>, DIDP Ex.A2

<sup>3</sup> See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

<sup>4</sup> All music constituent types - regardless whether they are commercial or non-commercial in nature - are reliant on music copyright “cohesion” in one way or another for their activities and participate as a whole in a regulated sector with demonstrated activities tied to music that cohere to international copyright law, united under international treaties, agreements and conventions

<sup>5</sup> Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>, DIDP Ex.A87

<sup>6</sup> Also See RR-related IFPI Letter to ICANN Board Governance Committee (“BGC”), <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>, DIDP Ex.88



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7. Disregard of global music federations “mainly” dedicated to Community recognized both by UN and WIPO;
8. Misapplication of the AGB’s “Organized” definition in Community Establishment based on false facts and lack of compelling evidence that the Music Community defined is not organized under a regulated sector, international law and international conventions/treaties;
9. Disregard that the Music Community defined existed before 2007 in Community Establishment;
10. Policy misapplication and disregard of ICANN-accepted GAC consensus Category 1 Advice in Community Establishment demonstrating the defined Community’s unity under a regulated sector;<sup>7</sup>
11. Failure to compare and apply consistent scoring across all CPE applications and implement the quality control process to ensure fairness, transparency, predictability and non-discrimination;
12. Economist Intelligence Unit (“EIU”) conflict of interest with competitor Google (Eric Schmidt was on The Economist Board during CPE) in violation of the ICANN-EIU Statement of Work (“SOW”) and Expression of Interest (“EOI”), the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles; and
13. EIU’s failure to undertake appropriate (if any) research to support compelling conclusions in the CPE Report, despite DotMusic’s (and DotMusic’s supporters’) provision of thousands of pages of “*application materials and...research*” as “*substantive evidence*” of “*cohesion*,”<sup>8 9</sup> including DotMusic’s in-depth response to the EIU’s Clarifying Questions.<sup>10</sup>

## A. Context

ICANN’s Documentary Information Disclosure Policy (“DIDP”) is intended to ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.<sup>11</sup> In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN’s Documentary Information Disclosure Policy (DIDP) Requests*.<sup>12</sup> According to ICANN, staff first

<sup>7</sup> Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17mar16-en.pdf>, DIDP Ex.A89

<sup>8</sup> Concluding that there is “*no substantive evidence*” that the Music Community defined in its entirety has no cohesion (i.e. does not unite cohesively under international music copyright or is reliant on international conventions) is not a compelling and defensible argument. No facts were presented by the EIU to refute DotMusic’s materials or prove that the Music Community defined has no cohesion under international music copyright or international conventions. In fact, it is a matter of international law, international conventions and government regulations that all of the Music Community depends on music copyright cohesion for its activities and could function as they do without them. In fact nearly all music constituent groups would not exist without cohesion and unity under music copyright.

<sup>9</sup> DotMusic’s supporters submitted thousands of letters of support, each letter containing “*substantive evidence*” of “*cohesion*,” which the EIU ignored entirely. The EIU did not argue nor oppose DotMusic’s (and its supporters’) facts, materials and evidence in its CPE Report. The EIU chose to remain silent and falsely concluded that there was no evidence of cohesion, despite the overwhelming submission of evidence and supporting documents. According to ICANN, “*DotMusic Limited and its supporters have submitted a high volume of correspondence (hundreds of letters) to ICANN for the CPE Panel’s consideration.*” See <https://www.icann.org/en/system/files/correspondence/willett-to-roussos-zamek-04dec15-en.pdf>, DIDP Ex.86.

<sup>10</sup> DotMusic Response to EIU’s Clarifying Questions, DIDP Ex.A92

<sup>11</sup> See Documentary Information Disclosure Policy, <https://icann.org/resources/pages/didp-2012-02-25-en>, DIDP Ex.A3

<sup>12</sup> Process for Responding to DIDP Requests,



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identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions, which include, among several others:

Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process; and

Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates.<sup>13</sup>

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>14</sup>

It is also important to note that at the Meeting of the ICANN Board on March 10, 2016, the Board affirmed serious issues raised by a recent Independent Review Proceeding declaration (relating to the CPE of .ECO and .HOTEL) about the lack of consistency and predictability of the CPE process, and encouraged staff to respond to DIDP requests in the most specific and detailed manner possible. To that end, the Board resolved:

Resolved (2016.03.10.11), the Board notes the Panel's suggestions, and: (1) directs the President and CEO, or his designee(s), to ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations; (2) encourages ICANN staff to be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents; (3) affirms that, as appropriate, ICANN will continue to ensure that its activities are conducted through open and transparent processes in conformance with Article IV of ICANN's Articles of Incorporation.<sup>15</sup>

Requester invokes ICANN's accountability mechanisms to request internal documentation to investigate ICANN's and the Panel's internal deliberation and decision-making process in determining the CPE Report that was grossly negligent as set forth in the RR, because it violated numerous established ICANN procedures and policies.

DotMusic would have passed CPE if the Panel followed established procedures and ICANN processes were managed "*in conformity with relevant principles of international law and applicable international conventions.*"<sup>16</sup> The Panel and ICANN should have recognized music community cohesion through applicable international conventions (such as the 1886 Berne Convention that relates to the protection of

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<https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf> , DIDP Ex.A4

<sup>13</sup> See ICANN DIDP, DIDP Ex.A3

<sup>14</sup> Ibid

<sup>15</sup> ICANN Board Resolution, March 10, 2016, <https://icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>, DIDP Ex.A5

<sup>16</sup> ICANN's Articles of Incorporation provide that: The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations, ICANN Articles of Incorporation, <https://icann.org/resources/pages/governance/articles-en>, Article 4, DIDP Ex.A45



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copyright signed by 171 countries<sup>17</sup>) and established international music copyright law. Indeed, The Economist, the parent company of the Economist Intelligence Unit CPE Panel (the “EIU”), also recognizes the Berne Convention because The Economist is reliant on copyright cohesion and international law protection<sup>18</sup> to conduct its primary activities. According to The Economist:

Copyright is a property right that gives the creators of certain kinds of material rights to control the ways in which such material can be used. These rights are established as soon as the material has been created, with no need for official registration. Copyright applies globally and is regulated by a number of international treaties and conventions (including the Berne Convention, the Universal Copyright Convention, the Rome Convention and the Geneva Convention).<sup>19</sup>

The Economist’s own words invalidate the EIU’s CPE Report rationale that “*application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are ‘united or form a whole.’*”<sup>20</sup> Concluding that there is “no substantive evidence” that the music community defined in its entirety has no cohesion (i.e. does not unite cohesively under international music copyright or is reliant on international conventions) is not a compelling and defensible argument. It appears that the EIU failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic’s provision of thousands of pages of “*application materials and...research*” as “*substantive evidence*” of “*cohesion,*” including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified in its Application materials that:

The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.<sup>21</sup>

The importance of copyright and the cohesion of the Music Community was previously recognized by the members of the ICANN Board and the NGPC (who are also members of the BGC) through acceptance of GAC Category 1 Advice that .MUSIC is a “*string that is linked to regulated sector*” that “*should operate in a*

<sup>17</sup> Berne Convention for the Protection of Literary and Artistic Works of 1886 with 171 contracting countries, See [http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) and

[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283693](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693), DIDP Ex.A55

<sup>18</sup> See The Economist website, *Terms of Use, “Governing Law and Jurisdiction,”* <http://economist.com/legal/terms-of-use>, (“*The Economist shall also retain the right to bring proceedings as to the substance of the matter in the courts of the country of your residence*”), DIDP Ex.A56

<sup>19</sup> See The Economist website, *Copyright Information,* <https://economist.com/rights/copyright.html>, DIDP Ex.A53

<sup>20</sup> CPE Report, p.4, DIDP Ex.A2

<sup>21</sup> See DotMusic Public Interest Commitments (“PIC”),

<https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, p.6, DIDP Ex.A16



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way that is consistent with applicable laws,”<sup>22</sup> a Resolution that, in effect, agrees that all music groups that comprise the music community defined (“logical alliance of communities that relate to music”) participate as a whole in a regulated sector with demonstrated activities tied to music that cohere to international copyright law, united under international treaties, agreements and conventions.

## B. Documentation Requested

Requester invokes ICANN’s accountability mechanisms to request documentation to determine whether the CPE Panel and ICANN followed established process and policies in the evaluation of the .MUSIC CPE: Among other things, it appears that the CPE Report was prepared in a manner that: i) did not apply criteria in a consistent manner; (ii) misapplied facts and evaluation criteria in the evaluation to establish conclusions that are not compelling nor defensible; and (iii) did not follow ICANN’s quality control process to ensure consistency of approach in scoring, non-discrimination, fairness, predictability and transparency.

**Requestor notes that any links or documentation that are publicly available are not requested and do not satisfy this request.** DotMusic has access to all publicly available documentation and policies and only requests for documentation that is currently unavailable i.e. internal ICANN documents.

