

**Subject:** [reconsider] DotMusic Analysis of .MUSIC CPE Process & FTI Reports for ICANN Board  
**Date:** Friday, February 2, 2018 at 1:47:38 PM Pacific Standard Time  
**From:** Constantine Roussos (sent by reconsider <reconsider-bounces@icann.org>)  
**To:** Reconsideration@ ICANN, Cherine Chalaby, Goran Marby, chris.disspain@icann.org, Jason Schaeffer, Ali, Arif, Sancheti, Harsh, Rana, Rajat, ALL DOT Music, Jason B. Schaeffer

Dear Mr. Göran Marby, ICANN Board Chair Cherine Chalaby and ICANN BAMC Chair Chris Disspain:

Attached is DotMusic's "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (the "Analysis") in relation to ICANN's Community Priority Evaluation ("CPE") process and FTI Reports that were released by ICANN on 13 December 2017 (See [https://newgtlds.icann.org/en/applicants/cpe#process-review\[newgtlds.icann.org\]](https://newgtlds.icann.org/en/applicants/cpe#process-review[newgtlds.icann.org])).

**We kindly request that the ICANN Board consider the substance of our Analysis during its upcoming Board Meeting that is scheduled for 4 February 2018.** According to the Agenda items, the ICANN Board will be looking into the "Next Steps in New gTLD Programs Community Priority Evaluation (CPE) Process Review" (See [https://www.icann.org/resources/board-material/agenda-2018-02-04-en\[icann.org\]](https://www.icann.org/resources/board-material/agenda-2018-02-04-en[icann.org])).

We would also **request an opportunity to present our Analysis and findings to the ICANN Board** prior to any ICANN determination to ensure that **ICANN's decision** with respect to Reconsideration Request 16-5 is **based on substantive and accurate facts, procedural fairness, non-discrimination and transparency.**

Please distribute the Analysis to all ICANN Board members for their kind consideration before the scheduled 4 February 2018 Board Meeting.

Respectfully Submitted

--  
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Founder  
DotMusic

Jason Schaeffer  
Legal Counsel  
DotMusic

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# Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports

31 January, 2018

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## A. Introduction and Background

1. On 13 December 2017, FTI Consulting prepared a Report for Jones Day<sup>1</sup> called the **Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports** (“Report”).<sup>2</sup> On 13 December 2017, ICANN issued an announcement that:

*The CPE Process Review was initiated at the request of the ICANN Board as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice,<sup>3</sup> and consisted of three parts: (i) reviewing the process by which the ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN initiated the CPE Process Review (Scope 3).*

*FTI concluded that “there is no evidence that the ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process” (Scope 1) and that “the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook [ ] and the CPE Guidelines throughout each CPE” (Scope 2). ([See Scope 1 report](#) [PDF, 159 KB], Pg. 3; [Scope 2 report](#) [PDF, 312 KB], Pg. 3.)*

*For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the*

<sup>1</sup> Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

<sup>2</sup> FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 December 2017). Prepared for Jones Day. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>

<sup>3</sup> According to their website, FTI Consulting “conducts sophisticated investigations, uncovers actionable intelligence and performs value-added analysis to help decision-makers address and mitigate risk, protect assets, remediate compliance, make informed decisions and maximize opportunities.” See <http://www.fticonsulting.com/services/forensic-litigation-consulting/global-risk--investigations-practice>



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reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

*“The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process,” said Cherine Chalaby, Chairman of the ICANN Board. “Further, this CPE Process Review and due diligence has provided additional facts and information that outline and document the ICANN organization's interaction with the CPE Provider.”<sup>4</sup>*

2. On January 2018, Arif Ali of Dechert LLP, DotMusic Limited's (“DotMusic”) legal counsel, sent a letter to ICANN that called into question the FTI Report's accuracy and reliability. In part, the letter stated:

*... [T]he Board's adoption of the FTI's findings will be fundamentally inconsistent with the unfairness and inconsistency issues that Board itself recognized in the CPE process.*

*As a neutral investigator hired by ICANN to pursue an “**independent review**” of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process. Instead, FTI sheltered the EIU's decisions, no matter how irrational or arbitrary, thus seriously calling into question its own credibility. As a result, FTI's findings are unreliable, unfair, and incorrect, while at the same time raising potential serious conflict of interest, bias and collusion concerns.*

*Accordingly, we request that the ICANN Board take no action with respect to the conclusions reached by FTI, until DotMusic, and indeed all affected parties, have been provided with the underlying materials reviewed by the*

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<sup>4</sup> ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 December 2017). See <https://www.icann.org/news/announcement-2017-12-13-en>



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*FTI, and subsequently had an opportunity to respond to the FTI Report. To do otherwise would violate DotMusic's right to be heard.*

*DotMusic reserves all of its rights and remedies all available for whether within or outside of the United States of America.*

3. This is an analysis of ICANN's Community Priority Evaluation process and the FTI Reports (the "Analysis"). Specifically:
  - a. Whether DotMusic's .MUSIC Report by the CPE Provider (EIU) conformed to the principles and methodology set forth in ICANN's Applicant Guidebook ("AGB").<sup>5</sup>
  - b. Whether DotMusic's .MUSIC CPE Report<sup>6</sup> was consistent with the CPE Reports that passed CPE for .ECO,<sup>7</sup> .HOTEL,<sup>8</sup> .OSAKA,<sup>9</sup> .RADIO<sup>10</sup> and .SPA.<sup>11</sup> I will apply the same interpretation of the Applicant Guidebook (AGB) that has been adopted by the EIU in grading the applications that were successfully granted community priority status. The analysis will be restricted to CPE Reports that have prevailed CPE or have been awarded maximum scores in certain sections that the .MUSIC Report was not awarded full scores.<sup>12</sup> The analysis will not look into sections where the .MUSIC Report was awarded full points because those sections are not in dispute.
  - c. Whether this Analysis is consistent with other opinions concerning DotMusic's .MUSIC Report, such as the Council of Europe Report<sup>13</sup> and opinions

<sup>5</sup> ICANN, New gTLD Applicant Guidebook (4 June 2012). See <https://newgtlds.icann.org/en/applicants/agb> and <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

<sup>6</sup> .MUSIC CPE Report for DotMusic Limited (10 February 2016). See <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

<sup>7</sup> .ECO CPE Report (7 October 2014). See <https://icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>.

<sup>8</sup> .HOTEL CPE Report (12 June 2014). See <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>

<sup>9</sup> .OSAKA CPE Report (30 July 2014). See <https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>.

<sup>10</sup> .RADIO CPE Report (10 September 2014). See <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

<sup>11</sup> .SPA CPE Report (22 July 2015). See <https://icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>.

<sup>12</sup> ICANN, Community Priority Evaluation and CPE Reports. See <https://newgtlds.icann.org/en/applicants/cpe>

<sup>13</sup> Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

[https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2), MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

<https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>





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filed by experts in (i) ethnomusicology;<sup>14</sup> (ii) law and intellectual property;<sup>15</sup> and (iii) organization<sup>16</sup> respectively.

- d. Whether the FTI Report fulfilled its objectives to facilitate ICANN Board decision-making on the DotMusic Reconsideration Request 16-5,<sup>17</sup> by taking an independent, complete and comprehensive look at the CPE Process. This analysis will examine the effectiveness of the FTI Report's evaluation methodology in relation to the issues outlined in DotMusic's Reconsideration Request 16-5 and any relevant recommendations on how the evaluation methodology and investigative process adopted by the FTI was appropriate or not for and if not, provide recommendations on how the process can be improved upon in a transparent, fair and neutral manner to benefit all affected parties.

## B. Community Priority Evaluation Process Overview

4. The AGB provided the procedures and rules on how new gTLD applications were to be evaluated. According to the AGB, new gTLD applicants could designate their applications as either standard or community based ("operated for the benefit of a clearly delineated community").<sup>18</sup> According to the AGB, Community Applicants must "demonstrate an ongoing relationship with a clearly delineated community" and "have applied for a gTLD string strongly and specifically related to the community named in [their] application."<sup>19</sup> If two or more applications were submitted for identical or "confusingly similar" strings and had completed all preliminary stages of evaluation then they were placed in a "contention set."<sup>20</sup> Community-based applicants could then elect to proceed with Community Priority Evaluation ("CPE") for that application.<sup>21</sup> If the applicant elected to proceed to CPE, then the application was evaluated by The Economist Group's Economist Intelligence Unit ("EIU") that was selected by ICANN in 2011 to conduct Community Priority Evaluations.<sup>22</sup>

<sup>14</sup> Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

<sup>15</sup> Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>

<sup>16</sup> Joint Organisation Experts' Opinion by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>

<sup>17</sup> DotMusic Reconsideration Request 16-5. See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

<sup>18</sup> AGB, § 1.2.3.1. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

<sup>19</sup> Id., § 1.2.3.1

<sup>20</sup> Id., § 4.1

<sup>21</sup> Id., § 4.2

<sup>22</sup> See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>



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ICANN solicited Comparative Evaluation Panel Expressions of Interest (“EOI”) in 2009. The EIU confirmed in its EOI that it had “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”<sup>23</sup> and 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>24</sup> In addition, the EIU agreed to provide ICANN with a “statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”<sup>25</sup>

5. The ICANN-EIU Statement of Work (“SOW”) agreement confirmed that the Panel must “ensure that the evaluations are completed consistently and completely in adherence to the Applicant Guidebook” and follow “evaluation activities based on ICANN’s gTLD Program Governance requirements to directly support the Program Office governance processes.”<sup>26</sup> In addition, the Panel confirmed that they would “document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result” by “document[ing] the evaluation and analysis for each question to demonstrate how the Panelist determined a score for each question based on the established criteria” [ ] “provid[ing] a summary of the rationale and recommended score for each question”<sup>27</sup> and “providing ad-hoc support and documentation as requested by ICANN’s Quality Control function as part of the overall gTLD evaluation quality control process” that would include “access to work papers as required verifying Panel Firm’s compliance.”<sup>28</sup> The CPE Panel Process Document necessitated that “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 highly qualified and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.”<sup>29</sup>
6. According to ICANN’s CPE Guidelines, it was a requirement that “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

<sup>23</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

<sup>24</sup> Id., p.5

<sup>25</sup> Id., p.6

<sup>26</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

<sup>27</sup> Id., p.5

<sup>28</sup> Id., p.12

<sup>29</sup> EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2



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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>30</sup>

7. If the application was determined to meet the CPE criteria set forth in the AGB by scoring at least 14 out of 16 possible points then the application prevailed in CPE and was thereby given priority, while the other standard applicants in the contention set did not proceed.<sup>31</sup>
8. The CPE process is set forth in Module 4 of the AGB. There are four principal criteria, each worth a maximum possible of 4 points: Community Establishment, the Nexus between Proposed String and Community, Registration Policies and Community Endorsement.<sup>32</sup> As mentioned earlier, an application had to receive a total score of at least 14 points in order to pass CPE.
9. The first criterion is Community Establishment, which is comprised of two main sub-criteria: 1-A Delineation (2 points possible) and 1-B Extension (2 points possible). According to the AGB, the term “community” implies “more of cohesion than a mere commonality of interest” with “an awareness and recognition of a community among its members;” an “understanding of the community’s existence prior to September 2007” and with “extended tenure or longevity—non transience—into the future.” Under the 1-A Delineation sub-criterion, the Community’s membership definition is evaluated to determine whether the Community defined by the community application is “clearly delineated [‘Delineation’], organized [‘Organization’], and pre-existing [‘Pre-Existence’].” Delineation requires “a clear and straightforward membership definition” and an “awareness and recognition of a community (as defined by the applicant) among its members.” Organization requires “documented evidence of community activities” and “at least one entity mainly dedicated to the community.” Pre-existence requires that the community defined by the applicant “must have been active prior to September 2007.” Under the I-B Extension sub-criterion, the community defined must be of “considerable size [‘Size’] and longevity [‘Longevity’].” Size requires that the “community is of considerable size.”<sup>33</sup> Longevity requires that the community defined “was in existence prior to September 2007.”<sup>34</sup> “With respect to ‘Delineation’ and ‘Extension,’ a community

<sup>30</sup> CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

<sup>31</sup> AGB, § 4.2.2

<sup>32</sup> AGB, Section 4.2.3, pp.4-9 to 4-19

<sup>33</sup> AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

<sup>34</sup> AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12





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can consist of [...] a logical alliance of communities (for example, an international federation of national communities of a similar nature).<sup>35</sup>

10. The second criterion is the Nexus between Proposed String and Community, which has two main sub-criteria: 2-A Nexus (3 points possible) and 2-B Uniqueness (1 point possible). Under “Nexus,” for a score of 3, “the essential aspect is that the applied-for string is commonly known by others as the identification / name<sup>36</sup> of the community” so that “[t]he string matches the name of the community.”<sup>37</sup> Under “Uniqueness,” for a full score, it must be determined that the “[s]tring has no other significant meaning beyond identifying the community described in the application.”<sup>38</sup> “With respect to ‘Uniqueness,’ ‘significant meaning’ relates to the public in general, with consideration of the community language context added. ‘Uniqueness’ will be scored both with regard to the community context and from a general point of view.”<sup>39</sup>
11. The third criterion is the Registration Policies section. There is 1 point possible for each sub-criterion: 3-A Eligibility, 3-B Name Selection, 3-C Content and Use and 3-D Enforcement.<sup>40</sup>
12. The fourth criterion is Community Endorsement, which has two sub-criteria, each worth a possible 2 points (4-A Support and 4-B Opposition). Under “Support,” the “Applicant is, or has documented support from, the recognized<sup>41</sup> community institution(s) / member organization(s).”<sup>42</sup> “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>43</sup> Under “Opposition,” 2 points are awarded if there is “no opposition of relevance.”<sup>44</sup> “To be taken into account as relevant opposition, objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”<sup>45</sup>

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<sup>35</sup> AGB, p.4-12

<sup>36</sup> AGB, “‘Name’ of the community means the established name by which the community is commonly known by others,” p.4-13

<sup>37</sup> AGB, p.4-12

<sup>38</sup> AGB, p.4-13

<sup>39</sup> AGB, p.4-14

<sup>40</sup> AGB, pp. 4-14 to 4-16

<sup>41</sup> AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

<sup>42</sup> AGB, p.4-17

<sup>43</sup> AGB, p.4-18

<sup>44</sup> AGB, p.4-17

<sup>45</sup> AGB, p.4-19



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## DotMusic Application Materials and .MUSIC CPE Process

13. DotMusic Limited (with Application ID. 1-1115-14110<sup>46</sup>) entered the CPE process on 29 July 2015.<sup>47</sup> According to DotMusic's Application materials provided to the CPE Panel and ICANN for evaluation:
  - a. The Mission and Purpose is “[c]reating 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 and fighting piracy; Supporting Musicians’ welfare, rights and fair compensation; Promoting music and the arts, cultural diversity and 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 commercial and non-commercial stakeholders.<sup>48</sup>
  - b. The “Community” was defined in 20A: “The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical *alliance* of communities of a similar nature (“COMMUNITY”)”, that relate to music: the art of combining sounds rhythmically, melodically or harmonically.”<sup>49</sup>
  - c. Community Establishment was described in 20A: “DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria “aligned with the community-based Purpose” and mitigate anti-trust and confidentiality / privacy concerns by protecting the Community of considerable size / extension while ensuring there is no material detriment to Community rights / legitimate interests. Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination.”<sup>50</sup>