DotMusic respectfully requests the following documentation from ICANN under the *Documentary Information Disclosure Policy*:

- 1) All non-public internal documents (including call records and minutes) of the communication between ICANN, the EIU and independent Quality Control service provider relating the EIU’s consistent, compelling and defensible decision-making process used in developing the CPE Report determination and showcasing how DotMusic’s application and CPE Process was compared to previous prevailing CPE determinations to ensure fairness, non-discrimination, transparency, predictability and consistency;**

### Context:

The CPE Report was grossly negligent and violated numerous established procedures, including incorporating false facts, misapplying procedural instructions from the AGB and CPE Guidelines, and inconsistently scoring DotMusic’s Application in CPE in comparison to prevailing CPE determinations.<sup>23</sup>

<sup>22</sup> <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, DIDP Ex.A41

<sup>23</sup> Also see RR-related letter from the IFPI stating: “We believe the finding to be flawed...Given the scale of the music community’s support for the Dot Music application, it is difficult to understand what level of support a CPE applicant would need to demonstrate to prevail, and this gives rise to serious misgivings about the transparency, consistency, and accountability of the CPE process...highlighting the disparity between the decisions of the EIU Panel. Unfortunately, these inconsistencies have continued in the EIU Panel’s evaluation of the DotMusic application...we note with concern the different criteria that appear to have been applied to the .HOTEL and . MUSIC CPE applications respectively. Also of concern is the EIU Panel’s finding that DotMusic failed to provide documented support from “recognised community institution(s)/member organization(s)”. IFPI is a globally recognised organization...Our members operate in 61 countries and IFPI has affiliated organisations, including national groups in 57 countries. We also administer the internationally recognised ISRC system. We therefore object to the EIU Panel’s finding,” DIDP Ex.88; Also see RR-related letter from the National Music Council, representing almost 50 music organizations and the International Music



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- 2) All the non-public internal *draft* CPE Reports and all related internal correspondence between ICANN and the EIU related to (i) DotMusic’s .MUSIC CPE; (ii) the prevailing .RADIO CPE; (iii) the prevailing .HOTEL CPE; (iv) the prevailing .SPA CPE; (v) the prevailing .ECO CPE; (vi) the prevailing .OSAKA CPE; (vii) the .GAY CPE;<sup>24</sup> and (viii) all non-public internal correspondence, reports, documents, emails and any other forms of other communication showcasing how DotMusic’s application and CPE Process was compared to other prevailing CPE determinations to ensure fairness, non-discrimination, transparency, predictability and consistency;

Context:

There is precedent to the disclosure of these types of documents. ICANN has publicly disclosed some *draft* CPE reports and deliberative and/or decision-making related emails between the EIU and ICANN concerning the CPE of .LLC, .INC, .LLP and .GMBH in the Dot Registry Independent Review Proceeding (“IRP”).<sup>25</sup> DotMusic requests the above-mentioned internal documents to investigate: (i) the CPE inconsistency issues between DotMusic’s CPE in comparison to the prevailing CPE Applications; (ii) the research and evidence used to determine Community Establishment “cohesion” for other prevailing CPE applications in comparison to DotMusic; and (iii) whether or not the Panel assessed DotMusic’s “*logical alliance*” community definition per the AGB and CPE Guidelines in its Determination (*Note*: The CPE Report did not assess nor identify DotMusic’s “*logical alliance*” community definition from DotMusic’s Application answer to 20A as required by the AGB, instead construed its own definition from DotMusic’s Application answer to 20D); and (iv) whether or not the

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Council. The letter stated that: “*The international music community has come together across the globe to support the DotMusic application, and we cannot comprehend how the application could have failed on the community criteria... We therefore object to the decision noted above, the basis of which is an apparent inconsistency in the application of the governing rules,*” <https://www.icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>, DIDP Ex.A90

<sup>24</sup> See DIDP Ex.A60 for comparison between DotMusic’s CPE Report and the .RADIO, .HOTEL, .SPA, .ECO, .OSAKA and .GAY CPE Reports that reveals material inconsistencies, the appearance of discrimination, lack of fairness and lack of transparency in violation of both ICANN’s Bylaws and Articles of Incorporation: According to ICANN’s Bylaws “*ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause*” under Article 2, Section 3, and “*ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness*” under Article 3, See <https://icann.org/resources/pages/governance/bylaws-en>, DIDP Ex.A72. Under Article 4 of ICANN’s Articles of Incorporation: “*The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations,*” <https://icann.org/resources/pages/governance/articles-en>, DIDP Ex.A45; Also see RR for more detail on inconsistencies between CPE Report and CPE determinations for .HOTEL, .SPA, .OSAKA, .GAY, .ECO and .RADIO, <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>, DIDP Ex.A91

<sup>25</sup> Dot Registry Independent Review Proceeding (“IRP”) documentation for examples of such released draft reports at <https://icann.org/en/system/files/files/additional-submission-exhibits-c35-13jul15-en.pdf>, C042 – C044; Also see RR, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Ex.A25, Ex.A26 and A27



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Panel assessed the Applicant Guidebook's ("AGB") "majority" criterion in its deliberation process to determine the CPE Report (*Note: The CPE Report did not assess nor mention the "majority" criterion as required by the AGB and CPE Guidelines*).

According to the Statement of Work ("SOW") signed by ICANN and the EIU, the EIU agreed that its activities will be bound by ICANN's **Governance requirements and governance processes** relating to ICANN's Articles of Incorporation and Bylaws:<sup>26</sup>

As part of the overall gTLD program, Panel Firm's project management team will work with the Program Office to ensure that the evaluations are completed consistently and completely in adherence to the Applicant Guidebook and in accordance with processes established by the Program Office...Panel Firm will establish a project management approach to manage, coordinate and monitor the evaluation activities based on...ICANN's gTLD Program Governance requirements. Panel Firm will tailor certain project management processes to directly support the Program Office governance processes.<sup>27</sup>

Moreover, according to the Comparative Evaluation Panel Expressions of Interest ("EOI"), the EIU agreed that *"the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination"*<sup>28</sup> and provided ICANN with a *"statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency."*<sup>29</sup>

As such, ICANN's Core Values through its Bylaws were **contractually imposed** on the EIU.<sup>30</sup> Implementing a quality control process that compares all CPE results to provide consistent CPE results was a critical process that DotMusic relied upon when applying in 2012. Quality control that compares CPE determinations to ensure consistency would have been easy to incorporate because ICANN had already employed such quality control process throughout the New gTLD Program's Initial Evaluation process: ICANN hired JAS to perform quality control and ensure consistency across hundreds of applications during initial evaluation.<sup>31</sup> For example, *"a statistically relevant number of technical/operational and financial evaluations were subject to half-blind Content Inspection reviews*

<sup>26</sup> Governance Documents that include ICANN's Bylaws and Articles of Incorporation and Bylaws, <https://icann.org/resources/pages/governance/governance-en>, DIDP Ex.A78

<sup>27</sup> EIU Contract and Statement of Work (SOW) with ICANN, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[ 2 ], p.8, DIDP Ex. A8

<sup>28</sup> New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest ("EOI"), Comparative Evaluation Panel, <https://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>, p.5, DIDP Ex.A79

<sup>29</sup> Ibid, p.6

<sup>30</sup> The EIU was also bound to The Economist's Guiding Principles that included *"commitment to independence, integrity...conducting business with common decency...and do not engage in corrupt practices...abide by strict guidelines governing...the disclosure of potential conflicts of interest. As an international company...conduct business in many different markets around the world...[and] abide by local laws and regulations."* See The Economist, Guiding Principles, [http://economistgroup.com/results\\_and\\_governance/governance/guiding\\_principles.html](http://economistgroup.com/results_and_governance/governance/guiding_principles.html), DIDP Ex.85

<sup>31</sup> JAS established that *"the existence of a visible and well-publicized proactive quality program properly incented all evaluation panel vendors to be appropriately cognizant of evaluation consistency, accuracy, and process fidelity, and perform accordingly."* The .MUSIC CPE lacked a *"proactive quality control process"* similar to the one implemented by ICANN during Initial Evaluation to ensure a *"unified approach,"* which JAS confirmed *"substantially mitigated the risk of isolation and inconsistent or divergent evaluations,"* ICANN Initial Evaluation Quality Control Program Report, <https://newgtlds.icann.org/en/program-status/application-results/ie-quality-program-26aug14-en.pdf>, p.16, DIDP Ex.80



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performed on a *de novo* basis” by JAS, which sampled 274 applications (over 12 times the number of CPE applications that were processed by the EIU).<sup>32</sup> According to JAS, a 100% “*Per Application Consistency Rating*” was accomplished for 274 applications that were entirely Consistent Post Outreach.<sup>33</sup> Out of the 1930 applications filed in March 2012,<sup>34</sup> only 22 have gone through CPE as of the .MUSIC CPE Report determination of February 2016 (i.e. about 1%). ICANN and the EIU also had nearly 4 years to review all 22 community applications and to ensure consistency of approach in determining the CPE Report. ICANN and the EIU were required to ensure equal treatment of similarly situated applicants when one considers that ICANN had already hired JAS to perform a similar function during the Initial Evaluation process that was over twelve (12) times the size of the number of applications going through CPE.