<sup>46</sup> DotMusic Application, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

<sup>47</sup> See ICANN CPE microsite, <https://newgtlds.icann.org/en/applicants/cpe>

<sup>48</sup> See .MUSIC Application, 18A. Also see 20C, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added)

<sup>49</sup> See .MUSIC Application, 20A, para.3 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added); Also see DotMusic Public Interest Commitments: “... Community definition of a “logical alliance of communities of similar nature that relate to music” ...” at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

<sup>50</sup> DotMusic Application, 20A, para.1



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- d. Examples of music community Organisation and Cohesion were described in 20A, which included “commonly used [ ] classification systems such as ISMN, ISRC, ISWC, ISNI [ ].”<sup>51</sup>
- e. The Size and Extension of the community defined were described in 20A, which stated that “the Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries [ ] with a Community of considerable size with millions of constituents (‘SIZE’).”<sup>52</sup>
- f. The “Name” of the community defined was described in 20A. “The name of the community served is the ‘Music Community’ (‘Community’).”<sup>53</sup>
- g. The “Nexus between Proposed String and Community” was described in 20A and 20D. “The ‘MUSIC’ string *matches* the name (‘Name’) of the Community and is the established name by which the Community is commonly known by others.”<sup>54</sup> DotMusic’s application “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in 20D. “The .MUSIC string relates to the Community by *completely representing* the *entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model.”<sup>55</sup>

<sup>51</sup> Id., 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12<sup>th</sup>, 2015 (See <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>): “The International Standard Music Number (ISMN) is a unique number for the identification of all notated music publications from all over the world. The ISMN is an ISO certified global standard number (ISO 10957:2009). See <http://www.ismn-international.org/whatis.html> and [http://www.iso.org/iso/home/store/catalogue\\_ics/catalogue\\_detail\\_ics.htm?csnumber=43173](http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=43173),” footnote 7, p.8; “The ISRC (International Standard Recording Code) is the international identification system for sound recordings and music video recordings. The ISRC is an ISO certified global standard number (ISO 3901:2001) and is managed by the IFPI. See <http://isrc.ifpi.org>, <https://www.usisrc.org/about/index.html> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=23401](http://www.iso.org/iso/catalogue_detail?csnumber=23401),” footnote 8, pp.8 to 9; “The ISWC (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical works. The ISWC has been approved by ISO (International Organization for Standardisation) as a global standard (ISO 15707:2001) and is managed by CISAC. See <http://www.iswc.org/en/faq.html> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=28780](http://www.iso.org/iso/catalogue_detail?csnumber=28780), footnote 9, p.9; “The International Standard Name Identifier (ISNI) is the ISO certified global standard number (ISO 27729) for identifying the millions of contributors to creative works and those active in their distribution. ISNI holds public records of over 8 million identities and 490,000 organizations. See <http://www.isni.org> and [http://www.iso.org/iso/catalogue\\_detail?csnumber=44292](http://www.iso.org/iso/catalogue_detail?csnumber=44292),” footnote 10, p.9; Also see DotMusic Answers to Clarifying Questions, <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, pp. 121 to 122 of 993, Exhibit A21

<sup>52</sup> DotMusic Application, 20A, para.4 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>

<sup>53</sup> Id., 20A, para.1

<sup>54</sup> Id., 20A, para.3 (emphasis added)

<sup>55</sup> Id., 20D, para.1 (emphasis added)



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14. DotMusic's community application received "documented support" from multiple organizations representing a majority of the community. In 20D, DotMusic states "See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support."<sup>56</sup> According to the DotMusic Application Materials, the community defined and application is supported by *multiple* recognized organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall community defined in its application (defined as the "organized and delineated logical alliance of communities of similar nature that relate to music").<sup>57</sup>

### Independent Expert Letters<sup>58</sup>

15. Forty-three (43) independent expert letters were also submitted to ICANN and the CPE provider that were in agreement that DotMusic's Application met the Community Establishment, Nexus and Support criteria.<sup>59</sup> The experts included Dr. Argiro Vatakis, Dr. Askin Noah, Dr. Brian E Corner, Dr. Chauntelle Tibbals, Dr. Daniel James Wolf, Dr. David Michael Ramirez II, Dr. Deborah L Vietze, Dr. Dimitrios Vatakis, Dr. Dimitris Constantinou, Dr. Eric Vogt, Dr. Graham Sewell, Dr. Jeremy Silver, Dr. Joeri Mol, Dr. John Snyder, Dr. Jordi Bonada Sanjaume, Dr. Jordi Janer, Dr. Juan Diego Diaz, Dr. Juliane Jones, Dr. Kathryn Fitzgerald, Dr. Lisa Overholser, Dr. Luis-Manuel Garcia, Dr. Manthos Kazantzides, Dr. Michael Mauskapf, Dr. Mike Alleyne, Dr. Nathan Hesselink, Dr. Paul McMahon, Dr. Rachel Resop, Dr. Shain Shapiro, Dr. Sharon Chanley, Dr. Tom ter Bogt, Dr. Vassilis Varvaresos, Dr. Wendy Tilton, Dr. Wilfred Dolfsma, JD Matthew Covey Esq, Jonathan Segal MM, Lecturer David Loscos, Lecturer David Lowery, Lecturer Dean Pierides, Professor Andrew Dubber, Professor and Author Bobby Borg, Professor Heidy Vaquerano Esq and Professor Jeffrey Weber Esq.

<sup>56</sup> Id., 20D, last paragraph

<sup>57</sup> See Support Letters from multiple organizations for DotMusic's Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>58</sup> The independent experts selected were from different fields of study. Having such diversity ensured that perspectives from different disciplines were applied to assess whether or not DotMusic's application met the CPE criteria in question. The independent expert letters agreed unanimously that the criteria were met.

<sup>59</sup> See 43 independent expert letters scoring chart at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A40; Also see 43 independent expert letters at <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also see <http://music.us/expert/letters>.





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## The Independent Nielsen QuickQuery Poll

16. An independent poll conducted by Nielsen<sup>60</sup> was also submitted to ICANN and the CPE provider as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria in relation to the Community Establishment and Nexus sections. According to DotMusic's Application and the Independent Poll conducted by Nielsen, the "Name" of the community defined was the "Music Community"<sup>61</sup> and the "Definition" of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."<sup>62</sup> The independent Nielsen QuickQuery survey (August 7, 2015, to August 11, 2015) comprised of 2,084 adults.<sup>63</sup> Its objective was to evaluate whether or not the applied-for string "music" was commonly-known and associated with the identification of the community that was defined by DotMusic by asking the following question: "If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?" A substantial majority, 1562 out of 2084 (75% of the respondents) responded positively, asserting that the applied-for string (music) corresponds to the name of community addressed by the application (the "music community") and that the "music community" definition derived from DotMusic's application can be accurately defined as "a logical alliance of communities of individuals, organizations and business that relate to music."

<sup>60</sup> See Nielsen QuickQuery. Retrieved on May 11, 2016, from

<http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

<sup>61</sup> According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>; According to the DotMusic Application: "The 'MUSIC' string matches the name ('Name') of the Community and is the established name by which the Community is commonly known by others." See 20A, para.3

<sup>62</sup> According to the DotMusic Application: "The Community is a strictly delineated and organized community of individuals, organizations and business, a 'logical alliance of communities of a similar nature ('COMMUNITY')', that relate to music: the art of combining sounds rhythmically, melodically or harmonically." See 20A, para.3; Also see DotMusic Public Interest Commitments: "[...] Community definition of a 'logical alliance of communities of similar nature that relate to music' [...]" at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

<sup>63</sup> See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: "Q3505 If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?" <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A32, Appendix B, pp. 38 to 41; Also see Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3





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## Responses to CPE Clarifying Questions

17. On September 29th, 2015, DotMusic received Clarifying Questions from ICANN and the CPE Panel on Community Establishment and Nexus.<sup>64</sup> On October 29, 2015, DotMusic provided ICANN and the CPE Provider with responses to the Clarifying Questions,<sup>65</sup> which included:
- a. A “Community Establishment & Definition Rationale and Methodology” section clarifying the “community defined, ‘a delineated and organized logical alliance of communities of similar nature related to music’” and the Community Establishment rationale and methodology.<sup>66</sup>
  - b. A “Venn Diagram for Community Definition and Nexus” section clarifying how the community defined matches the string, including clarification that “non-music community members that lack recognition and awareness of the community defined” were not part of the community defined because the community definition was a “strictly delineated and organized logical alliance of communities related to music with [the] requisite awareness of [the] community defined.”<sup>67</sup>
  - c. A “Music Sector Background: Music is a Copyright Industry for Clarifying Question D” section clarifying that the “organized alliance” community defined by DotMusic functions in a regulated sector and as such must have organisation, cohesion and awareness across all its members. DotMusic also points to “ICANN Resolutions and GAC Advice that recognized music as a regulated, sensitive sector.”<sup>68</sup> DotMusic also clarifies that the community defined has cohesion under international copyright law, treaties and conventions e.g. music “rights are defined within national copyright laws which are, in large part, shaped by international treaties, many of which are administered by WIPO.<sup>69</sup> Copyright law defines the rights conferred on authors of original works, and those who perform them, as well as those who support their widespread dissemination...Copyright includes economic rights which give the creator the right to authorize, prohibit or obtain financial compensation...Copyright also confers moral rights (Article 6b is of the Berne Convention) allowing the creator of a work to claim authorship in it (the right

<sup>64</sup> See Clarifying Questions (“CQ”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A20

<sup>65</sup> See Answers to Clarifying Questions (“CQ Answers”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A21

<sup>66</sup> Id., Annex A, p.26 of 993

<sup>67</sup> Id., Annex D, p.80 of 993

<sup>68</sup> Id., Annex F, p.93 of 993

<sup>69</sup> WIPO is a United Nations agency with 188 member states, which provides a global forum for intellectual property services, policy, and cooperation (See <http://www.wipo.int/about-wipo/en/index.html>). WIPO is also the leading provider of domain dispute and alternative dispute resolution services under the Uniform Dispute Resolution Policy (“UDRP”) adopted by ICANN (See <http://wipo.int/amc/en/domains> and <https://icann.org/resources/pages/udrp-rules-2015-03-11-en>)



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of paternity or attribution) and to object to any modification of it that may be damaging or prejudicial to them (the right of integrity) [ ] Every piece of music is protected by copyright.”<sup>70</sup>

- d. A “Forty-three (43) Expert Testimonies” section providing forty-three (43) expert letters that supported the position that DotMusic’s Application met the Community Establishment, Nexus and Support CPE criteria.<sup>71</sup>
- e. An “Independent Nielsen / Harris Poll for Community Establishment and Nexus” section providing supporting evidence by the general public (over 2000 surveyed) to demonstrate that DotMusic’s Application met the CPE criteria for the sections of Community Establishment and Nexus.<sup>72</sup>

### The .MUSIC CPE Report

18. The .MUSIC CPE Report<sup>73</sup> was released on 10 February 2016, giving DotMusic a score of 10 out of 16 possible points. 4 points were deducted from the “Community Establishment” criterion section, 1 point was deducted from the “Nexus between Proposed String and Community” criterion section, and 1 point was deducted from the “Community Endorsement” criterion section. 14 points were required to pass CPE.

## C. The Reconsideration Request 16-5

19. DotMusic,<sup>74</sup> the American Association of Independent Music<sup>75</sup> (“A2IM”), the Association of Independent Music<sup>76</sup> (“AIM”), the Content Creators Coalition<sup>77</sup> (“C3”), the Independent Music Companies Association<sup>78</sup> (“IMPALA”), the International Federation of Arts Councils and Culture Agencies<sup>79</sup> (“IFACCA”), the International Federation of Musicians<sup>80</sup> (“FIM”), the Merlin Network<sup>81</sup> (“Merlin”), the Nashville Songwriters Association International<sup>82</sup>

<sup>70</sup> Id., Annex F, pp.97 to 99 of 993

<sup>71</sup> Id., Annex K, pp. 159 to 993 of 993

<sup>72</sup> Id., Annex H, pp.102 to 105 of 993

<sup>73</sup> DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

<sup>74</sup> <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

<sup>75</sup> <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

<sup>76</sup> <http://musicindie.com/about/aimmembers>

<sup>77</sup> <http://c3action.org>

<sup>78</sup> <http://impalamusic.org/node/16>

<sup>79</sup> [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members) and [http://ifacca.org/membership/current\\_members](http://ifacca.org/membership/current_members)

<sup>80</sup> <http://fim-musicians.org/about-fim/history>

<sup>81</sup> <http://merlinnetwork.org/what-we-do>

<sup>82</sup> <https://nashvillesongwriters.com/about-nsai>



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(“NSAI”), ReverbNation<sup>83</sup> and the Worldwide Independent Network<sup>84</sup> (“WIN”), co-filed a Reconsideration Request 16-5 (“RR”)<sup>85</sup> requesting that the ICANN Board Governance Committee reject the findings of the .MUSIC CPE Report based on numerous CPE process violations, including the contravention of established procedures by both ICANN and the CPE Panel.<sup>86</sup> Some of these violations of established procedures and policies included:

- a. Ignoring International Laws and Conventions in relation to cohesion under music copyright<sup>87</sup> and incorrectly determining that the music community defined has no organization, no cohesion and no awareness. Such a conclusion would wrongly suggest that the community defined as a whole does not have international music rights functioning under a regulated sector.

<sup>83</sup> <https://reverbNation.com/band-promotion> (Artists/Bands), <https://reverbNation.com/industryprofessionals>, (Industry), <https://reverbNation.com/venue-promotion> (Venues), and <https://reverbNation.com/fan-promotion> (Fans)

<sup>84</sup> <http://winformusic.org/win-members>

<sup>85</sup> See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

<sup>86</sup> Also see RR-related letter from the International Federation of the Phonographic Industry (“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,” <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>; Also see RR-related letter from the National Music Council, representing almost 50 music organizations (including the Academy of Country Music, American Academy of Teachers of Singing, American Composers Forum, American Federation of Musicians, American Guild of Musical Artists, American Guild of Organists, American Harp Society, American Music Center, American Orff-Schulwerk Association, Artists Against Hunger & Poverty, ASCAP, BMI, Chopin Foundation of the United States, Conductors’ Guild, Country Music Association, Delta Omicron International Music Fraternity, Early Music America, Interlochen Center for the Arts, International Alliance for Women in Music, International Federation of Festival, Organizations, International Music Products Association, Mu Phi Epsilon International Music Fraternity, Music Critics Association of North America, Music Performance Fund, Music Publishers Association of the United States, Music Teachers’ Association of California, Music Teachers National Association, National Academy of Popular Music, National Academy of Recording Arts & Sciences, National Association for Music Education, National Association of Negro Musicians, National Association of Recording Merchandisers, National Association of Teachers of Singing, National Federation of Music Clubs, National Flute Association, National Guild for Community Arts Education, National Guild of Piano Teachers, American College of Musicians, National Music Publishers’ Association, National Opera Association, Recording Industry Association of America, SESAC, Sigma Alpha Iota and the Songwriters Guild of America) and the International Music Council (an organization that UNESCO founded in 1949 representing over 200 million music constituents from over 150 countries and over 1000 organizations globally. See <http://www.imc-cim.org/about-imc-separator/who-we-are.html>). 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://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

<sup>87</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>



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- b. Misapplying and ignoring the “Community” Definition defined 20A. Instead the CPE Panel used a sentence from 20D as the community definition even though the AGB required that the definition be stated explicitly in 20A.
- c. Misapplying and ignoring “logical alliance” Community Definition that has “cohesion” and fulfills the criteria based on the AGB.
- d. Misapplying and ignoring the Community “Name” under the Nexus section.
- e. Misapplying and ignoring the “Majority” criterion under the Support section.
- f. Misapplying and ignoring “Recognized” organisations that are recognized by the United Nations and the WIPO.
- g. Ignoring international music organisations that are “mainly” dedicated to the community defined and are recognized by United Nations and WIPO.
- h. Ignoring evidence that the Music Community defined existed prior to 2007.
- i. Misapplying policy in relation to GAC consensus Category 1 Advice accepted by ICANN that demonstrates that the community defined is united and legally-bound by a regulated sector.
- j. Discriminating by failing to compare and apply the same consistent grading methodology and rationale that was adopted by the CPE Panel in community applications that passed CPE. Instead the CPE Panel applied inconsistent point distribution in comparison to community applications that passed CPE.
- k. Failing to implement a quality control process to ensure fairness, transparency, predictability and non-discrimination in the CPE Process.
- l. Failing to address the CPE Panel’s conflict of interest with another competing applicant that is a violation of the ICANN-EIU Statement of Work and Expression of Interest, the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles.
- m. Failing to undertake, document and cite appropriate research to support the conclusions CPE Report’s conclusions in a compelling manner.





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## D. Expert Opinions

20. Three (3) expert opinions were submitted to ICANN. The expert opinions were presented from three (3) perspectives and fields of study: ethnomusicology, law and intellectual property, and organization.
21. An Expert Legal Opinion was submitted by Honorary Professor Dr. Jørgen Blomqvist on 17 June 2016 and said, in summary:<sup>88</sup>
  - a. *Activities of Music Community members – regardless whether they are commercial or non-commercial – are reliant in one way or another on the regulated structure of the music sector and cohesion of general principles of international music copyright, international law as well as international conventions, treaties and agreements that relate to music copyright and activities. The CPE Panel’s conclusion that there is “no substantive evidence” that the Music Community defined in its entirety has cohesion (i.e. does not unite cohesively under music copyright or is reliant on international conventions for its activities) is neither a compelling nor a defensible argument. In fact, all of the Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions, management of rights and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.*
  - b. *ICANN’s Articles of Incorporation mandate that all of ICANN’s activities and decision-making must be “in conformity with relevant principles of international law and applicable international conventions.” The Music Community participates in a regulated sector with activities tied to music that must cohere to general principles of international music copyright, international law as well as international conventions, treaties and agreements, which are held together by a strong backbone of collective management of rights that channels permissions to use protected material and the remuneration for such use from the one end of the feeding chain (the authors, performers and producers) to the other (the music users) and vice versa. Accordingly, ICANN cannot deny Music Community “cohesion” when its own Articles of Incorporation mandate it to recognize applicable international conventions, such as the 1886 Berne Convention that relates to the protection of music copyright signed by 171 countries and which, for*

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<sup>88</sup> Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>





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example, in its Article 14 bis (3) recognizes the specific situation for musical works.<sup>89</sup>

- c. *It appears that the Panel 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..."<sup>90</sup>*
- d. *The CPE Panel also ignored the significance of the Music Community's regulated sector that is governed by general principles of international copyright law as well as international conventions, treaties and agreements as well as by the collective management of copyright and related rights. In fact, both the ICANN Board and the NGPC have admitted such a finding by accepting the GAC Category 1 Advice that .MUSIC is a "string that is linked to regulated sector" that "should operate in a way that is consistent with applicable laws." In effect, this ICANN-approved resolution reaffirms that all music groups (and music sub-groups) that comprise the Music Community defined have cohesion because they participate as a whole in a regulated sector with activities tied to music that cohere to general principles of international copyright law, international conventions, treaties and agreements.<sup>91</sup>*
- e. *The music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. Recognized organizations include the IFPI and the FIM. DotMusic's application possesses documented support from the recognized community member organizations.<sup>92</sup>*

<sup>89</sup> Blomqvist, Expert Legal Opinion, pp. 39 - 40

<sup>90</sup> Id., p.40

<sup>91</sup> Id., p.41

<sup>92</sup> Id., p.48



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22. An Expert Ethnomusicologist Opinion was submitted by Dr. Richard James Burgess on 12 September 2016 and said, in summary:<sup>93</sup>
- a. *The CPE Report's conclusion that there is "no substantive evidence" that the defined Music Community in its entirety has cohesion is not a compelling or a defensible statement. The Music Community in its entirety (across all music constituent member categories as described in DotMusic's Application) must unite cohesively under music copyright in order to function as it does today. It is more of cohesion than a commonality of interest because legal music activities and participation are established by general principles of international law. The global Music Community as a unit is reliant on international conventions for its activities. Without cohesion established under international law and music-related conventions (such as the Berne Convention), the Music Community would lack structure and as a result would not be able to provide music to consumer nor have any way to compensate musicians and corresponding rights holders. In effect, if the Music Community across all member categories lacked cohesion and an awareness and recognition of general principles such music copyright protection established by international law, international conventions and a regulated sector then music consumption and the music industry as we know them today would not exist in their present form nor cohere. Mass copyright infringement cases (such as Napster, Limewire, Kazaa and Megaupload) showcase the importance of a regulated Music Community structure. Without cohesion and dependence under the current music regulatory framework that forms the basis of the music business and industry, the Music Community will have difficulties sustaining itself with respect to longevity because there will no longer be any protection of musical works or the ability for creators to be compensated or receive attribution. Furthermore, in the absence of international conventions and structures, Community members will no longer be able to make any sort of living through music.*<sup>94</sup>
  - b. *Activities of Music Community members depend on the regulated structure of the music sector. My music career's viability, that has spanned over 40 years, has been sustainable because of the Music Community's reliance on general principles of international music copyright, international law as well as international conventions, treaties and agreements (such as the Berne Convention that relates to music copyright and music activities).*<sup>95</sup>
  - c. *[E]ach member category delineated in DotMusic's Community definition is essential for the complete, proper and efficient functioning of the Community. In*

<sup>93</sup> Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

<sup>94</sup> Dr. Richard Burgess, Expert Ethnomusicologist Opinion, pp. 7 - 8

<sup>95</sup> Dr. Richard Burgess, Expert Ethnomusicologist Opinion, pp. 7 - 8



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*my professional music experience, all music constituent types delineated are interdependent and reliant on each other given the symbiotic nature of the Music Community and its regulated sector.*

- d. *From my perspective as an expert ethnomusicologist, it is essential to realize that the Community does not exist because of these international instruments; rather the instruments are a reflection of the fact that there is an organized Music Community. They satisfy a need of the Community, which is why the signatory states negotiated the treaties. All those who participate in music activities who demonstrably accept that they are subject to regulation is a reflection of having awareness and recognition that the Music Community exists. International instruments, such as the Berne Convention, are evidence of the existence of the Music Community. International treaties and agreements are a reflection of a need for rules that are accepted by a substantial number of nation states to serve the public interest and the public good with respect to those covered by the conventions. In my expert ethnomusicologist opinion, the existing international instruments provide the strongest evidence for Community existence that demonstrates awareness and recognition among its members.<sup>96</sup>*
- e. *[T]he Expert Ethnomusicologist Opinion agrees with the definition of the Music Community as an “alliance” of music communities that are organized under a regulated music sector and general principles of international copyright law and conventions of similar nature. DotMusic’s definition of the Music Community as an organized and delineated “alliance” of music communities of similar nature is the most accurate and reflective definition of the Community. Based on my music experience, the dictionary definitions of “alliance” align entirely with how the Music Community organizes itself. An “alliance” is defined as “a union between groups etc.: a relationship in which people agree to work together,” “an association to further the common interests of the members” (i.e. more of cohesion than a commonality of interest), a “union by relationship in qualities” or “a treaty of alliance.”<sup>28</sup> While there may be many member category types, music constituents all are united under common principles, such as the protection of music. As the CEO of one of the world’s leading music trade organizations, I can testify that it is the norm that organizations representing diverse member category types work together as a united family to protect principles aligned with DotMusic’s articulated Mission and Purpose, such as protecting music, supporting fair compensation as well as promoting legal music and music education.<sup>97</sup>*
- f. *The CPE Report does not explicitly define nor identify the delineated constituent category type(s) that should have been excluded to enable the community defined to function cohesively as defined by the AGB. The CPE Report did not provide any research or analysis explaining which specific music constituent types are not essential to the Music Community to function as it does today and how these music*

<sup>96</sup> Id., p.9

<sup>97</sup> Id., p.10



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*constituent types' activities and participation lack cohesion in relation to regulatory nature music sector and how the music community organizes itself and functions today. As such, any suggestion that a particular delineated community type compromises the cohesiveness of the "community defined as a whole" is false, imprecise and undocumented. Not only did ICANN and the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, ICANN and the EIU did not provide any EIU supporting research and documented evidence to substantiate this particular CPE Report conclusion. That said, a few of the primary categories, such as Musical Groups and Artists, Independent Music Artists, Performers, Arrangers and Composers, Music Publishers, Music Recording Industries, Music Collection Agencies or Performance Rights Organizations, represent nearly all of the Music Community defined in size. Even if one considers the EIU's undefined music constituent types that, according to the CPE Report, lacked cohesion with the community defined (I do not agree to such a vague, non-specific and unsubstantiated assessment), they are not substantial in size in comparison to be "considerable enough" (or influential enough) to conclude that "community defined as a whole cannot be said to have cohesion." Moreover, one "member category"<sup>98</sup>*

- g. *[A]s long as music is being made then the Community defined will continue to exist. As mentioned earlier, even if the CPE Report's purported Community definition of "member categories" is considered as the Community defined then again the CPE Report fails to show how these "member categories" will not continue into the future. In fact, all these Music Constituent categories (or constituent types) that delineate the "logical alliance of music communities" are essential for the Community to function as it does today and all are expected to have an extended tenure given the Community's symbiotic nature. As such, the community definition cannot be construed. Any assertion that the community defined will not have an "extended tenure or longevity—non transience—into the future" cannot in my view be considered credible. There is no ambiguity or contradiction concerning the Community's permanency because the music sector's regulated structure has a long history of sustainability, which includes conventions that date from 1886 that will continue to exist into the future. Even certain rules or guidelines are modified to reflect the digital age or to adapt to other changes in the regulatory environment, the regulatory framework of the music sector will never disappear. Furthermore, the alliance of communities of similar nature that relate to music will not disappear as a whole. The alliance of music communities are expected to evolve over time but not disappear or be "ephemeral." Again, not only did the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, the EIU did not provide any supporting research and documented evidence to substantiate this particular CPE Report conclusion.<sup>99</sup>*

<sup>98</sup> Id., p.14

<sup>99</sup> Id., p.24





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- h. *[I]n my Expert Ethnomusicologist Opinion, the music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. It is indisputable that DotMusic's application possesses documented support from the recognized community member organizations.*<sup>100</sup>
- i. *[R]ecognized supporting organizations, such as A2IM and Reverbnation, are representative of the addressed community defined in its entirety<sup>138</sup> without discrimination, with members across all the music categories and music subset of categories delineated by DotMusic's Application. As such, both A2IM and Reverbnation qualify as "recognized" community member organizations as per the AGB.*<sup>101</sup>
23. A Joint Organisation Experts' Opinion was submitted by Dr. Noah Askin and Dr. Joeri Mol on 11 October 2016 and said, in summary:<sup>102</sup>
- a. *Based on our collective qualifications and decades of experience in organisation, our professional vocation as researchers, academics and professors/lecturers/teachers, and having reviewed the relevant parts of the documents that include the ICANN Applicant Guidebook ("AGB"), the CPE Guidelines, DotMusic's publicly-available Application Materials, the expert testimonies submitted in support of the Application (43 in total), the results of an independent Nielsen Poll concerning DotMusic's community "definition" and "name," DotMusic's Public Interest Commitments, the CPE Reports conducted by the Economist Intelligence Unit (the EIU) on behalf of ICANN for the community applications for the strings .HOTEL, .SPA, .ECO, .RADIO, .OSAKA, .CPA, .MERCK and .GAY, the Expert Legal Opinion by Honorary Professor Dr. Blomqvist and the Expert Ethnomusicologist Opinion by Dr. Burgess, it is our collective expert opinion (the "Joint Organisation Experts' Opinion) and conclusion that DotMusic fully meets all CPE criteria for a score of 16 points. The music community defined is indeed a "real community" that can be grounded in both organization theory and practice. Indeed one could argue that the music community defined has a significant level of cohesion because it is highly organised in nature and operates under a regulated sector under international principles of copyright law and conventions. The Joint Organisation Expert's Opinion also provides additional supporting perspectives in relation to what constitutes an organised, symbiotic and*

<sup>100</sup> Id., pp. 27 - 28

<sup>101</sup> Id., pp. 28 - 29

<sup>102</sup> Joint Organisation Experts' Opinion by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>





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*interdependent community, including findings that, indeed, the music community defined and delineated is “real” and organised. The essential component of a “real community” is that it is linked by ties of commensalism, interdependence and symbiosis, including collective action by interest groups and associations that builds community legitimacy (Aldrich and Ruef). An organised community is a set of diverse, internally homogeneous populations that are fused together into functionally integrated systems based on interdependencies (Astley), with great emphasis on the relationships comprising a functioning community (Barnett, Henrich, and Douglas). In organisational ecology, community members are those that are essential to the viability of the other (Hannan and Freeman). Organised communities, such as the music community defined, are considered “real” and legitimate based on shared principles and a system of norms, values, beliefs, and definitions (Mark C. Suchman) and from a socio-political organisational theory perspective, a willingness to associate by environment (Aldrich and Fiol). Communities, such as the music community defined, emerge from relationships between units that involve competition, cooperation, dominance, and symbiotic interdependence (Aldrich and Ruef). An organised community is defined as a set of co-evolving organizational populations joined by ties of commensalism (Amos Hawley) and symbiosis (Aldrich and Ruef) through their orientation to a common technology (such as the Internet), normative order (such as a system of common values and principles), or legal regulatory regime (such as music copyright regulation by government).*