- 3) **All the non-public internal communication documents and non-public internal correspondence between ICANN and the EIU in formulating the CPE Guidelines that were “prepared by the Economist Intelligence Unit”<sup>35</sup> before and after the CPE Guidelines public comment period (nearly 1 ½ years after DotMusic’s 2012 Application filing);**

Context:

DotMusic would like to investigate the findings of the CPE Report to the extent that it disregarded the AGB and CPE Guidelines’ “*logical alliance*” criterion. This pertains to DotMusic’s community definition which relates to a “*logical alliance*” (“*delineated and organized logical alliance of communities that relate to music*”). According to the AGB (and CPE Guidelines), with respect to “*Delineation*” and “*Extension*” “*it should be noted that a community can consist of...a logical alliance of communities.*”<sup>36 37</sup> The AGB and CPE Guidelines also allow communities that are supported and established through multiple organizations and institutions. The relevant provisions provide: “*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.*”<sup>38 39</sup>

The EIU was knowledgeable of both the “*logical alliance*” and “*majority*” criteria because the EIU prepared the CPE Guidelines in 2013. Yet the EIU did not consider either criterion in determining the DotMusic CPE Report. The EIU awarded the maximum *Community Establishment* score to the .HOTEL CPE prevailing applicant by applying the “*logical alliance*” criterion.<sup>40</sup> Furthermore, the EIU awarded the maximum *Community Support* score to the .RADIO CPE prevailing applicant by applying the

<sup>32</sup> Ibid, p.7

<sup>33</sup> Ibid, Table 4, p.10

<sup>34</sup> New gTLD Program Statistics, <https://newgtlds.icann.org/en/program-status/statistics>, DIDP Ex.81

<sup>35</sup> CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.1, DIDP Ex.A6; Also see other CPE Materials, DIDP Ex.A54

<sup>36</sup> AGB, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>, §4.2.3, p. 4-12, DIDP Ex.A7

<sup>37</sup> CPE Guidelines, p.4 and p.6, DIDP Ex.A6

<sup>38</sup> AGB, §4.2.3, Module 4, p. 4-18, DIDP Ex.A7

<sup>39</sup> CPE Guidelines, p.18, DIDP Ex.A6

<sup>40</sup> See .HOTEL CPE Report, DIDP Ex.A57





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“majority” criterion.<sup>41</sup> In contrast, the EIU disregarded these criteria in DotMusic’s CPE process and did not follow AGB and CPE Guidelines. By not applying these CPE process criteria, the EIU did not follow established procedure that would have resulted in a passing grade for DotMusic’s Application.

- 4) **All non-public internal documents and internal correspondence between ICANN staff that relate to the altering of the original AGB language pertaining to the *Notice of Changes of Information* section of the AGB;**<sup>42</sup>

Context:

From 2012 to 2014 (after the Application was filed), ICANN introduced material new “change request” language numerous times that harmed the interests of community applicants and resulted in provided preferential treatment to non-community applicants without any formal policy development process.<sup>43</sup>

- 5) **The names of all the EIU CPE evaluators pertaining to the .MUSIC, .ECO, .RADIO, .SPA, .HOTEL, .OSAKA and .GAY CPE processes and any correspondence between ICANN and Google’s Vice-President (also ex-ICANN chairman and ICANN Strategy Chair) Vinton Cerf to further investigate the appearance of a conflict of interest and ensure that the evaluators were qualified to evaluate a music-related CPE as explicitly required by the AGB and CPE Materials;**

Context:

During the CPE Evaluation process, Google Chairman Eric Schmidt was on the Board of Directors of the Economist Group, the parent company of the EIU. While not necessarily dispositive, the ten (10) community applicants that competed with Google did not prevail in CPE. With the exception of the CPE Process, the names of New gTLD Program Panelists that performed evaluations that could determine a contention set after the Initial Evaluation process (such as Community Objections, Legal Rights Objections, String Similarity Objections, and Public Interest Objections) were publicly disclosed. The CPE process lacked such transparency, increasing the probability of conflicts of interest and eliminating the opportunity for full accountability, and verifying that the panel was qualified as mandated:

All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures. EIU evaluators are

<sup>41</sup> See .RADIO CPE Report, DIDP Ex.A58

<sup>42</sup> See AGB, §1.2.7, Module 1, p. 1-30: “*If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant. ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.*” DIDP Ex.A7

<sup>43</sup> See DIDP Ex.A52 for “Change Request” policy update changes from 2012 to 2014



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highly qualified... and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.<sup>44</sup>

The panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined...community plays an important role...The provider must be able to convene a... panel capable... of evaluating Applications from a wide variety of different communities....The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and... The panel must be able to document the way in which it has done so in each case. ...EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications....All Applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.<sup>45</sup>

- 6) **The name of “the appointed independent Quality Control service provider” per the SOW and all non-public internal documents and non-public internal correspondence between “the appointed independent Quality Control service provider for the purposes of helping it to verify that Panel Firm’s evaluation services have been and are performed in accordance with the Quality Control Guidelines” and ICANN and/or the EIU.**<sup>46</sup>

Context:

The CPE Guidelines state that the “EIU will fully cooperate with ICANN’s quality control process.”<sup>47</sup> Given the CPE inconsistencies between DotMusic’s CPE Report and prevailing community applicants’ CPE Reports, and the grossly negligent process failures, DotMusic requests all non-public internal documents and non-public internal correspondence between ICANN, the EIU and the independent Quality Control service provider pertaining to DotMusic’s CPE Process and the development of the CPE Report “to ensure consistency of approach across all applications”<sup>48</sup> as explicitly mandated by the CPE Guidelines prepared by the EIU. DotMusic relied on an effective and accountable quality control process to ensure fairness, predictability, non-discrimination and consistency when applying in 2012.

If ICANN denies the disclosure of all the documents requested, DotMusic requests ICANN to:

- i. **Define “public interest” with respect to the DIDP process and explain in detail how “the harm in disclosing the information outweighs the public interest in disclosing the information” in relation to DotMusic’s statements supporting why it serves the public interest for ICANN to release all the documentation requested (See Section C: Why It Serves Public Interest to Release the Documentation Requested);**
- ii. **Provide DotMusic with Privileged Logs which clearly describe as to each document withheld the type of document, the general subject matter thereof, the date on which**

<sup>44</sup> EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2, DIDP Ex.A82

<sup>45</sup> CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22, DIDP Ex.A6

<sup>46</sup> ICANN-EIU Contract and Statement of Work Information (SOW), <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[ 2 ], p.12, DIDP Ex. A8

<sup>47</sup> CPE Guidelines, p.23, DIDP Ex.A6

<sup>48</sup> Ibid, p.22



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it was created, the authors of the document, all parties who were intended to be recipients of the document, and the legal privilege being claimed, referencing the law that recognizes such claim of privilege; and

- iii. Follow the ICANN Board Resolutions of March 10, 2016 to “*be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents.*”<sup>49</sup>

### C. Why It Serves Public Interest to Release the Documentation Requested

DotMusic and the Music Community (the defined “*logical alliance*” with members representing over 95% of music consumed globally) have been negatively affected by the CPE Report and ICANN’s actions/inactions in relation to the CPE process. If DotMusic is not awarded .MUSIC, DotMusic, will suffer material brand dilution<sup>50</sup> and be subject to expensive auctions which (as agreed upon by the European Commission<sup>51</sup>) were designed to favor deep pocketed Applicants, such as Google and Amazon. More importantly, the Music Community, Internet users and the global public interest will suffer material harm as evidenced below.

As set forth in the Application, DotMusic has an all-inclusive tent that is united by its core principles consistent with its articulated community-based purpose:

- Creating a trusted, safe online haven for music consumption and licensing
- Establishing a safe home on the Internet for Music Community (“Community”) members regardless of locale or size
- Protecting intellectual property & fighting piracy
- Supporting Musicians’ welfare, rights & fair compensation
- Promoting music and the arts, cultural diversity & music education
- Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both reaching commercial and non-commercial stakeholders.<sup>52</sup>

Per DotMusic’s Application and Public Interest Commitments (“PIC”),<sup>53</sup> .MUSIC will be launched as a safe haven for legal music consumption that ensures that .MUSIC domains are trusted and authenticated to benefit the interests of the Internet community and the global music community. DotMusic, its current and future music members and supporters will be adversely affected if the Report stands and DotMusic is awarded to any of the competing non-community applicants<sup>54</sup> (which will also be a disservice to the Internet user community in general) because competing applicants either: (i) lack the music community multi-

<sup>49</sup> ICANN Board Resolution, March 10, 2016, <https://icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>, DIDP Ex.A5

<sup>50</sup> DotMusic holds the European community trademarks for “*DotMusic*” and “*MUSIC*,” See RR Ex.A35, A37 and A38

<sup>51</sup> <http://forum.icann.org/lists/comments-new-gtld-auction-rules-16dec13/msg00016.html>, DIDP Ex.A9

<sup>52</sup> Application, 18A. Also see 20C, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>, DIDP Ex.A1

<sup>53</sup> DotMusic PIC, <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, DIDP Ex.A16

<sup>54</sup> All of the competing non-community applicants in DotMusic’s contention set are existing gTLD portfolio registries (Google, Amazon, Donuts/Rightside, Radix, Minds & Machines and Famous Four Media). Collectively, these registries have launched the overwhelming majority of all keyword-based new gTLDs.