- b. *DotMusic delineated all music constituent parts that would represent the essential music community members that would have a legitimate claim in music-related activities and music-related participation with respect to the string. As per the CPE Panel, the music community defined “bounds community membership by way of well-defined categories” and “provides a clear and straightforward membership definition” based on NAICS codes. This scientific methodology was not an attempt to construe a community to be awarded a sought-after string. In fact, this approach is the most common scientific model used by researchers, academics and institutions (e.g. the Creative Economy Coalition and UNESCO) for defining, organising and delineating creative communities that are comprised of essential, symbiotic and interconnected category groups. For a community to function, community resources include not only individual artistic and creative abilities, but also all the complementing support necessary for activities to be undertaken (Bunting, Jones and Wagner). Music community cohesiveness relies on all music community components and sub-components to work together in symbiosis. DotMusic sensibly excluded non-essential (i.e. those that would not have a legitimate claim to identify themselves as members of the community) and peripheral entities that are*



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*unrelated to music from every “member category” to ensure the music community definition was precise and to make certain that the community addressed matches the string in relation to “music” in its entirety (without discriminating against legitimate music members, while at the same time preventing any overreach beyond the community defined). The music community defined is held together by shared sets of norms, values and practices and is defined in terms of an alliance, which by definition inherently has cohesion and organisation.*

- c. *The Joint Organisation Experts’ Opinion also used the Ngrams humanities research tool to conduct statistical analyses and frequency charting on corpuses found in printed sources prior to 2008. Relevant terms, such as the “music industry,” the “music community,” the “IFPI” and the “RIAA,” were charted against other pertinent benchmarks to comparatively demonstrate that (i) the music community defined is organised (given the prevalence of the “music industry” term) and pre-existed 2007; (ii) the “music community” name is a well-known short-form of the community defined (and pre-existed 2007); and (iii) both the RIAA and IFPI are recognized organisations mainly dedicated to music (and pre-existed 2007). The Joint Organisation Experts’ Opinion also investigated whether the “music community” name was a well-known short form of the community defined. Both music community members and the global media use the term “music community” to correspond to the community defined, encompassing both commercial (i.e. business/industry) and non-commercial music stakeholders. The “music community” is the most popular name in common parlance to describe the community addressed to match the string.*
- d. *The Joint Organisation Experts’ Opinion concludes that DotMusic’s application satisfies the criteria for “Community Establishment,” “Nexus” and “Support.” Based on the evidence provided and our expertise in organisation theory, DotMusic’s application meets the AGB’s community priority threshold. This conclusion is consistent with 43 other independent expert opinions that were submitted prior to DotMusic’s CPE process and two other independent expert opinions submitted following the release of the CPE Report, namely, the Legal Expert Opinion by Honorary Professor Dr. Blomqvist and the Ethnomusicologist Expert Opinion by Dr. Burgess. In conclusion, we are also in agreement that DotMusic’s application should be granted community priority by ICANN.<sup>103</sup>*

<sup>103</sup> Dr. Noah Askin and Dr. Joeri Mol, Joint Organisation Experts’ Opinion, pp. 3 - 5



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24. All Expert Opinions concluded that DotMusic's Application met the CPE criteria based on the guidelines set forth in the AGB.

## E. The Council of Europe Report

25. An independent Council of Europe<sup>104</sup> report also analyzed the CPE Process and provided recommendations to ICANN. The report titled "*Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*"<sup>105</sup> (the "CoE Report") was written by Eve Salomon and Kinanya Pijl and submitted to ICANN.<sup>106</sup>
26. The CoE Report revealed that the CPE Process was undermined by issues of inconsistency, disparate treatment, conflicts of interest, and lack of transparency in violation of ICANN's Bylaws and Articles of Incorporation. Furthermore, the CoE Report addressed how these failings specifically harmed DotMusic:

### a. CPE Process contained Major Flaws:

- i. *"During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination."*<sup>107</sup>
- ii. *"[W]e have found that priority is given to some groups and not to others, with no coherent definition of 'community' applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself ofrt all responsibility for determining priority, despite the delegated third party*

<sup>104</sup> The Council of Europe is Europe's leading human rights organization, with 47 member states (28 of which are also members of the European Union). The Council of Europe also has observer status within ICANN's Governmental Advisory Committee

<sup>105</sup> Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

[https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2), MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

<https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>

<sup>106</sup> Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>107</sup> *Id.*, p. 9.



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*(the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority.”<sup>108</sup>*

**b. ICANN and the EIU treated DotMusic Differently than other Community Applicants that passed CPE:**

i. **“First, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process... The Guidebook says utmost care has been taken to avoid any ‘double-counting’ – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria. However, the **EIU appears to double count ‘awareness and recognition of the community amongst its members’ twice: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.”<sup>109</sup>****

- “As an example, the .MUSIC CPE evaluation says:

*1A: However, according to the AGB, ‘community’ implies ‘more of cohesion than a mere commonality of interest’ and there should be ‘an awareness and recognition of a community among its members.’ The community as defined in the application does not demonstrate an awareness and recognition among its members. The 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’ (Oxford Dictionaries).*

*1B: However, as previously noted, the community as defined in the application does not show evidence of ‘cohesion’ among its members, as required by the AGB.*

*Although both 1A and 1B are part of the same criterion, the **EIU has deducted points twice for the same reason.”<sup>110</sup>***

- **“It is also interesting to note that the **EIU Panel has not considered this question of ‘cohesion’ at all in the CPE for .RADIO, where the term does not appear.”<sup>111</sup>****

<sup>108</sup> *Id.*, p. 16.

<sup>109</sup> *Id.*, p. 49 (emphasis added).

<sup>110</sup> *Id.*, p. 49 (emphasis added).

<sup>111</sup> *Id.*, p. 49 (emphasis added).





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- ii. **“Second, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others.”**<sup>112</sup>
- **“The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a majority of the community . . . . By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.”**<sup>113</sup>
  - **“It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional membership bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to membership by that community.”**<sup>114</sup>
- iii. **“Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to improve their process over time, but that this did not affect the process as described in the AGB.”**<sup>115</sup>
- iv. **Fourth, “[w]e found that although the Statement of Works (SOW) between ICANN and the EIU refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done... A mere assessment of consistency and alignment**

<sup>112</sup> *Id.*, p. 49 (emphasis added).

<sup>113</sup> *Id.*, p. 51 (emphasis added).

<sup>114</sup> *Id.*, p. 57.

<sup>115</sup> *Id.*, p. 51 (emphasis added).



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*with the AGB and CPE Guidelines does not suffice. Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law)."*<sup>116</sup>

**c. Improper Conflicts of Interest Existed During DotMusic's CPE Process:**

- i. *"It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest . . . In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that **Sir Robin Jacob** (Panellist) represented Samsung in a legal case, one of Google's multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist."*<sup>117</sup>
- ii. *"It was pointed out to us that **Eric Schmidt** became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google's former CEO). Google is in contention with CBAs for a number of strings[, such as .MUSIC], which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of **Vint Cerf**, who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN's reputation for taking decisions on a fair and non-discriminatory basis."*<sup>118</sup>
- iii. *"On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN's stated policy on community priority and the potential revenues that can be earned through*

<sup>116</sup> *Id.*, p. 52.

<sup>117</sup> *Id.*, p. 41 (emphasis added).

<sup>118</sup> *Id.*, p. 47 (emphasis added).



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*the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.”<sup>119</sup>*

**d. Lack of Transparency in the CPE Process:**

- i. *“The anonymity of panel members has been defended on the grounds that the Panels are advisory only. This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report, the EIU state, ‘We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.’ However, in all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.”<sup>120</sup>*
  - ii. *“It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available presubmission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).”<sup>121</sup>*
27. The CoE Report confirms that the CPE Process had issues concerning inconsistency, disparate treatment, conflicts of interests, and lack of transparency – especially in relation to DotMusic’s application. This is contrary to ICANN’s own commitments, Bylaws, and Articles of Incorporation. In the foreword to the CoE Report, *Jan Kleijssen*, the Council of Europe’s *Director of Information Society and Action against Crime*, reiterates ICANN’s commitment to make decisions in a fair, reasonable, transparent, and proportionate manner serving the public interest:

*The ICANN Board’s commitment to a new bylaw on human rights recognises that the Internet’s infrastructure and functioning is important for pluralism and diversity*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*, p. 53.

<sup>121</sup> *Id.*, p. 54.



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*in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the **public interest** . . . [P]articular attention is given to ICANN's decision-making which should be as fair, reasonable, transparent and proportionate as possible.<sup>122</sup>*

28. The CoE report re-affirms DotMusic's assertions in Reconsideration Request 16-5 concerning the CPE process for .MUSIC. According to DotMusic, the DotMusic Application Represents a Bona Fide Community and Serves the Public Interest and satisfies the core considerations identified in the CoE Report for determining whether or not a community-based application should be awarded community priority status:

*It seems to us that the core questions for ICANN to be assured of when giving priority to a [Community-based Applicant] are the first ones: "Is the applicant representing a bona fide community, and does it have the support of that community?" We would add a third question here: "Is the applicant properly accountable to the community it represents?" If the answers to those questions are "yes", then that should be the basis for awarding priority.<sup>123</sup>*

29. The CoE Report also outlines the significance of trust and protecting vulnerable communities (e.g., the music community and music consumers) while at the same time enhancing safeguards for strings linked to a regulated sector (such as music) to serve the global public interest:

*It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to national regulation or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse. Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted. To award a community TLD to a community can – as such – **serve the public interest**.<sup>124</sup>*

30. According to the "Declaration of the Committee of Ministers on ICANN, concerning human rights and the rule of law,"<sup>125</sup> in pursuing its **commitment to act in the general public interest**, ICANN should ensure that, when defining access to TLDs, an appropriate balance is struck between economic interests and other objectives of common interest,

<sup>122</sup> *Id.*, p. 3 (emphasis added).

<sup>123</sup> Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," *Directorate General Human Rights and Rule of Law (DGI)* (2016) 17, p. 58, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>124</sup> *Id.*, p. 35 (emphasis added).

<sup>125</sup> Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true).





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such as pluralism, cultural and linguistic diversity, and respect for the special needs of vulnerable groups and communities, such as the global music community.

31. The CoE Report also mentions DotMusic in relation to the right to freedom of expression and how DotMusic will enforce “legitimate” safeguards to protect the music community’s intellectual property rights and consumers against crime, thus facilitating the music community’s freedom of expression:

*DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal, licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community. [T]hese arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime.<sup>126</sup>*

32. Furthermore, the CoE Report asserts that there is a balancing act for evaluating whether a TLD supports the freedom of expression. It describes the balancing act as follows:

*As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas. [But,] [a]t the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded.<sup>127</sup>*

33. DotMusic does not “undermin[e] free expression and restricting numerous lawful and legitimate uses of domain names.”<sup>128</sup> DotMusic’s Public Interest Commitments reiterate its commitment to restrict .MUSIC registration to music community members and *not* to exclude any registrants that have a legitimate interest in registering a .MUSIC domain “to express and seek opinions and ideas” in relation to music or to exclude any registrant who is part of the music community:

<sup>126</sup> *Id.*, p. 20.

<sup>127</sup> *Id.*, pp. 19-20 (emphasis added).

<sup>128</sup> *Id.*, p. 20.



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3. *A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes. . . .*
  5. *A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.<sup>129</sup>*
34. The CoE Report affirmed that DotMusic “intends to create a safe haven for legal music consumption . . . [through] enhanced safeguards, tailored policies, legal music, [and] enforcement policies.”<sup>130</sup> It also reiterates the consensus that the objective of community-based applications is to serve the public interest and protect vulnerable groups (such as the music community) and consumers from harm (such as from malicious abuse):

*There is consensus that community-based applications ought to serve the public interest, but without agreement about what “public interest” might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection.<sup>131</sup>*

35. The authors of the CoE Report also made a presentation to ICANN during an ICANN webinar called “Community gTLD Applications and Human Rights”<sup>132</sup> on 18 January 2017.<sup>133</sup>

**a. The Findings on Human Rights, the Public Interest and Communities:**

<sup>129</sup> DotMusic Limited, Specification 11 Public Interest Commitments (“PIC”), pp. 1-2,

<https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>.

<sup>130</sup> Eve Salomon and Kinanya Pijl, Council of Europe Report on “Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” *Directorate General Human Rights and Rule of Law (DGI)* (2016) 17, p. 20, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

<sup>131</sup> *Id.*, p. 8.

<sup>132</sup> ICANN, Community gTLD Applications and Human Rights webinar (2017),

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes>

<sup>133</sup> Eve Salomon and Kinanya Pijl, Community gTLD Applications and Human Rights presentation (2017)

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes?preview=/53772757/64063241/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf>



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- i. *“ICANN adopted a new Bylaw in May 2016 that explicitly commits ICANN to respect internationally recognized human rights.”*
- ii. *“However, the Community TLD [CPE] process failed to adequately protect the following human rights:*
  - *Freedom of expression*
  - *Freedom of association*
  - *Non-discrimination.”*
- iii. *“These rights fell short in large part because due process (itself a Human Right) did not meet acceptable standards.”*
- iv. *“ICANN lacks a clear vision on the purpose of community-based TLDs.”*
- v. *“There is no clear definition of “community” for the purpose of community-based applications: the initially broad definition of community as formulated by the GNSO has been severely restricted in the Applicant Guidebook, the Community Priority Evaluation (CPE) Guidelines and by the Economist Intelligence Unit (EIU). As a consequence, the process defeats the initial GNSO Policy intention.”<sup>134</sup>*

**b. The Findings on Process:**

- i. *“Community Priority Evaluation*
  - *There is no external quality control of the Economist Intelligence Unit’s procedures and decisions, despite this being a term of the contract between the EIU and ICANN.*
  - *ICANN has devolved itself of all responsibility for determining community priority, despite the EIU insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN’s own accountability mechanisms are unable to hold ICANN (or the EIU) to account.”<sup>135</sup>*
- ii. *“Accountability Mechanisms*
  - *Community-based applicants and their competitors have recourse to the following accountability mechanisms: reconsideration requests, the Independent Review Process, the ICANN*

<sup>134</sup> Id., p.2

<sup>135</sup> Id., p.3



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*Ombudsman, and the court. These mechanisms have been of very limited value to community applicants.”*

iii. *General Concerns*

- *“The cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, have led to accusations of unfairness and of discrimination.*
- *Maximum predictability of the behaviour of delegated decision-makers need to be guaranteed by ICANN.*
- *There are no appeal mechanisms in place.*
- *The lines of responsibility are unclear when it comes to delegated decision-makers.”<sup>136</sup>*