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stakeholder governance model to represent the community's interests; and/or (ii) lack the extensive music-tailored safeguard policies that DotMusic has to protect consumers and serve the community.<sup>55</sup> Allowing the CPE Report to stand would turn .MUSIC into an open and unsafe, unreliable and untrusted string governed by non-community interests. **A non-community-based string will create material harm to the legitimate interests of the Music Community, Internet users and consumers, by increasing intellectual property infringement and other types of malicious abuse.** Music is a sensitive string driven by content and copyright protection that must be operated responsibly within its regulated sector as outlined in the Application.

Pirate sites distribute illegal content and continue to steal copyrighted content and siphon millions of dollars away from the creative community, making it much harder for artists to make a living.<sup>56</sup> Piracy sites are also *"being nurtured by revenues from both mainstream and high risk advertisements... These same sites – which are known to be popular with children and young people – are thereby exposing the latter to materials which are likely to be extremely damaging to them as well as to adults who might likewise be exposed."*<sup>57</sup> The Music Community is one of the Internet's most vulnerable communities given the adverse effects of mass piracy, intellectual property infringement and malicious abuse on the web and the inefficiencies of the outdated 1998 DMCA Law to provide adequate music copyright protection online.<sup>58</sup> The DMCA was signed into law in 1998 with a goal of updating copyright laws for the digital age, but it's now disturbingly out of date. Many famous artists and songwriters representing the Music Community filed public comments to the U.S Congress to reform the outdated DMCA:

One of the biggest problems confronting us as songwriters and recording artists today is the Digital Millennium Copyright Act. This law was written and passed in an era that is technologically out-of-date compared to the era in which we live. It has allowed major tech companies to grow and generate huge profits by creating ease of use for consumers to carry almost every recorded song in history in

<sup>55</sup> See Application 20E; Also See PIC, Commitments 1-8, pp.1-2; PIC, pp.22-27; Also see .MUSIC Applicant Comparison Chart, <https://icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>, Appendix C, pp.43-45, Ex.A32; Also see DIDP Ex.A17; For example, according to the KnujOn Report on Internet Consumer Trust and Abuse, the *"general trend is that certain new gTLDs are rapidly replacing exiting registries for spam and abuse...10 of these abused TLDs are sponsored by a single company: [.MUSIC] applicant Famous Four."* <http://www.knujon.com/knujon-icann-consumers-rygy-limbo-032016.pdf>, p.19, DIDP Ex.A48

<sup>56</sup> USC Annenberg Innovation Lab, Advertising Transparency Report, <http://annenberglab.com/projects/ad-piracy-report-0>, DIDP Ex.A14; It is noted that both .MUSIC applicants Google and Amazon have a prior history with the piracy of music: Google as a provider of ad networks to pirate sites and Amazon as a leading advertiser on pirate sites. See <http://billboard.com/biz/articles/news/digital-and-mobile/6106454/online-pirates-thrive-on-legitimate-ad-dollars> (DIDP Ex.A10), <http://venturebeat.com/2014/02/18/the-average-piracy-site-makes-4-4m-each-year-on-ads-from-amazon-lego-etc> (DIDP Ex.A11); Also see USC Annenberg Lab Ad Transparency Reports: Google's advertising networks placing second most advertisements to illicit sites at [http://annenberglab.com/sites/default/files/uploads/USCAnnenbergLab\\_AdReport\\_Jan2013.pdf](http://annenberglab.com/sites/default/files/uploads/USCAnnenbergLab_AdReport_Jan2013.pdf), p.1 (DIDP Ex.A12); and Amazon advertising on infringing sites at

[http://annenberglab.com/sites/default/files/uploads/USCAnnenbergLab\\_AdReport\\_May2013.pdf](http://annenberglab.com/sites/default/files/uploads/USCAnnenbergLab_AdReport_May2013.pdf), p.2 (DIDP Ex.A13)  
<sup>57</sup> Dr. Paul A. Waters, *An Analysis of Piracy Website Advertising in Brazil and Its Linkages to Child Exploitation Material*, [http://ecpat.net/sites/default/files/Piracy%20Website%20Advertising%20in%20Brazil\\_ENG.pdf](http://ecpat.net/sites/default/files/Piracy%20Website%20Advertising%20in%20Brazil_ENG.pdf), December 2015, p.14, DIDP Ex.A15

<sup>58</sup> <https://www.google.com/transparencyreport/removals/copyright/?hl=en> e.g. One single DotMusic supporter, BPI, filed over 2 million URL takedown requests to Google for the week of February 15, 2016, see <https://google.com/transparencyreport/removals/copyright/reporters/1847/BPI-British-Recorded-Music-Industry-Ltd>, DIDP Ex.A18



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their pocket via a smartphone, while songwriters' and artists' earnings continue to diminish. Music consumption has skyrocketed, but the monies generated by individual writers and artists for that consumption has plummeted. The growth and support of technology companies should not be at the expense of artists and songwriters. Section 512 of the DMCA has become the all-purpose shield that tech companies hide behind while they threaten the livelihood of music creators. The notice-and-takedown provision to which we refer allows ongoing infringements of the works we create since videos can immediately be re-posted, even after we have requested to have them removed. This outdated law forces us to stand by helplessly as billions of dollars in advertising is sold around illegal copies of our work. Most of the money goes to the tech services -- not to creators. In fact, according to a recently released report by the RIAA, U.S. vinyl sales generated more revenue for the music industry than ad-supported, free streaming by services like YouTube and Spotify over the past year. The DMCA actually thwarts the success of digital services that are prepared to pay musicians a living wage. These legitimate services are having a difficult time getting consumers to pay for music when illegal copies of our music are readily made available through services that hide behind the DMCA. In sum, the DMCA simply doesn't work. It's impossible for tens of thousands of individual songwriters and artists to muster the resources necessary to comply with its application. The tech companies who benefit from the DMCA today were not the intended protectorate when it was signed into law nearly two decades ago. We ask you to recommend sensible reform that balances our interests as creators with the interests of the companies who exploit our creations for their financial enrichment. It's only then that consumers will truly benefit.<sup>59</sup>

19 major music organizations also submitted a joint brief explaining the myriad flaws in the DMCA -- a law passed during the dial-up era -- and how it harms the Music Community:

The Music Community's list of frustrations with the DMCA is long. A broken "notice-and-takedown" system. Toothless repeat infringer policies. Active services mischaracterized as passive intermediaries. Incentives for services to embrace willful blindness instead of preventing known and widespread infringement. The words "representative list" read out of the statute... Several factors have contributed to the failure of the DMCA to fulfill its purpose. To start, Congress enacted the DMCA in 1998 when dial-up Internet speeds and static web sites predominated. Soon thereafter, individuals could be worldwide publishers of content on peer-to-peer networks and service providers began to distribute massive amounts of content uploaded to their servers. And then came along more sophisticated search engines, social networks, and an explosion of smartphones and other mobile Internet access devices. The rules for service providers and tools for content creators set forth in the DMCA proved unsuitable for this new world. There is no evidence that Congress anticipated that Google or any service provider would receive and be required to respond to more than one billion takedown notices. Google wears this as a badge of honor, yet this fact emphasizes the failure of the DMCA to address the challenges faced by content owners today. Given all of these fundamental changes, a law that might have made sense in 1998 is now not only obsolete but actually harmful. The problem is compounded by the fact that, as courts, too, have struggled to apply this outdated law for the present day, DMCA has been shifted from its original intent through a series of judicial rulings to strip away adequate protection for content owners. To start, courts have expanded application of the

<sup>59</sup> Comments of Recording Artists & Songwriters to U.S. Copyright Office, Library of Congress, *RE: Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*. Artists included Bryan Adams, Christina Aguilera, Tony Bennett, Jon Bon Jovi, Garth Brooks Chris Cornell, Dave Matthews Band, deadmau5, Mick Fleetwood, Don Henley, Billy Idol, Billy Joel, Maroon 5, Bruno Mars, John Mayer, Pearl Jam, Katy Perry, Lionel Richie, Gwen Stefani, Rod Stewart, Pete Townshend, Steven Tyler, Pharrell Williams and more. See <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90800&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.2-3, DIDP Ex.A64; and DIDP Ex.A63



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safe harbors well beyond the passive service providers of 1998 to more active distributors of music that compete directly with services that must obtain licenses. The result: a Hobson's Choice for content owners, either to license content for much less than it's worth, or have the broken notice-and-takedown system as the only recourse. Is it any surprise that in this distorted marketplace revenue from sales of vinyl records outpaces revenue from on-demand, ad-supported video platforms making billions of transmissions annually? Courts have also given little meaning to key provisions for content owners in the DMCA bargain. Examples include "red flag" knowledge, repeat infringer policies and representative lists. The result: safe harbor status for services that choose to stick their heads in the sand rather than do their fair share, forcing content owners to divert valuable resources from away creating content to sending minimally effective take down notices, or for content owners with limited resources, to actually refrain from sending takedown notices at all. Content owners, especially those with limited resources, simply cannot take on the entire digital universe alone. At its worst, the DMCA safe harbors have become a business plan for profiting off of stolen content; at best, the system is a de facto government subsidy enriching some digital services at the expense of creators.<sup>60</sup>

Many legal experts in the field of copyright law and music have reached the same conclusion:

The Safe Harbor Provisions were written to prevent isolated infringement by third parties through the use of ISPs and the notice-and-takedown provisions would have alone been an efficient alternative to legal proceedings if the Internet landscape had remained relatively same as it was in 1998. However, today, music creators are faced with the overwhelming burden of detecting these instances of infringement and notifying the service provider every single time a user posts and re-posts the work. Unfortunately, changes in the marketplace have presented the music community with the insurmountable burden of notifying ISPs for millions of instances of infringements which occur by the posting of links on thousands of unauthorized sources. After 18 years of changes in the marketplace, the balance of burdens placed on ISPs and creators to monitor for copyright infringement has greatly tipped in favor of the service providers.<sup>61</sup>

Although Music Community members can notify these services when their content is illegally posted, users (or the pirate websites) often repost the same content almost instantly, making it impossible for music community members to prevent the unauthorized distribution of their work. As such the music community is stuck using their own resources to police repeated abuse and in many cases are left bearing the costs of litigation if the service does not comply. To make matters worse, even if music community members are able to secure a judgment against rogue sites, the infringing actor responsible for hosting the site may be impossible to locate, which again leaves the music community without any remedy.<sup>62</sup>

<sup>60</sup> Comments of "Music Community" to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89806&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.2-3, DIDP Ex.A65

<sup>61</sup> Comments of LaPolt Law to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89896&attachmentNumber=1&disposition=attachment&contentType=pdf>, p.3, DIDP Ex.A66

<sup>62</sup> The pirate operator usually changes domain names by continually switching to new domains under different gTLD or ccTLD extensions e.g. MP3Skull moved from MP3Skull.yoga to MP3Skull.mn to MP3Skull.vg (MP3Skull.vg is operating as of April 4<sup>th</sup>, 2016). See *RIAA Wins \$22 Million MP3Skull Judgment, But They'll Never See A Dime And The Site Is Still Online*, Hypebot.com, February 27, 2016, <http://www.hypebot.com/hypebot/2016/02/riaa-wins-22-million-mp3skull-judgement-but-theyll-never-see-a-dime-and-the-site-is-still-online.html> and *Music labels win \$22.2m damages from MP3Skull – if they can find its owners*, The Guardian, February 26, 2016, <https://www.theguardian.com/technology/2016/feb/26/music-labels-damages-mp3skull-owners>, DIDP Ex.A70



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According to the Content Creators Coalition:

The DMCA was primarily designed to prevent isolated infringement by third parties on specific online sites when connection speeds were slower than today and storage space was limited. In that environment, these third parties were not able to infringe on the massive scale that they do today, and the “takedown notice” provisions were thought to provide an alternative to lengthy and expensive legal proceedings. However, it has had the exact opposite effect, leaving artists with little recourse if a legitimate takedown notice is denied. Legal representation is expensive and Section 512 does not allow for damages in all but the most egregious circumstances.<sup>63</sup> ...Instead of sending a relatively small number of “take-down” notices to prevent isolated infringement in a manner that ensures the material doesn’t reappear, musicians are instead faced with the unprecedented burden of attempting to “take-down” literally billions of infringing copies of music and associated links from thousands of unauthorized sources in an environment where infringers feel free to simply continuously repost links to the infringing content. This mismatch between the amount of infringement and the burden of enforcement has increasingly led to the devaluation of music and the perception that there is no effective remedy against unauthorized infringement. Once a song is available, authorized or not, the law provides no means to effectively protect the musicians’ property.<sup>64</sup> The process doesn’t work for large-scale entities, and the problem is infinitely worse for small-scale entities and individual creators.... What is expensive and difficult for large copyright owners is an impossible challenge for small copyright owners seeking to protect the value of their works from indiscriminate sharing online.<sup>65</sup> As Maria Schneider, a three-time GRAMMY winning jazz and classical composer, bandleader and conductor noted in describing the frustration with the DMCA, “[t]he DMCA makes it my responsibility to police the entire Internet on a daily basis. As fast as I take my music down, it reappears again on the same site—an endless whack-a-mole game.”<sup>66</sup>

As observed by Marquette University Law School Professor Bruce Boyden:

Even for the largest media companies with the most resources at their disposal, attempting to purge a site of even a fraction of the highest-value content is like trying to bail out an oil tanker with a thimble. . . . The expenses of locating, identifying, and then sending a notice for that many files is so significant that even large companies must limit their efforts.<sup>67</sup>

This observation is confirmed by the world’s largest music company<sup>68</sup> Universal Music Group (“UMG”):

Like many other copyright owners, UMG has been compelled to devote extraordinary resources . . .and millions of dollars – including personnel expense, investments in computer hardware and software, third-party vendor expenses, and substantial contributions to trade associations – specifically and solely to protect its interests, and those of its recording artists and songwriters, against

<sup>63</sup> Comments of Content Creators Coalition to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment*, Docket No. 2015-7,

<https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90917&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp.10-11, DIDP Ex.A67

<sup>64</sup> Ibid, p.11

<sup>65</sup> Ibid, p.22

<sup>66</sup> See Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm on the Judiciary, 113th Cong. 57 (2014) (statement of Maria Schneider).

<sup>67</sup> For data on the quantity of notices sent by the Motion Picture Association of America, see Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution for a Twenty-First Century Problem*, CENTER FOR PROTECTION OF INTELL. PROP. (Dec. 5, 2013)

<sup>68</sup> UMG has 26.5% global market share in recorded music (2010). See UMG 2011 Investor Meeting presentation, <http://vivendi.com/wp-content/uploads/2011/11/umg-investor-presentation-november-2011-final.pdf>, p.3,DIDP Ex.A71



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online infringement. However, notwithstanding this investment and dedication by UMG, the extent of online infringement and the rate at which it is continuing to grow, coupled with the imbalance of burdens between copyright owners and service providers under the current legal system, have rendered it impossible to fully address the massive violations of UMG's intellectual property rights. UMG...owns or controls the copyright for millions of recordings and several million more compositions... Under the current legal regime, and the burdens it has imposed, UMG is simply unable to protect its entire catalog and the wealth of intellectual property that it represents. ...For purposes of illustration...UMG is the distributor of the Taylor Swift album "1989" which was released by her label, Big Machine Records...The magnitude of the online infringement of "1989" was massive and required significant additional steps. First, UMG adopted a policy of actively searching for and blocking the album and all but one of its tracks on YouTube, rather than monetizing that content on the YouTube platform. And second, UMG devoted additional efforts to taking the recordings down from two other sites – SoundCloud and Tumblr – which paid no royalty at all at the time, and which responded relatively quickly to takedown notices. These efforts came at a considerable cost to both UMG and Big Machine Records. A staff of UMG employees devoted essentially 100% of their time between November 2014 and February 2015 to manually search for infringements of "1989" and its tracks on YouTube and other sites, so that these unlawful uses could be blocked or taken down. These efforts were supplemented by approximately a dozen employees working for IFPI who devoted a significant portion of their work days to the same task. Since the release of the album and through March 11, 2016, UMG or its agents have had to send over 66,000 DMCA takedown notices to online sites hosting copies of "1989" or its tracks. This is in addition to nearly 114,000 blocks that were automatically put in place through YouTube's Content ID system (described in response to No. 15 below), and nearly 30,000 additional blocks or takedowns that UMG or its agents manually placed through online interfaces that YouTube and SoundCloud make available to copyright owners. In addition, trade associations working on UMG's behalf, including RIAA and IFPI, identified over half a million URLs that link to infringements of "1989" since the album was released, and requested that search engines delist those URLs.<sup>69</sup> On the positive side, these massive efforts bore some fruit. Almost immediately, UMG and Big Machine Records began seeing evidence that consumers looking for unlicensed online copies of "1989" were unable to find them, and were thus being driven to purchase the album.<sup>70</sup>

According to the Copyright Alliance:

Sixty-eight percent of...creators...have never filed a takedown notice before because (1) they have either never heard of it; (2) it would take too much effort; (3) the process is too difficult to navigate; or (4) they are skeptical it would do anything to stop online infringement.<sup>71</sup> Individual creators who file notices lack the resources of larger copyright owners to make a meaningful impact. Eighty-five percent of those we surveyed said they issue takedown notices all by themselves, taking time away from their creative pursuits, which pushes many to give up enforcement efforts all together. These creators are defenseless against the volume and reach of online infringement, especially in light of how easy it is to re-post something nowadays.<sup>72</sup>

<sup>69</sup> See 17 U.S.C. § 512(d), <http://www.copyright.gov/title17/92chap5.html#512>

<sup>70</sup> Comments of Universal Music Group to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-90321&attachmentNumber=1&disposition=attachment&contentType=pdf>, pp5-7, DIDP Ex.A69

<sup>71</sup> Comments of Copyright Alliance to U.S. Copyright Office, Library of Congress, *Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, <https://www.regulations.gov/contentStreamer?documentId=COLC-2015-0013-89991&attachmentNumber=1&disposition=attachment&contentType=pdf>, p.8, DIDP Ex.A68