**c. Recommendations to Improve Process**

- i. *“Having greater clarity of the purpose of Community TLDs and why ICANN has created a special regime for Communities. This should be firmly grounded in Human Rights.”*
- ii. *“Introducing a single appeal mechanism which can look at substance as well as process.”*
- iii. *“Ensuring that all the delegated decision making processes – for Community Objections, CPE and the accountability mechanisms –are all human rights compliant and quality controlled.”*
- iv. *“Review the role of the Economist Intelligence Unit. The credibility of the EIU has arguably been damaged by allegations of lack of transparency, collusion with ICANN staff, and conflicts of interest.”<sup>137</sup>*
- v. *“Placing sufficient restrictions on the registry agreements for Community TLDs to deter purely commercial interests from applying. This would shift the burden of proof so that applicants would not need to prove they were, in fact, community-based as this would be a prima facie assumption. Instead, applications would be awarded to those who proved they had the most support from, and accountability to the community, and would provide the most benefit.”<sup>138</sup>*

36. Lee Hibbard, the Internet governance co-ordinator at the Council of Europe, authored an ICANN blog titled “Community consensus on the need for change regarding community-

<sup>136</sup> Id., p.4

<sup>137</sup> Id., p.5

<sup>138</sup> Id., p.6





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based new Generic Top-Level Domains (gTLDs)” on 18 January 2017 that encapsulated community conclusions in relation to the ICANN webinar that was organized by ARTICLE 19, the Council of Europe, and the Cross Community Working Party on ICANNs Corporate and Social Responsibility to Respect Human Rights:<sup>139</sup>

- a. *“The Council of Europe report on Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs) – Opportunities and challenges from a human rights perspective was presented. Its authors, Eve Solomon and Kinanya Pijl, raised concerns regarding the policies and procedures for community objections (i.e. inconsistency in who has standing to object, opaque decision-making) and community priority evaluations (i.e. uncertainty in appealing the decisions of the Economic Intelligence Unit).”*
- b. *“Concerns were expressed about the treatment of community applications in the ICANN process. Cherine Chalaby, ICANN Board member, underlined the need for an adequate rationale in dealing with all community applicants. Avri Doria, Co-chair to the GNSO working group on subsequent gTLD procedures, considered the pre-screening of community applicants.”*
- c. *“In summary, it was generally agreed that ICANN’s policies and procedures should be as clear, fair, reasonable and transparent as possible in order to reduce inconsistency, increase predictability, ensure due process, eliminate discrimination and deter potential gaming.”<sup>140</sup>*

## F. The FTI Reports

37. On 13 December 2017, FTI Consulting published the Reports it had prepared under instructions from Jones Day<sup>141</sup> relating to the CPE Process (“FTI Report”).<sup>142</sup>

<sup>139</sup> Lee Hibbard, ICANN, Community consensus on the need for change regarding community-based new Generic Top-Level Domains (gTLDs) (18 January 2017). See <https://community.icann.org/pages/viewpage.action?pagelD=64067496>

<sup>140</sup> Id.

<sup>141</sup> Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

<sup>142</sup> FTI Consulting, FTI Report (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf> (Communications Between ICANN Organization and the CPE Provider, Scope 1), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf> (Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2) and <https://www.icann.org/en/system/files/files/cpe-process->



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38. The **FTI Report Scope 1** pertained to “**Communications Between ICANN Organization and the CPE Provider.**”<sup>143</sup> It concluded:

*[T]hat there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI’s review of the written communications and documents described in Section III below and FTI’s interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.*<sup>144</sup>

39. The **FTI Report Scope 2** pertained to the “**Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports.**”<sup>145</sup> It concluded:

*[T]hat the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI’s review of the written communications and documents and FTI’s interviews with the relevant personnel [ ]. Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider’s findings in this regard were not the result of inconsistent application of*

[review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf](#) (Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3).

<sup>143</sup> FTI Report, Communications Between ICANN Organization and the CPE Provider, Scope 1 (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>

<sup>144</sup> Id., p.3

<sup>145</sup> FTI Report, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2 (13 December 2017), p.1. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>



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*the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.<sup>146</sup>*

40. The **FTI Report Scope 3** pertained to the **Compilation of the Reference Material** relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests.<sup>147</sup> It concluded:

*[FTI] observed that of the eight relevant CPE reports, two (.CPA and .MERCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers associated with the first .GAY evaluation.<sup>148</sup>*

## G. Analysis

### .MUSIC CPE and CPE Comparative Analysis

#### Community Establishment

41. The CPE Panel argues in the .MUSIC CPE Report that there is "no substantive evidence" that the defined "organized alliance of communities that relate to music" has no cohesion in its entirety. Such an argument is problematic because an "organized alliance" must have cohesion in order to be considered an alliance. In other words, the organizations that form the alliance must have awareness of each other and that each constituent group exists. In short, different constituents interconnect with each other and each constituent performs

<sup>146</sup> Id., p.3

<sup>147</sup> FTI Consulting, FTI Report, Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3 (17 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>148</sup> Id., pp. 57 - 58



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a function that is essential for the music industry to function the way it does. It is not possible to argue that constituent groups that make up the music community are not aware of each other, do not interact with each other, or do not understand how each constituent group functions within this logical alliance. If the CPE Panel's assertions are correct (they are not) then how can the music industry function without cohesion or organisation? More importantly, a lack of cohesion would also suggest that music copyright (and music rights in general) are non-existent or non-essential for each constituent to perform their activity. DotMusic provided various examples of internationally-recognized standards to showcase such cohesion, such as the International Standard Name Identifier (ISNI).<sup>149</sup>

42. **It is also observed that the community definition provided by DotMusic is nowhere to be seen in the CPE Report.** The “organized logical alliance” community definition is disregarded and it appears that a new definition is developed by the CPE Panel to help rationalize its argument. Such a process error creates unintended consequences because applying the wrong community definition compromises how the community application is graded. The CPE Process should be re-evaluated based on this procedural error alone. The description of the “constituent parts” is not the definition of the community. In fact, the AGB mandates applicants that in the case of a community of an “alliance of groups” (which is exactly what the community defined by DotMusic is), that the “details about the constituent parts are required.”<sup>150</sup> It appears that the CPE Panel mistook the “details about the constituent parts” as the community definition (it is not).
43. DotMusic clarifies in its Application materials that *“[t]he 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>151</sup>

<sup>149</sup> The ISNI is an ISO Standard for the Public Identities of parties: that is, the identities used publicly by parties involved throughout the music industry in the creation, production, management, and content distribution chains. See <http://www.isni.org> and <http://www.isni.org/content/isni-music-industry>

<sup>150</sup> AGB, Attachment to Module 2, Evaluation Questions and Criteria. “Descriptions should include: How the community is structured and organized. For a community consisting of an **alliance of groups, details about the constituent parts are required.**” See Notes, 20A, A-14

<sup>151</sup> DotMusic Public Interest Commitments (“PIC”), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6





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44. A logical alliance of communities qualifies for a full score under the AGB: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of [...] a **logical alliance of communities** (for example, an international federation of national communities of a similar nature).”<sup>152</sup> DotMusic met the criteria for a full score by explicitly using similar AGB language to meet this requirement to define the community: “a strictly **delineated** and **organized community** of individuals, organizations and business, a “**logical alliance of communities** of a similar nature (**‘COMMUNITY’**), that relate to music”<sup>153</sup> In short, the community definition adopted by DotMusic is aligned with the language permitted by the AGB to meet the Community Establishment criteria of a **delineated** and **organized** community. One could assert that the definition mirrors the requirements of the AGB for Community Establishment in relation to music. In addition, since a letter of endorsement was required to be filed by each of these organizations that comprise the constituent parts, it cannot be debated that they had no awareness of the community defined and that they unite under the mission and purpose of the string that was described in DotMusic’s application. A community that formally files letters of support to endorse and participate under a united purpose implies more of a cohesion than a mere commonality of interest.
45. Another requirement under the AGB is that there is “at least one entity mainly dedicated to the community” that was defined. Such organizations include the International Federation of Phonographic Industry (“IFPI”) and the International Federation of Musicians (“FIM”) that are entirely dedicated to the community in areas, including the protection of music rights, a key area that the entire community in its entirety relies upon and is united behind. Without such protections and activities to support such protections, the community would not have an industry or be able to conduct any of its activities the way it does.
46. Founded in 1948, the FIM is a globally recognized international federation representing the “voice of musicians worldwide.”<sup>154</sup> For example, the FIM is recognized by the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, the World Intellectual Property Organization and the Organisation Internationale de la Francophonie<sup>155</sup>
47. Founded in 1933, the IFPI is a recognized international federation “representing the “recording industry worldwide” and the majority of music consumed globally.”<sup>156</sup> The IFPI represents Universal Music, Sony Music and Warner Music, globally-recognized organizations that “control 78% of the global market.”<sup>157</sup>

<sup>152</sup> AGB, p.4-12

<sup>153</sup> DotMusic Application, 20A

<sup>154</sup> Musicians represent the majority of the music community defined in absolute numbers.

<sup>155</sup> UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

<sup>156</sup> IFPI, <http://www.ifpi.org>

<sup>157</sup> Credit Suisse Research and Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from

[https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document\\_id=1034433411&ext\\_docid=1034433411\\_1\\_eng\\_pdf](https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&ext_docid=1034433411_1_eng_pdf)



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48. The FIM and IFPI both qualify as recognized community member organizations that are mainly dedicated to the community addressed with “documented activities” such as activities centered around the protection of music rights.
49. The CPE Panel awarded the .HOTEL community applicant with a full score for “Organization” because the Panel found “recognized community institution(s)/member organization(s)”<sup>158</sup> and has at least one organization mainly dedicated to the community:

*“[T]he community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)”<sup>159</sup>*

*“The applicant possesses documented support from the recognized community institution(s)/member organization(s).”<sup>160</sup>*

*According to the .HOTEL CPE Report, it is also noted that the Panel recognized that the nationally-based AH&LA and CHA were “recognized” organizations that were “mainly” dedicated to the hotel community. Consistently and similarly, DotMusic’s application had multiple recognized international federations (such as the FIM and the IFPI) and national organizations mainly dedicated to the music community.*

50. Under the AGB, the community defined must be of “**considerable size** [‘Size’] and **longevity** [‘Longevity’].<sup>161</sup> DotMusic’s application meets this criterion because it states that “[t]he Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries...with a **Community of considerable size with millions of constituents (“SIZE”)**.”<sup>162</sup> Under the Pre-existence criteria, the community defined by the applicant “must have been active prior to September 2007.”<sup>163</sup> Longevity also mandates that the community defined is not ephemeral or set up for the specific purpose of obtaining a gTLD approval.<sup>164</sup> With respect to pre-existence, the FIM and IFPI were founded in 1948 and 1933 respectively. Their activities that have had global impact on the entire music community (in areas such as the

<sup>158</sup> .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6

<sup>159</sup> Id., p.2

<sup>160</sup> Id., p.6

<sup>161</sup> AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

<sup>162</sup> See .MUSIC Application, 20A, para.4 at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

<sup>163</sup> AGB, p.4-11

<sup>164</sup> AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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protection of music rights) occurred **decades prior to 2007**. In short, the community defined was not set up for the specific purpose of obtaining gTLD approval. The music community defined has been organized for ages and did not create itself after 2007 for the sole purpose of applying for a top-level domain.

51. According to the .GAY CPE Report, “the [International Lesbian, Gay, Bisexual, Trans and Intersex Association] ILGA, an organization mainly dedicated to the community as defined by the applicant ... **has records of activity beginning before 2007.**”<sup>165</sup> Similarly, according to the .SPA CPE Report: “The community as defined in the application was active prior to September 2007... [T]he **proposed community segments have been active prior to September 2007.** For example, the International Spa Association, a professional organization representing spas in over 70 countries, has been in existence since 1991.”<sup>166</sup> Consistent with the .SPA and .GAY CPE Reports’ rationale for ISA and ILGA, both the FIM and the IFPI have “records of activity before 2007.” Similarly, the constituent segments of the community defined by DotMusic have also been active prior to September 2007. Consistent with both the .GAY and .SPA Reports’ rationale and grading threshold, the CPE Panel should have also awarded DotMusic with a full score under Community Establishment by applying the AGB criteria in a similar manner.
52. DotMusic’s application was consistent with (and in some cases exceeded) the Community Establishment rationale and “cohesion” threshold that the CPE Panel applied to be award the .ECO, .GAY, .HOTEL, .OSAKA, .RADIO and .SPA community applications with maximum points under Community Establishment. As stated in DotMusic’s Reconsideration Request 16-5:
  - *“The EIU awarded .ECO full points, stating that “cohesion and awareness is founded in their demonstrable involvement in environmental activities” which “may vary among member categories.”<sup>167</sup> Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities.”*
  - *“The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under community establishment establishing that there is stronger cohesion than DotMusic based on “an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies”<sup>168</sup> (emphasis added). In contradiction, the EIU determined DotMusic’s “logical alliance” operating under a*

<sup>165</sup> .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3

<sup>166</sup> .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3

<sup>167</sup> .ECO CPE, p.2

<sup>168</sup> .GAY CPE, p.2



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regulated sector that is united by copyright lacked any “cohesion” of belonging to a community.”

- “The EIU awarded .HOTEL full points for community establishment for a “cohesive” community definition that is comprised of “categories [that] are a logical alliance of members.”<sup>169</sup> Even though DotMusic similarly presents music community based on “logical alliance” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper.”
- “The EIU awarded full points to .OSAKA determining there was “cohesion” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;<sup>170</sup> Similarly, DotMusic’s “logical alliance” is “related to music” (i.e. has a tie) but its Application was penalized.”
- “The EIU established that the .RADIO had cohesion solely on the basis of being “participants in this...[radio] industry.”<sup>171</sup>
- “[T]he .MUSIC Report penalized the Application under community establishment to the fullest extent possible (grading zero points) for lacking “cohesion” while the .SPA community applicant was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for community establishment. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their inclusion in industry organizations and participation in their events:

*Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.*<sup>172</sup>

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

<sup>169</sup> .HOTEL CPE, p.2

<sup>170</sup> .OSAKA CPE, p.2

<sup>171</sup> Id., p.2

<sup>172</sup> .SPA Report, p.2





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53. There has been no substantive engagement with the reasoning set out above in the FTI Reports. DotMusic’s reasoning is correct and DotMusic’s application meets all the criteria required under the Community Establishment section to score full points.