<sup>72</sup> Ibid, p.9





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Furthermore, according to the British Phonographic Industry (BPI):

Concerted efforts by the wider music community to build a healthy digital market have been held back by search engines and other intermediaries continuing to direct users and revenues towards sites that defraud artists and labels. The BPI has repeatedly called on Google and others to do more to ensure that consumers searching for recorded music are referred to legal services in preference to illegal sites, many of which pose risks from viruses, trojans or other harmful or inappropriate content.<sup>73</sup>

Research data consistently shows that search placement plays an important role in determining where consumers go to acquire music and other entertainment. A 2014 study by the Technology Policy Institute highlighted that “*changing the prominence of pirate and legal links has a strong impact on user choices: users are more likely to consume legally (and less likely to infringe copyright) when legal content is more prominent in search results.*” The study also found that users whose initial search terms indicate an intention to consume pirated content are more likely to use legal channels when pirated content is harder to find in search results.<sup>74</sup>

By not awarding .MUSIC to DotMusic, the Music Community will lose the only opportunity to offer assurance to Internet users that all .MUSIC sites are indeed trusted, safe and licensed. This would also benefit global consumers by helping search engines provide a better user experience by replacing unsafe, insecure pirate sites (that dominate music-themed web search results today) with relevant and higher quality .MUSIC sites.<sup>75</sup>

By virtue of ICANN’s actions and inactions pertaining to the CPE Report and process, the public interest will be harmed and the multi-stakeholder Music Community will not be able to ensure trust and reliability in the DNS for Internet users because the Music Community will not be able to govern the last remaining music-themed gTLD,<sup>76</sup> in violation of ICANN’s “*key responsibilities is introducing and promoting competition*”<sup>77</sup> in the registration of domain names, while ensuring the security and stability of the domain name system (DNS).<sup>78</sup> Further, ICANN disregards its own 2007 Recommendations and Principles that stated

<sup>73</sup> <https://www.bpi.co.uk/media-centre/urgent-reform-needed-to-notice-and-takedown-as-removal-of-200-millionth-illegal-search-result-from-google-approaches.aspx>, DIDP Ex.A19

<sup>74</sup> <https://techpolicyinstitute.org/2014/09/15/search-impact-on-piracy>, DIDP Ex.A20

<sup>75</sup> See <http://theverge.com/2015/11/23/9781752/google-takedown-requests-2015> (DIDP Ex.A21) and <http://billboard.com/biz/articles/news/1083146/business-matters-legal-mp3-sites-are-still-buried-by-google-search-results> (DIDP Ex.A22)

<sup>76</sup> No community applicant has been awarded a music-themed string in the New gTLD Program.

<sup>77</sup> ICANN has awarded Amazon the .SONG and .TUNES music-themed strings, See <http://nic.song> and <http://nic.tunes> (DIDP Ex.A23 and DIDP Ex.A24). Amazon is also a competing applicant for .MUSIC. Allowing Amazon to possibly be awarded the three most relevant music-themed strings violates ICANN’s Bylaws with respect to “promoting competition;” The French government also has recently criticized the agreement to move the domain name system to ICANN because “*the move hands too much control to internet giants like Google and Amazon,*” see [http://theregister.co.uk/2016/03/24/france\\_slams\\_us\\_govt\\_internet\\_transition](http://theregister.co.uk/2016/03/24/france_slams_us_govt_internet_transition), [http://lemonde.fr/economie/article/2016/03/24/icann-paris-denonce-une-privatisation-de-la-gouvernance-d-internet\\_4889567\\_3234.html](http://lemonde.fr/economie/article/2016/03/24/icann-paris-denonce-une-privatisation-de-la-gouvernance-d-internet_4889567_3234.html) and <http://proxy-pubminefi.diffusion.finances.gouv.fr/pub/document/18/20672.pdf>, DIDP Ex.A25

<sup>78</sup> <https://newgtlds.icann.org/en/about/program>, DIDP Ex.A26



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*“where an applicant lays any claim that the TLD is intended to support a particular community...that claim will be taken on trust.”<sup>79</sup>*

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

According to WIPO, cybersquatting cases were up in 2015 driven by new gTLDs.<sup>80</sup> Spamhaus also revealed that “*world’s worst top-level domains*” are new gTLDs stating that “*unsurprisingly, most of the TLDs listed on this page are the “new gTLDs” recently introduced by ICANN.*” Spamhaus released these findings “*in hope that this data can help the “Good” Powers That Be (starting with ICANN) to better focus their attention on network abuse issues, aiming for a better tomorrow for our Internet.*”<sup>81</sup>

An ICANN-sponsored survey also reported that consumer trust in new gTLDs is much lower than in legacy TLDs, with approximately 50% of consumers reporting trust in new versus approximately 90% reporting trust in legacy TLDs.<sup>82</sup> Researchers from the University of California, also found that new TLD domains are more than twice as likely as legacy TLDs to appear on a domain blacklist.<sup>83</sup> Further, according to the Anti-Phishing Working Group, malicious actors are testing the new gTLD space as a potential base for their activities.<sup>84</sup>

Cybersecurity firm RiskIQ found that one out of every three content theft sites exposed users to malware. Internet users who visited content theft sites were 28 times more likely to get malware from these sites than from mainstream websites or licensed content providers.<sup>85</sup> According to the IP Commission Report, such abuse has significantly negative effects on consumers, economies, industry and government:<sup>86</sup>

- *Effects on consumers.* Harm to health, harm to safety, costs incurred as a result of product failure, decreased or increased purchasing power;
- *Effects on economy as a whole.* Decline in economic growth as incentives to innovate are reduced, lost trade revenue, impact on the environment; increase in companies with substandard working conditions;

<sup>79</sup> <http://gns0.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf>, Implementation Guidelines (IG H), Mission and Core Values (CV 7-10), p.6, Ex.A4 (DIDP Ex.A27); Also see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm>, RR Ex.A5 (DIDP Ex.A28)

<sup>80</sup> [http://wipo.int/pressroom/en/articles/2016/article\\_0003.html](http://wipo.int/pressroom/en/articles/2016/article_0003.html), DIDP Ex.A29

<sup>81</sup> <https://www.spamhaus.org/news/article/728/spamhaus-presents-the-worlds-worst-top-level-domains> and <https://www.spamhaus.org/statistics/tlds>, and <http://www.csoonline.com/article/3041346/security/maintainers-of-new-generic-top-level-domains-have-a-hard-time-keeping-abuse-in-check.html>, DIDP Ex.A30

<sup>82</sup> ICANN Global Consumer Research, conducted by Nielsen, April 2015, <https://www.icann.org/news/announcement-2015-05-29-en>, DIDP Ex.A31

<sup>83</sup> “From .academy to .zone: An Analysis of the New TLD Land Rush,” University of California, San Diego, Department of Computer Science and Engineering, October 2015, doi: 10.1145/2815675.2815696, <http://www.sysnet.ucsd.edu/~voelker/pubs/newtlds-imc15.pdf>, p.12, DIDP Ex.A32

<sup>84</sup> Anti-Phishing Working Group, “Global Phishing Survey: Trends and Domain Name use in 1H2014,” 25 September 2014, [http://docs.apwg.org/reports/APWG\\_Global\\_Phishing\\_Report\\_1H\\_2014.pdf](http://docs.apwg.org/reports/APWG_Global_Phishing_Report_1H_2014.pdf); Also see <https://newgtlds.icann.org/en/reviews/dns-abuse/draft-safeguards-against-dns-abuse-15mar16-en.pdf>, p12, DIDP Ex.A33

<sup>85</sup> <http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=digitalbait>, DIDP Ex.A34

<sup>86</sup> IP Commission Report, [http://ipcommission.org/report/IP\\_Commission\\_Report\\_052213.pdf](http://ipcommission.org/report/IP_Commission_Report_052213.pdf), 2013, p.29, DIDP Ex.A35



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- *Effects on industry.* Lost sales; lost brand value; reduced scope of operations; lost jobs and reduced ability to provide employee benefits; reduced ability to conduct R&D; increased IP protection expenses for prevention, remediation, and enforcement; increased costs from dealing with malware; reduced incentive to innovate; and
- *Effects on government.* Lost tax revenue; increased IP protection expenses for prevention, remediation, and enforcement, including costs to store, secure, and destroy seized assets; benefit to criminal networks looking to launder money or harm the public; impact on national security; and impact on civilian safety.

According to ICANN, DNS abuse refers to intentionally deceptive, conniving, or unsolicited activities that actively make use of the DNS<sup>87</sup> to “exploit human weaknesses in the forms of greed, carelessness, and/or naiveté. Thus, end-users tend to be the weakest links in the cyber-security chain.”<sup>88</sup> According to ICANN, “DNS abuse can take a number of forms, its typical aim is to distribute malware, which is used to disrupt computer operations, gather sensitive information, or gain access to private computer systems.”<sup>89</sup> According to cybersecurity organization IID, “most new gTLDs have failed to take off and many have already been riddled with so many fraudulent and junk registrations that they are being blocked wholesale.”<sup>90</sup>

Google’s Transparency Report<sup>91</sup> shows that there is widespread copyright infringement and millions of takedown requests for New gTLDs that have music-themed characteristics, such as .ROCKS (which only has 65,047 domain registrations<sup>92</sup>). Infringing .ROCKS domain names include: *torrents.rocks* (with 1,145,272 copyright infringement takedown requests), *extratorrent.rocks* (940,971), *kickasstorrents.rocks* (561,065), *kickasstorrent.rocks* (507,161), *kickass-torrent.rocks* (434,016), *kickass-torrents.rocks* (348,910), *kickasstorrentz.rocks* (361,161), *thepiratebay.rocks* (264,147), *kickass.rocks* (263,673), *mp3song.rocks* (208,260) and many others retrieved on March 31 2016.<sup>93</sup> During the week of February 29, 2016 there were 21,064,571 URL takedown requests for copyright infringement removal (i.e. 125,384 takedowns per hour).<sup>94</sup>

As noted by ICANN and GAC, .MUSIC is “string likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm;” and (ii) that it is a “string that is linked to [a] regulated sector” that “should operate in a way that is consistent with applicable laws,”<sup>95</sup> As such, it is a certainty that .MUSIC, the most semantic music-themed gTLD in the New gTLD Program, will have exponentially more abuse and piracy than .ROCKS.<sup>96</sup> Such a result will not serve the public interest. Without community-based enhanced music safeguards in place, the popular .MUSIC string that invokes a high level

<sup>87</sup> <https://newgtlds.icann.org/en/reviews/dns-abuse/draft-safeguards-against-dns-abuse-15mar16-en.pdf>, p.3, Ex.A33

<sup>88</sup> Ibid p.10; Khonji, Mahmoud and Youssef Iraqi, “Phishing Detection: A Literature Survey,” IEEE Communications Surveys & Tutorials 15, no. 4 (Q4 2013), doi: 10.1109/SURV.2013.032213.00009, <http://ieeexplore.ieee.org/xpl/articleDetails.jsp?arnumber=6497928>

<sup>89</sup> “Implementation Advisory Group for Competition, Consumer Choice, and Consumer Trust (IAG-CCT): Final Recommendations on Metrics for CCT Review,” 26 September 2014, <https://newgtlds.icann.org/en/reviews/cct/iag-metrics-final-recs-26sep14-en.pdf>, p.4, DIDP Ex.A36.

<sup>90</sup> <http://internetidentity.com/press-release/iid-predicts-massive-botnet-takeover-of-iot-devices-by-2017>, DIDP Ex.A37

<sup>91</sup> <https://www.google.com/transparencyreport/removals/copyright>

<sup>92</sup> <https://ntldstats.com/tld/rocks>, Retrieved on March 16, 2016, DIDP Ex.A38

<sup>93</sup> See .ROCKS Google Transparency Reports, DIDP Ex.A39

<sup>94</sup> <https://google.com/transparencyreport/removals/copyright>, Retrieved March 19, 2016, DIDP Ex.A40; Also see <http://techtimes.com/articles/139220/20160307/google-copyright-takedowns-has-increased-about-one-billion-percent-since-2006.htm>, <https://torrentfreak.com/google-asked-remove-558-million-pirate-links-2015> and <https://torrentfreak.com/google-asked-to-remove-100000-pirate-links-every-hour-160306>, DIDP Ex.A40

<sup>95</sup> <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, An.5,p.8,DIDP Ex.A41

<sup>96</sup> Rightside, the .ROCKS registry, is also an applicant for .MUSIC in partnership with Donuts



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of implied trust will be significantly abused by bad actors and experience rampant piracy to the detriment of the Internet as whole.

*“The public good fully coincides...with the claims of individuals,”* wrote James Madison of the Constitution’s Copyright Clause, which secures the exclusive rights of creators. These rights, like any form of private property, serve as the building blocks of a free market, promoting economic growth and individual liberty. Madison’s remarks remain just as true after more than two hundred years. *“The issues of authors are intertwined with the interests of the public,”* wrote Register of Copyrights Maria Pallante last year. *“As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation.”* Pallante went on to note that *“A law that does not provide for authors would be illogical—hardly a copyright law at all. And it would not deserve the respect of the public.”*<sup>97</sup>

Copyright benefits the public by creating a marketplace for creative and expressive works. [For example, in the U.S] this marketplace currently contributes over \$1 trillion a year to U.S. GDP, directly employs 5.4 million people (with average wages 33% higher than national average), and generates \$141 billion in exports. The existence of this marketplace further incentivizes the creation and dissemination of works which promote the progress of art, science, culture, and knowledge. Consumers experience this benefit firsthand. Millions of consumers are able to enjoy music on numerous platforms that did not exist even a decade ago.<sup>98</sup>

The public benefits of a robust copyright system are not solely economic. Copyright protects human rights. Article 27 of the Universal Declaration of Human Rights (UDHR),<sup>99</sup> adopted in 1948 by the UN General Assembly, states:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Copyright also advances free speech values. The Supreme Court has said that *“the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”*<sup>100</sup> Indeed, creators and the creative communities are on the front lines defending their—and by extension everyone’s—right to free expression.

As indicated earlier, ICANN’s Articles of Incorporation commit ICANN to *“carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law.”* As such, ICANN’s Articles apply to .MUSIC, a *“string that is linked to regulated sector.”*<sup>101</sup>

Furthermore, ICANN has a number of policies and obligations concerning their relationship with the Internet user. These include issues such as *“competition, consumer protection, security, stability and resiliency,*

<sup>97</sup> [https://copyrightalliance.org/2014/03/copyright\\_public\\_interest\\_and\\_free\\_trade](https://copyrightalliance.org/2014/03/copyright_public_interest_and_free_trade), DIDP Ex.A42

<sup>98</sup> Ibid

<sup>99</sup> <http://www.un.org/en/universal-declaration-human-rights/index.html>, DIDP Ex.A43; Also see U.N Guiding Principles on Business and Human Rights, ‘Protect, Respect and Remedy’ Framework,

[http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf), p. 5, DIDP Ex.A44

<sup>100</sup> [http://scholar.google.com/scholar\\_case?case=12801604581154452950](http://scholar.google.com/scholar_case?case=12801604581154452950)

<sup>101</sup> <https://icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>, pp.1-2, DIDP Ex.A41



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*malicious abuse issues, sovereignty concerns, and rights protection.”*<sup>102</sup> According to the KnujOn Report “Concerning issues of consumer trust on the Internet as they apply to ICANN, the ICANN Compliance function, ICANN registries, and ICANN registrars (March 2016):”

ICANN is not connecting to consumers, but the abusive parties are connecting to consumers. So what the consumer sees is the ugly side of the Internet. The actual access to ICANN’s complaint or compliance process is hidden. ICANN’s website structure appears designed to avoid accepting complaints from consumers and deflecting any responsibility to external entities. Whether by design or negligence, the problem needs to be addressed immediately. Obfuscation and misdirection are not strategies for gaining consumer trust.<sup>103</sup>

Significant abuse and material harm to consumers and the Music Community will be prevented if DotMusic’s community initiative is granted .MUSIC. DotMusic’s community-based enhanced music safeguards will protect the popular and sensitive .MUSIC string. According to ICANN:

ICANN is not the content police.<sup>104</sup>

Complaints regarding copyright infringement due to Internet and website content are outside of ICANN’s scope and authority.<sup>105</sup>

However, such statements in relation to ICANN’s authority do not release ICANN of serious accountability and responsibility towards serving the public interest and making decisions within its control and authority to maximize consumer trust. As evidenced previously, if DotMusic is not delegated .MUSIC then pirates and bad actors will continue to materially abuse the Music Community and compromise consumer trust. Such malicious conduct will proliferate even further because of the loophole that deters meaningful copyright enforcement compliance because copyright protection is not within ICANN’s authority.

In agreement with the FTC (that “*expressed concerns about the need for more consumer protection safeguards...highlighting again the potential for significant consumer harm...magnify[ing] both the abuse of the domain name system and the...challenges...in tracking down Internet fraudsters*”<sup>106</sup>), a safe, secure and trusted .MUSIC gTLD with music community-tailored enhanced safeguards that enforce copyright protection and protect the global music community and enhance consumer trust is of paramount significance.

<sup>102</sup> See Competition, Consumer Trust and Consumer Choice Review (CCT), <https://icann.org/resources/reviews/aoc/cct>, DIDP Ex.A46 and ICANN Affirmation of Commitments, <https://icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>, DIDP Ex.A47

<sup>103</sup> KnujOn March 2016: Internet Limbo, <http://www.knujon.com/knujon-icann-consumers-rygy-limbo-032016.pdf>, p.56, DIDP Ex.A48

<sup>104</sup> <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>, DIDP Ex.49

<sup>105</sup> <https://www.icann.org/resources/pages/copyright-2013-05-03-en>, DIDP Ex.50

<sup>106</sup> See [https://www.ftc.gov/sites/default/files/documents/public\\_statements/icanns-plan-increase-available-generic-top-level-domains/111216letter-icann.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/icanns-plan-increase-available-generic-top-level-domains/111216letter-icann.pdf) and <https://www.ftc.gov/news-events/press-releases/2011/12/ftc-warns-rapid-expansion-internet-domain-name-system-could-leave>, DIDP Ex.A51



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## D. Conclusion

As set forth in the RR, the CPE Report and .MUSIC CPE process present serious deficiencies and concerns of conflicts of interest that were publicly disclosed to the ICANN Board, the ICANN staff and the EIU before the commencement of CPE.<sup>107</sup> There are no compelling reasons for confidentiality in disclosing the requested documents because it would serve the global public interest to do so and ensure the integrity of ICANN's deliberative and decision-making process while protecting consumers and the Music Community. We also note that CPE has invoked the majority of ICANN accountability mechanisms (and ICANN resources) in the last few years. As such, it would serve the public interest to disclose all documents requested to ensure ICANN transparency, accountability, credibility, predictability and non-discrimination.