### Nexus between Proposed String and Community

54. According to DotMusic’s Application, “[t]he **name** of the community served is the **“Music Community”** (“Community”).”<sup>173</sup>
55. With respect to the “Nexus between Proposed String and Community,” DotMusic’s application states that “[t]he **“MUSIC”** string **matches** the name (“Name”) of the Community [**Music Community**] and is the established name by which the Community is commonly known by others.”<sup>174</sup> DotMusic explained “the relationship between the applied- or gTLD string and the community identified in 20A:” “The .MUSIC string relates to the Community by ... **completely representing the entire Community**. It **relates to all music-related constituents using an all-inclusive, multi-stakeholder model**...”<sup>175</sup> In other words, the string fully matches the music community. The music string has no other significant meaning beyond identifying the community described in the application.
56. This is consistent with the .SPA CPE Report that passed CPE and scored full points under Nexus. In fact, the DotMusic Nexus requirements exceeded the threshold that was applied by the CPE Panel in the case of the .SPA CPE to fulfill the criteria for full points. Even though DotMusic matched the community definition by “completely representing the entire Community” with the string by “relat[ing] to all music-related constituents using an all-inclusive, multi-stakeholder model,” DotMusic was not awarded a full score. In contrast, the CPE Panel awarded the .SPA community applicant a full score based on a lower threshold for meeting the full point criteria. In fact, the .SPA community admits that they did not completely represent the entire community but received a higher grade than DotMusic even though DotMusic completely represented the entire community. The CPE Panel permitted the .SPA community applicant to include a secondary community that was not directly related to spas and awarded the .SPA community applicant a full score: “The secondary community generally also includes holistic and personal wellness centers and organizations. While these **secondary community organizations do not relate directly to the operation of spas**, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.”<sup>176</sup>

<sup>173</sup> DotMusic Application, 20A, para.1

<sup>174</sup> Id., 20A, para.3

<sup>175</sup> Id., 20D, para.1

<sup>176</sup> .SPA community application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/123?t:ac=123>, 20A, para.3



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57. DotMusic's Application, Music Community members are delineated and restricted to music categories and music subsets that *only* relate to music. According to DotMusic's Application Materials, unrelated secondary communities that have a tangential relationship with the music community defined are not allowed, which is a stricter threshold than the one permitted by the CPE Panel to award full points for the .SPA community applicant under the Nexus between the Proposed String and Community section. DotMusic "restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes"<sup>177</sup> and "exclude[s] those with a passive, casual or peripheral association with the applied-for string."<sup>178</sup> In comparison, the .MUSIC CPE exceeded the threshold that was applied for the .SPA CPE to be awarded full points under the Nexus section.
58. Again, there has been no substantive engagement by FTI with DotMusic's application or Reconsideration Request, and DotMusic's application meets all the criteria required under the Nexus between Proposed String and Community section to score full points.

### Community Endorsement

According to the AGB, "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>179</sup> <sup>180</sup>

59. According to DotMusic's Application Materials, there is support from multiple organizations with members representing over ninety-five percent of global music consumption, which is a **majority**.<sup>181</sup>
60. Another alternative for scoring 2 points in "Support" is having "documented support from recognized <sup>182</sup> community institution(s)/ member organization(s)." <sup>183</sup> The music

<sup>177</sup> DotMusic Public Interest Commitments ("PIC"), PIC Enumerated Commitment #3, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.1

<sup>178</sup> Id., PIC Enumerated Commitment #4, p.2

<sup>179</sup> AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

<sup>180</sup> CPE Guidelines, p.18

<sup>181</sup> See Support Letters from multiple organizations for DotMusic's Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf> (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

<sup>182</sup> AGB, "'Recognized' means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community," pp. 4-17 to 4-18

<sup>183</sup> AGB, p.4-17



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organizations supporting the DotMusic Application are the most recognized and trusted music-related organizations in the world. They include many internationally-recognized organizations. Recognized organizations include the FIM and IFPI as mentioned earlier that have documented activities in areas that are representative of the community's united interests, such as the protection of music rights and copyright in general. As such, DotMusic's application has the documented support from the recognized community member organizations.

61. This is consistent with the .HOTEL CPE Report, in which the .HOTEL community applicant fulfilled both the options for meeting the AGB. According to the .HOTEL CPE Report, recognized organizations mainly dedicated to the hotel community included the American Hotel & Lodging Association (AHLA) and the China Hotel Association (CHA): **"These groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant."**<sup>184</sup>
62. If the American and China hotel associations would suffice as recognized organizations mainly dedicated to hotels then international organizations, such as FIM (formed in 1948) and IFPI (formed in 1933), recognized by the United Nations and the World Intellectual Property Organisation, exceed the requirements in comparison to the acceptable threshold adopted by the CPE Panel for the .RADIO CPE because both the FIM and the IFPI are **globally-based (as opposed to nationally-based)** and have **pre-existed** both the AHLA (formed in 1953) and CHA (formed in 1996).
63. DotMusic's support rationale and documentation is also consistent with the .RADIO CPE Report, in which the .RADIO community applicant fulfilled the AGB Support criteria: "[T]he applicant possesses documented support from institutions / organizations representing a **majority** of the community addressed... The applicant received support from a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant. These entities represented a majority of the overall community. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support."<sup>185</sup> Under the same token, the DotMusic application also has the support from "a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant." As emphasized in DotMusic's application, its support comprised of recognized community organizations that "represented a majority of the overall community defined" by DotMusic.
64. In sum, DotMusic's Application meets both "Support" requirement options for attaining 2 points. DotMusic's application has "documented support from, the recognized community institution(s) / member organization(s)" as well as "documented support from institutions/organizations representing a majority of the overall community addressed."

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<sup>184</sup> .HOTEL CPE Report, p.6

<sup>185</sup> .RADIO CPE Report, p.7



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DotMusic's application meets all the criteria required under the Support section of Community Endorsement to score full points.

## Conclusion on .MUSIC CPE Analysis and CPE Comparison

65. DotMusic's application fulfills all the criteria under the sections of Community Establishment, the Nexus between the Proposed String and Community, and Support based on the AGB. In conclusion, **DotMusic should have passed CPE. Treating DotMusic's application differently from the decisions that have already been made in relation to RADIO, OSAKA and HOTEL would represent discriminatory treatment with no justification, in violation of ICANN's Bylaws.**<sup>186</sup> **DotMusic was close to passing, which makes the EIU's scoring inconsistencies even more troubling,** especially considering that DotMusic's community definition was disregarded, which in effect resulted to improperly awarding zero out of four points in Community Establishment. Applying the appropriate community definition as explicitly defined in 20A (not 20D) as mandated by the AGB would have led to a passing CPE grade for DotMusic.

## FTI Reports Analysis

66. It is clear that the FTI Report was superficial in nature and did not fulfill the obligations that an independent investigation of this significance would warrant. ICANN's stated objective with the CPE Review was to conduct a **complete, independent investigation** that would answer all the questions that applicants raised through their reconsideration requests, especially in relation to accusations of discriminatory treatment and unfair and inconsistent grading by the EIU's CPE Panel.
67. The FTI Report raises more questions than it answers because it failed to conduct a comprehensive investigation to analyze the issues of inconsistency, unfairness and discriminatory treatment that everyone was expecting to be addressed based on ICANN's comments and representations. Only after such investigation is conducted can the ICANN Board make any determination concerning any of the pending reconsideration requests. There are many issues that the FTI did not adequately address in the CPE Process, including, whether:
- a. The EIU properly developed and applied additional criteria and processes after receiving the community applications in 2012 without

<sup>186</sup> ICANN Bylaws, Sections 1.2 and 3.1. See <https://www.icann.org/resources/pages/governance/bylaws-en>





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- giving the community applicants to change their applicants to reflect these changes.
- b. ICANN allowed the EIU to participate in the evaluation of community applications despite conflicts of interest.
  - c. ICANN allowed the EIU to grade community applications without having the necessary expertise, training and understanding of the CPE process and its rules.
  - d. The CPE Panel were indeed music experts, with suitable knowledge to score an application in relation to music.
  - e. The EIU permitted individuals who were not EIU CPE panelists (including ICANN Staff) to perform substantive tasks in CPE in violation of explicit rules.
  - f. The EIU acted consistently with the rules of the AGB in its collection of information and its interpretation of the AGB while applying the CPE criteria.
  - g. The EIU applied the CPE criteria consistent with the human rights principles and general principles of international copyright law and international conventions.
  - h. The EIU and ICANN improperly considered evidence supporting community applications, including reconsideration requests and expert opinions.
  - i. ICANN should have accepted CPE Reports despite these issues without reasonable and effective investigation or the option to appeal.
  - j. The CPE process adopted by ICANN conformed with ICANN's Core Principles.
  - k. ICANN's actions and inactions in relation to the CPE process were consistent with its own Bylaws and Articles of Incorporation.
68. What raises additional serious concerns is the decision by ICANN or ICANN's internal or external legal counsel to narrow the scope of the FTI Report to exclude many key issues that still remain unaddressed and are pending reconsideration request decisions by the ICANN board. How can the ICANN board make a determination on pending Reconsideration Requests with an incomplete investigation that did not address the most glaring issues?



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69. This leads to the inference that the FTI “compliance-focused investigation methodology” was constructed in part to exonerate ICANN of any accountability and responsibility. In its own admission, the FTI did:
- a. Not re-evaluate the CPE applications.
  - b. Not compare applications that passed CPE with applications that did not pass in light of issues concerning grading inconsistencies and discriminatory treatment.
  - c. Not evaluate the substance of the reference material.
  - d. Not assess the propriety or reasonableness of the research undertaken by the CPE Provider.
  - e. Not interview the CPE applicants to understand their concerns or objections to the treatment afforded to their application.
70. Without addressing these overarching issues, the FTI cannot reasonably conclude that:
- a. “There is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.”<sup>187</sup>
  - b. “The CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook ([“AGB”]) and the CPE Guidelines throughout each CPE.”<sup>188</sup>
  - c. “The CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).”<sup>189</sup>
71. FTI purported to adopt a “compliance-focused investigation methodology” when evaluating the CPE Provider’s consistency in applying the AGB and the CPE Guidelines. It found that the “CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE.”<sup>190</sup>

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<sup>187</sup> Scope 1 Report, p. 17.

<sup>188</sup> Scope 2 Report, p. 3.

<sup>189</sup> Scope 3 Report, p. 4.

<sup>190</sup> Scope 2 Report, p. 21.



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72. According to FTI:

*The scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.<sup>191</sup>*

73. However, FTI ignores publicly available evidence that casts serious doubts on its findings concerning the CPE Provider's consistent application of the AGB and the CPE Guidelines. Contrary to independent reports and opinions, such as the Council of Europe report, expert opinions as well as opinions expressed by members of the ICANN Board, such as the current ICANN Chairman Cherine Chalaby, the FTI presents a rose-tinted picture of the CPE process. It appears that the FTI concludes that the CPE process had no serious flaws and was executed in alignment with the AGB and ICANN's Bylaws. This conclusion is neither supported by FTI's analysis or its investigative methodology.
74. FTI's conclusions lack objectivity and are superficial and unreliable. It appears the intent of the investigation was to advocate in favor of ICANN and the EIU, while disregarding serious issues presented in Reconsideration Requests, expert opinions and independent reports (such as the CoE Report).
75. What raises further concern is FTI's decision to reject expanding the scope of the investigation, which if legitimately pursued would have led to conclusions that would suggest that ICANN and the EIU violated established process, ICANN's Bylaws and Articles of Incorporation. The conclusions it actually did reach appear pre-determined and rationalizations to protect ICANN from accountability and responsibility for the failures of the CPE program.
76. It is not credible for FTI to conclude that ICANN did not unduly influence the CPE Provider, taking into consideration the findings by the independent review process ("IRP") panel in Dot Registry v. ICANN.<sup>192</sup> Indeed one is left with the troubling sense that ICANN carefully tailored the narrow scope of the investigation and cherry-picked documents and information to share with the FTI to protect itself.
77. However, the FTI concluded that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process."<sup>193</sup> The FTI's conclusion was based on.

<sup>191</sup> Scope 2 Report, p. 21.

<sup>192</sup> Dot Registry v. ICANN IRP Final Declaration (29 July 2016). See <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

<sup>193</sup> Scope 1 Report, p. 3.



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- a. Documents provided by ICANN concerning the CPE review process and evaluations.<sup>194</sup>
  - b. Interviews of six ICANN staff members “who interacted with the CPE Provider over time regarding CPE;”<sup>195</sup>
  - c. Interviews of only two CPE Provider staff members “of the core team for all CPEs that were conducted” between 2013 and 2016.<sup>196</sup>
  - d. Working papers, draft reports, notes, and spreadsheets provided by the CPE Provider concerning the CPE process and evaluations.<sup>197</sup>
78. Such a conclusion is unreliable and incomplete because it was based on (i) selective information provided by ICANN; (ii) a flawed understanding of issues based on this incomplete and inconsistent evidence; and (iii) the adoption of a flawed and inappropriate compliance-based investigative process by the FTI.
79. The evidence shows that the FTI’s conclusion that there were no procedural failures, inconsistencies or disparate treatment in the CPE process is unsupported and is not consistent with numerous independent reports and expert opinions. There appears to be a general consensus that the CPE Process lacked transparency, was flawed, inconsistent and unfair.
80. FTI’s finding that ICANN did not unduly influence the CPE Provider or engaged in any impropriety in the CPE Process is also **inconsistent with the IRP Panel’s final and binding declaration in the Dot Registry case, which concluded that ICANN was “intimately involved” in the CPE process.**<sup>198</sup> The FTI’s evaluation was based on inadequate and incomplete document collection from the EIU, self-serving and one-sided statements made by ICANN and the EIU, and lacking any participation from community applicants (despite requests by some applicants, such as DotMusic).
81. In contrast to the FTI investigation, the Dot Registry IRP Declaration was credible, neutral and trustworthy because: (i) it was determined by a neutral 3-person panel without any conflicts of interest or agenda; involved (ii) declarations under oath by 5 factual witnesses and 1 expert witness; (iii) seven hours of hearing; (iv) extensive documents produced by

<sup>194</sup> Scope 1 Report, pp. 3-7.

<sup>195</sup> Scope 1 Report, p. 13.

<sup>196</sup> Scope 1 Report, p. 14; see ICANN, Community Priority Evaluation (last visited 10 Jan. 2018), <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>197</sup> Scope 1 Report, p. 6.

<sup>198</sup> *Dot Registry*, ¶ 93. The *Dot Registry* decision is final and binding on ICANN. See *Dot Registry*, ¶ 73; see also ICANN Bylaws (16 Feb. 2016), Art. IV, §§ 3.11(c), 3.11(d), 3.21.





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both ICANN and Dot Registry; and (v) extensive written submissions by both ICANN and Dot Registry. The *Dot Registry IRP* panel concluded that:

- a. "ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports;"<sup>199</sup> and
  - b. The review of the documents concerning an ongoing exchange between the CPE Provider and ICANN concerning .INC revealed that the CPE report for .INC specifically states that certain determinations are based in the CPE Provider's research.<sup>200</sup> The panel, however, found that the origin of this research "comes from ICANN staff" who not only told the CPE Provider that they wanted to add "a bit more to express the research and reasoning that went into [the] statement," but also proposed the *exact language* to include in the CPE.<sup>201</sup>
82. FTI's conclusion that ICANN was not engaged in "any impropriety in the CPE Process" is deeply flawed, improper and inconsistent with the final and binding decision of the Dot Registry IRP panel. FTI's finding that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process"<sup>202</sup> appears to be based on incomplete and self-serving information provided largely by ICANN in a manner that would exonerate ICANN of any wrong-doing or failing to follow its Bylaws.
83. On 18 January 2017, Article 19,<sup>203</sup> a U.K. based human rights organization, and the CoE organized a webinar on Community Top-level Domains (TLDs) and Human Rights to discuss the CPE process, ICANN's accountability mechanisms, and concepts for the next gTLD application rounds. The speakers included ICANN Chairman Cherine Chalaby, ICANN Government Advisory Committee Vice-Chair Mark Carvell, and ICANN Vice-Chairman Chris Disspain.
84. ICANN Chairman Cherine Chalaby confirmed in his personal capacity that he observed inconsistencies with the CPE process:

*In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE and that's a personal observation and there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases. So this is one of the recommendations, the*

<sup>199</sup> *Dot Registry*, ¶ 93.