On April 12<sup>th</sup>, 2016, the ICANN Board responded to the GNSO's query concerning ICANN's definition of the "public interest." ICANN Chairman Dr. Steve Crocker clarified that "*historically at ICANN, there has been no explicit definition of the term "global public interest" and that "future conversation and work on exploring the public interest within ICANN's remit will require global, multistakeholder, bottom-up discussion."*<sup>108</sup>

According to ICANN:

I. Board interpretation and consideration of the public interest

While, historically at ICANN, there has been no explicit definition of the term "global public interest," the Board has understood the term within the context of Paragraph 3 of the Articles of Incorporation: "*In furtherance of the foregoing purposes, and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article 5 hereof, pursue the charitable and*

<sup>107</sup> Before the .MUSIC CPE process commenced, DotMusic publicly informed the ICANN Board and the EIU (at ICANN 52 Public Forum) that: "[DotMusic has] some serious concerns. The chairman of Google, Eric Schmidt, is on the Board of "The Economist." Google is an applicant for .MUSIC. "The Economist" grades our CPE. This is a serious conflict of interest... [DotMusic] will proceed with CPE but with disclosed prejudice." See ICANN 52 Singapore Meeting Public Forum Transcript, February 12, 2015, <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, DIDP Ex.A59; According to the EIU's Statement of Work agreement (the "SOW") with ICANN, the EIU had the opportunity to decline evaluating DotMusic's application in good faith after DotMusic publicly disclosed and raised the issue that there was a serious conflict of interest. According to the SOW, a mere "prospect" of a conflict of interest sufficed to decline the evaluation yet both ICANN and the EIU allowed the .MUSIC CPE to proceed (See EIU Contract and SOW at <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[ 2 ]: "Panel Firm shall be entitled to decline any assigned application or applications it considers, in good faith, will raise the prospect of a conflict of interest," DIDP Ex. A8, Section 4, p.10); Disqualification from a proceeding because of an appearance of a conflict of interest (including cases in which a judge's impartiality might be reasonably questioned) is a globally-recognized requirement in proceedings to ensure fairness, non-discrimination and equal treatment. For example, Title 28 of the U.S. Code § 455 mandates that "*any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned*" See <https://gpo.gov/fdsys/pkg/USCODE-2011-title28/pdf/USCODE-2011-title28-partI-chap21-sec455.pdf>, DIDP Ex.61; Also see Liteky v. United States (92-6921), 510 U.S. 540 (1994): "*Recusal is required whenever there exists a genuine question concerning a judge's impartiality, and not merely when the question arises from an extrajudicial source.*" (p.552) "*The judge does not have to be subjectively biased or prejudiced, so long as he appears to be so.*" (p.554), DIDP Ex.A62

<sup>108</sup> Dr. Steve Crocker, ICANN Chair, ICANN Board Response to GNSO Query on Public Interest, <https://www.icann.org/en/system/files/correspondence/crocker-to-bladel-12apr16-en.pdf>, p.1 and p.3, DIDP Ex.A73



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*public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)."*<sup>109</sup>

According to ICANN's DIDP "*Defined Conditions of Nondisclosure:*"<sup>110</sup>

Information...may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

Disclosure of the documents requested by DotMusic under the DIDP process does not impact nor influence the "operational stability of the Internet." As such, ICANN's interpretation and consideration of the *public interest* as it applies to Article 3 of ICANN's Articles of Incorporation cannot apply to DotMusic's DIDP Request. As such, ICANN Staff should interpret and consider "*public interest*" from a dictionary definitional perspective:

According to the Cambridge Dictionaries, *public interest* is defined as "*used when talking about people's rights to know the facts about a particular situation.*"<sup>111</sup>

According to MacMillan Dictionary, *public interest* is defined as "*the fact that the public has a right to know about something because it affects them*" or "*the fact that people in general are interested in something.*"<sup>112</sup>

According to Oxford Dictionaries, *public interest* is defined as "*the benefit or advantage of the community as a whole; the public good.*"<sup>113</sup>

According to Dictionary.com, *public interest* is defined as "*the welfare or well-being of the general public*" and "*appeal or relevance to the general populace.*"<sup>114</sup>

On April 12, 2016, a California Federal Court ruled against ICANN granting DCA (one of the .AFRICA gTLD applicants) a preliminary injunction invalidating the AGB's covenant not to sue. Neutral Judge Gary Klausner's findings revealed that "*evidence suggests that ICANN intended to deny DCA's application based on pretext:*"

<sup>109</sup> Ibid, pp.1-2, DIDP Ex.A3; Also see Article 3 of ICANN Articles of Incorporation, <https://www.icann.org/resources/pages/governance/articles-en>, DIDP Ex.A45

<sup>110</sup> See ICANN DIDP, <https://www.icann.org/resources/pages/didp-2012-02-25-en>, DIDP Ex.A3

<sup>111</sup> Cambridge Dictionaries definition of *public interest*, <http://dictionary.cambridge.org/us/dictionary/english/public-interest>, DIDP Ex.74

<sup>112</sup> MacMillan Dictionary definition of *public interest*, <http://www.macmillandictionary.com/us/dictionary/american/public-interest>, DIDP Ex.A75

<sup>113</sup> Oxford Dictionaries definition of *public interest*, [http://www.oxforddictionaries.com/us/definition/american\\_english/public-interest](http://www.oxforddictionaries.com/us/definition/american_english/public-interest), DIDP Ex.A76

<sup>114</sup> Dictionary.com definition of *public interest*, <http://www.dictionary.com/browse/public-interest>, DIDP Ex.A77



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The evidence suggests that ICANN intended to deny DCA's application based on pretext...As such, the Court finds serious questions regarding the enforceability of the Release due to California Civil Code § 1668. Because the Court finds serious questions regarding the enforceability of the Release due to California Civil Code § 1668, the Court need not address DCA's arguments regarding unconscionability or procurement by fraud.<sup>115</sup>

According to ICANN's Bylaws to "*operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness*"<sup>116</sup> and in light of this U.S Court ruling that determined ICANN "*intended to deny DCA's application based on pretext*," DotMusic requests that ICANN disclose all the documents requested in this DIDP Request to serve the global public interest by showing that ICANN did not also intend to deny DotMusic's application from passing CPE.

If ICANN denies the disclosure of all the documents requested in this DIDP Request, DotMusic requests ICANN to:

- i) Define "*public interest*" with respect to the DIDP process and explain in detail how "*the harm in disclosing the information outweighs the public interest in disclosing the information*" in relation to DotMusic's statements supporting why it serves the public interest for ICANN to release all the documentation requested (*See Section C: Why It Serves Public Interest to Release the Documentation Requested*);
- ii) Provide DotMusic with Privileged Logs that clearly describe as to each document withheld the type of document, the general subject matter thereof, the date on which it was created, the authors of the document, all parties who were intended to be recipients of the document, and the legal privilege being claimed, referencing the law that recognizes such claim of privilege; and
- iii) Follow the ICANN Board Resolutions of March 10, 2016 to "*be as specific and detailed as possible in responding to DIDP requests, particularly when not disclosing requested documents.*"<sup>117</sup>

DotMusic requests the RR be placed on hold until the DIDP Request is fully resolved. Based on the information disclosures and documents requested in this DIDP Request, DotMusic expects to update its RR after the documentation requested is disclosed and gauged.

We thank you for your consideration of this important matter.

<sup>115</sup> R. Gary Klausner, U.S. District Judge, *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry*, Case No. 16-CV-00862 RGK (JCx), April 12, 2016, <https://www.icann.org/en/system/files/files/litigation-dca-icann-motion-prelim-injunction-12apr16-en.pdf>, DIDP Ex.83; Also see Bloomberg BNA, *Judge Halts .Africa Domain; Lengthy Litigation Likely*, <http://bna.com/judge-halts-africa-n57982070034>, April 13, 2016, DIDP Ex.A84

<sup>116</sup> ICANN Bylaws, Article 3, <https://www.icann.org/resources/pages/governance/bylaws-en>, DIDP Ex.A72; Also see Article 4 or Articles of Incorporation "*The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related market.*" <https://www.icann.org/resources/pages/governance/articles-en>, DIDP Ex.A45

<sup>117</sup> ICANN Board Resolution, March 10, 2016, <https://icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>, DIDP Ex.A5





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Respectfully Submitted,

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Founder  
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