<sup>200</sup> *Dot Registry*, ¶ 94.

<sup>201</sup> *Dot Registry*, ¶ 98.

<sup>202</sup> Scope 1 Report, p. 3.

<sup>203</sup> Article 19 (last visited 10 Jan. 2018), <https://www.article19.org>.



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*recommendation of fixing that area, I think that it is an important recommendation that ought to be taken into account very seriously.<sup>204</sup>*

85. Likewise, ICANN GAC Vice-Chair Mark Carvell stated:

*But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.*

*[...]*

*The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. **That was not happening.** Became as I say an issue of increasing concern for many of us on the GAC.<sup>205</sup>*

86. In light of the Dot Registry IRP declaration, independent expert opinions and the findings of the Council of Europe Report directly discrediting and refuting FTI's conclusions, the FTI conclusion that the "CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE"<sup>206</sup> is unreliable, especially considering ICANN members' own admission that there were indeed problems with the CPE process. Given such overwhelming evidence, it would be unreasonable for the ICANN Board to accept the conclusions of the FTI Report and reject DotMusic's Reconsideration Request 16-5. Accepting the FTI's conclusions without a holistic and substantive investigation would be considered gross negligence, a violation of ICANN's Bylaws and an attempt to purposefully conceal fundamental flaws in the CPE process that even ICANN's current Chairman (and other ICANN members) observed and recognized.
87. It is problematic for ICANN to announce that it was conducting "an **independent review**" of the CPE Process<sup>207</sup> that would be comprehensive and neutral, when the facts indicate

<sup>204</sup> ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, [https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2).

<sup>205</sup> ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), p. 12, [https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2) (emphasis added).

<sup>206</sup> Scope 2 Report, p. 21.

<sup>207</sup> Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance



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a secretive and ICANN-controlled process that was incomplete and narrow in focus. The public comments made by ICANN legal counsel John Jeffrey and Vice-Chair Chris Disspain now appear inconsistent with the intent of the objective of conducting a fair, neutral and complete investigation that would address all the issues presented in pending Reconsideration Requests in order to assist the ICANN Board in its reconsideration decision-making.

John Jeffrey stated that the FTI:

*[The FTI would be “digging in very deeply,” have “a full look at the community priority evaluation,”<sup>208</sup> and “to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and ... trying to understand the complex process of the new gTLD program and the community priority evaluation process.”<sup>209</sup> “When the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”<sup>210</sup>*

In an ICANN session with DotMusic’s Constantine Roussos at the Madrid ICANN GDD Summit in 2017, ICANN CEO Göran Marby (who was a session panelist<sup>211</sup>) and ICANN Vice-Chair Chris claimed that they did not know who the investigator was despite the investigation being in progress for months. Furthermore, the Vice-Chairman stated that DotMusic would be able to present to the Board after the FTI Report would be released before the Board would decide upon the Reconsideration Request 16-5:

Constantine Roussos:

*Hi, this is Constantine from DotMusic. I have a question about timing and transparency...*

*One: Who is the auditor, their name?;*

*Two: How is this transparent when we don’t know who is doing it?; and*

*Three: When is there going to be a decision?*

Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>208</sup> John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, [http://sched.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%202-en.pdf](http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf).

<sup>209</sup> John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, [http://sched.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%202-en.pdf](http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf).

<sup>210</sup> John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), [http://sched.ws/hosted\\_files/icann58copenhagen2017/60/I58CPH\\_Thu16Mar2017-Public%20Forum%202-en.pdf](http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf).

<sup>211</sup> 2017 Global Domain Division (GDD) Summit Notes (9 May 2017), p.9. See <https://www.icann.org/en/system/files/files/notes-action-items-gdd-summit-madrid-30may17-en.pdf>



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*...[W]e're sitting around waiting, sending letters and asking what is going on, please let us know. So, I do not want to sound harsh but we need some help here. It is not only us, it is a few other applicants as well. Everyone is doing their business but we're just sitting on the sidelines waiting.*

Chris Disspain:

*Hi. How are you? Annoyed, right?... It is a very difficult situation. We have an IRP decision that made some suggestions about stuff that was happening that we felt was important to investigate.*

*... As to presentations that you made and changes to the BGC or possibly a new committee, I understood and it would be in my view, it would not be sensible in my view for the currently constituted BGC or any newly constituted accountability mechanisms committee to make a decision without giving you an opportunity to present again ...It may be, to be perfectly honest, that stuff comes out from the investigation, the review, that that you might want to talk about in a presentation...*

Constantine Roussos: *Who is the auditor?*

Chris Disspain:

*Who is here that knows who the auditor is? Anyone? Does anyone know who the auditor is? Anyone know who is running the investigation? Someone? Do we have anyone from legal here who can answer that?*

Göran Marby: *...Can't remember the name. I was jetlagged.*

Constantine Roussos: *Will they contact us?*

Chris Disspain:

*...I don't know the answer to that question. ... Let me be very clear... If they decide they need to talk you, they will talk to you.... Right? But it is not for us to decide. It is up to them to decide. ...It is so independent that I do not know who it is. That's how independent it is.<sup>212</sup>*

88. Another issue that was problematic was ICANN engaging in a new process to create updated CPE Guidelines with the EIU that were finalized on 27 September, 2013,<sup>213</sup> nearly

<sup>212</sup> ICANN GDD Industry Summit, Review of ICANN Process Documentation Initiative (9 May 2017). See <https://participate.icann.org/p4icilv7esy/?launcher=false&fcsContent=true&pbMode=normal> (0:46:50 to 0:53:10). Also see <https://www.icann.org/gddsummit>

<sup>213</sup> CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>





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a year and a half after community applicants such as DotMusic submitted their applications. This would be acceptable if community applicants were allowed to update their applications prior to CPE to reflect these critical updates that would be used to evaluate their community applications. However, ICANN decided to introduce new rules (published on 5 September 2014) that were not explicitly stated in the AGB that prohibited community applicants from changing relevant portions of their application<sup>214</sup> to reflect these new CPE Guidelines.

89. One of the areas that the CPE Guidelines required the EIU to follow was to consistently score community applications using the same approach for all applications. In other words, the grading thresholds and substantive rationales adopted must be consistent throughout all the CPE process. ICANN in return would provide the quality control required to ensure this:

“Consistency of approach in scoring Applications will be of particular importance...”<sup>215</sup>

“The EIU will fully cooperate with ICANN’s quality control process...”<sup>216</sup>

90. It is clear that the EIU and ICANN did not fulfill these obligations. What is striking is that the FTI purposely chose to follow a compliance-driven investigation methodology approach. This approach raises many unanswered questions. Why did the FTI narrow their scope and not conduct a comparative analysis of the grading inconsistencies and disparate treatment of applications that scored lower despite providing similar rationales? How can the same language of the AGB be interpreted differently and the scoring application from one application to another deviate so greatly? What exactly was the quality control process if it failed to meet both the AGB rules and the subsequent CPE Guidelines?
91. An IRP final declaration concerning the .ECO and .HOTEL community applications (the .ECO/.HOTEL IRP)<sup>217</sup> also outlines the serious concerns and glaring problems with the CPE process, including ICANN’s own admission that there was “no quality review or control process:”

<sup>214</sup>

New gTLD Application Change Request Process and Criteria. See <https://newgtlds.icann.org/en/applicants/global-support/change-requests>. Also see ICANN New gTLD Advisory (Advisory number: R1-A01-CR), Change Requests (5 September 2014) at <https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>

<sup>215</sup> CPE Guidelines, p.22

<sup>216</sup> Id., pp.22-23

<sup>217</sup> Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.ECO/.HOTEL IRP”) (12 February 2016). See <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>



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*[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.<sup>218</sup>... [T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.<sup>219</sup> ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure... ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.<sup>220</sup> The combination of these statements gives cause for concern to the Panel.<sup>221</sup> The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.<sup>222</sup> In conclusion...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.<sup>223</sup>*

92. Despite the findings of the .HOTEL/.ECO IRP declaration (and the Dot Registry IRP), the FTI narrowed the investigation methodology to exclude any substantive review of applications that would address the issues of discriminatory treatment and inconsistent point distribution between community applicants who prevailed and those who did not and are subject to a reconsideration request. It appears from the .HOTEL/.ECO IRP declaration (and the instructions provided to the FTI in relation to what investigative methodology to adopt) that “the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the

<sup>218</sup> .ECO/.HOTEL IRP, ¶ 146, p.37

<sup>219</sup> Id., ¶ 147, pp.37-38

<sup>220</sup> Id., ¶ 148, p.38

<sup>221</sup> Id., ¶ 149, p.38

<sup>222</sup> Id., ¶ 150, p.38

<sup>223</sup> Id., ¶ 158, p.39



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EIU followed established policy or procedure.” As indicated in the .ECO/.HOTEL Panel, such a methodology is unacceptable and improper because it gives the EIU ultimate power to discriminate against certain applicants without any repercussions or the need to justify why one applicant was treated differently than another in relation to approach and marking. Since ICANN performed quality control, ICANN clearly did not follow establish policy or procedure and was in violation of its Bylaws and Core principles in relation to fairness and non-discrimination.

93. Another problematic area was the level and quality of the research that was undertaken by the CPE panel. The CPE Reports lacked adequate research citations and consistent judgment to reach conclusions that were compelling and defensible, including documentation. According to the EIU Panel Process document rules:

*“The Panel Firm exercises **consistent judgment** in making its evaluations in order to reach **conclusions that are compelling and defensible**, and **documents the way in which it has done so in each case.**”<sup>224</sup>*

94. According to the FTI Report (Scope 3), the primary research sources adopted by the EIU in making their determinations were two: Google searches and Wikipedia. As is well known, the CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization **with significant demonstrated expertise** in the evaluation and assessment of proposals **in which the relationship of the proposal to a defined...community plays an important role.**”<sup>225</sup>
95. It would be reasonable that any panel “with significant demonstrated expertise” in the area of a “defined community” (for example the music community) would not need to perform Google searches or resort to using Wikipedia as primary research and basis for decision-making. Both ICANN and the FTI never released the names of the experts that evaluated DotMusic’s application in numerous DIDP requests filed by DotMusic. As such, it is impossible to accept that the CPE Panel did possess the necessary qualifications for CPE or the necessary expertise or knowledge in relation to the music community (or many of the other communities graded). This absence of qualification is likely based on the low quality of the CPE Reports’ research and references.
96. Using Google searches as a credible source of references is problematic due to the “filter bubble” concern. This refers to a phenomenon that occurs with many of the websites that we use: algorithms (mathematical equations) use our search history and personal information to tailor results to us. So the exact same search, using exactly the same search words, can return different results for different individuals. This is called personalization.<sup>226</sup>

<sup>224</sup> EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3

<sup>225</sup> CPE Guidelines, p.22

<sup>226</sup> University of Illinois at Urbana-Champaign, LibGuides, Ways of the Web: Filter Bubbles and the Deep Web: Home. See <http://guides.library.illinois.edu/filterbubbles>. Also see Eli Pariser, The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think (24 April 2012) at <https://www.amazon.com/Filter-Bubble-Personalized-Changing-Think/dp/0143121235>



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In other words, if the CPE Panel was inclined to fail an applicant and conducted specific research on Google towards that end then Google's algorithms would skew the results towards that end.

According to Google:

*"Previously, we only offered Personalized Search for signed-in users, and only when they had Web History enabled on their Google Accounts. What we're doing today is expanding Personalized Search so that we can provide it to signed-out users as well. This addition enables us to customize search results for you based upon 180 days of search activity linked to an anonymous cookie in your browser."*<sup>227</sup>

97. More troubling is the usage of Wikipedia as a credible source of research to reach compelling and defensible decisions. Wikipedia's "Wikipedia:Risk disclaimer"<sup>228</sup> confirms that information on Wikipedia may be inaccurate or misleading:

**USE WIKIPEDIA AT YOUR OWN RISK**

**PLEASE BE AWARE THAT ANY INFORMATION YOU MAY FIND IN WIKIPEDIA MAY BE INACCURATE, MISLEADING, DANGEROUS, ADDICTIVE, UNETHICAL OR ILLEGAL.**

*Some information on Wikipedia may create an unreasonable risk for readers who choose to apply or use the information in their own activities or to promote the information for use by third parties.*

*None of the authors, contributors, administrators, vandals, or anyone else connected with Wikipedia, in any way whatsoever, can be responsible for your use of the information contained in or linked from these web pages.*

Furthermore, a look at Wikipedia's "Wikipedia:General disclaimer"<sup>229</sup> makes no guarantee of the validity of information:

**WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY**

*Wikipedia is an online open-content collaborative encyclopedia; that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has*

<sup>227</sup> Google Official Blog, Personalized Search for everyone, (4 December 2009). See <https://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html>.

<sup>228</sup> Wikipedia: Risk disclaimer. See [https://en.wikipedia.org/wiki/Wikipedia:Risk\\_disclaimer](https://en.wikipedia.org/wiki/Wikipedia:Risk_disclaimer).

<sup>229</sup> Wikipedia: General disclaimer. See [https://en.wikipedia.org/wiki/Wikipedia:General\\_disclaimer](https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer)





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*necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information.*

*That is not to say that you will not find valuable and accurate information in Wikipedia; much of the time you will. However, **Wikipedia cannot guarantee the validity of the information found here.** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.*

98. British Medical Journal's Research has also warned against using Wikipedia as a trusted source of citations and research:

*An increasing number of peer reviewed academic papers in the health sciences are citing Wikipedia. The apparent increase in the frequency of citations of Wikipedia may suggest a lack of understanding by authors, reviewers, or editors of the mechanisms by which Wikipedia evolves. Although only a very small proportion of citations are of Wikipedia pages, the possibility for the spread of misinformation from an unverified source is at odds with the principles of robust scientific methodology and could potentially affect care of patients. We caution against this trend and suggest that editors and reviewers insist on citing primary sources of information where possible.<sup>230</sup>*

99. Many universities do not allow students to reference Wikipedia in their papers, thus demonstrating its inappropriateness for the use in expert evaluations such as CPE. According to the Massachusetts Institute of Technology:

#### **Wikipedia is Not a Reliable Academic Source**

*Many of us use Wikipedia as a source of information when we want a quick explanation of something. However, Wikipedia or other wikis, collaborative information sites contributed to by a variety of people, are not considered reliable sources for academic citation, and you should not use them as sources in an academic paper.*

*The bibliography published at the end of the Wikipedia entry may point you to potential sources. However, do not assume that these sources are reliable – use the same criteria to judge them as you would any other source. Do not consider the Wikipedia bibliography as a replacement for your own research.<sup>231</sup>*

<sup>230</sup> M Dylan Bould, Emily S Hladkovicz, Ashlee-Ann E Pigford, Lee-Anne Ufholz, Tatyana Postonogova, Eunkyung Shin, Sylvain Boet. BMJ Research, References that anyone can edit: review of Wikipedia citations in peer reviewed health science literature, DOI 348, (6 March 2014). See <https://doi.org/10.1136/bmj.g1585>.

<sup>231</sup> Massachusetts Institute of Technology,



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100. Yale University goes one step further to claim that the mere action of using and referencing Wikipedia as a source for your work will “position your work as inexperienced and immature.” Instead Yale advises “to move beyond Wikipedia and write from a more knowledgeable, expert stance.”

According to Yale University:

*Wikipedia merits additional attention because of its recent growth and popularity. Some professors will warn you not to use Wikipedia because they believe its information is unreliable. As a community project with no central review committee, Wikipedia certainly contains its share of incorrect information and uninformed opinion. And since it presents itself as an encyclopedia, Wikipedia can sometimes seem more trustworthy than the average website, even to writers who would be duly careful about private websites or topic websites. In this sense, it should be treated as a popular rather than scholarly source.*

*But the main problem with using Wikipedia as an important source in your research is not that it gets things wrong. Some of its contributors are leaders in their fields, and, besides, some print sources contain errors. The problem, instead, is that Wikipedia strives for a lower level of expertise than professors expect from Yale students. As an encyclopedia, Wikipedia is written for a common readership. But students in Yale courses are already consulting primary materials and learning from experts in the discipline. In this context, to rely on Wikipedia—even when the material is accurate—is to position your work as inexperienced and immature.*

*...Of course, if you do use language or information from Wikipedia, you must cite it—to do otherwise constitutes plagiarism. The advice here is not to hide what Wikipedia contributes to your ideas, but rather to move beyond Wikipedia and write from a more knowledgeable, expert stance.<sup>232</sup>*

101. Another key finding that was troubling is the research concerning: (i) whether or not certain supporting organizations for DotMusic were recognized organizations; (ii) whether or not there were organizations that were mainly dedicated to the music community with respect to music activities; and (iii) whether or not the supporting organizations collectively represented a majority of the community defined. In order to score the Community Establishment section and the Support section (in which DotMusic lost 5 points collectively) and answer these questions, the CPE panel should have investigated all of DotMusic’s supporters to determine whether the criteria set forth in the AGB was fulfilled. Support letters were sent by thousands of entities.

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Academic Integrity at MIT - A Handbook for Students, Citing Electronic Sources. See <https://integrity.mit.edu/handbook/citing-your-sources/citing-electronic-sources>

<sup>232</sup> Yale University, Center for Teaching and Learning, Citing Internet Sources. See <https://ctl.yale.edu/writing/using-sources/citing-internet-sources>.



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102. However, the CPE panel only researched a few of these organisations according to the findings of the FTI Report. The organisations that independent experts deemed to be “recognized” and “mainly dedicated” to the defined community (such as the IFPI, the FIM and ReverbNation for example) were not researched or assessed. **There was some research conducted on a few of DotMusic’s supporters, but most of their international organizations were not investigated** according to the findings of the FTI Report (Scope 3). As such, **it would have been impossible to grade the sections of Community Establishment and Support without any knowledge of the supporting organizations, their international breadth and scope, and whether collectively they represented a majority of the “logical alliance” community definition that was presented in DotMusic’s application** (emphasis added). The lack of research by the CPE panel is inadequate to make conclusions that would be regarded as defensible, compelling and credible, let alone provide enough insight to grade the Community Establishment and Community Endorsement sections of the CPE process.
103. One factor that is important to weigh is whether or not the FTI Report can be regarded as independent and neutral. After all, ICANN has claimed that the investigation would be independent. The investigation was not independent. The key reasons that have led to this conclusion are the following:
- a. The scope of the investigation was too narrow and did not fulfil its obligations to conduct a holistic and comprehensive look at the CPE process and the issues that the ICANN Board was asked by applicants to reconsider. Most of these issues were not investigated because of the compliance-based investigative methodology adopted. For example, many crucial disputes that would have rendered the CPE process a violation of the AGB rules and ICANN Bylaws would be the lack of transparency of the CPE process (e.g. the names of the expert panellists were unknown), the lack of research and low quality sources used to make decisions, the appearance of conflicts of interest and the inconsistency of the approach and scoring of community applications that would suggest disparate treatment and discrimination.
  - b. None of the complaining parties that were subject to Reconsideration Requests were interviewed by the FTI. What was deeply concerning was that the affected parties, such as DotMusic, did request to be interviewed but the FTI declined and did not give applicants the opportunity to provide information, ask and answer questions and participate.
  - c. The scope of the investigation’s scope and methodology was not developed and determined by all affected parties (ICANN and the affected applicants). It was a controlled investigation driven by ICANN and its outside legal counsel Jones Day.



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104. The FTI contends that it “incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally...”<sup>233</sup>
105. However, the steps taken by the FTI in its investigation would not lead to a conclusion by reasonable person that the investigation was independent or proper given that the expectations were that the investigation would be comprehensive, transparent and would allow all affected parties to participate in its development and execution.
106. ACFE Regent Emeritus Martin Biegelman and Bradley Bondi, LL.M., J.D. shared “Best Practices for Conducting Board-Managed, Independent, Internal investigations.”<sup>234</sup> One of the best practices was to ensure that the investigator is aware that the interests of management may not be aligned with the purpose of the investigation, especially if the investigation is based on examining whether or not management violated certain processes and established rules. If the investigator does not adopt the necessary investigative methodology to ensure neutrality and prevent one-sided bias then the investigation will not be deemed independent, fair and impartial:

*[I]f an allegation of fraud merits an independent investigation, that independence has to be diligently guarded.... Bondi and Biegelman shared many practical tips and strategies based on more than 56 years of combined experience, but kept returning to one common theme: if an allegation of fraud merits an independent investigation, that independence has to be diligently guarded [...] While an independent investigation shouldn't be antagonistic, pitting the investigators against management, it is important to realize “the interests of management and investigators may not be aligned.”*

107. According to the Association of Certified Fraud Examiners (ACFE) 2015 Fraud Examiners Manual under “Investigation - Planning and Conducting a Fraud Examination,” the ACFE advocates adopting the following investigation methodology:

*When conducting a fraud examination to resolve signs or allegations of fraud, the fraud examiner should assume litigation will follow, act on predication, approach cases from two perspectives, move from the general to the specific, and use the fraud theory approach.*

*[ ]*

*Fraud examinations must adhere to the law; therefore, fraud examiners should not conduct or continue fraud examinations without proper predication. Predication is*

<sup>233</sup> FTI Report (Scope 2), p.4

<sup>234</sup> Roger Aradi, ACFE, Putting the 'Independent' into Board-Managed, Independent, Internal Investigations. See <http://www.acfe.com/article.aspx?id=4294973663>.





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*the totality of circumstances that would lead a reasonable, professionally trained, and prudent individual to believe that a fraud has occurred, is occurring, and/or will occur. In other words, predication is the basis upon which an examination, and each step taken during the examination, is commenced.<sup>235</sup>*

[]

*If a fraud examiner cannot articulate a factual basis or good reason for an investigative step, he should not do it. Therefore, a fraud examiner should reevaluate the predication as the fraud examination proceeds. That is, as a fraud examination progresses and new information emerges, the fraud examiner should continually reevaluate whether there is adequate predication to take each additional step in the examination.*

[]

*Fraud examiners should approach investigations into fraud matters from two perspectives: (1) by seeking to prove that fraud has occurred and 2) by seeking to prove that fraud has not occurred. To prove that a fraud has occurred, the fraud examiner must seek to prove that fraud has not occurred. The reverse is also true. To prove fraud has not occurred, the fraud examiner must seek to prove that fraud has occurred. The reasoning behind this two-perspective approach is that both sides of fraud must be examined because under the law, proof of fraud must preclude any explanation other than guilt.<sup>236</sup>*

[]

*In most examinations, fraud examiners should start interviewing at the periphery of all possible interview candidates and move toward the witnesses appearing more involved in the matters that are the subject of the examination.<sup>237</sup>*

[]

*Generally, the investigation portion of the initial assessment will involve:*

- *Contacting the source, if the investigation was triggered by a report or complaint.*
- *Interviewing key individuals.*
- *Reviewing key evidence.<sup>238</sup>*

<sup>235</sup> ACFE 2015 Fraud Examiners Manual, Investigation - Planning and Conducting a Fraud Examination, p.3.104. See [https://acfe.com/uploadedFiles/Shared\\_Content/Products/Books\\_and\\_Manuals/2015%20Sample%20Chapter.pdf](https://acfe.com/uploadedFiles/Shared_Content/Products/Books_and_Manuals/2015%20Sample%20Chapter.pdf)

<sup>236</sup> Id., p.3.105

<sup>237</sup> Id., p.3.106

<sup>238</sup> Id., p.3.122



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108. According to the ACFE Fraud Examiners Manual:

*An investigation must have goals or a purpose, which should be identified at the outset so the team members can achieve them. Goals also help keep the investigation focused and on task, and they can serve as an energizer, as long as they are specific, well defined, and measurable. []*

*Although the basic goal for most fraud investigations is to determine whether fraud occurred, and if so, who perpetrated it, fraud investigations might be designed to achieve a number of different goals, such as to:*

- *Prevent further loss or exposure to risk.*
- *Determine if there is any ongoing conduct of concern. []*
- *Review the reasons for the incident, investigate the measures taken to prevent a recurrence, and determine any action needed to strengthen future responses to fraud.<sup>239</sup>*

*[]*

*When planning an investigation, the stakeholders should identify the scope (the boundaries or extent of the investigation), which will vary depending on the facts and circumstances.*

*To determine the scope, those responsible should use the following guidelines:*

- *Consider the ultimate goals of the investigation.*
- *Develop a list of key issues raised in the initial assessment.*

*[]*

- *Consider broadening the scope if the allegations indicate a failure in the company's compliance program.<sup>240</sup>*

*[]*

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<sup>239</sup> Id., p.3.137

<sup>240</sup> Id., p.3.138



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*Before beginning a fraud examination, the investigation team should develop a course of action to make sure it addresses every relevant issue.<sup>241</sup>*

109. The FTI did not follow most of these recommendations, thus undermining its own credibility and its reliance on the AFSCE approach. It is a reasonable inference that its failure to do so was because its objective was to exonerate ICANN and the CPE panel. The opaqueness, lack of transparency and narrow scope of the investigation would lead a reasonable person to conclude this.
110. The Association of Certified Fraud Examiners, Institute of Internal Auditors, and The American Institute of Certified Public Accountants co-authored a guide titled *“Managing the Business Risk of Fraud: A Practical Guide”* (“the Guide”).<sup>242</sup> The Guide “provides credible guidance from leading professional organizations that defines principles and theories for fraud risk management and describes how organizations of various sizes and types can establish their own fraud risk management program.”<sup>243</sup>
111. The Guide notes that one of the most important factors to consider in an investigation plan are the goals of the investigation and what “[s]pecific issues or concerns should appropriately influence the focus, scope, and timing of the investigation.”<sup>244</sup>

Specifically, the Guide frameworks how an investigation should be conducted, outlining that investigations generally include many key tasks, one of which is:

Interviewing, including:

- i. Neutral third-party witnesses.
  - ii. Corroborative witnesses.
  - iii. Possible co-conspirators.
  - iv. The accused.<sup>245</sup>
112. The FTI inappropriately rejected DotMusic’s request to be interviewed for the purposes of conducting an independent review of the CPE Process because specific issues or concerns influenced the focus, scope, and timing of the investigation.
  113. On 10 June 2017, soon after ICANN issued the CPE Process Review Update to announce that ICANN selected FTI in November 2016 to undertake an independent review of various

<sup>241</sup> Id., p.3.141

<sup>242</sup> Association of Certified Fraud Examiners (ACFE), Institute of Internal Auditors, The American Institute of Certified Public Accountants. *Managing the Business Risk of Fraud: A Practical Guide*, See [https://www.acfe.com/uploadedfiles/acfe\\_website/content/documents/managing-business-risk.pdf](https://www.acfe.com/uploadedfiles/acfe_website/content/documents/managing-business-risk.pdf).

<sup>243</sup> Id., pp. 5 - 6

<sup>244</sup> Id., p. 41

<sup>245</sup> Id., p. 43



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aspects of the CPE process,<sup>246</sup> DotMusic requested ICANN to speak with FTI.<sup>247</sup> It was only *after* FTI completed its investigation and its findings were published by ICANN that DotMusic learned about FTI’s decision not to interview the CPE applicants, including DotMusic, because neither the AGB nor the CPE Guidelines “provide for applicant interviews.”<sup>248</sup> However, FTI believed it was necessary to interview six ICANN employees “to learn about their interactions with the CPE Provider;”<sup>249</sup> and two CPE Provider staff members even when the AGB and CPE Guidelines are silent on the question of interviews of ICANN and the CPE Provider. And, further, FTI reviewed materials, including claims raised in all relevant reconsideration requests that were available only after the CPE evaluation was complete.<sup>250</sup>

114. FTI, however, believed that it was “not necessary or appropriate” to interview the CPE applicants because: (1) the AGB and the CPE Guidelines do not provide for applicant interviews; and (2) the CPE Provider did not interview applicants during its evaluation process. FTI’s decision is irreconcilable with its duty to conduct an independent investigation.
115. As a neutral and impartial investigator instructed by ICANN to conduct “an independent review”<sup>251</sup> of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants (e.g. DotMusic) to ensure a fair and thorough investigation was conducted about the CPE Process. This is a contributing factor to FTI’s findings being unreliable, unfair, and incorrect.

## H. Conclusion

116. The Dot Registry IRP decision highlights ICANN’s obligation to exercise due diligence and care, independent judgment, and transparency in reviewing community applications. The DotMusic Reconsideration Request has been pending for nearly 2 years, which is an unreasonably long time for the Board to make a decision. ICANN’s Bylaws mandate the ICANN Board to make decisions based on procedural fairness, non-discrimination and transparency while settling disputes in a predictable and timely manner.

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<sup>246</sup> ICANN, Community Priority Evaluation Process Review Update (2 June 2017), <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

<sup>247</sup> Letter from Arif Ali on behalf of DotMusic Limited to ICANN Board (10 June 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

<sup>248</sup> Scope 2 Report, p. 8.

<sup>249</sup> Scope 1 Report, p. 13.

<sup>250</sup> See Scope 1 Report, pp. 3-6; ICANN Bylaws (22 July 2017), Art. 4.

<sup>251</sup> Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).